

## Comments on George K. Walker Paper State Practice Following World War II, 1945-1990

By  
L.C. Green ★

It is not the purpose of these remarks to comment on the various conflicts considered by Professor Walker. Rather, they seek to draw attention to general problems relating to naval warfare law raised by the paper.

Professor Walker rightly draws attention to the varied sources or agencies from which evidence as to the rules on international law may be drawn, and there can be no doubt that the rules of armed conflict may be drawn from similar sources, bearing in mind in this context the significance of the Martens clause with its reference to “usages established among civilized peoples, the laws of humanity and the dictates of the public conscience”.<sup>1</sup> While it is true that Hague Convention IV relates to warfare on land, it cannot be denied that these same basic principles are of general application, regardless of the theatre involved. This view finds some support in the Preamble to Convention IX of 1907 relating to Bombardment by Naval Forces,<sup>2</sup> which expressly refers to “the desire to serve the interests of humanity and to diminish the severity and disasters of war.”

Care must be taken, however, not to exaggerate the significance of analogies, for, as Judge Badawi Pasha has pointed out,<sup>3</sup> “in international law, recourse to analogy should only be had with reserve and circumspection.” Caution must therefore be exercised in applying the rules which have been enunciated for one dimension of activity to another, unless the rules in question are of so general a character that it is obvious that they are intended to apply to armed conflict generally, regardless of whether it be conducted on land, at sea or in the air. This is particularly important in relation to Protocol I which expressly states in Article 49 that “the provisions of [the] Protocol with respect to attacks apply to all attacks in whatever territory conducted, including the national territory belonging to a Party to the conflict but under the control of an adverse Party.” This latter reference to ‘territory under the control of an adverse party’ clearly implies that it relates to land. Moreover, the Article goes on to state that its “provisions . . . apply to any land, air or sea warfare which *may affect the civilian population, individual civilians or civilian objects on land*. They further apply to *all attacks from the sea . . . against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea*. . . . (emphasis supplied)<sup>4</sup> Clearly, therefore, the Protocol is only of direct effect insofar as naval warfare is concerned when that warfare is directed against the land. As to warfare at sea, whether it involves belligerent or neutral shipping or nationals belonging to an adverse party or to

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a neutral power, it is the traditional customary law, plus the relevant Hague Conventions that govern, and the Protocol provision "has no application to ship-to-ship . . . combat."<sup>5</sup> The Protocol, therefore, is only relevant to the extent that it reproduces customary rules of warfare which may be regarded as of a general or fundamental character. Thus, rules regarding proportionality would be relevant,<sup>6</sup> for "[t]he principle of proportionality is a general principle of the law of armed conflict which has found its expression in such provisions as the prohibition of 'unnecessary' suffering" in Article 23(c) of the Hague Regulations annexed to Convention IV.<sup>7</sup> These comments apply even more emphatically to the Restatement (Third) Foreign Relations Law of the United States,<sup>8</sup> which does not purport to deal in any way with the law of armed conflict other than somewhat superficially in regard to war crimes. Any comments made in the *Restatement* concerning the registration of ships or any other matter can hardly be said to "provoke a[n]y spillover effect into the law of armed conflict."<sup>9</sup>

In his paper, Professor Walker has excluded any consideration of sea to air engagements, whether directed against enemy or neutral aircraft. However, it should be noted that civil aircraft are as much "transports" as are merchant ships, while NWP 9 constantly coalesces its comments regarding both seagoing vessels and aircraft. It is perhaps proper, therefore, that at least some comment be made with regard to the targeting of civil aircraft. There can be no question that if there is ample evidence to indicate that a neutral aircraft is so assimilated to the forces or service of an adverse party, it is as amenable to attack as is a neutral merchant vessel in similar circumstances. However, the restrictions which traditional naval warfare law imposes with regard to the safety of personnel would not be normally applicable if such aircraft were attacked. The problem of a civil aircraft belonging to a belligerent arose in its most glaring form in relation to the attack upon an Iranian civil aircraft by the *USS Vincennes* during the Gulf War. This is perhaps not the place to consider whether the United States was in the position of a belligerent during that conflict and, if so, the identity of its adverse party. The fact that Captain Rogers considered himself to be under attack and the fact that United States naval forces were engaged in combat with Iranian vessels on occasion enables us to comment at least briefly on this particular incident. This attack, combined with warnings directed also to neutral aircraft in the vicinity of U.S. naval craft, while flying in an internationally recognized scheduled airline, emphasizes the importance of careful attention not only to rules of engagement, but also to the factual situation, proper reading of technological information and, especially, the maintenance of proper training and discipline on individual vessels. The issue of wrongful determination of the intention of an aircraft in the vicinity of operations must, in the first instance, be the responsibility of the naval commander, provided, however, that he exercises all reasonable precautions that may be expected of one of his rank when in action. This is particularly important in view of the provision in NWP 9<sup>10</sup>

