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Depoliticizing Individual Criminal Responsibility

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The Theory and Practice of International Criminal Law

*Essays in Honor of
M. Cherif Bassiouni*

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CHAPTER 3

DEPOLITICIZING INDIVIDUAL CRIMINAL RESPONSIBILITY

*Bartram S. Brown**

I. CHERIF BASSIOUNI'S LEGACY: THE CONTINUING DEPOLITICIZATION OF INDIVIDUAL CRIMINAL RESPONSIBILITY

Cherif Bassiouni's intellectual legacy is vast and varied, but a key theme has been his dedication to advancing the international rule of law by promoting individual criminal responsibility for serious international crimes. He has extended the boundaries of existing international practice by advancing the simple notion that international criminal investigations and prosecutions imposing individual criminal responsibility may be appropriate even when one or more of the national governments concerned argues that the issue is somehow too "political." This marvelous effort builds upon a Bassiouni family tradition of dedication to the rule of law.¹

After a brief review of Cherif Bassiouni's historic legacy of promoting the depoliticization of international criminal responsibility and human rights, this chapter will briefly review the basic tenets and terminology of both the politicization analysis developed by the author and the legalization analysis developed independently by other scholars. The objective is to explore both the relationship and distinction between them and their joint applicability to understanding issues of politicization and principle in international law and institutions.

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¹ His grandfather was a lawyer and politician dedicated to the proposition that "only the observance of the Rule of Law and the preservation of human rights could mediate between human enmities, and thus right and not might was the only alternative to violence." *To Mahmoud Bassiouni: In Memoriam*, Editor's Dedication, in *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* v (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

This chapter concludes that an untenable situation results when politicization prevails over fundamental international principle. This is especially troubling when apparent violations of *jus cogens* norms such as the prohibition of genocide are at issue, and effective prosecution is stymied by national political opposition to a stronger, more legalized regime of international criminal law. Under such circumstances it is both necessary and appropriate to act, as Cherif Bassiouni has done, to help depoliticize the situation by building the political will to act according to principle.

His Legacy as a Scholar

His Visionary Perspective on International Criminal Law

In 1973, when Professor Bassiouni published his first treatise on International Criminal Law, the Cold War was in full swing, and few scholars saw any real prospect that international criminal law might develop into the vital and dynamic area of law that it has become today. Two decades earlier, Professor George Schwarzenberger had expressed the view that "[i]t would be unduly optimistic to assume that 'international criminal law' has now been established unequivocally as a technical term."² In the intervening years the prospects for the development of international criminal law had gone from bad to worse, yet Professor Bassiouni persisted in believing that stronger substantive international control would ultimately be both possible and necessary. His notions at that time about the future of international criminal law were remarkably prescient:

It appears to me that *the future may well see two stages of development. The first one will be in the field of adjective international criminal law*, and the second state of substantive international control may only come into being after the first one has been successful in the course of the customary practice of states. *That second stage would be the elaboration of an international criminal code with an international supporting structure for its enforcement and implementation.* That stage may prove unnecessary if the first one produces satisfactory outcomes. However, since this is not likely, the second stage may prove necessary if a sufficient number of states deem it in their own best interest and in the interest of

² 3 CURRENT LEGAL PROBLEMS 263 (1950), quoted in J.M. van Bemmelen, *Reflections and Observations on International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW 77 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

preserving minimum world order to abate jealously guarded concepts of sovereignty.³

The adjective international criminal law of which he spoke has developed a great deal since then. Most states have enacted the prohibitions of international crimes into their national penal law, and there has been considerable progress in inter-state cooperation in criminal matters. The principle *aut dedere aut judicare* has been widely codified and accepted as establishing the duty of states to extradite or prosecute those believed responsible for serious international crimes.⁴ More recently, the creation of a permanent International Criminal Court (ICC) even in its present, very limited, form has taken international criminal law well into the second stage of development.

His Acknowledgement of the Practical Constraints

Despite his personal commitment to human rights and the rule of law, Professor Bassiouni has always been realistic in assessing the practical and political obstacles to a more effective system of international criminal law. Three decades ago he identified the two principal obstacles to progress in the field he would help to build:

Two main problems seem to plague the ultimate establishment and effectiveness of international criminal law. Foremost is *the adamant refusal of nation-states to surrender or share their power with an international organization in certain areas determined for various reasons by each nation-state to be of vital self-interest*. This recalcitrance derives from a multitude of sources. The other seminal problem is *the apparent impossibility of nation-states to agree on common goals* in the areas considered part of the subject matter. Even when some consensus is reached on commonly shared goals, there is disagreement on the appropriate means to achieve them.⁵

The same two problems, the reluctance of states to surrender their freedom of action and their inability to reach consensus on their common

³ INTERNATIONAL TERRORISM AND POLITICAL CRIMES, *supra* note 1, at 490 (emphasis added).

⁴ See M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

⁵ 1 INTERNATIONAL CRIMINAL LAW, *supra* note 2, preface, xii (emphasis added).

goals and means, were still the focus when the ICC Statute was negotiated in 1998. Writing specifically about international legal responses to terrorism in terms then applicable to the development of international criminal law in general, he noted in 1975 that

the problems of enforcement and implementation which have plagued the progress of international law in general are particularly visible in this area. . . . *The contemporary approach seems to avoid the issue of an international enforcement mechanism*, and consequently the trend is moving away from the elaboration of a general treaty defining the international crime of terrorism. The direction seems to be . . . to impose upon states the duty to prosecute under municipal law or to extradite. Thus the methodological choice appears *to steer away from substantive international criminal law* to adjective (complementary) international criminal law.⁶

At the time, Professor Bassiouni frankly acknowledged that international enforcement of international criminal law could not yet be achieved, and he focused on the practical task of developing and advancing the adjective international criminal law of inter-state cooperation. Decades later, he sensed before others that the time had come for a change.

His Frank Critique of the Realpolitik Extreme

Professor Bassiouni's lectures and academic writings offer a clear analysis of the *realpolitik*⁷ constraints he faced in that capacity. This analysis has been offered in numerous talks, books, and articles, but its central arguments can be formulated in a few basic propositions drawn here from one of his recent speeches. It begins with the observation that "in most cases, political considerations permit perpetrators of gross violations of human rights to operate with impunity."⁸ Professor Bassiouni follows

⁶ INTERNATIONAL TERRORISM AND POLITICAL CRIMES, *supra* note 1, at 488–89 (emphasis added).

⁷ He offers a concise definition of *realpolitik*: "*Realpolitik* involves the pursuit of political settlements unencumbered by moral and ethical limitations. As such, this approach often runs directly counter to the interests of justice, particularly as understood from the perspective of victims of gross violations of human rights." M. Cherif Bassiouni, *The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191 (2003).

⁸ *Id.*

with a critique of the extreme *realpolitik* policy perspective as inconsistent with the principle of accountability⁹ as well as with the most basic promise of international human rights.¹⁰ Perhaps most importantly, he then argues that for the long-term good of humanity, justice and accountability should prevail over the short-term immediacy of *realpolitik*.¹¹

One central insight is based upon his practical experience with the Commission of Experts, as discussed below. Although the stakes in matters of human rights can be immeasurably high, all too often the contest between the justice and *realpolitik* plays out away from the public eye.¹² This makes it easier for adherents of *realpolitik* to undermine the development and functioning of effective international legal institutions without appearing to be the enemies of principle and justice.¹³

⁹ "Impunity, at both the international and national levels, is commonly the outcome of *realpolitik* which favors expedient political ends over the more complex task of confronting responsibility. Accountability, in contrast, embodies the goals of both retributive and restorative justice. This orientation views conflict resolution as premised upon responsibility and requires sanctions for those responsible, the establishment of a clear record of truth and efforts made to provide redress to victims." *Id.*

¹⁰ "At the end of the Second World War, the world collectively pledged 'never again.' While the intention of this global promise may have been sincere, its implementation has proved elusive." *Id.*

¹¹ "The pursuit of *realpolitik* may settle the more immediate problems of a conflict, but, as history reveals, its achievements are frequently at the expense of long-term peace, stability, and reconciliation. It is difficult to achieve genuine peace without addressing victims' needs and without providing a wounded society with a sense of closure. A more profound vision of peace requires accountability and often involves a series of interconnected activities including: establishing the truth of what occurred, punishing those most directly responsible for human suffering, and offering redress to victims. Peace is not merely the absence of armed conflict; it is the restoration of justice, and the use of law to mediate and resolve inter-social and inter-personal discord. The pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts. For this reason, sacrificing justice and accountability for the immediacy of *realpolitik* represents a short-term vision of expediency over more enduring human values." *Id.*

¹² "The conflict between *realpolitik* and justice seldom takes a visible form. Instead, it is generally concealed from the general public. Often, the decision to pursue *realpolitik* strategies takes place during secret negotiations or through processes and formalities designed to obfuscate the truth and manipulate public perceptions." *Id.* at 192.

¹³ "Some mechanisms of concealment are formal in nature, such as introducing weak components into legal norms and judicial institutions in order to deprive them of the capacity to ensure accountability. In this way, where advocates of *realpolitik* must accept a legal norm of accountability, they often neutralize its potential and render its

Cherif Bassiouni has done much to bring this conflict into the public consciousness by exposing the *realpolitik* behind the scenes and mobilizing public shame about it. Sometimes this is the principal means available to motivate governments, and the international bodies they control, to make international justice a priority. He has been all the more effective because he works, as few can, within the multiple frameworks of academia, international organizations, and international civil society.

Thus, Professor Bassiouni's scholarship and his academic legacy supplement his work as an international official. A rejection of *realpolitik* constraints is evident in each.

His Legacy as an International Official

When the Federal Republic of Yugoslavia began to disintegrate in the early 1990s, and war and ethnic conflict broke out in the region, consistent and reliable reports of widespread atrocities against civilians failed to produce a political consensus among the permanent members of the Security Council to take direct military action. As U.N.-appointed mediators, former U.S. Secretary of State Cyrus Vance and former British Foreign Minister David Owen attempted, without success, to produce a peace settlement by mediating between the warring sides in Bosnia and Herzegovina. In October of 1992, the U.N. Security Council passed a U.S. government-sponsored resolution¹⁴ establishing a Commission of Experts to investigate allegations that serious violations of international humanitarian law had been committed in the former Yugoslavia. In December of that same year, U.S. Secretary of State Lawrence Eagleburger proposed the establishment of an international tribunal to try those responsible for war crimes in the region.¹⁵ At the time, many thoughtful people opposed this idea, fearing that the threat of prosecution would complicate efforts to achieve a political settlement of the conflict.¹⁶ According to Eagleburger, U.S. allies "reacted with an awkward silence" when he publicly accused Slobodan Milosevic, Radovan Karadzic,

impact limited and insubstantial. The goals of *realpolitik* can also be achieved by creating legal institutions with a mandate to administer justice, and then, imposing bureaucratic, logistical and financial constraints to render them ineffective or only marginally effective." *Id.*

¹⁴ S.C. Res. 780, 972 U.N. Doc. S/RES/780 (Oct. 6, 1992).

¹⁵ *Peace vs. Justice; DePaul Professor Fears UN Sabotaged His Inquiry into Yugoslav War Crimes*, CHI. TRIB., Sept. 2, 1994, at 1.

