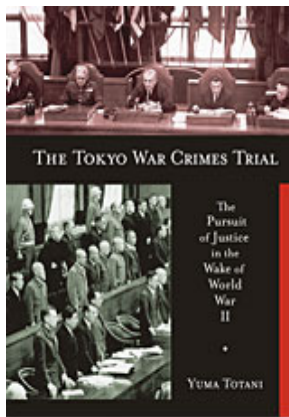


International Justice and International Politics: Intertwined Paths

By David Penna



International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation. By Victor Peskin. New York: Cambridge University Press, 2008. 272 pp.

Building the International Criminal Court. By Benjamin N. Schiff. New York: Cambridge University Press, 2008. 304 pp.

The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II. By Yuma Totani. Cambridge, MA: Harvard University Asia Center / Harvard University Press, 2008. 335 pp.

International Justice: Are We There Yet?

The end of July 2008 was marked by an unexpected event: the announcement of the spectacular arrest and transfer of Radovan Karadzic to the International Criminal Tribunal for the Former Yugoslavia by Serb authorities. Karadzic, slightly disguised, had led a life hiding in plain view and even making television appearances in his new personality. The transfer came thirteen years after Karadzic's indictment ("Karadzic Set to Make First Court Appearance" 2008). The arrest left two indicted war criminals from Yugoslavia (Ratko Mladic and Goran Hadzic) remaining at large and seemed to promise some prospect that the tribunal will have a high profile conviction before it closes its doors in 2010. This is especially compelling given Karadzic's claim that he was promised immunity by the United States for agreeing to the Dayton Accords and limiting his political activity in later years; the Court rejected that any immunity could be recognized under international law (ICTY 2009, para. 5). Was the arrest an indication that international justice had triumphed over international politics? The Court seems to accept a standard of international justice that demands respect for agreed upon international standards of humanitarian law or respect for victims' rights rather than political deals, even those guaranteed by great powers to end a conflict.

What is international justice? Some perspectives emphasize the fulfillment of duties that states have voluntarily undertaken. For example the following of an international treaty that a state has signed and ratified would be an example of justice; this is a narrow positivist reading of the term

however. Nardin emphasizes a broader aspect of this in discussing what he labels “rule of law positivism”:

What distinguishes a society of states from a jumble of ad hoc transactions is that its members acknowledge, as authoritative and binding, common laws that are antecedent to their particular transactions and agreements. Because these laws must be common to all, they are found only in customs binding on states generally not in treaties which bind only states that are a party to them...International law proper—general law applying to all (present and future) members of international society—is therefore always customary international law. (1998: 21)

Nardin (1998, 25) goes on to emphasize that international justice is not to be determined by the consequence of specific laws or actions but by the limits on action and choice imposed by customary law; justice is not an outcome but a constraint in his rule of law positivism. Seemingly here the focus is upon justice between states rather than between individuals, but the notion that certain elements of customary international law are superior to and prior to more mundane interactions may give some element of consideration to individual interests.

According to Fernando Teson’s (1998: 107-109) Kantian interpretation of international justice, a just international society can only happen in a world of liberal states. Tyrannical states cannot be considered a part of international society in this view and to trying to include them tends to subvert Kantian justice to realism; the respect for state sovereignty in Kantian international society supports international justice while the respect for state sovereignty in realism ignores international justice. But is it possible that, absent some over-arching system, there can be justice in individual cases? Can there be a kind of ad hoc justice?

When most people speak of international justice in the press or even in international law they are often transplanting some assumptions from domestic notions of society: that the law itself is just, that it was made in a “just” way and has justice as its objective. They assume that a fair and neutral application of the law will achieve justice. In this essay I will adopt this common sense notion of international justice: that those who seriously violate the norms of war will receive punishment. Often the public assumes a rather strict dichotomy between the neutral application of the law and the tug and pull of politics which is tolerated in the creation of law but not its application. Politics in the application of justice is seen as illegitimate domestically, but in the international system there has always been a much more ambiguous relationship between justice and politics.

