

REVIEW ESSAY/ESSAI RENDU

Humanism and Realism in International Humanitarian Law

Patricia Marchak, *No Easy Fix: Global Responses to Internal Wars and Crimes Against Humanity*. Montreal and Kingston: McGill-Queen's University Press, 2008, 375 pp. \$34.95 hardcover (978-7735-3368-4)

Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials*. Stanford, CA: Stanford University Press, 2008, 240 pp. \$US 24.95 paper (978-0-8047-5971-7)

Patricia Marchak starts with three questions: should international actors intervene in the affairs of foreign states to protect citizens from atrocities committed by their own governments? How do such states eventually cope with the traumatic consequences? And what role can International Humanitarian Law (IHL) play in bringing the authors of atrocities to answer for their crimes? Between 2000–2006, Marchak undertook extensive fieldwork in Cambodia, Rwanda, and Bosnia-Serbia to research societies “broken” by genocide and crimes against humanity. Her project starts optimistically in the shadow of the 2001 report by the International Committee on Intervention and State Sovereignty, *Responsibility to Protect*. That report suggested that sovereigns have a duty to protect their own citizenry, and that in the absence of such indigenous protection, the world communities, indifferent to their immediate self-interests, must waive the presumption of noninterference and come to the aid of the victims. Her subsequent conclusions are more sobering, and reflect the halting record of the UN and the superpowers in averting genocide or effectively abating its longer term consequences. Bush's invasion of Iraq (2003) and Putin's invasion of Georgia (2008) were justified on “humanitarian grounds,” creating a specious justification for war based neither on self-defense nor Security Council Chapter 7 peace-making powers. In particular the social value of a hybrid court to try five former leaders of the Khmer Rouge for their responsibility in

the death of 1.8–2.5 million Cambodians is questionable. Although the court has the merit of being sited in the country where the atrocities occurred (unlike the International Criminal Court and International Court of Justice at the Hague) and of invoking Cambodian criminal law as well as IHL, the investment by donor states (Japan, Britain, France, Germany, and Australia) appears ill-considered given the widespread poverty, corruption, and war-related injuries in the surviving population. In January 2008, the court received funding of \$56.3M. By March, before trials had commenced, it requested a further \$111M amid charges of cronyism in the award of positions. This is not atypical for UN-backed courts. The ICTR in Arusha (Tanzania) has received funding of \$1B. Although its trial mandate has been extended for a year until December 2009, its progress over the past decade has aptly been described as “glacial” and it is not expected to register more than 45–50 cases involving up to 70 accused. The *gacaca* courts in Rwanda, by contrast, are expected to process over 800,000 cases and are staffed essentially by untrained, unpaid judges. Marchak provides a useful overview of the various national and international judicial bodies that have been constituted in the aftermath of the atrocities in search of justice.

The core of the book involves a series of very detailed analyses of how the atrocities developed, both in terms of local conflicts, and longer term colonial and geopolitical influences. She also attempts to relate how the nature of the conflicts, their level of brutality, the manner in which the perpetrators were defined, the extent of trauma, and the institutional structures remaining at the end of the conflict all influence the nature and success of the social reconstruction. The case of Cambodia was most troubling. Before the population was butchered by an ill-conceived variety of Maoism, the countryside had been bombed into near oblivion as a side-show of the US war on the Viet Cong. Between 1965–1973, the US Air Force dropped more ordinance on Cambodia than was used throughout the entire air campaign against Japan in the Second World War (p. 101). When the Vietnamese ousted the Khmer Rouge in 1979 and installed a puppet government, the Khmer representative at the UN was permitted to retain his seat since it served the combined political interests of China, Thailand, and the US. Even today many former Khmers hold political office with impunity. Marchak’s dissection of the complexity of the Cambodian situation, as well as that in Rwanda and in the former Yugoslavia should be must-reading for any student of contemporary genocide.

The final section of the book is more forward looking. Marchak reviews the pros and cons of humanitarian interventions, how in many cases the societies are left more divided after the fact than before. She

makes a convincing case that the chief civilian victims of these conflicts are the women raped and mutilated, deprived of property rights after conflicts, and burdened by the demands of reconstruction in the aftermath of conflict. Intervention is a moral imperative. However, Marchak also argues that the institution to which the world turns instinctively in these matters, the UN, is not organized effectively to optimize humanitarian objectives. It has no recourse to independent armed force and is hobbled by a Security Council of actors with veto powers employed to further their individual self-interests. She proposes an alternative, the "Global Intervention Institute," headed up by cultural specialists, experts in the ecology of conflict and advisers on economic harmony. "This institute, unlike the United Nations, would have a full-time military force at its disposal ... they would be prepared to fight and kill and they would have no personal or national vested interest in the outcome. But they would be properly paid" (p. 291). This may be a little starry-eyed but it represents an idea that could lead to some reform of the existing international institutions. In point of fact, in her last chapter she notes some success in such institutions as the ICTY and its apprehension of Milosovic for war crimes. She notes the failure of the International Court of Justice in hearing a case for war reparations sought by Bosnia against Serbia for the murders of 7,500 Muslim men in Srebrenica in 1995. That case failed because documents released by the Serbs to the ICTY in the Milosovic case were unavailable in the ICJ, and the culpability of the Serb leaders for the actions of the Bosnia Serb militias and leaders was not established. The book leaves off before the more recent victory of the ICJ in November 2008 in establishing the court's jurisdiction to hear a case for reparations sought by Croatia from Serbia for the commission of genocide on Croatian soil. The ICTY has also apprehended and charged former Bosnian Serb President Radovan Karadzic. The international institutions have a sorry record in achieving justice but the picture is not entirely bleak.