that "civilian airliners in flight are subject to capture but are exempt from destruction . . . unless at the time of the encounter they are being utilized by the enemy for a military purpose . . . or refuse to respond to the directions of the intercepting warship." It is also probably required that the naval commander should be reasonably certain that his "directions" are received and understood. It is recognized that this may put a heavy burden upon the naval commander in question, but it would appear, since such aircraft are *prima facie* immune from destruction, that the burden of denying immunity or protection rests upon him.

Although, as has been pointed out, Professor Walker has drawn attention to the problem of proportionality, which may be said to underlie the whole of the law of armed conflict, and although he comments on it in the light of Protocol I,<sup>11</sup> it is suggested that he perhaps over-extends the analogies from land warfare with which the relevant sections of the Protocol deal. It is further suggested that he has not fully discussed the problem as it may arise in actual naval combat. A merchant vessel which may well be a legitimate target in the circumstances may nevertheless have to be granted immunity from attack on account of the disproportionate damage that would ensue, particularly to the environment or of a long-term character, if an attack were launched. This issue could easily arise if the vessel in question were an oil tanker or, even more seriously, nuclear-powered. He bases his approach to this issue on the attacker's intent to destroy the vessel, without paying sufficient attention to the direct and reasonably anticipated consequences of such an attack.<sup>12</sup> In such a case it might well be that, regardless of the legitimacy of the target, a naval commander might be required by his rules of engagement to consult with his political masters whether an attack should be undertaken. The effect of the destruction of such a vessel, particularly if that effect could result in damage to a neutral coast, might be so disproportionate to the advantage to be gained from a sinking that a commander would be well-advised, if he is unable to capture the vessel, to allow it to continue on its way.

A further problem arises concerning attacks on vessels carrying food, or, as in the Korean war, fishing vessels—a problem that would be aggravated if the adverse party was essentially a fish-eating state. While it is true that in customary law food may be considered as conditional contraband, new attitudes with regard to proportionality and the rights of non-combatants would require greater care than may have been necessary in the past. Once again a commander might have to weigh with care the effects of a sinking upon the civilian population as distinct from preventing a cargo of food that might be intended for the armed forces of the adverse party. The fact that NWP 9 is silent on the status of even coastal fishing vessels should not be taken to mean that such vessels belonging to nationals of the adverse party are automatically to be considered as legitimate targets either for sinking or capture, although if there is sufficient economic intelligence available to suggest a reasonable conclusion that the food is in fact

intended for the armed forces there would be justifiable grounds to seize the vessel and submit it to prize jurisdiction. There is strong ground for arguing that, regardless of technical and similar changes that have taken place in recent years, the law remains as it was settled by Hague Convention XI<sup>13</sup> in 1907, until such time as that Convention has been revised. It should be remembered that at Nuremberg the Tribunal took the line that “by 1939 [after a mere thirty years the] rules [laid down in Hague Convention IV] were recognized by all civilized nations as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter” establishing the Tribunal.<sup>14</sup> The Preamble to Convention XI states that “it is expedient to lay down in written mutual engagements the principles which have hitherto remained in the uncertain domain of controversy, or have been left to the discretion of Governments.” Perhaps even more significant was the attitude of the Tribunal with regard to the London Naval Agreement of 1930<sup>15</sup> and the 1936 Protocol<sup>16</sup> concerning unrestricted submarine warfare against merchant ships. The fact that both sides had indulged in such warfare did not remove guilt from Doenitz and Raeder<sup>17</sup> in respect of having ordered such breaches of the law. The law remains despite naval practice, but punishment for breaches in such circumstances may be discounted.