The long delay between indictment and arrest in the Karadzic case raises some of these broader issues related to the nature of international justice. Is Karadzic’s capture an example of international justice or international politics? Was he turned over as a result of detective work uncovering clues to his whereabouts or because he became a political inconvenience to continue shielding? Obviously both politics and justice played a role. More recent events raising the same issue include the arrest warrant issued for Sudanese President Omar al-Bashir in March 2009 (ICC 2009). Of course few events in international affairs can be attributed to a single motivating factor, but even if justice is a motivating factor, one must ask if such international tribunals are appropriate methods for achieving international justice, especially absent appropriate police powers? And what should be the goal of international justice in this context: retribution or reconciliation? Indeed in the case of Bashir, African nations such as Gabon and Libya are pressing other African states to withdraw from the International Criminal Court (ICC); others contend that ICC intervention has worsened the crisis in Darfur by weakening moderate Sudanese political forces (Lynch 2009).

There is an extensive emerging literature on these and other related questions. Some of the literature focuses upon conflicting perceptions of justice: older notions of “victors’ justice” and inherent bias in prosecution have been merged into concerns over fair punishment and then victims’ rights. In fact, Bass (2000) claims that almost all tribunals illustrate victors’ justice by transplanting elements representing key values from the victors’ domestic judicial system to the international tribunals they establish: authoritarian victors provide “show trials” while more liberal victors provide trials in the particular liberal flavor their domestic constituency finds familiar. Of course another possibility is the establishment of truth commissions, either purely domestic institutions or internationally-assisted ones that assist a country emerging from authoritarian rule by somehow investigating past abuses of human rights law, such as that governing illegal detentions and extrajudicial executions and disappearances—and potentially humanitarian law which regulates the conduct of war—normally without the prospect of punishment of transgressors. But these are also controversial and analysts have had difficulty in assessing their impact (Rotberg and Thompson 2000; Brahm 2007).

The trial of Saddam Hussein and the treatment of Guantanamo Bay prisoners are examples of renewed unilateralism in the operation of international justice. The trial and death sentence of the former Iraqi President was condemned by Amnesty International, noting:

Given the compelling nature of the trial, every effort should have been made by the new Iraqi authorities, assisted by the international community, to ensure that the trial was fair and seen to be fair... (Amnesty International 2006: 1)

The flaws identified relate to the lack of independence of the judiciary and the failure to adequately protect witnesses, lawyers and court personnel from threats and violence. In addition, Amnesty International noted the interference with the right of the accused to consult with counsel and to have choice of counsel, as well as the failure to adequately investigate allegations of torture and ill-treatment. Is it possible, then, to establish a tribunal that will satisfy international expectations of justice for both the accused and the victims of violations of international humanitarian law? Obviously there was political motivation in trying Saddam quickly while other leaders charged with equally appalling crimes go untried for decades or continue to enjoy immunity. But does political motivation destroy justice?

The international community has a legitimate concern in enforcing international law, particularly humanitarian law. Historical efforts to restrict the destruction and violence of war are long-standing with efforts to proscribe resort to force and limit methods and targets dating back centuries, prior to modern customary law. Early writings were religious, moral or rationalist appeals rather than legal ones, and were found in many cultures. For example, John Finnis (1996: 18-28) discusses the Catholic tradition that evolved under theologians such as Alexander of Hales and Thomas Aquinas; this involved not only when to use force but principles that innocents should not be killed. Buddhism, according to Ishay (2004: 42) views war as only permissible in self-defense after exhausting all other alternatives. Penalties for transgressors were assessed in an afterlife, or perhaps, in loss of reputation among other enlightened leaders (Best 1994: 14-15). Of course the penalty for losing might ultimately involve execution or exile, but this was viewed as a political expedient or an application of the rule of the jungle, not enlightened international law.

