BOOK REVIEWS


The present volume, edited by two scholars of the Maastricht Centre for Human Rights, covers a highly topical subject. Increasingly more representatives of one state are present in the territory of another state. They can, either deliberately or accidentally, become involved in violations of human rights of the individuals in the ‘host state’. As Coomans and Kamminga note in their comparative introductory comments, ‘state conduct increasingly affects the human rights of individuals across borders’ (p. 1). It must then be examined to what extent the acting state can be held accountable under human rights treaties for acts committed on another state’s territory. This book deals with the relevant case-law of regional and international monitoring bodies, including the European Court of Human Rights, the Inter-American Commission and Inter-American Court of Human Rights, and two United Nations treaty bodies, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. As to the latter two bodies, the authors also examine the general recommendations and the concluding observations adopted upon the examination of States Parties’ reports. The introductory comments are followed by two chapters of a quite general nature.

James Ross focuses on ‘Jurisdictional aspects of international human rights and humanitarian law in the war on terror’. The author first deals with the obligations arising from the Geneva Conventions, which apply ‘in all circumstances’, regardless whether a person is a victim of territorial or extraterritorial state conduct (common Art. 1 of the Geneva Conventions). The United States considers, however, that there are other grounds to conclude that the Geneva Conventions are not applicable to Guantanamo Bay, which is, as convincingly reasoned by Ross, unjustified. Subsequently, he deals with the question of ‘enemy combatants’ from other locations, such as Algerian nationals in Bosnia and Herzegovina. The Geneva Conventions do not apply to these persons, but, according to the author, human rights instruments are applicable. He does not provide as thorough arguments for this position as he did for the former issue. He pragmatically states, ‘to permit a government that is at war in one part of the world to detain people without charge elsewhere in the world without demonstrating participation in the armed conflict is to create a gaping and dangerous loophole in international human rights guarantees’ (p. 21). The next chapter of this volume, by Emanuela-Chiara Gillard, on ‘International humanitarian law and extraterritorial state conduct’, begins with a brief overview of international humanitarian law and its scope of application and deals with substantive and procedural aspects of the co-existence of international humanitarian law and human rights law. Gillard examines how tensions between substantive interna-
tional humanitarian law and international human rights law can be avoided. Of the three options the author describes, she prefers to interpret human rights norms in a manner consistent with international humanitarian law, the *lex specialis*, since that would offer the greatest protection to individuals (p. 36). Problems arise, however, because of the various enforcement mechanisms. She concludes that at this level, accountability gaps exist.

After these two chapters, the main part of this volume presents a detailed analysis of the relevant clauses in the Covenant on Civil and Political Rights (CCPR), the European Convention on Human Rights (ECHR), the Inter-American human rights instruments and the Covenant on Economic, Social and Cultural Rights (CESCR). On each instrument, two contributions are included. The central question in each chapter is an examination of States Parties’ obligations to ensure the rights laid down in the treaty to all individuals ‘within its territory and subject to its jurisdiction’, or ‘within their jurisdiction’, ‘subject to their jurisdiction’ and ‘through international assistance and cooperation’ entail. Further, the authors examine to what extent States Parties can be held accountable by international supervisory organs, which are established under each of the instruments mentioned. It is undisputed that States Parties are obliged to guarantee human rights not only to their own citizens, but also to non-citizens. There are only a few exceptions to this rule, for example with respect to the right to vote. The responsibility and accountability of states for acts committed in another state’s territory, however, is quite a different matter.

The European Court of Human Rights’ admissibility decision in the *Banković* case (*Banković and others v. Belgium and 16 other Contracting States*, Appl. No. 52207/99, admissibility decision, European Court of Human Rights, 12 December 2001) plays a central role in the contributions. As a result of a NATO attack during the Operation Allied Force, a building of Radio Television Serbia was hit, killing sixteen and seriously injuring another sixteen persons. Five relatives of deceased persons submitted a complaint to the European Court of Human Rights against the NATO member states that are parties to the ECHR, claiming violations of Article 2 (right to life) and Article 10 (right to freedom of expression). In a lengthy decision the Court declared the application inadmissible, ruling that the ECHR was not applicable, because the victims were not ‘within the jurisdiction’ of the States Parties against which the complaint had been submitted. Furthermore, according to the Court, a distinction must be made between extraterritorial conduct inside and outside the ‘legal space’ of the ECHR. According to the Court, the ECHR operates in an essentially regional context and notably in the legal space of the contracting states. It noted that the FRY did not fall within this legal space. The Court went on to state that the ECHR was not designed to be applied throughout the world, even in respect of the conduct of the contracting states.

