
The views expressed herein are solely those of the author and may not necessarily represent policy of the Department of the Army or an agency of the United States.
and partial prohibition (rather than total prohibition) of antipersonnel land mines, nongovernment organizations (NGOs) and the Government of Canada rushed through a conference that resulted in the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction of September 18, 1997. On July 17, 1998, the United Nations Diplomatic Conference on the Establishment of an International Criminal Court produced the Rome Statute of the International Criminal Court. A diplomatic conference was held in The Hague from March 15 to 26, 1999 to promulgate a second protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954. Planning already is underway for the second UNCCW review conference, to be held not later than 2001, to consider the possibility of regulating or prohibiting other conventional weapons.

The list of recent and possible future law of war legislation reflects a prodigious effort on the part of the international community. Equally impressive on its face is the number of States Parties to these and other law of war treaties. Whereas there are only thirty-four States Parties to the Hague Convention (IV) Respecting the Laws and Customs of War on Land of October 18, 1907, and the Annex Thereto, there are 188 States Parties to the Geneva Conventions for the Protections of War Victims of August 12, 1949, and 156 States Parties to the 1977 Additional Protocol I.

But the value of the law of war depends less on codification and ratification or accession of treaties than on effective implementation and observance. The urgency to create the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, the International Criminal Tribunal for Rwanda, and, subsequently, the International Criminal Court, is clear evidence that codification and ratification or accession mean little without effective implementation. Evidence of any implementation, much less effective implementation, by States Parties to Additional Protocols I and II, or the 1980 Conventional Weapons Convention and its protocols, or even the older 1949 Geneva Conventions, is lacking and, for many States Parties, nonexistent. Although the Diplomatic Conference that promulgated Additional Protocol I concluded its work twenty-two years ago, there is little evidence of implementation of its obligations by States Parties, and the treaty has yet to be tested by the harsh realities of combat.

In 1999, some governments and the International Committee of the Red Cross (ICRC) were engaged in a futile headlong rush to create more law of war legislation in celebration of the centennial of the First Hague Peace Conference,
or the fiftieth anniversary of the 1949 Geneva Conventions. The ICRC and other NGOs as well as some governments, flushed with their perceived successes in Ottawa and Rome, also are casting about to find other areas to legislate in their effort to regulate or limit, if not entirely prohibit, the taking up of arms.19

The real success of recent efforts in Ottawa and Rome remains to be seen. As is true with cooking, the proof is in the eating rather than the making. The lessons of history offer some evidence of the probability of success. Governments and NGOs would be well advised to examine those lessons heralding recent legislative "successes" or advocating new legislative ventures.

Clear lessons are available from the between-the-wars endeavor by nations to prohibit or regulate submarine warfare. The product of nearly two decades’ effort involving numerous conferences was a spectacular failure when confronted by the crucible of war. The legal history of the law of submarine warfare was reported in the late Professor W. T. Mallison’s 1966 volume in the Naval War College’s International Law Studies.20 Subsequent scholarship and examination of the military, political, economic and diplomatic environment in which these negotiations occurred provides a more complete picture of that history.

Regulating Submarine Warfare: A Preface

Near-continuous negotiations between 1919 and 1936 produced a single document regulating submarine warfare. The 1936 Procès-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 193021 declares:

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 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 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 on board.
At the outset of World War II, forty-nine nations were States Parties. Yet the rules quickly proved a failure in that conflict. Each of the major naval powers—Germany, Italy, Japan, United Kingdom, and the United States—willingly and systematically violated its provisions. While Germany, Italy, and the United Kingdom moved steadily away from compliance, the departure of Japan and the United States from compliance was instant and unhesitating. As will be shown, recent scholarship revealed that the U.S. decision was premeditated.

Upon conclusion of that conflict, Germany’s naval leadership was charged by the International Military Tribunal at Nuremberg with waging unrestricted submarine warfare contrary to the London Naval Protocol. That tribunal acquitted each accused of the charge for Germany’s attack of British armed merchant ships, but found each guilty of violation of the protocol with respect to the attack of neutral merchant vessels by German U-boats and its rescue provisions. However, in light of evidence offered of similar conduct by British and U.S. submarines, the court awarded no punishment for these infractions.

This summary provides the framework for the analysis that follows: the rejection by all principal State Parties of a treaty devised in the years immediately preceding the conflict, by (at least in theory) persons fully seized with the issue and the experience of a previous conflict to assist them in their negotiation efforts.

Initial Regulation Efforts, 1899–1914

Consideration of the possibility of regulation or prohibition of submarines began at the turn of the century. On August 24, 1898, acting on behalf of Tsar Nicholas II, Russian Foreign Minister Mikhail Muraviev proposed the convening of an international disarmament conference to address issues relating to disarmament, the proscription or regulation of certain modern weapons of war, and establishment of a mechanism for arbitration of international disputes. Although other governments were suspicious of Russian motives, none felt that they could afford not to attend, and the First Peace Conference was convened in The Hague on May 18, 1899. Among its proposals, the Russian government offered to abstain from submarine construction provided all other governments agreed. As was true of its rationale for calling the conference, Russia’s motivation for its proposal was primarily economic; with a dreadnought construction race on, abolishing the new, unknown submarine would reduce naval acquisition costs. Great Britain, Germany, Italy, Japan, and Romania expressed a willingness to accept the Russian proposal if it were adopted by consensus. Other nations—Belgium, Greece, Persia, Siam, and
Bulgaria—favored a prohibition, but with reservations. Ten nations, including the United States, France, Austro-Hungary, Denmark, Spain, Sweden, Norway, the Netherlands, and Turkey, strongly resisted the proposal, while Serbia, Switzerland and, ironically, Russia, abstained. Lacking unanimity, it failed. Of note is the fact that the proposal was introduced as an arms control rather than a law of war issue. Although “humanitarian” arguments were made in subsequent conferences, the issue of controlling submarines remained primarily one of arms limitation, not the law of war. By 1907, more nations—including Russia and Germany—had acquired submarines. As a consequence, neither the original Russian proposal nor any new proposal to regulate or prohibit submarines was offered at the Second Hague Peace Conference in 1907. Nor was the submarine the subject of special consideration in the subsequent London conference of major naval powers that produced the Declaration Concerning the Laws of Naval War. 

This should not be surprising. In the pre-World War I era, the submarine was a relatively unknown but emerging capability. Nations were unwilling to surrender it unilaterally or prohibit it without universal agreement; most undoubtedly preferred to take a wait-and-see attitude. By 1912, the world’s major navies were building a substantial number of submarines. Its anticipated role was seen primarily as scouting and support for the battle fleet. Limitations on employment of submarines in a visit and search role were recognized by then-First Lord of the Admiralty Winston Churchill who, in June 1913, acknowledged that the submarine “cannot capture the merchant ship; she has no spare hands to put a prize crew on board . . . she cannot convoy her into harbor. . . . There is nothing else the submarine can do except sink her capture. . . .” The potential for use of submarines for attacks on commerce had been forecast. Six months prior to the beginning of World War I, Admiral of the Fleet Sir John Fisher advised the Prime Minister that Germany would likely employ her submarines for that purpose. As his biographer notes:

The [Royal] Navy recognized the danger; and the only doubt was whether Germany, owing to the impossibility of differentiating between belligerent and neutral, would risk bringing neutrals into the war. Germany did what Fisher had forecasted; and in consequence, what others had foreseen also happened, namely, that the United States was drawn into the war. 

British anticipation of probable German use of submarines was not met with a commensurate degree of preparation for antisubmarine warfare. Subsequent British conduct makes it probable, however, that having recognized the likely
outcome if a merchant ship carrying contraband was stopped by a German submarine, the decision was taken that British merchant ships would actively resist visit and search if attempted by a German submarine.

German use of submarines in World War I would change naval warfare, but changes already were occurring in warfare that led to Germany’s actions. The nation-State system had produced an environment in which a nation went to war with an enemy nation as a whole, rather than merely waging war against the enemy’s military forces. Attacking a nation’s ability to wage war included denying it seaborne commerce. The advent of the naval mine, submarine, and shore-based aircraft made close blockade difficult. Distant blockade became an alternative, and the submarine a viable force option notwithstanding recognized limitations on its use in that role.

The story of Germany’s use of its submarines in World War I is well known. Its employment of its submarines as commerce raiders virtually brought Great Britain to its knees. But its resort to unrestricted submarine warfare, which resulted in the sinking of the British passenger ship Lusitania by U-20 on May 7, 1915, with the loss of 1,198 passengers (twenty-eight Americans), and neutral vessels, was a major step in bringing the United States into the war on the side of the British and its allies. The end of World War I began an effort to prohibit or regulate submarine warfare that would continue for almost two decades.

International Regulation Efforts, 1919–1936

The conclusion of World War I raised two initial issues with respect to submarine warfare: prosecution of German U-boat personnel for engagement in unrestricted submarine warfare, and disposition of the German U-boat fleet. With respect to the former, whether unrestricted submarine warfare was a crime for which U-boat commanders and crews could be held criminally responsible was debated during the war. Allied demands at the end of the war for prosecution of Germans accused of war crimes, including U-boat personnel, proved only marginally successful.

The conduct of nations in World War I raised a legal issue in clear terms. Although enemy and neutral merchant vessels historically have been regarded as noncombatants, the status of the former had been challenged by the new theory of nation-State wars, and further complicated by distinctions made in diplomatic correspondence during that conflict between public and private vessels of a belligerent, and the status of either when armed; in some cases manning their guns with military personnel; commissioning their captains as members of the Royal Naval Voluntary Reserve; directing them to report any sighting of a
U-boat; and ordering them not to subject their ships to visit and search, but instead to ram and sink the challenging U-boat. Some belligerent merchant vessels were converted into heavily armed decoy ships, displaying false flags, known as "Q-ships." The decoy ship posed as a neutral merchant vessel until the unsuspecting U-boat approached, having ordered the merchant ship to stop to be searched. At the submarine's most vulnerable time, the Q-ship crew, members of the Royal Navy dressed in civilian clothing to disguise their true identity, would open fire with heavy guns from previously concealed positions.

The issues had been identified, viz., (a) when does an enemy merchant ship forfeit its noncombatant status, and (b) what rules should apply to submarines in light of the changes brought about by (a)? Failure to address these critical issues in the post-World War I series of multilateral negotiations was a primary cause for the subsequent failure of the 1936 *Procés-Verbal* regulating submarine warfare.

The second issue was U-boat disposition. Germany surrendered its High Seas Fleet, including 176 U-boats. Another seven foundered en route to Great Britain. Ten older, unseaworthy U-boats and 149 boats under construction were broken up, and German submarine salvage vessels and docks were turned over to the Allied and Associated Powers. Their disposition could decide the future of submarine warfare.

*Paris Peace Conference.* In anticipation of the Paris Peace negotiations, the American Naval Planning Section London considered the potential use of submarines. In a memorandum completed only days before the end of the war, its authors reached several conclusions with regard to the issues at hand and future use of submarines. The submarine, the authors asserted, "has an undoubted right to attack without warning an enemy man-of-war or any vessel engaged in military operations and not entitled to immunity as a hospital ship, cartel ship, etc." After recognizing the limitations of submarines in visit and search, and the "inherent right" of merchant ships to be armed, the authors stated that "Submarine operations in the present war may be considered to be typical of what may be expected in future wars, when success is dependent on the result of commerce. . . . It is interesting to note the several phases of submarine operations in the present war as illustrating the tendency to develop maximum efficiency regardless of legal restrictions."

Continuing, the memorandum noted the success of German U-boat operations against Great Britain, "the greatest naval power as well as the greatest mercantile power in the world." It considered the value of submarines in a future conflict to other naval powers, noting Japan's potential submarine threat.
to U.S. lines of communications. The U.S. counter was that “our submarine bases on the Philippines and Guam would be within striking distance of her coasts and would be a great threat to the commerce on which her existence depends....” Having recognized the military potential of the submarine as an effective commerce raider, the memorandum took an ironic twist, recommending the abolition of the submarine not for humanitarian reasons but because “our public opinion would never permit their use in the same manner as that of our adversaries.”

The memorandum was forwarded to Washington with an unfavorable endorsement by Admiral William S. Sims, Force Commander of American Naval Forces operating in European Waters, who stated that “The Force Commander does not consider that the arguments put forward by the Planning Section in this paper are logical, nor that they support the conclusions reached. The paper is therefore forwarded without approval for consideration by the Department [of the Navy].” Although the memorandum’s recommendations were for naught, its value lies in its recognition of the potential and likely employment of the submarine in future conflicts.

The issue would not be resolved at the Paris Peace Conference, as it was regarded as beyond the scope of that conference and more in the purview of the League of Nations. The conferees ultimately distributed former German U-boats to France (ten), Japan (seven), and the United States (six). The remaining U-boats were broken up.

The Paris Peace Conference exacerbated a growing naval rivalry between Japan, Great Britain, and the United States. Although allies during World War I, Japan and the United States previously had identified each other as potential foes in any future Pacific naval war; Great Britain joined in the assumption of war with Japan following World War I. Japan’s receipt of the former German Pacific mandates (Marianas, Caroline, and Marshall groups, without providing a verification mechanism to ensure it kept its pledge not to fortify the islands) in the Paris Peace settlement, in part as a reward for its alliance against Germany, increased the concern of British-American naval leaders. It also was to be a factor in the American decision to resort to unrestricted submarine warfare more than two decades later.

