Professor Myron Nordquist, Stockton Professor of International Law, Naval War College: When Professor Grunawalt asked me to serve as a moderator for this Panel, he made it clear that I was to moderate and not to speak. So, I will be quite business-like and briefly introduce the Panel’s three speakers. We have all agreed to strict time limits on the theory that we will have questions and comments from the floor and that we will all gain something from the interchange. I am Myron Nordquist, the current holder of the Stockton Chair here at the Naval War College. I am on loan from the faculty of the United States Air Force Academy.

The first speaker on our Panel is Professor George Walker, Professor of International Law at Wake Forest University. George, as many of you are aware, is a prior holder of the Stockton Chair. Our second speaker is Professor Adam Roberts, Professor of International Relations at Oxford University. Adam has a great deal of experience in this area, and I am confident that his remarks will stimulate comments from the floor.

The commentator for our Panel also has had a very distinguished career. Professor Paul Szasz was, until 1989, the Principal Legal Officer at the United Nations and is currently with the Center for International Studies at New York University School of Law. Among the many things that Paul has done that are not mentioned in his biograph in front of you is that he served as Legal Counsel to the International Conference on the Former-Yugoslavia. With that, may I please turn the rostrum over to Professor George Walker.

Professor George K. Walker, Wake Forest University: Thank you Myron. My topic this morning is “The Oceans Law, the Maritime Environment and the Law of Naval Warfare.” As do many government speakers who come to private institutions such as mine, I have a few disclaimers. First of all, the September 6th draft of my paper is just that, a draft. I welcome comments before final publication. Secondly, my remarks are limited to the topic of the paper; the law of the sea, the oceans environment and how these sometimes overlapping bodies of law relate to the law of armed conflict at sea, i.e., the law of naval warfare. Third, I might add that I was a member of the group of academics and sea service officers, who appeared in private capacity, that produced the San Remo Manual on the Law of Naval Warfare. I am not here to endorse the Manual; I own no stock, and will receive no royalties, but I wanted to make that disclaimer. Finally, I am not about
to cover even a small part of the substance of what I have written but that fact leads me to the principal points I make today.

There is an enormous volume of law related to the maritime environment, most of it in treaties appearing since the 1958 Law of the Sea Conventions. However, if we include the 1907 Hague Conventions dealing with bombardment and the like, and their successors such as the 1925 Geneva Gas Protocol, the 1935 Roerich Pact, the 1949 Geneva Conventions, and so forth, there is an older and deeper legacy of environmental protection, at least as it pertains to general human health and cultural and historical objects as specific aspects of environmental quality during warfare.

The 1982 Law of the Sea Convention is the first treaty to deal comprehensively with maritime environmental problems. For those countries that are or become parties, the Convention will be an effective, if "mild" trumping device, much as the U.N. Charter, Article 103, declares that Charter norms supersede all other treaties, including those treaties related to environmental protection, whether already in force or to come into force, which may have special terms but which "should be carried out in a manner consistent with the general principles and objectives of this Convention." That is from Article 237. In other words, what we have in the 1982 Convention is a constitution or a charter for the marine environment. The upshot of it is that all agreements in place, or to be negotiated, must conform generally to the Convention's generally stated norms.

The Convention does several things with respect to the environment. First, Part XII deals generally with protection and preservation of the marine environment. Other aspects of environmental protection are found throughout the Convention. If, for example, you look through some of the navigational articles, which have already been acknowledged to represent customary law, they too have statements related to environmental protection, conservation, and the like. The third point about the Convention is that it solidly endorses the absolute sovereign immunity of "any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service." That is language from Article 236, which is found in Part XII, the environmental provisions of the Convention, but similar language appears in other places. However, many of these provisions also declare that flag States bear responsibility for damage, that is, even though the warship itself is immune, flag States bear responsibility for any damage they may cause in contravention of Convention norms. Article 236 declares that States must adopt measures, not impairing operations or operational capabilities, to ensure that such vessels or aircraft operate consistently, so far as it is reasonable or practical to do so, with the Convention. The importance of that, especially in the non-war context, is that if we assume, as I do, that the 1982 Convention is more or less the overarching control or standard, and that all treaties in place, or to be put in place,
have to conform to it in substance, those treaties in place that do not have a sovereign immunity clause, for example, now must have sovereign immunity read into them. I think that is fairly important for the confrontation situations that may confront the Navies of the world in the future.

Another point about the Law of the Sea Conventions is that there are clauses in the 1958 and in the 1982 Conventions that are often overlooked. These are declarations that the treaties are subject to "other rules of international law," as well as the terms of the Conventions themselves. For example, Article 87 of the 1982 Convention, dealing with high seas freedoms, says in part that the freedom of the high seas is exercised "under the conditions laid down by this Convention and by other rules of international law." I draw three conclusions from this.

First, the overwhelming majority of commentators, including the International Law Commission, have stated that "other rules of international law" refer to the law of armed conflict. Therefore, provisions such as Article 88 of the 1982 Convention state a truism, that the high seas are reserved for peaceful purposes. However, high seas usage can be subject to the law of naval warfare when Article 87 is read into it. Moreover, in no case can either provision "trump" United Nations Charter norms, and here again we come back to Article 103 of the Charter, and to fundamental Charter principles which include the inherent right of individual and collective self-defense in Article 51.

Second, there is no indication, at least in my research, that the drafters of the law of the sea conventions, certainly not in 1958, and likely not in 1982, thought that the "other rules" clauses referred to anything else, and particularly not to any customary law of the environment. To be sure, under traditional analysis, you have to consider parallel custom or general principles in analyzing sources that bear on a particular problem, but there is nothing to indicate that there was any intention to incorporate general customary law or general principles through the "other rules" clauses.

Third, there are other agreements in being which also include clauses exempting, or partially exempting, their application during armed conflict; the older ones speaking of "war," others of "armed conflict," and still others of "emergency situations," and that includes the NAFTA package of about a year ago. This tends to confirm the view of applying the law of armed conflict as a separate body of law in appropriate situations. To the extent that treaties dealing with the maritime environment do not have such clauses, and there are a few, they must be read in the light of the law of the sea conventions that include them; recalling that the 1958 High Seas Convention recites general customary norms to nonparties to any treaty, and that Convention has an "other rules" clause.

Moreover, I would submit that the traditional principles of the law of treaties, such as impossibility of performance, fundamental change of circumstances, or
armied conflict, may suspend operation of some agreements for the duration of the
conflict or other emergency situation.

