The thoughts and opinions expressed are those of the authors and not necessarily of the U.S. Government, the U.S. Department of the Navy or the Naval War College.
Situation II

Submarines

Assuming that the treaty of the Conference on Limitation of Armament, 1921–22, relating to the use of submarines and noxious gases in warfare should not be ratified, what are the privileges of a belligerent submarine?

Conclusion

A belligerent submarine lawfully commissioned as a vessel of war may exercise the rights of a vessel of war, but its nature gives it no special rights or privileges.

Notes

Treaty in relation to the use of submarines and noxious gases in warfare—It is assumed in this situation that the treaty in relation to the use of submarines and noxious gases of the Washington Conference on the Limitation of Armament has not been ratified.

By Article II of the above treaty “all other civilized powers” are invited “to express their assent” to Article I, which is declared to be “among the rules adopted by civilized nations.” This reaffirmation is apparently to make clearer to “the public opinion of the world the established law.” The law as stated in Article I would presumably be binding, even without a treaty, because it is declared to be “an established part of international law.”

2 A Treaty Proposed at Washington, 1922, in Relation to the Use of Submarines and Noxious Gases in Warfare

The United States of America, the British Empire, France, Italy and Japan, hereinafter referred to as the Signatory Powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, and to pre-
Queries as to articles.—Many queries have arisen as to the exact meaning of words and clauses in Article I of the treaty. These questions vary in significance, but deserve attention because any new statement, even of law already "adopted," should be clear to those who may be bound to act in accordance with its provisions. It has been asked whether the use of the word "adopted" in the preamble and in Article I had the same meaning, and

vent the use in war of noxious gases and chemicals, have determined to conclude a Treaty to this effect, and have appointed as their Plenipotentiaries:

[Names of plenipotentiaries.]

ARTICLE I

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 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 refuse 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 merchant 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.

ARTICLE II

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.

ARTICLE III

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.

ARTICLE IV

The Signatory Powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated
it was presumed that the word referred to an act completed, or, as stated, rules "deemed an established part of international law."

The first paragraph speaks of the rules enumerated thereunder as "adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war." The history of the law of visit and search shows that it was primarily concerned with mat-

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.

**ARTICLE V**

The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves and invite all other civilized nations to adhere thereto.

**ARTICLE VI**

The present Treaty shall be ratified as soon as possible in accordance with the constitutional methods of the Signatory Powers and shall take effect on the deposit of all the ratifications, which shall take place at Washington.

The Government of the United States will transmit to all the Signatory Powers a certified copy of the procès-verbal of the deposit of ratifications. The present Treaty, of which the French and English texts are both authentic, shall remain deposited in the Archives of the Government of the United States, and duly certified copies thereof will be transmitted by that Government to each of the Signatory Powers.

**ARTICLE VII**

The Government of the United States will further transmit to each of the Non-Signatory Powers a duly certified copy of the present Treaty and invite its adherence thereto.

Any Non-Signatory Power may adhere to the present Treaty by communicating an Instrument of Adherence to the Government of the United States, which will thereupon transmit to each of the Signatory and Adhering Powers a certified copy of each Instrument of Adherence.

In faith whereof, the above named Plenipotentiaries have signed the present Treaty.

Done at the City of Washington, the sixth day of February, one thousand nine hundred and twenty-two.
ters of property rather than life, and that prior to the World War loss of life was rarely involved except in case of attempt to escape or in case of resistance. If, "(1) A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized," means, that after an "order to submit to visit and search" a vessel may be seized without further action, it can scarcely be maintained that this part of Article I is "an established part of international law." Under accepted law the order is preliminary to the visit and search. By visit and search the grounds for seizure are determined, and visit and search precedes seizure, and seizure without visit and search would be justified in such a case only on the ground of resistance. The Instructions for the Navy of the United States issued in June, 1917, were similar to those of other States, and were as follows:

47. The boarding officer shall first examine the ship's papers in order to ascertain her nationality, ports of departure and destination, character of cargo, and other facts deemed essential. If the papers furnish conclusive evidence of the innocent character of vessel, cargo, and voyage, the vessel shall be released; if they furnish probable cause for capture she shall be seized and sent in for adjudication. (1925 Naval War College, 27.)

There is the further complication in this paragraph of the proposed treaty that the word "seizure," when used in the same article as "capture," would be presumed to be used in the technical sense as the terms are used in naval regulations, though it is not clear that this was intended. Further, the object of visit and search of a vessel is not merely to determine "its character," but also to determine the character of its cargo and personnel and its destination, conduct, etc., as grounds for seizure.