Both Rick Lawson and Michael O’Boyle deal with the extraterritorial application of the European Convention on Human Rights. Rick Lawson critically examines the above-mentioned case. He places the case in the international legal context, and examines previous and subsequent jurisprudence of the Court. He states that at first sight the
answer to the question whether a state violates its obligations under human rights law if its armed forces commit a human rights violation on foreign soil would be affirmative, since the basic function of human rights is to regulate public power and it does not matter where this power is exercised (Lawson, p. 86). He demonstrates, however, that the answer is much more complicated. O’Boyle also deals with the Banković case, explaining – and defending – the reasoning of the Court.

In the contributions on other human rights treaties, the authors examine relevant case-law of the respective monitoring organs, and compare the findings with the Banković judgment. This leads to conclusions and speculations on the interpretation of the relevant provisions in the future, by, for example the Human Rights Committee and the Inter-American Court of Human Rights. Interestingly, the authors do not all reach the same conclusions.

Dominic McGoldrick, in a chapter on ‘Extraterritorial application of the International Covenant on Civil and Political Rights’, concludes that the Human Rights Committee, considering the same facts, would not take a view different from the European Court (p. 68). Martin Scheinin, in his contribution on ‘Extraterritorial effect of the International Covenant on Civil and Political Rights’ finds it difficult to believe that Banković would have resulted in an inadmissibility decision on the same grounds as those applied by the European Court (p. 78).

Both Christina Cerna (‘Extraterritorial application of the human rights instruments of the Inter-American system’) and Douglass Cassel (‘Extraterritorial application of Inter-American human rights instruments’) are careful when speculating what the Inter-American Commission on Human Rights would do if confronted with a case similar to Banković. While the Commission has accepted that state agents can exercise authority and control over persons outside the national territory, within the Americas region, there is no precedent yet in which accountability was accepted for violations committed outside the region (Cerna, p. 173; Cassel, p. 180-181).

The question on extraterritorial obligations under the CESC is of quite a different nature, as described by Fons Coomans and Rolf Künnemann. According to Coomans, in his chapter ‘Some remarks on the extraterritorial application of the International Covenant on Economic, Social and Cultural Rights’, there is a need for further legal confirmation and progressive legal development of the moral idea that the CESC ought to be read as also implying international obligations of states to people in other countries who are in need of assistance in order to enjoy their basic economic, social and cultural rights (p. 199). Künnemann sees a need for new steps to be taken in the realisation of economic, social and cultural rights. He argues that this realisation requires the accountability of international institutions and external business activities. He formulates some interesting suggestions that may help achieve this, aimed at further development the notion of extraterritorial application of the CESC. He suggests that the United Nations High Commissioner for Human Rights could draft instruments on international obligations to the CESC, as well as on human rights obligations of inter-governmental organisations (Künnemann, ‘Extraterritorial application of the International Covenant...')

The final two contributions, by Matthew Craven and Liesbeth Lijnzaad, to this volume concern the issue of sanctions and human rights.

The volume edited by Coomans and Kamminga contains many interesting contributions. The issue of extraterritorial application of human rights treaties has been examined in the light of general international law, of which human rights law is a part, be it a unique part. Many issues relating to the question of jurisdiction and extraterritorial accountability for human rights violations have not yet been addressed by international organs. There are, of course, also other treaties that could have been dealt with in the volume, such as the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Furthermore, there are developments before domestic courts. The editors have chosen to restrict this volume to a number of general human rights treaties. It is commendable that this volume includes the issue of accountability in respect of economic, social and cultural rights, an area which is all too often overlooked. In that respect, the Maastricht Centre for Human Rights has a strong history and by including this issue in a volume on extraterritorial application of human rights the authors do justice to the reputation of Maastricht University.

Under present-day circumstances, it is unavoidable that complaints will be submitted to the various organs in the future. Many people, including judges, members of United Nations treaty bodies and scholars will certainly find this volume useful.

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Watercourse Co-operation in Northern Europe
Professor Malgosia Fitzmaurice and Dr Olufemi Elias are the authors of this book on watercourse co-operation in Northern Europe. Chapter 4 was written by Professor Vaughan Lowe. A welcome feature of the book is the map of the Nordic countries under discussion.