In 1919, however, nations were engaged in the inevitable postwar retrenchment of military forces. Great Britain’s national debt had soared during the five years of World War I. Major cuts in government spending were paramount, and no costs were more apparent than naval shipbuilding. The issue was framed all the more by the belief by many that the pre-World War I naval arms race was a major cause of that war. Against these beliefs was the genuine desire
by Great Britain that she retain her naval and mercantile supremacy upon the high seas, and the recognition that much of its pre-war fleet was reaching block obsolescence. The Royal Navy's dilemma was heightened by the changes in naval construction made necessary by the submarine threat: hull blisters to protect against torpedoes, more extensive internal subdivision within the ship into watertight compartments, higher speeds, and an increased need for antisubmarine vessels. A call by U.S. Secretary of State Charles Evans Hughes on July 8, 1921, for a conference on the limitation of armament to be held in Washington, therefore, came as welcome news to Great Britain. A ban on submarines would eliminate a threat to its naval and mercantile supremacy while reducing its naval shipbuilding costs. The Washington Naval Conference, convened four months later, would provide Great Britain its first and best opportunity to prohibit the submarine as an instrument of war. With Germany theoretically (or at least temporarily) eliminated as a threat, Great Britain's budgetary and naval defense planning problems could be eased substantially by prohibition of one of the greatest threats to its naval and commercial shipping superiority.

The three major naval powers (U.K., U.S. and Japan) shared a belief in the Mahanian doctrine of guerre d'excadré, which emphasized command of the seas through fleet engagements, rejecting the doctrine of guerre de course, or attacks on commerce. This philosophy drove the debate in negotiations between the wars and, in particular, British efforts to abolish the submarine. Those efforts failed in part because the belief in guerre d'excadré erroneously assumed that each future opponent would play to the opposite's strong suit, that is, the three major powers assumed that future enemies would choose to attack their opponent where he was strongest rather than weakest.

**Washington Naval Conference.** Submarines were an important issue at the Washington Conference on the Limitation of Armaments, but not the most important. The meeting's primary purpose was to stop the capital ships arms race between the three major naval powers. The host nation opted to meet the issue head-on. In the opening plenary session on November 12, 1921, U.S. Secretary of State Charles Evan Hughes proposed a tonnage ratio for capital ships for the three major naval powers that would require the scrapping of a large number of commissioned vessels and a stop-and-scrap program for new capital ships under construction. Hughes' ratio of 5:5:3 (U.S., Great Britain, and Japan, respectively) met with considerable resistance from Japan, which favored a 10:10:7 ratio, but ultimately accepted it with conditions. In return for Japan's agreement to this ratio, the United States and Great Britain could not fortify any of their respective territories within striking distance of Japan.
While the original U.S. proposal (5:5:3) considered only the naval armament of the three principal naval powers, an effort to extend the formula to France and Italy in the course of the conference had an effect on the submarine issue. France balked at the formula proposed of 5:5:3:1.67:1.67, eventually accepting a 5:5:3:1.75:1.75 tonnage ratio provided it did not extend to auxiliary vessels, such as cruisers, destroyers and submarines. This was the first of several ploys by the participating powers, and served to enable the submarine to evade prohibition—which France vehemently opposed—while introducing the alternative of use regulation.

The British attempt to abolish the submarine, opposed by France, Japan, Italy, and the United States, and offered against the advice of the American delegation, had an overly optimistic goal and an ulterior motive. If Great Britain could achieve the abolition of the submarine, the threat would be removed. If it could not, it would use that fact to insist that the tonnage ratio not extend to cruisers, which it used not only in antisubmarine operations but also for most of its peacetime naval missions. Failing attainment of a submarine prohibition, a submarine tonnage ratio was proposed by the U.S. delegation. The British resisted, arguing that if a total prohibition could not be achieved, tonnage ratios should be substantially lower than those proposed by the United States, and there should be an express prohibition on ocean-going (as opposed to coastal) submarines whose primary use would be commerce destruction. This argument played well in the media and with the American public, which the British fully exploited. Over the next month the American delegation received over 400,000 letters and telegrams urging abolition or drastic limitation of submarines, with only 4,000 supporting submarine retention. Notwithstanding assurances by the British that its proposals had neither unworthy nor selfish motives, but that it was acting solely "on the highest of humanitarian principles," and domestic pressure on the U.S. delegation to support the British proposals, agreement as to abolition or to tonnage limitations was not possible. Japan viewed its ability to build submarines in parity with the United States and Great Britain as one of its few successes at the Washington Conference.

It was at this moment that Elihu Root, former United States Senator, former Secretary of War and Secretary of State, and a member of the U.S. delegation, introduced the idea of regulating submarines as commerce destroyers. The Root resolution not only proposed new rules relating to visit and search, but also stipulated that the members of a submarine crew violating its provisions would be subject to international prosecution as pirates.

The proposal met with almost as much opposition as the British argument for total abolition, not the least initially from the British delegation, which
feared its piracy provision would place its own submarine commanders and crews at risk. The French, Italian, and Japanese delegations, while agreeing with the resolution’s aim, raised doubts as to its clarity and legal correctness. They suggested its referral to a committee of jurists for further study. This effort received an acid rejoinder from Root, declaring that neither he nor his resolution would be “buried under a committee of lawyers.” Continuing, he argued that while the resolution might be ineffective “if made between diplomats or foreign offices or governments,” he believed that if its rules “were adopted by the conference and met with the approval (as would surely be the case) of the great mass of the people, the power of the public opinion would enforce them.” Efforts to clarify basic terms, such as “merchant ship,” were firmly refused by the United States and Great Britain. After considerable debate, with slight modifications, the Root Resolution was adopted as the Submarine Treaty, as follows:

**Resolutions proposed by Mr. Root**

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 stop for visit and search to determine its character before it can be captured.

   A merchant vessel must not be attacked unless it refuses 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 cannot capture a merchant vessel in conformity with these rules the existing law of nations requires that it desist from attack and from capture and to permit the merchant vessel to proceed unmolested.

**The Submarine Treaty, Articles I-IV**

**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 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 cannot 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.
The signatory powers invite the adherence of all other civilized powers to the foregoing statement of established law to the end that there may be 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.

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.

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 world public opinion is to pass judgment upon future belligerents.

Article IV

The signatory powers recognize the practical impossibility of using submarines as commerce destroyers without violating, as they were violated in the recent war of 1914-18, the requirements universally accepted by civilized nations for the protection of the lives of neutrals and noncombatants, and to that end 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.

III. The signatory powers, desiring to insure the enforcement of the humane rules declared by them with respect to the prohibition of the use of submarines in warfare, further declare that any person in the service of any of the powers adopting these rules who shall violate any of the rules thus adopted, whether or not such person is under orders of a government superior, 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 such powers within the jurisdiction of which he may be found.

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 the orders of a government superior, shall be deemed to have violated the laws of war and shall be liable to trial before the civil or military authorities of any power within the jurisdiction of which he may be found.

In its re-worded form, the Root Resolution was adopted by the conference with an express stipulation demanded by Root that a forthcoming commission of jurists would not have authority to examine it. Its survival was at risk from the outset. Its intent was to accomplish through ambiguous regulation what could not be achieved through express prohibition. It did not resolve issues raised in the recent war. The well-established legal distinction between commerce raiding and blockade, blurred by both sides during that conflict, was not
addressed. Efforts to clarify the term “merchant ship” with respect to the distinction between unarmed neutral and armed belligerent merchant ships were blocked by Senator Root and vehemently opposed by the British delegation. Despite efforts to clarify this critical question by Italy and Japan—with France discreetly supporting but hiding behind each—the conferees, “in order to secure an outward appearance of agreement, studiously evaded the real crux of the submarine problem; namely, the denial of merchant-ship privileges and immunities to armed merchant vessels.”

Ultimately, the 1922 Submarine Treaty would fail entry into force owing to France’s refusal to ratify it. Its problems had deeper roots: ambiguities in its most important terms and provisions, an imbalance between attacker and defender, a refusal to address the fundamental issue of the armed merchantmen, and a rush to reach agreement in response to the hysteria of popular demand rather than being based upon sound thinking. An analysis by a U.S. naval submarine officer writing before World War II offered these criticisms:

> It is difficult to escape the conviction that the delegates were still influenced by the “spirit of Versailles.” No attempt was made to consider the submarine problem calmly and realistically. . . . Questions concerning the legality or practicability of the rules were . . . swept aside. . . . [T] represents a solution of the submarine problem which is chiefly emotional and far too simple in view of the complexity of the considerations involved.

Of the treaties drafted at the Washington Conference, only the Submarine Treaty failed to gain the necessary support for entry into force.

Another mistake of the Washington Naval Conference was the exclusion of Germany as a participant. For the moment an international pariah and not a naval power, Germany’s participation nonetheless may have provided an opportunity for a fuller, fairer consideration of the submarine issue.

The view of Germany and the German people with regard to the U-boat was substantially different from that of the British and others who favored abolition of the submarine. As was the case with the airplane, the U-boat enjoyed popular support in Germany throughout the years between World Wars I and II notwithstanding the provisions of the Treaty of Versailles prohibiting Germany from building or possessing either. Germany saw the value of the submarine, and was prepared to take the necessary steps to maintain its expertise in submarine design, development and construction. As was the case with military aircraft, Germany wasted no time following Versailles in commencing work to maintain and enhance its submarine expertise.
Geneva Naval Conference. Submarines remained a secondary issue in the years following the Washington Naval Conference. The major topic of international debate was cruiser strength, which was not resolved at Washington. Upon conclusion of that conference, Japan, Great Britain and the United States embarked on new cruiser construction programs. Britain and the United States, experiencing tension in naval matters with one another that began following World War I, did not keep pace with Japanese auxiliary construction. Under congressional pressure to stave off an arms race in auxiliaries (cruisers, destroyers, and submarines), on February 10, 1927, President Calvin Coolidge invited the leading naval powers to a new conference to seek resolution of that which could not be attained in Washington five years earlier. France and Italy declined, sending observers only, but Great Britain and Japan agreed to meet with the United States in Geneva. As early as 1923 the Japanese had anticipated that the United States would call for a second naval conference, and that its purpose would be to bring auxiliary vessels under the Washington treaty ratio. It viewed this with great disfavor and opposed it tenaciously.

Subsequently described as “one of the most dramatically unsuccessful international gatherings of the twentieth century,” the conference was in trouble from the start. The United States believed that Great Britain sought superiority rather than parity with respect to auxiliary vessels. Agreement among the parties could not be reached for formulas as to numbers of cruisers, tonnage, or gun caliber (six-inch or eight-inch) due to fundamental differences with respect to national requirements. The Japanese refused to extend the 5:5:3 capital ship ratio to auxiliary vessels, reverting to insisting upon the 10:10:7 ratio it unsuccessfully sought for capital ships at Washington.

While the conference ultimately faltered over cruiser strength issues, submarine disarmament was considered. In preparation for the Geneva Conference, a U.S. Navy study reported that while submarines would be of an advantage in the event of war with Japan, the U.S. Navy was at a point of numerical inferiority in submarines vis-à-vis Japan. The report concluded that submarines were “a vital element in any well-balanced fleet,” and recommended that the United States oppose the abolition of the submarine unless there was universal agreement. Agreement on means for controlling the submarine race, such as displacement, maximum deck gun caliber, or total submarine tonnage, could not be gained. No consideration was given to improvement of the unadopted 1922 Submarine Treaty or to other possible regulation of submarine use, perhaps due in part to France’s refusal to participate fully in the conference.
As was the case at the Washington Naval Conference, Germany was not invited to participate in the Geneva Naval Conference. It remained busily engaged in clandestine rearmament, including submarine development.90

**London Naval Conference.** Several events occurred between the 1927 Geneva Disarmament Conference and the 1930 London Naval Conference that would color the approach to the latter. On March 4, 1929, Herbert Hoover succeeded Calvin Coolidge as President. A Quaker, Hoover vowed to stop the naval arms race. Three months later the Labor Party took office in Great Britain. There followed informal discussions between the two new governments. On June 24, 1929, British Prime Minister Ramsay MacDonald announced acceptance of naval parity with the United States, canceling work on two 10,000-ton cruisers and three submarines. In subsequent Anglo-American talks, the United States agreed to parity with the British with regard to submarines, provided agreement could be reached with regard to cruisers. On October 7, 1929, the British extended invitations to France, Italy, Japan and the United States to participate in a conference on naval disarmament in London to address categories of ships not covered by the Washington Treaty. The invitation was accepted, though not entirely as the British had hoped, and the conference convened on January 21, 1930.91

In many respects the parties were back to square one. The Washington Treaty’s ten-year capital ship building holiday would expire at the end of 1931, and Great Britain, Japan, and the United States each were considering new battleship construction. The period was one of intense naval rivalry between France and Italy, while the former also was taking a number of steps to secure itself against the threat posed by the resurrection of Germany.92 The Americans and British, having begun the process of settling the differences that were the hallmark of their naval rivalry during the 1920s, proceeded with a mutual interest in continuing the provisions of the Washington Naval Treaty for a period of five years, and extending its tonnage ratio to cruisers. As was true in Washington, delegation debates were heated, with Great Britain and the United States siding against Japan.93

On February 11, 1930, the First Lord of the Admiralty offered British arguments for abolition of the submarine, which included “the general interests of humanity”; the fact that the submarine was primarily an offensive rather than defensive weapon (to counter a long-standing French argument to the contrary);94 the contribution such a move would make towards disarmament and world peace; the financial relief that would be possible through its prohibition; and the arduous conditions under which submarine crews had to serve.95 He
suggested that if the assembled governments could not agree to abolish the submarine, efforts should be made to limit its size and numbers and to reconsider the rules set forth in the failed 1922 Submarine Treaty. In a reversal of its previous, long-standing position, the United States supported the British proposal for abolition. France, Italy, and Japan remained opposed to submarine abolition.