The third paragraph of Article I states:

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

If this paragraph intends to convey in the word "attack" the meaning of "use of force against" in case of
attempt to escape or resistance to visit and search, the statement would be in accord with practice. There would be some doubt as to the meaning of the words "to proceed as directed after seizure." If a merchant vessel is in control of a prize crew there might be some question as to the interpretation of the clause. If, however, the merchant vessel was under escort of a vessel of war the liability would be recognized. It might be possible that after seizure a merchant vessel had been directed to proceed without prize crew or escort to a named port; then under this paragraph some maintain that the vessel would be liable to attack if deviating from the prescribed course.

As the paragraph seems to read, a merchant vessel must not be attacked unless it refuse to submit to visit and search after warning or (refuse) to proceed as directed after seizure, it may be said that this clause "or to proceed as directed after seizure" did not appear in the draft resolutions as originally presented.

It has been claimed that the fourth paragraph greatly extends the liability of merchant vessels to destruction because stating that "A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety" might imply that after placing the crew and passengers in safety, the vessel might lawfully be destroyed, which is not an established part of international law, and some have questioned how this restriction applies in case of refusal to submit to visit and search.

The second part of Article I affirmed that the above are universal rules, and that if a submarine can not capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and to permit the merchant vessel to proceed unmolested. Verbal questions, such as whether the use of the word "desist" was with intention to imply that the attack had already begun have been put forward. In view of the use of the word "seizure," in preceding para-
graphs, and the use of the words "capture" and "seizure" in this part of Article I, there has been uncertainty as to the significance of these words and the order of action implied.

Article II invites the assent of civilized powers to Article I as a "statement of the 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." This clearly aims to secure the sanction of public opinion for Article I, while Article III aims to secure legal sanction for making a man who may be under orders of his government and liable for disobedience to those orders, also liable to the civil or military authorities of any other power, even the enemy, "as for an act of piracy." This is not necessarily confined to officers of submarines.

Article IV affirms what has been further questioned, "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." There are many different points of view as to what are "commerce destroyers" and in regard to other matters.

Some of these and other queries were raised at the Conference on Limitation of Armament and in the course of the subcommittee discussions, as may be seen from the official report.

Preparation of treaty on submarines.—The treaty, as stated in the official report, was not referred to technical subcommittees for consideration and hence the discussion of its provisions is found in the reports of the subcommittee on limitation of armament.

The original proposition as to the rules for submarines was made by Mr. Root, of the American delegation, on December 28, 1921. Mr. Root said:
One fact which seemed very clear was that mere agreements between Governments, rules formulated among diplomats in the course of the scientific development of international law, had a very weak effect upon belligerents when violation would seem to aid in the attainment of the great object of victory. This has been clearly demonstrated in the war of 1914-18.

Another fact established by the war was that the opinion of civilized nations had tremendous force and exercised a powerful influence on the condition of belligerents. The history of propaganda during the war had been a history of almost universal appeal to the public opinion of mankind and the result of the war had come largely as a response.

The report further says:

The purpose of the resolutions he was about to read was to put into such simple form the subject which had so stirred the feelings of a great part of the civilized world that the man in the street and the man on the farm could understand it.

The first resolution, Mr. Root said, aimed at stating the existing rules, which, of course, were known to the committee but which the mass of people did not know, in such a form that they would be understood by every one.

Mr. Root then read the following:

"1. The signatory powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, declare that among those rules the following are to be deemed an established part of international law:

"1. A merchant vessel must be ordered to stop for visit and search to determine its character before it can be captured.

"A merchant vessel must not be attacked unless it refused to stop for visit and search after warning.

"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 merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from capture and to permit the merchant vessel to proceed unmolested."

"*

This, Mr. Root said, was a distinct pronouncement on the German contention during the war in regard to the conflict between the convenience of destruction and the action of the belligerent under the rules of international law.
Mr. Root then read the following:

"II. The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating 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 such use shall be universally accepted as a part of the law of nations, they declare their assent to such prohibition and invite all other nations to adhere thereto." (Conference on the Limitation of Armament, p. 594.)

Discussion of treaty.—When taken up for discussion on December 29, 1921, Mr. Balfour (British) and Admiral de Bon (French) adhered in principle to the propositions of Mr. Root.

Senator Schanzer said that he associated himself entirely with Mr. Balfour’s and Admiral de Bon’s remarks. The Italian delegation at the preceding meeting gave its full adherence to the aim to which Mr. Root’s proposal tended, but they also thought that the question of formulating rules for the use of submarines in war was, above all, a legal question, which ought to be examined by a competent committee of jurists. (Ibid. p. 606.)