In this regard, it must be emphasized that international law is the product of state practice as evidenced by custom or by agreement in treaty. However, the mere fact that a treaty has not been amended or denounced does not mean that it remains declaratory of the law when belligerents have ceased to comply with its provisions. Such behavior may indicate that the treaty has fallen into desuetude and that the contrary practice, particularly when pursued by both sides without protest or attempt to indict an adverse party with criminality, is a better indication of what they consider acceptable or legitimate.

Professor Walker suggests<sup>18</sup> that “[a]n inference could be made that the negotiators [of the 1949 Geneva Convention on the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea<sup>19</sup>] would not have included [in its protective provisions] all merchant seamen, including those aboard enemy merchant vessels, if they did not feel that all such ships were subject to attack, which had become the norm during World War II.” It could perhaps even more easily be inferred that it was because such conduct had become the norm during World War II, the draftsmen sought to protect such merchant seamen and to emphasize that if they were the victims of unlawful attacks they were still to be protected.

While it may be true that the humanitarian law of armed conflict is part of the law of human rights, it may be submitted that the instance cited in the Walker Report<sup>20</sup> concerning “a war of genocidal experimentation at sea, or an [order by an] individual commander that directs execution of a captured crew with genocidal intent” does not need any reference to general human rights law or

the specific crime of genocide. In view of the accepted law with regard to war crimes, regardless of the theatre in which they are committed, to base criminality on the general body of human rights law in such circumstances would only amount to “gilding the lily”. The reference<sup>21</sup> to the perfidious use of the protective emblem with regard to cultural property is not confined to a vessel purporting to be carrying such property. It is of general application with regard to the use of any protective emblem, and is merely indicative of the problem that will face any commander who suspects that an emblem is being improperly used. Similarly, it is suggested that the references made to the 1958 Law of the Sea Conventions are not really in point since they are dealing with the normal uses of the sea in time of peace and do not purport in any way to affect the rights of belligerents, for, as Professor Walker himself points out,<sup>22</sup> the freedom of the high seas is exercised—and therefore limited by— “the other rules of international law” as well as the stipulations of the Convention. Equally the reference in UNCLOS, 1982, that “the high seas shall be used only for peaceful purposes”<sup>23</sup> implies that the contents of that Convention have no relevance to naval warfare, at least until such time as there is no doubt that naval warfare as traditionally conducted is contrary to international law *per se*.

Rather than drawing analogies from Protocol I, it might be better, particularly in view of the number of major naval powers that have failed to ratify this instrument, and of the fact that there is by no means universal agreement as to which articles of the Protocol amount to rules of customary law in regard to warfare on land, let alone to fundamental principles underlying the law of armed conflict as such, to ignore the terms of the Protocol and seek to evolve a draft applicable to naval warfare alone. Moreover, it should be remembered that Protocol I is intended to elaborate the Geneva Conventions of 1949 as they apply to humanitarian law in armed conflict. In the light of the experience of World War II and the technological advances that have evolved since, it would appear that the various Hague and later agreements concerning naval warfare have become somewhat archaic and tend to be disregarded. Experience in the Gulf War and the use of protective fleets by non-participants suggest that it is time to revise also the rights and duties of neutrals in naval warfare and to re-examine their right to establish protective convoys,<sup>24</sup> for it is submitted the legal position is not as clear as Professor Walker asserts.<sup>25</sup> Any such revision would, of course, make use of any relevant principles to be found in the agreements mentioned by Professor Walker.

However, to seek to extend to naval warfare principles especially drafted with a view to the needs of land warfare often makes the exercise somewhat artificial and far-fetched. This is particularly true when the specific provisions of Protocol I are incompatible with the customary or previously established treaty law relevant to naval warfare.<sup>26</sup> The comments here made with regard to Protocol I are equally applicable to the Protocols appended to the 1980 Conventional

Weapons Convention.<sup>27</sup> At the same time it should always be borne in mind that the fact that neither a specific Convention nor customary law specifically “requires or approves or permits” a particular line of conduct, such as the establishment of a “Red Cross Box” during the Falklands conflict,<sup>28</sup> does not in any way prevent the parties to the conflict from setting up any similar “box” or making any arrangement that they choose and, as between themselves, this would even apply to an arrangement derogating from a treaty requirement. This is probably true even of those agreements that have been made for the protection of persons *hors de combat*, unless it can be maintained that the treaty provision in question amounted to a principle of *jus cop-ens* applicable to the protection of human rights even during armed conflict.<sup>29</sup>

In connection with the Gulf War and the destruction and attacks on neutral shipping, Professor Walker draws attention to Commander Fenrick’s comment:<sup>30</sup>

It is somewhat surprising that the actions of Iran and Iraq in the Persian Gulf did not generate a stronger, or at least more vociferous, response on the part of other states. It is presumed the relative lack of response is owing to the desire of the superpowers to avoid conflict with each other in a sensitive area. . . .