Let me turn now to problems of environmental standards during conflict. Most
recently, the San Remo Manual, to be published later this year, endorsed Professor
Robertson's view, set out in one of the "Newport Papers," published by the Naval
War College, that the relationship of States not parties to a conflict and belligerents
can be stated in terms of "due regard," this phrase being taken from the 1982 Law
of the Sea Convention, Article 87, which states that high seas users have to exercise
"due regard" for ocean users rights. The idea of "due regard," or words to that
effect, was used in the 1958 and 1982 Law of the Sea Conventions to describe those
relationships. Since the 1958 High Seas Convention reflects customary law, then
presumably the idea of "due regard," at least in the law of the sea context, may be
read as customary international law.

The San Remo Manual on the Law of Naval Warfare, also applies a "due regard"
standard for protecting the environment; belligerents must exercise "due regard"
for the environment along with customary principles of military objective,
proportionality, and the rest of it. In general, I agree with both positions of the
Manual; that is, using a "due regard" formula for interfaces between the law of the
sea and the law of naval warfare, and between the law of naval warfare and
environmental concerns.

I have a couple of caveats, however. First, any general "due regard" standard
should be subject to any specific customary, treaty or general principles norm. The
Manual recognizes these in certain contexts, such as in customary general
principles of proportionality, and in the ENMOD prohibition on military or other
hostile use of environmental techniques having widespread, long-lasting or severe
effects. However, since the Manual drafters chose to stop at the water's edge, there
is little in the Manual, beyond general standards of proportionality, that would
apply to shore bombardment or air attacks from the sea that would call into play
treaty and customary rules regarding monuments, and so forth.

Second, there is no indication in the Manual as to the content of either "due
regard" standard, or whether the two are considered together as part of a general
"due regard" standard. Do you first take "due regard," for example, for rights
pertaining to the Exclusive Economic Zone and then consider "due regard" with
respect to the environment within that zone? Or, do you take it the other way
around?

In my paper I have tried to resolve these issues as follows. First, general norms,
perhaps stated in the U.N. Charter or treaties related to the law of naval warfare, such
as the Hague Convention related to shore bombardment, would "trump" any general
"due regard" principle. For example, if we consider that the Geneva Gas Protocol is
an environmental norm, because it kills horses and cattle as well as people, then under
those circumstances that Protocol would "trump" anything else. Then, of course, the U.N. Charter pursuant to Article 103, would "trump" all.

Secondly, I would argue that because some environmental principles are stated in treaties or custom whose parameters may overlap, but not coincide with the 1982 Law of the Sea Convention's geographic coverage, for example those protecting coastal forests, and mangrove swamps do not stop at the water's edge, the degree of conflict between maritime environmental protection treaties and the 1982 Convention has not yet been sorted out. Indeed, the 1982 Convention is not now treaty law for many countries, including the United States.

Third, because there are environmental concerns stated in the navigational provisions of the 1982 Convention, for which the San Remo Manual apparently would state a separate "due regard" requirement, and because of the sheer volume of these agreements, some of them bilateral and others regional, that there should be one, general "due regard" requirement, throwing both law of the sea "due regard" concerns, such as those for the exclusive economic zone and those for environmental concerns, into a common analysis. In terms of anticipated military operations, this can be done as part of the military planning process with which we are familiar, even as rules of engagement can be customized for particular operations or scenarios. Now what I am talking about today is not so much the guy on the bridge of the destroyer, but the planner before the operation begins, when the operation order is being drafted.

I would like to speak briefly of the specifics of the law of due regard. The National Environmental Policy Act (NEPA), with which many of us are familiar, has a factorial approach. I suggest that planners should follow the analogy of the Restatement (Second) of Conflict of Laws of the United States, which follows the Anglo-American common law rule of applying U.S. constitutional principles, and then a statute before any judge-made common law principles are pronounced, followed by a factorial rule of reasonableness, whose analogies are in the Restatement (Second), Section 6 and Restatement (Third), Foreign Relations Law of the United States, Section 403's elaboration which might in a way be due regard as a synonym.

My model would be: first, application of any relevant norms in the United Nations Charter analogous to application of Constitutional principles; second, any norms stated in jus cogens principles, however you want to define that term; third, any rules found in treaties, custom and general principles under traditional multisource analysis; and only then, any application of "due regard" or reasonableness as part of the proportionality test for which a tentative list is found in my paper. The list is very tentative and I sincerely invite your comments on it.

Although this formulation might seem to push "due regard" out of the picture, except for Charter norms, which must be observed in any case, and there may be a few jus cogens principles out there, there are very few traditional rules within the
various treaties impacting environmental concerns in the law of naval warfare. The result is that "due regard" or "reasonableness" factors will likely come to the fore more often than not through proportionality analysis.

I will now turn to problem areas of the future. First, the proliferation of players. Instead of just worrying about what the Security Council and the General Assembly have said, we are going to be dealing with a veritable flood of new players, including new governments and private sector organizations.

The second problem beginning to emerge is the notion that the right to a clean environment is a human rights issue. I have addressed several aspects of this problem in my paper. One is the so-called "derogation clause" which is found in some human rights conventions but not all. Another involves the application of the law of treaties, such as impossibility of performance, fundamental change of circumstances, and law of armed conflict suspension rules for treaties, and the attempted utilization of human rights theories to enforce environmental laws.

The third problem area addressed in my paper involves the carryover of land warfare concepts, particularly those in Additional Protocol I, into an analysis of environmental protection in naval warfare. I think there is a possibility of that trend continuing.

The last point I would like to make concerns the utility of a new humanitarian law treaty for protection of the environment. In my paper I argue that now is not the time to do that and I reach that conclusion for some of the reasons that have already been stated by prior speakers at this symposium.

One final comment. Jack provided us with the text of Paragraph 8.1.3, "Environmental Considerations," from the newly revised Commander's Handbook on the Law of Naval Operations. In general, I would agree with that treatment. The one dissent I would have is my reference to what I call the black letter law. That is, before you get into the due regard analysis set out in Paragraph 8.1.3, I think I would follow the model of Restatement Second, Conflict of Laws, Section 6, that if you have any black letter norms that apply directly to an issue, such as the 1925 Geneva Gas Protocol, you never get into the due regard analysis.

The foregoing summarizes my lengthy paper and extensive footnotes. My remarks, and indeed those of others at this Symposium, demonstrate that the environmental protection factor is a real issue for planners today and will continue to be so for the foreseeable future. While there are few clear navigational beacons to show the way in terms of applicable law during armed conflict at sea, there is a real opportunity to develop norms that will, at the same time, assure maximum permissible use of the Earth's oceans, while protecting the maritime environment, and assure each country's security through lawful use of force on the seas. Thank you.
Professor Nordquist: Thank you George. Our next speaker is Professor Adam Roberts.