In his book (originally published in hardcover in 2006), Kingsley Moghalu provides the reader with more of a survey of the historic attempts since the First World War to bring sovereigns and their political and military underlings to justice for war crimes, genocide, and crimes against humanity. Moghalu, who served as a legal advisor to the ICTR in Arusha, is familiar with all the war crimes tribunals created in association with the UN. He presents one of the most accessible introductions to International Humanitarian Law and the conventions and institutions on which it is based. His first analysis is the case made by the Allied victors against Kaiser Wilhelm II of Germany for starting the First World War. While several Geneva conventions had attempted to secure inter-

national agreements about the rules of war in respect of treatment of prisoners and civilians, the declaration of war *per se* was not recognized as a crime, and the sovereign has traditionally enjoyed immunity from international jurisdiction since the Treaty of Westphalia (1648). Wilhelm died a free man in the Netherlands. The prosecution of German military personnel for war crimes in Leipzig by German criminal courts resulted in “ridiculously light sentences” (p. 22). Similarly, Britain’s attempts in the 1920s to prosecute some of the perpetrators of the Armenian massacres in Malta were thwarted by Turkish political interventions. Sovereign immunity carried the day.

Moghalu analyzes the Nuremberg trials, the prosecution of Milosovic at the ICYT, the prosecution of Charles Taylor by the Special Court for Sierra Leone, and the trial of Saddam Hussein by the Iraqi Special Tribunal for Crimes Against Humanity. He points out the problems of victor’s justice, the ineligibility of the “*tu quoque*” defense (the accusers acted the same way), the law of command responsibility, the principle of *jus cogens* (a norm of law from which no derogation is permissible), and the diminishing inviolability of sovereign immunity. He observes that the Nuremberg trials, aimed at prosecuting the “supreme crime” of making aggressive war, were not based on robust positive law, but on an opportunistic interpretation of the Peace of Paris (1928) in which the international signatories vowed to denounce war as an instrument of international conflict. He notes that, in 1945, US Admiral MacArthur shielded Emperor Hito from prosecution for war crimes in order to secure the peaceful integration of the Japanese into the Allied postwar reconstruction. He similarly notes that the decision to indict Milosovic was highly political inasmuch as Milosovic had acted as a statesman in signing the Dayton Peace Accords that brought the Bosnia war to an end. Not only that, the “fearless” prosecutor, Carla Del Ponte declined the brief from Canadian law professor, Michael Mandel, which suggested the culpability of Western leaders in the deaths of scores of civilians targeted by NATO bombs on trains and office buildings. Notably, neither the US invasion of Iraq nor the NATO bombings in Serbia were approved by the UN security council and technically were equivalent to the supreme crime of making aggressive war.

Moghalu’s perspective throws some light on what has been described as the halting ineffectiveness of international institutions analyzed by Marchak and others. In the minds of some writers, Nuremberg and subsequent UN tribunals represent a course of *liberal legalism* in which advocates of intervention see the rule of law as a value of intrinsic worth, and see the internationalization of justice resulting ultimately in a form of what Kant described as “cosmopolitan law.” That law ideally tran-

scends national boundaries, and makes perpetrators of the most heinous forms of crime (genocide, slavery, piracy, etc) subject to prosecution by courts in any jurisdiction irrespective of where the crime occurred or who perpetrated it. This amounts to “universal jurisdiction,” a legal policy adopted with disastrous consequences in Belgium during the 1990s. This was the type of law that resulted in the issuance of arrest warrants for Pinochet in London in 1998 and for Kissinger in Paris in 2002. Before being repealed, the Belgium law led to arrest warrants for Ariel Sharon, Yasser Arafat, Paul Kagame and others. Moghalu follows the political philosophy of Hedley Bull who holds that there is no coherent international *community*, but rather a *society* of independent sovereigns whose behaviours are dictated primarily by self-interests. When it is in their interests, they may enter into treaties such as the 1948 UN Convention on the Prevention and Punishment of Genocide. Or they may refuse, as has the US in its opposition to the International Criminal Court established by the Rome Accords in 1998. Bull characterizes this as an “anarchical” order without any teleological guarantee for Kant’s cosmopolitan law. This explains the close relationship between law and politics, especially in the international order. For Moghalu, justice is not possible without a judicial space created by politics and diplomacy, but it is sometimes cravenly subservient to political interests, and in such contexts, national success depends more on differential access to force than to the rule of law. The humanism of Marchak’s perspective and the realism of Moghalu makes these ideal companion volumes in making sense of both our failures and successes in adjudicating modern atrocities.

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