Progress was made with respect to defining *standard displacement*, setting a limit on individual submarine displacement (a maximum of 2,000 tons, with an allowance for existing submarines above that displacement), total tonnage (52,700 tons each for Great Britain, Japan, and the United States), and maximum gun caliber (5.1 inch). Japan was successful in its insistence upon parity in submarines.

Failing a total submarine prohibition, which the British Admiralty did not believe possible, it offered for reconsideration in revised form the unadopted rules of the 1922 Submarine Treaty. One of the most contentious issues, however, that of belligerent rights at sea in time of war—the British opposite to the long-standing American principle of freedom of the seas—was kept off the agenda at the insistence of the British political leadership, even though critical to resolution of the submarine regulation issue. Separate meetings of a committee of jurists produced abbreviated but complementary rules to those contained in the 1922 Submarine Treaty. Article 22 of the 1930 London Naval Treaty stated:

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 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 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 on board.

The High Contracting Parties invite all other Powers to express their assent to the above rules.

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Gone were the piracy provisions. But in avoiding the differing British and American views, which in turn failed to consider issues such as the definition of merchant ship, the status of armed merchant ships, and the flying of false flags, the participants had not resolved the overall problem. The rules had been revised with the hope that French objections to ratification of the 1922 Submarine Treaty could be overcome. But concern was expressed by British First Sea Lord Sir Charles E. Madden who, upon reading the revised rules, commented that "I am strongly in favor of supporting the French view [opposing the rules]. We will certainly wish one day to use submarines in a legitimate way against commerce." The official British naval historian was less charitable, concluding that "As it was plainly impossible for submarines and aircraft to conform to the Hague Conventions applicable to surface warships this now appears to be an example of legalistic considerations obscuring practical realities."

The London Conference concluded on April 22, 1930, with a treaty of limited parties (only Great Britain, Japan and the United States) and of limited duration (it expired December 31, 1936, except for its rules regulating submarine warfare, which were without time restriction). The repetition in its submarine warfare rules of the failure of the Washington submarine treaty to clarify the ambiguities with respect to "merchant ship" doomed any chance of their success. Agreement as to many of the London Naval Treaty's key provisions came at what ultimately proved a very high price. Although Japan gained many of its demands, the agreement was roundly condemned by the Command Faction of the Imperial Navy, and was a factor in Japan's movement down the slippery slope to World War II.

Germany, uninvited to the London Naval Conference, continued its progress in clandestine U-boat development.

World Disarmament Conference. On February 2, 1932, after many years of preparatory sessions, the World Disarmament Conference convened in Geneva. The war clouds of World War II already were forming on the distant horizon. On September 18, 1931, Japanese and Chinese troops engaged in combat at Mukden. On January 28, 1932, only days before the Geneva disarmament conference, Japanese atrocities in its attack on Shanghai received worldwide media coverage. Its many issues are beyond the scope of this paper. It adjourned sine die on June 11, 1934, without alteration of the status quo with regard to submarines.

The failure of the World Disarmament Conference coincided with, or was immediately followed by, a number of events that reduced the likelihood of
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further agreement with respect to submarines. On November 15, 1932, German authorities approved a plan for rebuilding the German Navy, to include construction of sixteen U-boats. Franklin Delano Roosevelt’s assumption of the White House in January 1933 was followed almost immediately by the National Socialists assuming power in Germany. On January 16, 1933, the U.S. Congress passed the National Industrial Recovery Act, authorizing the President to use its funds to bring the Navy up to London Naval Treaty limits. Funds were appropriated for thirty-two ships, including four submarines. On October 13, 1933, the German leadership approved a new naval construction plan, authorizing larger U-boats while increasing construction of small U-boats to six per month. The following day, having been allowed to return to the community of nations, it withdrew from the World Disarmament Conference in Geneva. Japan’s 1933 withdrawal from the League of Nations was followed by its formal notice in December 29, 1934, of its intention to withdraw from the 1922 Washington and 1930 London naval treaties, effective December 31, 1936. On March 27, 1934, Congress passed the Vinson-Trammel Act, authorizing the President to construct auxiliary naval tonnage adequate to bring the U.S. Navy, by 1942, up to the limits established by the Washington and London naval treaties. The twenty-eight submarines authorized were to be of the “maximum effective tonnage . . . that accords with Treaty provisions.” On March 16, 1935, German Führer Adolph Hitler renounced the disarmament clauses of the Treaty of Versailles. In April 1935 Germany publicly disclosed its intention to begin construction of submarines. Two months later Great Britain and Germany signed a naval agreement permitting Germany to possess a total tonnage in combatant vessels, equal to thirty-five percent of the aggregate tonnage of the British Commonwealth. Germany also was entitled to construct for its use submarine tonnage equal to the total tonnage of the British Commonwealth, with the agreement that it would not exceed 45 percent of the Royal Navy’s submarine tonnage. Noting British acquiescence to Germany’s demands in the Anglo-German Naval Agreement, on October 3, 1935, Italian dictator Benito Mussolini invaded Abyssinia in open defiance of the League of Nations. This was the environment in which the second London Naval Conference convened on November 9, 1935.

Second London Naval Conference. Preparation for the anticipated follow-on London Naval Conference began one week after the end of the failed Geneva disarmament conference. The United States and Great Britain began meetings on June 18, 1934, that continued intermittently through December. Meetings in London with Japan began on October 16, 1934. On October 24, Japan
proposed abandonment of the Washington Treaty's ratio, and defended submarines as a defensive weapon. An impasse between the Japanese and Anglo-American positions was clear and, as previously noted, on January 29, 1934—even before the London Naval Conference convened—Japan announced its intention to rescind its obligations under the Washington and London naval treaties, effective December 31, 1936.110

Japan's announcement made the actual conference an anticlimax. Japan insisted upon full parity with Great Britain and the United States, which each refused on January 16, 1936. In reaction, Japan announced its withdrawal from the London Naval Conference, leaving the conferees with nothing more than an Article 22 of the 1930 naval treaty once that treaty's other arms control provisions expired on December 31, 1936.111 Article 22 was adopted as the Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the London Naval Treaty of 1930.112

Post-London, 1936–1939

The downward slide to World War II continued. The Sino-Japanese War began on July 7, 1937, with combat between Chinese and Japanese forces in North China. Two months later, the Imperial Japanese Navy commenced a total blockade of China. Japanese attack on December 18, 1937, of the gunboat USS Panay on the Yangtze River prompted President Roosevelt to expand the Navy's strength. On March 31, 1938, in light of reports of Japanese naval construction beyond treaty limits, the United States; Great Britain, and France agreed to employ the escalator clauses of the 1936 London agreement. On December 12, 1938, Germany announced that it intended to increase its submarine tonnage to parity with Great Britain. Four months later, it abrogated the entire Anglo-German Naval Agreement.113

There would be one more effort at regulating submarines. The Spanish Civil War began in July 1936. On August 13, 1937, Italian submarines supporting the Nationalist forces of Spanish dictator Francisco Franco began unrestricted submarine attacks of merchant shipping, prompting British antisubmarine responses and a call for a conference to establish rules for submarine employment. At the request of Great Britain and France, nations with Mediterranean frontiers, less Spain, along with Germany, Russia, and Great Britain, met in Nyon, Switzerland, between September 6th and 13th. Their meeting produced an agreement of the same name that refers to the rules contained in the 1936 London Procès-Verbal, without any substantive modification or improvement. Their efforts were for naught, however, as the British were aware from their
interception of Italian signals that its submarine operations had been suspended two days before the conference began.  

The state of play on the eve of World War II was less than perfect. The vague, unadopted submarine rules of the 1922 Washington Conference formed the basis for the improved but equally vague Article 22 of the 1930 London Naval Treaty and the 1936 Procés-Verbal. Although the latter ultimately was adopted by all of the major users of submarines in World War II, its ambiguity did not lend itself to a likelihood of success. It failed to distinguish between public and private belligerent vessels, or armed belligerent ships and neutral merchant ships. Other issues needed to be addressed, clarified and resolved, either through a multilateral, bilateral or unilateral process. U.S. Navy officers, writing in the pages of the prestigious Naval Institute Proceedings, dissected the 1922 Washington submarine treaty, Article 22 of the 1930 London Naval Agreement, and the 1936 London Procés-Verbal, and highlighted their shortcomings. 

The parties to the negotiations between the wars chose purposeful ambiguity to reach agreement, however flawed; they drafted ambiguous rules as an alternative for a prohibition they sought but could not achieve.

**World War II: The Bloom Comes Off the Rose**

World War II began on September 1, 1939, with Germany's invasion of Poland. Two days later, Great Britain and France declared war on Germany. Each major submarine user took different roads at a different pace to abandonment of the rules contained in the 1936 London Procés-Verbal.

**Germany.** Initial orders to German U-boats were that they were to strictly observe the 1936 Procés-Verbal's rules for visit and search, with three exceptions: enemy troopships, that is, vessels known from intelligence or actually observed to be carrying troops or war materiel; vessels in convoy, or any vessel escorted by warships or aircraft; or vessels taking a direct part in enemy actions, or acting in direct support of enemy operations, including intelligence gathering. Although France had declared war on Germany, U-boat commanders were ordered to take no hostile action against French ships, including combatants, other than in self defense.

History repeated itself early. Germany stumbled badly in World War I with the sinking of the Lusitania on May 7, 1915, the ocean liner Arabic on August 19, and the liner Hesperian on September 9. As previously indicated, the sinking of the Lusitania and neutral vessels was a key factor in the U.S. decision to enter into the war against Germany. Aware of this risk, Hitler for political
reasons insisted upon strict compliance with the rules for submarine visit and search. But on September 3, 1939, the first U-boat sinking of World War II occurred when U-30 attacked and sank the British ocean liner Athenia (with a loss of 118 lives, including 28 Americans) when it was misidentified as a British auxiliary cruiser. Errors occur in war, but this error was compounded by the German decision to deny responsibility.119

The leading U-boat historian concludes that through the first seven months of the war, German U-boat commanders carried out their duties “in a fair—and at times even chivalrous—manner.”120 Hitler’s decision to comply strictly with the 1936 London submarine rules added significantly to the risk for U-boat commanders, while reducing their effectiveness. Within days the ambiguities in the language of the 1936 Procés-Verbal became apparent, as U-boat commanders and the U-boat command sought clarifications or relaxation of Hitler’s directive. The authority to attack belligerent merchant shipping was complicated by the knowledge that a ship might be using a false flag to conceal its identity, thereby forcing the U-boat to endeavor to visit and search, or might be a decoy ship.121 On September 23, Admiral Karl Dönitz sought a relaxation of the directive to permit attack of neutral vessels carrying contraband in the North Sea. Hitler approved changes and clarifications that permitted the attack or capture of any merchant ship that made use of its radio to send the “SSS” (submarine alarm) on being stopped by a U-boat for visit and search; authorized the attack of French shipping; and British or French passenger ships carrying 120 passengers or less. Hoping to avoid a repetition of the Athenia sinking, large passenger vessels were not to be attacked. The following day he authorized the attack of French warships; one week later the requirement to comply with the Procés-Verbal in the North Sea was withdrawn. But objections from Norway, Sweden and Denmark prompted Hitler to rescind that portion of his September 23rd order to the extent that it authorized the attack of neutral shipping. Two days later Hitler authorized the attack on sight and without warning of darkened ships (including neutral ships) encountered off the British and French coasts.122 On October 4, the requirements for visit and search were extended to 15° west longitude; on October 17, U-boats were authorized to attack without warning any belligerent merchant ship; on October 19, the authority to attack blacked-out ships was extended to 20° west; and on November 12, Hitler authorized the attack on sight of any passenger vessel known or seen to be armed, and any tanker which was “beyond doubt” proceeding to or from Great Britain or France.123 By mid-1940, Germany’s movement toward unrestricted submarine warfare was well underway.124
**Italy.** On July 11, 1940, Italy entered the war as an ally of Germany, adding its 105 submarines to Germany's strength. Italian Atlantic submarine operations commenced the following month. When operating in the Atlantic under the operational control of the German U-boat command, Italian submarines followed German rules of engagement. 125

**Great Britain.** British progression toward abandonment of the submarine rules it worked so hard to achieve was slow but steady. Always the Cinderella of the Royal Navy, British thinking with respect to submarine employment suffered. Royal Navy submarines were so hindered by legal, moral and political restrictions, and bureaucratic impediments, especially poor training, that their first and only success in 1939 was not realized until December 12, 1939, when HMS *Salmon* sank *U-36*. 126 This was to change with the German invasion of Norway on April 9, 1940. Forced by the enemy aircraft threat to attempt to identify vessels through the submarine's periscope, many German troopships made their way to their destinations unscathed. The very neat rules of the 1936 *Procès-Verbal* had run head on into the realities of war, and been found wanting. On April 9, 1940, the British Cabinet authorized the sinking on sight of all German ships, combatant vessel or merchant ship, in the Heligoland Bight, the Skagerrak and the Kattegat. The zone for executing such attacks was extended up the coast of Norway as far as Bergen three days later. 127 On February 5, 1941, British submarines were authorized to attack on sight, without warning, all ships met south of 35° 46' north on the assumption that they were German. 128 In the Mediterranean, on July 15, 1940, British submarines were authorized to attack all vessels operating within thirty miles of the Italian coast. Two days later, this authority was extended to any vessel operating between Italy and Libya or within thirty miles of the Libyan coast. Subsequently, the Mediterranean "sink at sight" operational areas were extended as required. 129 While the Royal Navy continued to place priority on attack of German Navy combatants, and British operational zones for unrestricted submarine warfare may not have been as extensive as Germany's, British practice was a renunciation of the 1936 *Procès-Verbal* requirements. 130 The British decision was taken for operational reasons rather than in response to German U-boat operations.

