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Book Review

Lakshman Guruswamy

University of Colorado Law School

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Citation Information

Lakshman Guruswamy, Book Review, 14 Colo. J. Int'l Envtl. L. & Pol'y 111 (2003) (reviewing *The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives* (Jay E. Austin & Carl E. Bruch eds., 2000)), available at <http://scholar.law.colorado.edu/articles/528/>.

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Citation: 14 Colo. J. Int'l Envtl. L. & Pol'y 111 2003

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Book Review

THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES. Edited by Jay E. Austin* and Carl E. Bruch,** Cambridge; Cambridge University Press, 2000. Pp. 691, Index. \$95.00.

Lakshman Guruswamy***

This book, unlike many others on the impact of war, deals with the environmental consequences of war, not the human toll. There can be little doubt that this timely anthology of twenty-five essays is a testament to the growth of international environmental consciousness. While the book seeks to address a cluster of legal, scientific and economic issues about the consequences of war, it also reflects some of the difficulties associated with the broad and wide-ranging nature of conference proceedings. The multitude of areas traversed by this substantial five part volume include: The Legal Framework, Lessons from Other Regimes, Assessing Impacts, Valuing Impacts, and Prospects for the Future.

Any attempt to evaluate efforts to protect nature or the environment during times of war or other hostilities, should answer at least three fundamental sets of questions.

First, what are the environmental consequences of war? The degree of action required to protect the environment during war will depend on the extent of the harm inflicted on the environment during hostilities.

Second, to what extent should the protection of nature trump humanitarian concerns during wartime? The possibility of such a conflict is undeniable.

Third, to what degree might the environment be protected under existing humanitarian laws? The word environment is hardly mentioned

* Jay E. Austin is Senior Attorney with the Environmental Law Institute, Washington, D.C.

** Carl E. Bruch is Staff Attorney with the Environmental Law Institute, Washington, D.C.

*** Lakshman Guruswamy, LL.B., Sri Lanka; Ph.D, University of Durham, U.K., is a Professor of law at the University of Colorado School of Law in Boulder.

in humanitarian law.

While the book does not answer these questions in the order posed above, the first question is addressed in Part III of the book. The assessment of the long term environmental consequences of war is undertaken remarkably well by Asit A. Biswas in his paper, entitled *Scientific Assessment of the Long-Term Environmental Consequences of War*.¹ He addresses the effects of war on land, water, and air in an admirable and concise manner. Biswas then proceeds to examine how war depletes natural resources and generates hazardous material. Additionally, Jeffrey McNeely presents a balanced and interesting contribution on war's effect on biodiversity.² McNeely makes a strong case that because environmental stress is a major source of international strife and conflict, efforts to conserve biological diversity can greatly help reduce the potential for war. Two other essays explore the impact of the Gulf war on the terrestrial and marine environment.

The question of why the environmental damages caused by war are so extensive as to merit special attention is only contextually or inferentially addressed in this collection of papers. To answer this question, one must consider how war-time environmental damage rates compared to the regular and sustained assault on the environment that is an endemic part of any industrial society. Furthermore, it must be determined if war-time environmental damage is so egregious as to call for special regimes that might result in the dilution of humanitarian concerns.

The second question originally presented, to what extent nature should be protected during wartime at the expense of humanitarian concerns, underlines the importance of thoroughly exploring the philosophical basis for creating and implementing laws protecting the environment. Such laws may be able to protect the environment only at some expense to humans. Any efforts to protect the environment from travesties during wartime must be a new undertaking, as there are no successful shoulders of humanitarian protection for it to be built upon. The dismal truth is that the implementation of humanitarian law has not been a triumphant exercise, despite the ghastly death toll and human misery inflicted by wars. Indeed, in the Twentieth Century alone it is estimated that between 170 and 270 million humans were killed because

1. See generally Asit K. Biswas, *Scientific Assessment of the Long-Term Environmental Consequences of War*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES* 303 (Jay E. Austin & Carl E. Bruch eds, 2000).

2. See generally Jeffrey A. McNeely, *War and Biodiversity: An Assessment of Impacts*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR*, *supra* note 1, at 353.

of war and political violence.³ The horrifying human toll of war in contemporary times has led to a variety of international measures that attempt to both promote peace and prevent war (*ius ad bellum*), and control the actual conduct of hostilities (*ius in bello*).

Two important *ius ad bellum* treaties unfold a revealing tale. The Kellogg-Briand Pact of 1928, formerly known as the General Treaty for the Renunciation of War,⁴ sought to outlaw war by declaring that it “condemn[s] recourse to war for the solution of international controversies, and renounce[s] it as an instrument of national policy. . .”⁵ This treaty was relied upon by the Nuremberg International Military Tribunal, better known as the War Crimes Tribunal, when it concluded that the planning or waging of aggressive war is the “supreme international crime.”⁶ Similarly, the UN Charter moved international law in a dramatic new direction by creating an unconditional core obligation in Article 2(4) that: “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁷

Despite these and other treaties governing the actual conduct of hostilities (*ius in bello*), human and political actions have thwarted the implementation of these laws. This has cast an almost hopeless pall over the actual realization or implementation of these international laws. In light of the international community’s failure to protect humans in times of war, a strong case must be made for creating a new arena of protection that stretches beyond humans to the environment.