¹⁶ See Aryeh Neier, *Watching Rights; War Crimes in the Former Yugoslavia*, NATION, Aug. 8, 1994, at 152.

and other Serb leaders of war crimes and called for a "second Nuremberg."¹⁷

The Commission of Experts received only minimal financial and political support from the United Nations.¹⁸ Frits Kalshoven, the original chairman of that Commission, interpreted his mandate narrowly and publicly questioned the feasibility of establishing an international tribunal before the end of the conflict.¹⁹ He resigned after a few months, complaining that the major powers of the Security Council had not adequately supported the Commission's work.²⁰ This proved to be a fortuitous development for the development of international criminal law because M. Cherif Bassiouni, already a member of the Commission, was appointed its new Chairman. He took a more expansive view of the Commission's agenda and pursued it energetically. By raising additional funds from private foundations, he supplemented the limited budget provided by the United Nations and created a vast database of information incorporating all the evidence gathered by the Commission.²¹

A dispute developed between Cherif Bassiouni and David Owen over the Commission's work. As Owen saw it, his task was to seek peace through a negotiated settlement with political leaders who themselves might be future targets of prosecution. At a time when there was still little political will within the Security Council to proceed with international prosecutions,²² Bassiouni was determined to bring to justice those indi-

¹⁷ *Atrocity Docket; UN Has Done Little to Prosecute Villains in Bosnia*, CHI. TRIB., Feb. 13, 1994, at 1.

¹⁸ As one report described it: "Bassiouni says that from the beginning it was obvious to him that certain powerful member States of the U.N.—such as Great Britain and France—had no appetite to pursue war criminals. "But I found a way to end-run the pattern of delay the U.N. was engaging in," he says. When the U.N. declined his request to set up a database collection operation in Geneva, he set one up right at his own university in Chicago. When funding dried up, he drummed up more by convincing certain countries to kick in to a voluntary trust fund he says the U.N. set up at his behest." William W. Horne, *The Real Trial of the Century*, AM. LAW., Sept., 1995, at 5.

¹⁹ *War Crime Unit Hasn't a Clue; U.N. Setup Seems Destined to Fail*, NEWSDAY, Mar. 4, 1993, at 5.

²⁰ *Yugoslav War Crimes Investigator Assails U.N.*, REUTERS WORLD SERV., Mar. 18, 1994.

²¹ *Peace vs. Justice*, *supra* note 15, at 1.

²² "I still think there is a lack of political will. I still think that the priorities are to have peace irrespective of justice, and the trouble with that . . . is you cannot compromise justice. Politics is a field in which you can make compromises, but you can-

viduals responsible for serious international crimes regardless of their continued political importance. The Bassiouni Commission made no secret of its emerging conclusion that most of the atrocities in the former Yugoslavia had been committed by Serbs. When Owen suggested that the Commission should place more emphasis on acts by Bosnian Muslims against Serbs, Bassiouni rejected this as an attempt to impose an artificial moral equivalence.²³

When the previous head of the Commission resigned, he specifically identified Britain and France as countries that had failed to support its investigations.²⁴ The British government shared Owens's apparent²⁵ skepticism about both the work of the Commission and the advisability of creating an international tribunal, and that government's support for the creation of the tribunal was particularly weak.²⁶

Under Cherif Bassiouni's leadership, the Commission pursued its task with surprising vigor. The Security Council and the U.N. bureaucracy seemed less than enthusiastic about this fact, as illustrated by the circumstances surrounding the release of the Commission's final report. U.N. administrators insisted upon receiving the final report in April of 1994 despite the Commission's prior announcement that it would not conclude its investigation of rape crimes until July of that year. The United Nations publicly released the report late Friday afternoon on May 27, without ben-

not make compromises in justice." M. Cherif Bassiouni, as quoted in the Transcript #35 2, DIPLOMATIC LICENSE (CNN), Aug. 14, 1994.

²³ *Peace vs. Justice*, *supra* note 15, at 1.

²⁴ *Exasperation Drives War Crimes Commission Chief to Resign*, AGENCE FRANCE PRESSE, Oct. 1, 1993.

²⁵ David Owen rejects the notion that he opposed the work of the Commission or the creation of the ICTY. *Id.*

²⁶ "The British record is quite evident in this regard. In public, Britain went on record several times in support of war crimes proceedings. Behind the scenes, the British were a brake on various proposals. They provided little money, scant personnel, and few documents to the Commission and Tribunal. British officials made known to the press that they had strong misgivings about the practicality of what they saw as a U.S. push for criminal proceedings. Several circles of British opinion knew well that their government did not really favor judicial proceedings." David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 401, 404 (1994). See also Patrick Bishop, *Britain "Snubbed War Crimes Team"*, DAILY TELEGRAPH, Dec. 4, 1993, at 16; Mark Tran & Hella Pick, *U.N. to Set Up Commission to Investigate Atrocities in Former Yugoslavia*, GUARDIAN (London), Oct. 7, 1992, at 8, noting that "[w]hat began as a robust American initiative was watered down by Britain, France and China."

efit of an accompanying press release,²⁷ strongly suggesting an attempt to minimize media coverage of the report and its contents.

The final report of the Commission of Experts²⁸ is a strongly worded document that carries the imprint of Cherif Bassiouni and reflects his life-long commitment to bring the rule of law to the field of international criminal justice. The report carefully details the patterns of violence in the former Yugoslavia. It concludes that approximately 200,000 Yugoslavs were killed, 50,000 tortured, and 20,000 raped, and there were reports of 700 concentration camps and 150 mass graves.²⁹ It also expresses shock at "the high level of victimization and the manner in which these crimes were committed."³⁰ The report describes the policy of "ethnic cleansing" conducted by Serbs in pursuit of a "Greater Serbia,"³¹ and notes that "similar practices have been committed at certain times and places by Croatian warring factions."³²

Rejecting the politically motivated demand for a veneer of moral equivalence, the report stresses that, while all sides have been guilty of violations, "it is clear that there is no factual basis for arguing that there is a 'moral equivalence' between the warring factions."³³ The report also takes a strong stand in favor of "effective and permanent institutions of international justice."³⁴ Thus, the tone of the report was in stark contrast

²⁷ *Peace vs. Justice*, *supra* note 15, at 1.

²⁸ Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), *Final Report* U.N. Doc. S/1994/674 (May 27, 1994).

²⁹ *Id.*, n.87.

³⁰ *Id.*, n.319.

³¹ *Id.*, paras. 131-145.

³² *Id.*, paras. 146-147.

³³ *Id.*, para. 149.

³⁴ "It is particularly striking to note the victims' high expectations that this Commission will establish the truth and that the International Tribunal will provide justice. All sides expect this. Thus, the conclusion is inescapable that peace in the future requires justice, and that justice starts with establishing the truth. The Commission would be remiss if it did not emphasize the high expectation of justice conveyed by the parties to the conflict, as well as by victims, intergovernmental organizations, non-governmental organizations, the media and world public opinion. Consequently, the International Tribunal must be given the necessary resources and support to meet these expectations and accomplish its task. Furthermore, popular expectations of a new world order based on the international rule of law require no less than effective and permanent institutions of international justice. The Inter-

to the ambivalence of many Security Council members towards the creation of even an *ad hoc* international criminal tribunal.

Even before the release of its final report, the work of the Bassiouni Commission established the institutional and political momentum that ultimately resulted in the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY). The Commission's interim report had stated that establishing an international criminal tribunal would be "consistent with the direction of its work,"³⁵ and it was soon thereafter that the Security Council first decided to create the ICTY.³⁶ Just over a year later, the Security Council followed that precedent by creating the International Criminal Tribunal for Rwanda³⁷ (ICTR) in response to a separate crisis in that country.

Cherif Bassiouni played a pivotal role in this historic process that went far beyond his technical work as head of the Commission of Experts. He spoke out publicly on the issues, stressing not only the need for justice, but also the political obstacles he had encountered in the Security Council and beyond. His blunt criticisms may not have been consistent with the usual diplomatic niceties,³⁸ but in this case they proved effective in motivating a reluctant Security Council to act.

national Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 must, therefore, be given the opportunity to produce the momentum for this future evolution." *Id.* para. 320.

³⁵ Commission of Experts Established pursuant to Security Council Resolution 780, *Interim Report* U.N. SCOR, Annex, para. 20, U.N. Doc. S/25274 (Feb. 10, 1993).

³⁶ The International Criminal Tribunal for the former Yugoslavia was created by U.N. Security Council Resolution 827, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter Resolution 827].

³⁷ The International Criminal Tribunal for Rwanda was created by Security Council Resolution 955, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter Resolution 955].

³⁸ Cherif Bassiouni paid a price, of sorts, for outspokenness when he was denied appointment as the first prosecutor of the ICTY. According to one report: "Last week in New York, the players mounted a successful, if cynical, double bill at the Security Council. First, UN Secretary-General Boutros Boutros-Ghali officially nominated a candidate for prosecutor at the Yugoslav War Crimes Tribunal to the Security Council. The British, French and Russians indicated that they would veto his suggestion, Professor Cherif Bassiouni of Chicago's De Paul University. . . . Officially, the opposition to Professor Bassiouni was based on his lack of experience as a prosecutor. In fact, diplomats candidly admit that his real problem is an excess of efficiency. He is a year

Rarely do the actions of any one individual have such a crucial effect upon the decisionmaking of the Security Council. One reason that Cherif Bassiouni was so unusually effective is because human rights non-governmental organizations (NGOs) and other elements of international civil society were mobilized in support of his goals. Professor Bassiouni was acutely aware of the potential power of these groups. Pressure from civil society had been instrumental in motivating the Security Council to establish the Commission of Experts in the first place.³⁹ By making public statements about the *realpolitik* political maneuvering that impeded the pursuit of international justice, he brought the influence of international civil society into play once again, this time to ultimately decisive effect.⁴⁰

Cherif Bassiouni once stated that the tribunal was only created as a fig leaf to mask the failure of the international community to prevent atrocities in the former Yugoslavia.⁴¹ Even so, the creation of the ICTY was a major victory for the rule of law in the international system, and a key first step leading to the establishment of the permanent ICC. Before the Bassiouni Commission and the ICTY, international criminal responsibility was the forgotten stepchild of state interests and state responsibility.⁴²

When Cherif Bassiouni was appointed as the Independent Expert for Afghanistan in 2004, he once again demonstrated the same dedication to advancing international law and principle despite the political fallout.

ahead of any other potential candidate in assembling war crimes evidence—and among the chief suspects are the ‘leaders’ to whom David Owen and the west are urging the Bosnians to surrender most of their country.” Ian Williams, *Bosnia Let Down at U.N.*, NEW STATESMAN & SOC’Y, Sept. 17, 1993, at 10.

³⁹ See *Importance of Choosing Accountability*, *supra* note 7, at 198.

⁴⁰ “I think international civil society is the necessary countervailing force to the forces of cynicism and *realpolitik*. The presence of an international civil society makes it more difficult for the forces of cynicism and *realpolitik* to achieve their ultimate goals of compromising justice.” *Id.* at 203.

⁴¹ “The decision on war crimes trials was a convenient fig leaf.” Quote from M. Cherif Bassiouni in Wilbur G. Landrey, *War Crimes Tribunal: More than a Fig Leaf?*, ST. PETERSBURG TIMES, Sept. 4, 1994, at 1A. See also NEW REPUBLIC, Feb. 12, 1996, at 19.

⁴² The possibility of a war crimes trial for Saddam Hussein was considered by the U.S. government, but ultimately rejected, after the first Gulf War. “President Bush issued a public warning to Saddam Hussein in October 1990 that he could face a war-crimes trial . . . [b]ut senior Administration officials acknowledge that there is no enthusiasm in the Administration for initiating a complicated process like the Nuremberg trials of Nazis after World War II.” Elaine Sciolino, *U.S. Is Said to Withhold Evidence of War Crimes Committed by Iraq*, N.Y. TIMES, July 6, 1992, at A6.

