CHAPTER 1
A HARD LOOK AT THE SOFT THEORY OF INTERNATIONAL CRIMINAL LAW

Mark A. Drumbl*

Cherif Bassiouni has promoted international criminal justice in innumerable ways. He has helped design its institutions, including the International Criminal Court (ICC), 1 and he has shaped the elements of its crimes. He has taught its values through his diverse faculty appointments; motivated rule of law in places marked by impunity; and worked tirelessly to build political consensus in favor of accountability. What is more, Bassiouni has thought long and hard about the theoretical framework and jurisprudential base of international criminal law. It is this latter aspect of Bassiouni’s work that I discuss in this chapter.

I recently had the honor of being invited to review Bassiouni’s Introduction to International Criminal Law for the American Journal of International Law. After weaving my way through more than 700 pages of tightly woven and doctrinally sophisticated text, I was struck by the maturity of the work. As I wrote in the Journal, Bassiouni has the gift of being a catalyst behind the creation of international criminal law and a true enthusiast of the discipline without succumbing to the easy path of the naïve partisan. This self-discipline is reflected in his assessment that international criminal law


has not developed its own independent theoretical foundation. To be sure, Bassiouni notes that the discipline certainly is functional. But he hastens to add that it is not yet cohesive or coherent and in fact depends on other areas of legal theory and doctrine, including municipal criminal law and human rights law, notwithstanding the difficulties that inhere in transferring experiences at the national level to that of the international. Bassiouni is wise to ascribe this dependence to the essentially reactive nature of international criminal law, which results in its evolution in a manner that is not “linear, cohesive, consistent, or logical.”

Looking ahead, though, Bassiouni still predicts that “events”—as opposed to legal doctrine—will continue to drive international criminal law. However, this does not have to be the case. With Bassiouni’s prompting in mind, younger scholars confidently can push the field toward greater doctrinal independence. This is an important challenge that constitutes much more than merely an academic exercise, insofar as such an endeavor could enhance the effectiveness of international criminal justice institutions within communities roiled by systemic violence. This is the direction I pursue in this chapter, which reflects some of my ongoing second-generation scholarly initiatives and reflections in the field.

I set out to accomplish three goals in the discussion that ensues:

1. identify an incoherence—let’s say a gap—in the international criminal law literature;
2. suggest that this gap accounts in some measure for shortcomings in the output and effectiveness of international criminal justice institutions; and
3. posit new directions to enhance the theory, doctrine, and praxis of these institutions.

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3 Id. at 1.

4 Id. at 626–27, 686, 689.

5 Id. at 585.

6 Id. at 583, 588.

7 Id. at 23.

8 Id. at xxxvi.