The editors appear to think that the second question will be answered because they state in the introduction that the first part of the book surveys “the ethical, moral, and religious bases for constraining the environmental consequences of war.”⁸ The task fell upon Christopher Stone, whose essay is the only one that addresses this question⁹. Stone insightfully raises the central question as to whether there are moral,

3. *Id.* at 384.

4. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

5. *Id.* at art. 1.

6. *Judicial Decisions*, 41 AM. J. INT’L. L. 172, 186 (1947) (providing the text of the International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, as provided by Col. Laurance D. Egbert, Editor of the Record of the Tribunal).

7. U.N. CHARTER art. 2, para. 4.

8. THE ENVIRONMENTAL CONSEQUENCES OF WAR, *supra* note 1, at 8.

9. See generally Christopher D. Stone, *The Environment in Wartime: An Overview*, in THE ENVIRONMENTAL CONSEQUENCES OF WAR, *supra* note 1, at 16.

religious or philosophical grounds for protecting nature distinctly from humans. He answers the question in the negative, after pointedly inquiring if any treaties recognize rights of nature, or the environment, to be afforded protection absent human utility.

Stone argues that homocentrism, as distinct from biocentrism, serves as the motivation for agreements that protect the environment during wartime. He concludes his overview of this topic by questioning whether there is any support for a treaty that would require belligerents to leave certain ecosystems intact for their intrinsic, non-instrumental worth, or for the sake of future generations, despite the human costs of doing so.

Surprisingly, none of the twenty-five essays in the rest of the book seek to answer this question in any substantive fashion. While some of these essays are sprinkled with references to "anthropocentric," "homocentric," and "intrinsic" grounds for protecting nature, these terms are not explained or examined in a manner that satisfactorily answers the question. The only author that makes a pass at this issue is Michael Schmitt, who deals with the principles underlying damage assessment in his essay.¹⁰

Schmitt asserts that there are two ways of valuing the environment. The first, based on utilitarian principles, considers the degree to which the environment contributes to human well-being through the provision of food, shelter, clothing and quality of life. The second, based on the environment's intrinsic value, would appraise the environment independently of any contribution to humankind. While his effort to explain the basis of damage evaluation is useful in seeking to understand how to assess damage to ecosystems and species, such an examination does not address an even more fundamental question. That question is whether, and to what extent, we should protect biodiversity or a single species at the expense of people during a war.

There are also three very distinct theories that provide possible answers to the question posed by Stone, even though they are not discussed in this book. The first theory is based on anthropocentrism. According to anthropocentrists, all nonhuman values, whether in nature or species must be measured according to what they contribute to humans.¹¹ These nonhuman values only possess instrumental, as distinct from intrinsic, value.¹² The second is inherentism, which sees all

10. See generally Michael N. Schmitt, *War and the Environment: Fault Lines in the Prescriptive Landscape*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR*, *supra* note 1, at 87.

11. BRYAN G. NORTON, *TOWARD UNITY AMONG ENVIRONMENTALISTS* 235 (1991).

12. *Id.*

nonhuman value as dependent on human consciousness. According to the inherentist view, however, human consciousness is able to embrace values that are neither instrumental nor utilitarian, and can accept ideas and conduct that do not contribute to human welfare.¹³ This view may also be seen as a form of noble anthropocentrism. The third is intrinsicism, which recognizes “values in nature [that are] independent of human values and human consciousness.”¹⁴

What separates intrinsicism from both the anthropocentric and inherentist views is its position that intrinsic value existed prior to human conceptualization.¹⁵ It “cannot be supported by scientific or other cultural resources [because it exists] independent of all experience.”¹⁶ Jurisprudentially, there are some analogies between intrinsicism and the foundational or *grundnorm* advanced by the famed Austrian jurist Hans Kelsen.¹⁷ Intrinsicism deals with a deontological proposition that does not admit proof and therefore must be assumed or accepted before it can properly be assessed.

The existence of these three broad philosophical views does not mean that law and policy makers, who have the responsibility of addressing the environmental consequences of war, accept these views at a theoretical, let alone practical level. Nor is it true that each of these philosophical underpinnings is made up of isolated and unrelated ideas that invariably pull in different directions. It is quite possible that policies concerning the environmental consequences of war may emerge from an interactive dialectical process engaging aspects of all three philosophical strands. The policy that ultimately emerges may well express the “reflective equilibrium” suggested by Rawls, in which intuitive convictions are tested against the realities of actual situations and thus give rise to answers that adapt the rigor of the initial principles to the requirements of justice and fairness.¹⁸ Despite these riders, it is necessary to begin the difficult process of canvassing these world views if the environment is to become an explicit component of the legal and

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. A *grundnorm*, as described by Kelsen, is translated in the United States as a basic norm. It is the foundational premise or initial hypothesis conferring validity or legitimacy on all other norms of international environmental governance. As directly formulated by Kelsen, “The basic norm is the postulated ultimate rule according to which norms. . . are established and annulled, receive and lose their validity.” HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 113 (Anders Wedberg trans., Harvard Univ. Press, 2nd prtg. 1946).