His mandate was to "develop . . . a programme of advisory services to ensure the full respect and protection of human rights and the promotion of the rule of law and to seek and receive information about and report on the human rights situation in Afghanistan in an effort to prevent human rights violations,"⁴³ and he was not inclined to interpret that mandate narrowly. His report drew attention to a number of troubling human rights issues in Afghanistan, including:

Actions by United States-led Coalition forces that appear to be unregulated by a Status of Forces Agreement (SOFA), including arbitrary detentions under conditions commonly described as constituting gross violations of human rights law and grave breaches of international humanitarian law.⁴⁴

The U.S. government was not pleased to be mentioned in this context, but it could hardly have been too surprised. Serious questions about U.S. practices in Afghanistan had already been raised in the U.S. media,⁴⁵ but Professor Bassiouni was once again⁴⁶ penalized for speaking truth to power. The Commission for Human Rights abruptly terminated his mandate as Independent Expert after a single year, reportedly at the behest of the U.S. government.⁴⁷

II. POLITICIZATION AND DEPOLITICIZATION: AN ANALYTICAL FRAMEWORK BASED ON U.S. PRACTICE

Politicization and the Theory of Functionalism

Accusations of "politicization," generally refer to a dysfunction in which actions or decisions relating to technical or "non-political" matters are influenced by "political" considerations unrelated to the agreed pur-

⁴³ U.N. Commission on Human Rights Res. 2003/77, para. 15(b) (Apr. 25, 2003).

⁴⁴ M. Cherif Bassiouni, *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, U.N. Doc. E/CN.4/2005/122 918(1) (Mar. 11, 2005).

⁴⁵ Human rights organizations had already protested the techniques allegedly used by the CIA on some captives at the U.S.-held Bagram air base in Afghanistan and other facilities overseas. See Alan Cooperman, *CIA Interrogation Under Fire; Human Rights Groups Say Techniques Could Be Torture*, WASH. POST, Dec. 28, 2002, at A9.

⁴⁶ Compare the previous situation in which Cherif Bassiouni was denied appointment as the first Prosecutor of the ICTY. See *supra* note 38 and the accompanying text.

⁴⁷ See Warren Hoge, *Lawyer Who Told of U.S. Abuses at Afghan Bases Loses U.N. Post*, N.Y. TIMES, Apr. 30, 2005, at A7.

poses of the organization.⁴⁸ For example, in the summer of 2005, the Chinese government criticized the United States for its "mistaken ways of politicizing economic and trade issues"⁴⁹ after Congress threatened to prevent the attempted takeover of an American oil company by a large Chinese energy firm. China argued that the take-over bid was "a normal commercial activity between enterprises and should not fall victim to political interference."⁵⁰

In an earlier work, this author investigated the legal and practical implications of a certain type of politicization in the context of the World Bank.⁵¹ That study focused upon the use by the United States of its voting power in these organizations in order to serve political purposes unilaterally determined by the U.S. Congress. The framework for the analysis of politicization outlined below was developed in the course of that study. Although originally developed for inter-governmental organizations (IGOs) such as the United Nation's specialized agencies this framework may also be applied to less formally organized international regimes.⁵²

The concept of politicization can best be understood in relation to the functionalist theory of international organization that was prevalent in the 1940s. This theory holds that the process of international organization should logically begin with the creation of "non-political" inter-

⁴⁸ See BARTRAM S. BROWN, *THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK: ISSUES OF INTERNATIONAL LAW AND POLICY* 14 (1992).

⁴⁹ The Chinese Foreign Ministry said in a written statement: "We demand that the U.S. Congress correct its mistaken ways of politicizing economic and trade issues and stop interfering in the normal commercial exchanges between enterprises of the two countries. . . CNOOC's bid to take over the U.S. Unocal company is a normal commercial activity between enterprises and should not fall victim to political interference. The development of economic and trade cooperation between China and the United States conforms to the interests of both sides." Peter S. Goodman, *China Tells Congress To Back Off Businesses: Tensions Heightened by Bid to Purchase Unocal*, WASH. POST, July 5, 2005, at A1 (emphasis added).

⁵⁰ *Id.*

⁵¹ BROWN, *supra* note 48. The International Bank for Reconstruction and Development (IBRD) is commonly referred to as the World Bank, and the cluster of affiliated organizations centered around the IBRD is often referred to as the World Bank Group. *Id.*

⁵² Krasner defines a regime as "principles, norms, rules, and decision making procedures around which actors expectations convergence in a given issue-area." *INTERNATIONAL REGIMES* (Stephen D. Krasner ed., 1983).

national agencies dealing with specific economic, social, technical, or humanitarian functions of common interest upon which state actors can most easily agree, leaving more ambitious political goals until later.⁵³ According to this theory, it is only after states have developed habits of effective international cooperation on non-political matters that it will be possible for them to cooperate in resolving high-level political problems.⁵⁴ The fact that certain international organizations are sometimes referred to as non-political is a reflection of this theory.

The rules and goals of international organizations must be built upon the consensus of member states. In a few organizations, such as the World Bank, the rules explicitly exclude politicized decisionmaking and mandate that decisions should be made on technical grounds.⁵⁵ In others, there may be only an implicit understanding that decisions should be made on technical terms. Either way, there is a clear link between the agreed purposes of an IGO and the notion of politicization. This theory was well known in the years prior to the formation of most of the U.N. specialized agencies and, in effect, "[t]he conceptual basis of the specialized agencies is functionalism."⁵⁶

While it is indeed arguable that functionalism as a strategy for international cooperation is the conceptual basis of the specialized agencies, it is clear that the theory is neither a rule nor even a principle of international law. Nonetheless, there is a considerable body of state practice relating to the politicization of international organizations. The U.S. gov-

⁵³ See DAVID MITRANY, *A WORKING PEACE SYSTEM* 69-73 (4th ed. 1946).

⁵⁴ Claude calls this the "separability-priority" thesis. I. CLAUDE, JR., *SWORDS INTO PLOWSHARES: THE PROBLEMS AND PROCESS OF INTERNATIONAL ORGANIZATION* 384 (4th ed. 1971).

⁵⁵ The Articles of Agreement of the International Bank for Reconstruction and Development, Article IV(10), provides as follows: "The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."

Both the General Counsel of the Bank, and the Bank's EDs, have endorsed the view that this Section 10 "is no more than a reflection of the technical and functional character of the Bank as it is established under its articles of agreement." Letter from the IBRD General Counsel to the U.N. Secretariat (May 5, 1967), in *U.N. JURID. Y.B.* 121 (1967).

⁵⁶ Ekhardt Klein, *United Nations Specialized Agencies*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 366 (1983).

ernment invoked politicization as one of the justifications for its temporary withdrawal from the International Labor Organization (ILO) from 1977–1980.⁵⁷ A similar logic contributed to the decision of the United States to withdraw from the U.N. Economic Scientific and Cultural Organization (UNESCO) at the end of 1984.⁵⁸ In the course of these experiences the U.S. government outlined its view of the applicable principles. Ultimately the ILO⁵⁹ and UNESCO⁶⁰ responded by instituting major reforms to address the stated concerns of the United States, and the United States has in turn rejoined each of them. This body of practice suggests that a basic framework of legal principles applicable to the politicization of international organizations has already been accepted as part of customary international law.

Patterns and Categories of Politicization

The link between the agreed purposes of an IGO and the notion of politicization is of critical importance. The common thread detectable in various definitions of the term seems to be that politicization implies some politically motivated actions tending either to go beyond or to contradict the agreed object and purpose of the agency involved. David Kay identifies three patterns of politicization that provide a good example of this thread.⁶¹

⁵⁷ See 30(2037) DEPT. STATE BULL., at 65–66 (Apr. 1980); Letter from Henry Kissinger, *Secretary of State of the United States of America, to Francis Blanchard, Director General of the ILO, containing notice of intent to withdraw from the ILO*, 14(6) I.L.M. 1582–84 (Nov. 5, 1975).

⁵⁸ See 84(2083) DEPT. STATE BULL., at 41–42 (Feb. 1984).

⁵⁹ See David Johnston, *Washington Talk: International Labor Organization; Goal of Cooperation, International Division*, N.Y. TIMES, Sept. 14, 1987, at B8. “The I.L.O. actually lost American support once. . . . From 1977 to 1980 the United States declined to participate, saying that the agency had deteriorated into little more than a propaganda front. . . . In 1980 the Carter Administration decided to rejoin the agency after Mr. Blanchard [the ILO Director-General] said he would use his powers to prevent politically motivated resolutions from being acted on by the group’s full membership.”

⁶⁰ See Alan Riding, *A U.N. Agency Is Revitalized by Re-entry of the U.S.*, N.Y. TIMES, Sept. 29, 2002, at 22.

⁶¹ Kay says the following about the term “politicization”: “When this term is used carefully, which is often not the case, it denotes three closely related behavior patterns: first, considering and acting on matters that lie essentially outside the specific functional domain of a given specialized agency or program; secondly, the reaching of decisions on matters within an agency’s or program’s functional competence through a process that is essentially political and does not reflect technical and scientific fac-

The first pattern is essentially a matter of an IGO that reviews and/or acts on matters not insufficiently related to the functional mandate of that agency. The second concerns decisions by an agency that are taken according to a procedure that may be considered flawed because it reflects "political" factors rather than the "technical" or "scientific" factors that are related to the purposes of the agency and are often considered to be its only appropriate concern. Kay's third pattern of politicization may overlap substantially with his second, but it seems in particular to involve the use of an agency's decision-making process in order to make political statements.

Kay's three patterns of politicization, like those of at least one other scholar who has written on the subject,⁶² appear to be derived from an analysis of the reasons cited by the U.S. government in 1975 as the motivation for its purported withdrawal from the ILO. The U.S. notice of intent to withdraw from that organization, signed by Henry Kissinger, refers to "four matters of fundamental concern" considered to be problems by the U.S. government. As three of these four items involve politicization of a sort, it will be worthwhile to examine each of them individually here.

Involvement in Political Issues Beyond the Mandate of the Organization

One of the matters referred to is the "increasing politicization of the organization." The following is the description of this problem contained in the U.S. notice of withdrawal.

In recent years the ILO has become increasingly and excessively involved in political issues which are quite beyond the competence and mandate of the organization. The ILO does have a legitimate and necessary interest in certain issues with political ramifications. It has major responsibility, for example, for international action to promote and protect fundamental human rights, particularly in respect of freedom of association, trade union rights and the abolition of forced labor. But international politics is not the

tors in the decision process; and thirdly, the taking of specific actions on issues within an agency's or program's competence for the sole purpose of expressing a partisan political position rather than attempting to reach an objective determination of the issues." DAVID KAY, *THE FUNCTIONING AND EFFECTIVENESS OF SELECTED UNITED NATIONS SYSTEM PROGRAM* (1980) (Studies in Transnational Legal Policy, Series No. 18).

⁶² DOUGLAS WILLIAMS, *THE SPECIALIZED AGENCIES AND THE UNITED NATIONS: THE SYSTEM IN CRISIS* 55-56 (1987).

main business of the ILO. Questions of relations between states and proclamations of economic principles should be left to the United Nations and other international agencies where their consideration is more relevant to those organization's responsibilities. *Irrelevant political issues divert the attention of the ILO* from improving the conditions of workers—that is, from questions on which the tripartite structure of the ILO gives the organization a unique advantage over the other, purely governmental, organizations of the United Nations family.⁶³

The concern here is with the first pattern of behavior, described by Kay above, and specifically with the fact that the attention of the ILO was being diverted by “irrelevant political issues,” or issues considered by the U.S. government to be inadequately related to the specific functional domain of the ILO.