Replying to certain questions of Senator Schanzer, Mr. Root said:

First, as to the agreement of Resolution I of the resolutions now before the committee, with the second resolution relative to the prohibition of making use of submarines as commerce destroyers, which Senator Schanzer deemed inconsistent with Resolution I.

Resolution I was a statement of existing law; Resolution II, if adopted, would constitute a change from the existing law and therefore it was impossible to say that it was not inconsistent. If it were not inconsistent, there would be no change. Resolution II could not be consistent with Resolution I and still make a change.

The report continues:

Senator Schanzer had also suggested that the Resolution I be completed by including a definition of “a merchant ship.” Throughout all the long history of international law no term had been better understood than the term “a merchant ship.” It could not be made clearer by addition of definitions which would only serve to weaken and confuse it. The merchant ship,

a These references are to the full report printed in English and French. Government Printing Office, 1922.
DISCUSSION OF TREATY

its treatment, its rights, its protection, and its immunities, were at the base of the law of nations. Nothing was more clearly or better understood than the subject called "merchant ship." (Ibid. p. 610.)

Mr. Root declared he was opposed to the reference of this resolution to a committee of lawyers or to any other committee. He asked for a vote upon it here. If the delegation of any country represented here had any error to point out in it, he was ready to correct it, but he asked for a vote upon it in furtherance of the principle to which every one of his colleagues around the table had given his adherence.

Mr. Root said that, in answering Senator Schanzer's very discriminating question regarding the relations between Resolutions I and II, he had omitted to say that, of course, if the second resolution were adopted by all the world, it would supersede Resolution I. This, however, would be a long, slow process and during the interval the law as it stood must apply until an agreement was reached. Resolution I also explained in authorized form the existing law and could be brought forward when the public asked what changes were proposed. In proposing a change, he said, it was necessary to make clear what the existing law was. It was very important to link this authoritative statement in Resolution I with the new principle proposed in Resolution II. (Ibid. p. 618.)

Mr. Balfour, on the afternoon of December 29, 1921, said of the British Empire delegation—

the members of that delegation would have preferred that the document itself should have been rendered unnecessary by the abolition of submarines. Since they had not been able to carry out this policy, however, Mr. Root's resolution provided them with an alternative. (Ibid. p. 630.)

Mr. Hughes, on the same day, said:

Such a declaration as the one proposed in the first resolution would go to the whole world as an indication that, while the committee could not agree on such limitation, there was no disagreement on the question that submarines should never be used contrary to the principles of law governing war. (Ibid. p. 630.)

Drafting committee.—The first resolution, later Article I of the submarine treaty, was referred to a drafting committee of one member from each delegation, Mr. Root
being named from the American delegation; Sir Auckland Geddes, from the British; Admiral de Bon and Mr. Kammerer, from the French; Signor Ricci, from the Italian; Mr. Hanihara, from the Japanese. The other provisions were also referred to the same committee.

Mr. Hughes, speaking of the second resolution, which later became Article IV of the treaty, said:

This resolution fundamentally recognized, however, the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of neutrals and noncombatants. He assumed the resolution to mean that, while the rules of war were as stated in the first resolution—at least in substance—and while it was the sense of the powers there represented that they should be adhered to and clearly understood, the civilized world would be asked to outlaw the submarine as a weapon against commerce.

( Ibid. p. 638 )

Resolution I.—Resolution I was presented by the drafting committee on January 5, 1922, as follows:

I. The signatory powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, declare that among those rules 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 refuse 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 merchant 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. (Ibid. p. 686.)

"Merchant vessel" and "capture."—Senator Schanzer requested the following entries in the minutes of the subcommittee:
It is declared that the meaning of Article II is as follows: Submarines have the same obligation and the same rights as surface craft.

And:

With regard to the third paragraph of Article I it is understood that a distinction is made between the deliberate destruction of a merchant vessel and the destruction which may result from a lawful attack in accordance with the rules of the second paragraph. If a war vessel under the circumstances described in paragraph 2 of Article I lawfully attacks a merchant vessel, it can not be held that a war vessel, before attacking, should put the crew and passengers of the merchant vessel in safety. (Ibid. p. 686.)

_Later the report says:

Senator Schanzer stated that the Italian delegation accepted Resolution I, but that, so far as they were concerned, the application of the resolution was subject to the two statements made by him in the subcommittee as entered on the minutes of the first meeting (December 31, 1921) of the subcommittee of five on drafting and as just read by Mr. Root.

Senator Schanzer stated in addition that the Italian delegation understood the term "merchant vessel" in the resolution to refer to unarmed merchant vessels.

Mr. Hanihara said that he wished to suggest that the word "seize" should be substituted for "capture" in the last paragraph.

