XVI

Submarine Warfare: With Emphasis on the 1936 London Protocol

The Law of Naval Warfare: Targeting Enemy Merchant Shipping 28
(Naval War College International Law Studies No. 65,
Richard J. Grunawalt ed., 1993)

Part I
Early History of the Submarine

A lthough the idea of a submersible boat dates back at least to the early seventeenth century, and a number of efforts to perfect such a vessel had occurred over the subsequent years, it was not until the latter part of the eighteenth century that realistic attempts began to be made in this respect. During the American Revolution David Bushnell devised a one-man submersible known as the American Turtle. Its several attacks against British warships were, for one reason or another, all unsuccessful. Then in 1797 Robert Fulton, who had been demonstrating his version of the submersible to the French Navy, submitted a proposal to the French Directory for the construction and the use by his “Nautulus Company” of a submarine against the ships of the British Navy. Paragraph Six of that proposal stated:

And whereas fire Ships or other unusual means of destroying Navies are Considered Contrary to the Laws of war, and persons taken in such enterprises are liable to Suffer death, it will be an object of Safety if the Directory give the Nautilus Company Commissions Specifying that all persons taken in the Nautilus or Submarine Expedition Shall be treated as Prisoners of War, And in Case of Violence being offered the Government will Retaliate on the British Prisoners in a four fold degree.

It can thus be seen that even in its earliest form, and even when it was to be directed solely against warships, the submarine was a controversial weapon. Fulton was unable to sell his idea to the French Government. Subsequently, he was equally unsuccessful in selling it to the British.

From the very beginning of the idea of a vessel that would travel under the water instead of on the water, it was accepted that if it could be successfully
developed it would be an asset to small nations, nations which could not afford large standing navies. It was assumed that, because of its anticipated short range, it would be used primarily for coastal defense. It is, therefore, not surprising to find that during the American Civil War the Confederacy developed and built this type of vessel to be used against the blockading warships of the Union Navy. It was called a David and altogether the Confederate Navy probably constructed more than a dozen of them. It was not truly a submersible, because, being propelled by a steam engine, it had to have a constant source of air. Accordingly, it moved with its deck awash and an open hatch—not exactly a recommended method for safe navigation, and one which resulted in a number of sinkings during its trials, with the loss of most of the members of the crews. However, on October 5, 1863, one of these boats attacked and damaged the U.S.S. New Ironsides. The Confederates also built a true submersible, called the Hunley, propelled by eight members of the crew turning a crankshaft which ran down the center for most of the length of the vessel and which was connected to a propeller. Its claim to fame is that on February 17, 1864 it sank the U.S.S. Housatonic—and itself! It may be said that the David and the Hunley ushered in the era of the submarine in warfare—even though at this point the Confederate Navy appeared to lose interest in submersibles.

In the quarter century which followed, numerous other inventions were being developed, and tested, in various countries, particularly in France, a country which had early exhibited great interest in such a weapon, even though it had rejected Fulton’s proposal. The first really successful submersible, the forerunner of the submarine of today, was built by John P. Holland, an Irish-American who, after he had constructed several models, succeeded in selling the latest version of the Holland to the United States Navy in 1900, the first that it had acquired. At that same period both the United States Navy and the Royal Navy placed orders with Holland for the construction and delivery of additional submarines; while a number of continental nations were placing similar orders with Holland and other inventors. Even Admiral von Tirpitz, head of the German Navy, was eventually convinced that the submarine was no longer solely a weapon of coastal defense.

The 1899 Hague Peace Conference

When, on December 30, 1898, the Ministry of Foreign Affairs of Imperial Russia issued its proposed agenda for the 1899 Hague Peace Conference, one item thereof stated:

4. Prohibition of the use in naval battles of submarine or diving torpedo-boats or of other engines of destruction of the same nature;
When the matter was discussed in the Second Subcommission of the First Commission of the Conference on May 31, 1899, the German representative indicated that “if all the other governments agreed not to adopt vessels of this kind, Germany would join in this understanding”; and the Italian and Japanese delegates concurred in that statement; the United States delegate indicated that his Government “wishes to preserve full liberty . . . to use submarine torpedo boats or not”; the delegate of Austria-Hungary gave his personal opinion that “this new invention . . . may be used for the defense of ports and roadsteads and render very important services”; the French delegate stated that “the submarine torpedo [boat] has an eminently defensive purpose, and that the right to use it should therefore not be taken from a country”; the British delegate thought that “his country would consent to the prohibition in question if all the great Powers were agreed on this point. It would concern itself little as to what decision the smaller countries reached”; the Dutch delegate and the delegate of Sweden and Norway believed that “the submarine torpedo [boat] is a weapon of the weak, and does not think its use can be prohibited.”

In his report the Rapporteur of the Subcommission said

After an exchange of personal views on the question of submarine torpedo boats which enabled several delegates . . . to formulate very clear and precise ideas regarding the future of this weapon, it is shown that, according to the declarations made by a majority of the delegates, a prohibition of the boats in question must be considered as very unlikely, at least for the time being.

His prognostication was confirmed when a vote on the proposal to ban the submarine was taken in the First Commission and resulted in five votes (Belgium, Bulgaria, Greece, Persia, and Siam) for the prohibition with reservations; five votes (Germany, Great Britain, Italy, Japan, and Rumania) for the prohibition on condition of unanimity; and nine votes (Austria-Hungary, Denmark, France, Netherlands, Portugal, Spain, Sweden and Norway, Turkey, and the United States) in the negative. Russia, Serbia, and Switzerland abstained. That ended all efforts to ban the submarine at the 1899 Hague Peace Conference. It should be borne in mind that at this point in time most naval experts still considered that the submarine was a weapon to be used for coastal defense, particularly by the smaller and weaker nations which did not have strong navies. Little or no consideration was given to the fact that the submarine might be valuable as a commerce destroyer and on the high seas. Moreover, having failed to ban the submarine, inexplicably, no attempt was made to obtain even minimum restrictions on its operations.
The 1907 Hague Peace Conference

During the period between the Hague Peace Conferences of 1899 and 1907, the major international event in the military area was the Russo-Japanese War (1904-1905). No submarines participated in this conflict but, as one author has pointed out, even a few Russian short-range submarines could have done enough damage to the Japanese to have caused the latter to lift the blockade of Port Arthur and even a few of the longer-ranged ones could have effectively impeded the landing of Japanese troops in Korea. At that time, however, neither Japan nor Russia had any submarines in their navies. That situation would soon change.

The Russian agenda for the 1907 Second Hague Peace Conference called for the “framing of a convention relative to the laws and customs of maritime warfare,” but contained no specific mention of the submarine. When the Fourth Commission of that Conference met for the first time on June 24, 1907, its President, de Martens of Russia, said: “We must now do for naval warfare what the Second Commission of the last Peace Conference did for land warfare.” While the Conference did draft a number of conventions with respect to war at sea, some good and some not so good, the possibility of drafting rules with respect to the use of submarines was not even a subject of discussion. Although there is a tendency on the part of writers to refer to the inability of both of those Hague Peace Conferences to reach agreement on restrictions on the use of submarines, the present author could find only one passing reference to the subject in the proceedings of the 1907 Conference. During the lengthy discussion of the United States proposal to exempt all private property from capture or seizure at sea the Belgian delegate said:

A torpedo-boat or a submarine can annihilate in a few moments a magnificent vessel representing an enormous outlay and a thousand lives. In 1899 Russia proposed that the employment of such engines of destruction be given up, just as the poisoning of arms and of springs had been prohibited, and most of the Powers seemed ready to adhere to the proposal provided it were accepted unanimously. But unfortunately I do not now see any indication among us of such an idea.

No further mention of submarines could be found. It will, however, be appropriate to point out that Article 3 of the 1907 Hague Convention No. VI provided that if an enemy merchant ship were to be destroyed “provision must be made for the safety of the persons on board as well as the security of the ship’s papers.”

1909 Declaration of London

Article I of this Declaration stated that “the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law.” As the Declaration was intended to be all-inclusive insofar
as restrictions on maritime trade during the course of a war were concerned and as it contained no special rules with respect to submarines, it must be assumed that there were at that time still no such rules.\(^3\) That being the case, submarines would be bound by the general rules applicable to all warships. Customary international law prescribed that, while a warship could be attacked without warning, a merchant vessel was a noncombatant which could only be attacked after warning and which could only be sunk under exceptional circumstances and then only after the safety of the passengers and crew had been assured.\(^4\)

Although the then Lieutenant Rickover wrote in 1935 that “[i]n its official correspondence with the United States the German government appears not to have questioned the American contention that the rules of international law governing surface men-of-war applied also to the submarine,”\(^25\) during World War I Germany actually did take issue with this conclusion. She contended that she had chosen to use “a new weapon, the use of which had not yet been regulated by international law and, in doing so, could not and did not violate any existing rules but only took into account the peculiarity of this new weapon, the submarine boat.”\(^26\) Contrariwise, Lauterpacht took the position that “[t]he novelty of a weapon does not itself carry with it a legitimate claim to a change in the existing rules of war.”\(^27\) Strange to relate, in a message of July 18, 1916 to the British Ambassador in Washington, the British Foreign Office said: “The first point to be established is that international law ought not to transfer without modification to submarines, rules and regulations which work fairly well as regards surface vessels.”\(^28\)

It was during the immediate pre-World War I period that Great Britain made a decision which was to have far-reaching consequences with respect to the use of the submarine as a commerce destroyer and the disregarding of the requirements of warning and of assuring the safety of the passengers and crew. On March 26, 1913 Winston Churchill, then First Lord of the Admiralty, announced in Parliament the intention of the British Government to arm its merchantmen, at the same time asserting that the armaments would be strictly defensive and would not change the status of these vessels as noncombatant merchant ships, to be distinguished from converted armed merchant cruisers.\(^29\) As we shall see, this decision had serious consequences in both World Wars, one being the so-called “unrestricted submarine warfare” and the subsequent controversy as to whether the provisions of the 1936 London Submarine Protocol are still binding law.

**Part II**

**World War I (1914-1918)**

In World War I the inadequacy of the law of naval warfare with respect to the protection of merchant vessels proved to be a matter of prime importance
for both belligerents and neutrals. It may well be said that while the American Civil War was the beginning of the era of the submarine, it only received full recognition as a dangerous—and controversial—naval weapon system during World War I.

On August 6, 1914, just a few days after the outbreak of World War I, Secretary of State Bryan sent a circular message to the belligerents asking each if it would be “willing to agree that the laws of naval warfare as laid down by the Declaration of London of 1909 shall be applicable during the present conflict in Europe.” Most of the belligerents, including Germany, indicated that they would comply with the rules set forth in that Declaration, subject to reciprocity. However, Great Britain’s decision to adopt these rules was made “subject to certain modifications and additions which they adjudge indispensable to the efficient conduct of their naval operations.” As a result of the British position, the United States withdrew its suggestion. Primary among these British “modifications and additions” was a vast increase in the list of contraband items. Historically, an enemy merchant ship was a noncombatant which could be stopped, visited, and searched in order to examine her papers and to determine whether she was carrying contraband, and captured if found to be carrying contraband, but which could not be attacked, nor destroyed, except under specific and limited circumstances—and then only after the safety of the persons aboard had been assured. The lifeboats were not considered to be a place of safety unless the weather was moderate and land was within a reasonable distance, or another vessel was available which could take the crew and passengers of the doomed vessel aboard. For some months after the outbreak of World War I German submarines were used almost exclusively in the capacity of warship against warship. The few merchantmen which were sunk by German submarines during this period had suffered their fate in strict accordance with the customary law of naval warfare applicable to the sinking of merchant vessels by surface warships—they had been stopped by a warning shot, visited and searched, found to have contraband aboard, and the safety of passengers and crews had been assured before they were sunk. That procedure was not to continue.

On November 3, 1914 the British gave notice that “the whole of the North Sea must be considered a military area.” The British sea blockade of Germany was so effective that the German Navy urged the need to counter it by a declaration of a war zone around the British Isles within which all ships would be sunk. The Foreign Office opposed such a procedure because of its anticipated effect on neutrals and the German Chancellor, Bethmann Hollweg, at first agreed with the Foreign Office. However, early in 1915 the German Government determined that it had no alternative but to use the submarine to stop the flow of food and essential munitions to the British Isles and on
February 4, 1915 the German Admiralty issued a Proclamation declaring the waters around Great Britain and Ireland, including the entire English Channel, to be a “war zone” in which, after February 18, 1915, all enemy merchant ships would be destroyed without assuring the safety of the passengers and crews—in other words, they would be sunk without warning. The Proclamation added that, because, on January 31, 1915, the British Admiralty had ordered British merchant vessels to fly neutral flags, even neutral merchant vessels would be at risk in the announced zone. A lengthy “Memorial”, issued at the same time, justified the German action as retaliation for British disregard of the provisions of the 1909 Declaration of London and of the 1856 Declaration of Paris and the British declaration of the North Sea between Scotland and Norway as being “comprised within the seat of war” combined with neutral acceptance of these British violations. It was thus that first arose a problem which continues to plague the Governments and navies of the world and students of the law of maritime warfare to this day—the question of the legality of war zones, under any of the various names which have been given to such areas of the high seas by belligerents.

The German Proclamation caused considerable consternation in the United States. Robert Lansing, then Counselor of the Department of State, prepared a reply to the German proclamation which he himself referred to as “sharp.” It described the German intention as “a wanton act unparalleled in naval warfare.” However, after he had read the accompanying “Memorial” he relented considerably. Nevertheless, the United States protest may still be described as “strong.” The United States also protested to Great Britain the use of the American flag by British merchant ships. As neither of these protests accomplished its purpose, the United States proposed that each side should, among other things, agree:

That neither will use submarines to attack merchant vessels of any nationality except to enforce the right of visit and search.

That each will require their respective merchant vessels not to use neutral flags for the purpose of disguise or ruse de guerre.