Professor Adam Roberts, Oxford University: Rather than summarize my paper, which deals with numerous aspects of environmental damage in war—with particular reference to the 1990-1991 Gulf Conflict—I will take up a few specific issues related to the subject of the paper that have come up here in discussions.

Rear Admiral Wright clearly felt that there was some risk that environmental considerations would undermine deterrence postures. On this critically important issue, two key points should be stressed.

First, although it is sometimes discussed as if it was a new issue, protection of the environment is a classic "law of war" issue. Environmental damage resulting from war can affect innocent civilians. It can affect third countries; and, it concerns damage that may endure long after a conflict. All these characteristics mean that environmental damage is completely within the area of classic laws of war restraints.

Second, environmental damage in war is often caused by an aggressor who wants to hang on to his ill-gotten gains or to destroy them rather than return them. Hence the scorched earth policy pursued by the Nazis in many areas towards the end of World War II, especially in northern Norway; and the Iraqi destruction of the oil wells in Kuwait at the very end of the land campaign in 1991. Limiting and controlling such environmental destruction, by developing legal restraints on it, may indeed serve the cause of weakening the position of aggressors. Environmental concerns may thus be compatible with at least some deterrent purposes.

I do not want to imply that it is only aggressors that engage in environmental destruction. Yesterday someone said that he could think of no precedent for what happened in the Gulf in 1991. There is a precedent, mentioned briefly in my paper, which involved a British Colonel who in Romania in the winter of 1916-17, ran riot with a box of matches. He drove a car around destroying any oil wells he could find, as well as corn fields. He was at the same time, a British member of Parliament. The reason he did it was that Romania was about to be occupied by the Central Powers. For his services, he was awarded the Commander of the Grand Star of Romania Medal.

Irrespective of the critical importance of environmental issues in war, I agree strongly with Chris Greenwood that neither the act of destruction of oil facilities, nor every act involving environmental damage, necessarily constitutes a violation of the laws of war. The existing law leaves space for a degree of latitude in the pursuit of legitimate military purposes. While new rules in the two 1977 agreements (Additional Protocol I and ENMOD) may have some value in respect of certain particular cases of environmental destruction, or possibly certain
particular cases of use of the environment as a weapon, for the most part the issue of environmental destruction is addressed in long-standing and much simpler rules, particularly 1907 Hague Convention IV and the 1949 Geneva Conventions. These include, particularly, a rule mentioned yesterday by many people: Article 147 of the 1949 Geneva Convention IV declares that extensive destruction of property not justified by military necessity is a grave breach. The word “environment” does not appear in the other rules, but that is not necessary for them to have relevance to the environment.

Many individuals and institutions have understated the value of these older provision. At the time of the 1991 Gulf War, for example, in dealing with the matter of environmental destruction many people, including the International Committee of the Red Cross, got the balance wrong by putting slightly too much emphasis on 1977 Additional Protocol I, which, of course, was not technically in force.

Since the 1991 Gulf Conflict, the ICRC has had three meetings of experts to discuss the protection of the environment in time of armed conflict. This work has led to a number of resolutions by the U.N. General Assembly, to which I refer in my paper. The approach taken by the ICRC has been a very good one, stressing the illegality of many acts of environmental destruction under long-established rules of international law, as well as the importance of ratification of more recent conventions.

I now want to look at the actual events of the 1991 Gulf War, highlighting the issue of the failure of deterrence. There was a tendency among many before the war to exaggerate the nature of the environmental threat. Such exaggerations reflected the perennial fascination of man with apocalyptic threats such as environmental catastrophe. However, it is not necessary to warn of a global environmental catastrophe in order to justify opposition to acts of environmental destruction and despoliation. Crying of “wolf” did considerable damage. It meant that, in many minds, concern with the environment was associated with opposition to the war and to the attempt to reverse the Iraqi occupation of Kuwait.

Some of the deterrent threats made before the war by the Coalition powers were concerned with dissuading Iraq from engaging in acts of environmental destruction. The clearest example was the famous Bush letter that was not accepted in Geneva on 9 January 1991. There was a Security Council Resolution on 29 October 1990 threatening legal action in respect to Iraqi violations of Geneva Convention IV.

The Bush letter warned Iraq not to commit acts of destruction of the oil wells, yet Iraq was not deterred. Why not? Iraq was successfully deterred from engaging in other unlawful actions, in particular use of chemical weapons. One might say that part of the explanation is that the Coalition powers in the end put much less emphasis on preventing environmental destruction than they put on other forms of deterrence, including against the use of nuclear, bacteriological and chemical weapons.
I may be wrong, but I am told that not a single one of the many millions of leaflets that were dropped on Iraqi positions during the war tried to prevent acts of environmental despoliation, such as the destruction of the oil wells. One can point to other failures to press this issue hard enough. Perhaps this was because it did not involve the saving of lives of Coalition troops.

For the Coalition leaders, the prime issue was deterring Iraq from using chemical weapons. They probably felt that they could not make equal threats in respect to acts of environmental destruction. They could only use the ultimate threat in respect of one class of action. The result was that environmental destruction fell through the cracks of deterrence.

Now I will discuss a few post-war implementation questions. After the 1991 Gulf War there were no trials of the major figures responsible. The international community instead chose to follow the path of reparations which, in many respects, is unsatisfactory: it does not effectively punish those directly responsible for the acts of environmental despoliation.

The United States reported a whole range of Iraqi war crimes, including acts of environmental despoliation, to the United Nations in March 1993 in a little noted document which I happened to pick up quite by chance in the U.N. Building. However, we have not seen a satisfactory implementation of international standards. This underlines the more general point that implementation of the law of war is proving to be an extraordinarily difficult issue in the contemporary world.

In conclusion, I would just make two general observations about implementation of the laws of war in the contemporary world, both of which I think are controversial, especially to lawyers.

The first is that it is the case that there is much more of a link between the laws of war, *jus in bello*, and the law about resort to war, *jus ad bellum*, then is generally admitted. Often one State's illegal behavior in war leads to a decision by other powers to engage in hostilities as the only way of effectively stopping the offending State's behavior.

Second, the 1991 Gulf War illustrates the possibility, not extensively discussed in the literature, that the laws of war can be seen as a set of professional military standards to be applied, even if necessary unilaterally, by one side in a war. This is especially the case in coalition actions. We had reinforcement of that approach in the discussion yesterday of Operation Sharp Guard in the Adriatic. In coalition actions, there may be a special value in observing the laws of war because it is a means of maintaining support for the coalition, both within the countries involved and between them.