The context of the global water crisis is elaborated upon in chapter 1 – including freshwater scarcity, its uneven distribution around the world and emphasising the potential of water problems as a catalyst for co-operation, as well as the need for a ‘blue revolution’ in agricultural productivity. Chapter 1 further explains the aims and structure
of the book. It is, for example, explained that the book consists of a number of discrete essays rather than a unified sequence of parts of a monograph.

The aim and international water law are now presented as the setting of the book. Next, the position of the Saami people (chapter 3) and the elaboration on Northern European co-operation – the subject of chapters 4 and 5 – are reviewed. This is followed by the way sustainable development has been dealt with, foremost in chapter 6. Finally, the extent is reviewed to which a model for the future – as referred to by the aim and subtitle of the book – is indeed provided.

*Setting of the book*

The aim of the book, as formulated at pages 3 and 4, is to contribute to the development of a set of acceptable rules to govern the co-operation between states in management of international watercourses. To that end, it is considered how such co-operation works in Finland, Norway, Sweden and Russia. The authors thereby hope to ‘shed some light on the possibilities that exist for a generalizable model for the development of the needed legal regulation’. Reference is also made to ‘the ultimate goal of ensuring the availability of water for present and future generations’.

The preface formulates the aim of writing the book as to make a contribution to the global water scarcity debate, especially on the equitable sharing of watercourses. According to the back of the cover, the co-operation between Finland, Sweden, Norway and Russia ‘provides a blueprint for watercourse co-operation in other regions of the world’.

The book encompasses both international law and national law. Chapter 2, on the law of the navigational and non-navigational use of international watercourses, seems to set the international water law context rather than adding to existing books on international water law. It includes an elaboration on: sovereignty, territorial integrity and community of interests; the right of free navigation; definition of international watercourse; equitable utilization of water; the obligation not to cause significant harm to neighbouring states; and liability and dispute settlement.

*The Saami of Lapland and Finnmark*

Chapter 3 contributes to other studies of international water law through the case study on the Saami (Norway, Sweden, Finland, Russia). It discusses difficulties in defining minorities, people and peoples and emphasises the special relationship between indigenous people and land. The chapter also elaborates on national law, the right to water and international law relating to indigenous people.

More rights generally appear to be accorded to the Saami by Norway and Finland than by Sweden. This is partly related to the fact that Norway is bound by the 1989 ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169). However, neither Norway, Finland nor Sweden has actually granted full right of ownership of land to the Saami. Rights that are granted include rights related to reindeer herding and fishing. Moreover, their interests are to be represented in
Northern European Co-operation

Chapter 4 on Northern European co-operation regarding watercourses deals with the regimes between: Norway and Sweden; Finland and Norway; Norway and Russia; Finland, Norway and Russia; Finland and Russia; and Finland and Sweden. The Nordic regimes seem to range from conservative/simple to progressive/complex. The chapter is cautious in drawing conclusions based upon this range since that would require more fieldwork on the actual practice.

Chapter 5 deals with Northern European watercourse institutions. It covers the elaborate network between Finland-Russia formed by, e.g., the Joint Finnish-Russian Commission on the Utilization of Frontier Watercourses, the Agreement concerning Regulation of Lake Inari, the Frontier Commission and the Reindeer Agreement. The relationship between Norway and Finland in this perspective is only discussed shortly and appears to be more conservative.

The Finnish-Swedish Frontier River Commission (FSFRC) is regarded by the authors as the most progressive Nordic regime and is thoroughly discussed. The Commission was established by the 1971 Agreement between Finland and Sweden Concerning Frontier Rivers. The discussion of the FSFRC includes its independent character, structure and composition, the scope of its functions that virtually covers all watercourse matters, the nature of its functions, and involvement of Finland and Sweden in certain cases. The concluding section on the FSFRC aims at identifying the extent to which the FSFRC Agreement expresses the principle of equitable utilization and the duty to cooperate, both discussed in chapter 2.

The concluding remarks of chapter 5 emphasise that the range of institutions examined provides options for watercourse management in other parts of the world. The Nordic-Russian regimes are of special interest when one considers existing co-operation in spite of different legal heritage and culture. In case the political will exists, suitable institutions apparently can already be established with a modest amount of creativity. Caution is again referred to in relation to the gap between theory and practice related to rules and procedures.

Sustainable development

According to chapter 2, the basis of the international regulation of the use of international watercourses ‘has moved from the doctrine of absolute territorial sovereignty, through the community of interests principle and equitable utilization, to sustainable development’. Although progress has definitely been made, the movement toward sustainable development is an ongoing process.