Germany accepted this proposal with conditions. Great Britain rejected it on the ground that the German Proclamation of February 4, 1915 was, “in effect, a claim to torpedo at sight”; and that submarines did not, and could not, comply with the well-established rules of maritime warfare, such as bringing merchant ships before prize courts, sinking them only when extraordinary circumstances existed, distinguishing between neutral and enemy ships, assuring the safety of crews, etc. Of course, the British position disregarded the fact that by accepting
the proposed agreement Germany would have, in effect, consented to give up any claimed right to "torpedo at sight" with all of its corollaries.

This began a campaign of submarines as commerce destroyers, a campaign that extended from February 1915 to September 1915, during which period strong protests were made to the German Government by the Government of the United States over attacks upon and the sinking of American merchant vessels and of other merchant vessels on which American citizens were traveling. The matter reached a peak with the sinking of the Lusitania on May 7, 1915 as a result of which over 100 American citizens were lost. The U.S. protest included the following statement: 47

The Government of the United States, therefore, desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice, and humanity which all modern opinion regards as imperative. It is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo. It is practically impossible for them to make a prize of her; and, if they cannot put a prize crew on board of her, they cannot sink her without leaving her crew and all on board of her to the mercy of the sea in her small boats.

After another strong protest by the United States when the Arabic was sunk on August 19, 1915, with American citizens aboard, German submarines were ordered not to attack passenger ships without a warning and an opportunity for the passengers and crew to be taken to a place of safety. 48 As this required the submarine to come to the surface, an extremely dangerous procedure in a confined area, all German submarines were soon recalled from the English Channel. One anonymous author believes that this seven-month period (February–September 1915) "saw the submarine come of age as the first modern weapon to make war a universal scourge, rather than a professional duel between rival armies and fleets." 49

Thus, within the first year of World War I the use of the submarine had generated issues with respect to the arming of merchantmen, the use of false colors, the establishment of "war zones", the sinking of merchantmen without warning, and the failure to assure the safety of the passengers and crews. All of those issues continue to exist; only the latter two were addressed by the 1936 London Submarine Protocol. 50 The problem of the status of merchantmen under convoy did not arise until much later in the war.

Disputes with respect to submarine warfare continued to arise and finally, on April 18, 1916, the United States warned Germany that if the latter intended to continue "to prosecute relentless and indiscriminate warfare against vessels of
commerce without regard to what the United States must consider the sacred and indisputable rules of international law and the universally recognized dictates of humanity,” it would have no choice but to sever diplomatic relations. The German reply, dated May 4, 1916, notified the United States Government that the following instructions had been issued to German naval forces:

In accordance with the general principles of visit and search and destruction of merchant vessels recognized by international law, such vessels, both within and without the area declared as a naval war zone, shall not be sunk without warning and without saving human lives, unless these ships attempt to escape or offer resistance.

The following months were comparatively free of incidents but, understandably, the success of the U-boats was considerably reduced. Ultimately, the German Government decided that its only possibility of winning the war, which had reached a stalemate on land, was to embark on a program of unrestricted submarine warfare and an announcement of such a policy was suddenly made on January 31, 1917, to take effect the following day. On February 3, 1917, the United States severed diplomatic relations with Germany; on March 12, 1917, the United States announced its intention to arm its merchantmen; on April 2, 1917, in a speech to Congress requesting a declaration of war against Germany, President Wilson stated: “The intimation [of the German Government] is conveyed that the armed guards which we have placed on our merchant ships will be treated as beyond the pale of the law and subject to be dealt with as pirates would be”, and on April 6, 1917, the United States declared war on Germany.

Because of the magnitude of the problem created by the arming of merchantmen during World War I, it is, perhaps, advisable to deal with it at some length at this point. It is a problem which was and is important to neutrals as well as belligerents inasmuch as Article 12 of the 1907 Hague Convention No. XIII provides that, in general, a warship may only remain in neutral waters for twenty-four hours. If armed merchantmen are warships, then this rule applies to them and if they remain in neutral waters beyond the twenty-four-hour period, they are, under Article 24 of the same Convention, subject to internment. If they were held to fall within the ambit of those provisions, their utility as cargo carriers would be completely nullified as none could accomplish unloading and reloading within that time frame. Germany demanded that the United States (and other neutrals) apply the provisions of this Convention to British armed merchantmen. The United States declined to do so. It appears that The Netherlands was the only country that so interpreted and applied the cited provisions of the Hague Convention. One author has taken the position that “neutrals are not justified in treating an armed merchant
vessel as an innocent peaceful carrier. By so doing they risk their neutrality. 60
A major work argues that neutral states “employed the convenient but elusive
and tenuous distinction between ‘offensive’ and ‘defensive’ armament” because
of their desire to avoid the need to apply the provisions of the 1907 Hague
Convention No. XIII to armed belligerent merchantmen. 61

The provisions of the 1907 Hague Convention No. VII 62 require, among
other things, that merchant vessels converted into warships must be placed under
the direct authority of the State and must have a commander who is “in the
Service of the State and duly commissioned by the competent authorities” and
a crew which is subject to military discipline. When the British ordered the
arming of all of their merchant vessels, many of the captains and other officers
of these vessels held commissions in the Royal Navy Reserves and many of the
vessels were subsequently furnished with Royal Navy gun crews. Nevertheless,
the British Government contended that these vessels were armed solely for
defensive purposes and that, therefore, these facts did not make them armed
auxiliary cruisers. The British were probably correct in contending that the status
of the officers and men did not bring the vessel within the provisions of this
Hague Convention. The vessels were not State vessels and the crews, other than
the gunners, were not subject to military discipline. However, whether the fact
that they were armed removed them from the category of vessels entitled to the
protections of customary international law is an altogether different question.

It is often believed that the original decision of the British Government to
arm its merchant ships was reached as a measure of protection against submarines.
This is not so. In March 1913, when Churchill made his announcement in the
House of Commons, 63 the British were not concerned with submarines, they
were concerned with converted merchant auxiliary cruisers. Thus he said: 64

There is now good reason to believe that a considerable number of foreign
merchant steamers may be rapidly converted into armed ships by the mounting
of guns. . . . Our food-carrying liners and vessels carrying raw material following
these trade routes would in certain contingencies meet foreign vessels armed and
equipped in the manner described. If the British ships had no armament, they
would be at the mercy of any foreign liner carrying one effective gun and a few
rounds of ammunition. . . . Hostile cruisers, wherever they are found, will be
covered and met by British ships of war, but the proper reply to an armed
merchantman is another merchantman armed in its own defence.

Again, a year later, on March 17, 1914, he said: 65

The House will expect me to say a few words on the arming of merchant ships.
Much misconception has arisen on this subject. . . . Forty ships have been armed
with two 4.7 guns apiece, and by the end of 1914-1915 seventy ships will have
been so armed. They are armed solely for defensive purposes. The guns are mounted in the stern and can only fire on a pursuer. Vessels so armed have nothing in common with merchant vessels taken over by the Admiralty and converted into commissioned auxiliary cruisers, nor are these vessels privateers or commerce destroyers in any sense. They are exclusively ships which carry food to this country. They are not allowed to fight any ship of war. . . . They are, however, thoroughly capable of self-defence against an enemy's armed merchantmen.

During the years that it was a neutral in World War I, the position of the United States with respect to armed merchantmen was so ambivalent as to leave much to be desired. However, as it was one of the main players with respect to the problem, it will be of interest to analyze the permutations and combinations which were encountered in the negotiations on this subject and the decisions which were made and unmade.

Within a few days after the beginning of the war the British Charge d'Affaires in Washington called the attention of the Secretary of State to the fact that "a certain number" of British merchant vessels were armed "solely for the purpose of defence,"66 Two weeks later, the British Ambassador advised the Secretary of State that he had been directed to give the United States:

the fullest assurances that British merchant vessels will never be used for purposes of attack, that they are merely peaceful traders armed only for purposes of defence, that they will never fire unless first fired upon, and that they will never under any circumstances attack any vessel.67

Despite these assurances, it does not appear that the armed merchantmen used their guns solely for defense, nor that the British Government expected them to do so. Thus, confidential instructions to masters of armed merchant vessels stated:68

If a submarine is obviously pursuing a ship by day and it is evident to the master that she has hostile intentions, the ship pursued should open fire in self-defence, notwithstanding the submarines [sic] may not have committed a definite hostile act, such as firing a gun or torpedo.

Any submarine approaching a merchant vessel may be treated as hostile.69

Moreover, when they became available, merchant ships were supplied with depth charges, definitely an offensive weapon.70

In justification of the practice of arming merchant ships, and in support of their contention that this did not remove them from a noncombatant status, the British frequently referred to the long history of armed merchant ships, pointing out that this had been ordered by Royal Proclamation as early as the seventeenth
century and that this right had been recognized by Prize Courts during the
Napoleonic Wars. They omitted to mention that this procedure had been
directed against pirates and privateers and that there were no longer pirates on
the well-traveled trade routes which the British ships were traversing and that
privateering had been prohibited by the 1856 Declaration of Paris.

Lauterpacht, while a strong supporter of the right of a belligerent to arm its
merchant ships for defensive purposes, added the following caveat:

At the same time it is clear that the arming of merchant vessels raises problems of
substantial difficulty. In the first place, it is not easy to draw a line of distinction
between offensive and defensive acts. Secondly, the encouragement of even
defensive hostilities on the part of private vessels is fraught with danger inasmuch
as it threatens to undermine the abolition of privateering by the Declaration of
Paris of 1856 [and the distinction?] between commissioned and
non-commissioned vessels. Thirdly, the fact that a merchantman is armed and that
she is entitled to resist actual or anticipated attack makes it impossible for enemy
submarines to exercise their right of visit and capture in accordance with
International Law without running the risk of destruction by the superior
armament of the merchant vessel or being rammed by her.

On September 19, 1914 the Department of State issued a memorandum,
prepared by Robert Lansing, entitled “The Status of Armed Merchant
Vessels,” which provided that, while a merchant vessel might carry armament and
ammunition for defensive purposes without becoming a warship, the presence
of such items aboard would create a presumption that they were for offensive
purposes, a presumption that could be overcome by showing that the vessel
carried its armament for defensive purposes only. The memorandum then
proceeded to list a number of “indications” that the armament would not be
used offensively, including such items as the size and number of the guns, their
location on the vessel, the status of the officers and crew, etc. With one
amendment which provided that the presence of any gun on a merchantman,
no matter what its size, would create the presumption of offensive use,
this memorandum laid down the policy followed by the United States during 1914
and 1915.

On January 7, 1916, Lansing, now the Secretary of State, sent a memorandum
to President Wilson in which he pointed out the potential danger to submarines
of even a small caliber gun on an armed merchantman; that if submarines were
to be required to give warning to merchant vessels, the latter should not be
armed; and that armed merchantmen should, therefore, be treated as not
possessing the immunities of private commercial vessels. President Wilson
concurred with these conclusions and, on January 18, 1916, Lansing circulated
an informal letter to the belligerents in which he set forth the general rules of
international law and humanity understood to be applicable to noncombatant merchant vessels during a war. He called attention to the manner in which the submarine had changed maritime operations and the dangers it faced when compelled to stop and search an armed merchant vessel on the high seas. He then said:

Moreover, pirates and sea rovers have been swept from the main trade channels of the seas, and privateering has been abolished. Consequently, the placing of guns on merchantmen at the present day of submarine warfare can be explained only on the ground of a purpose to render a merchantman superior in force to submarines and to prevent warning and visit and search by them. An armament, therefore, on a merchant vessel would seem to have the character of an offensive armament.

It would, therefore, appear to be a reasonable and reciprocally just arrangement if it could be agreed by the opposing belligerents that submarines should be caused to adhere strictly to the rules of international law in the matter of stopping and searching merchant vessels, determining their belligerent nationality, and removing the crews and passengers to places of safety before sinking the vessels as prizes of war, and that merchant vessels of belligerent nationality should be prohibited and prevented from carrying any armament whatsoever.

I should add that my Government is impressed with the reasonableness of the argument that a merchant vessel carrying an armament of any sort, in view of the character of submarine warfare and the defensive weakness of undersea craft, should be held to be an auxiliary cruiser and so treated by a neutral as well as by a belligerent Government, and is seriously considering instructing its officials accordingly.

If the paragraph last quoted was intended to put pressure on Great Britain to agree to the basic suggestion, as it undoubtedly was, it did not accomplish its purpose. While the British Government's adamant opposition to the proposal of the United States had probably previously been conveyed orally, it was not until March 23, 1916 that the British Ambassador delivered to the Secretary of State a memorandum from the British Government setting forth in some detail, not always relevant, the reasons why that Government believed the proposal to be pro-German, why it could not rely on a “non-guaranteed German promise”, and why it could not, therefore, accept the proposal made some two months earlier. It also presented its reasons why it did not consider that the action mentioned in the last paragraph of the American note would be in accordance with international law. The Germans also rejected the proposal, asserting that it was pro-British. The British won both battles: they continued to arm their merchantmen; and these armed merchantmen continued to be treated by the
United States as ordinary merchant vessels "armed for defense only." On March 25, 1916, just two days after the date of the British memorandum, the Department of State issued a new "Memorandum on the Status of Armed Merchant Vessels" which was even more lenient on the subject than the 1914 memorandum had been. Two pertinent paragraphs provided: 80

The status of an armed merchant vessel as a warship in neutral waters may be determined, in the absence of documentary proof or conclusive evidence of previous aggressive conduct, by presumption derived from all the circumstances of the case.

Merchantmen of belligerent nationality, armed only for the purposes of protection against the enemy, are entitled to enter and leave neutral ports without hindrance in the course of legitimate trade.