**Japan.** Japanese abrogation of the 1936 *Procès-Verbal* was immediate, coinciding with its December 7, 1941, attack on Pearl Harbor. The I-26 sank the merchant ship *Cynthia Olsen* several hundred miles west of Honolulu at 0800, as the Japanese attack on Pearl Harbor was underway. 131 This was
followed by other attacks on merchant ships in the western Pacific, and a brief campaign along the U.S. west coast.\textsuperscript{132} While other merchant ship attacks followed, including extended campaigns in the Indian Ocean, the Imperial Japanese Navy's deployment of its submarines for the balance of the war did not serve it well. Former Japanese submarine officers and historians have been unanimous in their criticism of the failure of Japan to give priority to the attack of merchant shipping.\textsuperscript{133} The evidence is clear, however, that prioritization of missions was an operational rather than a legal decision, and that Japan did not adhere to the rules set forth in the 1936 \textit{Proces-Verbal} in its submarine operations.

\textbf{United States.} On December 7, 1941, upon notification of the Japanese attack on Pearl Harbor, Admiral Harold R. Stark, U.S. Chief of Naval Operations, issued the following order: "Execute against Japan unrestricted air and submarine warfare."\textsuperscript{134}

Historians and international lawyers long held that the United States' action was a reprisal for the Japanese attack on Pearl Harbor,\textsuperscript{135} apparently based upon the statement by Admiral Chester A. Nimitz, USN, in response to interrogatories from the International Military Tribunal on behalf of Admiral Karl Dönitz. After acknowledging that the Chief of Naval Operations had ordered unrestricted submarine warfare against Japan on December 7, 1941, Admiral Nimitz was asked if that decision was based upon reprisal. Admiral Nimitz responded:

The unrestricted submarine and air warfare ordered on 7 December 1941 resulted from recognition of Japanese tactics revealed on that date. No further U.S. orders to submarines concerning tactics toward Japanese merchantmen throughout the war were based on reprisal . . . .

The unrestricted submarine and air warfare ordered by the Chief of Naval Operations on 7 December 1941 was justified by the Japanese attacks on that date on U.S. bases, and on both armed and unarmed ships and nationals, without warning or declaration of war.\textsuperscript{136}

These responses are postwar legal justifications for operational and political decisions taken before the Japanese attack on Pearl Harbor. They also are legally inaccurate as a basis for reprisal.\textsuperscript{137}

The decision of the United States to abandon its obligations under the 1936 \textit{Proces-Verbal} was premeditated, and not based upon reprisal. The historian who discovered the actual basis for the decision is quite specific:
The motives which impelled the United States ... to resort to unrestricted submarine warfare ... were the same which had activated Germany to the same tactic. They were coolly, studiously strategic: to cut off the enemy's vital overseas trade and thereby weaken his capacity to fight and win a long war. Submarines were the only American naval instrument which could reach across the Pacific at the beginning of the conflict, and they were promptly put to this prearranged task.\(^{138}\)

Revelation of the basis for the U.S. decision was protracted. Samuel Flagg Bemis, professor emeritus of diplomatic history at Yale University, pieced together the story and offered a classified presentation to the faculty of the Naval War College on November 1, 1961. He returned to offer the presentation to Naval War College faculty and students on December 15 and discuss his paper further in a seminar the following day. Each was classified.\(^{139}\) Declassified in 1978, the story emerged in 1984.\(^{140}\) Other pieces of the story were added by other historians.\(^{141}\)

The pre-World War II change in U.S. policy emerged rapidly. Following the 1930 London Naval Conference, a new draft of the U.S. Navy's Instructions for the Navy of the United States Governing Maritime Warfare was received by the General Board of the Navy\(^{142}\) on June 30, 1933. Incorporating the rules contained in Article 22 of the 1930 London treaty, it was shelved by the General Board without adoption.\(^{143}\) When war began in 1939, the Navy's War Plans Division prepared a revision. It was referred to the Judge Advocate General of the Navy in April 1940 for comment and concurrence. The newest draft repeated the provisions of Article 22—now the 1936 Procés-Verbal—without elaboration as to what constituted a “merchant ship,” or possible bases (other than resistance to visit and search) for loss of protection. The questions raised publicly by U.S. Navy submarine officers\(^{144}\) went unanswered. This document subsequently was adopted, published, and distributed to the fleet, but with the proviso that “In the event of emergency these instructions may be supplemented by additional instructions made necessary by circumstances then existing.”\(^{145}\)

The U.S. plan for war against Japan, War Plan Orange, long had recognized that Japan could be defeated through blockade.\(^{146}\) As war clouds approached, the role of the submarine in accomplishing this mission received fresh attention. In October 1940, Admiral J. O. Richardson, Commander of the U.S. Fleet, proposed long-range interdiction of Japanese commerce, recommending that were war to begin, U.S. submarines should “make an initial sweep of Japanese merchantmen . . . in the Pacific.”\(^{147}\) On January 18, 1941, the commander of the U.S. Asiatic Fleet, Admiral Thomas Hart, advised that “the possibilities
in raids on Japan sea communications—meaning shipping other than naval forces—would be great if our submarines were free to wage 'unrestricted' war.\textsuperscript{148}

Others entered the deliberation process. On March 20, 1941, Admiral E. C. Kalbfus, President of the Naval War College, advised the Chief of Naval Operations of the solution by its faculty and students to its annual international law problem, which assumed war with Japan. The solution acknowledged the law of war principle of distinction between combatants and noncombatants, but argued that "new weapons may well call for changes in the technique of applying fundamental procedures in altering some of the traditional procedures which no longer fit current needs." Noting the use of war zones in the European conflict, it proposed similar zones—proclaimed as "strategic areas"—for the purpose of attacking Japanese merchant shipping, inasmuch as "visit and search by plane, submarine, or surface vessel cannot be readily or safely accomplished."\textsuperscript{149}

Admiral Kalbfus' letter was referred to the Navy General Board. Responding on May 15, 1941, the Chairman of the General Board rejected the Naval War College's recommendations, declaring "These [war] zones have no justification in international law, and the United States and other nations have vigorously protested the establishment of such zones." The response went on to conclude that "No change in this policy is considered at this time."\textsuperscript{150} However, a memorandum one week later advised that the issue was being addressed "in another manner."\textsuperscript{151}

The "other manner" involved steps being taken by the Chief of Naval Operations (CNO). On May 26, 1941, the CNO approved Rainbow 5, the U.S. strategic war plan. Ten days earlier, the CNO had advised Admiral Ernest J. King, Commander in Chief, Atlantic Fleet, of his intention to transfer all long-range submarines to the Pacific.\textsuperscript{152} By November 14, 1941, the CNO had drafted directions to the Commander, U.S. Asiatic Fleet for unrestricted submarine warfare against Japan that matched the Naval War College's recommendations. Professor Bemis reported that he could find no evidence that the CNO consulted with the Judge Advocate General of the Navy in the preparation of these instructions. The new instructions were released on November 26, 1941, two weeks before the Japanese attack on Pearl Harbor, apparently after their discussion between the CNO and President Franklin Delano Roosevelt. The CNO's action coincides with the rejection by Secretary of State Cordell Hull of the most recent Japanese demands, following which he declared that he "left the matter to the Army and the Navy."\textsuperscript{153} The CNO's instructions declared:
If formal war eventuates between the United States and Japan, "Instructions for the Navy of the United States Governing Maritime and Aerial Warfare, May 1941," will be placed in effect but will be supplemented by additional instructions, including authority to . . . [Commander-in-Chief, Asiatic Fleet] to conduct unrestricted submarine and aerial warfare against Axis shipping within that part of the Far East area lying south and west of a line joining Latitude 30 North Longitude 122 East, and Latitude 7 North 140 East, which you will declare a strategical area. . . .

The following day, a general war alert was sent to all naval commanders. When Japan attacked Pearl Harbor on December 7, Admiral Stark spoke by telephone with President Roosevelt at 2:28 p.m. Washington time. Roosevelt directed Admiral Stark to execute the "agreed orders" to the Army and Navy for the event of an outbreak of war in the Pacific. Stark issued his order at 5:52 p.m., Washington time, on December 7. The order to conduct unrestricted submarine warfare against Japan was not amended to include German and Italian naval shipping when Germany and Italy declared war against the United States four days later. The first Japanese loss—merchant ship or combatant—to a U.S. submarine was the 8,663-ton Atsutusan Maru, sunk by USS Swordfish (SS-193), on December 16, 1941. Japan merchant ship losses to U.S. submarines in the following years would reach 1,150.5 ships for a total of 4,859,634 tons, more than were sunk by naval aviation, U.S. and Allied air forces, mines, and surface ship actions combined.

There were various reasons for the U.S. decision. By the end of the 1930s, the United States was constructing and deploying fleet submarines with the range to reach Japan. This capability did not exist at the time of the Washington Naval Conference or London Naval Conference. As indicated, attack of Japanese lines of communications was a long-standing part of U.S. war plans. To paraphrase an adage, the prospect of war wonderfully concentrates the mind. Issues raised by U.S. submarine officers in open source, professional military journals during the 1920s and 1930s about the ambiguities of the 1922 Root Resolution and Article 22 of the 1930 London Naval Treaty had to be faced by naval planners. As the semi-official U.S. submarine history concluded:

[Realistic thinking demanded recognition . . . that a nation's economic forces and its fighting forces bear the inseparable relationship of Siamese twins. Any reduction of a nation's economic resources weakens its war potential. Sever the commercial arteries of a maritime nation and its industrial heart must fail, while the war effort expires with it. . . . Armed or not . . . merchantmen were in effect combatant ships. . . .

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Other factors contributed to the U.S. decision. The practical arguments against submarine visit and search expressed by Winston Churchill twenty-eight years earlier undoubtedly were weighed, along with questions as to whether Japanese merchant ships would comply with a demand for visit and search by an enemy submarine. In his directives to his U-boat forces, Hitler's desire for compliance with the rules contained in the 1936 Procès-Verbal was not altruistic. He was concerned about damage to neutral shipping, including that of the United States, that might widen the war. The political risk for the United States was not as great as it had been for Germany. U.S. submarine forces would operate in an area virtually devoid of neutral shipping, and neutral entry into the war on the side of the Axis was unlikely. The U.S. decision was not based on reprisal or retaliation, but was a conscious, deliberate decision made at the highest levels of the government to abandon flawed rules the government had a hand in drafting eleven years earlier.

In a war that saw each and every major submarine power consciously abandon the rules in the 1936 Procès-Verbal, it is an understatement to say that the treaty did not measure up to the harsh reality of war. Its postwar status has been debated, as has the legality of exclusion zones by whatever euphemism they may be called. Even the most ardent defenders of the Procès-Verbal provide numerous clarifications and conditions identified by submarine officers before World War II but persistently ignored or dismissed by diplomats, negotiators, naval leaders and international lawyers of that era.

History offers lessons. While the negotiation experience of one era may not transfer entirely to another, the reader is invited to consider analogies between the lessons from events described in these pages and recent negotiation efforts.

1. Law of war treaties stringently regulating the use of a weapon system cannot be used as a substitute for an arms control agreement. Efforts to rigorously regulate submarine use as a substitute for its outright abolition, something which Great Britain sought but could not obtain, immediately jeopardized the future of the rules in Article 22 of the 1930 London Naval Treaty (repeated in the 1936 Procès-Verbal), while undermining the purposes of the law of war.

2. The law of war may not be used to "cancel out" a threat to another nation's strengths, or for other purposes. The submarine presented a clear threat to British maritime superiority and, by the time of the 1930 London Naval Conference, to the United States in the Pacific. A law of war treaty was not an appropriate
basis for attempting to offset the threat. Nor was it a suitable way to balance the national budget.

