CHAPTER 3
DEPOLITICIZING INDIVIDUAL CRIMINAL RESPONSIBILITY

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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.” 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

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