The Politicization of International Criminal Law

by

Bartram S. Brown

I. POLITICIZATION AND DEPOLITICIZATION: AN ANALYTICAL FRAMEWORK BASED ON US PRACTICE 1

A. Politicization and the Theory of Functionalism 1

B. Patterns and Categories of Politicization 3

1. Involvement in Political Issues Beyond the Mandate of the Organization 4

2. Selective Concern for Human Rights 4

3. Disregard of Due Process 5

4. Positive and Negative Forms of Politicization 5

C. Politicization as a Legal Phenomenon 6

D. Politicization as a Political Phenomenon 9

II. LEGALIZATION ANALYSIS 9

A. The Two Possible Extremes of Legalization 10

B. Asymmetries in the Legalization Process 11

C. Legalization and the Gap Between the Development of Norms and Their Enforcement in International Law 12

D. Legalization Analysis Distinguished from Politicization Analysis 12

III. POLITICIZATION AND PRINCIPLE IN INTERNATIONAL CRIMINAL LAW 13

A. Extending the Concept of Politicization Beyond the Technical Realm into International Criminal Law: A Few Caveats 13

B. Legalization, Politicization and the ICC: Reconciling Principle and Practicality 15

1. Precision is essential 15

2. Prudence is essential 16

3. Neutral principles must be the basis 18

4. The nature and quality of the principles involved and other relevant factors 19

5. Legalization, Politicization and the ICC 20

a) Creation of the ICC as Politicization 20

b) US Acts in Response to the ICC as Politicization 21

IV. OBSERVATIONS AND CONCLUSIONS 23
I. Politicization and Depoliticization: An Analytical Framework Based on US Practice

A. 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 purposes of the organization.\(^1\) For example, in the summer of 2005 the Chinese government criticized the United States for its “mistaken ways of politicizing economic and trade issues”\(^2\) 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.”\(^3\)

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.\(^4\) 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 US Congress. The framework for the analysis of politicization outlined below was developed in the course of that study. Although originally developed for intergovernmental organizations (“IGOs”) such as the UN’s specialized agencies this framework may also be applied to less formally organized international regimes.\(^5\)

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


\(^2\) 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, WASHINGTON POST, July 5, 2005 at A01. (emphasis added)

\(^3\) _Id._

\(^4\) The 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._

of international organization should logically begin with the creation of “non-political” international agencies dealing with specific economic, social, technical, or humanitarian functions upon which state actors can most easily agree, leaving more ambitious political goals until later. According to this theory it is only after states have developed habits of effective international co-operation on non-political matters that it will be possible for them to co-operate in resolving high-level political problems. 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 state. In a few organizations, such as the World Bank, the rules explicitly exclude politicized decision-making and mandate that decisions should be made on technical grounds. 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 UN specialized agencies and, in effect, "[t]he conceptual basis of the specialized agencies is functionalism." 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 United States government invoked politicization as one of the justifications for its temporary withdrawal from the International Labor Organization from 1977-1980. A similar logic contributed to the decision of the US to withdraw from the United Nations Economic Scientific and Cultural Organization (UNESCO) at the end of 1984. In the course of these experiences the US government outlined its view of the applicable principles. Ultimately the ILO responded by

---

8 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." From a letter dated 5 May 1967 from the IBRD General Counsel to the UN Secretariat, cited in UN JURIDICAL YEARBOOK (1967), 121.
instituting major reforms to address the stated concerns of the US, and the US 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.

**B. 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.¹⁴

The first pattern is essentially a matter of an IGO which reviews and/or acts on matters not sufficiently related with the functional mandate of that agency. The second concerns decisions by an agency that are taken according to a procedure which may be considered flawed because it reflects "political" factors rather than the "technical" or "scientific" factors which 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,¹⁵ appear to be derived from an analysis of the reasons cited by the US government in 1975 as the motivation for its purported withdrawal from the ILO. The US 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 US government. As three of these four items involve politicization of a sort it will be worthwhile to examine each of them individually here.

---

¹³ See, Alan Riding, *A U.N. Agency Is Revitalized by Re-entry of the U.S*, THE NEW YORK TIMES, September 29, 2002, Section 1; Column 3; Foreign Desk; Pg. 22.

¹⁴ Kay says the following about the term "politicization", (David Kay, *The Functioning and Effectiveness of Selected United Nations System Programs*, American Society of International Law (1980), (Studies in Transnational Legal Policy; no. 18), at p. 7.):

"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 factors 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."

