

The Evolution of Criminal Law since 9/11

By Professor David P. Stewart ¹

My topic is the evolution of international criminal law since 9/11. I will talk about it by asking four questions. The first question is: what has been the evolution of international criminal law since 9/11? I think it is quite easy to see that there has been a phenomenal evolution. All one has to do is look at the world of international criminal law as it was 10 years ago and then look at it the way it is today. The changes are remarkable. In terms of institutional structures alone, we now have a standing International Criminal Court which didn't exist 10 years ago. We also have had a number of hybrid courts. These courts have conducted a number of trials. The system is actually functioning in a way that it didn't at all 10 years ago. Granted there had been some predecessors; for example, the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda, which pre-dated 9/11 considerably, and they're still going on. But by comparison the world of international criminal law is a markedly different thing today than it was 10 years ago. In fact, it would have been hard in September 2001 to imagine and sketch the changes that have taken place over the following decade.

The other thing to look at is the phenomenal growth in decisional law. It's not just the structure, but there has actually emerged a body of substantive international criminal law, decisional law, elaborating doctrines in ways that one could only have imagined might evolve (for example) from the simple textual definition of the crime of genocide, particularly in respect to the issues of public incitement or aiding and abetting, or the scope of crimes against humanity, which really had very little content

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before the Rome Statute was adopted, and today one can see movement toward adopting a convention on that very topic (in my view long overdue). The articulation of war crimes hadn't had much movement since World War II. The doctrine of joint criminal enterprise continues to emerge even on almost a monthly basis, although it has its roots back to the international military tribunal in Nuremberg following World War II. Even U.S. courts are now dealing with issues of war crimes and international criminal law to an extent that they never did before.

So the answer to this first question is very simple: we now see a very different world of international criminal law than what existed 10 years ago, different in structure and different in substantive law, overall a much more complex and developed international system. One could hardly have contemplated a decade ago that there would be serious efforts to arrest heads of states, sitting heads of states, under indictment for committing crimes against humanity and other offenses against their own citizens. This was a notion, maybe an ideal or a goal, a decade ago that was really unprecedented and today we have, of course, outstanding indictments against Bashir, Gaddafi, and others. It's quite clear there has been a phenomenal change.

The second question is: what does all that have to do with the events of 9/11? And the easy answer is, I think, rather strangely, not very much. The evolution that we've seen in the world of international criminal law really hasn't taken place directly in response to the events of 9/11, or even as a necessary consequence of those particular events. The institutional and structural developments in many cases had been put in motion beforehand. Some of the roots of the decisional law go back, as I said, into the 1990's. And actually, if you count the number of multilateral treaties in the field of international criminal law that have been adopted in the last 10 years, you are hard put to find very many at all. Granted, the UN Convention on Corruption was adopted in 2003 and the amendments to the Rome Statute were

approved a year ago, but there have been virtually no new treaties or conventions in the area of terrorism. There's a supplemental treaty on nuclear terrorism, but the effort in the United Nations to agree on a global (or "comprehensive") convention on terrorism is really not making any significant progress at all.

This may seem paradoxical because the origins of the International Criminal Court go back to a proposal by Trinidad and Tobago, motivated by concerns over international drug trafficking and terrorism. However, as it emerged, neither of those two crimes was included in the Rome Statute and neither is found in the jurisdiction of any of the current international tribunals. So the paradox is, while the world of international criminal law has blossomed over the past decade, its expansion really has almost nothing to do with terrorism. As an example, look at the response to 9/11 in the context of efforts to deal with Osama Bin Laden himself. There does not appear to have been any serious consideration given to capturing him and bringing him before any international tribunal. It's really quite remarkable. If we're honest about it, I think probably the sentiment of the people involved in pursuing him did not focus on international prosecution as the first option, and perhaps such a possibility might even have been considered counter-productive. But it seems that under the particular circumstances the opportunity didn't actually arise.

If these recent developments in the field of international criminal law did not occur in response to the events of 9/11, then another important question, and my third question, is: does that mean international criminal law hasn't been influenced by the events of 9/11? Or that the development of international criminal law has failed to react to 9/11? And my answer is, that's not true at all. In fact, one can identify a very interesting but somewhat paradoxical relationship. The paradox lies, I think in large part, in the fact that the United States was the victim of 9/11. For much of the past decade, as you all know, the United States has been one of the most energetic resisters of the International Criminal Court.