In passing, it is worthy of note with respect to this problem that when, in 1928, the members of the then Pan American Union drafted a convention on the subject of maritime neutrality, Article 12(3) provided that the rules relating to warships would apply to armed merchantmen. The United States ratified the Convention with a reservation to that provision. 81

In conclusion, it might be said that "defensively armed merchant vessels" were properly so-called in that, unlike auxiliary merchant cruisers, they did not go searching for enemy vessels; they were not properly so-called in that they usually opened fire immediately upon sighting a U-boat, before it had taken any offensive action other than to make its appearance. It should be obvious that the present author agrees with the following statement: 82

The criteria [for determining whether a merchant vessel is participating in the hostilities] should certainly include, inter alia, any armed merchant vessel and no consideration should be given to the purported distinction between "defensive" and "offensive" armament.

As we shall see, this same problem arose during the course of World War II. 83

Part III
The Intra-War Period (1919-1939)

The Versailles Treaty

In the course of drafting a suggested basic document for the proposed League of Nations, to be submitted to the Peace Conference which met at the end of World War I, President Woodrow Wilson sought comments from David H. Miller, the Legal Adviser of the American Delegation to the Conference. In his
comments on Wilson's Second Draft, Miller suggested the inclusion of the following provision:

The Contracting Parties agree never to make use of armed submarines in naval operations, and further agree that they will hereafter build no submarines armed or capable of being armed and further agree that all submarines now in existence or under construction shall be dismantled and rendered incapable of being armed or shall be destroyed.

Wilson did not adopt this suggestion and while Article 191 of the Treaty of Versailles, which ended World War I as between Germany and the Allies, specifically prohibited "[t]he construction or acquisition of any submarine, even for commercial purposes" by Germany, the Covenant of the League of Nations contained no provision on the subject. As events proved, this provision of the Treaty, like many of the other provisions thereof, was of little value.

The 1921-1922 Washington Conference

In 1921 a Conference on the Limitation of Armament met in Washington. The conferees represented the five major victorious Powers in World War I: France, Great Britain (and the Commonwealth countries), Italy, Japan, and the United States. When the discussion with respect to submarines began, the British Delegation took the position that "what was required was not merely restrictions on submarines, but their total and final abolition." The French delegation was, as it had been in the past, particularly opposed to the banning of the submarine as an accepted naval weapons system, its delegate saying:

The French Government believes that every method of warfare may or may not be employed in conformity with the laws of war, and that the inhuman and barbarous use made of the submarine by a belligerent in the late war is a reason for condemning that belligerent, but not for condemning the submarine.

It quickly became obvious that the British proposal would not receive the necessary support. As one commentator on the 1922 Diplomatic Conference stated: "The British seem to hold that the submarine is an offensive weapon, while the others consider that it is a defensive weapon." Elihu Root, one of the delegates of the United States and a former Secretary of State, then submitted several proposed resolutions to the Conference. These resolutions may be considered to have been the genesis of the 1922, 1930, and 1936 codifications of the rules relating to submarine warfare. Resolution I was said to be a statement of existing law, while Resolution II was said to constitute a change in the existing law. An examination of the Root Resolutions, as minimally modified by the Conference, will enable us to determine what the rules of submarine warfare
were then considered to be and what the representatives of the nations present considered that they should be, it being an accepted fact that the submarine was here to stay.

Root's Resolution 191 became Articles 1 and 2 of the treaty then in process of being drafted, with only one major change: the logical addition of a second condition under which a merchant vessel might be attacked (when it refused "to submit to visit and search after warning, or to proceed as directed after seizure").

As adopted and included in the Treaty which was ultimately drafted, these articles stated:

Art. 1. The Signatory Powers declare that among the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, the following are to be deemed an established part of international law:

(1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning, or to proceed as directed after seizure.

A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

(2) Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a vessel in conformity with these rules the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.

Art. 2. The Signatory Powers invite all other civilized Powers to express their assent to the foregoing statement of established law so that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents.

The provisions of Article 1 have since been accepted as binding rules of the law of war at sea by reiteration in substance in international agreements subsequently drafted. It will become apparent that they formed the basis for the provisions of Part IV of the 1930 London Naval Treaty 94 and for those of its offspring, the 1936 London Submarine Protocol. 95

There can be no question but that the provisions of Root's Resolution II 96 represented a major addition to the restrictions on the use of submarines in war at sea. It condemned the submarine for what a belligerent had done in World War I. It was adopted as Article 4 of the Treaty with only minor amendments which did not affect its substantive content. It read:
Art. 4. The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914–1918, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to the end that the prohibition of the use of submarines as commerce destroyers shall be universally accepted as a part of the law of nations, they now accept that prohibition as henceforth binding as between themselves and they invite all other nations to adhere thereto.

This Article, outlawing the use of submarines against merchant vessels, even if they complied with the provisions of Article 1, did not survive as a rule of the law of war. Had it done so, it would, as Root had indicated, have supplanted the rules set forth in Article 1, rules which codified then existing law.

Root's Resolution III\textsuperscript{97} was adopted as Article 3 of the Treaty with only one major change. That change was the substitution of the words “rules declared by them with respect to attacks upon and the seizure and destruction of merchant ships” for the words “rules declared by them with respect to the prohibition of the use of submarines in time of war.” Under either reading, the provisions cover violations of both Articles 1 and 4 of the Treaty. As Article 3 it now read:

Art. 3. The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.

During the discussion of this Resolution the Japanese delegate asked for an explanation of the meaning of the phrase “punishment as if for an act of piracy.” The ambiguity of the phrase was demonstrated by the fact that the Chairman, Secretary of State Hughes, said that he assumed that it meant that a violation should be treated as an act of piracy. Root was quick to indicate that it merely meant that there would be universal jurisdiction, as in the case of piracy.\textsuperscript{98} Inasmuch as the provision already specifically so provided, there was, in reality, no need for the reference to piracy which merely caused confusion and antipathy.

Like Article 4, Article 3 has not survived as a separate rule of the law of war. However, like any other violation of the law of war, violations of the provisions of the customary or conventional law of submarine warfare constitute universal war crimes and the violator may still “be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found”—depending, of course, on the domestic law of that Power. In fact, as
we shall see, after World War II two German Admirals, Doenitz and Raeder, were charged with and tried for having allegedly ordered illegal submarine warfare.

In its final form this 1922 Washington Treaty (which also contained a provision banning the use of noxious gases) included in its Article VI a provision which stated that it would “take effect on the deposit of all the ratifications.” Inasmuch as France failed to ratify it, the Treaty never took effect. Perhaps this was just as well. Admiral William V. Pratt, of the United States Navy, is quoted as having written, a few days after the Conference ended, that the treaty was not practical and that it would not work. 99

This Diplomatic Conference created a Commission of Jurists with the task of determining the adequacy of certain rules of international law with respect to the law of war. 101 The Commission produced two sets of rules, one on wireless telegraphy in time of war and one on aerial warfare. Article 6, paragraph 1, of the former stated 102

The wireless transmission, by an enemy or neutral vessel or aircraft while being on or above the high seas, of any military information intended for a belligerent’s immediate use, shall be considered a hostile act exposing the vessel or aircraft to be fired at;

As the Diplomatic Conference had adjourned sine die before the Commission completed its work, neither set of rules ever received codified international status. However, they undoubtedly represented the customary international law on the subjects and are worthy of and have received considerable attention, despite their informal status. 103

Article 1, paragraph 1 of the Inter-American Convention on Maritime Neutrality 104 sets forth in considerable detail the rules with respect to the rights of belligerent warships towards merchant vessels, including a provision that a ship may not be rendered unnavigable before the crew and passengers have been placed in safety. Paragraph 2 makes these rules applicable to submarines with the specific proviso that “[i]f the submarine cannot capture the ship while observing these rules, it shall not have the right to continue to attack or to destroy the ship.” 105

The 1930 London Naval Conference

On January 21, 1930 another Conference on the Limitation of Armament convened, this time in London. It was officially known as the London Naval Conference of 1930. The participating Powers were the same as those which had been represented in Washington eight years earlier. At the very first Plenary Meeting at which the subject of submarines was discussed the British once again
proposed the abolition of the submarine, this time with the full support of the United States; and once again this proposal received the support of all of the Commonwealth countries, but the opposition of France, Italy, and Japan.  

The United States had submitted a proposed resolution calling for the appointment of a committee to consider (1) the abolition of the submarine; and (2) regulation of the use of the submarine "through subjecting it to the rules of war governing the use of surface craft." France had submitted a proposed resolution "forbidding submarines to act towards merchant ships otherwise than in strict conformity with the rules, either present or future, to be observed by surface warships." These resolutions were referred to a Committee of Experts and a Committee of Jurists. The latter produced a Declaration which was approved unanimously by the First Committee and which was approved without discussion by the Plenary Meeting. As incorporated into the Treaty, it read:

Art. 22. The following are accepted as established rules of International Law:

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed the passengers, crew, and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them aboard.

These rules were, in general, a rephrasing and amplification of the rules which had been included in Article 1 of the 1922 Washington Treaty. It is important to note that while, pursuant to Article 23, the other provisions of the Treaty ceased to be effective on December 31, 1936, Article 22 was "to remain in force without limitation of time." Despite the fact that there was a provision for accession to Part IV of the Treaty by other Powers, no non-Conference Power ever acceded, perhaps because France and Italy did not ratify these provisions until 1936.

In addition to drafting the Declaration which became Article 22 of the Treaty, the Committee of Jurists made a statement which bears repeating. It said:

The Committee wishes to place it on record that the expression merchant vessels where it is employed in the declaration, is not to be understood as including a
merchant vessel which is at the moment participating in the hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel.\textsuperscript{113}

This would certainly include the merchant vessel which, when a submarine surfaces in its vicinity, immediately opens fire or radios that it has sighted a submarine, giving its longitude and latitude.\textsuperscript{114}

The 1935-1936 London Naval Conference

In 1935 another Diplomatic Conference convened in London to draft a new treaty limiting naval armament prior to the expiration of the 1930 London Naval Treaty. The 1936 London Submarine Protocol\textsuperscript{115} is frequently associated with the 1935-1936 London Naval Conference and with the Treaty for the Limitation of Naval Armament that was drafted at that Conference.\textsuperscript{116} Its relationship to that Conference and Treaty is rather tenuous. At the opening session of the Conference Stanley Baldwin, the Prime Minister of Great Britain, said:\textsuperscript{117}

There is one further point that I should like to mention, because it appears to me very encouraging for our future deliberations. If it proves impossible to obtain agreement for the abolition of submarines, it is of vital importance to reach an agreement which will prevent their misuse. Part IV of the London Naval Treaty laid down rules for the treatment of merchant ships by submarines in time of war. These rules are already in force between the United States, Japan and the members of the British Commonwealth of Nations. But I am glad to be able to announce, as a result of the preliminary talks with representatives of other nations, that, once these rules have been incorporated in an instrument which will be distinct from the London Naval Treaty, the French and Italian Governments who were unable to ratify the London Treaty as a whole will be in a position definitely to accept such an instrument. We hope that this will be the signal for the acceptance of these rules by all the maritime Powers of the world and that, by this means, unrestricted submarine warfare may in the future be averted.

However, at the Fifteenth Meeting of the First Committee, held on March 13, 1936, the French delegate found it necessary to state:\textsuperscript{118}

I am surprised not to see on the Agenda a subject on which we appeared all to be agreed at the opening meeting of the Conference and which our First Committee has not yet examined, namely, the embodiment in the Acts which our Conference is to draw up of the rules of Part IV of the London Naval Treaty [of 1930], concerning the use of submarines against merchant vessels.

The British representative pointed out that the two treaties were quite separate (the Japanese had left the Conference and would not sign the Naval Treaty but would sign the Submarine Protocol) and that as another text had to be prepared
they could only hope that the two could be signed at the same time. As a matter of fact they were not, the Treaty being signed on March 25, 1936, and the Protocol more than seven months later, on November 6, 1936. On the latter date it (the Protocol) was signed by the five nations which had participated in the drafting of both the 1930 and the 1936 London Naval Treaties: France, Great Britain (and the Commonwealth Nations), Italy, Japan, and the United States. Other nations were invited to accede to the Protocol and approximately 37 others had done so before World War II erupted, including all of the European belligerents in that war except Rumania. Japan was a Party, but China was not. Germany had acceded on November 23, 1936.

The Nyon Agreements

The Spanish Civil War which began in 1936 was the first such conflict since the American Civil War in which submarines played a part. Because of their method of operation, which included attacks on and the sinking of merchant ships which did not belong to either side in the conflict, a number of concerned nations met at Nyon, Switzerland, in 1937 and drafted the Nyon Agreement. This agreement provided:

II. Any submarine which attacks such a ship [one not belonging to either side in the conflict] in a manner contrary to the rules referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on April 22, 1930 and confirmed in the Protocol signed in London on November 6, 1936, shall be counter-attacked and, if possible, destroyed.

In effect, the Parties to this Agreement were demanding that the contestants in a civil war comply with the provisions of the 1936 London Submarine Protocol. (A Supplementary Agreement, signed three days later, made the original agreement applicable to surface vessels and aircraft.) Nine European and Mediterranean States were Parties to these agreements. (Understandably, this did not include Germany and Italy, both of which were actively supporting the Franco insurgents who probably controlled all of the submarines involved.) Shortly thereafter, on 5 October 1937, the Council of the League of Nations adopted a Resolution which stated:

(7) Notes that attacks have taken place in violation of the most elementary dictates of humanity underlying the established rules of international law which are affirmed, so far as war time is concerned, in Part IV of the Treaty of London of April 22, 1930, rules which have been formally accepted by the great majority of Governments.
(8) Declares that all attacks of this kind against any merchant vessels are repugnant to the conscience of the civilised nations which now find expression through the Council.

It is strange that the League’s Council referred to the 1930 Treaty, which had only a few ratifications, and not to the 1936 Protocol, which, by this time, had more than twenty-five ratifications and accessions.