Nordic watercourse co-operation and the sustainable use of water is the subject of chapter 6. The authors, with reference to Handl, nicely formulate the essence of sustainable development (p. 159): ‘In other words, the core of the concept is to ensure living
off nature’s “income” rather than squandering its “capital.” Inclusion of the 2002 ILA New Delhi Principles on sustainable development could have added further to the elaboration in this chapter on suggestions made to elucidate the implications of the concept of sustainable development. The discussion of the Gabcíkovo-Nagymaros case seems to include less common observations. Fitzmaurice and Elias argue, for example, that the case could in certain regard be viewed as not being particularly illuminating.

Chapter 6 furthermore includes discussion of Agenda 21, its Chapter 18 on fresh water, the World Summit on Sustainable Development, the 1997 UN Framework Convention on Non-Navigational Uses of International Watercourses, and the European Union’s Water Framework Directive (EUWFD). EU Member States Finland and Sweden as well as Norway, being a member of the European Economic Area, are bound to the implementation of the EUWFD. It is argued that instruments such as the EUWFD possibly contribute to more progressive developments.

The complexity of sustainable development and the lack of its expression in the Nordic co-operation instruments under discussion are acknowledged. It is nevertheless submitted in concluding chapter 7 that ‘on the basis of the preceding chapters, the practice of these states reflect concern for the concept of sustainable development, and that this further indicates that the nature and the extent of the co-operation between these states can serve at least as a testing ground, if not as a blueprint, for the development of watercourse management strategies in other parts of the world’.

A Model for the Future?
In comparison to other publications on international water law, the case study of the Saami clearly is one of the strengths of the book. Lessons can be drawn from the Nordic practice regarding rights and interests of the Saami, taking into account however that lack of ownership of land and uncertainty on who represents them seem to remain. The extensive elaboration on Nordic institutions also deserves mention. It adds to most other literature on the subject, of which it is said to often neglect the institutional aspect of international water law. These parts rightfully appear to be at the core of the book.

The 2004 ILA Berlin Rules on international water law were finalised after the publication of the book. Otherwise, its progressive approach – such as to integrated water management and a human right to water – could have provided further indicators to measure the ‘progressiveness’ of the Nordic water regimes, likely to have resulted in a lower score.

Sustainable development has been taken into account when considering the possible contribution of the regimes to a model for future water regimes. The presence of sustainability within Nordic co-operation to a certain extent appears to be concluded from references such as to ‘optimal’ or compensations. This may not suffice in expressing the wide variation of interests and elements that need to be balanced in order to contribute to the achievement of sustainable development. For example, optimal use may represent economic sustainability without acknowledgement of interrelations among species within ecosystems or their intrinsic value. The acknowledgement of the complexity of
sustainable development may have been limited by the aim of the book, as noted at page 3: ‘Such a system should take account of developmental needs and of environmental concerns in such a way as to minimise disputes and conflicts over water.’ Minimising disputes and conflicts is one thing, and sustainable development another: states can very well minimise disputes by agreeing to co-operate in the overexploitation of natural resources, maybe even accepting the suffering of certain groups of their population or leaving ecological consequences to future generations.

Further analysis of lessons learned from the Nordic regimes – also in comparison to other regions – remains necessary in the effort to identify a ‘blueprint’ for water-course co-operation. As concerns the structure of the book, links between and lessons from foregoing chapters could have been made more explicit in the concluding chapter. Although the book may not in itself present a generalised model for the development of the needed legal regulation to govern the co-operation between states in management of international watercourses, it succeeds in shedding light on the possibilities for such a model as formulated in its aim. The added value of the book mainly lies in its elaboration and analysis of the Nordic countries water regimes, which may entail more general options for ways to approach the global water crisis.

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This book is a useful overview of discussions on the question whether international humanitarian law (hereafter: IHL) adequately takes into account the position of women in armed conflict, and whether the law is sufficiently gendered to do justice to the experiences of women in armed conflict. The authors describe IHL from a feminist point of view, and the reader necessarily has to follow them in that approach. This feminist point of view will appeal to a great many readers, but may not be that self-evident to other readers less familiar with feminist legal theory. Unfortunately, the book does not provide a brief introduction to feminist legal analysis. While such an introduction may have seemed redundant for the authors, the sometimes quite direct style of writing about the position of women may make the book less attractive to a group of potential readers in military and defence policy circles who could in fact greatly benefit from reading it.