3. The likelihood that an effective, lawful weapon can be banned is limited. The history of the law of war is replete with unsuccessful efforts to ban weapons that have legitimate military value. The attempt to ban the submarine is one example. A respected expert of that era observed that no effective weapon has ever been banned.164 The failure of the negotiators to acknowledge this did not augur well for their efforts.

4. If it is to succeed, a law of war provision must be balanced. It cannot favor the operational capabilities of a party to the conflict over another. The 1922 Submarine Treaty and its successors placed the submarine at an unreasonable disadvantage, assuring failure of the rules, once conflict occurred.

5. Beware those who proffer “humanitarian” arguments. No one party in law of war negotiations generally has a monopoly on humanitarian concerns. The “humanitarian card” was played against the submarine, because other arguments against its use were unpersuasive. Concern for human life includes the lives of military personnel, not just civilians.

6. The likelihood of success for a law of war treaty is in direct proportion to who participated in the negotiations and became a party to it, and why. The nation with the greatest experience with submarines, Germany, was excluded from each conference that considered prohibiting or regulating submarines. It is possible that more realistic rules might have been produced had Germany been included. However, participation by every nation in law of war negotiations, in today’s practice, does not necessarily increase the likelihood for success. The ability to understand an issue generally is in direct proportion to the time that has elapsed since a nation’s military forces have been in combat. A nation may be willing to accept unrealistic rules if they are perceived as irrelevant to the nation’s interests or to foreseeable threats to its security. Similarly, the recent practice of adopting new rules by majority vote, rather than consensus, militates against the likelihood of their long-term success. Likewise, the fact that there are a certain number of States Party to treaty x is of little relevance. A nation may agree to the most benevolent rules in peacetime. The test is whether that nation is likely to follow those rules when it is involved in conflict, when its national security is directly threatened and its men and women are dying on the battlefield.

7. Treaties based primarily upon emotional appeal may offer short-term political gain, but have less chance of long-term respect. The 1922 Submarine Treaty and its 1930 and 1936 successors were constructed in part in response to emotional rhetoric rather through dispassionate deliberation. Singling a weapon out for
description of its effects in horrific terms may play well with the media and cause some to succumb to emotional calls to ban that weapon. But war remains a violent confrontation between nations, and people suffer from the lawful use of lawful weapons. As evidenced by the efforts to prohibit the submarine, seeking a political solution in response to emotional rhetoric often results in a fatally flawed product.

8. A difficult issue seldom becomes easier to resolve with time. The refusal of the United States and Great Britain to address the distinctions with regard to "merchant ships" merely postponed the inevitable. Using ambiguities to gain consensus did not resolve issues raised early in World War I that re-surfaced in World War II, prompting each submarine power to abrogate its obligations.

Notes


3. Schindler & Toman, supra note 1, at 829. Signed by the United States on December 12, 1977. Forwarded by President Ronald Reagan to the United States Senate for its advice and consent to ratification on January 29, 1987, where it awaits action; see Message of the President, supra note 2.

4. The popular name is United Nations Conventional Weapons Convention. It is referred to by the acronym UNCCW (for United Nations Convention on Certain Conventional Weapons) to avoid confusing it with the 1993 Chemical Weapons Convention, whose acronym is CWC.

5. 1342 U.N.T.S. 137, U.S. Treaty Doc. No. 103-25, 19 I.L.M. 1523; Schindler & Toman, supra note 1, at 195. Protocol I prohibits weapons the primary effect of which is to injure by fragments which in the human body escape detection by x-ray; Protocol II regulates the use of land mines, booby traps and other devices; Protocol III regulates the use of incendiary weapons.


7. 35 I.L.M. 1206, Treaty Doc. 105–1. The amended Mines Protocol (Protocol II) and Blinding Laser Protocol (Protocol IV) were forwarded to the Senate for its advice and consent to ratification by President Clinton on January 7, 1997. See Message from the President, supra note 3. As indicated therein, Senate action remains pending.


11. First Review Conference Final Declaration, CCW/CONF.I/14 (Part I), May 6, 1996, at 33. The Final Declaration (p. 38) states that “The Conference decides … to convene a further Conference five years following the entry into force of the amendments adopted at the First Review Conference, but in any case not later than 2001, with preparatory expert meetings starting as early as 2000, if necessary.” The Final Declaration notes two potential areas for consideration at the Second Review Conference: naval mines and small-caliber weapons and ammunition. The small-caliber weapons and ammunition issue was fully considered during the original conference that promulgated the UNCCW and its first three protocols (1978–1980), without resolution. A Swiss proposal during the 1994–1996 First Review Conference was withdrawn in the face of a general lack of support, and strong opposition by a number of delegations, including the United States. A Swedish proposal on naval mines was deferred to the Second Review Conference due to lack of time. Personal knowledge of the author, who was a member of the U.S. delegation to the original UNCCW conference (1978–1980) and the First Review Conference (1994–1996), and the U.S. negotiator for small arms issues at each.

13. Regulations Respecting the Laws and Customs of War on Land (36 Stat. 2295, TS 539); Schindler & Toman, supra note 1, at 75.


17. For example, in 1974 the United States promulgated a Department of Defense directive requiring a legal review of all new weapons and munitions to ensure their compliance with its law of war and arms control obligations; the current directive is DoD Dir. 5000.1 (March 15, 1996), Subj: Defense Acquisition, para. D.2.j. The author performs these legal reviews for weapons and munitions developed or acquired by the U.S. Army or U.S. Special Operations Command. Article 36 of Additional Protocol I obligates a State Party to conduct similar reviews of any new weapon, means or method of warfare in its development, acquisition or adoption of that weapon. Informal polling by the author of representatives of States Parties indicates that fewer than ten States Parties have taken any steps to implement this obligation. Similarly, some nations, Party throughout this century to the Hague Convention II with Respect to the Laws and Customs of War on Land of July 29, 1899, and its 1907 successor, Hague Convention IV, are just beginning to prepare a law of war manual for their respective military, despite the obligation to do so contained in Article 1 of each treaty. Most States Parties to that treaty have not even taken this basic step.


19. A senior official of the ICRC proclaimed, "If we cannot stop war, we will take the toys away from the boys," that is, prohibit as many weapons as possible and in particular new weapons. The United States recognizes the responsibility and expertise of the ICRC with respect to the 1949 Geneva Conventions, but, as an NGO of Swiss citizens—a neutral nation without combat experience in this century—regards the ICRC as possessed of limited expertise with regard to weapons or warfighting.
20. W. THOMAS MALLISON, International Law Studies, Volume LVIII, Studies in the Law of Naval Warfare: Submarines in General and Limited Wars (1966). See also R. TUCKER, International Law Studies, Volume XLX, The Law of War and Neutrality at Sea (1955), at 55–73. The distinction between a legal treatise and a military/diplomatic history is: the former usually explains what the law is, with minimal reference to history (for example, "Participants in the x conference decided that a was prohibited, but could not agree on a course of action with regard to b"). The latter explains why, in the circumstances ruling at the time, participating nations agreed to restrictions on a but could not agree to a course of action with regard to b. The international lawyer must know the former, but is a better adviser and negotiator if he understands the latter.


22. Schindler & Toman, id. at 884–885.


28. R. CHAPUT, DISARMAMENT IN BRITISH FOREIGN POLICY (1935), at 50; C. DAVIS, THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE (1962), at 120, reports that “The ... [Russian proposal] promised extensive debate. In fact, it was disposed of with little discussion. The result was entirely negative.” See also MARDER, supra note 27, at 341–352, who notes that the naval representatives on the United States and British delegations—the equally-legendary Alfred Thayer Mahan and Admiral of the Fleet Sir John Fisher, respectively—were “frankly out of sympathy with the main purposes for which the conference was called” (p. 347). Fisher was an early enthusiast for the submarine; see R. HOUGH, ADMIRAL OF THE FLEET: THE LIFE OF JOHN FISHER (1969), at 168–172. The various Russian arms limitations proposals at the First Hague Peace Conference, which included limiting army force levels and military budgets for five years, and freezing naval budgets for three years, are noteworthy in their total rejection by the other participants in the subcommittee that considered
them. Other Russian proposals to limit fleets, naval gun sizes, and naval armor plate met a similar fate. SCOTT, supra note 26, at 320–322, 371–373.


30. J. Scott, ed., THE DECLARATION OF LONDON (1919); Schindler & Toman, supra note 1, at 843. The conference, attended by representatives of Austria-Hungary, France, Germany, Great Britain, Italy, Japan, Netherlands, Russia, Spain and the United States, met from December 4, 1908, to February 26, 1909. Although the declaration was signed by each delegation, it was ratified by none.

31. ALDEN, supra note 29, at 3.

32. C. Nimitz, Military Value and Tactics of Modern Submarines, U.S. NAV. INST. PROC. 38-4 (December 1912), at 1193; MASSIE, supra note 27, at 453. The ability of the submarine to attack combatant surface vessels was not viewed seriously; see MARDER, supra note 27, at 339.


35. For example, Article 20 of U.S. Army General Orders No. 100 of April 24, 1863, declares that “Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.” Schindler & Toman, supra note 1, at 6. The effect of this approach is described in E. HAGERMAN, THE AMERICAN CIVIL WAR AND THE ORIGINS OF MODERN WARFARE (1988), 282, 283, 285, and, generally, J. MICDONOUGH AND J. JONES, WAR SO TERRIBLE: SHERMAN AND ATLANTA (1987). A U.S. State Department proposal at the First Hague Peace Conference that the U.S. support the traditional American view of neutral rights was strongly opposed by Mahan. He argued that the traditional view benefited the neutral to the loss of the stronger belligerent. With U.S. ascendancy as a naval power during the previous decade, approaching parity with the Royal Navy, Mahan believed an international agreement in support of its traditional position would be inconsistent with America's new strategic interest in command of the seas. Hawkins, supra note 27, at 84–85.

36. MARDER, supra note 33, at 328–339; MASSIE, supra note 27, at 453.


of U-8 and U-12 treated as war criminals. While charged with no offense, the thirty-nine men were detained as common criminals rather than as prisoners of war. In reprisal, Germany incarcerated a matching number of British prisoners of war from distinguished British families under like conditions until the British relented. Id., at 17–21.

40. Under articles 228, 229 and 230 (Part VII, Penalties) of the Versailles Treaty (225 C.T.S., 2 Bevans 43, at 137), Germany was obligated to turn over to the Allies and Associated Powers all persons accused by them of war crimes for trial before military tribunals. Rather than acquiesce to surrender of the accused, Germany convened war crimes trials at Leipzig in May 1921. The British demand for the prosecution of Lieutenant Karl Neumann, commander of U-67, for the May 26, 1917, intentional sinking of the British hospital ship Dover Castle, was nol-prossed on June 4. With the cooperation of the British, evidence was collected by Germany against Captain Wilhelm Werner who, as commander of the U-55, allegedly sank the hospital ship Torrington on April 8, 1917, and murdered thirty-four survivors. But Werner “escaped” and was not brought to trial. The Germans prosecuted Lieutenants Ludwig Dithmar and John Boldt of U-86 for the June 27, 1918, intentional sinking of the British hospital ship Llandovery Castle, and the murder of survivors. (U-86’s commander was beyond the Leipzig court’s jurisdiction.) Acquitted of any crimes in the attack on the hospital ship (the defense argued successfully that the Llandovery Castle was carrying Allied combatants, and was a lawful target), the court convicted the accused of manslaughter for the murder of the survivors. Each was sentenced to four years imprisonment. With strong domestic sympathy and outside assistance, both escaped after brief incarceration. In 1928 the Reichsgericht annulled the sentences of each and declared the men innocent. WILLIS, supra note 39, at 126, 131, 137–141, 146; J. PLUMRIDGE, HOSPITAL SHIPS AND AMBULANCE TRAINS (1975), at 45, 46.


42. Arming merchant vessels for defensive purposes was historic practice. But the controversy of doing so was raised before and throughout World War I. See G. Hackworth, ed., DIGEST OF INTERNATIONAL LAW (1943), Vol. VI, at 449–453, 489–503. In the aftermath of the Lusitania sinking, U.S. Secretary of State Robert Lansing, writing to the British Ambassador on January 18, 1916, noted that historic visit and search procedures were premised on an armed merchant ship’s acquiescence to the demand by a surface man of war with superior armament. The arming of merchant ships with a gun superior to that carried by a submarine, and its use for offensive purposes against the submarine, was inconsistent with the historic rule. He urged the disarmament of belligerent merchant ships. Lansing’s New Code of Warfare for Sea, N.Y. TIMES (February 12, 1916), at 1; C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES (1951), Vol. III, at 1994–1995.

43. One British merchant captain, captured by the Germans, was known to have endeavored to ram a U-boat the year before his capture. Charged with being a franc-tireur, he was court-martialed, convicted, and executed; WILLIS, supra note 39, at 30.