18. JOHN RAWLS, *A THEORY OF JUSTICE* 48-51 (1971).

policy agenda during wars. Unfortunately, it is impossible to escape or ignore the possible conflicts between human and environmental protection.

The book is at its strongest when answering the question of what degree of protection humanitarian laws may afford the environment. It offers a variety of scholarly and forceful views on the extent to which existing humanitarian laws might also be utilized to protect the environment in times of war. Some of the authors assert that existing humanitarian laws contain principles that can be adapted and implemented to protect the environment. However, others deny this assertion and argue in the alternative for specific laws governing environmental harm during wartime.

In a succinct, cogent, and tightly reasoned essay, Adam Roberts pleads for abandoning the view that "those very few provisions in the law of war that actually use the word 'environment' can be viewed as the centerpiece of legal protection of the environment in war."¹⁹ He reviews the existing humanitarian laws with exceptional clarity, and argues that these laws, whose primary objective is to protect humans, do in fact offer a basis for protecting the environment.

Silja Vöneky takes a different tack and argues that some peacetime rules of environmental protection should apply during war.²⁰ In addition to those treaties that specifically provide for their application during war, and obligations *ius cogens* and *erga omnes*, he suggests that there are other rules obliging states to protect the environment during times of war for the interest of the community of nations as a whole. Vöneky asserts that the rules of the United Nations Convention on the Law of the Sea (UNCLOS) governing the use and protection of the deep-sea bed and the marine environment come under this rubric. While his conclusion may be accurate, it is difficult to see in what way his final category is different to obligations *erga omnes*.

The problem with applying UNCLOS to any warship, whether in times of peace or war, lies in Article 236 which asserts that the provisions of UNCLOS "regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State. . ."²¹ Although Vöneky

19. Adam Roberts, *The Law of War and Environmental Damage*, in THE ENVIRONMENTAL CONSEQUENCES OF WAR, *supra* note 1, at 47.

20. Silja Vöneky, *Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War*, in THE ENVIRONMENTAL CONSEQUENCES OF WAR, *supra* note 1, at 190.

21. United Nations Convention on the Law of the Sea (UNCLOS), Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) (emphasis added)

and Thomas Mensah attempt to subordinate this very specific and strong exclusionary provision to other weaker obligations of a general nature, such as Article 30 of UNCLOS (requiring compliance with the regulations of coastal states while passing through their territorial sea), their effort is not persuasive.²² The better view, despite the contentions of these authors to the contrary, is that the environmental provisions of UNCLOS will not apply during war-time.

In his essay, Richard Falk points to the inadequacy of the existing humanitarian legal frameworks for protecting the environment.²³ First, Falk recognizes that there may be a potential conflict between environmental protection and humanitarian concerns. He then concludes that shaping an adequate legal regime to address this question requires a separate and dedicated effort of major proportions. Such an enterprise cannot be treated as an incidental application of humanitarian law. Michael Schmitt offers support for this position, by pointing to fault lines in the prescriptive landscape dealing with war and the environment.²⁴

The rest of the book is a worthy smorgasbord containing an assortment of essays. These essays range from United States civil liability models for war-caused environmental damage to public health approaches to environmental destruction in the twentieth century to human health impacts of defoliants to militarism to the public health consequence of armed conflict to the Chemical Weapons Convention. Such contributions take their place beside a mélange of others on economic methodologies for assessing natural resource damage. The concluding section, entitled *Prospects for the Future*, also contains an interesting, if somewhat wishful contribution, about moving from the punishment of war crimes toward the punishment of environmental crimes.²⁵

While this anthology does not answer all of the relevant questions arising from the environmental consequences of war, it provides a commendable and important introduction to an unexplored area of geo-

[hereinafter Law of the Sea].

22. Vöneky, *supra* note 20, at 207; Thomas A. Mensah, *Environmental Damages Under the Law of the Sea Convention*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR*, *supra* note 1, at 226, 248-49.

23. Richard Falk, *The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR*, *supra* note 1, at 137.

24. Schmitt, *supra* note 10.

25. Mark A. Drumbl, *Waging War Against the World: The Need to Move From War Crimes to Environmental Crimes*, in *THE ENVIRONMENTAL CONSEQUENCES OF WAR*, *supra* note 1, at 620.

political importance. Overall, it is a valuable book consisting of some excellent individual contributions on a variety of subjects related to the environmental consequences of war. While the book suffers from poor organizational structure resulting in a lack of analytical coherence, and a deficiency of thematic unity, this may at least partially be due to the nature of conference proceedings.

Moreover, there is a surfeit of introductions of variable quality, including an introduction to Part I, despite the fact that Part I consists of only a single overview essay. However, these limitations do not detract from the strength of this book. This is particularly evident in Part II, which tackles the adequacy of humanitarian laws to address environmental questions. Furthermore, the editors have succeeded in obtaining some excellent individual contributions in this large collage of essays. An informed reader may well benefit from going through the entire table of contents to find what she is looking for, rather than relying upon the index alone, or the analytical rubrics provided by the editors.