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## Book Review, Victor Peskin, International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation (2008)

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MARK A. DRUMBL\*

## BOOK REVIEW

### *Reviewing:*

Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation*, Cambridge University Press, 2008, pp. 272. ISBN 978-0-521-87230-0 (Hardcover)

*Virtual Trials* unpacks the mechanics of international criminal justice. It examines how the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) undertake the nitty-gritty of their operations: obtaining evidence, apprehending suspects, and conducting trials. In a global order where states remain influential and sovereign, the work of these tribunals depends on their ability to cooperate with states, specifically the states whose atrocities are judicialized. In authoring *Virtual Trials*, political scientist Victor Peskin affirms as a “principal objective” to “determine [...] the conditions under which Rwanda and the states of the former Yugoslavia cooperate with the international war crimes tribunals” (p. 4). Although Peskin’s focus is on the ICTR and ICTY, two institutions created by the United Nations Security Council, he also considers in a concluding chapter the Special Court for Sierra Leone (SCSL) and the International Criminal Court (ICC). Although both of these institutions have a different provenance than the ICTY and ICTR (the SCSL was created consensually by treaty between Sierra Leone and the United Nations, the ICC by multilateral treaty), in both cases institutional abilities to secure goals also depend on state cooperation. In the end, Peskin is justified in concluding that his “study of state cooperation in the international prosecution of war crimes seeks to illuminate a political

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process whose actors are often poised to avoid or downplay its public acknowledgement” (p. 26).

Peskin’s insights derive from 300 in-depth interviews of tribunal officials, diplomats, and politicians in 14 months of field research conducted over a span of 8 years (pp. 24–25). Many interviewees are prominent players. Peskin organizes his findings in two principal sections – one on the ICTY, the other on the ICTR. Each section is internally ordered around a historical time-line. In Part II (Chapters 2 to 5) Peskin provides a wealth of information on Serbia and Croatia’s relationship with the ICTY, focusing on high level actors such as Slobodan Milošević, Franjo Tuđman, Zoran Dindić, Vojislav Koštunica, and Ante Gotovina. He contrasts the bold defiance by Serbia and the subtle resistance by Croatia (p. 94). Peskin does not examine Bosnia or the emergent pattern in which Bosnian Muslim defendants, when convicted at the ICTY, receive comparatively lenient sentences or in some cases are acquitted. By way of example, Bosnian Muslim Naser Orić was sentenced by an ICTY Trial Chamber in 2006 to 2 years’ imprisonment (owing to time already served in custody, Orić was immediately released), but the convictions were overturned in 2008 owing to the Appeals Chamber judges’ finding that there was no proof Orić had control over forces that murdered and tortured Serb captives. Nor does Peskin spend much time discussing crude power politics at the ICTY and the influence of powerful states over its work (these topics are bluntly addressed by Florence Hartmann, a former insider, in *Paix et châtime*nt). Hartmann was convicted of contempt by the ICTY. In Part III (Chapters 6 to 9), Peskin assesses Rwanda’s relationship with the ICTR. He focuses on how the Rwandan government (the RPF) uses the threat (and reality) of non-compliance to ensure that the ICTR does not investigate RPF crimes allegedly committed during its ouster of the extremist Hutu genocidal regime in 1994 or afterwards, especially in light of Rwanda’s military engagement in the Democratic Republic of the Congo (DRC). Peskin unpacks the use of shame by both the ICTR and the Rwandan government. In some of the most trenchant passages of the book, Peskin critiques the laudatory portrayal of the RPF initiated by commentators such as Philip Gourevitch and Samantha Power (pp. 158–159, 193–194, 210), whose work frames much of the contemporary political perception of the RPF. In terms of the remainder of the book, Chapter 1 introduces the themes and arguments while Chapter 10 applies concluding thoughts to the SCSL and ICC.

Peskin develops the wonderful insight that actual trials are dependent on “virtual trials” (which he also calls “trials of cooperation”). By actual trials, of course, he means the flesh-and-bones defendant sitting in the courtroom. By virtual trials he means the behind-the-scenes maneuvering by state representatives and tribunal officials that determine who is tried, when the trial occurs, or whether there ever is a trial at all. Peskin concludes: “The political interactions between tribunal, state, and international community are virtual trials of their own that determine a state’s response to tribunal demands for cooperation” (p. 9). His examination of the work of the ICTY and ICTR leads him to three conclusions, as follows (pp. 236–237): (1) “without decisive international community intervention on behalf of war crimes tribunals – whether in the form of persuasion, incentives, or coercion – cooperation from targeted states will rarely be forthcoming”; (2) “notwithstanding international pressure and incentives, a targeted state will often withhold cooperation when domestic anti-tribunal actors threaten state authority and stability”; and (3) “at critical junctures, the tribunals, and particularly their chief prosecutors, have garnered state cooperation by the use of adversarial and conciliatory strategies – from shaming to negotiation.”