44. E. CHATTERTON, Q-SHIPS AND THEIR STORY (1972); R. Smith, The Q-Ship – Cause and Effect, U.S. NAV. INST. PROC. (May 1953), at 533. British decoy ships were named “Q-ships” as they were based in a British port known as Queenstown during World War I. K. BEYER, Q-SHIPS VERSUS U-BOATS (1999), at xix. The author is indebted to Colin Babb of the U.S. Naval Institute Press and Mr. Beyer for permitting the author to see the page proofs of this book prior to its publication for preparation of this article.

45. Flying false flags, that is, flying the national insignia of a nation other than one’s true identity, is an ancient naval tradition, as is arming a merchant ship for its self-defense. By the twentieth century, however, the distinction between warship and merchant ship was clear. Had the distinction between the noncombatant merchant vessel and the combatant warship been
maintained, the history of submarine warfare might have taken a different turn, no matter how
difficult it might have been for the submarine to engage in visit-and-search activities. Certainly
the moral and legal arguments for agreed rules would have been stronger.

46. TARRANT, supra note 37, at 77; Versailles Treaty, Part V, Military, Naval and Air
Clauses, Section II, Naval Clauses, Articles 181, 188, 189, 191.

47. Dept. of the Navy, THE AMERICAN NAVAL PLANNING SECTION LONDON (1923),
Paper No. 68, Submarine Warfare, at 466, 467 [emphasis supplied].

48. Id. at 470.
49. Id. at 472.
50. Id. at 472–473.
51. Id. at 475.

52. Great Britain and Italy received no U-boats. The U-boats received by Japan and the
United States were to be retained temporarily for experimental reasons before being broken up.
Japan retained its U-boats for an extended period of time and employed former U-boat design
and construction engineers in the development of its submarine fleet even before the issue of
U-boat distribution had been resolved at Versailles. On October 9, 1919, almost two months
before the Versailles participants reached a decision, the U.S. naval attaché in Tokyo reported
that Japanese officials were in Berlin “for the purpose of studying submarine construction from
German naval designers. . . . Captain Godo expects to obtain German patents and designs for
submarines, and also expects to bring German naval mechanics back to Japan.” A subsequent
U.S. Navy intelligence report advised that by 1920 over 800 German U-boat specialists were
working in Japan. C. BOYD AND AKIHlKO YOSHIDA, THE JAPANESE SUBMARINE FORCE

53. E. MILLER, WAR PLAN ORANGE: THE U.S. STRATEGY TO DEFEAT JAPAN, 1897–1945
(1991), at 19–30, 313–314; M. BARNHART, JAPAN PREPARES FOR TOTAL WAR (1987), at 50;
ANTAGONISM (1968), at 278–279; A. MARDER, OLD FRIENDS, NEW ENEMIES: THE ROYAL
NAVY AND THE IMPERIAL JAPANESE NAVY (1981), at 6; TERRAINE, supra note 33, at 156–157;
Sadao Asada, The Revolt Against the Washington Treaty: The Imperial Japanese Navy and Naval
Limitation, 1921–1927, NAV. WAR COLL. REV. XLVI, 3 (Summer 1993), at 83.

54. ROSKILL, supra note 53, at 87; R. KAUFMAN, ARMS CONTROL DURING THE
PRE-NUCLEAR ERA: THE UNITED STATES AND NAVAL LIMITATION BETWEEN THE TWO
WARS (1990), at 14; H. SPROUT AND M. SPROUT, TOWARD A NEW ORDER OF SEA POWER
(1940), at 88–90. Japan also received the former mandates as a quid pro quo for termination of the
1902 Anglo-Japanese Alliance, which was due for renewal but opposed by the United States;
ROSKILL, supra note 53, at 315–317.

55. TERRAINE, supra note 33, at 154–155; Douglas, supra note 52, at 72; SPROUT AND
SPROUT, supra note 54, at 190; and A. CLAYTON, THE BRITISH EMPIRE AS A SUPERPOWER


57. S. PELZ, RACE TO PEARL HARBOR (1974), at 27, 88, 89; SPROUT AND SPROUT, supra
note 56, at vii, xiii–xiv, xxii, xxvii; BLAIR, supra note 38, at 16; E. LACROIX AND L. WELLS,
JAPANESE CRUISERS OF THE PACIFIC WAR (1997), at 114–116. It should be noted that neither
Great Britain, the United States nor Japan asserted that guerre de course was illegal, but merely
that it was not the first course of action. For example, a February 25, 1925, U.S. Navy report of
the Special Board to Consider the Upkeep of the Navy and Its Various Branches (consisting of
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the Chief of Naval Operations, Commandant of the Marine Corps, President of the Naval War College, and other senior Navy officials) to the House of Representatives stated in part that "The board is of the opinion that submarines are an essential part of our national defense...." It defined the object of the Navy to be "first, to destroy or blockade the enemy fleet in order; second, to protect our commerce; third, to destroy the enemy's commerce in order; fourth, to bring economic pressure on him...." W. Anderson, Submarines and the Disarmament Conference, U.S. NAV. INST. PROC. (January 1927), at 54.

58. Its purposes can be summarized in the principal treaties concluded: (I) Treaty for the Limitation of Armament (2 Bevans 351), a five-power (U.S., France, Great Britain, Italy, Japan) treaty of ten-year duration which addressed capital ship (battleships and aircraft carriers) strength; (II) Treaty Relating to the Use of Submarines and Noxious Gases in Warfare ("Submarine Treaty," III Malloy 3116, Schindler & Toman, supra note 1, at 1195), which (as summarized in this article) endeavored to regulate submarines while prohibiting the use of chemical weapons; (III) Treaty Relating to Insular Possessions and Insular Dominions in the Pacific Ocean (2 Bevans 332), a treaty of ten-year duration between the British Empire, France, Japan and the United States for amicable relations with respect to their respective Pacific territories; (IV) Treaty Relating to Principles and Policies to be Followed in Matters Concerning China (2 Bevans 375), a treaty between the United States, Belgium, British Empire, China, France, Italy, Japan, the Netherlands and Portugal, relating to the "Open Door" permitting trade with China; and (V) Treaty Between the Nine Powers Relating to Chinese Customs Tariff (2 Bevans 381). The only treaty that failed to enter into force was the Submarine Treaty.

59. The precise tonnage ratio for capital ships was 525,000 tons each for the United States and Great Britain and 315,000 tons for Japan, with the Japanese authorized to substitute the older battleship Settsu, commissioned in 1912 as one of Japan's first dreadnoughts, for the newer Mutsu, completed nine days after the opening of the Washington Naval Conference; Douglas, supra note 52, at 115; H. JENTSCHURA, D. JUNG AND P. MICKEL, WARSHIPS OF THE IMPERIAL JAPANESE NAVY, 1869-1945 (1977), at 24-25, 28. An ironic but fortuitous result of the Washington Conference was that the agreement to scrap capital ships permitted conversion from battle cruiser to aircraft carrier of USS Lexington (CV-2) and USS Saratoga (CV-3), providing a significant boost to U.S. naval aviation, which, with the submarine, was a primary force in the subsequent victory over Japan in the Pacific. A. TURNBULL AND C. LORD, HISTORY OF UNITED STATES NAVAL AVIATION (1949), at 209-211; R. STERN, THE LEXINGTON CLASS CARRIERS (1993), at 27. C. MELHORN, TWO-BLOCK FOX: THE RISE OF THE AIRCRAFT CARRIER, 1911-1929 (1974), concludes (p. 85) that "In terms of attitudes and concessions on the part of the Contracting Powers, naval aviation emerged from the [Washington] conference with something close to a blank check." The United States was not the only beneficiary. For the same reason, the Japanese battleship Kaga and battle cruiser Akagi were completed as aircraft carriers; JENTSCHURA, et al., supra, at 42-45, while Great Britain converted the cruisers Courageous and Glorious into carriers; R. CHESNEAU, AIRCRAFT CARRIERS OF THE WORLD (1984), at 98.

60. G. WHEELER, ADMIRAL WILLIAM VEAZIE PRATT, U.S. NAVY (1974), at 177, 179, 181; Douglas, supra note 52, at 92-93, 113-115; DAVIS, supra note 38, at 292-293; PEIZ, supra note 57, at 1; SPROUT AND SPROUT, supra note 56, at xi-xii.

61. U.S., Great Britain, Japan, France, and Italy, respectively. Italy's only demand was parity with France. Douglas, supra note 52, at 115-117.

of the Navy Theodore Roosevelt, Jr., “the submarine would be of most value ... against the two island empires—Great Britain and Japan.” He regarded it as imperative that the United States Navy not “permit our hands to be tied as regards submarines.”


64. SPROUT AND SPROUT, supra note 54, at 199; ROSKILL, supra note 53, at 328. Roskill (p. 328) notes that the Root Resolution prompted the British Admiralty to raise with its law officers the risk of individual criminal liability of its own submarine officers, but could not obtain a definite ruling. Continuing, “This discussion continued for some years, and in 1926 the Admiralty took note of the fact that ‘if in a naval war we were forced to sink merchant ships as a reprisal we might have to suspend or abrogate this provision...’”


68. Resolution on Commission of Jurists to Consider Laws of War (2 Bevans 346), February 4, 1922. The subsequent Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, which met in The Hague from December 11, 1922, to February 19, 1923, was expressly guided by this resolution, which read in part: “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 submarine ... adopted by the powers in this conference.” COMMISSION OF JURISTS TO CONSIDER AND REPORT UPON THE REVISION OF THE RULES OF WARFARE (1922), at 7. This conference of jurists proceeded to an equally unsuccessful effort to regulate aircraft use in war in Articles 22 through 24 of the Hague Rules of Air Warfare, contained in Schindler and Toman, supra note 1, at 283, 285. The rules were never adopted. L. Brune, An Effort to Regulate Aerial Bombing: The Hague Commission of Jurists, 1922-1923, AEROSPACE HIST. (September 1982), at 183–185; R. Wyman, The First Air Rules of Warfare, AIR U. REV. (March–April 1984), at 94–102; and Parks, supra note 18, at 25–36.

69. Although a U.S. proposal, the U.S. Navy opposed the Root Resolution because it placed “inequitable restrictions upon the use of submarines” and “introduced ambiguities in the rules governing their use.” The naval architect of the 5:5:3 formula, then-Captain William Veazie Pratt, was an Anglophile and intensely anti-Japanese. In particular, he believed that in a future war with Japan, that nation would be vulnerable to attack on its merchant commerce. ROSKILL, supra note 53, at 328; SPROUT AND SPROUT, supra note 56, at x, xiv, xvii; WHEELER, supra note 60, at 203–204, 248–250, 296.

70. The British delegation turned initial skepticism into a tactical gain. As one analysis noted, “Once more Great Britain showed the quality of its diplomacy. It had proposed the abolition of the submarine. In that it was thwarted. Then by a flank movement, but an open and fair one, it obtained a great deal that its frontal attack had failed to accomplish. It obtained abolition of the use of submarines in all operations, against merchant ships. ... This abolition includes not only illegitimate operations, but those that until the making of the treaty were admitted by all to be legitimate.” Anderson, supra note 57, at 69.

71. SPROUT AND SPROUT, supra note 54, at 200, 201, 202–204. The Advisory Committee assisting the U.S. delegation at the Washington conference argued that a merchant ship’s defensive armament would almost surely be used offensively against a submarine, leading to a
“sink at sight” result. It proposed rules to prohibit the arming of merchant ships and their use of false flags, in vain. The delegates of Italy and Japan expressed doubts as to whether an armed belligerent merchantman could continue to be regarded as a “noncombatant.”

72. Senator Root made it clear that the Submarine Treaty was not regarded as a codification of customary international law, that is, the application of customary law for surface vessels to submarines, but as a proposal to change the law. Anderson, supra. n. 57, at 59. By its terms (article VI), it was binding only upon ratification by each of the parties to the negotiations – the U.S., the British Empire, France, Italy and Japan.

73. Rickover, supra note 66, at 1213, 1220.

74. Id. at 1220.


77. Germany was permitted aircraft for civil aviation; Treaty of Versailles, supra note 40, Part V, Military, Naval and Air Clauses, Section III, Air Clauses, Articles 198, 202. Submarines were prohibited for any purpose, including commercial. Treaty of Versailles, Article 191.

78. See, e.g., RADM Spindler, The Value of the Submarine in Naval Warfare: Based on the German Experience in the War, U.S. NAV. INST. PROC. (May 1926), at 835, who commented (at 837) that “the present state of treaties does not preclude the unrestricted employment of the submarine in the future. So long as the situation remains as it is, this method of the employment of submarines cannot be dismissed from military consideration.”


80. As previously indicated (note 52), trade in submarine technology and expertise between Germany and Japan commenced even before conclusion of the Versailles Treaty. In addition to its transfer of six U-boats, Germany sold U-boat blueprints to Japan in 1920. The following year the Argentine Navy invited the former head of the Flanders U-boat flotilla and two former German naval architects to assist in the establishment of an Argentine submarine capability. Similar work by German submarine engineers was undertaken in Sweden and Italy. Over the 1921/1922 winter Germany conducted research on the question of “Which of our U-boat types that we used in the war are most appropriate for future development?” In April 1922, German shipbuilding yards, with the approval of the German Navy, established in The Hague a German Submarine Construction Office under the cover of the Dutch firm NV Ingenieurskaantor voor Scheepsbuow (IvS). A dummy Berlin company, “Mentor Bilanz,” provided the conduit between the German Admiralty and IvS. RÖSSLER, supra note 29, at 88–90; TARRANT, supra note 37, at 77.