Mr. Root, replying to Mr. Hanihara, said that the subcommittee understood the word "capture" to describe the whole process, one step of which was seizure and that it was intended to make the term "capture" comprehensive. (Ibid., p. 688.)

Senator Schanzer said he did not deny that under existing rules of international law a merchant vessel might properly carry a limited armament for defensive purposes, but he wished to say that the Italian interpretation of the term "merchant vessel" took into account this limitation. He therefore repeated that the Italian interpretation was in accord with his preceding declaration and with the existing rules of international law. (Ibid. p. 692.)

Mr. Hughes said:

He assumed that all the representatives present accepted the proposition that merchant vessels, as merchant vessels—a category well known—stood where they were under the law, and that this resolution defined the duties of submarines with respect to them. (Ibid. p. 692.)
Mr. Root later himself explained Article I:

It will be observed that the statement in this treaty of the rules relating to visit and search and seizure does not undertake to state all the rules of international law upon that subject. It was not intended to state all such rules. It was not intended to be a codification of international law relating to visit and search and seizure. The purpose was to state only the most important rules for the protection of innocent life so briefly and simply that every intelligent person could understand them, and to refrain from confusing the unscientific mind by the introduction of the less important details. This was required by the main consideration upon which the treaty relies for its effectiveness. The treaty is not merely a declaration of existing law. It is not merely an agreement between governments resulting from diplomatic negotiation. It is all these, but above all, it is an appeal to the public opinion of mankind to establish and maintain a fundamental rule of morals applied to international conduct in the form of a rule of international law. (Men and Policies, p. 462. Address American Society of International Law, April 27, 1922.)

Resolution II.—Resolution II later became Resolution III and finally Article IV of the submarine treaty. As presented on the afternoon of January 5, 1922, it was as follows:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating 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 such use shall be universally accepted as a part of the law of nations they declare their assent to such prohibition and invite all other nations to adhere thereto." (Conference on the Limitation of Armament, p. 694.)

Mr. Sarraut then read the following statement:

"The Germans have made war on commerce almost exclusively with their submarines, which were instructed to sink without mercy the merchant vessels of the enemy with the object of destroying that enemy's commerce. The abominable program was made worse by sinking, without distinction, steamers and hospital ships as well as vessels carrying cargo—neutrals as well as those of the enemy. These ships were destroyed without the passengers and crew having been first put in a place of safety. France has already proclaimed and she has reiterated her denunciation of the barbarous methods thus used contrary to the law of humanity and
she has condemned the pitiless destruction of merchant ships as contrary to international law. With these views, the French delegation fully indorses the spirit of Senator Root's resolution and of the amendment proposed by Mr. Balfour. But the delegation considers it desirable that the sentiment of condemnation of the methods employed in the last war should be expressed in the resolution, and for this purpose it suggests the addition of the words 'in the manner that was employed in the last war' at the end of the phrase.

"The first phrase of the resolution would then read as follows:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating 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 such use 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."

The chairman said that Mr. Sarraut had called attention to the amendment which had been proposed by Mr. Balfour. The resolution, as it had been read a moment before, had not included that amendment and therefore it should be restated; he would, therefore, read Resolution III with the amendment proposed by Mr. Balfour:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating 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 such use 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."

That was the resolution before the committee with the amendment suggested by Mr. Balfour. Mr. Sarraut had suggested that it should also embrace a reference to the methods adopted by the Imperial German Government in the last war, which had received general condemnation. As he understood it, the resolution, with the amendment of Mr. Balfour and the further amendment proposed by Mr. Sarraut, would read as follows:

"The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants in the manner that was employed in the last war, and to the end that the prohibition of such use 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."
The question before the committee was the adoption of this resolution. Before the discussion proceeded, he wished to ask Mr. Sarraut whether the words which Mr. Sarraut desired inserted, to wit, "in the manner that was employed in the last war," were to be inserted at the place which had been indicated.

Mr. Root said that Admiral de Bon and he had worked out a phrase on the exact line of Mr. Sarraut's and he wondered whether it would not meet the purpose. After the word "violating" the words "as they were violated in the recent war of 1914–1918," should be inserted, so that the resolution would read:

"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," etc.

The chairman asked whether this wording was agreeable to Mr. Sarraut.

Mr. Sarraut assented.

The chairman said he would read the complete resolution, so that there would be no question upon what action was being taken:

"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 such use 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."

Mr. Balfour said he wished to ask a question in regard to the amendment, now slightly modified, which Mr. Sarraut had proposed and which read as follows:

"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," etc.