Fundamentally, Peskin’s book delivers a somewhat self-evident argument: international criminal justice is about politics – at least to a large degree. What is new here, though, is Peskin’s focus on the longitudinal fluidity of these political factors. The relationships between tribunal actors and state actors are idiosyncratic and variable. Peskin charts how the ICTY’s ability to achieve institutional goals has increased over time while the ICTR’s has decreased (which he calls a “surprising reversal of fortune” (p. 4)). Collaterally, over time the ability of states in the former Yugoslavia to manipulate the ICTY has declined, whereas Rwanda’s ability to manipulate the ICTR has grown. Although post-dating the publication of *Virtual Trials*, Serbia’s arrest of notorious indictee Radovan Karadžić in July 2008 further corroborates Peskin’s observation of the growing cooperation between Serbia and the ICTY prompted, in this instance, by Serbia’s desire to associate more deeply with the European Union. Karadžić’s arrest is a boost for the credibility of international criminal tribunals generally.

One of the provocative implications of Peskin’s research is that, despite the rhetoric, international criminal trials are not really about impartial justice. Taking the ICTR as an example, Peskin observes that it is “a de facto ‘victor’s court’ in which Tutsi RPF suspects

enjoy virtual immunity from prosecution” (p. 152). In this regard, his nomenclature differs from another recent book on the politics of international criminal law, *Le tribunal des vaincus* by Thierry Cruvellier, in which the author characterizes the ICTR as a tribunal of the defeated, namely the United Nations. What both versions suggest is that we may not have come as far from Nuremberg’s instantiation of pure victor’s justice as we would hope. What Peskin does not interrogate, however, is whether victor’s justice necessarily taints the legitimacy of law (p. 188). Would the Nuremberg Trials have been more legitimate if conducted only by nationals of neutral states during World War II? Or are they more legitimate because those states that expended lives and lucre in defeating Hitler were the ones judging Nazi criminality? Should Allied fire-bombing have been prosecuted as well? Although Peskin appropriately reports on the threats posed by a lack of even-handedness, for example to the ICC in Uganda and the DRC (which only investigates human rights abuses by rebels, not governments) indiscriminately prosecuting all sides to a conflict is no guarantor of legitimacy either. When the SCSL Appeals Chamber ruled that “fighting for a just cause” could not serve as a mitigating factor in sentencing in the *CDF* case, it may have upheld the neutrality of law but is also contradicted the way many Sierra Leoneans perceive the aggregated gravity of the violence.

Also useful in Peskin’s approach is the application of Joseph Nye’s concept of “soft power” to the work of international prosecutors (p. 7). In many ways, the soft power of prosecutorial authority parallels the soft power of international criminal law generally. Neither concrete deterrence nor hard retribution is realistically possible here. Instead, the most plausible aspiration of international criminal law probably is softer in form: an expressive, norm-generating social constructivism. Assuredly, conducting investigations, prosecutions, and securing good faith convictions is related to the expressive justification for tribunals. In this sense, Peskin does well to underscore how international prosecutors are political actors, dispensing a few carrots while threatening with brittle sticks. At times they succeed, at times they fall short. Once again, he demonstrates the fluidity of soft power, noting that “the ICTY has been able to exercise its soft power more effectively than the ICTR because of the ICTY’s greater success in completing trials, maintaining professionalism in court operations, and obtaining frequent and favorable international press coverage” (p. 7).

Peskin does well within *Virtual Trials* to develop intra-institutional analysis. He elegantly develops the argument that state attitudes

toward international tribunals are shaped by internal machinations, primarily between moderate and nationalist politicians. William Burke-White has undertaken research in the DRC that reveals how the ICC itself may be seen as a tool of domestic politics in which certain actors within the state perceive gain in ICC involvement whereas other actors, often internal opponents, perceive loss.<sup>1</sup> International criminal tribunals are not monolithic actors either. Peskin recognizes this (p. 14); and to his credit includes even the Registry within his discussion of internal actors. In particular, the operation of international tribunals evinces deep tensions between the prosecutorial and adjudicative branches. Whereas the Prosecutor may cave to extrinsic political pressures, at times the judges prove themselves to have different interests. Recent decisions by ICTR judges not to transfer three cases to the national courts of Rwanda signal some resistance to Prosecutorial wishes. The judges expressed concern about the ability of the accused to receive fair trials in Rwanda. It may well be that the RPF's genocide credit is expiring. Moreover, although the Rwandan government prevailed upon the ICTR judges to revise their stance on Jean-Bosco Barayagwiza's release, it has not succeeded in thwarting the ICTR judges from acquitting other high-profile defendants. Despite bureaucratic delays that hamper its effectiveness, the ICTR may be overcoming certain embarrassments of the past – such as having alleged *génocidaires* on the payroll – and, in its waning years, may forge somewhat of a more robust identity.

In a similar vein, one of the emergent cleavages within the ICC that is having great effect on the institution's work is the judges' restraining of prosecutorial strategies. Preliminary matters in the proceedings against DRC rebel leader Thomas Lubanga's trial for child soldiering are a bellwether for these tensions. Whether by substituting charges (Lubanga confirmation of charges judgment), by resisting prosecutorial confidentiality agreements, or by adopting a more liberal approach to victim involvement, judges contour prosecutorial action and, thereby, apply considerable pressure. Accordingly, the phenomenon at hand is not simply an interchange between aggregated tribunal and state. It is much more fractured, networked, and diffuse. International civil society and human rights entrepreneurs also play a pivotal role in the work of the institutions.