In particular since the atrocities in the armed conflicts of the nineties, there has been
much concern about a gender bias in the existing IHL instruments and the insufficient protection the law offers as a consequence of that. Triggered by horrendous stories about events in the war in Yugoslavia, as well as the Rwandan conflict, the question was raised whether the law of armed conflict protects women to a level equal to that of men and fully takes into account what armed conflict means for the reality of women’s lives. These conflicts, and subsequent ones have drawn the attention of the world to the plight of women during armed conflict and have increasingly focused on the fact that the experiences of women, mostly as civilians but increasingly also as troops, differ from the experiences of men. Thus it has been contended that the law has a male bias, and that the rules have been formulated largely with men in mind and are therefore inadequate with respect to the situation of women.

Although the Geneva Conventions and Protocols provide general rules, it was felt at the time of drafting that some specific rules regarding women needed to be included. These rules all refer to issues specifically related to the biological fact of being a woman: pregnancy and nursing young children, as well as rape and enforced prostitution (e.g., Arts. 27, 50 GC IV; Art. 75 AP I). Relevant as these provisions may be, they at the same time seem to summarize the essence of being a woman as procreation, which by no means appropriately reflects the societal context of womanhood.

The concern about the gender bias in IHL has in the recent past led to a number of important developments both within the ICRC, as well as within the UN. Examples are the work the ICRC has done on the Women facing War project, the aim of which is not only to draw attention to the role of women during times of armed conflict, but also to sensitise the organization itself to the woman’s perspective on the implication of conflict for everyday life. The UN Security Council adopted Resolution 1325, which focuses on the position of women in armed conflict, and on their roles in the prevention of conflict, and in post-conflict situations. Thus, the concern about a gender bias has led to steps being taken at international level, although it remains to be seen whether such steps suffice. It will probably take a broad range of steps, both of a normative character and of a practical nature to deal with the gender bias in humanitarian law.

This book is very legible and provides a fast and thorough insight into the feminist critique of IHL. After the introductory chapter the book opens with a chapter that explains the experiences during armed conflict particular to women. It is important to understand how seemingly neutral rules have a different impact on women and men, as a consequence of the differences of their position in society which has an impact on how an armed conflict will influence their lives. This discussion concerning the impact of armed conflict relies on an extensive amount of documentation. A lot of attention is being given to hazards, such as the spread of STDs and pregnancies, as well as the social stigma faced by abused women. But the authors also extensively describe how armed conflict disrupts social structures and economic life, and how this impacts on the life of women. This underlines the fact that the experiences of women go beyond the much-publicized risks of sexual violence during armed conflict. Briefly, the way
in which armed conflict impacts on the lives of women is that it frequently aggravates pre-existing inequalities in society. War thus magnifies social injustice, and it reinforces gender stereotypes that contribute to the subordination of women.

The following chapter discusses the substantive rules of IHL that specifically deal with women. It criticizes the Geneva Conventions’ starting point of prohibiting adverse distinction on the basis of sex as a standard of equal treatment under the Conventions. The authors discuss the provisions that do provide specific rules applicable to women. Invariably the woman that transpires through these rules of IHL is weak, she is a victim and/or a mother. This chapter is a broad overview, which is informative albeit largely descriptive. In the section on war crimes Gardam and Jarvis are critical about exactly which violations of the rules of IHL are defined as crimes, and the fact that for non-international armed conflict only recent developments have led to the recognition that war crimes may exist. Here the expertise of Jarvis, working for ICTY, shines through. The discussion on the role of the international tribunals and the ICC in the section concerning international crimes is one of the strongest features of the book.

Chapter 4 is entitled ‘a gender view of the shaping of IHL’ and it looks at the images of men and women hidden behind the substantive rules. It is without doubt correct to say, as the authors do, that ‘IHL takes a particular male perspective on armed conflict, as the norm against which to measure equality’. Here the authors write that ‘IHL is a particular useful laboratory for gender analysis as it deals with the activity where one finds the ultimate in the constructed male and female – armed conflict. Its rules perpetuate in a condensed and strikingly visible way all assumptions of Western femininity and masculinity that permeate law in general.’ This followed by the criticism that IHL implicitly suggests it functions in a society without any systemic inequalities, a criticism that in the feminist perspective is also be applicable to other fields of law. Gardam and Jarvis attack the fact that the combatant takes centre stage in the narrative of IHL, and that the civilian population seems of peripheral importance. Whether or not one agrees with this reading of the law, it is relevant to keep in mind that the laws of armed conflict have developed over time and that indeed war has traditionally been a male occupation. The focus on the combatant may thus be a historical development rather than a plot to minimize the importance of the protection of civilians. At the same time it is undoubtedly true that the warrior is an ancient, though very much alive, male archetype. The important message to retain from this chapter is its convincing plea to include the relevant reality of women’s lives when drafting or indeed implementing IHL.