If that were intended merely as an illustration it might be wise or unwise; it might be necessary or unnecessary; at any rate, used in this manner, it could do no harm. It added form and perhaps picturesqueness to the whole resolution. He wished to ask, however, whether it was not possible so to twist the phrase that the article would apply only to German methods. The ingenuity of man for wrongdoing was very great. Was it not unfortunate that the wrongdoers should be hampered only by the methods adopted by the Germans? Would it not be possible
for them to say, "It is true we have used our submarines as commerce destroyers, but we have not used them as the Germans did, and consequently we are not violating this resolution." Perhaps the question he asked was oversubtle, but it appeared to be worthy of consideration.

Mr. Root asked whether that question would not be obviated by simply repeating the words "The use of submarines as commerce destroyers" in the place of "of such use."

Mr. Balfour replied in the affirmative.

The chairman asked whether that amendment was acceptable. Admiral de Bon said that his reasons, as already stated by Mr. Sarraut, were based upon the fear that the Germans might use the first draft suggested as a pretext to justify some of their actions during the recent war. They might claim that, if the Washington Conference took the ground that it was not possible to use submarines otherwise than in contravention of actual international law, they were in a measure absolved. This was the only idea that he had sought to convey. In his opinion there ought to be a full and complete condemnation of these methods. It was for this reason that the French delegation had desired specifically to object to German practices and thus to remove all possibility of their being able to use the resolution in question to justify their conduct.

The chairman asked whether the amendment as suggested was acceptable. The amendment was that the clause: "To the end that the prohibition of such use shall be universally accepted as a part of the law of nations" should read "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."

The chairman said that the reason he asked whether this was acceptable was that it was an amendment to meet the amendment suggested by Mr. Sarraut, and therefore really formed part of the amendment in the line suggested, and he thought it would be well to know whether there was any objection to the amplification of Mr. Sarraut's amendment in that manner.

Mr. Sarraut replied that he had no objection. The chairman said that in view of what had just been said by Admiral de Bon, it might be well to call attention to the fact that this resolution was not, and did not purport to be, a statement of existing law; it purported to go beyond existing law and to prohibit the use of submarines as commerce destroyers. (Ibid. pp. 694-700.)

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 require-
ments 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. (Ibid. p. 710.)

"Commerce destroyer."—Lord Lee asked what was the precise meaning of the term "commerce destroyer."

He did not know if "commerce destroyer" was a recognized legal term or whether it included the processes of attack and seizure referred to in the first resolution.

Mr. Root said he believed it covered the whole process. He thought that "commerce destroyer" was a perfectly well-known term.

Lord Lee said that doubts were being expressed in his delegation as to the precise meaning of the phrase "commerce destroyer." He asked whether the term "for seizures or attacks on commerce" would not produce the same effect.

Mr. Root said he thought that if the committee undertook to go into the details of the processes, it would find itself involved in statements which were neither clear nor intelligible to the common mind, and that it really did not accomplish its purpose as well as would be done by the use of perfectly well-known terms, such as "commerce destroyers." (Ibid. p. 700.)

Mr. Hanihara said he desired to be informed with respect to the exact meaning of the term "commerce destroyer." As he had already pointed out in a previous discussion, he believed that the words were intended to apply to vessels suitable for destruction of merchant shipping.

Mr. Root said he thought that the prohibition would apply to submarines attacking or seizing or capturing or destroying merchant vessels under any circumstances, so long as the vessel remained a merchant vessel; he also thought it was necessary to have an effective prohibition to have it so apply. (Ibid., p. 703.)

Article IV.—On January 6, 1922, Mr. Root, discussing what later became Articles I and IV, said of Article IV:

The next resolution, which forbade the use of submarines as commerce destroyers, that was to say, forbade submarines attacking merchant ships, and which if it were to become a part of the law of nations would supersede these other rules so far as submarines were concerned—but which would not supersede them
until it had become a part of the law of nations—was an entirely
different proposition. It certainly was not competent for them
to make an agreement between the five powers here that would
produce the effect of a law of nations upon which they could de-
nounce a punishment as for piracy. (Ibid., p. 722.)

Presentation to conference.—On February 1, 1922, at
the plenary session at the Conference on the Limitation
of Armament, Mr. Root presented the treaty on subma-
rines with the following explanation:
You will observe that this treaty does not undertake to codify
international law in respect of visit, search, or seizure of merchant
vessels. What it does undertake to do is to state the most important
and effective provisions of the law of nations in regard to the
treatment of merchant vessels by belligerent warships, and to
declare that submarines are under no circumstances exempt from
these humane rules for the protection of the life of innocent
noncombatants.
It undertakes further to stigmatize violation of these rules, and
the doing to death of women and children and noncombatants
by the wanton destruction of merchant vessels upon which they
are passengers, as by a violation of the laws of war which, as be-
tween these five great powers and all other civilized nations who
shall give their adherence thereto, shall be henceforth punished
as an act of piracy.
It undertakes further to prevent temptation to the violation of
these rules by the use of submarines for the capture of merchant
vessels and to prohibit that use altogether. It undertakes fur-
ther to denounce the use of poisonous gases and chemicals in
war as they were used to the horror of all civilization in the war
of 1914–1918. (Ibid. p. 268.)