Part IV
World War II and Its Aftermath (1939-1947)

As in the case of World War I, the British Admiralty had prepared for another conflict by ensuring that many of its merchant ships had been built with reinforced areas for the mounting of guns and by storing guns to be used for arming those ships.124 Moreover, the 1938 British Defense of Merchant Shipping Handbook included the following provisions:125

As soon as the Master of a merchant ship realises that a ship or aircraft in sight is an enemy, it is his first and most important duty to report the nature and position of the enemy by wireless telegraph. Such a report promptly made may be the means of saving not only the ship herself but many others: . . .

Conditions under which fire may be opened:

(a) Against enemy acting in accordance with International Law—As the armament is solely for the purpose of self-defence, it must only be used against an enemy who is clearly attempting to capture or sink the merchant ship. On the outbreak of war it should be assumed that the enemy will act in accordance with International Law, and fire should therefore not be opened until he has made it plain that he intends to attempt capture. Once it is clear that resistance will be necessary if capture is to be averted, fire should be opened immediately.

(b) Against enemy acting in defiance of International Law—If, as the war progresses, it unfortunately becomes clear that, in defiance of International Law, the enemy has adopted a policy of attacking merchant ships without warning, it will then be permissible to open fire on an enemy surface vessel, submarine, or aircraft, even before she has attacked or demanded surrender, if to do so will prevent her gaining a favorable position for attacking.

According to a British history of World War II “between the outbreak of the war and November 4 [1939], thirty-two British and three Allied ships had been sunk illegally . . .; as many as thirty-three neutral ships had been attacked and at least sixteen sunk in circumstances which led to the conclusion that the sinking had been illegal.”126
In his *Memoirs*, Admiral Doenitz, the Commander of the U-boat arm of the German Navy for a large part of the war, later the Commander-in-Chief of the German Navy, and, ultimately, Hitler's successor, asserts that these Instructions were "a contravention of the Submarine Agreement." He also indicates his belief that the convoy system was contrary to the same Agreement. Neither arming merchant ships, nor ordering them to send by radio what can only be described as intelligence information, nor sailing them in convoy under the protection of warships, were acts contrary to the provisions of the 1936 London Submarine Protocol—but any of those acts removed the particular merchant ship involved from the limited category of ships protected by that Agreement.

On November 27, 1939 the British Government issued an Order in Council Restricting Further the Commerce of Germany which was intended, among other things, to eliminate all German exports. In response to neutral complaints of violation of the 1856 Declaration of Paris, the British Government said in notes to the Dutch and Italian Governments that "the main basis of their actions is admittedly the right of retaliation the essence of which is a departure from the ordinary rules as reprisal for illegal action by the enemy." This was, of course, an admission by the British that the Order in Council did, in fact, violate the 1856 Declaration of Paris and a claim that it was, nevertheless, legal because by definition a reprisal contemplates an illegal action by the party undertaking reprisal action.

On May 8, 1940, Churchill, once again First Lord of the Admiralty, stated to the House of Commons that the Royal Navy had been instructed that in the Skagerrak (a narrow arm of the North Sea between Denmark and Norway leading into the Kattegat and the Baltic Sea) "all German ships by day and all ships by night were to be sunk as opportunity served." This action was frequently referred to by the Germans as a basis for their subsequent actions. Although the International Military Tribunal found Doenitz guilty of violating the 1936 London Submarine Protocol by establishing operational zones, it listed Churchill's order as one ground for not assessing punishment against Doenitz on the basis of German submarine warfare.

On August 28, 1939, a few days before the outbreak of World War II, Germany had issued its Prize Ordinance which included some of the protections provided by the 1936 London Submarine Protocol. A week later, on September 3, 1939, Hitler issued Fuehrer's Directive No. 2, which provided that offensive actions by the German Navy against Great Britain were permissible but that "warfare against merchant shipping is for the time being to be conducted according to the prize regulations, also by submarines." Fuehrer's Directive No. 4, September 25, 1939, extended this directive to include the French.

The minutes of a conference between Hitler and Admiral Raeder, Chief of the Naval Staff, held on September 23, 1939, reveal the following decisions:
2. The intensification of anti-submarine measures by aircraft and armed merchant vessels will apparently make it impossible to search British merchantmen in the future. The Fuehrer approved the proposal that action should be taken without previous warning against enemy merchant ships definitely identified as such (with the exception of unmistakable passenger steamers), since it may be assumed that they are armed.

3. The expression 'submarine warfare' is to be replaced by the expression 'war against merchant shipping.' The notorious expression 'unrestricted submarine warfare' is to be avoided. Instead of this, the proclamation of the 'siege of England' is under consideration; such a military system would free us from having to observe any restrictions whatsoever on account of objections based on International Law.

Fuehrer's Directive No. 5, September 30, 1939, implemented these decisions. It provided: 

The war against merchant shipping is, on the whole, to be fought according to prize law, with the following exceptions.

(1) Merchantmen and troopships recognized beyond doubt as hostile may be attacked without warning.

(2) The same applies to ships sailing without lights in the waters around the British Isles.

(3) Armed force is to be employed against merchantmen which use their radio transmitters when stopped.

(4) As before, no attacks are to be made upon passenger vessels or large steamships as appear to be carrying passengers in large numbers as well as goods.

Even assuming that "hostile" merely meant "enemy," the first part of the first exception (merchantmen, not armed merchantmen) was a violation of the Protocol; the second part of that exception (troopships) was valid; the second exception was probably justified; the third was undoubtedly justified; and the fourth was intended to avoid incidents such as that of the _Lusitania_ in World War I and of the _Athenia_ in World War II.

During World War II Germany contended that its use of the submarine as a commerce destroyer was a legal reprisal because of such British violations of the law of naval warfare as arming merchant vessels, ordering them to radio reports of submarine sightings, ordering them to navigate without lights at night, ordering them to ram submarines, violations of the rules pertaining to blockades, etc. Thus, in his Memoirs, Doenitz wrote:
In the same way Naval High Command reacted only with extreme caution and step by step to the British measures which I have just described and which constituted a breach of the London Submarine Agreement. Slowly and one by one the restrictions on the conduct of U-boat operations were removed in a series of orders from Naval High Command—beginning with permission to fire upon vessels which used their wireless, which sailed without lights and which carried guns, followed (as a result of the instructions to ram given to British ships) by permission to attack all vessels identified as hostile and ending with a declaration of sea areas that would be regarded as operational zones.

It is, then, an established fact that from the very outset the German Naval High Command painstakingly adhered to the provisions of international law contained in the London agreements and that it was only step by step, in response to breaches of these provisions by the enemy, that we allowed ourselves more and more latitude, until finally, we reached the stage, as it was inevitable that we would, where the London agreement was abandoned completely and for good.

Actually, there was no need for Germany to place its actions on a reprisal basis. The British *modus operandi* constituted their merchant vessels naval auxiliaries, subject to the same treatment as warships—that of being attacked without warning immediately upon being sighted. As one author has stated, the provisions of the 1936 London Submarine Protocol did not extend, and were not intended to extend, to the “warshiplike merchantmen” of the British merchant marine. Many publicists are of the opinion that these, and other, British procedures changed the status of armed British merchantmen from noncombatants to combatants, that it integrated them into the British naval forces, and that the provisions of the 1936 London Submarine Protocol were, therefore, no longer applicable to them. The Commander’s Handbook on the Law of Naval Operations, issued by the United States Navy in 1987, states:

During World War II the practice of attacking and sinking enemy merchant vessels by surface warships, submarines, and military aircraft without prior warning and without first providing for the safety of passengers and crew was widespread on both sides. Rationale for these apparent departures from the agreed rules of the 1936 London Protocol varied. Initially, such acts were justified as reprisals against illegal acts of the enemy. As the war progressed, however, merchant ships were regularly armed and convoyed, participated in intelligence collection, and were otherwise incorporated directly or indirectly into the enemy’s war-fighting/war sustaining effort. Consequently, enemy merchant vessels were widely regarded as legitimate military targets subject to destruction on sight.

Shortly after the beginning of World War II the United States Congress enacted a Neutrality Act which, among other things, authorized the President
to place restrictions "on the use of the ports and territorial waters of the United States by the submarines or armed merchantmen of a foreign state." It also made it unlawful for foreign vessels to fly the American flag (a rather difficult provision to enforce) and authorized the President to designate "combat areas" within which American flag vessels were forbidden to proceed.¹⁵⁰ A Presidential Proclamation issued immediately thereafter placed such restrictions on the use of American ports and territorial waters on submarines, but not on armed merchantmen.¹⁵¹ Unlike the situation during World War I, the entrance into the ports of the United States by armed British merchantmen from the early days of World War II did not seem to cause the Administration any concern and was completely uncontrolled. From the very beginning of the war these vessels were treated as peaceable cargo ships and Borchard's strong protest appears to have occasioned little comment and no change of policy.¹⁵² This must be considered as one of the many indications of official American political policy favoring the British, rather than as a thoughtful interpretation of the applicable law.

In accordance with the authority granted by the Neutrality Act, President Roosevelt also issued a Proclamation designating a "combat area" within which American flag vessels were forbidden to navigate.¹⁵³ Germany availed itself of this combat zone and declared its zone, within which all vessels would be sunk without warning, to coincide with the American zone. During his cross-examination by Sir David Maxwell-Fyfe, the British prosecutor, before the International Military Tribunal, Doenitz testified:¹⁵⁴

"I have already said that the neutrals had been warned not to cross the combat zones. If they entered the combat zones, they had to run the risk of suffering damage, or else stay away. That is what war is. For instance, no consideration would be shown on land either to a neutral truck convoy bringing ammunition or supplies to the enemy. It would be fired on in exactly the same way as an enemy transport. It is, therefore, quite admissible to turn the seas around the enemy's country into a combat area. That is the position as I know it in international law, although I am only a soldier.

Sir David Maxwell-Fyfe: I see.

Doenitz: Strict neutrality would require the avoidance of combat areas. Whoever enters a combat area must take the consequences.

During this cross-examination Doenitz was also asked, "If you sank a neutral ship which had come into that [declared operational] zone, you considered that you were absolved from any of your duties under the London Agreement to look after the safety of the crews?" To this, he replied: "In operational areas I
am obliged to take care of the survivors after an engagement, if the military situation permits."\textsuperscript{155}

In finding Doenitz guilty of violating the 1936 London Submarine Protocol by virtue of the German establishment of "operational zones," the International Military Tribunal stated that the conference in Washington in 1922, in London in 1930, and in London again in 1936, had had full knowledge of the fact that "operational zones" (or "war zones," or "exclusion zones," or "combat zones," under whatever name one may give to them), had been declared by both sides during World War I, "yet the protocol made no exception" for them.\textsuperscript{156} It is of interest to note that there was no mention whatsoever of such zones during the discussions that accompanied the drafting of the provisions of the 1922 Washington Treaty, nor of those of the 1930 London Naval Treaty which became the 1936 London Submarine Protocol; and that there were no discussions whatsoever involved in the drafting of the Protocol itself. Would it not be just as logical to interpret all this as indicating that there was no intention on the part of the draftsmen of those agreements to legislate with respect to this problem, which went far beyond submarine warfare in the scope of its application, that there was no desire or authority on their part to establish rules in an area which did not relate exclusively to submarine warfare?\textsuperscript{157} Moreover, while the Tribunal found Doenitz not guilty of waging unrestricted submarine warfare on what amounted to a \textit{tu quoque} defense, it failed to find him not guilty of the use of operational zones on that same basis despite undisputed evidence that the British practice in this respect was identical with, and had preceded, that of the Germans.\textsuperscript{158}

There is one aspect of submarine warfare which appears to warrant mention even though there can be no question as to the criminal liability of any person engaged in it: the murder of the shipwrecked crews and passengers of ships which have been sunk. This problem arose during World War II because of an incident involving the \textit{Laconia}, a British ship which was sunk in September 1942 by a German submarine which then discovered that a large number of Italian prisoners of war had been among those on board. The submarine took in tow several lifeboats (as it happened, the occupants of the lifeboats included a substantial number of members of the British crew), with a large Red Cross displayed, and sent a message, in English in the clear, asking for assistance in the rescue efforts, promising to take no aggressive action against any vessel coming to render assistance as long as none was taken against his U-boat. Unfortunately, the only response was by an American bomber which attacked and damaged the U-boat, causing it to cast the lifeboats adrift and to submerge.\textsuperscript{159} When this was reported to Doenitz he issued the so-called "Laconia Order" which provided: \textsuperscript{160}
Levie on the Law of War

(1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats, and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.

(2) Orders for bringing back captains and chief engineers still apply.

(3) Rescue the shipwrecked only if their statements would be of importance for your boat.

(4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities.

At Nuremberg the British prosecutor contended that this was an order to destroy any survivors of the ships sunk by German submarines, contending that this had long been German submarine policy. Evidence was adduced of a conversation between Hitler and Oshima, the Japanese Ambassador to Germany, which the International Military Tribunal for the Far East reported as follows: 161

OSHIMA had a conference with Hitler on January 3, 1942. Hitler explained his policy of submarine warfare, which he was conducting against Allied shipping, and said that although the United States might build ships very quickly, her chief problem would be the personnel shortage since the training of seafaring personnel took a long time. Hitler explained that he had given orders for his submarines to surface after torpedoing merchant ships and to shoot up the lifeboats, so that the word would get around that most seamen were lost in torpedos and the United States would have difficulty in recruiting new crews. OSHIMA, in replying to Hitler, approved this statement of policy and stated that the Japanese would follow this method of waging submarine warfare.