In view of the apparent willingness of the superpowers to tolerate the situation and indulge in minesweeping, chartering or reflagging of vessels, it seems unlikely that such a conflict might have ensued. Perhaps it may be suggested that the reason for the lack of more vigorous response was that the superpowers were not prepared to state that Iranian and Iraqi practices were in conflict with the rights of belligerents to attack neutrals when there was some evidence to suggest that they were in fact trading with or indirectly supporting a belligerent. Moreover, practice during World War II, as well as during the Gulf War, suggests that belligerents will disregard the former distinction between absolute and conditional contraband or the requirement that contraband lists be published, and will instead seek to inhibit any trade with an adverse party, contending that such trade automatically assists the economic war effort, which would appear to be recognized by NWP 9<sup>31</sup> and this, moreover, seems to be Commander Fenrick’s current view.<sup>32</sup> While it is true that both Fenrick’s proposals and the draft to have come out of Pisa and Bochum<sup>33</sup> are completely unofficial, they may be indicative of the manner in which the law of naval warfare, at least in regard to the targeting of merchant vessels, might proceed.

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## Notes

\* LL.B., LL.D., F.R.S.C., University Professor, Honorary Professor of Law, University of Alberta.

1. Preamble to Hague Convention IV, 1907, *reprinted in* Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* 70 (3d ed. 1988) [hereinafter Schindler and Toman].
2. *Id.* at 812. *See also* Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 113-4 (para. 218).
3. *Reparation for Injuries Case*, 1949 I.C.J. 205, 211.
4. Schindler and Toman, *supra* note 1, at 650.
5. Michael Bothe *ET.AL*, *New Rules for Victims of Armed Conflicts* 290 (1982).
6. *See, e.g.*, U.S. Department of the Navy, *Commander's Handbook on the Law of Naval Warfare*, NWP 9 (1987) 8.1.2, 8.5.1.7 [hereinafter NWP 9]; W.J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 *Mil. Law Rev.* 91 (1982). On the general principle of "proportionality", see *Case Concerning Air Service Agreement (U.S. v. France)* 18 *Rep. Int'l Arb. Awards* 417, 443-5.
7. *Supra* note 5, at 119; *see also id.*, at 194-5.
8. George K. Walker, *State Practice Following World War II, 1945-1990*, 65 *International Law Studies: Targeting Enemy Merchant Shipping* 172 (Richard J. Grunawalt, ed., 1993).
9. *Id.* at 174.
10. NWP 9, *supra* note 6, at 8.2.3.6.
11. *Supra* note 8, at 182.
12. *Id.* at 182-186.
13. *Convention Relative to Certain restrictions with regard to the Exercise of the Right of Capture in Naval Warfare*, *reprinted in* Dietrich Schindler and Jiri Toman, *supra* note 11, at 819.
14. *H.M.S.O.*, *Cmd.* 6964, 65; 141 *Ain, J. Int'l L.* 1947, 172, 248-9.
15. *supra* note 1, at 881.
16. *Id.* at 883.
17. *Loc. cit.*, n. 12, 109, 112; 304-5, 308, *resp.*
18. *Supra* note 8, at 131.
19. *Supra* note 1, at 401.
20. *Supra* note 8, at 131.
21. *Id.* at 132.
22. *Id.* at 156-157.
23. *Id.* at 156.
24. *Id.* at 170.
25. *See, e.g.*, Robert W. Tucker, *The Law of War and Neutrality at Sea*, 1955 *International Law Studies* 335 (1957).
26. *Supra* note 8, at 148 *et seq.*
27. *Supra* note 1, at 179-96. *See* W.J. Fenrick, *New Developments in the Law Concerning Conventional Weapons in Armed Conflicts*, 19 *Can. Y.B. Int'l L.* 229 (1981).
28. *Supra* note 8, at 153.
29. *See, e.g.*, Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989).
30. *Supra* note 8, at 169.
31. NWP 9, *supra* note 6, at 8.2.2.2(7).
32. *Supra* note 8 at 185-186.
33. *Id.* at 186.