Admiral Knapp’s comment.—A resolution for the ap-
pointment of a commission of jurists to consider whether
existing rules cover new methods of warfare was adopted
at the Conference on the Limitation of Armament, but a
later resolution removed from their competence the con-
sideration of submarines and gas warfare. Of this reso-
lution Admiral Harry S. Knapp, United States Navy,
writing shortly before his death, said:
But the most extraordinary limitation on the powers of the
commission is to be found in resolution No. 2 of the Washington
Conference. This was adopted by the same signatory powers that adopted resolution No. 1 and at the same session. It reads:

"Resolved, That it is not the intention of the powers agreeing to the appointment of a commission to consider and report upon the rules of international law respecting new agencies of warfare that the commission shall review or report upon the rules or declarations relating to submarines or the use of noxious gases and chemicals already adopted by the powers in this conference."

Resolution No. 2 can only mean that the delegates of the signatory powers were so entirely satisfied with the work of the conference regarding submarine and gas warfare as to regard it as the last word in form and substance; otherwise they would not have removed the right to review or report upon the rules and declarations of that treaty from the commission they themselves had just created to study the broad question, of which submarine and gas warfare are such integral and outstanding parts.

Such satisfaction is not universally shared. The need for revision of the laws of war is manifest; and it is regrettable that a commission of distinguished jurists should have been called together for that purpose with such a limitation upon their action as that imposed by resolution No. 2. As for treaty No. 2, an attempt is made in what follows to show that it needs revision, especially in respect of its provisions regarding submarine warfare—a revision that The Hague commission would have been so competent to make.

The present criticism of the treaty is not born of any lack of sympathy with its purpose on the part of the writer. On the contrary, he has exerted such influence as he had toward the adoption of a more radical solution of the submarine problem than the treaty attempts. He would prefer to see the submarine abolished. That view has not prevailed, however, and worse still, the Washington Conference failed to put any limitation upon the numbers of submarines, relative or absolute. It consequently failed, potentially at least, to stop competition in submarine building. Under existing circumstances, and having in mind the submarine practices of the Germans during the war—practices that were such a blot upon the German national reputation—it was all-important that any agreement on the subject reached by the Washington Conference should be correct in substance and form; and this is especially true if that agreement was to be the final word on the subject. It was the last word in so far as The Hague commission is concerned; but it can not be doubted that a future conference on the laws of maritime warfare, composed of delegates from all maritime powers so that the voice of the conference will carry real international authority, will refuse to be
shackled by such a limitation as that prescribed by resolution No. 2 of the Washington Conference. (39 Am. Pol. Sci. Rev., June, 1924, p. 203.)

Report of American delegation.—In the report of the American delegation to the President on February 9, 1922, there are reprinted certain parts of the report of the advisory committee of twenty-one, and of this report on submarines the delegation says "this report was presented by the American delegation as setting forth in a succinct manner the position of their Government." In this report it was stated:

The submarine as a man-of-war has a very vital part to play. It has come to stay. It may strike without warning against combatant vessels, as surface ships may do also, but it must be required to observe the prescribed rules of surface craft when opposing merchantmen as at other times. (Conference on the Limitation of Armament. Sen. Doc. No. 126, 67th Cong., 2d sess., p. 814.)

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The committee is therefore of the opinion that unlimited warfare by submarines on commerce should be outlawed. The right of visit and search must be exercised by submarines under the same rules as for surface vessels. (Ibid. p. 815.)

Immediately following this report is the treaty upon submarines, and as introductory thereto is the following paragraph:

While the conference was unable either to abolish or to limit submarines, it stated, with charity and force, the existing rules of international law which condemned the abhorrent practices followed in the recent war in the use of submarines against merchant vessels. (Ibid. p. 815.)

The report also repeats Mr. Root's statement to the conference when, speaking of the submarine treaty and the rules of maritime war, he said:

It undertakes further to prevent temptation to the violation of these rules by the use of submarines for the capture of merchant vessels, and to prohibit that use altogether. (Ibid. p. 816.)