In the modern era, it would be difficult to deny international humanitarian law's existence. Even at the outset of the application of humanitarian law after World War II, Indian Justice Radhabinod Pal's dissenting opinion in the Tokyo Trials only argued that Crimes against Peace (i.e., waging aggressive war) did not exist and that Japan's treatment of prisoners was uncivilized and despicable, but not punishable because Japan's signature of the 1907 Hague Convention was unratified; on the other hand, he acknowledged that soldiers and officers who actually committed atrocities could be punished, but their superiors could not be held responsible for actions they had not directly ordered (Totani: 218-24). Today, such a view would be even more vigorously rejected by the international community as too legalistic; in addition many of these duties can be seen as deriving from customary international law. In the wake of the "war on terror," when the United States tried to claim technical exemption from such rules by imprisoning and punishing prisoners through the creation of the category of "enemy combatant," it was roundly condemned even by allies. International expectations, although not always satisfied are high and there is an expectation that justice—however defined—will be sought against those who do not satisfy these expectations. Schiff describes this as the "swelling stream of international justice" (29-30). Still there is a disconnect between these expectations of justice and the international political position of a superpower.

Schiff uses the analogy of the swelling stream while recognizing its limits; his point is to reinforce the fact that as more and more norms are recognized, it becomes harder and harder to go against the current of international justice. He also recognizes that one weakness of the analogy is the fact that it seems to make little room for human intention by over-emphasizing the inevitability of the process. The stream of international justice is more easily reversible than the analogy implies—people, states and institutions are faced with choices frequently that can result in reversals, large or small, for the achievement of international justice. One might suggest that a better analogy might be a path that requires human intention to navigate. If one imagines two intertwined paths, one representing political considerations and another pure, apolitical justice, one might have a better idea of the evolution of international justice in this context. Each crossroad represents a new decision to be made, and as long as the travelers generally agree on the direction of travel, the decisions are small and made more and more automatically the closer one gets to the end of the path. Still it does require decisions and effort rather than reliance on forces of nature to achieve justice.

For any system of international justice to be effective, several criteria would need to be met. First, there would need to be an international consensus on basic jurisdictional issues: the problems or crimes to be addressed, the geographic and historical breadth of the tribunal, etc. These issues seem to have been largely addressed. Second, there would need to be a perception of the professionalism and neutrality of those involved in the administration of justice: judges, prosecutors, court officials, and other key players in the process. In many ways, the ICC was designed to satisfy this concern and has built in several safeguards to address it. The inclusion of the Prosecutor's power to initiate investigations, balanced by the Pre-Trial Chamber's ability to check prosecutorial fishing expeditions may ultimately assist in bolstering the Court's neutrality credentials. Finally, there would need to be the power and resources for the tribunal to carry out its mandate. Resources could be financial, but they could also be coercive. Resources also need to be such that they allow the system to operate efficiently: justice too long delayed is justice denied. In any case, to the extent these criteria are satisfied, the more likely the international community is to believe that international

justice is indeed being carried out impartially. Of course it is unlikely that everyone would be satisfied—or even that everyone would be satisfied most of the time in all situations. There must be a process for not only the continual improvement of all mechanisms, but also the development of new ones for specific situations. Several of these factors are discussed in Peskin's book (4-9).

Trying to understand the development of any aspect of international law, absent consideration of international politics, can be misleading: sometimes the development of legal doctrine masks political considerations. But international law should not be understood as pure rhetoric; legal concepts and precedents themselves can influence the political calculations of states, especially in the modern world where international public opinion often has considerable weight. The rest of this essay considers how well the authors under review recognize this truth.