Selective Concern for Human Rights

As noted above, Kay's second and third patterns of politicization appear to overlap a great deal. Both seem to entail action or decisions by an agency on matters within its competence or mandate but according to a process that is politically rather than “technically” or “objectively” determined. One clear distinction between them is that Kay's second category involves “the reaching of decisions” (plural) and thus describes a general pattern of behavior, while his third concerns “the taking of *specific* actions on issues . . . for the sole purpose of expressing a partisan political position.”

Whether one considers the distinction to be a useful one or not, it is fairly evident that the same distinction was made by Henry Kissinger in the U.S. notice of intent to withdraw from the ILO. Complaining of “selective concern for human rights” as another of the fundamental matters of concern to the U.S. government, that letter describes the problem as follows:

The ILO Conference for some years now has shown an appallingly selective concern in the application of the ILO's basic conventions on Freedom of Association and Forced Labour. It pursues the violation of human rights in some member states. It grants immunity from such citations to others. This seriously under-

⁶³ Letter from Henry Kissinger, *supra* note 57.

mines the credibility of the ILO's support of Freedom of Association, which is central to its tripartite structure, and strengthens the proposition that these human rights are not universally applicable, but rather are subject to different interpretations for States with different political systems.⁶⁴

This selective concern for human rights is a general pattern of behavior that the United States apparently found objectionable in a number of decisions by the ILO conference. In this way it corresponds to Kay's second category of politicization.

Disregard of Due Process

Kissinger's complaint about the alleged "disregard of due process" by the ILO conference in adopting resolutions corresponds to Kay's third pattern of politicization. Note the language used:

The ILO once had an enviable record of objectivity and concern for due process in its examination of alleged violations of basic human rights by its member states. The constitution of the ILO provides for procedures to handle representations and complaints that a member State is not observing a convention that it has ratified. Further, it was the ILO which first established fact-finding and conciliation machinery to respond to allegations of violations of trade union rights. In recent years, however, sessions of the ILO conference increasingly have adopted resolutions *condemning particular member states* which happen to be the political target of the moment, in utter disregard of the established procedures and machinery. This trend is accelerating, and it is gravely damaging the ILO and its capacity to pursue its objectives in the human rights field.⁶⁵

The reference here to "resolutions condemning particular member states which happen to be the political target of the moment" is more specific than the prior complaint about selective concern for human rights, just as Kay's third pattern of politicization is more specific than his second. The distinctions between Kay's three patterns of politicization can thus be clarified by reference to the U.S. notice of withdrawal from the ILO.

⁶⁴ *Id.*

⁶⁵ *Id.* (emphasis added).

Positive and Negative Forms of Politicization

A simpler classification distinguishes between two basic types of politicization using more or less the same criteria mentioned above. One type, essentially identical to what Victor-Yves Ghébalì has referred to as "extraneity,"⁶⁶ involves an attempt to cause the resources of an international agency (its time, its financial resources, perhaps even its publicity) to be diverted to purposes beyond the competence and agreed mandate of the organization. This can be referred to as "*positive politicization*." Kay's first pattern of politicization and Henry Kissinger's complaint quoted above about the increasing politicization of the ILO would both fall under this rubric. UNESCO's efforts to promote a New World Information Order may also be considered an example of this type of politicization.

The other basic type of politicization, which can be referred to as "*negative politicization*," occurs when an international specialized agency makes decisions (which may well be within its competence) according to "politicized" criteria that are unrelated to, or at least not adequately related to, the technical mission of the agency involved. This form of politicization is negative because it is normally directed against a certain member state, or a group of member states, targeted for political reasons. The result of negative politicization, when it is effective, can be to deprive a member state (the target) of some or all of the benefits of membership in an organization or participation in a regime.⁶⁷

Politicization as a Legal Phenomenon

By what objective and definable criteria might one hope to identify the threshold between politicization as mere political phenomenon and politicization as a legally significant development? The latter must by definition have legal as well as political implications, that is, it must affect the rights or the duties of states under international law and not just

⁶⁶ Victor-Yves Ghébalì, *The Politicization of U.N. Specialized Agencies: A Preliminary Analysis*, in *MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES* 322 (1985).

⁶⁷ As we have seen above, the increasing politicization of the ILO was only one of four matters of concern referred to by the United States in its notice of withdrawal from that agency. Two of the other problems mentioned were "selective concern for human rights" by the ILO conference and "disregard of due process" by the organization in its examination of alleged violations of basic human rights by member states. In a sense, both of these involve action directed against a State or States presumably targeted for political reasons, and thus both can be classified as forms of negative politicization. See Letter from Henry Kissinger, *supra* note 57.

their interests as politically defined. The legal significance of politicization results from the effect that it can have upon the balance of such *rights* and *duties* applicable to individual member states.

The legal significance of politicization is most apparent when it substantially and detrimentally affects the legal rights of a state.⁶⁸ Only in the case of effective negative politicization is this likely to occur. If the negative politicization of an organization is ineffective, this will usually mean that in spite of the politicization, no decision adverse to the target's rights was ultimately taken by the organization. This is a very common result of negative politicization (especially within the World Bank context).⁶⁹

Of course, any state is sure to resent being the target of negative politicization even if the actual legal effect upon its rights seems minimal or even nil. The target may take little comfort from the knowledge that the manner in which it has been condemned is merely symbolic, regardless of whether that condemnation comes in the form of a unilateral statement by the representative of a single member state or a resolution endorsed by a majority of the entire membership.

A condemnation or other decision by an organization that detrimentally affects the rights of a member state may be legal and appropriate if the state is targeted as a form of accountability for its activities within the purview of that agency. When, for political reasons, that agency acts selectively against certain members, it raises problems of fairness, and charges of politicization are sure to follow, but this alone cannot invalidate an otherwise valid decision.⁷⁰

Legally significant politicization also occurs whenever a state, acting within the context of an IGO, takes politicizing actions that are in con-

⁶⁸ The legal concept of politicization can be usefully extended well beyond this narrow state-centric usage. For example, legally significant politicization might also consist in the violation of the internationally recognized rights of non-state actors such as individuals. See the discussion of Politicization and Principle in International Criminal Law, *infra* notes 99–147 and the accompanying text.

⁶⁹ See BROWN, *supra* note 48, at 242–44.

⁷⁰ Thus, the unfavorable treatment that the *apartheid* government of South Africa once received in many specialized agencies could at that time be justified by the detrimental effects of *apartheid* upon the technical cooperation dealt with by those agencies. The fact that some other member states with serious human rights problems were not subjected to the same unfavorable treatment was not enough to automatically invalidate the anti-*apartheid* policies of these agencies.

flict with the constitutive treaty of that organization and that materially violate its *obligations* as a member. In many cases, such a material violation is likely to have a direct effect upon the rights of other members, but a material breach is legally significant even where there is no such immediate effect.⁷¹

It is difficult to say at exactly what point the *positive* politicization of an IGO becomes a legal, rather than merely political, phenomenon. When, according to the standard suggested above, are the legal rights of member states "substantially and detrimentally affected" by positive politicization? And when could this form of politicization constitute a material violation of an IGO's constitutive treaty? Positive politicization by definition refers to an attempt to cause the resources of an IGO to be diverted to or used for purposes beyond the competence and mandate of the organization. But who determines what does and what does not fall within that mandate?

How convenient it would be if this matter could always be determined objectively and according to legal principles. In reality, the charter of an IGO can be very vague about the scope of its intended mandate, and indeed these mandates often evolve.⁷² States can and do disagree about how broadly or narrowly the purposes of a given organization or regime should be interpreted, and when this occurs, the dispute is likely to be resolved politically if at all. Of course, if the various member states agree that broader action by an agency is desirable, then the issue will not be controversial, and no charges of politicization will be raised. All of this suggests that it will be especially difficult to formulate a workable definition of *positive* politicization as a legal phenomenon.⁷³

⁷¹ According to the definition found in Article 60(3)(b) of the Vienna Convention on the Law of Treaties, material breach of a treaty can consist in either the unsanctioned repudiation of the treaty or "the violation of a provision essential to the accomplishment of the object and purpose of the treaty." Article 60(2) of that convention also provides that the material breach of a multilateral treaty can in certain circumstances be invoked to justify the suspension of such a treaty. Vienna Convention on the Law of Treaties art. 60, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679.

⁷² See BROWN, *supra* note 48, at 87-155.

⁷³ See INIS L. CLAUDE JR., *THE CHANGING UNITED NATIONS* xvii (1967), where he asserts that the U.N. can have no purposes of its own. He goes on to state that "the political process within the organization . . . is, in essence, a continuous struggle between the advocates of conflicting purposes or between those whose conception of the proper order of priorities are different, a struggle to determine which purposes

This is not to say, however, that there is no possible loss to member states from the positive politicization of an international agency. The political interests of a state may be disserved by the unwelcome expansion of an IGO's field of activities. The United States, for example, considered that UNESCO's efforts to promote a New World Information and Communication Order were contrary to its own national interest.⁷⁴

The interests of a member state, which does not support the positive politicization of an international agency, may be affected in a more tangible manner as well if the agency's funds, a portion of which are normally contributed by each member, are diverted to activities that are seen as going beyond the agreed purposes of the organization. This form of positive politicization may affect the pecuniary interest of member states to the extent that they are required to pay the costs of the activities or programs involved. Disputes between member states about the proper purposes of an IGO can therefore be directly linked with disputes about the budget of the organization.⁷⁵

If positive politicization is fundamentally a political rather than a legal phenomenon, the remedy for this type of problem, from the point of view of a concerned state that objects to the politicization, is likely to

and whose purposes the United Nations will serve. This is what politics is about, and this is the fate of political institutions."

Although Claude expresses this view only with regard to the United Nations and "political institutions," his point that the purposes of an international organization are determined by the attitudes of its members could be applied to the specialized agencies as well. According to this logic, positive politicization would only be a state of mind and could not be objectively defined at all.

⁷⁴ See Gregory D. Newell, Former Ass't U.S. Sec'y of State for Int'l Org. Affairs, Perspectives on the U.S. Withdrawal from UNESCO, Address at Stanford University (Oct. 31, 1984), published in DEPT. STATE BULL., at 54-55 (Jan. 1985), Newell explaining the motives behind the U.S. withdrawal from that agency:

UNESCO programs and personnel are heavily freighted with an irresponsible political content and answer to an agenda that is consistently inimical to U.S. interests. . . .

Voluble UNESCO participants are persistently hostile to U.S. political views, values, and interests. Our participation, then, in UNESCO "consensus" can, on occasion, amount to complicity in vilification of the United States—which is part of everyday life there.

⁷⁵ The case of the U.S. withdrawal from UNESCO again provides a convenient example of a situation where one member state, the United States, was unhappy both with the scope the organization's activities, which it considered to be excessively broad, and with the expansion of the organization's budget. See *id.*

be political as well. One political remedy is that course of action pursued by the United States to protest what it perceived as the politicization of the ILO and of UNESCO. No state can legally be obliged to remain a member of an IGO, and this, in theory, means that they all retain the option of withdrawing. By withdrawing and "voting with their feet,"⁷⁶ member states can demonstrate their disagreement with a trend towards politicization.

It is the past practices of the U.S. government, in withdrawing from and rejoining the ILO and UNESCO, that have generated the bulk of the state practice, and evidence of *opinio juris*, contributing to the development of customary international law standards on politicization. The relevant practice also includes the response of those organizations to U.S. demands for reforms. By implementing those reforms, and effectively depoliticizing their activities, the ILO and UNESCO have themselves endorsed the legal framework for politicization discussed above.