1. 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 US 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 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."  

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 US government to be inadequately related to the specific functional domain of the ILO.

2. 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 US 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 US 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 undermines 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."\(^{17}\)

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

3. 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 \textbf{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."\(^{18}\) (emphasis added)

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 is his
second. The distinctions between Kay's three patterns of politicization can thus be clarified by
reference to the US notice of withdrawal from the ILO.

4. 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 Ghébali has referred to as "extraneity,"\(^{19}\) 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 \textbf{"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 \textbf{"negative
politicization,"} occurs when an international specialized agency makes decisions (which may
well be within its competence) according to "politicized" criteria which are unrelated to, or at

\(^{17}\) Id.
\(^{18}\) Id.
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.\textsuperscript{20}

**C. 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, \textit{i.e.} it must affect the rights or the duties of states under international law, and not just their interests as politically defined. The legal significance of politicization results from the effect which it can have upon the balance of such \textit{rights} and \textit{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.\textsuperscript{21} 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).\textsuperscript{22}

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 which detrimentally affects the rights of a member state may be legal and appropriate if the state targeted as a form of accountability for its activities within the purview of the 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.\textsuperscript{23}

\textsuperscript{20} As we have seen above, the increasing politicization of the ILO was only one of four matters of concern referred to by the US 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 \textit{US Notice of Intent to Withdraw from the ILO}, supra, note 16.

\textsuperscript{21} 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 \textit{International Criminal Law}, infra. notes 52 to 100 and the accompanying text.

\textsuperscript{22} See, \textit{The United States and the Politicization of the World Bank}, supra note 1 at pp. 242-244.

\textsuperscript{23} Thus the unfavorable treatment which the \textit{apartheid} government of South Africa once received in many specialized agencies could at that time be justified by the detrimental effects of \textit{apartheid} upon the technical cooperation dealt with by those agencies. The fact that some other member states with serious human rights
Legally significant politicization also occurs whenever a state, acting within the context of an IGO, takes politicizing actions which are in conflict with the constitutive treaty of that organization and which 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.24

It is difficult to say at exactly what point the positive politicization of an IGO becomes a legal rather than merely a 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.25 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.26

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 US, for example, considered that UNESCO's efforts to promote a New World Information and Communication Order were contrary to its own national interest.27

24 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, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force Jan. 27, 1980, Article 60.


26 See Inis L. Claude Jr., THE CHANGING UNITED NATIONS, New York, Random House, 1967, at p. xvi, where he asserts that the UN 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 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 UN 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.

27 See "Perspectives on the U.S. Withdrawal from UNESCO", an address at Stanford University on October 31, 1984 published in DEPARTMENT OF STATE BULLETIN, No. 2094, January 1985, at pp.54-55, where Gregory D.
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 which 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. 28

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 which objects to the politicization, is likely to be political as well. One political remedy is that course of action pursued by the US 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," member states can demonstrate their disagreement with a trend towards politicization.

It is the past practices of the US 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 US 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. 30

Newell, the former Assistant Secretary of State for International Organization Affairs of the US, explaining the motives behind the US withdrawal from that agency stated that:

"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."

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

29 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, A.J.I.L., Vol. 77, No. 3, (1983), at p. 583.

30 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 US, 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 MASON, E. S. and ASHER, R. E., THE WORLD BANK SINCE BRETTON WOODS, Washington, Brookings Institution (1973), at pp. 170-171. 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.
D. 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, have noted that it seems to be nothing more than the existence of controversy within an organization which leads to charges by some of the antagonists that the organization has become politicized.  

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.

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 UN specialized agencies is indicative of the present state of development, or underdevelopment, 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 manifestation of the controversy generated by conflicts of interest both within that institutional framework and outside of it.

II. Legalization Analysis

A different perspective on the depoliticization of individual criminal responsibility is revealed through analysis focusing on the “legalization” of international affairs. Legalization “represents the decision in different issue-areas to impose international legal constraints on governments.” The relevant literature defines “legalization” as a set of institutional

---


32 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 p. 84-85.


34 Legalization and World Politics: An Introduction, supra. note 33, at p. 386.
characteristics defined along the three dimensions of obligation, precision, and delegation. 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.” Precision measures how far “rules unambiguously define the conduct they require, authorize, or proscribe.” 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.” 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.