On the Path to International Justice

While the Nuremberg Trials are largely seen as the start of the modern era of international justice, and have received much scholarly attention, the Tokyo War Crimes Tribunal has been much less studied. The Tokyo Tribunal dealt with atrocities committed in World War II in Asia by the Japanese, and it was seen as breaking little new legal ground as its legal decisions largely followed Nuremberg precedent. Totani's The Tokyo War Crimes Trial largely avoids the legal aspects of the trials, focusing on the personal and political issues it generated, both during the trial and in its aftermath. This is more than mere trivia as the result of these conflicts and compromises contributed to the perceptions of this tribunal in various ways. First, the fact that the Emperor and other important leaders were never tried contributed to the perception that the trials were a political rather than a legal tool. Hirohito was not tried because it was decided that Japan might become ungovernable for the US should he be tried and that Japan would be a useful Cold War ally against communism. This issue is discussed at length in Totani (43-62) who maintains that while the initial terms of surrender deflected Japanese requests that the Emperor be guaranteed to stay on the throne (and requests from allies such as Australia that he be forced to confess at the moment of surrender); ambiguity best served the dual US interests of pacifying Japan and mollifying the allies, with the ultimate decision to ignore the Emperor's culpability in the hands of President Truman and his political advisors. Totani presents some evidence to refute the more popular view that this was General Douglas MacArthur's decision, contending that MacArthur's protection of the Emperor was merely a reflection of the political preferences he recognized from Washington.

The decision, according to Totani, was actually a non-decision—the allies never committed to trying the Emperor, nor to providing immunity for him. Totani's conclusion on this matter is that US decision-making was consistent with the principle of the Potsdam Declaration that placed decisions about the ultimate form of government with the people themselves. This seems like a dubious fig leaf, however, when no evidence is presented of this sort of principled thinking among American leaders. In addition, in his narrative, Totani presents considerable evidence that a) American leaders were acutely aware of the political implications a trial of the Emperor would raise; and b) proposals to prosecute the Emperor by war crimes investigators were not even passed along to the highest levels since there was an awareness that Washington would not approve of such a trial. In the end, this selectivity in prosecution could have contributed to Japanese opinion, especially

on the right, that these trials were political contrivances to exact revenge rather than to impartially interpret the laws of war. Totani (3-4) believes this is an unfair conclusion: the Tokyo trials, for the most part, demonstrated a commitment to procedural fairness for the defendants who were prosecuted and legitimate application of existing humanitarian law.

In other situations, individual level idiosyncrasies prevented the efficient operation of the tribunal or interfered with the perception of fairness. In the haste to shorten the trial, for example, prosecutors presented some evidence in synopsis form, especially about abuses of Prisoners of War. This was a compromise between the Chief Prosecutor who felt such charges should be left for other tribunals and his Deputies who felt this was a key purpose of the Tokyo tribunal. While the judges and defense had access to the full record of witness statements and other documentation, the public in the gallery did not. It seemed then to the Japanese public (and later to researchers) that convictions were being based upon conclusory hearsay rather than careful documentation (Totani, 177-79).

Similarly, during the investigation stage, the Chief Prosecutor insisted on long interviews with potential witnesses and defendants, while ignoring the task of collecting documentary evidence. His assumption was that any documentary evidence did not exist or had been destroyed, especially related to what he believed was the primary purpose of the tribunal, crimes against peace. In reality, some of the documents had been destroyed, but there was much documentary evidence in the process of being destroyed especially related to war crimes (Totani: 32-34).

As well, in Benjamin Schiff's Building the International Criminal Court, a careful analysis is made of both the individual and intra-institutional conflicts that shape the action of the new Court. For example, in the International Criminal Court there is often friction between the Court President, the Prosecutor and the Registrar (Schiff: 127-28). Similarly Victor Peskin's International Justice in Rwanda and the Balkans notes the differing styles of prosecutors in these tribunals and how it impacts the "trial" for state cooperation in support of the Courts' mission. Both authors confront the question of international politics directly and recognize the compromises this requires for standards of international justice.