In practice, withdrawal will be a more attractive option for some states than for others. If, for example, a developing country wanted to withdraw from the World Bank to protest the politicization of that agency, it might have a lot to lose by doing so. As a non-member, it would no longer be eligible to borrow from the Bank.⁷⁷

Politicization as a Political Phenomenon

It is possible, and even necessary, to analyze and attempt to understand politicization both as a political phenomenon and as a legal phenomenon. Some observers, rejecting a legal approach to the question,

⁷⁶ Leo Gross suggests that states serious about preserving the rule of law in international organizations "will have to vote, regretfully perhaps, more often 'with their feet,' as the saying goes, and with the purse, and not merely with the voice and hands." Leo Gross, *On the Degradation of the Constitutional Environment of the United Nations*, 77 AM. J. INT'L L. 583 (1983).

⁷⁷ In 1950, Poland, originally a member of the Bank, withdrew because it became clear that the Bank, which was largely under the influence of the United States, was not going to approve any loans to that state as long as it was on the other side of the East-West ideological divide. Czechoslovakia's membership in the Bank followed a similarly troubled course and was formally terminated in 1954 after a dispute about the unpaid portion of its capital subscription. See E.S. MASON & R.E. ASHER, *THE WORLD BANK SINCE BRETTON WOODS* 170-71 (1973). This demonstrates that withdrawal can be a viable option for target states in cases of negative politicization. After all, a state that has been deprived of all the benefits of membership has little to gain by remaining a member.

have noted that it seems to be nothing more than the existence of controversy within an organization that leads to charges by some of the antagonists that the organization has become politicized.⁷⁸ It is undeniable that politicization seems to be something that states are quite willing to accuse each other of doing but never seem to admit to doing themselves. While states have been known to trade legal as well as political accusations, the use of the term suggests that its primary usage may indeed be political and not legal, and that the actual meaning of the term is unclear.⁷⁹

If a broad consensus could be achieved on international economic and political issues across the board (admittedly a highly unlikely development), then there would, in theory, be no need for any state or group of states to politicize international agencies in protest over their inability to obtain satisfaction elsewhere. In a sense then, politicization is linked to the lack of consensus and is as inevitable within the international agencies as is controversy itself.

The politicization phenomenon in the U.N. specialized agencies is indicative of the present state of development, or under-development, of the international community. There must be a certain degree of *consensus* within that community before international organizations or regimes can be formed at all, simply because their very existence depends upon the concurrence of the participating states. On the other hand, the differing viewpoints and, more fundamentally, the differing *interests* of the participating states ensure that the consensus will always be a limited one. Viewed as a political phenomenon, the politicization of an international organization or regime is a manifestation of the controversy generated by conflicts of interest both within that institutional framework and outside of it.

⁷⁸ See G.M. Lyons, D.A. Baldwin & D.W. McNemar, *The Politicization Issue in the U.N. Specialized Agencies, in THE CHANGING UNITED NATIONS, OPTIONS FOR THE UNITED STATES* 85-86 (David A. Kay ed., 1977). In a discussion of politicization that is not limited to the phenomenon as it occurs within international agencies, Keohane and Nye once took a similar view stating that "[i]n the terminology that we will use . . . the system becomes 'politicized' as controversy increases and depoliticized as it decreases." R.O. Keohane & J.S. Nye, *World Politics and the International Economic System*, in C. FRED BERGSTEN, *THE FUTURE OF THE INTERNATIONAL ECONOMIC ORDER: AN AGENDA FOR RESEARCH* 117 (1973).

⁷⁹ Lyons, Baldwin, and McNemar put it this way: "the term 'politicization,' like 'exploitation,' and 'imperialism,' is so loaded with pejorative connotations that serious questions arise about its analytic utility." *Id.* at 84-85.

III. LEGALIZATION ANALYSIS

A different perspective on the depoliticization of individual criminal responsibility is revealed through analysis focusing on the "legalization" of international affairs.⁸⁰ Legalization "represents the decision in different issue-areas to impose international legal constraints on governments."⁸¹ The relevant literature defines "legalization" as a set of institutional characteristics defined along the three dimensions of obligation, precision, and delegation.⁸² *Obligation* refers to the extent to which states are legally bound, meaning that "their behavior is subject to scrutiny under the general rules, procedures, and discourse of international law."⁸³ *Precision* measures how far "rules unambiguously define the conduct they require, authorize, or proscribe."⁸⁴ The dimension of *delegation* charts the degree to which "agreements delegate broad authority to a neutral entity for implementation of the agreed rules . . . including their interpretation, dispute settlement, and (possibly) further rule making."⁸⁵ This definition makes it clear that this last dimension of delegation is much broader than the concept of "judicialization," which is more often the focus of legal scholars.⁸⁶

Legalization can sometimes serve the interests of states, but it comes at a cost in that it imposes constraints on government action.⁸⁷ Governments are understandably reluctant to accept these autonomy costs.

⁸⁰ See Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Legalization and World Politics: An Introduction*, 54 INT'L ORG. 385 (2000); Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT'L ORG. 401 (2000).

⁸¹ Goldstein et al., *supra* note 80, at 386.

⁸² Abbott et al., *supra* note 80.

⁸³ Goldstein et al., *supra* note 80, at 387.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 389.

⁸⁷ "[L]egalization can help States and other actors resolve the commitment problems that are pervasive in international politics, reduce transaction costs, and expand the grounds for compromise. These benefits stem from both interest-based and norm-based processes, and they accrue to interest-based and norm-based agreements. But legalization also entails contracting costs of its own, as well as imposing constraints on government action (autonomy costs)." Goldstein et al., *supra* note 80, at 394.

Greater legalization, "[i]n creating new institutional forms, mobilizes different political actors and shapes their behavior in particular ways."⁸⁸

The Two Possible Extremes of Legalization

It is useful at least initially, to think of the degree of legalization of international affairs as a continuum between two extremes.⁸⁹ At one extreme would be the complete primacy of *realpolitik* and state power and the absence of all legalization. At the other would be the primacy of international law and institutions in a fully legalized system making, interpreting and enforcing the global rule of law.

Although the use of military force in the service of *realpolitik* remains an all too familiar part of today's world, we are nonetheless far removed from the extreme of zero legalization. If we take as our example the field of international criminal law, there is an almost universal consensus on standards of international humanitarian law prohibiting genocide, crimes against humanity, and war crimes, as well as a growing international consensus on basic international human rights standards. The broad, effectively universal, acceptance by states of these fundamental normative restrictions means that even before the ICC and its predecessors, the ICTY and the ICTR, there was already a significant degree of *obligation* and *precision* in our still-primitive and auxiliary system of international criminal law. State power and state prerogatives are limited by treaty obligations, the rights of other states and by international human rights standards even when no effective international enforcement mechanisms are available.

At the other extreme, all important international matters might someday be regulated by a fully legalized international regime operating pursuant to agreed principles. This would require both the development of new international norms in multiple subject areas and the delegation of authority to stronger and more effective international institutions. It

⁸⁸ Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT'L ORG. 661 (2000).

⁸⁹ The seminal paper on legalization describes this continuum as follows: "Consequently, the concept of legalization encompasses a multidimensional continuum, ranging from the 'ideal type' of legalization, where all three properties are maximized; to 'hard' legalization, where all three (or at least obligation and delegation) are high; through multiple forms of partial or 'soft' legalization involving different combinations of attributes; and finally to the complete absence of legalization, another ideal type. None of these dimensions—far less the full spectrum of legalization—can be fully operationalized." Abbott et al., *supra* note 80, at 401–02.

is clear that we are far from this end of the spectrum as well, given the persistence of state sovereignty, the continuing primacy of state (especially U.S.) power, and the lack of international consensus on more effective international enforcement mechanisms.

There has been quite a proliferation in the *delegation* of authority to international courts and enforcement mechanisms in recent years in areas such as international trade, the law of the sea, and, of course, international criminal law. The uneven progress of this legalization,⁹⁰ and the fact that strong legalized institutions are more common in more "technical" areas than in more "political" ones, may be evidence of David Mitrany's theory of functionalism at work.

Asymmetries in the Legalization Process

Although the basic contrast between these two poles is quite clear, the present state of all international law and international institutions cannot be charted on a single axis of legalization. First, the three separate dimensions of obligation, precision, and delegation must be accounted for. Even then, varying degrees of each dimension prevail within different subject areas or regimes such as trade, human rights, the use of force, refugee affairs, or the environment. Legalization can only be achieved through consensus, and there are varying levels of consensus within each of these subject areas. The situation is not totally fragmented. For example, some limited subject-matter integration has already occurred in the legalization of the international trade and international environmental regimes.⁹¹ On the other hand, there has been considerably less integration between fields such as human rights and the use of force.⁹² Only at the highest level of legalization would full integration of all such international sub-regimes be achieved.

⁹⁰ See the discussion of asymmetries in the legalization process, *infra* notes 91–92 and accompanying text.

⁹¹ International trade bodies, such as those within the WTO, now consider certain international environmental standards in the context of international trade disputes. According to the WTO website: "Issues relating to trade, the environment and sustainable development more generally, have been discussed in the GATT and in the WTO for many years. Environment is a horizontal issue that cuts across different rules and disciplines in WTO. The issue has been considered by Members both in terms of the impact of environmental policies on trade, and of the impact of trade on the environment." *WTO: Trade and the Environment*, http://www.wto.org/english/tratop_e/envir_e/envir_e.htm.

⁹² Compare the controversial issue of the legality of the use of force for purposes of humanitarian intervention. See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683 (2000).

Legalization and the Gap Between the Development of Norms and Their Enforcement in International Law

It is easier to reach international consensus on rules than on effective institutions to enforce them. Thus, in the present state of what is still a very weakly institutionalized international legal system, *lex lata* rules often exist without enforcement mechanisms at all, much less effective ones. The resulting gap between law and enforcement leaves states with effective freedom of action despite the obligations they have assumed. At the very least, it leaves them with a large margin of discretion in their interpretation and application of the very international legal norms intended to restrain them.⁹³

The gap between law and enforcement is even greater with respect to the major political and military powers. Under the U.N. Charter, the veto permits the permanent members of the Security Council to act with only minimal concern for the Council's reaction. For example in 2003, the United States sought Council support for its invasion of Iraq without concern that the Council might instead condemn that action or declare it to be a violation of international law or threat to international peace and security. Any attempt by the Council to do so would have been met by a U.S. veto.

This is not to say that there is nothing to deter a permanent member from violating international law. Many foreign governments, the U.N. General Assembly, and the U.N. Secretary-General all condemned the Iraq invasion as illegal, but none of their pronouncements, nor even all of them together, could match the legal effect of a Security Council decision.⁹⁴ Basic balance-of-power constraints (another side of *realpolitik*) con-

⁹³ "In most areas of international relations, judicial, quasi-judicial, and administrative authorities are less highly developed and infrequently used. In this thin institutional context, imprecise norms are, in practice, most often interpreted and applied by the very actors whose conduct they are intended to govern. In addition, since most international norms are created through the direct consent or practice of States, there is no centralized legislature to overturn inappropriate, self-serving interpretations. Thus, precision and elaboration are especially significant hallmarks of legalization at the international level." Abbott et al., *supra* note 80, at 414.

⁹⁴ Back in 1950, the Uniting for Peace Resolution was formulated by the United States to allow the U.N. General Assembly to take action when the Soviet Union's veto prevented the Security Council from acting to protect international peace and security. See Uniting for Peace Resolution, G.A. Res. 377 (V), U.N. Doc. A/377 (Nov. 3, 1950). "[B]y approving the American-sponsored Uniting for Peace Resolution, the Assembly set itself up as a substitute for the Security Council in handling crises when-

tinue to apply but may not always be effective. The balance-of-power operates best in tandem with the U.N. Charter's collective security system as it did in the 1991 Gulf War response to Iraq's invasion of Kuwait.