Legalization can sometimes serve the interests of states, but it comes at a cost in that it imposes constraints on government action. Governments are understandably reluctant to accept these autonomy costs. Greater legalization “[i]n creating new institutional forms, mobilizes different political actors and shapes their behavior in particular ways.”

A. 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. 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

36 Legalization and World Politics: An Introduction, supra. note 33 at 387.
37 Id.
38 Id.
39 Legalization and World Politics: An Introduction, supra. note 33, page 389.
40 “[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).” Legalization and World Politics: An Introduction, supra. note 33, p. 394.
41 Miles Kahler, Conclusion: The Causes and Consequences of Legalization, 54 Intl. Org. 661, 661 (Summer 2000).
42 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. The Concept of Legalization, supra. note 33 at 401-402.
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 some day 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 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 US) 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, and 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.

**B. 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 could not 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. Only at the highest level of legalization would full integration of all such international sub-regimes be achieved.

---

43 See the discussion of Asymmetries in the Legalization Process, infra.

44 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.”


C. 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.46

The gap between law and enforcement is even greater with respect to the major political and military powers. Under the UN 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 US 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 US veto.

This is not to say that there is nothing to deter a Permanent Member from violating international law. Many foreign governments, the UN General Assembly, and the UN 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.47 Basic balance-of-power constraints (another side of *realpolitik*) continue to apply, but may not always be effective. The balance-of-power operates best in tandem with the UN Charter’s collective security system as it did in the 1991 Gulf War response to Iraq’s invasion of Kuwait.

D. 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

46 “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.” The Concept of Legalization, supra. note 33 at 414.

47 Back in 1950 he Uniting for peace resolution was formulated by the US to allow the UN General Assembly to take action when the Soviet Union’s veto prevented the Security Council from acting to protect international peace and security. See, UNGA Resolution 377 (V) A (1950) the Uniting for Peace Resolution. “[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 whenever the use of the veto might have blocked action by the latter body.” Claude, SWORDS INTO PLOWSHARES, supra., note 7 at p. 150. The Uniting for Peace resolution procedure has been used 10 times since 1950, but not since the 1960s. Proposals to invoke it in response to the anticipated US 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 SERVICE, March 27, 2003 (available in NEXIS/LEXIS, Library ALLNEWS, consulted August 9, 2005.
decision-making 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, but without arguing that any legal rules or other normative standards apply to the process or taking a position for or against legalization.

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 decision-making 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.

Opponents of greater legalization stress the shortcomings of international law and institutions, especially including their alleged or at least 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. 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 decision-making was offered as a rationale for opposition to the legalization which the ICC represents. In the past US charges of politicization were made only after an international organization had somehow misbehaved. In the case of the ICC, the US launched a pre-emptive strike against the possibility of a politicized anti-American ICC.

III.Politicization and Principle in International Criminal Law

A. 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 IMF and not to an organization such as the United Nations whose primary

---

48 Legalization and World Politics: An Introduction, supra. note 33 at p. 386 (Summer 2000).
49 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.
50 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.
51 These safeguards include preconditions 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, 2187 U.N.T.S. 90, entered into force July 1, 2002.
function (the maintenance of international peace and security) is fundamentally political. This paper 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 organized 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 US government’s continuing opposition to the ICC.

By taking international criminal law farther outside of the realm of politics the depoliticization 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 99 states ratifying the ICC Statute have committed themselves to the idea that it can. For those key states which 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.

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 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.

---

54 See the discussion of functionalism, supra, notes 1 to 11 and the accompanying text.
B. Legalization, Politicization and the ICC: Reconciling Principle and Practicality

It is important to balance international legal principle and legitimate state interests in applying the concept of international criminal responsibility. The ratification of the ICC Statute by 99 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 US opposition to the ICC so there is need for a principled, yet pragmatic, approach.

1. Precision is essential

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

Individual criminal responsibility for grave breaches is clearly established by the terms of the Geneva Conventions of 1949 as is international criminal responsibility for genocide by the 1948 Genocide Convention. The rule of customary international law establishing individual criminal responsibility for crimes against humanity developed from the practice of the 1945

---

55 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.


59 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 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.


60 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.
Nuremberg Charter later endorsed by a 1946 resolution of the United Nations General Assembly.\textsuperscript{62}

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 the formulation of 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 United States government sought to minimize the delegation of authority to the ICC by insisting upon very "clear, precise, and specific definitions of each offense."\textsuperscript{63} 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.