Peskin's thesis concerns the "virtual trials for state cooperation" that occur in order for the UN tribunals to operate (9). He describes the attempts of the tribunal to mobilize "shame" to get both the target states (which hold key defendants and evidence) and the powerful states such as the US and those in Western Europe (who ultimately hold the power to coerce other states into cooperation). The domestic agendas of states such as Croatia, Serbia and Rwanda often prevented full cooperation with the tribunals even when their leaders were politically opposed to the indicted criminals; foreign policy agendas of the West in pursuit of stability in the regions involved often counseled against administering too much pressure in favor of the tribunal. Still the tribunals had their share of victories. Indeed, it would be interesting to begin gathering evidence to determine what constellation of pressures resulted in Karadzic's capture, and if they support the political game described in Peskin's virtual trials.

At the same time, the target states learned how to play the game, using their own mobilization of shame: complaining about the inefficiency of the tribunal and the failure of the tribunals to indict or convict war suspects of other nationalities. Rwanda seemed to hold a unique status as a victim state—generating much international sympathy. In addition, it held control of key evidence and

access to witnesses. The Rwandan government was frequently able to exert considerable pressure to achieve its goals—particularly in blocking investigations of alleged atrocities by its own Patriotic Front troops who ended the genocide by toppling the Hutu government. Similar tactics can be seen in the activities of President Omar al-Bashir, after the issuance of the ICC’s arrest warrant, in rallying nationalist sentiment as sympathetic allies, domestic and international, argue that the warrant represents a double standard in international justice and an impediment to the peace process in Sudan (African Union 2009; Simons & MacFarquhar 2009; Lynch 2009).

Barria and Roper (2006) had developed a list of nine issues, such as the type of conflict, how the case was referred to the ICC, the type and location of indictees, which influence the ability of the ICC to apprehend suspects. They applied the list to the four African situations, including the Sudan conflict. They found that in three cases (the Central African Republic, the Democratic Republic of Congo and Uganda) the majority of factors tended to enhance the ability of the ICC to apprehend suspects while in Sudan, a majority of factors cut against apprehension (Barria & Roper 2006: 45, Table 3). While politics certainly could have changed in the three years since the research was done, it would seem that most of the factors identified by Barria and Roper have not significantly changed. So why would the ICC indict the Sudanese President knowing it was unlikely to apprehend him in the near future? Is this best understood as an attempt to influence the conflict in Darfur or an attempt to raise the visibility of the ICC itself? Or perhaps it is an attempt to satisfy ICC supporters in the NGO community.

The operation of the Rwanda and Yugoslavia tribunals, according to Peskin, is best understood outside of the traditional perspective of state-centric realism and outside of a more traditional international law-human rights approach. Both states and the tribunals attempt to primarily exercise soft power in appealing to the international community to support their stand on issues. The tribunals are relying on international politics to accomplish their goals, specifically with regard to apprehension of suspects; Peskin also notes that this influences the timing of indictments as well as the selection of cases.

Schiff makes similar observations with regard to the ICC, but places it within the context of larger theories of international relations. He argues that different methodological perspectives help explain different aspects of the International Criminal Court’s establishment and operation. Constructivism is used to explain the development of humanitarian law itself; realism explains the negotiation of the Statute of the ICC which ultimately protects a large degree of state sovereignty; and neoliberal institutionalism helps in understanding the operation of the Court itself (Schiff: 40-41). While these approaches and theories are briefly introduced and appear occasionally in the analysis, the book itself is much more narrative than theory and is a useful contribution. Each theory provides a link between international politics and the development of international law and international institutions.

There is much discussion linking the politics between states and domestic politics. This seems a common theme related to human rights and humanitarian actions generally (Busby 2007). The issue of politics in war crimes tribunals is addressed directly by Gary Bass (2000: 28-33). He includes at least two primarily domestic factors among the five factors he identifies in explaining the creation of war crimes tribunals. While he was writing before the operation of the ICC, his theory would seem to predict a difficult road to ICC success. For example, that a major impetus to the creation of

tribunals has been outrage of both elites and the public is less likely to be reflected in a permanent institution: this is positive for its neutrality toward defendants but might hamper the ICC's ability to move swiftly to prosecute perpetrators. Prosecuting or refusing to prosecute will likely entangle the ICC in the domestic politics of states.. This has created difficult trade-offs for the ICC in the initial cases it has investigated as in Uganda, Sudan and the Congo.