Summary.—Article I of the treaty, aiming as the whole treaty does, to protect the lives of neutrals and noncom-
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batants, considers in successive paragraphs visit and search before seizure, attack after refusing visit and search, or to proceed as directed after seizure, destruction without placing personnel in safety, and the application of these so-called universal rules, and adds—

and if a submarine can not capture a merchant 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. (Conference on Limitation of Armament, p. 836.)

By this last clause the submarine is required under certain conditions, to desist "from attack and from seizure." Manifestly it is not the purpose to deny the right of visit and search, but, as Mr. Root says, "to declare that submarines are, under no circumstances, exempt from those humane rules for the protection of the life of innocent noncombatants," and Article I itself simply declares "that among the rules adopted by civilized nations ""the following are to be deemed an established part of international law." The discussion in the conference indicates this understanding.

The conclusion is that Article I does not change existing law but, as said in Article II, aims to establish "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."

Further in Article III penalty "as if for an act of piracy" is provided for "attacks upon and the seizure and destruction of merchant ships" in violation of these rules.

In the original proposal Mr. Root stated the first resolution as follows: "A merchant vessel must be ordered to stop for visit and search to determine its character before it can be captured." Later, in reply to Mr. Hanihara, who suggested "seize" instead of "capture" in a later paragraph of the same article, Mr. Root said "that the subcommittee understood the word 'capture' to describe the whole process, one step of which was seizure, and it
was intended to make the term 'capture' comprehensive.” (Ibid. p. 688.)

It was not understood that this term included visit and search, as by the article itself visit and search must precede capture or seizure, and was to determine the character of the merchant vessel and its liability to seizure or capture.

*Early opinions.*—Visit and search as necessarily preceding seizure or capture has long been recognized. Sir William Scott in the case of the *Maria* in 1799 declared he takes it to be incontrovertible—

That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visit and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured, it is impossible to capture. . . . In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. (1 C. Robinson, p. 340.)

Similarly in the case of the *Marianna Flora* Mr. Justice Story said of visit and search:

This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. (11 Wheaton, 1)

No treaty would renounce such a generally recognized right as visit and search, which is the subject of so many treaty agreements, without express stipulation. From a practical standpoint the exercise of visit and search when camouflage or other concealment of identity are possible and much resorted to is essential to the conduct of war on the seas. This seems to be admitted in the first clause of the provisions of Article I which states “a merchant
vessel must be ordered to submit to visit and search to determine its character before it can be seized.” Further, it may be said that visit and search does not necessarily imperil “the lives of neutrals and noncombatants” which it is the aim of the submarine treaty to protect.

*German practice, 1914–1918.*—Germany on February 4, 1915, proclaimed the waters about Great Britain and Ireland a war zone in which every enemy merchant ship would, after February 18, “be destroyed without it being always possible to avert the dangers threatening the crews and passengers on that account.” Neutral vessels were warned that they were exposed to danger in the war zone, because neutral flags had been used by belligerent merchantmen and because of possible accidents.

In what has been called the “strict accountability” note of Mr. Bryan of February 10, 1915, it was said:

It is, of course, not necessary to remind the German Government that the sole right of a belligerent in dealing with neutral vessels on the high seas is limited to visit and search, unless a blockade is proclaimed and effectively maintained, which this Government does not understand to be proposed in this case. To declare or exercise the right to attack and destroy any vessel entering a prescribed area of the high seas without first certainly determining its belligerent nationality and the contraband character of its cargo would be an act so unprecedented in naval warfare that this Government is reluctant to believe that the Imperial Government of Germany in this case contemplates it as possible. The suspicion that enemy ships are using neutral flags improperly can create no just 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. (Spec. Sup. Amer. Jour. Int. Law, July, 1915, p. 86.)

Germany had previously attempted to justify, on the ground of retaliation, its action, which was admittedly beyond the law, saying:

Great Britain invokes vital interests of the British Empire which are at stake in justification of its violations of the law of nations, and the neutral powers appear to be satisfied with theoretical protests, thus actually admitting the vital interests of
a belligerent as sufficient excuse for methods of waging war of whatever description.

The time has come for Germany also to invoke such vital interests. It therefore finds itself under the necessity, to its regret, of taking military measures against England in retaliation of the practice followed by England. (Ibid. p. 85.)

In the German note of February 16, 1915, it was said:

Moreover, the British Government have armed English merchant vessels and instructed them to resist by force the German submarines. In these circumstances it is very difficult for the German submarines to recognize neutral merchant vessels as such, for even a search will not be possible in the majority of cases, since the attacks to be anticipated in the case of a disguised English ship would expose the commanders conducting a search and the boat itself to the danger of destruction.

The British Government would then be in a position to render German measures illusory if their merchant marine persists in the misuse of neutral flags and neutral vessels are not marked in some other manner admitting of no possible doubt. (Ibid. p. 94.)