Professor Nordquist: Thank you Adam. I will now turn the rostrum over to our commentator, Professor Paul Szasz—Paul?
Panel Discussion

Professor Paul C. Szasz, New York University: Thank you very much Myron.

The principal speakers have given excellent presentations of the subject of our panel: “The existing Legal Framework on Protecting The Environment During International Armed Conflict.” I agree with their principal conclusions, on which I will elaborate a bit later. However, I do have one or two little nits to pick with both of them.

Professor Walker referred once or twice to the “trumping effect” of the U.N. Charter provisions over other potential environmental principles, referring to Article 103 of the Charter, which states that that treaty supersedes all other treaties, earlier or subsequent.

He refers, in particular, to Article 51 of the Charter and the self-defense provisions therein. But when one looks at Article 51, it does not create the right of self-defense. Article 51 states that nothing in the Charter shall derogate from the existing underlying right of self-defense. But it clearly does not create a right to self-defense. Therefore, it cannot be said that the Charter says that self-defense justifies anything that could not be justified otherwise. Moreover, even if that were so, I do not believe that the Charter authorizes the use of force so as to violate humanitarian considerations, anymore than Article 42 authorizes the Security Council to override humanitarian treaties. I do not think that the Security Council could order the destruction of civilians as an Article 42 action. So I consider this “trumping effect” as not really relevant or significant.

The other point I would challenge is that any distinction between the rules of naval warfare and the rules of land warfare could make a difference regarding the protection of the environment. I think that the justification for any distinctions has largely disappeared. When a U.S. naval vessel can send missiles 250 miles inland to hit targets near Banja Luka, one cannot say that different rules should apply to what may be done to a particular target, if the missiles had been fired by an airplane, or from ground artillery from 10 or 20 miles away over the Croatian border.

The rules for protecting the environment must depend on the location of the environmental damage. If the potential target is an oil tanker, it should be just as illegal to hit it from a shore battery as it is to hit it from a naval battery or an airplane. Therefore, I think that these distinctions, to the extent that they exist—and I will not argue about this because it is not a field in which I am expert—will have to be eliminated. The applicable rule should always depend on the target, and not on whether the attack comes from a naval, air or land force.

Coming now to Professor Roberts’ presentation, I also have some quibbles. One is the example he gave about the British officer in Romania torching oil wells. Two things should be said. First of all, the circumstances were that Romania was about to be taken over by the enemy and the Romanians later rewarding him for that action. This is an example of self-scorching of territory, the scorched earth policy,
mentioned yesterday, used by the Russians to scorch their own earth as they were retreating. This is not the same as scorching someone else's territory. Moreover, burning the wells was not recognized as an environmental threat then and, indeed, it was not. At that time, the CO₂ overload of the atmosphere was not nearly as dangerous as it is now.

Moreover, of course, the British officer, Colonel Griffiths, did not consider environmental matters. The Iraqis did. They made the threat that what they were about to do might cause a global winter. They knew they were doing something destructive to the environment. In fact, they thought their actions would be far more destructive to the environment than they actually were. So I think the Romanian example is not really appropriate here.

As to mere reliance on the Hague Rules, I think we can show some examples where they are insufficient to protect the environment. For instance, releasing a great deal of ozone destroying chemicals into the atmosphere will not be destroying any one's property because it cannot be said that the ozone layer is somebody's property. Furthermore, the value of the property destroyed may be quite disproportionately slight compared to the environmental damage caused. Thus, if the environmental damage caused is far greater than the value of the property destroyed, there might not be much of a case under the Hague Convention, making it necessary to find some other basis for protecting the environment.

Now I would like to briefly summarize my understanding of the state of the existing law to protect the environment during warfare. First of all, there are rules governing armed conflict, the so called humanitarian rules. Some generally prohibit wanton destruction. These go back to 1899, 1907 and perhaps even earlier. They are embodied in treaties that have almost universal participation and, in any event, are generally considered to have become solid parts of customary international law binding even nonparties to these treaties. The Hague Conventions do not specifically refer to the environment, but they do, incidentally, protect the environment if they are observed.

On the other hand, there are other humanitarian law instruments that are more recent. These include the ENMOD Convention and Additional Protocol I to the Geneva Conventions. Each contain specific environmental provisions, but have not received all that many ratifications. Because of the paucity of ratifications, they cannot be said to have become part of customary law. Consequently, they do not bind any countries, except those parties to the treaty. As we know, in the 1991 Gulf War, Iraq was not a party to many of the relevant treaties, while the United States was not a party to Additional Protocol I. Therefore, it was difficult to rely on the environmental principles set forth in those treaties.

Secondly, there are the treaties and norms relating generally to environmental protection, such as those expressed in the 1982 Law of the Sea Convention and the oil dumping and oil pollution conventions that originate with the IMO, as well as
the UNEP-sponsored 1978 Kuwait Oil Pollution Protocol to the Regional Maritime Environment Convention that covers the Persian Gulf. As to these, the problem is that they do not indicate whether or not, and to what extent, they are meant to apply during an international armed conflict.

Finally, there are among the environmental instruments, some that specifically address the environment in time of war, such as the 1982 World Charter of Nature and the 1992 UNCED Declaration. Unfortunately, these are simply declarations of high-level international plenary bodies, and thus really constitute only the softest of soft law. At most, they may indicate what the future law might be. As to solid law, we must simply go back to the Hague Conventions.

Following the Gulf War, with its major and deliberate environmental destruction, there was a flurry of legal stock-taking to see what had gone wrong and to determine whether the existing law was good enough. Greenpeace and others proposed the formulation of a fifth Geneva Convention. Others suggested the establishment of an International Green Cross to protect the environment. Fairly quickly, these initiatives were taken up by the International Committee of the Red Cross (ICRC) which, of course, was concerned to protect its own unique status as the champion of humanitarian law—as expanded through Additional Protocol I to include some general environmental concerns. It was also taken up by the U.N. General Assembly, which rather cautiously decided to give the ICRC the lead to see what it could produce.

Within two years, the Red Cross produced a comprehensive report on the subject (set out in U.N. Document A/48/269 of 29 July 1993), which the General Assembly then substantially endorsed. I would commend that document to anyone interested in the subject matter of this panel, as it is very complete. The report also summarizes the frantic legal activity starting with the spring of 1991. It concludes that the time was not opportune for codifying and/or developing this area of the law, but that a number of remedial and other measures should be taken to patch up and reinforce the existing archaic regime. Many of the proposals it discusses were first articulated at the now notorious 1991 Ottawa Conference.

Actually, if one compares the Red Cross meetings with other related conferences, one finds many similarities. This is because the experts convened by the ICRC are likely to be the same persons who participated in previous and subsequent conferences on the same subject.