Legalization Analysis Distinguished from Politicization Analysis

Both legalization and politicization are concerned with the analysis of international organizations and regimes, but the two concepts are in fact quite distinct. Politicization analysis is normative in the sense that politicization is not a neutral term. Politicization is a normative anomaly that occurs when international institutions fail to comply with agreed standards in their decisionmaking and other actions. Legalization analysis is explanatory rather than normative. It attempts to explain why and how actors choose to create legalized institutions, and considers the consequences of legalization,⁹⁵ but without arguing that any legal rules or other normative standards apply to the process or taking a position for or against legalization.⁹⁶

The debate about legalization is concerned with the varying degrees to which there is a consensus that political interaction between states should be subject to international law and institutions. Politicization analysis is about whether international decisionmaking is done according to the agreed rules despite political pressures. Thus, an international institution or regime (e.g., refugee affairs) can be at either a high or low level of politicization, regardless of its place along the continuum of legalization.⁹⁷

Opponents of greater legalization stress the shortcomings of international law and institutions, especially including their alleged or at least

ever the use of the veto might have blocked action by the latter body." CLAUDE, *supra* note 54, at 150. The Uniting for Peace resolution procedure has been used ten times since 1950, but not since the 1960s. Proposals to invoke it in response to the anticipated U.S. invasion of Iraq never got off the ground. See Thalif Deen, *U.S. Moves To Block U.N. Emergency Session on War*, IPS-INTER PRESS SERV. Mar. 27, 2003.

⁹⁵ Goldstein et al., *supra* note 80, at 386.

⁹⁶ After defining legalization, the scholars who developed legalization analysis insist that "[t]his definition does not portray legalization as a superior form of institutionalization. Nor do the contributors to this special issue adopt a teleological view that increased legalization in international relations is natural or inevitable." *Id.* at 388.

⁹⁷ A more legalized regime will tend to provide more standards on which to base later politicization analysis, but this does not necessarily mean that it will in practice be any more, or less, politicized.

potential politicization. A well-known example is the critique of the ICC that assumes it will be too easily manipulated for political (anti-American) purposes. The ICC Statute attempts to address this concern by providing a number of safeguards against politicization.⁹⁸ These safeguards could not placate the principal opponents of the ICC, however, to the extent that the safeguards themselves (and indeed the entire ICC Statute) are perceived by those opponents to constitute more undesirable legalization of international politics.

Fear of politicized international decisionmaking was offered as a rationale for opposition to the legalization which the ICC represents. In the past, U.S. charges of politicization were made only after an international organization had somehow misbehaved. In the case of the ICC, the United States launched a preemptive strike against the possibility of a politicized anti-American ICC.

IV. POLITICIZATION AND PRINCIPLE IN INTERNATIONAL CRIMINAL LAW

Extending the Concept of Politicization Beyond the Technical Realm into International Criminal Law: A Few Caveats

Traditional politicization analysis, as discussed above, is generally applied only to international institutions in more technical, non-political fields, such as the ILO, UNESCO, the World Bank, or the International Monetary Fund (IMF), and not to an organization such as the United Nations whose primary function (the maintenance of international peace and security) is fundamentally political.⁹⁹ This chapter considers, briefly and for the first time, the broader application of the concept of politicization to the issues and institutions of international criminal law.

This inquiry immediately raises a number of issues, the first of which is whether the enforcement of international criminal law should be orga-

⁹⁸ These safeguards include pre-conditions limiting the ICC jurisdiction (unless the Security Council intervenes) to cases where either the territorial state or the state of nationality of the accused has consented in some way (ICC Statute, Article 12); especially narrow definitions of some of the crimes within the jurisdiction of the ICC, (Articles 7-8); the principle of complementarity, which limits the jurisdiction of the ICC to situations where states are unwilling or unable to prosecute (Statute, Article 17); and various procedures by which interested states or individuals can challenge any ICC investigation or prosecution before a pre-trial chamber (Articles 18-19). Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 1, 2002) [hereinafter Rome Statute].

⁹⁹ See BROWN, *supra* note 48, at 14.

nized primarily as a technical task or primarily as a political one. It can be organized as a technical task only if there is a strong international consensus both on the norms of international criminal law (*obligation* and *precision*) and to some extent also on mechanisms for their implementation (*delegation*). Recent years have seen tremendous progress in building this consensus as evidenced by the success of the *ad hoc* ICTY and ICTR and the creation of a permanent ICC. But the consensus is incomplete in light of the U.S. government's continuing opposition to the ICC.

By taking international criminal law farther outside of the realm of politics, the depoliticization¹⁰⁰ of international criminal law promotes the rule of law. The ICC now has the opportunity to prove that it can apply the norms of international criminal law fairly and without undue political bias. The 105 states ratifying the ICC Statute have committed themselves to the idea that it can. For those key states that have not accepted the ICC, its existence and functioning remain a matter of political controversy and not a mere technical issue.

But if the legalization of international criminal law is not a technical matter separable from politics, is it nonetheless appropriate to speak of the politicization of international criminal law or international criminal responsibility? My original politicization analysis applied only to international cooperation in relatively non-political subject areas. There were two reasons for this limitation. The first is that the state practice from which I first developed that framework was limited to withdrawal from two organizations of this type. A second key rationale was the separability-priority thesis from Mitrany's theory of functionalism, which holds that non-political matters should be separated from more political ones and given priority in the process of international organization. The priority aspect of this theory reflects the assumption that the rule-based cooperation of states and their agreement to the delegation of international authority are easier to achieve in non-political fields.¹⁰¹

But since separability-priority is a practical prescription and not a normative rule, the notion is not directly relevant to a legal theory of politicization centered upon compliance with agreed norms. Although the politicization framework discussed above applies best to those aspects

¹⁰⁰ The term "depoliticize" means "to remove the political character of: take out of the realm of politics." The Merriam-Webster Online Dictionary, <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=depoliticize&x=23&y=15>.

¹⁰¹ See the discussion of functionalism, *supra* notes 48-58 and accompanying text.

of international cooperation most easily separable from politics, a new generation of politicization analysis must recognize that principle remains a value even in fields not easily separable from politics.

Legalization, Politicization, and the ICC: Reconciling Principle and Practicality

It is important to balance international legal principle and legitimate state¹⁰² interests in applying the concept of international criminal responsibility. The ratification of the ICC Statute by 105 states thus far demonstrates that there is a broad, if still incomplete, international consensus in favor of stronger legalization in international criminal law. The situation remains tenuous due to strong U.S. opposition to the ICC so there is need for a principled, yet pragmatic, approach.

Precision Is Essential

Individual criminal responsibility should never be imposed unless international fair trial standards have been met.¹⁰³ These standards require respect for the principles *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no penalty without law).¹⁰⁴ The *nullum crimen* principle reflects essentially the same considerations of justice as the prohibition of *ex post facto* laws under the U.S. Constitution.¹⁰⁵

Individual criminal responsibility for grave breaches is clearly established by the terms of the Geneva Conventions of 1949,¹⁰⁶ as is interna-

¹⁰² Ultimately, the proper application of international criminal law must also accommodate the legitimate interests of other non-state international actors, such as individuals and international organizations.

¹⁰³ See International Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 171, 179 (setting out the most broadly accepted formulation of international fair trial rights).

¹⁰⁴ The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, para. 34, U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993).

¹⁰⁵ See U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1. See also Jordan J. Paust, *It's No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALBANY L. REV. 657, 664-65 (1997).

¹⁰⁶ Under each of the four Geneva Conventions of 1949, the parties must search for and, if successful, either prosecute or extradite those alleged to have committed the "grave breaches" they define. The following provision is typical: "Each High Contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring

tional criminal responsibility for genocide by the 1948 Genocide Convention.¹⁰⁷ The rule of customary international law establishing individual criminal responsibility for crimes against humanity developed from the practice of the 1945 Nuremberg Charter¹⁰⁸ later endorsed by a 1946 resolution of the U.N. General Assembly.¹⁰⁹

But how much *precision* is appropriate in the definition of those crimes subject to international prosecution and enforcement? States may be wary of meticulous precision in formulating their obligations, especially in sensitive fields in which they prefer to maintain their freedom of action. In international criminal law, we have recently seen the opposite scenario in which a key state actor calculated that greater precision would limit the prerogatives of an international institution receiving delegated authority more than it would limit those of states. In the course of the 1998 negotiations on the Rome Statute, the U.S. government sought to minimize the delegation of authority to the ICC by insisting upon very "clear, precise, and specific definitions of each offense."¹¹⁰ The effect of these definitions, as intended, was to leave the ICC as little discretion as possible in the interpretation and application of substantive international criminal law.

such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting party concerned, provided such High Contracting party has made out a *prima facie* case." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added).

¹⁰⁷ Under Article 1 of the Genocide Convention, the parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish." Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

¹⁰⁸ Charter of the International Military Tribunal, *annexed to* The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

¹⁰⁹ Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal, G.A. Res. 95, U.N. GAOR, 1st Sess., 55th Plen. Mtg., U.N. Doc. A/64/Add.1 (1946).

¹¹⁰ See Abbott et al., *supra* note 80, quoting *U.S. Releases Proposal on Elements of Crimes at the Rome Conference on the Establishment of an International Criminal Court*, Statement by James P. Rubin, U.S. State Department spokesperson, June 22, 1998, available at <http://secretary.state.gov/www/briefings/statements/1998/ps980622b.html>.

In highly developed national legal systems, rules are often formulated precisely, but in some areas they may be formulated in general terms to allow courts more freedom to adapt broad principles to specific facts.¹¹¹ Over time, these courts may then build up a very precise body of precedent. In international law, states are not inclined to take this approach, so "precision and elaboration are especially significant hallmarks of legalization at the international level."¹¹²

Prudence Is Essential

While the fatalistic extremes of lawless *realpolitik* must be rejected, some aspects of political realism should be kept in mind. Hans Morgenthau defined the realist virtue of prudence as "consideration of the political consequences of seemingly moral action [and] . . . the weighing of the consequences of alternative political actions."¹¹³ Prudence can be as important to success in advancing the international rule of law as it is to success in power politics. It would be naïve and counter-productive to ignore the dedication of states to their own interests. As Professor Bassiouni himself has noted, "[i]t is merely stating a political fact of life that a State can be expected to act in any international organization in a manner most suited to its own interests."¹¹⁴

¹¹¹ In highly developed legal systems, normative directives are often formulated as relatively precise "rules" ("do not drive faster than 50 miles per hour"), but many important directives are also formulated as relatively general "standards" ("do not drive recklessly"). The more "rule-like" a normative prescription, the more a community decides *ex ante* which categories of behavior are unacceptable; such decisions are typically made by legislative bodies. The more "standard-like" a prescription, the more a community makes this determination *ex post*, in relation to specific sets of facts; such decisions are usually entrusted to courts. Standards allow courts to take into account equitable factors relating to particular actors or situations, albeit at the sacrifice of some *ex ante* clarity. Domestic legal systems are able to use standards like "due care" or the Sherman Act's prohibition on "conspiracies in restraint of trade" because they include well-established courts and agencies able to interpret and apply them (high delegation), developing increasingly precise bodies of precedent. Abbott et al., *supra* note 80.

¹¹² *Id.* at 414.

¹¹³ Even Hans Morgenthau, the ultimate proponent of *realpolitik*, counseled prudence as an essential aspect of rational policymaking. "There can be no political morality without prudence; that is, without consideration of the political consequences of seemingly moral action. Realism, then, considers prudence—the weighing of the consequences of alternative political actions—to be the supreme virtue in politics." HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 10 (1978).