The following chapter focuses on developments within the UN, and in particular on the way in which this subject has been dealt with, in particular since the 1990s. It narrates how the issue of the Japanese ‘Comfort women’ brought the issue of sexual slavery during armed conflict on the international agenda, followed by the conflicts in Yugoslavia and Rwanda. The authors cautiously discuss that while the initial steps to address the issue of sexual violence in Yugoslavia seemed to indicate a commitment by the international community, the following situation in Rwanda seemed to indicate on the contrary a complete lack of commitment, or a failure to recognize this dimen-
sion of the conflict. In this interesting section of the book, the importance of perceptions in taking decisions related to the protection of women during armed conflict are well illustrated. Thus, the book deals with the personal involvement of leading international figures, as well as the role of states in presenting a particular conflict. The role of different Special Rapporteurs is discussed, as is the role of the UN Secretary General with respect to UN forces.

Chapter 6 then deals with issues related to redress, prosecution by the international tribunals and compensation. It gives an overview of the development of case-law with respect to the gender aspect of war crimes, genocide and crimes against humanity, largely based on the work of ICTY and ICTR. The ICC is briefly touched upon, and some considerably discussion is provided on the role of gender in the decision to prosecute. The chapter concludes with a discussion of the issue of compensation.

The final chapter distinguishes between a utopian version of the future resolution, as well as a pragmatic version. In the utopian view an integration of human rights law and international humanitarian law would emerge which would have the benefit of protecting all women. Regrettably very little time is devoted to the elaboration of this idea. The pragmatic solution is perhaps somewhat more realistic and suggests amongst others a re-write of the authoritative (ICRC) Commentaries to the Geneva Conventions and the Additional Protocols to include the gender perspective, or the development of an additional protocol to the Women’s Convention. Both ideas have some merit, and should perhaps be actively discussed in future.

To conclude, a few final points concerning the book are drawn. It is worthwhile to point out that Gardam is a prolific writer on IHL, and specifically on the way it treats women. She has made an important contribution to making the gendered aspect of this part of international law more visible, and to raising awareness in academic and diplomatic fora for this issue. Her work has also provided the legal basis for the efforts of numerous NGO’s speaking out on the protection of women in armed conflict. To a certain extent this book is a compilation of ideas that have already appeared in Gardam’s earlier work and few new insights are to be found. This makes the book a useful tool for readers embarking on the subject as it provides a fairly comprehensive overview of the relevant discussions, but the well-versed reader may be slightly disappointed with the content.

The book is a useful overview of the debate on this important issue, but unfortunately the analysis in the book is sometimes a bit shallow. At times the reader would like to see a more critical approach of the subject by the authors. The question could be raised whether the fact that women account for a large number of victims of armed conflict is a reflection of the inadequacy of the law, or a consequence of the violation of the law. After all, attacks on civilians are prohibited in IHL – this is an essential rule. If that rule is broken, it is debatable whether that indicates a gender bias, or – as the present author would think – is a worrying sign of the deteriorating implementation of IHL during armed conflict. As there seems to be an increasing trend to ignore the protection offered to civilians – and the majority of civilians are women – does this mean that there is a gender bias, or is it a development of a regretful series of breaches of the law?
It is important to recognize that while the press seem to focus mostly on sexual crimes, the feminist concern must be much broader. Sexual crimes are a despicable demonstration of male dominance in armed conflict, but are by no means the only proof of the imbalance between the sexes. The claim of a gender bias is about the law reflecting the reality as seen through male eyes, and as organised in support of the dominant position of men in society. It may be suggested that the fact that women are victims of armed conflict to a larger extent than men is a reflection of the fact that armed conflict tends to aggravate and magnify pre-existing inequalities in society. Consequently, if in society the legal protection of women is gendered and thus insufficient, it is to a certain extent not surprising that the situation of women in armed conflict will be worrying. It would be, after all, unrealistic to expect the protection during armed conflict to be fully taking into account gender issues when this has not been realized in society even during peace.