Having been initially amongst those who advocated a reformulation and expansion of the existing laws through a new treaty, I would now like to confess and concede the force of the arguments against such a project. My principal reason for this retreat is that stated yesterday by the Legal Adviser to the State Department, Mr. Harper. At present, governments would simply not be ready to assume any serious new obligations in this field. Any attempt to formulate a new treaty at this time would likely be regressive and, thus, counter-productive.
As the Legal Advisor to the 1979-1980 U.N. Conference on Inhumane Conventional Weapons, I saw the extent to which the military advisers jealously opposed the imposition of any restrictions that could inhibit military actions their forces might conceivably engage in, even though such restrictions would, if observed, greatly protect the troops whose commanders they were representing. I am afraid the same thing would happen if, at this stage, in this atmosphere, an attempt were made to convene a conference to improve the law protecting the environment during warfare.

This having been said, I would like to summarize a number of proposals, some of which are set out in the 1990-93 ICRC report, for improving the current state of the law. I will first direct my suggestions to the state of actual combat, on which we seem to be concentrating most, but will also cover, as was suggested in our second panel yesterday, the pre- and post-combat phases. With respect to the combat phase I would suggest that the following be done.

First, there should be a campaign to promote adherence to the existing treaties, particularly to Additional Protocol I and to ENMOD, so that they cover substantially all countries in the world.

Second, an attempt should be made to clarify the existing norms, particularly the terms “widespread,” “long-lasting” and “severe,” which appear disjunctively in the ENMOD Convention and conjunctively in Additional Protocol I. It is understood that these terms were meant to be different in the two conventions, as shown by the respective travaux.

The ICRC suggests that the committee of experts that may be established under the ENMOD Convention, straighten out these differences. I have some doubts about that suggestion because it would likely be one-sided.

Most important is to clarify the status of environmental treaties during armed conflicts. These include general environmental treaties, as well as the environmental provisions of the Law of the Sea Convention, the oil dumping rules, and regional seas conventions. First of all, during a status of war, what is the state of these conventions as between parties to the conflict, assuming that both are parties to the treaty in question? And secondly, what is the status between such parties and neutrals? In that connection, one must consider that during wartime certain treaties are suspended as between the parties to the conflict, and also, that certain rules may simply be inapplicable to a conflict situation.

On the other hand, one should also consider that some of the obligations established by environmental treaties, in fact, all those deriving from multilateral treaties, are *ergo omnes* obligations. Just as two parties bound by such an *ergo omnes* obligation could not, by agreement between themselves, suspend that obligation, why should they be able to do so just by going to war with each other?

Turning now to the ICRC proposal for the wide publication of the environmental rules relating to warfare and, in particular, the formulation and
distribution of manuals on environmental protection during combat. Indeed, the 1993 ICRC report has annexed a 3-page set of guidelines showing how such a manual should be formulated. That enterprise should be undertaken quite seriously. It is one of the most important measures, because, as was pointed out yesterday, all rules are meaningless unless they are known and understood at the level of the commanders who will implement them.

There is a need to establish a supervisory organ to assist the parties in implementing these provisions during wartime. One candidate, not necessarily the best nor the only existing one, is the International Fact-Finding Commission established pursuant to Article 90 of Additional Protocol I.

Turning now to the pre-combat phase, there are, first of all, the rules restricting the right to engage in military conflicts and those designed to inhibit preparation for war. In this connection I would like to call attention to a little known General Assembly Resolution on the “Historical Responsibility of States for the Preservation of Nature for Present and Future Generations.” Therein the Assembly noted that the continuation of the arms race, including the testing of various types of weapons, especially nuclear weapons, and the accumulation of toxic chemicals, adversely affect the human environment and damage the vegetable and animal world; it therefore proclaimed the historical responsibility of States for the preservation of nature for present and future generations and drew the attention of States to the fact that the continuing arms race has a pernicious effect on the environment, and reduces the prospects for the necessary international cooperation in preserving nature on our planet.

I do not really think that this quite sensible statement is of much use. Nevertheless, it should be emphasized that simply preparing for war is itself apt to be environmentally destructive.

A more pertinent and practical rule, regarding the development of new weapons, is Article 36 of Additional Protocol I. It is rarely mentioned, but I consider it important. Article 36 reads as follows: “In the study, development, acquisition or adoption of new weapons, means or methods of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or in all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.” In other words, one should not develop weapons whose use is prohibited for humanitarian reasons. Though this caution was not addressed to environment consideration, but, is formulated within the context of general humanitarian rules, it can equally apply to environmental restrictions.

In this connection, I would like to call attention to environmental impact assessments and to the precautionary principle. Neither of these makes any sense in a combat situation. But in a non-combat situation, when new weapons are being
prepared, it makes eminent sense to make such assessments and even to apply the precautionary principle.

Finally, as to the development of targeting rules, to the extent that these are made at the policy level in the Pentagon, there is an opportunity to consider environmental principles that a company commander or battleship captain would not necessarily be able to take into account. For instance, the point made yesterday regarding how to stop an oil tanker. Do you shoot at it, or do you not shoot at it. That decision should really be made back home and should be conveyed to the captain of the blockading vessel.

As to the post combat situation, I make the following suggestions. First, it might be useful to establish an international fact finding body to determine after every such conflict what happened from the environmental point of view. We are four or five years past the Gulf War and there are still questions about who did what to whom. If there had existed some sort of international fact finding organization it might have been used for this and other conflicts.

Second, is the liability of States, which might even relate to damage that was lawfully inflicted. Thus, even if it is concluded that in a war situation a particular oil pollution convention does not apply, if a State in the course of armed conflict pollutes an area, there is no reason why that State should not pay for the clean-up or for whatever other damage resulted. Why should a State be allowed to cause damage and then not compensate neutrals or innocent parties?

Third, criminal liability. I think we now have a much better basis for this than we had at the time of the Gulf War. Since then, two war crimes tribunals have been established and the General Assembly is well on its way to establishing an international criminal court. In this regard, I might call attention to a Mock International Criminal Tribunal conducted by the American Bar Association in 1991, to try Saddam Hussein on a variety of charges, including for environmental war crimes. It was an interesting exercise.