¹¹⁴ M. CHERIF BASSIOUNI, *AGGRESSION*, Chapter III, in 1 *INTERNATIONAL CRIMINAL*

During the initial period of its existence, the ICC as an institution must exhibit prudence by carefully respecting the limits to its jurisdictional mandate. If it does not, it risks unduly alarming the United States and other members of the Security Council whose support for the ICC will likely be essential in the future.

The Rome negotiations resulted in a very modest institution, highly legalized and even judicialized, but with only very narrowly defined jurisdiction. A first, very substantial, limit on the ICC resulted from the decision to base its jurisdiction on the consent of either the territorial state where relevant crimes have allegedly been committed or the state of nationality of the accused.¹¹⁵ If neither consents nor is a party to the ICC Statute, only a referral from the Security Council can establish ICC jurisdiction.¹¹⁶ Another major limit on the jurisdiction of the ICC is the strict regime of complementarity that ensures ICC deference to national investigations or prosecutions. This limitation, as well, does not apply to cases initiated by decision of the Security Council.¹¹⁷ The ICC itself will have no army, no police force, nor any power to impose economic sanctions on states. From the arrest of suspects to the production of evidence, the ICC will depend entirely upon the cooperation of states, and of the Security Council, in order to function. The Council's recent referral of the Darfur situation to the ICC is clear evidence of that dependence.

The ICTY interpreted its mandate from the Security Council broadly in finding that it had jurisdiction to prosecute violations of common Article 3 of the 1949 Geneva Conventions as violations of the laws and customs of war.¹¹⁸ The ICTY's decision to impose criminal responsibility based on participation in a joint criminal enterprise was also never anticipated by the ICTY Statute. These may well have been appropriate decisions for the ICTY. But unlike the ICTY and ICTR, each of which was created *ad hoc* by decision of the U.N. Security Council, the ICC was established by multilateral treaty and is intended to be a permanent

LAW 172 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973). (After noting the differing positions of various powers on the definition of aggression, already a hot issue in 1973).

¹¹⁵ Rome Statute, *supra* note 98, art. 12(2).

¹¹⁶ *Id.* art. 13(b).

¹¹⁷ *Id.* art. 18.

¹¹⁸ See Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeals Decision on Jurisdiction 73-89 (Aug. 19, 1995).

international institution. As such, it must be careful not to exceed the consensus reflected in its agreed mandate. If the ICC can build a reputation for professionalism and responsible action within that narrow framework, it may eventually grow into a more broadly relevant and effective international institution. On the other hand, if it is generally perceived to be exceeding its agreed jurisdiction, it risks feeding a politicization controversy that could undermine its credibility and future development.

In any case, the reality between the ICC and the United States (one might be tempted to call it the balance-of-power between them) is that the ICC needs the support, or at least the acquiescence, of the United States, but the United States does not want or presently believe that it needs the ICC. This suggests that, as a matter of prudent policy, the ICC should avoid gratuitous conflicts with the U.S. government as these could be disastrous or even self-destructive for the still-nascent institution. Prudence, however, cannot justify special treatment for the United States, or any other country.

Neutral Principles Must Be the Basis

In any system of law, whether national or international, neutral principles must be the basis of judicial decisions. The term was popularized in a different context by Herbert Wechsler, who stressed that both in deciding to exercise jurisdiction and in deciding the merits, courts should decide based upon the law and not based on the discretion of judges.¹¹⁹ This same notion, as applied to the ICC, essentially means that it should avoid decisions that are politicized in the sense of unfairly favoring or disfavoring one country or its nationals over another. Few would dispute the importance of this goal, but it is not always clear how best to achieve it.

If neutral principles are to be applied, it goes without saying that there can be no special accommodation for "American exceptionalism," the view that the United States, as the sole superpower and bearing a spe-

¹¹⁹ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959) (describing the judicial obligation "to decide the litigated case and to decide it in accordance with the law"). See also Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1773 (2004). "To Wechsler, a court's decision either to accept jurisdiction or to dismiss a case, just like the court's resolution of a case once accepted, must be based on legal principle and not left to judicial discretion."

cial burden in the international system, must be given special treatment and should not be held to the same rules as other states.¹²⁰ Former Secretary of State Madeleine Albright's statement that the United States is an "indispensable"¹²¹ global power reflects this American exceptionalism, and it has also been invoked, directly or indirectly, as a justification for U.S. objections to the ICC Statute.¹²²

But U.S. exceptionalism cannot be recognized by international law. The implied derogation from neutral principles is ethically untenable and inconsistent with the rule of law. Furthermore, this exceptionalism is likely to backfire in the long run by fueling unintended consequences such as sentiments of anti-Americanism and a trend towards the "soft-balancing"¹²³

¹²⁰ As this author has written elsewhere: "For some, the logic of U.S. indispensability justifies American exceptionalism, the idea that this country should get special treatment and remain free from the legal restraints applied to other States. According to this view, the United States should retain freedom of action, not only for its own sake but for the sake of the international community, since in many cases only the United States has the power and the will to act when necessary." Bartram S. Brown, *Unilateralism, Multilateralism and the International Criminal Court*, in *MULTILATERALISM AND U.S. FOREIGN POLICY: AMBIVALENT ENGAGEMENT* 334 (Stewart Patrick & Shepard Forman eds., 2002).

¹²¹ Secretary of State Madeleine Albright has described the "indispensable" U.S. role as follows: "But if we have to use force, it is because we are America. We are the indispensable nation. We stand tall, and we see further than other countries into the future, and we see the danger here to all of us. And I know that the American men and women in uniform are always prepared to sacrifice for freedom, democracy, and the American way of life." *Secretary of State Madeleine Albright Discusses Her Visit to Ohio to Get Support from American People for Military Action Against Iraq*, NBC News Transcripts, The Today Show (Feb. 19, 1998).

¹²² David Scheffer, the Clinton administration's special envoy dealing with war crimes, summed up these concerns in the following terms: "[T]he reality is that the United States is a global military power and presence . . . Our military forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring out American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal does not limit the capacity of our armed forces to legitimately operate internationally . . . that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power." Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at 10A.

¹²³ The 18th-century philosopher de Vattel described the balance of power as an automatic system for the maintenance of order and liberty in international affairs in which the weaker states will naturally unite against the strongest. EMMERICH DE VATTIEL, *THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT*

of other states against U.S. hegemony.¹²⁴

The Nature and Quality of the Principles Involved and Other Relevant Factors

Another consideration is the nature and quality of the principles concerned. Due to the limits of the international consensus at the present stage of development, international courts should prosecute individuals only for serious crimes of concern to the international community as a whole. If the norms allegedly violated are truly fundamental in importance, prosecution might even be a humanitarian imperative.¹²⁵ Norms of *jus cogens*¹²⁶ are so imperative that they cannot be dismissed even when reasons of state or national security are invoked. This is especially true when the norms are defined with sufficient precision to be enforced in the relevant circumstances.

Of course there may be other circumstances surrounding violations that are relevant to determining if international criminal prosecution is appropriate. Are the actions in this case manifestly illegal, or are the facts

AND AFFAIRS OF NATIONS AND SOVEREIGNS, BOOK III, § 47 (1758). Some "soft-balancing" against the United States is already evident in the reactions of U.S. allies such as France to U.S. hegemony. Former French Foreign Minister Hubert Vedrine once described the United States as a "hyperpower. . . a country that is dominant or predominant in all categories." He suggested that this domination could best be resisted "[t]hrough steady and perservering work in favor of real multilateralism against unilateralism, for balanced multipolarism against unipolarism, for cultural diversity against uniformity." Quoted in, *To Paris, U.S. Looks Like a 'Hyperpower'*, INT'L HERALD TRIB., Feb. 5, 1999, at 5.

¹²⁴ Compare Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 843 (2001) with Jose E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873 (2003).

¹²⁵ The obligation of states to punish violations of *jus cogens* and other universal jurisdiction crimes is well established. States may now be in the process of accepting the duty to prevent them as well. See Bartram S. Brown, *The Evolving Doctrine of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383, 397 (2001).

¹²⁶ The Vienna Convention on the Law of Treaties sets out a special rule for what it refers to as "Treaties Conflicting with a Peremptory Norm of General International Law": "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties *supra* note 71, art. 53.

disputed? Are any justifications given plausible? All things considered, is international prosecution in the interest of justice?¹²⁷

Legalization, Politicization, and the ICC

The second-stage process Cherif Bassiouni once described as “the elaboration of an international criminal code with an international supporting structure for its enforcement and implementation”¹²⁸ can only be achieved by a substantial increase in the degree of obligation, specificity, and delegation in the regime of international criminal law. This radical process has been realized, if only imperfectly and to a limited extent, by the Rome Statute of the ICC. The imperfections lie in the limits to the jurisdiction of the ICC and the failure to include the United States, and a few other key powers within the ICC consensus.

For the moment, the entire issue of the ICC remains controversial for the U.S. government, but what aspect of that controversy presents the greatest threat to politicize international criminal law? Did the very creation of the ICC improperly politicize international criminal law, or have U.S. actions in opposition to the ICC done more to politicize the field?

Creation of the ICC as Politicization

Did the creation of the ICC violate the legal rights and legitimate interests of the United States enough to qualify as legally significant politicization? One argument is that, without U.S. consent, the ICC Statute has transformed international criminal law by altering the balance between the rights and responsibilities of the United States and other non-party states. But is this truly the case? It is undeniable that the ICC Statute increases the degree of legalization within the regime of international criminal law and that legalization can alter the playing field within which states interact. But the ICC Statute does not substantially affect the legal rights and obligations of the United States.

As a non-party state, the United States has no obligations whatsoever under the ICC Statute. Like any treaty, it creates obligations for its parties: these include the obligations to comply with requests for the surrender and transfer of suspects to the Court,¹²⁹ to provide requested

¹²⁷ The initial determination of whether prosecution would be in the interests of justice is left to the Prosecutor under the Rome Statute *supra* note 98, art. 53(2)(c).

¹²⁸ INTERNATIONAL TERRORISM AND POLITICAL CRIMES, *supra* note 1, at 490.

¹²⁹ Rome Statute, *supra* note 98, art. 89(1).

evidence,¹³⁰ to give effect to fines or forfeitures ordered by the Court,¹³¹ and to pay assessments for the regular budget of the Court.¹³² None of these obligations applies to any non-party state, nor does the exercise of criminal jurisdiction against an individual accused bind that individual's home state.

Although the prosecution of a U.S. national by the ICC might potentially affect the *interests* of the United States, the fact is that no state has the legal *right* to shield its citizens from prosecution abroad for genocide, crimes against humanity, or serious war crimes.¹³³ A state may refuse to extradite or surrender its nationals abroad for trial, but when their nationals are on the territory of another state, that state does not need home state consent to try them. Since the jurisdiction of the ICC is based on that of the 105 states parties to the Rome Statute,¹³⁴ the same principle, that is, that no home state consent is needed to try them, must apply to its derivative jurisdiction as well. As far as the protection of nationals from prosecution abroad is concerned, the ICC Statute does little to change the *status quo ante*.

As the ICC begins to function, it is inevitable that new problems and controversies will arise. All states will have a legal interest in ensuring that the internationally recognized fair trial rights of the accused will be protected. If the nationals of the United States or some other country were for political reasons unduly targeted for investigation or prosecution, that would undoubtedly constitute an illegal politicization of international criminal law to the detriment of that state. A major U.S. concern has been that the ICC will open the door to politicized prosecutions of U.S. nationals, but none of these potential problems has yet materialized. Although the U.S. government has launched a robust campaign of anti-

¹³⁰ *Id.* art. 93.

¹³¹ *Id.* art. 109(1).

¹³² *Id.* art. 117.

¹³³ See the discussion of this issue in Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L L. & POL. 855, 871-73 (1999).