Sir Edward Grey, in a note of February 19, 1915, stated:

The obligation upon a belligerent warship to ascertain definitely for itself the nationality and character of a merchant vessel before capturing it and a fortiori before sinking and destroying it has been universally recognized. (Ibid. p. 97.)

American discussion.—On February 20, 1915, the United States, anxious to establish a modus vivendi between the belligerents, proposed "That neither will use submarines to attack merchant vessels of any nationality except to enforce the right of visit and search." Many notes between the belligerents and the United States were exchanged, and Mr. Bryan, replying on March 30, 1915, to certain British notes, said:

The order in council of the 15th of March would constitute, were its provisions to be actually carried into effect as they stand, a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area and an almost unqualified denial of the sovereign rights of the nations now at peace.

This Government takes it for granted that there can be no question what those rights are. A nation's sovereignty over its
own ships and citizens under its own flag on the high seas in time of peace is, of course, unlimited; and that sovereignty suffers no diminution in time of war, except in so far as the practice and consent of civilized nations has limited it by the recognition of certain now clearly determined rights, which it is conceded may be exercised by nations which are at war.

A belligerent nation has been conceded the right of visit and search, and the right of capture and condemnation, if upon examination a neutral vessel is found to be engaged in unneutral service or to be carrying contraband of war intended for the enemy's government or armed forces. (Ibid. p. 117.)

In the note of April 21, 1915, to the German ambassador, the Secretary of State said of the Government of the United States:

It has, indeed, insisted upon the use of visit and search as an absolutely necessary safeguard against mistaking neutral vessels for vessels owned by an enemy and against mistaking legal cargoes for illegal. (Ibid. p. 128.)

On June 9, 1915, in a note to Germany, the United States said:

Nothing but actual forcible resistance or continued efforts to escape by flight when ordered to stop for the purpose of visit on the part of the merchantman has ever been held to forfeit the lives of her passengers or crew. (Ibid. p. 139.)

The United States has therefore insisted upon the necessity of visit and search before seizure in order to safeguard neutral rights and has denied the right to attack merchant vessels except on the ground of resistance or attempts to escape.

Review of proposed treaty.—Article IV of the submarine treaty is a "prohibition of the use of submarines as commerce destroyers."

In reply to Lord Lee's query as to whether "commerce destroyer" was a recognized legal term, or whether it included the process of attack and seizure referred to in the first resolution, "Mr. Root said he believed it covered the whole process. He thought 'commerce destroyer' was a perfectly well-known term." (Conference on Limitation of Armament, p. 700.)
After discussion in the committee on limitation of armament on January 5, 1922, the words "commerce destroyer" were retained instead of substituting the words "submarines for operations against merchant vessels." During this discussion Senator Schanzer said:

Submarines were military weapons and should be allowed the privileges of military weapons. They might even act in the same way as surface vessels. (Ibid. p. 708.)

The expression "The signatory powers recognized 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" was deliberately adopted with the understanding that the words "commerce destroyers" "was a perfectly well-known term." This well-known term "commerce destroyers" in the common dictionary sense means a vessel "intended to prey on, capture, and destroy the merchant shipping of an enemy, generally one of high speed and light armament." As this article was adopted at the conference where limitation of naval armament was a prime object, it may be presumed that this meaning of the word was intended, particularly as the phrase in the article is "using submarines as commerce destroyers"; i. e., as light, fast vessels might be used to prey on commerce, or as in 1914-1918 submarines were used putting in peril the lives of neutrals and noncombatants.

According to the final report of the American delegation, quoting from the report of the advisory committee of twenty-one, the opinion of the American Government was that submarines would continue to be used against combatant ships and as scouts, and that "unlimited warfare by submarines on commerce should be outlawed. The right of visit and search must be exercised by submarines under the same rules as for surface vessels." (Sen. Doc. 126, 67th Cong., 2d sess., p. 815.) The report
of the American advisory committee of twenty-one also stated: "If the submarine is required to operate under the same rule as combatant surface vessels no objection can be raised as to its use against merchant vessels." (Ibid. p. 813.) "This report was presented by the American delegation as setting forth in a succinct manner the position of their Government." (Ibid. p. 813.)

Article VI of the proposed treaty in relation to the use of submarines and noxious gases in warfare provided that it should take effect on the deposit of ratifications at Washington by all the signatory powers. Up to the present date, December 31, 1926, these ratifications have not been deposited; therefore the rules governing lawful submarine warfare remain unchanged.

CONCLUSION

A belligerent submarine lawfully commissioned as a vessel of war may exercise the rights of a vessel of war but its nature gives it no special rights or privileges.