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.\textsuperscript{64} 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."\textsuperscript{65}

2. 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

\textsuperscript{61} CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, annexed to The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 U.N.T.S. 279 (hereinafter NUREMBERG CHARTER), Article 6(b).


\textsuperscript{64} 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.


\textsuperscript{65} Id. at 414.
of the consequences of alternative political actions.”

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 counterproductive 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.”

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 US 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. If neither consents nor is a party to the ICC Statute only a referral from the Security Council can establish ICC jurisdiction. Another major limit on the jurisdiction of the ICC is the strict regime of complementarity which ensures ICC deference to national investigations or prosecutions. This limitation, as well, does not apply to cases initiated by decision of the Security Council. 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 it 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. 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 UN Security Council, the ICC was established by multilateral treaty and is intended to be a permanent international institution. As such, it must be careful not to exceed the consensus reflected in its agreed

---

66 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.


67 M. Cherif Bassiouni, Aggression, Chapter III, in M. Cherif Bassiouni and Ved P. Nanda, eds. INTERNATIONAL CRIMINAL LAW, VOLUME I (1973) at 172. (After noting the differing positions of various powers on the definition of aggression, already a hot issue in 1973.)

68 Statute, Article 12(2).

69 Statute, Article 13(b).

70 Statute, Article 18.

71 See Prosecutor v. Tadic, APPEALS DECISION ON JURISDICTION, Case No. IT-94-1-AR72, Aug. 19, 1995, [hereinafter APPEALS DECISION ON JURISDICTION]; paras. 73-89.
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 US (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 US but the US 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 US government as these could be disastrous or even self-destructive for the still-nascent institution. Prudence, however, cannot justify special treatment for the US or any other country.

3. 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. 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 US, as the sole superpower and bearing a special burden in the international system, must be given special treatment and should not be held to the same rules as other states. Former Secretary of State Madeleine Albright’s statement that the US is an “indispensable” global power reflects this American

72 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 Virginia 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.”

73 As this author has written elsewhere:

For some, the logic of US 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 US 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 US has the power and the will to act when necessary.


74 Secretary of State Madeleine Albright has described the “indispensable US 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, February 19, 1998
exceptionalism, and it has also been invoked, directly or indirectly as a justification for US objections to the ICC Statute.  

But US 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” of other states against US hegemony.

4. 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. Norms of *jus cogens* are so imperative that they cannot be dismissed even when reasons of state or national security are invoked. This is

---

75 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*, *New York Times*, August 13, 1997, Section A, at p. 10.)

76 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 Vattel, *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, BOOK III, § 47. Some “soft-balancing” against the US is already evident in the reactions of US allies such as France to US 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 persevering work in favor of real multilateralism against unilaterism, for balanced multipolarism against unipolarism, for cultural diversity against uniformity.” Quoted in, *To Paris, U.S. Looks Like a 'Hyperpower',* *International Herald Tribune*, February 5, 1999, at 5.


78 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 England Law Review 383, 397 (2001).

79 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**, Article 53.
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 disputed? Are any justifications given plausible? All things considered, is international prosecution in the interest of justice?80

5. 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”81 could 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 US, and a few other key powers within the ICC consensus.

For the moment, the entire issue of the ICC remains controversial for the US 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 US actions in opposition to the ICC done more to politicize the field?

a) Creation of the ICC as Politicization

Did the creation of the ICC violate the legal rights and legitimate interests of the US enough to qualify as legally significant politicization? One argument is that, without US consent, the ICC Statute has transformed international criminal law by altering the balance between the rights and responsibilities of the US 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 US.

As a non-party state the US 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,82 to provide requested evidence,83 to give effect to fines or forfeitures ordered by the Court,84 and to pay assessments for the regular budget of the Court.85 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.