81. WATTS AND GORDON supra note 63, at xii; LACROIX AND WELLS, supra note 57, at 155–157; DAVIS, supra note 38, at 315–317; 322–324, 330–331, 335; ROSKILL, supra note 53, at 508-516; N. FRIEDMAN, U.S. CRUISERS (1984), at 163–164. A Japanese defense policy approved on February 23, 1923, listed its potential enemies, in order of probability, as (1) the United States, (2) Great Britain, (3) Russia, and (4) China. Its naval construction program was designed to meet those threats. LACROIX AND WELLS, supra, at 51.

82. DAVIS, supra note 38, at 314, citing Representative Carl Vinson, Congressional Record, 69th Cong., 2nd Sess., pp. 1095–1096, January 4, 1927, offered the following contrast in naval shipbuilding between the Washington Naval Conference and President Coolidge’s call for a new naval disarmament conference:

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Ships Built and Building 1922–1927

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<th>United States</th>
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<tr>
<td>Battleships</td>
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<td>Aircraft carriers*</td>
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<td>Cruisers</td>
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<td>Destroyers</td>
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<td>Submarines</td>
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*As noted (note 59), aircraft carrier construction was a direct result of conversion rather than scrapping of existing battleships/battle cruisers under the terms of the Washington Treaty.


** U.S. submarine construction had been inhibited in part by a Navy General Board decision in May 1921 giving priority to aviation development over submarines. ALDEN, supra note 29, at 14.

83. DAVIS, supra note 38, at 316–319.
85. D. Carlton, Great Britain and the Coolidge Disarmament Conference of 1927, POL. SC. QTLY. LXXXIII (December 1968), at 573.
86. ROSKILL, supra note 53, at 505, 514–515; Douglas, supra note 52, at 168–169. Conference failure produced one of the ironies of history. Resolving to achieve parity with Great Britain, the Coolidge Administration on April 5, 1927, authorized the construction of the six remaining cruisers of the Northhampton class and in December 1927 introduced legislation calling for a major increase in U.S. naval shipbuilding. The cruiser construction bill, the largest naval construction bill since 1916, became law on February 13, 1929. It authorized and instructed the President to undertake the construction of fifteen 10,000-ton cruisers, five in FY 1929, 1930, and 1931, and one aircraft carrier in FY 1930. On August 6, 1928, a Japanese report responded by (a) identifying its potential enemies as (in order of priority) the United States and Great Britain, and (b) recommending an increase in cruiser construction and parity between Japan, the United States and Great Britain in battleships and cruisers. Douglas, supra, at 173, 179; DAVIS, supra note 38, at 330–331; LACROIX AND WELLS, supra note 57, at 155–157; KAUFMAN, supra note 54, at 108–111.
87. In the post-Washington Naval Conference period, the United States, Great Britain, France, and Japan embarked on construction programs for exploiting the potential of the submarine. These included the possibility of long-range cruiser submarines, carrying heavy deck guns for commerce raiding, patterned along the lines of the World War I U-139. The most celebrated was the French Surcouf, displacing 4,318 tons submerged, with 8-inch guns. Other examples are the British X-1, displacing 3,600 tons submerged, with 5.25-inch guns in twin turrets, and the U.S. V-4 design (4,135 tons submerged, 6-inch guns). ALDEN, supra note 29, at 13–14; RÖSSLER, supra note 29, at 71–75; and A. MARS, BRITISH SUBMARINES AT WAR 1939–1945 (1971), at 17–18; J. RUSBRIDGE, WHO SANK SURCOUF? (1991), at 16–19.

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88. For example, a British-American proposal to extend the Washington Conference 5:5:3 capital ship tonnage ratio to submarines was not acceptable to Japan. Douglas, supra note 52, at 154–156, 159; Davis, supra note 38, at 159, 162, 167, 168.

89. The following year, on February 20, 1928, the Sixth International Conference of American States, meeting in La Habana, Cuba, adopted the Convention on Maritime Neutrality (4 Malloy 4743, 2 Bevans 721; Schindler & Toman, supra note 1, at 1379). Article 1, paragraph 2 of that treaty is similar to Article 1, paragraph 2 of the Washington Submarine Treaty. Although signed by the twenty-one participants, only Brazil, Colombia, Dominican Republic, Ecuador, Haiti, Nicaragua, Paraguay and the United States ratified it. It entered into force on January 12, 1931, but appears to have had limited, if any, effect.

90. On September 1, 1925, a clandestine U-boat department was established in the German Naval Command Office. The following year Ivs began building two submarines for Turkey based upon its UB–111 design, with the stipulation that Ivs had the right to select the crews and attend all trials of the boats. That same year Ivs contracted with Finland to construct a mine-laying submarine at Abo (now Turku). Its keel was laid in September 1926, and the boat was completed in 1930. In 1927, the German Admiralty's secret U-boat technical section was established in Mentor Bilanz. On October 27, a German Navy memorandum declared that “In evading the Treaty of Versailles by maintaining submarine development and, if possible, training a limited number of personnel, it is essential that ... Ivs be given all possible support.” In that same year agreement was reached with Spain for Mentor Bilanz’s technical section to build a 750-ton U-boat at Cadiz. Subsequently Mentor Bilanz was liquidated and a new dummy company “Igewit” (Ingenieurbüro für Wirtschaft und Technik) was established to hasten clandestine re-establishment of the German U-boat service. Rossler, supra note 29, at 88, 90, 91–92, and 93–97; Tarrant, supra note 37, at 77–78; and Padfield, supra note 23, at 111, where it is noted that “The determination to thwart the drastic provisions of Versailles ran powerfully through the whole German Officer Corps—Army, airmen, surface Navy and submariners.”

91. Davis, supra note 38, at 333, 334; Douglas, supra note 52, at 184, 187; Roskill, supra note 82, at 38–43. The conference undoubtedly gained greater urgency with the crash of the U.S. stock market on October 29, 1929, bringing on the Great Depression. President Hoover responded to the economic crisis by cutting funds for naval construction in 1931 and eliminating them entirely in 1932. The conference was preceded by talks between representatives of the United States and Japan. The Japanese repeated their long-standing preference for a 10:10:7 ratio in auxiliary vessels. It was opposed to abolition of the submarine, and wished to retain its current tonnage (78,000 tons) rather than reduce its submarine fleet. Douglas, supra, at 188–189. The British and the United States were disappointed that Italy and Japan named admirals to their respective delegations. Prime Minister MacDonald and President Hoover had intended to keep the negotiations out of the hands of “naval experts,” an idea that undoubtedly would have ensured conference success but ultimate treaty failure. Breakdown of the Treaty ultimately occurred in part because the naval leadership of each participant, including the United States and Great Britain, was repeatedly cut out of the negotiations by their respective political leaders and delegations. Roskill, supra, at 52, 53; Kaufman, supra note 54, at 129.

92. Germany launched the pocket battleship Deutschland in May 1931, signaling its revived navalism. Ruge, supra note 23, at 26, 28; Roskill, supra note 82, at 27.


96. Id. The position reversal was based in large measure upon the Hoover Administration's fiscal and disarmament policies, not on any change of heart by the U.S. Navy with respect to the value of the submarine. It also was based upon the belief that the American public would not tolerate U.S. resort to unrestricted submarine warfare and that the Japanese Navy stood to gain more by their retention than did the United States. As shown in footnote 82, Japan had vastly out-built the United States in submarines in the period prior to the Hoover administration. That administration authorized only two submarines for construction—V-7 (USS Dolphin) in FY 1930 and V-8 (USS Cuttlefish) in FY 1932. Alden, *supra* note 29, at 36–39; Davis, *supra* note 38, at 354–355; Wheeler, *supra* note 60, at 294–295; Kaufman, *supra* note 54, at 124, 126, 138, 139.

97. In deference to the French *Surcouf* (note 87), which as defined in the London Treaty displaced 2,880 tons.

98. Douglas, *supra* note 52, at 198–200. By late 1930, Japan's large submarine construction program provided it with twenty-two first-class submarines (34,788 tons total) and forty-five second-class submarines (36,185 tons total). The program was adjusted downward briefly following the London Naval Conference to comply with the tonnage limitations of that treaty. Carpenter and Polmar, *supra* note 93, at 2–4.


100. One historian states that Article 14 of the 1930 London Naval Treaty prohibited the arming of merchant ships; S. Pelz, *supra* note 57, at 146. Article 14 provides that "The naval combatant vessels of the United States, the British Commonwealth of Nations and Japan, other than capital ships, aircraft carriers and all vessels exempt from limitation under Article 8, shall be limited during the term of the present Treaty as provided in this Part III, and, in the case of special vessels, as provided in Article 12." Reading Articles 8 and 12 indicates that while these provisions may have had an effect on the number of vessels that could be armed commissioned vessels in the navy, or that would be counted for the purposes of the arms control provisions of the Treaty, Article 14 does not prohibit the arming of private merchant vessels for the historic purpose of self defense. This distinction is set forth in D. Knox, *The London Naval Treaty and American Naval Policy*, U.S. NAV. INST. PROC. (August 1931), at 1079, 1084. He notes "the size and characteristics of the British merchant marine, representing an auxiliary to purely naval strength," as being of immense importance. The unresolved issue was the arming of merchant vessels for defensive purposes, with a directive that a belligerent's merchant ships would (a) report all enemy submarine sightings, (b) resist visit and search, (c) endeavor to ram surfaced submarines attempting to carry out visit and search in accordance with Article 22, and (d) use its weapons for offensive purposes. Knox (p. 1985) acknowledges the advantage Great Britain gained in preventing full consideration of the issue, stating that "The value of armed merchant ships as a substitute for cruisers in blockade and trade protection operations was amply demonstrated during the World War. While a single merchant ship may not be a match for one regular cruiser carrying the same armament, it is necessary to consider the question from the viewpoint of multiple numbers. Then it becomes evident that to equal the fighting power of a given force of merchant auxiliaries at least 50 per cent of their total number is required in regular cruisers."

101. Roskill, *supra* note 82, at 60 [emphasis in original]. That day would come sooner than anticipated. One British submariner commented that "Successive British governments persisted
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in their efforts to hamstring the submarine and, in the London Naval Treaty of 1930, achieved success. By 1940, they wished they hadn't!" MARS, supra note 87, at 20. Despite its opening language ("The following are accepted as established rules of International Law"), the concluding sentence ("The High Contracting Parties invite all other Powers to express their assent to the above rules") indicates that the delegations regarded Article 22 to be contractual rather than a codification of customary international law.

102. Id. at 44, 49; and KAUFMAN, supra note 54, at 137–138.

103. LNTS, Vol. 112, at 65–69; 2 Bevans, at 1055–1075. The ambiguities of the Treaty's submarine warfare regulations regarding merchant ships were immediately identified in the Naval War College's INTERNATIONAL LAW SITUATIONS 1930 (1931), at 1–56.

104. In the period preceding the London conference, Japan had taken advantage of the 1922 Washington Treaty's lack of cruiser regulation to build a new fleet of heavy cruisers and submarines that provided it superiority over the U.S. fleet in the Western Pacific. The London agreement would sacrifice that superiority. The Japanese Cabinet, led by Prime Minister Hamaguchi Osachi, overrode the Navy's objections, precipitating a constitutional crisis. In November 1930, Prime Minister Hamaguchi was shot by a right-wing fanatic; he died the following summer. KAUFMAN, supra note 54, at 141; PELZ, supra note 57, at 14; LACROIX AND WELLS, supra note 57, at 51, 53.

105. RÖSSLER, supra note 29, at 93–97; TARRANT, supra note 37, at 78.

106. CHAPUT, supra note 28, at 211; WATTS AND GORDON, supra note 63, at xii; BARNHART, supra note 53, at 56. The first session of the League of Nations Preparatory Commission for the 1932 World Disarmament Conference took place in May 1926. ROSKILL, supra note 53, at 498.


111. Douglas, id., at 248; MARDER, supra note 53, at 11; PELZ, supra note 57, at 164.

112. See note 21. The Treaty was signed on November 6, 1936, by Australia, Canada, France, United Kingdom, India, Ireland, Italy, Japan, New Zealand, South Africa, and the United States. As the signatory States were parties to the 1930 London Naval Treaty, ratification of the Procès-Verbal was unnecessary. Thirty-nine other nations, including Germany (November 23, 1936), subsequently became States Parties.

113. TARRANT, supra note 37, at 79; Douglas, supra note 52, at 235, 251; PELZ, supra note 57, at 193, 203; WATTS AND GORDON, supra note 63, at xii, xiii; ROSKILL, supra note 109, at 52; SHIRER, supra note 109, at 471. As part of the 1936 London meeting, France, Great Britain and the United States agreed to restrictions on the individual size of the different types of combatants and the gun caliber on each vessel type, with escalator clauses if the provisions were exceeded by a nonsignatory, with Germany and Japan clearly in mind. Douglas, supra note 52, at 250–251.