Concerning this matter the International Military Tribunal said: 162

It is also asserted that the German U-boat arm not only did not carry out the warning and rescue provisions of the protocol but that Doenitz deliberately ordered the killing of the survivors of shipwrecked vessels, whether enemy or neutral. The prosecution has introduced much evidence surrounding two orders of Doenitz, war order No.154, issued in 1939, and the so-called “Laconia” order of 1942. The defense argues that these orders and the evidence supporting them do not show such a policy and introduced much evidence to the contrary. The Tribunal is of the opinion that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous, and deserve the strongest censure.
The evidence further shows that the rescue provisions [of the 1936 Protocol] were not carried out and that the defendant ordered that they should not be carried out. The argument of the defense is that the security of the submarine is, as the first rule of the sea, paramount to rescue and that the development of aircraft made rescue impossible. This may be so, but the protocol is explicit. If the commander cannot rescue, then under its terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope. These orders, then, prove Doentiz is guilty of a violation of the protocol.

To summarize, in passing upon the charges of illegal submarine warfare made against German Admiral Doenitz, the International Military Tribunal discussed and reached decisions on four aspects of the question: 1) waging unrestricted submarine warfare (not guilty); 2) the proclamation of operational zones and the sinking of neutral merchant ships therein (guilty); 3) ordering that the shipwrecked be killed (not guilty); and 4) failure to rescue the shipwrecked (guilty). However, because of the evidence of a number of British and American practices, no sentence was assessed against Doenitz for the foregoing offenses of which he was found guilty.  

What were the reasons for the failure to comply with the rules of customary international law with respect to submarine warfare during the course of World War I and for the failure to comply with those rules, as codified in the 1936 London Submarine Protocol, during the course of World War II? One student of the problem has answered that question as follows:

The non-observance of the rules of the Protocol could be explained with the help of military considerations: impossibility for the aircraft to act in conformity with the rules, impossibility for the German surface warships to penetrate into and effectively control the waters surrounding the British Isles, and, as far as submarines were concerned, the unacceptable risk involved in the procedure of surfacing, ascertaining the character of the ship and cargo, ordering the ship to be abandoned and waiting until the order was carried out and those on board as well as the papers and mail were safe in the ship’s boats, in an area where the superior enemy forces, warned with the aid of technical devices like radio and radar or by air reconnaissance, could arrive on the scene in very little time.

Part V
Post-World War II (1948-to date)

As the footnotes will have indicated, there has been much discussion of the question of restrictions on submarine warfare and the continued viability of the 1936 London Submarine Protocol since the end of World War II and the completion of the trial before the International Military Tribunal. However, unfortunately, there has been no attempt on the part of the international
community to clarify a very confused situation, something that should be avoided at all costs in the law of war. The only “official” action which has been taken in this respect during the past forty or more years is the issuance by the U.S. Navy of its Commander’s Handbook on the Law of Naval Operations. That volume contains the following:

Although the rules of the 1936 London Protocol continue to apply to surface warships, they must be interpreted in light of current technology, including satellite communications, over-the-horizon weapons, and antiship missile systems, as well as the customary practice of belligerents that evolved during and following World War II. Accordingly, enemy merchant vessels may be attacked and destroyed by surface warships, either with or without prior warning, in any of the following circumstances:

1. Actively resisting visit and search or capture;
2. Refusing to stop upon being summoned to do so;
3. Sailing under convoy of enemy warships or enemy military aircraft;
4. If armed;
5. If incorporated into, or assisting in any way, the intelligence system of the enemy’s armed forces;
6. If acting in any capacity as a naval or military auxiliary to an enemy’s armed forces;
7. If integrated into the enemy’s war-fighting/war-sustaining effort and compliance with the rules of the 1936 London Protocol would, under the circumstances of the specific encounter, subject the surface warship to imminent danger or would otherwise preclude mission accomplishment.

In an earlier volume, entitled Law of Naval Warfare, sub-paragraph 4, above, had included the additional words “and there is reason to believe that such armament has been used, or is intended for use, offensively against an enemy.” In explanation of the deletion of those words, a proposed Annotated Supplement to the Handbook, which is unofficial and which is still in draft form, states:

In light of modern weapons it is impossible to determine, if it ever was possible, whether the armament on merchant ships is to be used offensively against an enemy or merely defensively. It is unrealistic to expect enemy forces to be able to make that determination. Accordingly, this rule has been modified in this text from that previously appearing in NWIP 10-2, para. 503b(3).
In the 1987 volume we find a number of references to submarines and to submarine warfare. Having stated that "[the law of armed conflict imposes essentially the same rules on submarines as apply to surface warships (a paraphrase of the first paragraph of the 1936 London Submarine Protocol), the Handbook goes on to say:"

8.3.1. Interdiction of Enemy Merchant Shipping by Submarines. The conventional rules of naval warfare pertaining to submarine operations against enemy merchant shipping constitute one of the least developed areas of the law of armed conflict. Although the submarine’s effectiveness as a weapons system is dependent upon its capability to remain submerged (and thereby undetected) and despite its vulnerability when surfaced, the London Protocol of 1936 makes no distinction between submarines and surface warships with respect to the interdiction of enemy merchant shipping. The London Protocol specifies that except in the case of persistent refusal to stop when ordered to do so, or in the event of active resistance to capture, a warship, “whether surface or submarine” may not destroy an enemy merchant vessel "without having first placed passengers, crew, and ship’s papers in a place of safety." The impracticality of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practice of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. As in the case of such attacks by surface warships, this practice was justified either as a reprisal in response to unlawful acts of the enemy or as a necessary consequence of the arming of merchant vessels, of convoying, and of the general integration of merchant shipping into the enemy’s war-fighting/war-sustaining effort.

The United States considers that the London Protocol of 1936, coupled with the customary practice of belligerents during and following World War II, imposes upon submarines the responsibility to provide for the safety of passengers, crew, and ship’s papers before destruction of an enemy merchant vessel unless:

1. The enemy merchant vessel refuses to stop when summoned to do so or otherwise resists capture.

2. The enemy merchant vessel is sailing under armed convoy or is itself armed.

3. The enemy merchant vessel is assisting in any way the enemy’s military intelligence system or is acting in any capacity as a naval auxiliary to the enemy’s armed forces.

4. The enemy has integrated its merchant shipping into its warfighting or war-sustaining effort and compliance with this rule would, under the
Levie on the Law of War

circumstances of the specific encounter, subject the submarine to imminent danger
or would otherwise preclude mission accomplishment.

In a learned discussion of this problem which arrives at conclusions closely
resembling those reached by the draftsmen of the Handbook, one author states: 170

Besides the two circumstances mentioned in Article 22 (2) of the London Naval
Treaty of 1930—persistent refusal to stop on being summoned and active
resistance to visit and search—there are other situations in which international law
may allow the attack and destruction of merchant vessels. They include:

i) sailing under convoy of enemy warships or enemy military aircraft.

ii) if armed, and there is reason to believe that such armament has been used,
or is intended for use offensively against an enemy.

iii) if incorporated into, or assisting in any way, the intelligence system of an
enemy’s armed forces.

iv) if acting in any capacity as a naval or military auxiliary to an enemy’s armed
forces

He immediately points out that “[m]any British writers question the validity of
some of these situations.”

Conclusions

Can it be said that, after the experiences of two World Wars, the mandates
of the 1936 London Submarine Protocol, codifying customary international law,
are still a valid and binding part of the law of war at sea? The International
Military Tribunal, sitting after the conclusion of those two conflagrations, left
no doubt that in its opinion the provisions of the Protocol had been, during
World War II, and still were, after that conflict, very much alive and binding.
A majority of the writers who have studied the problem are of a similar
opinion. 171 Although it is unquestionably true that a rule of international law
may be changed by evidence of a substantial change in the practice of States, the
failure of one belligerent in World War I to comply with the applicable rules
of customary international law, following which it was severely chastised for its
action and the rules were codified, and the failure of three belligerents in World
War II (Germany, Japan, and the United States), even though they may have
been major maritime Powers, to comply with the provisions of the Protocol
does not forever erase them from the rule book. During World War I all of the
Entente Powers and the United States, both as a neutral and as a Power associated
with the Entente Powers, insisted that the rules with respect to submarine warfare, which were then a part of customary international law and are now set forth in the 1936 London Submarine Protocol, were valid and binding rules. During the interim between the wars a large number of the nations of the world, including in many cases those which later did not comply therewith, accepted these rules in conventional form in 1922, in 1930, in 1936, and in 1937. The failure of Germany, Japan, and the United States to comply with those rules during World War II did not result in their nullification. It must also be borne in mind that in both World Wars Germany contended that her failure to comply with the customary or conventional law of submarine warfare was an act of reprisal, i.e., an admittedly illegal act. The same argument may, perhaps, be made for the United States inasmuch as a Japanese submarine had already sunk an American merchantman without warning when the message ordering unrestricted submarine warfare by the United States Navy, concerning which Admiral Nimitz testified, was sent.\(^{172}\) (No evidence could be found that Japan claimed that her unrestricted submarine warfare was an act of reprisal.)\(^{173}\)

Which brings the present author to the following conclusions:

1. While, during World War II, the provisions of the 1936 London Submarine Protocol were largely not applied, this was frequently excused by the particular belligerent, not on the basis that they were no longer a part of the law of war at sea, but on the basis of reprisals against illegal actions on the part of the enemy (arming of merchant vessels with guns and depth charges, sailing them in warship-escorted convoys, ordering the immediate reporting by radio of submarine sightings, ordering merchant vessels to ram submarines, illegal mining, illegal expansion of the list of contraband, illegal blockades, declarations of war zones, etc.), in itself a recognition of the continuing validity of those provisions;

2. The 1936 London Submarine Protocol continues to be a valid and subsisting part of the law of war at sea;

3. If the establishment of zones (operations zones, war zones, exclusion zones, combat zones, etc.) is determined to be a legal method of making war at sea, the application of the rules of the 1936 London Submarine Protocol will be largely, but not entirely, nullified, at least in the zones so declared;

4. It is highly probable that in any World War III belligerents will again find reasons why the 1936 London Submarine Protocol should not be applied;
5. In any future armed conflict of lesser extent than a World War III the pressure of neutral Powers may be sufficiently strong to cause the belligerents to comply with the provisions of the 1936 London Submarine Protocol.

One cannot do better than to conclude a study of the submarine with a portion of the final conclusion reached by a noted expert in a book recently published: 174

The era of the submarine as the predominant weapon of power at sea must therefore be recognized as having begun. . . . Five hundred years ago, before the sailing-ship pioneers ventured into great waters, the oceans were an empty place, the only area of the world’s surface in which men did not deploy military force against each other. In a future war the oceans might appear empty again, swept clear both of merchant traffic and of the navies which have sought so long to protect it against predators. Yet the oceans’ emptiness will be illusory, for in their deeps new navies of submarine warships, great and small, will be exacting from each other the price of admiralty.

Notes

2. Quoted in Cynthia O. Philip, Robert Fulton: A Biography 74 (1985). The author states: “He realized that the submarine would be considered an illegal weapon and that if he or any of his crew were taken prisoner by the British they would be executed as common criminals. The objection to submarine warfare . . . was that the submarine would attack with unscrupulous stealth.” Id. at 75.
3. Admiral Earl St. Vincent, the British First Sea Lord in 1804, is reputed to have said of Fulton’s submarine:
   Don’t look at it, and don’t touch it. If we take it up, other nations will; and it will be the greatest blow at our supremacy on the sea that can be imagined.
4. The Union Navy made one attempt to construct a submersible to be used against the Confederate iron-clad Merrimac. This boat, the Alligator, was eventually lost, not through enemy action, without ever having been submerged. Bernard Brodie, Sea Power in the Machine Age 272 (1969).
5. One author says that New Rome was “did not even need a major dockyard repair job.” Edwin P. Hoyt, Submarines at War: The History of the American Silent Service 11 (1983); another author says that she was “out of action for a year.” Alex Roland, Underwater Warfare in the Age of Sill 162 (1978).
6. Edwin P. Hoyt, supra note 5, at 10-13. The lessenng of the interest of the Confederate Navy in submersibles may have been due to the difficulty of recruiting crews for what appeared to be suicide missions. However, it cannot be said that Confederate underwater activities (which included mines, another pioneering method) ceased. See Roland, supra note 5, at 162, where the following statistics are set forth:
   By the end of the war the toll from Confederate underwater warfare was impressive. Damage was found to have been sustained by forty-three Union vessels, twenty-nine of which were sunk. This was more damage than was effected by the rest of the Confederate Navy.
   It is to be noted that all actions of the Confederate submersibles were directed against Union warships. For a fairly detailed history of the “David” and the “Hunley”, see Milton F. Perry, Infernal Machines: The Story of Confederate Submarine and Mine Warfare 63-108 (1965).
7. Hoyt, supra note 5, at 15.
9. The Reports to The Hague Conferences of 1899 and 1907, at 2, 3 (James B. Scott ed., 1917).
11. Id. at 296.
Submarine Warfare

12. Id. at 299.


14. A 1917 Grotius Society Committee pointed out that until World War I "the employment of [submarines] as commerce destroyers was not seriously considered." Report of a Committee of the Grotius Society, The Legal Status of Submarines, 14 Trans. Grot. Soc. 155 (1929) [hereinafter Grotius Committee Report]. A later author said: "Perhaps the major law in the naval thinking of the years preceding World War I was the apparent lack of appreciation of the economic facet of naval warfare." William H. Barnes, Submarine Warfare and International Law, 2 World Polity 121, 132 (1960). The effectiveness of the British blockade of Germany early in World War I was undoubtedly a major reason for the decision of Germany to retaliate in the only way open to it, by the employment of the submarine as a commerce destroyer. Gray, supra note 8, at 38.

15. Bernard Brodie, supra note 4, at 287.

16. In 1901 France had 6 submarines, Italy 2, the United States 1, and Great Britain none; while in 1907 France had 49, Great Britain 39, Russia 13, the United States 10, Italy 7, Japan 5, and Germany 2. Barnes, supra note 14, at 121, 127-128. By 1914 Great Britain had 76 (with 20 under construction), France had 70 (23), the United States had 29 (21), Germany had 77 (12), Russia had 25 (18), and Italy had 18 (2). Id., at 131.