Another aspect that is largely missed by the book is that it focuses on the specific rules dealing with the protection of individuals during armed conflict. That is the issue that is at the centre of the discussion about a gender bias in IHL. The laws of war are however much broader than merely the protection of individual victims. If there would be a gender bias in IHL, the question logically following from that would be how that influences the very concepts of the laws of war. Little attention has been paid to the rules of warfare as such. If indeed, and this view is very much shared by the present author, law is gendered, it would stand to reason to not only investigate the set of rules applicable to the protection of victims, but to take a broader approach and look at the rules of warfare. The question may be raised whether for instance rules on targeting would call for a feminist analysis. Why not discuss the specific rules for combat, for occupation as well? It would have been interesting to see the authors take their research one level deeper and read how they view the gender issues in the more tactical and operational rules of actual warfare.

In sum, the book is descriptive rather than analytical, which is to a certain extent regrettable. The book would have been an opportunity to look at the broader legal framework or armed conflict, and it could have been the opportunity to raise a number of unorthodox questions in that field. However, it is a most useful overview of the important discussions about the way in which the law protects women during armed conflict. The authors do not present any fundamentally new insight, but the book is a user-friendly introduction to an important contemporary debate and it must be appreciated as such. In fact, it may be a useful tool for those wanting to learn more about this debate and the authors are to be praised for bringing together a wealth of information in a very legible and accessible manner.

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One of the core elements in the fashionable criticism of contemporary American foreign polity is the putative lack of commitment by the US administration to the tenets of international law. As proof of the correctness of their thesis, critics tirelessly point to the long list of treaties the US has rejected in spite of the overwhelming support from other countries: the Statute of the International Criminal Court, the Landmines Treaty, the Comprehensive Nuclear Test Ban Treaty, the Kyoto Protocol, the Biological Diversity Treaty, the Law of the Sea Treaty, and the proposed Protocol to the Biological Weapons Convention. In addition to the abrogation of the ABM Treaty, for a long time widely regarded as a showpiece of classical bilateral arms control, the US is blamed for having undermined a series of multilateral treaties. Cited examples are its use of reservations to the Civil and Political Rights Covenant and the Race Convention (to ensure that no change in US law and practice would be required), its enactment of implementing legislation for the Chemical Weapons Convention (aimed at limitations on verifications efforts by the OPCW), and its failure to comply with its obligations under Article VI of the NPT to pursue nuclear disarmament. On top of that, the decision of the Bush administration in March 2003 to resort to military force, without explicit authorization of the UN Security Council, against the regime of Saddam Hussein was castigated by many commentators as an unjustified blow to the effectiveness of the UN Charter.

The contention has been made that the prevailing American approach to international law is such that it defines this corpus of law basically in terms of private contractual relationships. International law is not seen as a value in its own right that is conducive to transforming the international system from relatively anarchical patterns of state interactions to a society of nations (or even a global society) unified by common bonds. Rather, it is perceived as a vehicle to serve national policy goals. In the voluntarist system that presumably predominates the international legal process, the US is believed to be fully entitled to contract in or out according to what the national interest requires. Unlike most continental European states which are tilting towards the view that international law and national law are parts of a single legal system (legal monism), the US considers the two fields of law to represent separate orders (legal dualism). The belief in the supremacy of the American Constitution is another important feature of the approach. On the face of it, this strikes as an anomaly. Article VI of the Constitution explicitly stipulates that ‘Treaties’ are the supreme law of the land, further providing that ‘the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding’. However, the practical meaning of these provisions has been fundamentally weakened by American jurisprudence. As early as 1829, Chief Justice John Marshall interpreted Article VI in such a way as to distinguish between
‘self-executing’ and ‘non-self-executing’ treaties. The implication of this distinction is far-reaching: a treaty cannot take effect as domestic law without implementation by the US Congress if the agreement would achieve what lies within the exclusive lawmaking power of Congress.