80 The initial determination of whether prosecution would be in the interests of justice is left to the Prosecutor under the ICC Statute, Article 53(2)(c).
81 INTERNATIONAL TERRORISM AND POLITICAL CRIMES, supra. note Error! Bookmark not defined. at 490.
82 Statute, Article 89(1).
83 Statute, Article 93.
84 Statute, Article 109(1).
85 Statute, Article 117.
Although the prosecution of a US national by the ICC might potentially affect the interests of the US, 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.\textsuperscript{86} 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 99 State Parties to the Rome Statute,\textsuperscript{87} the same principle, i.e. 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 US 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 US concern has been that the ICC will open the door to politicized prosecutions of US nationals, but none of these potential problems has yet materialized. Although the US government has launched a robust campaign of anti-ICC policies\textsuperscript{88} the ICC as of 2005 has not yet politicized international criminal law to the detriment of any state.

b) US Acts in Response to the ICC as Politicization

In contrast, some of the actions by the US 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 policy-makers suggested that the US should embark on an active campaign against the ICC.\textsuperscript{89} More recently US ICC policy has focused on gaining assurances from other states that they will never transfer US nationals to the custody of the ICC. States can reassure the US on this point either by declining to become parties to the ICC Statute, or by signing a so-called Article 98 agreement with the US.\textsuperscript{90} Article 98 of the ICC Statute\textsuperscript{91} was

\begin{itemize}
  \item 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 United Nations Security Council. See, ICC Statute, Article 12(2), and Article 13.
  \item Some of these policies are discussed further in the next section of this paper.
  \item 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, \textit{Helms vows retaliation for new world court}, THE WASHINGTON TIMES, July 24, 1998, Part A; Pg. A1.
  \item In 2003 a State Department Press Spokesman stated the US 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
\end{itemize}
intended to allow the States-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 lawyers on the US delegation, could have anticipated that the US government would later craft special article 98 agreements for the sole purpose of ensuring that US 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 US 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 US response to the ICC Statute and its state-parties. US 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.”

92 Countries that sign Article 98 Agreements with the US may be exempted from this prohibition, as are all NATO member countries and a short list of major non-NATO allies.

93 The current US 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 US has already shut off military aid to many countries, including 12 in the Western Hemisphere alone.

94 This policy of coercion by threat of aid cutoff may not be illegal, 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 pre-existing rules of international criminal law and should refrain from acts which would defeat the object and purpose of those rules.

91 Article 98(2) of the ICC Statute provides as follows:


92 The American Servicemembers’ Protection Act, 22 USCS § 7426(a) (2005).

93 The American Servicemembers’ Protection Act, 22 USCS § 7426 (b) (2005).


95 Another politicizing aspect of US legislative policy towards the ICC is referred to in Europe as the “Hague Invasion Act” because it authorizes the US President to use force to free any US personnel held by the Hague-based ICC. See, The American Servicemembers’ Protection Act, 22 USC § 7427 (2005).

96 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 Convention on the Law of Treaties, supra, note 24, Article18(a). The US signed the ICC Statute in December of 2000 but, in an effort to avoid even this obligation as a signatory, sent the UN Secretary-General the following message on May 6, 2002:

Politicization of Intl Criminal Law 22
degree of **obligation** and **precision** in the definition of international crimes is unprecedented. The 1949 Geneva Conventions and the 1984 Torture Convention not only define international crimes, but also oblige State-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, can properly be classified as politicization.

### IV. Observations and Conclusions

A permanent ICC was supposed to depoliticize international criminal law so that international investigations and prosecutions would 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 jurisdiction. 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.


97. 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.*


98. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 3d Comm., 93rd plen. mtg. Supp. No. 51, art. 7(1) at 197, 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).

99. 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 US 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. In 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 in interpreting the text of the ICTY Statute. *See, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Prosecutor v. Tadic, Case No. IT-94-1, A.C., 2 Oct. 1995, (hereinafter "Appeals Decision on Jurisdiction"), paras. 72-78.*

prosecution unless the Security Council makes a political decision to intervene. The legalization of international criminal law is trapped 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.

The legalization of international criminal law began many years ago when international norms prohibiting genocide and other serious international crimes were first formulated\(^\text{101}\) then broadly endorsed by the international community.\(^\text{102}\) 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 other than principle. 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 about 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.\(^\text{103}\) 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 the issue of international criminal prosecutions is through a gradual process of building trust in the ICTY, ICTR, and most importantly the ICC. These institutions can only earn that trust through their own actions, 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.

Although doubts remain about the ability of the ICC to enforce its jurisdiction and authority, the Security Council’s recent referral of the Darfur situation to the ICC\(^\text{104}\)


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.

When violations of *jus cogens* norms are at issue, but political opposition stymies effective enforcement action, an essentially untenable situation prevails calling out for some remedy or response. Cherif Bassiouni’s 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 all play an important role.

END