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<sup>1</sup> W. Burke-White, *Complementarity in practice: The International Criminal Court as part of a system of multi-level global governance in the democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2005).

Peskin's writing is comprehensive and confident. He avoids jargon. He does not desperately attempt to fit complicated acts of institutional and individual agency into unrealistically parsimonious pre-existing theoretical models. The research is exhaustive. That said, criminal lawyers might find Peskin's inexactness with legal terms to be somewhat confusing. He writes of "international war crimes tribunals" when, as a matter of law, international criminal tribunals prosecute and punish much more than war crimes. In fact, some of the greatest controversies in their work, particularly at the ICTY, involve whether a defendant should be charged with or convicted of genocide. The politicization of genocide hovers over the work of the ICTY, influencing plea bargains, indictments, and motions to dismiss. To this end, prosecutorial choices to charge certain substantive crimes and not others bear upon the functionality of the tribunals and state attitudes toward cooperation. Looking beyond the ad hoc, much of the conversation about the Sudan involves whether genocide has been committed, an issue all the more relevant now that the ICC Pre-Trial Chamber denied Chief Prosecutor Moreno-Ocampo's wish to charge Sudanese President Omar al-Bashir with genocide (although at the time of writing this judgment remains under appeal).

In *Virtual Trials*, Peskin provides lengthy historical detail of the work of the ICTY and ICTR. This discussion fills most of the book. The material is well organized and, insofar as it delivered with a journalistic bent, is gripping reading. However, at some point, the visibility of his underlying argumentation dims amid the sheer volume of information. There are so many dots that the image loses focus. In juxtaposition, Peskin delivers in a dozen pages a concluding discussion of the work of the SCSL and ICC that is effective.

This is not to say that the details are insipid. *Au contraire*: Peskin's hard-hitting discussion of Rwanda's RPF government is deeply informative. So, too, is his digging into certain scandals, such as the ICTR judges' laughter at a testifying witness, and exposing how the incident served political purposes that transcended the judges' apparent intent (pp. 199–200). Here Peskin has an opportunity, which he passes upon, to comment on the reaction of international non-governmental organizations – particularly those concerned with the prosecution of sexual violence during conflict situations – to this display of intemperance by the judges, and how this incident served as a catalyst to improve upon the gender sensitivity of international criminal tribunals. To this end, on this one point, the government of Rwanda joined with international NGOs in casting this incident as part of a

broader narrative: judicial incompetence as well as neglect in dealing with the pervasive sexual torture that occurred during the Rwandan genocide. Turning to the Balkans, Peskin's discussion of the Norac trial, undertaken in Croatia, is a real gem insofar as it instructs how conciliatory approaches by the ICTY Chief Prosecutor led to some justice, albeit not actuated at the international level (p. 127). That said, Peskin takes a different approach in relating the story of the arrest of Croatian Ante Gotovina and his transfer to the ICTY. Here Peskin concludes that "[t]he backlash against the government would likely have been much stronger had Gotovina been arrested by Croatian authorities. In this regard, the fact that Gotovina was beyond the reach of the government was a critical factor in diminishing nationalist mobilization" (p. 147). To be sure, there are differences between the two cases, but it would be helpful if Peskin were able to offer some broader generalizable lessons for stakeholders in international criminal justice. Why in one case was state control beneficial for the wheels of justice but not in the other?

Peskin describes his work as challenging numerous constituencies. He remarks that *Virtual Trials*' "attention to the strategic actions of tribunals poses a challenge to realists who contend that international law and international legal institutions have no independent power to influence events [...]" (p. 8). At the same time, however, the book also challenges "the inspiring Kantian vision of international law associated with human rights advocacy by highlighting the ways in which international tribunals may generate domestic crisis and threaten political stability" (p. 9). And, "[f]inally, the book also disputes the claim that a state's decision to cooperate by handing over suspects to an international war crimes tribunal is proof of the growing legitimacy of tribunals and the universal acceptance of human rights norms [insofar as] [b]ehind such apparent state cooperation are layers of conflict and compromise" (p. 9). Although the nuance in Peskin's work helps contextualize absolutist approaches to international law, including those that either venerate or deride, the reader is left wondering what guidance, exactly, Peskin would offer to those tasked with prosecuting atrocity crimes internationally in the future.

Implementation of the law requires strategic cooperation. No surprise there: It does so even in the most taut domestic polity. Law is intrinsically contingent. And political. But what does the particularly acute dependency of international criminal law on political cooperation teach us about its pertinence? Its promise? Its limits? It is one thing to assess the functionality of international criminal law. It is



another to gauge the value of international criminal law, when actuated through adversarial trials, in reconstituting shattered communities; and its effectiveness as a tool of transitional justice. At its core, *Virtual Trials* is an analysis about functionality. It is not a normative inquiry. Although academic lawyers may find that *Virtual Trials* hems itself in by the modesty of its goal, the book compellingly delivers what it aims to deliver.