In his latest book John Murphy, who is Professor of International Law and Business at Villanova University School of Law (Pennsylvania), exposes the relationship between the US and current international law. Recognizing the vital role the US played at the close of World War II in creating an international order based on legal principles he particularly explores the reasons successive American administrations have found it increasingly difficult afterwards to adhere to the rule of law in international affairs. At the outset of his treatise, three possible explanations are indicated. These explanations are not mutually non-exclusive. The first one sounds very familiar: the loss of control by the US over the international legal process since the 1960s as the result of the emergence of new centers of power and the ensuing disappearance of its overriding influence in the UN and other international organizations. The second explanation requires deeper reflection; it concerns the impact of the great expansion in the scope of international law, especially under the weight of economic globalization and the externalization of previously domestic matters. The underlying idea is that this development gave rise to the creation of legal institutions, bringing new actors (both governmental and non-governmental) on the political stage who articulated interests and views opposed to the US. Murphy suggests that also the ambiguity of the terms of many treaties, their unsettled status as laws of the land, as well as the difficulty of invoking them in US courts, made American decision makers reticent to adhere to the rule of law at the international level. But this raises the question of whether these problems have worsened over time. If not, they can impossibly serve as an explanation. What did change, of course, is the global power configuration after the collapse of the Soviet Union in the early 1990s. The predicament of the US as the ‘sole remaining superpower’ made, in the view of (neo-) conservative defense intellectuals and right-wing politicians, the so-called unipolar moment a tempting occasion to make the case for lasting US hegemony in the world. The third explanation ties in with the global power shift. It emphasizes that the present unprecedented power of the US has encouraged an attitude of triumphalism, strengthened sentiments of exceptionalism (the belief that the US bears special burdens and is entitled to special privileges), and brought about a preference for acting unilaterally rather than multilaterally. Obviously, these predispositions are seen as obstacles to US support of the progressive development of international law.

The author elaborates his argument in nine chapters and a concluding part. The first two chapters, dealing with respectively the changing nature of international law during the last few decades and the disputed status of international law under US law, are the foundations of the other chapters that analyze a number of legal cases having been issues in recent US foreign policy. These cases show a rich variety of subjects. They touch on the compatibility of US withholding of its UN dues with the rule of law; the legality of the use of force in several theaters of conflict; legal obligations in the field of
arms control and disarmament; the law of the sea; the US posture towards the International Court of Justice; policies concerning the prevention, prosecution, and punishment of international crimes; and – finally – US actions and reactions to human rights and international environmental issues. Murphy does not refrain from taking clear stances and firm positions on most issues. On several places John R. Bolton (since August 2005, US Ambassador to the UN) is cast as the villain in official American legal thinking. His claim that treaties are not legally binding in their international operation but can be taken as mere ‘political obligations’ is understandably strongly contested. At the same time, Murphy does not seem quite fair to Bolton to deduce from his deep-rooted suspicions of the effectiveness of international law in matters of international security the proposition that Bolton considers the development of international law, and the acceptance by ‘the rest of the world’ of its legally binding nature, a grave threat to the vital interests of the US (p. 133).

The author does not limit himself to criticizing decisions taken under Republican Presidents. Thus, he takes issue with the legality and morality of the US-led NATO action with respect to Kosovo in 1999, believing that the Clinton administration was in the position to avoid military intervention in this part of the former Yugoslavia. More generally, Murphy holds that the doctrine of humanitarian intervention should not become part of international law on the ground that almost any criteria for the use of armed force one could think of would be subject to manipulation by states (p. 163). In contrast with the Kosovo case, he is relatively mild in his judgment on the use of armed force against Iraq in March 2003. Yes, there can be reasonable doubt about the legality of the invasion. But, with reference to UN Security Council Resolution 1441 warning Iraq of ‘serious consequences’ in the case of further non-compliance, Murphy leans to the conclusion that the US (and other members of the coalition) cannot justly be accused of engaging in lawless behavior (p. 173). Turning to another contentious issue, the establishment of the International Criminal Court, it is strange to note that there is no discussion of the reasons that the US advanced in support of its opposition to the Court. Murphy declares them beyond the scope of the chapter – a chapter that is expected to present a balanced picture of the debate about the punishment of international crimes!

Notwithstanding this peculiar omission and the author’s penchant for lengthy quotations (some of them placed at the very end of chapters) Murphy has definitely written a valuable book about a challenging subject. The main strength of the volume lies in the deep insight that is offered into the intricate relationship between international law and American national law, as well as the demonstration of profound knowledge about the general context of the selected cases. Legal scholars will admire Murphy’s firm grasp of the technical complexities of the relatively large number of divergent legal issues under discussion. Non-legal scholars may be somewhat disappointed at the superficiality of his analysis of the growing distance between the overall direction of US foreign policy and the rule of law in international affairs. Unfortunately, the reader learns little of the impact of the changes that have occurred in the domestic political environment of the US. The weakening of the post-WW II internationalist forces under the influence of the
neo-conservative revolution was bound to affect the inclination of the American administration to subordinate policy decisions to the imperatives of international law. Nor has the book much to say about the inevitable trade-off for any US administration between the restraints to its freedom of action as the result of adherence to international legal norms on the one hand and the greater legitimacy or acceptance of its policies by lesser powers on the other. A cursory view of modern history shows it is hardly self-evident that the strongest power is ready to become subject to the international legal process if it is not able to control it.

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