18. 3 id. at 741. That Commission had drafted the 1899 Hague Convention No. II with Respect to the Laws and Customs of War on Land and its attached Regulations, signed at The Hague, 29 July 1899, 32 Stat. 1803; 1 Am. J. Int'l. L. (Supp.1907) 129; The Laws of Armed Conflicts 63 (Dietrich Schindler and Jiri Toman, eds., 3d ed., 1988) [hereinafter Schindler/Toman]. This Convention was readopted with only a few minor changes as the 1907 Hague Convention No. IV, signed at The Hague, 18 October 1907, 36 Stat. 2227; 2 Am. J. Int'l. L. (Supp. 1908) 90; Schindler/Toman, supra, and still constitutes a major portion of the conventional law of war on land.


20. 3 Scott, Proceedings, supra note 17, at 792-793.

21. 1907 Hague Convention No. VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, signed at the Hague, 19 October 1907, 2 Am. J. Int'l. L. (Supp. 1908) 127; Schindler/Toman, supra note 18, at 791. The United States is not a Party to this Convention.

22. 1909 London Declaration Concerning the Laws of Naval Warfare, signed at London, 26 February 1909, 3 Am. J. Int'l. L. 179, 186 (Supp. 1909); Schindler/Toman, supra note 18, at 843. After an adverse vote in the British House of Lords, this Declaration received no ratifications and never became effective. One author has written:

"For belligerents [in World War I] the Declaration of London proved a remarkably flexible weapon, the more so because it was unratified. Since the London Conference had maintained the fiction that it was not writing new law, but declaring law, it was easy to use the declaration. Since it was unratified it was simple to announce interpretations by proclamation, or ignore it. Calvin D. Davis, The United States and the Second Hague Conference 343 (1975).

23. The 1913 Oxford Manual on the Law of Naval Warfare Governing The Relations Between Belligerents, Resolutions of the Institute of International Law 174 (James B. Scott ed., 1913); Schindler/Toman, supra note 18, at 857), while perhaps even more extensive in its coverage than the 1909 Declaration of London, supra note 22, likewise contained no mention of the submarine.

24. It is worthy of note that the provision in this regard contained in Article 50 of the 1909 Declaration of London, supra note 22, applied only to neutral merchant vessels and that there are no comparable provisions relating to enemy merchant vessels. Perhaps this was because of the provision of the 1907 Hague Convention No. VI. See supra text accompanying note 21.

25. Hyman G. Rickover, supra note 13, at 1217.


27. 2 Lassa Oppenheim, International Law: A Treatise 469 (Hench Lauterbach ed., 7th ed. 1952) [hereinafter Lauterbach's Oppenheim]. Another British writer concluded that "the introduction of the submarine does not call for the making of new laws for naval warfare, but demands the rigid application of those hitherto accepted." A. Pearce Higgins, Submarine Warfare, 1 Brit. Y.B. Int'l L. 149, 164 (1920-1921). However, an expert in the field of the law of war has written:
Levi on the Law of War

So in our own times, Professor Lauterpacht and the late Professor Oppenheim, Dr. Colombos and the late Professor Higgins and other Anglo-American publicists have regarded air and submarine craft as interlopers in naval warfare, which must play the game according to surface rules, or not at all, with no ground of complaint if the rules forbid their effective use. It is not believed that this is an adequate approach either for understanding the present state of international practice, or for moulding future practice.

Julius Stone, Legal Controls of International Conflict 603-604 (2d imp., 1959).

29. 50 Parl. Deb., H.C. (5th serv.) 1750 (1913). The 1907 Hague Convention No. VII Relating to the Conversion of Merchant Ships into War-Ships, 2 Am. J. Int'l. L. 133 (Supp. 1908); Schindler/Toman, supra note 19, at 797; 100 B.F.S.P. 377 had covered some, but not all, of the problems connected with such conversions, which created warships sometimes referred to as "armed merchant cruisers" and sometimes as "auxiliary cruisers." In particular, it had not solved the problem as to where such conversions could be accomplished.
33. Although food and clothing remained on the conditional contraband list, as Lauterpacht pointed out this was "a distinction without a difference" as, contrary to the provisions of the 1909 Declaration of London, supra note 22, British prize courts applied the doctrine of continuous voyage to items of conditional contraband. Hersch Lauterpacht, The Problem of the Revision of the Laws of War, 29 Brit. Y.B. Int'l L. 360, 375 (1952). Concerning problems with respect to contraband during World War 1, see H. Reason Pyke, The Law of Contraband of War 178-190 (1915).
34. On 5 September 1914, the British light cruiser Pathfinder became the first victim of a submarine's torpedo in World War I. As some indication of the naiveté of the time with respect to submarines, on 22 September 1914 a German submarine sank another British cruiser, the Aboukir—and then sank two more such cruisers, the Cressy and the Hogue, which engaged in rescuing the crew of the first one, in complete disregard of the possible presence of the submarine. R.H. Gibson, supra note 3, at 6-7.
35. On 20 October 1914 a German U-boat sank the Gliba, a small merchant vessel, the first such to be sunk during World War I. This was accomplished in the manner prescribed for surface vessels and occasioned no outcry. Brodie, supra note 4, at 302.
39. Declaration Respecting Maritime Law, signed at Paris, 16 April 1856, 1 Am. J. Int'l. L. 89 (Supp. 1907); 115 Perry C.T.S. 1 (1969); Schindler/Toman, supra note 18, at 787. One of the provisions of this Declaration, which the British were allegedly disregarding, stated: "The neutral flag covers enemy's goods, with the exception of contraband of war." Of course, the British would have denied any violation of the Declaration as they had included practically every conceivable item on their revised lists of contraband! For variously stated reasons, the United States is not a Party to this Declaration but can probably be said to recognize the applicability of its provisions.
40. For. Rel. 96-98 (Supp. 1915); 9 Am. J. Int'l. L. 84-85 (Spec. Supp. 1915). A memorandum to German U-boat commanders issued at the same time said:
   The first consideration is the safety of the U-boat. Rising to the surface to examine a ship must be avoided for the boat's safety, because, apart from the danger of a possible surprise attack by enemy ships, there is no guarantee that one is not dealing with an enemy ship even if it bears the distinguishing marks of a neutral... Its destruction will therefore be justified unless other attendant circumstances indicate its neutrality.
Bernard Brodie, supra note 4, at 304.
41. While, for a complete overview of the problem of submarine warfare against merchantmen, it will be necessary to refer to the use of "operational zones," the question of their legality is beyond the scope of this article. The reader interested in this subject is referred to the definitive discussion thereof in Maritime War Zones and Exclusion Zones by L.F.E. Goldie, 64 International Law Studies 156 (1991). See also W.J. Fenrick, The Exclusion Zone Device in the Law of Naval Warfare, 1986 Can. Y.B. Int'l L. 91. At this point it will suffice to say that "[t]he German operational area may be justified as a legitimate reprisal to the British one." William T. Mallison, Jr., Submarines in General and Limited Wars, Studies in the Law of Naval Warfare (1966).
42. 5 Ray S. Baker, Woodrow Wilson, Life and Letters 247, 250-251 (1935) [hereinafter Baker].
Submarine Warfare 329

said, in part:
To declare or exercise a right to attack any vessel entering a prescribed area without first certainly
determining its belligerent nationality and the contraband character of the cargo would be an act so
unprecedented in naval warfare that this Government is reluctant to believe that the Imperial
Government of Germany contemplates it as possible. The suspicion that enemy ships are using neutral
flags improperly can create no presumption that all ships traversing a prescribed area are subject to
the same suspicion. It is to determine exactly such questions that this Government understands the right
of visit and search to have been recognized.


47. For. Rel. 393 (Supp. 1915); 9 Am. J. Int’l. L. 129, 131 (Spec. Supp. 1915). It will be noted that this
protest repeated many of the arguments which had been advanced by the British in rejecting the proposal
made by the United States.

this decision as:
a significant admission by Germany that the right of unarmed belligerent merchantmen were
recognized by international law, and that the duty with respect to warning and the saving of human
life was as applicable to the submarine as to the surface warship.

Horace B. Robertson, Jr., Submarine Warfare, JAG J. 3 (November 1956).

49. Submarines 14 (1953).

50. Proces-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of
London of 22 April 1930, signed at London, November 6, 1936, 3 Treaties and Other International Agreements
of the United States of America, 1776-1949, at 298 (Charles I. Bevans ed.) [hereinafter Bevans]; 31 Am. J.
Int’l. L. 137 (Supp. 1937); 173 L.N.T.S. 353; 140 B.F.S.P. 300; Schindler/Toman, supra note 18, at 883.
Although it is officially a “Proces-Verbal,” it is generally referred to as a “Protocol.”


field concluded that “the international law Germany had a good case. She failed to exploit it
effectively in neutral eyes and eventually roused the neutrals to anger.” O’Connell, supra note 37, at 48.


Bill” passed the House by a lopsided margin but was successfully filibustered in the Senate. President Wilson
then decided to exercise his authority as Commander-in-Chief to direct the Navy to furnish American
ed.).


57. 1907 Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval
War, signed at The Hague, October 18, 1907, 36 Stat. 2415; T.S. 545; 2 Am. J. Int’l. L. 202 (Supp. 1908);
100 B.F.S.P. 448; Schindler/Toman, supra note 18, at 951.


59. The Dutch reply to a British protest, stated:
The observation of a strict neutrality obliges them to place in the category of vessels assimilated to
belligerent warships those merchant vessels of the belligerent parties that are provided with an armament
and that consequently would be capable of committing acts of war.


61. The authors also point out that:
The construction of this “right to resist” urged by the same writers and by the British Government
was singularly liberal. Attack was said to include the attempt to capture, and the attempt to capture
included the attempt to exercise visit and search. In net effect, an armed merchantman was, under this
view, entitled to start firing upon being sighted and approached by an enemy force.

62. See supra note 29.

63. See supra text accompanying note 29.

64. 50 Parl. Deb., H.C. 1750 (5th ser. 1913). It will be noted that Churchill spoke of a British “armed
merchantman” meeting a foreign “armed merchantman.” Actually, he was undoubtedly referring to a foreign
"armed merchant cruiser." Moreover, he continued to fail to make this verbal distinction. On June 11, 1913, during a question period, he was asked: "Is it not a fact that these ships are armed for defence only and not for attack?" to which he replied: "Surely these ships will be quite useless for the purpose of attacking armed vessels of any kind. What they are serviceable for is to defend themselves against the attack of another vessel of their own standing." 53 id. at 1859 (1913). (The question was undoubtedly "planted")

65. 59 id. at 1925 (1914). The extent of this operation is indicated by the fact that by the end of the war 4,139 merchant ships had been armed. Bernard Brodie, supra note 4, at 319. During World War I Germany had no "armed merchantmen" although it did have some "commissioned auxiliary cruisers"; and the guns to which Churchill referred were very much used against "ships of war" inasmuch as they were used against submarines. In a memorandum of October 13, 1914, the German Government stated that the purpose of the armament on the merchantmen was for armed resistance against German cruisers and that "such resistance is contrary to international law because a merchant vessel is not permitted to defend itself against a war vessel." (The issue of the right of such armed vessels to remain in neutral ports more than twenty-four hours was also raised.) For. Rel. 613 (Supp. 1914); 10 Am. J. Int'l L. 321 (Spec. Supp. 1916).

66. For. Rel. 598 (Supp. 1914); 9 Am. J. Int'l L. 223 (Spec. Supp. 1915). The British Privy Council has held that "it must be recollected that defence is not confined to taking to one's heels or even resuming a blow, but, in the jargon of strategy, may consist in an offensive-defensive, or in plain words in hitting first." International Law Situations, 1930, at 6, 8. And as one author stated: "[I]f a surprise shell which sent down a submarine and its crew had been fired in self-defence, the pity is that the drowning men would be unable to detect its difference from an offensive shell." Kenkichi Mori, The Submarine in War 86 (1931) [hereinafter Mori].

67. For. Rel. 604 (Supp. 1914); 9 Am. J. Int'l L. 230 (Spec. Supp. 1915). In view of the provisions of the 1907 Hague Convention No. XIII, supra note 57, the British Ambassador also stated that "His Majesty's Government hold the view that it is not in accordance with neutrality and international law to detain in neutral ports merchant ships armed with purely defensive armaments." For. Rel. 606 (Supp. 1914); 9 Am. J. Int'l L. 231 (Spec. Supp. 1915).


70. The same procedure was followed in World War II. 13 International Military Tribunal, Trial of Major War Criminals 258 (1947) [hereinafter T.M.W.C.].


72. See supra note 39.

73. Lauterpacht's Oppenheim, supra note 27, at 469. Elsewhere he states that: "An overwhelming weight of authority recognized that their defensive armament in no way altered the legal status of these vessels." Id. at 468. While this is probably true as to most British writers on the subject, it is probably not true in general. See, e.g., infra note 74, and the Borchard article cited supra in note 60.

74. For. Rel. 611-612 (Supp. 1914); 9 Am. J. Int'l L. 234-235 (Spec. Supp. 1915). Secretary of State Bryan disagreed with this memorandum and in a letter to President Wilson he argued that "the character of the vessel is determined, not by whether she resists or not, but by whether she is armed or not . . . the fact that she is armed raises the presumption that she will use her arms." Baker, supra note 42, at 354. John Bassett Moore, one of the deans of international law in the United States, said of Secretary Bryan's position that "It was obviously founded in law and common sense." John B. Moore, Fifty Years of International Law, 50 Harv. L. Rev. 395, 439 (1937).