More generally, it has actually been quite ambivalent in many respects to the emergence of a formal international criminal law structure, preferring to seek solutions (i.e., to pursue prosecutions) at the domestic level. I won't say the attitude has been consistently hostile, since in recent years the government has been more amenable to various forms of cooperation, but certainly the current Administration (like its predecessor) has not rushed to embrace the International Criminal Court or to deal with terrorism issues through international prosecutions.

Nonetheless, I think the response of the United States (which has often taken a military rather legal form) has in fact had an important influence on the development of international criminal law. Today more people in the United States, more courts, more lawyers, know much more about international criminal law than they ever did before precisely because of 9/11, despite the fact that we're really not engaged at the international level in treating terrorism as a crime. I worked in the area of human rights for many years and we knew about the UN Torture Convention, but if you raised it with most scholars and most practicing lawyers, they'd ask "the torture what?" They wouldn't know about the Convention. Today most people know about it, at least in the context, regrettably, of water boarding. I'm not suggesting that 9/11 has necessarily had a salutary effect; I'm suggesting that there has been a rather paradoxical effect in educating courts and lawyers about the field and the instruments of international criminal law, and about the relevance of the principles of international law more generally. Imagine how many judges today know about the 1949 Geneva Conventions and Common Article 3, which is relevant to international criminal matters, who didn't know about them before.

I could give you a number of other examples, for example concerning irregular rendition or use of military commissions or the human rights of defendants and so on. But I think if you look fairly and squarely at the domestic legal context, you'll find that

the events of 9/11 have had a clear, if indirect, effect in raising awareness and increasing knowledge about international law. From the perspective of U.S. law schools, for instance, the simple fact is today there are many more courses on international criminal law than there ever were before. I did a quick search on the Georgetown University Law Center website, just asking the computer, “how many courses currently scheduled use the term ‘international criminal’” and it came up with 19 courses. That couldn’t possibly have been true a decade ago.

There has been similar growth in the number of interest groups, committees and sections in bar associations and other professional groups and activities for lawyers in the field of international criminal law. The American Society of International Law sent around a brand new newsletter called “Accountability” (that’s one of the words broadly associated with the general field of international criminal law) in which the very first entry was entitled “Has the International Criminal Court’s decision on the Prosecutor’s application, pursuant to Article 53 [of the Rome Statute], as to Omar Muammar Al Gaddafi, expanded the definition of crimes against humanity?” I thought the topic itself was pretty interesting (perhaps a bit specialized) but for our purposes what was even more interesting was that the American Society of International Law is sending this out as a newsletter. That was unthinkable 10 years ago.

The fourth question, and my concluding point, is simply: what are we to make of all of this? Has 9/11 had no real effect on the field of international criminal law? Or is it the case that there’s been an indirect effect, subtle but possibly salutary, in advancing overall knowledge and awareness and even compliance with the normal of international criminal law? You may recall that I just said that the international criminal law system hasn’t really reacted (post 9/11) to the phenomenon of terrorism. It’s not a crime within the jurisdiction of the international tribunals, and no one is being prosecuted internationally for acts of terrorism, so perhaps one

might conclude, as a very prominent European professor said, that the international response to the events of 9/11 has been “a total catastrophe” from the point of view of international law precisely because it provoked a military and not a legal response.

I take a different view. I think on the contrary it may well turn out to have been a turning point of enormous significance. The decade following 9/11 may eventually be understood as a time when, even in the absence of new conventions or new tribunals, the growth in knowledge and awareness, the expanded appreciation of the emergent international criminal law system and its long-range possibilities and benefits will be seen – perhaps in another decade -- to have laid the foundations for yet another quantum leap forward. If you look at the history of international criminal law, it grows in fits and spurts, and usually in response to a catastrophe. World War II produced the international military tribunals at Nuremburg and Tokyo, and then things lay fallow for a while. The incredible humanitarian catastrophes in the former Yugoslavia and Rwanda eventually produced the ad hoc tribunals; other catastrophes led to the creation of hybrid tribunals in various countries around the world. It’s quite possible that, as we look back in a decade, we will see that there was a lot going on here under the surface, not directly responsive to the events of 9/11 but certainly driven by the overall reaction to that tragedy.

No one can doubt, in any event, that over the past decade attitudes have changed, knowledge has expanded, awareness has grown, so many people are now cognizant of and interested in the substance of international criminal law, taking the subject in law schools, and writing about it prolifically, so that it’s likely (at least in my view) that ultimately there will be another leap forward and we will find that its roots indirectly come from events of the past decade.