In December 2003, the Ugandan government referred the situation of its internal conflict with the Lord's Resistance Army alleging terrorism and barbaric acts against the rebels to the ICC. The ICC called for and received some cooperation from neighboring states in attempts to gather information. The complications arose as Ugandan President Museveni continually attempted to use ICC involvement as a bargaining chip with the rebels. This raised the question of the independence of the ICC from state interests. In addition, some NGOs raised the issue of whether ICC involvement was even wise since it might prove an impediment in the sporadic negotiations aimed at ending the conflict. So the issues raised here involved ICC independence versus state sovereignty and international justice versus peace. While the ICC could, at the Prosecutor's initiative, investigate government atrocities, this would come at the likely cost of government cooperation. Indeed that cooperation has already been limited at times as the government has periodically renewed peace efforts with rebels.

Similar issues arose when the ICC took its first suspect into custody in 2006, arising from the conflict in the Democratic Republic of Congo. Thomas Lubanga Dyilo was extradited from the Congo to the ICC to eventually face charges related to the use of child soldiers. Several issues are identified by Schiff here: First is the instrumental use of the ICC by Congolese President Kabila to deal with political enemies. Second, is the difficulty the ICC has had in dealing with the UN peacekeeping mission in the Congo where each entity feared that too close an association with the other would damage its claim to neutrality among the local population; eventually modes of cooperation were indeed developed. Finally, since this was to be the first trial for the ICC, internal conflicts among the Prosecutor, the Pre-Trial Chamber and the Registrar needed to be addressed. For example the Pre-Trial Chamber often tried to hasten the preparation of cases by calling status conferences where it would hope to gain information about the Prosecutor's plans to move forward with various cases; according to Schiff (125), the Office of the Prosecutor often viewed this as unwarranted interference with its powers. There were also internal power struggles over hiring, disclosures of official information and other issues between the Prosecutor and the Registry. Schiff reports that for periods of time the Chief Prosecutor and Registrar "were not on speaking terms" (121).

Much of this information presented in these narratives is "insider" information not available in previous studies. All three studies rely, to a certain extent, on interviews. Obviously the most limited in this respect is the Tokyo study, since it is about an event that happened more than sixty years ago. Peskin's interviews are impressive, having interviewed the movers and shakers, including Chief Prosecutors Carla Del Ponte and Richard Goldstone on the record. He also includes anonymous interviews both with tribunal officials and key diplomats. Schiff also places substantial reliance on interviews, mostly anonymous ones, which allows him to carefully document the operations and conflicts inside the ICC. In addition, all the books under review are meticulously documented with excellent lists of references.

The three books under review are sensitive to the issue of the politics of international justice. These politics involve international relations, domestic politics within states and the politics within international justice institutions such as the ICC. They represent attempts to merge concerns for international justice with the real political forces that influence case outcomes. They do so without making justice an ancillary concern as in traditional realism.

Conclusions

These three books address the question of the state of international justice today. Schiff and Peskin contend that the experiences, especially of the Yugoslav and Rwandan tribunals, informed much of the mandate of the ICC: not only the discomfort with the ad hoc approach, but also the marginalization of many of the victims in the process. The authors of the Rome Statute were to incorporate these lessons into the ICC. But were these attempts similar to the generals who learn to fight the last war, not the next one? Has the landscape of international criminal law changed so much that the ICC would not be able to deal with it? Would the mechanisms of international justice be able to deal with an Osama Bin Laden or allegations against heads of state that cooperated with the establishment of a Guantanamo Bay? Does the ICC lack the political power and other resources to carry out its nominal mission in these cases? Keep in mind that already there is the prospect of the Yugoslavia and Rwanda tribunals ending operations with indicted suspects still at large because the international community wishes to stop funding their operations.