75. For. Rel. 749 (Supp. 1916).


77. For. Rel. 146-148 (Supp. 1916); 10 Am. J. Int'l L. 310,312-313 (Spec. Supp. 1916). Of the problem created by permitting merchant vessels to be armed and yet considering them to be noncombatants, while requiring the submarine to comply with the law applicable to surface warships, one expert in the law of submarine warfare has written:

It soon became apparent [in World War I] that even a British armed merchant ship sailing alone presented a very real military danger to German submarines which attempted to comply with traditional law. The predictable result of the new situation was that consideration of military necessity, as well as simply self-preservation, led to the submarine remaining submerged and making torpedo attacks without warning.

William T. Mallison, Jr., supra note 41, at 107. A similar conclusion was reached by a number of other students of the problem. See, e.g., the Grotius Committee Report, supra note 14, at 155; Hyman G. Rickover, supra.


79. In his Memoirs, Lansing, although strongly pro-British, said: "... I had already worked to the advantage of Great Britain and wished the law modified when the change would benefit Great Britain."

Robert Lansing, supra note 55, at 111. The German response was a memorandum of 10 February 1916 in which it was stated that armed merchantmen were not entitled to the status of peaceable vessels of commerce and that German naval vessels were receiving orders "to treat such vessels as belligerents." For. Rel. 163-165 (Supp. 1916); 10 Am. J. Int'l L. 314-318 (Spec. Supp. 1916).

80. For. Rel. 244-248 (Supp. 1916); 10 Am. J. Int'l L. 367, 369-370 (Spec. Supp. 1916). The vacillation of the United States on this matter and its ultimate improper decision was pointed out with vigor by Borchard when the same problem arose in the early years of World War II. He termed the March 1916 memorandum a "humiliating retreat." Edwin Borchard, supra note 60, at 107. But see Mack, supra note 66, at 86-87. Another expert in the field asserted that it "represented a return to a pro-Allied policy in the guise of a return to traditional law." William T. Mallison, Jr., supra note 41, at 111.

81. Inter-American Convention on Maritime Neutrality, signed at Havana, February 20, 1928, 47 Stat. 1928, infra note 94, and the 1936 London Treaty because of the Senate's objections to the London Naval Treaty, supra note 94, and the 1936 London Treaty between the Allied and Associated Powers, of the One Part, and, Germany, of the Other Part, signed at Versailles, June 28, 1919, 2 Bevans, supra note 50, at 43, 127; 112 B.F.S.P. 1, 94; 225 Perry C.T.S. 188, 276. (The United States did not ratify this Treaty because of the Senate's objections to the Covenant of the League of Nations which was a part thereof. However, Article 191 (in Part V) was carried over into the Treaty Between the United States and Germany for the Establishment of Friendly Relations, signed at Berlin, August 25, 1921, 42 Stat. 1928, 38 L.N.T.S. 295, 33 Am. J. Int'l L. 167, 224 (Spec. Supp. 1939) provides that belligerent merchant vessels "shall, if armed for defense or offense, be assimilated to warships."

See also Articles 28 and 55 of that document. However, Article 3 (2) of the Scandinavian Declaration Regarding Similar Rules of Neutrality, signed at Stockholm, May 27, 1938, 188 L.N.T.S. 295, 32 Am. J. Int'l L. 141 (Supp. 1938) states:

2. Access to [Danish] ports or to [Danish] territorial waters is likewise prohibited to armed merchant ships of the belligerents if the armament is destined to ends other than their own defense.

82. William T. Mallison, Jr., supra note 41, at 120.

83. It will have been noted that no mention has been made of the famous "O-ships." These were warships disguised as unarmed merchant ships and were undoubtedly another reason why Germany elected to discontinue the practice of having a submarine surface and warn during the course of World War I. Id. at 67.

84. 2 David H. Miller, The Drafting of the Covenant 65, 74 (1928).

85. Treaty of Peace between the Allied and Associated Powers, of the One Part, and, Germany, of the Other Part, signed at Versailles, June 28, 1919, 2 Bevans, supra note 50, at 43, 127; 112 B.F.S.P. 1, 94; 225 Perry C.T.S. 188, 276. (The United States did not ratify this Treaty because of the Senate's objections to the Covenant of the League of Nations which was a part thereof. However, Article 191 (in Part V) was carried over into the Treaty Between the United States and Germany for the Establishment of Friendly Relations, signed at Berlin, August 25, 1921, 42 Stat. 1928, 38 L.N.T.S. 295, 33 Am. J. Int'l L. 167, 224 (Spec. Supp. 1939) provides that belligerent merchant vessels "shall, if armed for defense or offense, be assimilated to warships."

86. Within a few years of Versailles the German Navy was able to arrange to retain its expertise in the submarine field through the use of Dutch and Spanish connections. Erich Raeder, My Life 138-139 (1960); Francis L. Casset, The Reichswellen and Politics 1918-1933, at 242-244 (1966); John Keegan, The Price of Admiralty 221 (1989).

87. Conference on the Limitation of Armament, Washington, November 12, 1921 – February 6, 1922, supra at 467 (1922) [hereinafter 1922 Washington Conference].

88. Id. at 486.


90. 1922 Washington Conference, supra note 87, at 610.

91. Id. at 596.

92. During the course of the discussion, the Italian representative stated that his delegation understood the term "merchant vessel" to refer to unarmed merchant vessels. Id. at 688. He adhered to this definition despite remonstrances from the British delegate. Id. at 690, 692. The Soviet text International Law 438 (F.I. Kozhevnikov ed., n.d.) indicates that the 1936 Protocol applies only to "unarmed merchantmen."

93. Treaty between the United States of America, the British Empire, France, Italy and Japan Relating to the Use of Submarines and Noxious Gases in Warfare, signed at Washington, February 6, 1922, supra note 87, at 1605; 16 Am. J. Int'l L. 57 (Supp. 1922); Schindler/Toman, supra note 18, at 789. It must be emphasized that this Treaty never became effective. It required the unanimous acceptance of the drafting States and France refused to ratify it. Nevertheless, both the 1930 London Naval Treaty, infra note 94, and the 1936 London
Naval Treaty, infra note 116, refer to the 1922 Washington Treaty as though it were an effective international agreement.


95. See supra note 50.

96. 1922 Washington Conference, supra note 87, at 596.

97. Id.

98. Id. at 728. He added: "The peculiarity about piracy was that, though the act was done on the high seas and not under the jurisdiction of any particular country, nevertheless it could be punished by any country." Unfortunately, he had previously stated that the Conference was "competent to declare that those who violated the laws of war were guilty of acts of piracy." Id. at 720. Most commentators seem to have reached the conclusion that Hughes did. See, e.g., Herbert A. Smith, The Law and Custom of the Sea 93 n.3 (3rd ed., 1959) where the statement is made that "[t]he Washington text was objectionable by reason of provision that submarine officers who broke the rule should be treated as pirates." See also infra note 121.

99. One author calls attention to this by asserting that "the stipulation [in Article VI] dispels any misapprehension that the instrument would be obligatory as between the nations which have ratified it." Kenkichi Mori, supra note 66, at 118. But see infra note 93. In Mallison, supra note 41 at 43, the conclusion is reached that "the submarine came out of the Washington Conference with undiminished status as a lawful combatant."


102. Rules Concerning the Control of Wireless Telegraphy in Time of War, 32 Am. J. Int'l. L. 2 (Supp. 1938); General Collection of the Laws and Customs of War 819, 821 (M. Deltenre ed., 1943). In his testimony before the International Military Tribunal after World War II, German Admiral Doenitz pointed out that if the provision was contained in a footnote to the German Prize Ordinance. 13 T.M.W.C., supra note 70, at 361. (Actually, it was in Article 39 (iii) of the Ordinance.)

103. In O'Connell, supra note 37, at 19, the author apparently takes the position that using a ship's radio to announce the appearance of a submarine and giving its location does not affect the ship's status as it calls the decision to sink vessels which follow that procedure a "dilution of Germany's standards" of submarine warfare.

104. See supra note 81.

105. The International Military Tribunal paraphrased this provision by stating that "if the commander cannot rescue, then under its [the 1936 Protocol's] terms he cannot sink a merchant vessel and should allow it to pass harmless before his periscope." 1 T.M.W.C., supra note 70, at 313; Nazi Conspiracy and Aggression: Opinion and Judgement 140 (1947) [hereinafter Nazi Conspiracy].


107. Id. at 411.

108. Id. at 444.

109. Id. at 238.

110. See supra note 94.

111. In a criticism of these provisions (as read in the 1936 London Submarine Protocol), one author has written:

[T]he Protocol was much like an elegant carpet thrown over a littered and soiled passage, for it attempted reform with one sweeping gesture, while what was called for was a thorough sifting and meticulous renovation of the laws governing submarine conduct. In essence the London Protocol was the product of an idealistic era which trusted in glib moralizing to right past wrongs and prevent future digressions.

Barnes supra note 14, at 189. However, another author takes the position that while the 1922 Washington Conference was influenced by the "spirit of Versailles," in the 1930 agreement "the tone of moral disapproval is wanting." Hyman G. Rickover, supra note 13, at 2220 and 2221.

112. See infra text accompanying note 93.

113. 1930 London Conference, supra note 106, at 443. Both the 1922 and the 1930 provisions have been properly criticized because "they attempt a regulation of submarine warfare without at the same time considering the question of the armed merchantman; yet the two problems are intimately connected." Rickover, supra note 13, at 2221.

114. See supra text accompanying note 102.
115. See supra note 50.


117. Documents of the London Naval Conference 1935, at 54 (1936) [hereinafter 1935 London Conference]. Prime Minister Baldwin’s statement was confirmed by the French representative in his opening address. Id. at 63.

118. Id. at 741-742 and 104.

119. Id. at 742-743. For a discussion in depth of the background of the 1935 London Naval Conference, and its inevitable failure, see Stephen E. Pena, Race to Pearl Harbor (1974).

120. 140 B.F.S.P. 300, 302. It is believed that Hitler did this as a political gesture and against the advice of his naval advisers. It is, perhaps, appropriate to note that when World War II began, the United Kingdom and France both took the position that these rules applied to aircraft as well as to surface warships and submarines. 1 For. Rel. 547-48 (1939).

121. The Nyon Agreement, signed at Nyon, Switzerland, Sept. 14, 1937, 181 L.N.T.S. 137; 33 Am. J. Int’l. L. 550 (Supp. 1939); Schindler/Toman, supra note 18, at 887. The Preamble stated that the submarine attacks were “contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy.” Thus, although the 1922 Washington Treaty, supra note 93, had never become effective, its provisions continued to be noted—and misinterpreted.


124. Bernard Brodie, supra note 4, at 341. He also states that by the spring of 1939 over 9,000 officers of the British merchant marine had received instruction in gunnery and in convoy tactics. The statistics in I Stephen W. Roskill, The War at Sea, 1939-1945, at 22 (1954) [hereinafter Roskill], disclose that by the end of 1940 some 3,400 ships had been fitted with low-angle guns for protection against submarines and some 20,000 members of the Royal Navy had been trained to use these “defensive” armaments, as well as a large number of the members of the merchant crews.

125. 40 T.M.W.C., supra note 70, at 88-89. The British moved to the implementation of paragraph (b) on 13 June, 1940. Id. at 90. It will be observed that the Handbook assumed that a merchant vessel had a right to use its arms to resist visit and search and capture by an enemy warship—an action that Churchill had once said a merchant vessel had no rights to take. See supra text accompanying note 65.

126. 1 William M. Medlicott, The Economic Blockade 113 (1952). On the other hand, it is reported that until late in 1943 the primary objectives of British submarines were the enemy’s surface warships. 1 Roskill, supra note 124, at 334. However, restrictions on attacks by British submarines on enemy merchant shipping were relaxed in Norwegian waters in 1940, id. at 172, and were removed in the Mediterranean on February 5, 1941, id. at 439.


128. See infra text accompanying note 149, concerning the convoying of neutral merchant ships. See Frits Kalshoven, Belligerent Reprisals 139 (1971) where the following appears:

On the other hand, neutral merchant vessels on their way to or from Great Britain in this period gradually took to sailing under the protection of the British navy and air force. Attacks on such escorted vessels could not be considered unlawful; by the voluntary acceptance of direct armed protection of one of the belligerents, the vessel in question assumed the character of legitimate objectives for the armed attacks of the other belligerent.

A fazioni, the same rule would apply to belligerent merchant vessels in convoy. Concerning neutral merchant vessels in a convoy escorted by neutral warships, see Articles 61 and 62 of the 1909 Declaration of London, supra note 22, which sets forth the customary rule in this respect. See also Article 64a, Harvard Research, supra note 81, at 653 and Kyriakides v. Germany, 8 Recueil des Decision des Tribunaux Arbitraires Mixtes 349, summarized in the Harvard Research at 679. In S.S. Hall, Submarine Warfare, 5 Trans. Grot. Soc. 82, 89 (1920), the author, a Rear Admiral in the Royal Navy, stated that merchantmen in convoys “appear to lose their non-combatant standing” and that “from the day we [the British] adopted the convoy system the German submarine campaign became legitimate.”

129. Order in Council Restricting Further the Commerce of Germany, November 27, 1939, Stat. R. & O. 1939, no. 1709. For a full discussion of the contents of this Order and its effect, see Fris Kalshoven, supra note 128, at 118-19. For the reaction of the United States, see the U.S. note British Blockade of German Exports, 1 Dept. St. Bull. 651 (No. 24, December 9, 1939).

130. See supra note 39.
334 Levie on the Law of War

131. Cnd. 6191, 1940, at 5 (as quoted in Kalshoven, supra note 128, at 143). The preamble of the Order in Council asserted violations by Germany of, among others, the 1936 London Submarine Protocol, supra note 50. One expert in this field points out that at this stage German exports were Government controlled and that probably the provision of the 1856 Declaration of Paris, supra note 39, did not apply "to the public interests of the enemy State." Kalshoven, supra note 128, at 143. (A typographical error substituting "to" for "not" in the original text was corrected by letter from the author, May 25, 1989.)