Fourth, is the question of the remnants of war. I would like to call attention to a General Assembly Resolution, again not well known, in which the Assembly states that it was: “Convinced that the responsibility for the removal of the remnants of war should be borne by the countries that planted them, recognizing that the presence of the material remnants of war, particularly mines, on the lands of developing countries seriously impedes development efforts and causes loss of life and property.” Further, it regrets that no real measures had been taken to solve the problem of remnants of war, despite the various resolutions and decisions adopted by itself and by the Governing Council of UNEP. Finally, the Assembly reiterated support for the just demands of the States affected by the implantation of mines and the presence of remnants of war on their lands, and called for compensation to be paid by the States responsible for leaving those remnants. This is an important subject and ought to be pursued further. You may know that a few
months ago, in June 1995, a meeting on the removal of mines was sponsored by
the United Nations to address this problem.

These are the proposals that I would make for protecting the environment from
the effects of international armed conflict. Thank you Mr. Chairman.

Professor Nordquist: Thank you. Our Commentator has, I am sure, provoked a
couple of specific responses from our speakers. What I would like to do, as he has
raised so many fundamental points, is to ask, first, that the audience be given an
opportunity for questions and comments.

Vice Admiral James H. Doyle, Jr., U.S. Navy (Ret.): Professor Szasz may have
retreated, but it is probably only a millimeter. You have raised a number of issues with
which I take issue. We do not have all day, however, so I will focus on just one or two.
I think to pursue the clarification of trying to find the true meaning of “severe,”
“widespread,” and “long-term” is a futile exercise and will get us nowhere.

Actually, I think the standard that we have in both the San Remo Manual, which
relates to military necessity, and the one that Professor Grunawalt passed out the
other day, is a much more realistic standard. I would submit that it will give much
more protection to the environment in specific situations than any effort to try to
find the true meaning of “widespread,” “long-term,” and “severe.”

I would, as a matter of fact, like to see Additional Protocol I eliminate that
standard because I think it is meaningless. I think also that I must defend the
military against the allegation that we are bound and determined to prevent any
modification or improvement in the laws of war. I think from the speakers that
we have heard, you will find there is a great deal of difference between assessing
the context and situation and the taking of action as a policy matter, rather than
an abstract legal principle. I believe that it has been shown that there is a much
greater appreciation of the environment, and the necessity to protect the
environment to the maximum extent, during armed conflict.

Professor Szasz: I will respond very briefly. On the point of pursuing better
definitions of “widespread,” “long-term,” and “severe,” this is really not my
suggestion. It is one that the ICRC repeated several times, even in its latest report.
The General Assembly also endorsed the idea that such clarification should be
pursued. I, myself, share some of Admiral Doyle’s doubts on that point.

I can say that at the 1979-1980 Conference I really saw the military advisers
absurdly defensive of some weapons that were clearly inhumane and that the
military currently clearly did not want to use, merely because it was conceivable
that in the future some situations might arise in which such weapons might be of
some use. I do not want to make a general accusation of all militaries at all times,
but it is my feeling, as I believe it also was of Mr. Harper, that if you now tried to get a more extensive treaty, the results would probably be counter-productive.

**Professor Michael Bothe, Johann Wolfgang Goethe University, Frankfurt, Germany:** I have two comments. First, the sea-land dichotomy. I completely agree with Professor Szasz that what counts is the target. As far as targets on land are concerned, the "due regard" rule of the law of the sea is not applicable. The "due regard" rule of the law of the sea is really a development of the classical law of the sea in circumstances where you had competing users making war and peace over navigation rights, as a kind of competing use, which have to be some how accommodated. That is the basic justification of the "due regard" rule.

This is not applicable to any damage caused on land. As far as damage on land is concerned, which may be caused by shooting or by releasing oil from a tanker, it is a good old rule that neutral territory is inviolate. This means a protection of the neutral against the effects of war. The fact that two countries make war between each other does not give them any right to cause damage to neutral territory. The relationship between the parties to a conflict and neutral States is governed by the laws of peace. There are exceptions, mainly in the field of naval warfare. However, there is no rule of customary international law permitting States to cause collateral damage to neutral territory.

My second point is the question of "new law." I think what all the speakers have very convincingly shown is that this is a good subject for discussion. Why is this a good subject for discussion? Because there are uncertainties to say the least. It would be quite an appropriate purpose of new law to resolve those uncertainties. The main argument I have heard against the development of the law yesterday, and this morning, is that, for the time being, it is not advisable to try to get new laws because that would be regressive and because States do not want to undertake additional obligations and so on. Granted that may be so, but the fact that States are reluctant to accept something does not necessarily mean that it is not necessary to try.

We can then surrender to the objective necessities of universal diplomacy and the like, but there is no reason to be really content with this situation. That being so, I am, of course, very much tempted by Professor Szasz's approach which asked; "if we cannot achieve a treaty which might be desirable, what can we do in the meantime?" I agree that there are a number of steps which can be taken for the purpose of clarifying the law by whatever means. I think the military manuals are a good place to start in addition to consultation between countries concerning rules of engagement, in certain situations. There is also the approach of utilizing conferences of these parties to environmental treaties. In reviewing those treaties, pay more attention to the question of what happens within the scope of the treaty in the event that an armed conflict breaks out. Thank you.
Professor Nordquist: Thank you. May I ask Professor Walker if he would respond perhaps to the first point you made, then Professor Roberts, maybe you can comment on his second point.

Professor Walker: In discussing “due regard,” I come back to my first disclaimer. What I was talking about primarily was the law of the sea, the law of naval warfare, and the environment.

Professor Roberts: On Professor Bothe’s second point, about the desirability, or otherwise, of a new convention, I think it is mischievous of him to imply that those who are skeptical about the value of a new convention are skeptical exclusively, or even largely, on the grounds that States do not want it, or are reluctant to embark on a new negotiation. There is another ground, which is that nobody could quite see the desirable shape of such a new convention or how to make a serious advance on the existing treaty provisions.

Professor Ivan Shearer, University of Sidney: I just want to make two or three very brief comments. The first on Professor Walker’s paper, which I have not yet read, but the summary was very interesting. I want to comment on the apparent disagreement between Professor Walker and Professor Szasz over the nature of Article 51 of the U.N. Charter as a kind of a “trump.” Maybe the true explanation is that the law of armed conflict, including the right of self-defense, is *lex specialis*, viewed against the *lex generalis* of environmental and other laws that apply in peacetime.

So one of the things we are looking at here, I think, is to what extent environmental protections are incorporated in the *lex specialis* of the law of armed conflict through the principles of military necessity and proportionality.