¹³⁴ The jurisdiction of the ICC, as set out in the Rome Statute, is built upon the unquestioned right of states to prosecute crimes committed on their territory or by their nationals. Either the territorial state or the state of nationality of the accused must consent to every case prosecuted by the ICC, except for those referred under the authority of the U.N. Security Council. See Rome Statute, *supra* note 98, arts. 12(2), 13.

ICC policies¹³⁵ the ICC as of the time of this writing has not yet politicized international criminal law to the detriment of any state.

The United States Acts in Response to the ICC as Politicization

In contrast, some of the actions by the U.S. government in response to the ICC do politicize international criminal law. In 1998, the final text of the ICC Statute was adopted in Rome, and immediately thereafter some policymakers suggested that the United States should embark on an active campaign against the ICC.¹³⁶ More recently, U.S. ICC policy has focused on gaining assurances from other states that they will never transfer U.S. nationals to the custody of the ICC. States can reassure the United States on this point either by declining to become parties to the ICC Statute, or by signing a so-called Article 98 agreement with the United States.¹³⁷ Article 98 of the ICC Statute¹³⁸ was intended to allow the state parties to accommodate existing agreements such as Status of Forces Agreements (SOFAs) under which states sometimes welcome foreign troops on their soil under a grant of immunity. Few people at the 1998 Rome Conference, at least outside the elite corps of international

¹³⁵ Some of these policies are discussed further in the next section of this chapter.

¹³⁶ Former Senator Jesse Helms, speaking as Chairman of the Senate Foreign Relations Committee in 1998, stated that "[r]ejecting this treaty is not enough. . . . The United States must . . . be aggressively opposed to this court." Toni Marshall, *Helms Vows Retaliation for New World Court*, WASH. TIMES, July 24, 1998, at A1.

¹³⁷ In 2003, a State Department Press Spokesman stated the U.S. position on the ICC in the following terms: "We have been very clear with Europeans and others all around the world that we are not trying to sabotage the ICC. . . . Our efforts are geared at, first of all, protecting the integrity of international peacekeeping efforts, and we have respected the European Union's request not to attempt to influence other countries regarding their decisions to become a part of the Rome statute to join on to the ICC. . . . We certainly respect the rights of other countries to make their decisions, to become parties to the Rome statute, but, at the same time, we have asked other countries to respect our right not to do so. And so an essential element in that, in respecting our right and separating U.S. citizens from the ICC, is negotiating these Article 98 agreements." *State Department's Reeker on ICC Article 98 Agreements*, Philip T. Reeker, Deputy Spokesman, U.S. Dept. of State, Daily Press Briefing Index, June 10, 2003, 1:05 p.m. EDT, available at http://usinfo.state.gov/dhr/Archive_Index/icc_agreements.html.

¹³⁸ Article 98(2) of the ICC Statute provides as follows: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." Rome Statute, *supra* note 98.

lawyers on the U.S. delegation, could have anticipated that the U.S. government would later craft special Article 98 agreements for the sole purpose of ensuring that U.S. personnel cannot be transferred to the ICC for trial. Although the effect of these agreements is to frustrate any future request for the surrender of U.S. nationals to the ICC, the agreements are not a violation, per se, of the ICC Statute or of any state's rights.

Unfortunately, these Article 98 agreements are only one part of a coordinated U.S. response to the ICC Statute and its states parties. U.S. federal law now mandates that "no United States military assistance may be provided to the government of a country that is a party to the International Criminal Court."¹³⁹ Countries that sign Article 98 agreements with the United States may be exempted from this prohibition, as are all NATO member countries and a short list of major non-NATO allies.¹⁴⁰ The current U.S. policy is thus to punish states when they ratify the ICC Statute unless they also agree to an Article 98 agreement. Pursuant to this law the United States has already shut off military aid to many countries, including 12 in the Western Hemisphere alone.¹⁴¹ This policy of coercion by threat of aid cutoff may not be illegal,¹⁴² but it politicizes international criminal law and could undermine its effectiveness.

Rejecting the Rome Statute was not an improper act of politicization because no state is obliged to consent to any treaty. But even those states declining to participate in the *delegation* of international authority to the ICC remain bound by preexisting rules of international criminal law and should refrain from acts that would defeat the object and purpose of those rules.¹⁴³ The degree of *obligation* and *precision* in the definition of

¹³⁹ The American Servicemembers' Protection Act, 22 U.S.C.S. § 7426(a) (2005).

¹⁴⁰ *Id.*, § 7426(b).

¹⁴¹ See "Article 98" Agreements and the International Criminal Court, *available at* <http://ciponline.org/facts/art98.htm>.

¹⁴² Another politicizing aspect of U.S. legislative policy towards the ICC is referred to in Europe as the "Hague Invasion Act" because it authorizes the U.S. president to use force to free any U.S. personnel held by the Hague-based ICC. See *supra* note 139, at § 7427.

¹⁴³ This duty is well-established in the context of the law of treaties, and the basic logic of this norm should apply here as well. Under the Vienna Convention on the Law of Treaties "[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . [i]t has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty." Vienna

international crimes is unprecedented. The 1949 Geneva Conventions¹⁴⁴ and the 1984 Torture Convention¹⁴⁵ not only define international crimes, but also oblige states parties either to try or to extradite those believed to have committed them. Politically motivated efforts to undermine this basic normative regime, or even to prevent its implementation,¹⁴⁶ can properly be classified as politicization.

Convention on the Law of Treaties, *supra* note 71, art. 18(a). The United States signed the ICC Statute in December of 2000 but, in an effort to avoid even this obligation as a signatory, sent the U.N. Secretary-General the following message on May 6, 2002: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N6>.

¹⁴⁴ Under the Geneva Conventions of 1949, the parties must search for, and if successful, either prosecute or extradite those alleged to have committed the "grave breaches" they define. The following provision is typical: "*Each High Contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.* It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting party concerned, provided such High Contracting party has made out a *prima facie* case." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added).

¹⁴⁵ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7(1), G.A. Res. 39/46, para. 197, U.N. GAOR, U.N. Doc. A/Res/39/51 (1984) (noting the principle of extradite or prosecute, as expressed here in the Torture Convention, has become a cornerstone of international criminal law). "The *State Party in the territory* under whose jurisdiction a person alleged to have committed any offence referred to in Article 4 is found *shall* in the cases contemplated in Article 5, *if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.*" *Id.* (emphasis added).

¹⁴⁶ The concept of improper politicization might perhaps be taken one step further but only if we consider international criminal law from a *teleological* perspective. The purpose of international criminal law is to enforce the standards of that law by facilitating the investigation, prosecution, and trial of those individuals responsible for serious violations. To the extent that U.S. opposition to the ICC could be seen as frustrating that purpose, it might thereby be considered an improper politicization of the principles of international criminal law. This approach is suspect in that it goes beyond narrow positivism to find impropriety based on a standard states have never explicitly consented to. It was in such a teleological vein that the ICTY Appeals Chamber considered the purpose of the Security Council in creating the ICTY as a guide to interpreting the text of the ICTY Statute. See *Prosecutor v. Tadic*, Case No. IT-94-I,

V. OBSERVATIONS AND CONCLUSIONS

A permanent ICC was supposed to depoliticize international criminal law¹⁴⁷ so that international investigations and prosecutions need not depend on Security Council approval, but unfortunately this vision has not yet been fully realized. The ICC is a very weak institution and will therefore depend *de facto* upon the Security Council both for more effective jurisdiction based on referrals and for enforcement of its judicial authority over recalcitrant states. Even those accused of genocide, the most grievous of all crimes, may still escape international prosecution unless the Security Council makes a political decision to intervene. The legalization of international criminal law remains trapped in an intermediate place in which politics, as opposed to principle, still holds considerable sway. This allows for continued politicization in the non-application of universally accepted standards of international criminal law.

Although many doubts remain about the ability of the ICC to enforce its jurisdiction and authority, the Security Council's recent referral of the Darfur¹⁴⁸ situation to the ICC demonstrates that, in a particular case, both the jurisdictional limitations of the ICC and its lack of clear enforcement authority can be remedied by decision of the Security Council.

The legalization of international criminal law began many years ago when international norms prohibiting genocide and other serious international crimes were first formulated¹⁴⁹ then broadly endorsed by the

Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, paras. 72–78 (Oct. 2, 1995).

¹⁴⁷ "The creation of a permanent International Criminal Court (ICC) is a further step down the road to impartiality." Richard Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 52 (Sarah Sewell & Carl Kaysen eds., 2000).

¹⁴⁸ See S.C. Res. 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

¹⁴⁹ The legalization of international criminal law began in 1945 when the International Military Tribunal at Nuremberg was established by an agreement between four victorious Allied Powers at the end of World War II. See, *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis* Charter of the International Military Tribunal, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472 (Aug. 8, 1945) (annexed to the London Agreement).

international community.¹⁵⁰ Since then, Cherif Bassiouni and others have called for the creation of effective international mechanisms for the enforcement of these fundamental norms. States cannot always be expected to apply these rules uniformly or neutrally, as in practice they often seek to promote national interests. International enforcement is needed both to supplement the failure of states to enforce these rules and, on occasion, to deter the excesses of great powers as well.

A major constraint limiting the delegation of strong authority to the ICC lies in national sensitivities to the perceived loss of sovereignty involved. These sensitivities limit consensus and must therefore be taken into account, but no state has a legitimate interest in shielding its nationals from criminal responsibility for serious international crimes.¹⁵¹ The principle *aut dedere aut judicare* now establishes each state's duty under international law to extradite or prosecute persons implicated in serious international crimes. Disputes abound, of course, as to whether crimes have been committed in any particular circumstance and as to who may have committed them. Ultimately it is only by depoliticizing these disputes that the interests of international criminal justice can best be served. But how is this to be accomplished?

The only way to depoliticize these issues is through a gradual process of building trust in the ICTY, the ICTR, and most importantly the ICC. These institutions can only earn that trust through their own actions, by developing a credible track record much as the ICTY and ICTR have for the most part already done. The ICC, in particular, will need to meet high professional standards and demonstrate dedication to its founding principles. It must also be prudent enough not to attempt to do too much with the limited jurisdiction that it has.

When violations of *jus cogens* norms are at issue, but political opposition stymies effective enforcement action, a fundamentally untenable situation prevails calling out for some remedy or response. Cherif Bassiouni's

¹⁵⁰ The legalization process continued when the U.N. General Assembly endorsed the Nuremberg Principles in 1947. See Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95, U.N. GAOR, 1st Sess., 55th plen. mtg., U.N. Doc. A/64/Add.1 (1946) (confirming the status of the Nuremberg Charter).

¹⁵¹ See Brown, *supra* note 133, at 871–73.

answer has been his life-long campaign for the depoliticization of international criminal law. It is an ongoing dynamic process in which national governments, NGO activists, international officials, and scholars can all¹⁵² play an important role.

¹⁵² Commenting in 1995 on the success of the ICTY, the *Economist* noted that people committed to justice can sometimes make a difference:

the nervous and the reluctant can be nudged in the right direction by energetic supporters of the idea. That role has been played in this instance by the Soros and MacArthur foundations, Physicians for Human Rights, Medecins sans Frontieres, Human Rights Watch and Messrs Bassiouni and Goldstone. They have done admirable work, and they have got results.

Every effort at justice in this field, from Leipzig to The Hague, builds on the previous ones, as the world gradually becomes accustomed to the thought that there should be a court to deal with those who use the machinery of State for mass murder. The idea is taking root. If a few of the world's main countries show courage and creativity, the rest may follow.

The World Tries Again, *ECONOMIST*, Mar. 11, 1995, at 21.