The recent ICC investigations highlight other issues that do not go away. The first is what does the international community prefer, peace or justice? For the first part of the post-Cold War era, this was left to the players in local conflicts to decide: issues of amnesties, immunities and truth commissions were generally decided at the local level at the end of civil conflicts. In international conflicts, it was decided by peace treaties. It was recognized that the establishment of the ICC would likely complicate this issue (Scheffer 1996: 37). Although the jurisdiction of the ICC is secondary to that of individual states—if a state carries out a good faith investigation/prosecution then the ICC does not have jurisdiction—the exact relationship between ICC prosecution and state prosecution is unclear in real life; since the issue has yet to arise the standard the court will use to measure the bona fides of state prosecution is yet to be determined. The creation of the ICC seems to trump or at least pre-empt some local options in the future: if the ICC acts before the conflict is resolved, can immunity still be an issue that is to be negotiated at a subsequent peace conference without damaging ICC credibility? This is an issue that is repeatedly raised in regard to the Darfur conflict, although human rights groups seem to support the warrant for President al-Bashir's arrest (Simons & MacFarquhar 2009). Does granting amnesty prevent a prosecution? In a perfect world, of course, the international community wants BOTH peace and justice. Indeed some in the international community will argue that justice is the only path to peace. The expectations of the public for both may be achievable if they are moderated; but that is the least likely outcome in a politicized atmosphere. It is most likely that pursuit of international justice will make the culpable sweat but probably not “hang”—or spend any significant time inside a jail cell.

Another issue that must be raised is the concern over the selectivity and quality of international justice. Are the people indicted and prosecuted by the tribunals the most culpable? While there

seems to be some confidence that those indicted are guilty of some crime (but see the recent concern raised in relation to the Rwanda tribunal (Heller 2007)), are other, more politically well-connected suspects ignored? Is this different from the Tokyo tribunal where some high-ranking, politically useful suspects were ignored?

The expectation that international justice should somehow be pure and devoid of all political considerations immediately is perhaps unrealistic; bringing the mighty to justice is a challenge even in the most developed legal systems where defendants can hire the best legal assistance possible. And even in domestic legal systems as in the US, plea bargains are a way of doing business, but often compromise the pursuit of full justice for other considerations, including the need for testimony in other cases and the lack of resources to fully investigate and prosecute all potential cases.

In the end, the lesson of the books under review and much of the literature does seem to point the way to a better understanding. Totani's historical view of the Tokyo tribunal suggests that incomplete information to the public may taint perceptions of justice. Schiff, Peskin and other analysts suggest that the more modern tribunals are indeed beholden both to the broader international public in their creation and operation. Continued public support for their functions is vital to their ability to carry out their missions. At the same time, they need to function in a world of sovereign states which ultimately provide their resources. In such circumstances, justice is more likely to be "negotiated" (for good or ill) at some level rather than blindly applied. The more the international public understands this the less likely they are to be disappointed with the results.

On the other hand, international NGOs, states and the international community must understand that the achievement of international justice is an incremental process, as imperfect as it might be today. Attentive and knowledgeable international public opinion operating through NGOs and states can influence this process both formally through amendment of the ICC statute through the Assembly of State Parties or informally and have a voice in when interests in peace outweigh interests in punishment, for example.

Even such a process will be an improvement over the earlier eras when the political convenience of the elites in the most powerful states was all that mattered. While similar situations may arise under the current situation, it will be more difficult for those elites to reconcile these actions with their professed commitment to international justice. The machinery that has been established has contributed to at least the perception that the tribunal itself will be fair to the defendants and apolitical. The law itself is evolving and can be seen as an improvement over the ad hoc pronouncements of the past. In the end, the pursuit of international justice may be a path rather than a destination, and a winding path at that.

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*David Penna is Professor of Government at Gallaudet University in Washington, DC. He has written about issues related to human rights and international justice in *Third World Quarterly*, *Africa Today* and the *Denver Journal of International Law and Policy*. He is currently working on a project related to the rights of people with disabilities.*