The second comment that I want to make concerns Professor Roberts’ reference to Geneva Convention IV of 1949, Article 147. Several people have mentioned this. I am sure he did not mean to do so, but it came out as a general rubric against environmental destruction. Of course, it has to be remembered that that provision relates only to the duties of an occupying power vis-a-vis civilians. Now, that, of course, was the situation in Kuwait. It leads to an interesting question of whether there is a shift from the duties that Iraq owed Kuwait under Article 147. Is there a shift once the occupying power begins defending that territory against the attempts by the lawful owners to reoccupy it? Does one then move into a different world where Article 147 does not apply, but some other rules do? I just throw that open for discussion and would be interested to see if anybody has an explanation for that. The background of Article 147 is to be found in the Hague Conventions,
which refer to the occupiers as usufructuary. So, I think there is an unresolved conflict there.

Finally, I wonder whether Professor Roberts really thought it was a mistake for the allies not to have specifically warned Iraq against environmental damage. What else should we have warned him not to do? We were dealing with someone who was not entirely rational. At least we thought he was not entirely rational. To give him a whole list of things that he should not do might only put ideas into his head.

Thank you.

Professor Nordquist: Thank you very much. We have to give our panel an opportunity to respond to what has been said to this point.

Professor Roberts: Both those points are well taken. On the first, within the limits of time available, I was using Article 147 of the Geneva Convention as an example of the fact that there are long-established provisions which cover many, but I would agree with those who have said not necessarily all, cases of environmental destruction. You may be right that at a time when the occupation of Kuwait was ending and a struggle for reconquest of Kuwait was beginning, you could argue whether the applicable law was that relating to occupied territory, or that relating to armed conflict. There are provisions, including those in the Hague Convention of 1907, which would govern the situation of armed conflict. So one does not rely on one provision alone.

As regards the proposition about putting ideas in Saddam Hussein's head, I think, unfortunately, there were quite a lot of ideas there already. The Coalition did specifically warn Iraq about environmental destruction, or at least about destruction of the oil wells, in George Bush's letter of 9 January 1991. So there was a very clear warning. It is a question of judgement whether that letter could or should have been followed up. A number of other matters were successfully pursued in the leaflet campaigns including the issue of non-use of gas and the very successful campaign persuading Iraqi soldiers that if they left their vehicles they would be a great deal safer than if they stayed in them. To me, it is still something of an oddity that there was no effort made to persuade officers within Kuwait, who were going to be ordered to carry out the task, that the destruction of the oil wells would be a war crime. That simply was not spelled out with clarity to the people who counted.

I agree that the threat of destruction of the oil wells probably could not have been made a central issue to the same extent as the threat of use of gas. But nonetheless, it would not have been putting ideas into Saddam Hussein's head. As Bill Arkin reminded us yesterday, he had explicitly planned this oil destruction from August 1990 and had publicly threatened the Coalition with it in September 1990.
Professor Szasz: I would like to comment on the issue of Article 51. I do not doubt it is *lex specialis*, but all I was saying is that Article 51 does not create a right of self-defense. Therefore, U.N. Charter Article 103 does not give self-defense a higher status than other activities of States. Self-defense, and all that goes with it, has to stand on its own legal feet. It can not rely on the Charter to exempt it from rules governing other military actions.

Dr. Hans-Peter Gasser, International Committee of the Red Cross: I would like to say a few words about where the ICRC stands now and what we have on the program. I have a copy of the 1993 report mentioned by Professor Szasz. If the organizer would be so kind to Xerox it, it could be at the disposal of everybody.

In 1993, many points were brought out which have already been mentioned. First, the relation between the ENMOD Convention and Additional Protocol I. We are not really pursuing that matter and we leave it to others. No action is planned in this respect.

Second, the applicability of armed conflict to international environmental law. There is no question that general environmental law continues to be binding in armed conflict. There is indeed a necessity to clarify the law of the subject.

Third, the protection of the environment and restrictions on the use of mines. The mines issue, which generally has not been directly associated with the environmental question, of course, is actually very much associated with it. As you know, next week the Review Conference of the 1980 Conventional Weapons Convention meets in Vienna. The ICRC is on record for having called for a complete ban on anti-personnel land mines for humanitarian reasons. But also, the environment is being used as a kind of vehicle which must also be protected in order to protect human beings which move around in the environment. Therefore, there is the proposal to put a complete ban on anti-personnel land mines. Most governments do not follow that line of thinking. However, we remain absolutely convinced that with time, the military will understand that such anti-personnel land mines should be outlawed. It is estimated that there are about a hundred million land mines now scattered all around the world. Therefore, action on this issue is expected.

The issue of the protection of natural reserves and parks has been handed over to UNESCO. The protection of the environment in time of non-international armed conflict is an important topic. We attempt to deal with that issue through the distribution and use of manuals. Manuals should be used in all types of international armed conflict without making any difference between the two categories. Distribution of manuals is high on our priority list. With regard to the rules for the protection of the environment, this will be a discussion topic tomorrow where I will present some proposals.
Protection of the Environment During Armed Conflict

Utilizing the Article 90 Fact Finding Commission, as a means to monitoring compliance, is to be commended. Finally, dissemination being the beginning and the end with respect to furthering respect for humanitarian law.

I have just one comment regarding Professor Roberts' statement that any violation of the rules regarding the environment is also a violation of some other rule. He seems to place more emphasis on the other rule and not so much on the violation of the environmental rule. Specifically, he felt that ICRC and others have put too much emphasis on the environmental side in the case of the Gulf War. Well, I wonder whether placing so much emphasis on the property approach is so satisfactory. If I look at the Gulf Report of the United States Armed Forces, under the heading of Environmental Terrorism, the text seems to indicate that the environment is not important, it is just a question of property. I do not think this is really a good statement of where we stand. There are so many problems with regard to the environment. I think it is important to put forward, and refer to, environmental rules and Additional Protocol I, even though some other provisions may be affected. Thank you.

Professor Nordquist: Thank you. I am going to ask the panelists to keep their rounds chambered and ask Professor Green, Dr. McNeill and then, Professor Shearer, to respond and then close the list unless anyone is really moved. Professor Green.

Professor Leslie C. Green, University of Alberta: All I will say about Ottawa at this stage is that I have the feeling from a number of the comments that have been made that there is a complete misunderstanding of the purpose of the Chairman's concluding statement at that Conference. I wish they would go back and look again and see why the Chairman made the statement he did.

With regard to Article 51 of the Charter, generally, I think we ought to remember that the purpose of the Charter was to preserve the peace. As such, I think Professor Shearer gets close to it when he points out in his lex generalis, "We must be very careful not to quote the Charter, not to keep going back to the Charter once we are in a stage of armed conflict." The law of armed conflict is very much lex specialis. There is nothing in lex generalis that forbids a resort to lex specialis, particularly when the lex generalis in question is related to an entirely different type of issue, the preservation of peace, the prevention of conflict. Therefore, the debate on Article 51, whether it creates a right or recognizes a right, I submit, becomes completely irrelevant.