132. Kalshoven, supra note 128, at 33.

133. 360 Parl. Deb., H.C., 5th Ser., colt 1351. (There has been considerable discussion as to whether Churchill (and the International Military Tribunal) said, and meant, "night" or "night's", See, eg., 10 Digest of International Law 663-64 (M. Whiteman ed., 1968). The Parliamentary reporter recorded it as "night" which in the context of the sentence, is much more logical than "night": otherwise the sentence would read "all German ships by day and all ships by night").

134. "This order went far beyond anything contained in German orders, since it meant that in these waters from then onward neutral ships sailing with full lights would also be sunk by British submarines." Doenitz, supra note 127, at 59.

135. 1 T.M.W.C., supra note 70, at 313; Nazi Conspiracy, supra note 105, at 140.

136. German Prize Ordinance, August 28, 1939, at 149 B.F.S.P. 663. After providing that ships in convoy had no protection (Article 32), that forcible resistance could be overcome by force (Article 36), and that the use of the wireless constituted assistance to the enemy (Article 39), the Ordinance stated, in Article 74:

(1) The destruction of vessels in accordance with articles 72 (enemy) and 73 (neutral) is only permissible if the passengers, the crew and the ship's papers are placed in safety before destruction.

(2) The ship's boats are not deemed to be a place of safety unless under the prevailing conditions of the sea and weather the safety of the passengers and the crew is assured by the proximity of land or by the presence of another vessel which is capable of taking them on board.

48. The contents of this article correspond to the London Rules of Submarine Warfare (printed in the annex). (Note in original.)

The German Navy had proposed a "prohibited area" which would, in effect, have been a "free fire" zone but this proposal was apparently rejected at that time. 7 Documents on German Foreign Policy, 1918-1945, at 546, Series D (1956).

137. 7 Fuehrer's Directive No. 2, Documents on German Foreign Policy, 1918-1945, at 548, Series D (1956).

138. Fuehrer's Directive No. 4, Fuehrer's Directives for the Conduct of the War 53, 54 (1947). A British historian asserts that these decisions "were not issued in any altruistic spirit but in the hope that after Poland had been crushed, Britain and France—and especially the latter—would make peace. As soon as it was realized that this hope was vain, removal of the restrictions on the methods of waging war at sea started." 1 Foskell, supra note 124, at 103. He is undoubtedly correct.

139. 1 Fuehrer Conferences on Matters Dealing with the German Navy 9 (1947).

140. 8 Fuehrer's Directive No. 5, Documents on German Foreign Policy, 1918-1945, at 176, 177, Series D (1954). Fuehrer's Directive No. 7, October 18, 1939, id. at 316, authorized the Navy to "attack enemy passenger ships which are in a convoy or sailing without lights."

141. In his cross-examination before the International Military Tribunal, Doenitz stated:

"If a merchant ship sails without lights, it must run the risk of being taken for a warship, because at night it is not possible to distinguish between a merchant ship and a warship. At the time the order was issued, it concerned an operational area in which blacked-out troop transports were traveling from England to France.

13 T.M.W.C., supra note 70, at 357.

142. See supra notes 102 and 103. See also Doenitz's testimony before the International Military Tribunal, 13 T.M.W.C., supra note 70, at 255.

143. The Athenia, a passenger vessel, had been torpedoed without warning by a German U-boat on September 4, 1939. The Germans denied that its sinking had resulted from the action of a German U-boat and accused Churchill of having ordered a British submarine to sink the vessel in order to stir up feeling against Germany. When German officials learned that the Athenia had, indeed, been the victim of a German torpedo they continued to deny this and it was not until after the war had ended that the truth was learned. 1 T.M.W.C., supra note 70, at 316; Nazi Conspiracy, supra note 105, at 143.

144. In 2 George Schwarzenberger, International Law as Applied by International Courts and Tribunals 433 (1958), the following apt statement appears:

"It is always possible to maintain legal continuity on this issue [warfare at sea] by explaining the departures from the traditional law by way of reprisals and counter-reprisals. At least in the relations between the belligerents, this type of argument can claim a modicum of formal validity. In substance,
however, reasoning on these lines merely hides a breakdown of the law and the resumption by belligerents at sea of an almost complete freedom of action.

145. Karl Doenitz, supra note 127, at 58-59. The International Military Tribunal had found more or less to the same effect. 1 T.M.W.C., supra note 70, at 311-12; Nazi Conspiracy, supra note 105, at 138-139. Compare the enumeration of events leading to unrestricted warfare by Germany during World War II which appears in 1 Roskill, supra note 124, at 103-104.

146. In Mallison, supra note 41, at 66-67, the author takes the position that "the actual British blockade methods [such as including food on the list of contraband] also provided adequate justification for the submarine operational zones as a legitimate reprisal.

147. Frits Kalshoven, supra note 128, at 128. In his testimony before the International Military Tribunal Doenitz said:

It is a matter of course that if a ship has a gun on board she will use it. It would have been a one-sided obligation if the submarine, in a suicidal way, were then to wait until the other ship fired the first shot. That is a reciprocal agreement, and one cannot in any circumstances expect the submarine to wait until it gets hit first. And as I have said before, in practice the steamers used their guns as soon as they came within range.

13 T.M.W.C., supra note 70, at 360.

148. See, e.g., Edwin I. Nwogugu, Submarine Warfare, The Law of Naval Warfare 358-59 (N. Ronzitti ed., 1988) [hereinafter Nwogugu]. See also Robert W. Tucker, 50 International Law Studies 68 (1957). There does not appear to have been any dispute that merchant vessels, armed or unarmed, sailing in a convoy under the protection of warships, were beyond the ambit of the Protocol, even though the British did attempt to entice neutral ships into their convoys by claiming that such action "affords neutral merchant vessels greater protection and does not signify a breach of neutrality" and the Germans disagreed. 8 Documents on German Foreign Policy, 1918-1945, at 319-20, Series D (1954).


151. Presidential Proclamation of November 4, 1939, Use of Ports or Territorial Waters of the United States by Submarines of Foreign Belligerent States, 54 Stat. 2672 (1939); 1 Dep't St. Bull. 456 (No. 19, November 4, 1939); International Law Situations 1939, at 48 (Paul S. Wild ed., 1940).

152. Edwin Borchard, supra note 60, at 107. He pointed out that these ships were far more powerful than their World War I predecessors as they carried four six-inch guns, mounted fore and aft. See supra text accompanying note 65.

153. Presidential Proclamation of November 4, 1939, Definition of Combat Areas, 54 Stat. 2673 (1939); 1 Dep't St. Bull. 454-55 (No. 19, November 4, 1939); 1939 International Law Situations, supra note 151, at 146. Germany urged other neutrals to designate a similar zone.

154. 13 T.M.W.C., supra note 70, at 365. One author goes even further, asserting that: "There is no logical difference between the merchant ship on the one hand and the railroad train or the factory on the other." Alex A. Kerr, supra note 77, at 1108.

155. 13 T.M.W.C., supra note 70, at 367. Later answers indicated that he was referring to the provisions of Article 16 of the 1907 Hague Convention No. X for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, signed at The Hague, October 18, 1907, 36 Stat. 2371; 2 Am. J. Int'l L. 153 (Supp. 1908); Schindler/Toman, supra note 18, at 313.

156. 1 T.M.W.C., supra note 70, at 312-13; Nazi Conspiracy, supra note 105, at 139.

157. Another argument criticizing the Tribunal's logic on this matter will be found in Mallison, supra note 41, at 80, where the author points out:

There is no indication that the Tribunal gave careful consideration to the alternative interpretation that the Protocol was inapplicable in operational areas since there was no international agreement on this subject. Such an interpretation was advanced by Kranstuhler [Doenitz's defense attorney] and it is at the very least as plausible as the interpretation selected by the Tribunal. It is more plausible if the operational area is evaluated as too important to be dealt with by implication.

The authors of two post-war studies of submarine warfare both recommend the affirmative legalization of "war zones" or "operational zones." Alex A. Kerr, supra note 77, at 1109; and Barnes, supra note 14, at 197-98.

158. See, e.g., the testimony of Admiral Gerhard Wagner, 13 T.M.W.C. supra note 70, at 453. See also supra the text accompanying note 36.


160. 35 T.M.W.C. supra note 70, at 270.
336 Levie on the Law of War


162. 1 T.M.W.C., supra note 70, at 313; Nazi Conspiracy, supra note 105, at 139-40. Concerning the Laconia order, one analysis states:

The ambiguity of the order apparently was considered to stem from an uncertainty as to whether its intent was only to forbid submarine commanders from making any attempt to rescue survivors or was intended to enjoin them deliberately to kill survivors. The International Military Tribunal seemed to have been of the opinion that if the former interpretation was intended the order was a lawful one. But even this opinion is doubtful, since the rule in question allows only for circumstances of operational necessity. The most favorable interpretation of the Laconia Order was that it laid down a policy of no rescue, not solely—or perhaps not even primarily—for reasons of operational necessity, but because rescue was deemed to run "counter to the rudimentary demands of war for the destruction of enemy ships and crews." On this basis alone the unlawful character of the order would seem to be readily apparent.

Tucker, supra note 148, at 73.

163. One commentator construes this portion of the opinion as indicating that the Tribunal had found that "the British merchant marine was no longer entitled to be considered as non-combatant. It had become an auxiliary to the British naval forces." Horace B. Robertson, Jr., supra note 48, at 6-7.

164. 1 T.M.W.C., supra note 70, at 311-13; Nazi Conspiracy, supra note 105, at 138-40. The Tribunal made the same findings on these charges with respect to German Grand Admiral Raeder. 1 T.M.W.C. 317; Nazi Conspiracy 143.

165. Frits Kalshoven, supra note 128, at 139-40.

166. Commander’s Handbook, supra note 149, at para. 8.2.2.2. Relevant quotations from this volume will also be found in the text accompanying notes 149, supra, and 168, infra. Earlier the U.S. Navy had issued Law of Naval Warfare (NWIP 10-2) (1955) [hereinafter Law of Naval Warfare]. Strange to relate, there is no mention of the submarine in that volume. The word "submarine" does not even appear in its Index.

167. A Soviet volume entitled The International Law of the Sea recently published in English in Moscow (J.P. Blischchenko, gen., 1988) states, at 229:

The arming of merchant ships in contravention of the VII Hague Convention on the transformation of merchant ships into naval vessels, especially accompanied by a request of civilian status for armed ships, eliminates the difference between military and civilian objects. In this case such ships cannot be regarded either as noncombatants or as legitimate combatants, and therefore cannot be protected under international law. It is of interest to note that Russia never ratified the 1907 Hague Convention No. VII and that the Soviet Union is not a Party thereto.

168. Law of Naval Warfare, supra note 166, at para. 503b(3).


171. Of the publicists whose works have been reviewed who express an opinion on the subject, the following take the position that the 1936 London Submarine Protocol is still binding law: Eric Castrén, The Present Law of War and Neutrality 289 (1954); C. John Colombos, The International Law of the Sea 388 (3d ed., 1954); Gerald I.A.D. Draper, Rules Governing the Conduct of Hostilities—the Laws of War and Their Enforcement, 18 Nov. War Coll. Rev. 22, 30 (November 1965), reprinted in 62 International Law Studies 247 (Richard B. Lillich & John Norton Moore eds., 1980); William T. Malison, Jr., supra note 41, at 118-1221; Edwin I. Nwogugu, supra note 148, at 359-60; Daniel P. O’Connell, supra note 37, at 52; Horace B. Robertson, Jr., Submarine Warfare, in JAGJ. 7 (November 1956); Herbert A. Smith, The Law and Custom of the Sea 198 (3rd ed., 1959); and Robert W. Tucker, supra note 148, at 352. The United States Navy’s position, as expressed in Commander’s Handbook supra note 149, at para. 8.3.1, is to the same effect. See supra text accompanying note 169. The publicists taking the position that the 1936 London Submarine Protocol is no longer an effective part of the law of maritime warfare include Barnes, Submarine Warfare and International Law, 2 World Polity 121, 187 (1960); Kerr, supra note 77, at 1110; William O. Miller, The Law of Naval Warfare, 24 Nav. War Coll. Rev. 35 (February 1972); reprinted in 61 International Law Studies 263 (Richard B. Lillich & John Norton Moore eds., 1980); W. Hays Parks, Conventional Aerial Bombing and the Law of War, 108 U.S. Nav. Inst. Proc. 98, 106 (May 1982); and Julius Stone, Legal Controls of International Conflict 428 (2nd. imp., 1959). As quoted in O’Connell, supra note 37, at 51, the 1966 Manual of International Maritime Law of the Soviet Navy states that submarine warfare is regulated by the Protocol, among other treaties, and then says that all of these rules are obsolete.
172. Robert W. Tucker, supra note 148, at 66. In answer to interrogatories prepared by Dönitz's defense counsel, Admiral Chester Nimitz, Commander-in-Chief of the United States Pacific Fleet at the time of the attack on Pearl Harbor on December 7, 1941, stated that on that date he had received a message ordering unrestricted submarine warfare. 40 T.M.W.C., supra note 70, at 108-11. This could, of course, also be attributed to the nature of the attack on Pearl Harbor.

173. Japanese merchant ships acted very much the same as British merchant ships, being armed, reporting submarine sightings, attempting to ram, etc. William T. Mallison, Jr., supra note 41, at 89-90. This would have justified unrestricted submarine warfare in the Pacific by the United States. However, it would not be a justification for such action from the very first day of the war. Another author justifies the action of the United States on the basis that the Japanese merchant marine was integrated into the Japanese Navy (armed, sent radio sightings, etc.), that there was no danger to neutrals (there were no neutral vessels in the Pacific), and that there were no neutrals in the declared operational zones. Horace B. Robertson, Jr., supra note 48, at 8.

174. John Keegan, supra note 86, at 274–75. The final chapter of this book (266–75) contains a succinct discussion of the tremendous technical evolution which the submarine has undergone since the end of World War II.