In regard to the problem of new law. It is very nice to talk about new law. It is a lovely ideology. It gives a very good feeling to the lawyers who may be involved in the discussion. But in too many cases, particularly in recent years with this new political correctness that we have on an international level, where we all have to
bow down to the views of the developing countries come what may, I have the feeling that too often when we are talking about “new law” we find that the developing countries, bless them, do not like the “old law.” In too many cases, we are likely to go backwards rather than to go forward. That was very clear over the issues in the Law of the Sea Conference with regard to no longer recognizing the territorial sea as it had been understood for centuries.

Again, the other thing that arises with regard to the new law is very much like what happens whenever the U.N. is discussing a humanitarian prospect. We all love humanity, so long as we do not have to do anything about it. Therefore, we get to the point in the Assembly that when there is a humanitarian issue being considered, we go by consensus, which saves any of us from saying “no.” I fear that when we talk about “new law” we may get a new law that nobody wants anyway and nobody is going to do anything about. I always have the feeling that, from the point of view of the impact on the public, a new law that we know nobody is going to do anything about just brings the whole law into complete disrepute.

Dr. John H. McNeill, U.S. Department of Defense: There are many wonderful targets of opportunity here that could be engaged, but I would like to confine myself to a comment and to a question that have both arisen out of our discussion, particularly with respect to what Professor Bothe said about warring parties not having the right to cause damage to neutral territory. That in itself, I think, was engendered by remarks of Paul Szasz, who referred to a number of General Assembly resolutions and perhaps others calling upon the warring parties, the States that have participated in a conflict, to collect their own remnants, if I understood him correctly.

I think there is something very important that is missing from that approach which is that there seems to be no recognition of the fact that in many conflicts today, and particularly in the recent Gulf War, there was an aggressor. I fail to see why States exercising the right of self-defense against an aggressor should be penalized for, in effect, protecting their own survival from what an aggressor has perpetrated upon them—they, being the innocent victim. I certainly hope that there is not a trend that we are going to see that treats everyone exercising the use of force, whether legally or illegally, the same when it comes to damages. I am not sure that the standard of damages should be that suggested by Professor Bothe, that warring parties should somehow be responsible for any and all damage to neutral territory. I know it has been suggested that even affects caused by ships at sea, having a conflict on the high seas, might have an affect on the biosphere and that they should be penalized financially for engaging in that act.

Fortunately, I think that is still a ways off, although pending litigation may prove me wrong. I would like to focus on this, and I wanted to ask Professor Szasz, particularly, if Resolution 687—which specified that Iraq should be financially
liable for the damage it caused and which also sets up the U.N. Claims Commission to look at damages, including environmental damage and, basically, all damages that flow from aggressive acts—is not the correct way to look at the problem.

**Professor Szasz:** In response to that point, I think Resolution 687 is correct. It says that, ultimately, Iraq will have to bear responsibility for the damage it caused. It does not quite answer the question of whether, since Iraq is not paying, somebody else who caused damage should also pay for the damage to a neutral. Now, of course, this military action was a bit different, this was a U.N.-sanctioned action and, therefore, one could say that the entire world community was lined up against Iraq. Those who simply acted as instrumentalities but caused damage, should not, therefore, themselves have to carry more responsibility. What I was saying before is that, as between two combatants and a neutral, if a neutral is damaged, there is no reason why even the combatant who is right should not initially reimburse the neutral even though the former might be able to recover ultimately from an aggressor.

Let me make one more point with respect to Professor Bothe's suggestion. What I said was that not only do the rules of land targeting apply where the target is a neutral, but also where the target is the other combatant. The rules as to land targeting require combatants to follow the rules of Geneva Convention IV so as to protect civilians, rather than being bound by any “due regard” principles of naval warfare. So the prior suggestion mentioned, which I did not really contemplate, is the target State being the other combatant.

**Professor Roberts:** In answer to Dr. McNeill, I am slightly worried about what he said concerning the significance of the war being against an aggressor, because it does still remain, as he well knows, that the basic rules of the law of war apply equally to all combatants during the course of the war. It may be that questions of reparations subsequently are a different matter. But in the course of the war, it is still the case that, for practically all purposes, the law has to apply equally to all belligerents.

In response to Hans-Peter Gasser, I do not want to be depicted as saying, in connection with the protection of the environment, “forget Additional Protocol I and just stick to ancient rules.” That is not my position. My position is that, yes, indeed, there is an important principle enunciated in Additional Protocol I in respect to protection of the environment. However, it does set a very difficult standard to meet. It is not a case of abandoning Additional Protocol I. It is a case of looking, as well, at the provisions of earlier treaties; at other provisions within Additional Protocol I which cover, better than any previous treaty, the issue of accuracy in targeting; not destroying civilian objects, and so on and so forth. So
it seems to me that there are other provisions which are highly important. I cannot resist throwing that in at the end of the session when nobody can directly reply.

In Britain, I think, we have interpreted the experience of the Gulf War as reflecting rather positively on Additional Protocol I, which contributed to the decision of the U.K. Government to ratify the Protocol. The ratification will actually be implemented imminently, but all the legislation is through. I know that there are many other issues in the United States concerning whether or not we want to ratify besides the issue of our experience in the Gulf War. Our interpretation of the experience, and I think some U.S. interpretation of the experience, is that Additional Protocol I does enunciate a number of very useful rules in clearer form than in other treaties and, therefore, is worth pursuit.

Finally, I think we have had some tendency in the discussion to find what I would call “lawyerly solutions to para-political” problems. I do not believe that simply setting up another international fact finding commission or trying, by some new means, to have an international criminal tribunal look at the problems of cases such as the Gulf War, really addresses the fundamental problem which is that we live in a world of States. This same problem is arising in respect to the former Republic of Yugoslavia, where there are very difficult problems of determining whether or not one can effectively bring violators of the law of war to court. It is a problem that has preoccupied governments throughout this century and never more so than at present. I think that some times we have to admit that there may not be solutions to these problems and, certainly, there may not be “lawyerly” solutions to these problems in the form of tribunals or courts which are capable of really meeting the need that is undoubtedly there.

Professor Walker: Two quick thoughts. The first is that some of the concern is about potential “liability of innocent States” in terms of punishing an aggressor. I can see a situation where a response may be totally disproportionate, although the position taken is whether there was “due regard.” If calculated in proportionality, the due regard principle will take care of some of those problems. The second point is that we have to find out about the relationship of the environmental protection conventions such as the 1982 Law of the Sea Convention and regional conventions. I reiterate my paper’s point that the other rules and principles take care of all that. Thank you.