114. H. THOMAS, THE SPANISH CIVIL WAR (Rev. ed., 1977), at 739–742; ROSKILL, supra note 82, at 370, 383, 385. The complete text of the Nyon Agreement is in Schindler & Toman,
supra note 1, at 1207. The agreement was signed by Bulgaria, Egypt, France, Great Britain, Greece, Romania, Turkey, the Soviet Union and Yugoslavia.

115. Anderson, supra note 57; Rickover, supra note 66; Knox, supra note 100. In his lengthy and well-reasoned 1927 article, Captain Walter S. Anderson, USN (at 66) asked the key question indicated in the main text, listing conditions that might cause a belligerent ship to lose its noncombatant status, viz.:

(a) Carrying a few soldiers?
(b) Using the radio to help the enemy?
(c) Under the enemy's orders?
(d) Chartered by the enemy?
(e) Owned by the enemy but doing strictly merchantman service?
(f) Attempting to avoid visit and search?
(g) Carrying irregular papers or no papers?
(h) Carrying contraband?
(i) Breaking blockade?
(j) Under enemy convoy?
(k) Armed?
(l) A privateer?

The conundrum therefore is, when is a merchant ship not a merchant ship?

In a lecture at the U.S. Naval War College on December 22, 1938, Professor Payson S. Wild, Jr., Professor of International Law at Harvard and Associate Professor for International Law at the Naval War College, raised similar questions. Noting the degree to which governments, particularly in totalitarian States, had "obliterated" the distinction between private and public functions, the traditional law of war distinction between "combatant" and "non-combatant" also would merit re-examination. "Recent Trends in International Law," 3810/3210 (4/3/39) Naval War College Archives, RG 15, Box 8. The author is indebted to Professor John B. Hattendorf of the Naval War College for this document.

117. BLAIR, supra note 38, at 64–66; ROSKILL, supra note 109, at 103. The British began convoying in October 1939. Blair, supra, at 39. Attack of French warships was authorized on September 24, 1939; Roskill, supra, at 103.
118. BLAIR, supra note 38, at 11; TARRANT, supra note 37, at 20–22.
119. BLAIR, supra note 38, at 66–69; TERRAINE, supra note 33, at 215–217; SHIRER, supra note 109, at 622, 636–638. Mistakes did, indeed, occur in submarine attacks during World War II. In addition to the Athenia, U-453 attacked by mistake, the British hospital ship Somerseshire on April 7, 1942. Despite being struck by three torpedoes, Somerseshire survived to limp into Alexandria, Egypt; Blair, supra, at 645–646. On September 10, 1939, the British submarine HMS Triton sank the submarine HMS Oxley; MARS, supra note 87, at 30. On October 11, 1942, the Japanese submarine I-25 sank the Russian submarine L-16 (at the time a neutral in the Pacific war) by mistake; BOYD AND AKIHIKO, supra note 52, at 111, and CARPENTER AND POLMAR, supra note 93, at 21. During the evening of April 1–2, 1945, the USS Queenfish (SS-393) sank the Japanese Awa Maru, a ship guaranteed safe passage by the United States. In contrast to the German and Japanese examples, the United States acknowledged its error, and the commander of the Queenfish, an experienced and highly decorated officer, was charged, tried, and convicted by general court-martial. R. Voge, Too Much Accuracy, U.S. NAV. INST.

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120. BLAIR, supra note 38, at 144.

121. The British returned to their World War I practice of decoy ships quickly. Between October 1939 and March 1940, eight decoy ships were constructed in “utmost secrecy,” according to the official history; ROSKILL, supra note 109, at 136. On the evening of May 31/June 1, 1941, U-107 attacked the British freighter Alfred Jones. Surfacing to aid its “survivors,” who were “abandoning ship,” the U-107 was attacked by the vessel, which was a decoy ship. BLAIR, supra note 38, at 297; K. WYNN, U-BOAT OPERATIONS OF THE SECOND WORLD WAR, Vol. I (1997), at 89; J. ROHWER, AXIS SUBMARINE SUCCESSES OF WORLD WAR TWO (Rev. ed., 1999), at 54. The latter argues that Alfred Jones was not a Q-ship, but an armed merchantman. From the perspective of the U-boat commander endeavoring to comply with the visit and search requirements of the 1936 Procés-Verbal, whether or not Alfred Jones was a decoy ship or an armed merchantmen is moot. Less successful than they had been in World War I, the British Q-ships were withdrawn from service. Roskill, supra, at 137; Rohwer, supra, at 54. The U.S. Navy’s Q-ship effort was equally brief; BEYER, supra note 44.

122. BLAIR, supra note 38, at 66, 68–69, 95–96, 111; ROSKILL, supra note 109 at 103, 104.

123. BLAIR, supra note 38, at 115, 117–118. British steps complicated the legal questions. On August 26, 1939, before war began, the British Admiralty had assumed control of all British merchant shipping; pre-war plans for utilizing decoy ships (Q-ships) brought the first deployment in December 1939 (see note 121). Merchant ship guns were manned by trained seamen or marines from the Admiralty’s Defensively Equipped Merchant Ship organization; TERRAINE, supra note 33, at 244; ROSKILL, supra note 109, at 136–137, 363. In somewhat of an irony, a British submarine officer, writing of the British submarine efforts of World War II, concluded that the submarine “cannot observe international law when waging war against an enemy who disregards it.” N. Gilbert, British Submarine Operations in World War II, U.S. NAV. INST. PROC. (March 1963), at 74, 81.

124. Listing of further steps in the evolution must be limited due to space limitations. Commencing May 24, 1940, U-boats were authorized to attack any ship, belligerent or neutral, in British or French waters; Hitler extended the authority for unrestricted attack to 20° west longitude on August 17, 1940; other steps came throughout the war. Restrictions on attack of neutral combatant vessels in announced zones of operations, and merchant vessels outside zones of operations, continued through much of the war. BLAIR, supra note 38, at 104, 115, 117–118, 161, 179, 308–309. A collateral issue is the requirement in the 1936 Procés-Verbal with regard to rescue and safeguard of crew and passengers of vessels sunk. Regrettably, space limitations also preclude discussion in this article. For the same reason, neither is it possible to discuss the ancillary issue of murder of shipwreck survivors by submarine crews, as occurred during some Japanese and German submarine operations during World War II.


126. MARS, supra note 87, at 28, 30, 33–34; WYNN, supra note 121, at 25.

127. MARS, supra note 87, at 70, 71, 73; Gilbert, supra note 123, at 74. This authorization was cited by the International Military Tribunal in its acquittal of Admirals Raeder and Dönitz; see text at note 24.

128. ROSKILL, supra note 109, at 439.

129. Gilbert, supra note 123, at 77; MARS, supra note 87, at 124.

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130. British submarine officers were critical of the decision to place priority on attack of combatants; Gilbert, supra note 123, at 75, 77.

131. BOYD AND AKIHIKO, supra note 52, at 59; ROHWER, supra note 121, at 278.

132. I-10 sank the 4,473-ton Panamanian Donreil on December 10; I-4 sank the 4,858-ton Norwegian Heigh Merchant on December 15. The campaign off the U.S. west coast began on December 21, when I-17 sank the U.S. Emidio. BOYD AND AKIHIKO, supra note 52, at 59, 65–67; CARPENTER AND POLMAR, supra note 93, at 17; ROHWER, supra note 121, at 278.


134. C. BLAIR, SILENT VICTORY (1975), at 106; MALLISON, supra note 20, at 87.

135. For example, the late Professor D. P. O’Connell stated that “The [U.S.] policy of unrestricted warfare against Japan...[was] justified as a reprisal for Japanese breach of the law.” THE INFLUENCE OF LAW ON SEA POWER (1975), at 44. Similarly, see S. MORISON, HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II, vol. IV, CORAL SEA, MIDWAY AND SUBMARINE OPERATIONS (1949), at 190. Clay Blair, supra note 38, at 106, refers to the U.S. action as a renunciation. In his Naval War College treatise, Professor Mallison is more circumspect, suggesting possible operational reasons in support of Admiral Nimitz’s statement (MALLISON, supra note 20, at 89, 90) apparently in agreement with the semi-official U.S. submarine history, which states that the decision “was not reprisal so much as military imperative that caused Washington to reverse its opinion on the already abrogated naval laws.” T. ROSCOE, UNITED STATES SUBMARINE OPERATIONS IN WORLD WAR II (1949), at 19. Professor Leslie C. Green, whom this essay and volume honors, is more cynical: “...[M]ilitary necessity prevailed over respect for human rights.” L. Green, Human Rights and the Law of Armed Conflict, in ESSAYS ON THE MODERN LAW OF WAR (1985), at 91.

136. 40 I.M.T. 111; MALLISON, supra note 20.

137. At the time of the attack on Pearl Harbor, the U.S. Navy was operating under its TENTATIVE INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME AND AERIAL WARFARE (May 1941). That document does not use or define reprisal. However, the U.S. Army Field Manual 27–10, RULES OF LAND WARFARE (1 October 1940), which was in effect at the time, defines and discusses reprisal in the following terms (pp. 89–90):

a. Definition.—Reprisals are acts of retaliation resorted to by one belligerent against the enemy...for illegal acts of warfare committed by the other belligerent, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.

b. When and how employed.—Reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from illegitimate practices... .

c. Form of reprisal.—The acts resorted to by way of reprisal need not conform to those complained of by the injured party, but should not be excessive or exceed the degree of violence committed by the enemy. . . . [Emphasis supplied]

As the attack on Pearl Harbor had concluded and would not be repeated, the U.S. decision to resort to unrestricted submarine warfare against Japan could not have been taken to induce Japan to “desist from its illegitimate practices.” Had the United States government intended this to be a reprisal for that purpose, it would have been necessary to communicate this to the Japanese government, either through diplomatic communication or public announcement. It did neither. Indeed, the December 7, 1941, order by the Chief of Naval Operations to commence
unrestricted air and submarine warfare against Japan remained classified until March 29, 1961; MALLISON, supra note 20, at 89, fn. 152. It would be difficult to conclude that engagement in unrestricted submarine warfare for the duration of the Pacific war was proportionate to the Japanese attack on Pearl Harbor. Finally, operational rationale such as those offered by Professor Mallison (id. at 138) would not be necessary if the action taken was a reprisal.


139. Id., and Bemis, Submarine Warfare, unpublished seminar and panel discussion, Naval War College, December 16, 1961.


142. The General Board was created by the Secretary of the Navy on March 13, 1900, for advisory purposes only. E. Potter, ed., SEA POWER: A NAVAL HISTORY (2nd ed., 1981); K. HAGAN, THIS PEOPLE'S NAVY: THE MAKING OF AMERICAN SEA POWER (1991), p. 232; MILLER, supra note 53, at 15–18. By 1921, “its functions were clearly delineated. By executive order, the Board concerned itself with war plans, naval policy, fleet organization and reorganization, naval construction planning, and ship (also aircraft) design characteristics.” WHEELER, supra note 60, at 174.

143. Bemis, supra note 138, at 18–19.

144. See sources at note 115.

145. Id. at 19–21; TENTATIVE INSTRUCTIONS, supra note 137, at iii, 14, 17, 20–21.

146. MILLER, supra note 53, at 319.

147. Talbott, supra note 140, at 62.

148. MANSON, supra note 141, at 150.


150. Id. at 26.

151. Director, War Plans Division to Director, Central Division (May 21, 1941), Records of the Secretary of the Navy, File A16–3(26), as cited in Bemis, supra note 138, at 27.

152. Talbott, supra note 140, at 62, 63.


155. Id., at 32–34, citing R. SHERWOOD, ROOSEVELT AND HOPKINS (1948), at 431. Bemis (at 33) confirmed Admiral Stark's conversation with President Roosevelt in a lunch meeting at the Army-Navy Club in Washington on May 31, 1961, where Stark confirmed that President Roosevelt knew clearly that the “agreed orders” included unrestricted submarine warfare. The semi-official U.S. history indicates that, among other things, the order was one for which the U.S. submarine community was totally unprepared, having devoted all pre-war training and planning to compliance with the rules contained in Article 22 of the 1930 London Naval Treaty.
and, subsequently, the 1936 Procès-Verbal; ROSCOE, supra note 135, at 18. Other reasons are provided in SPECTOR, supra note 141, at 482–483. Fortunately, the Imperial Japanese Navy’s antisubmarine capabilities were equally unprepared for the change in U.S. submarine tactics. Id. at 485–486.

156. Bemis, supra note 138, at 36, 41.

157. Id. at 38; ROSCOE, supra note 135, at 34.

158. ROSCOE, supra note 135, at 524; BLAIR, supra note 134, claims 1,314 vessels—combatants and merchant ships—for 5.3 million tons, or 55 percent of all Japanese ships sunk. In contrast, Germany sank 5,078 merchant ships for about 11 million tons during World War I, and 2,882 Allied merchant vessels, for 14.4 million tons, plus 175 Allied combatant vessels in World War II. Id., at 878. He revised these figures subsequently to 5,000 ships (combatant or merchant ship) for about 12 million tons in World War I, and approximately 3,000 ships and 4 million tons in World War II. Id., at 18, 20, and 771; and BLAIR, HITLER’S U-BOAT WAR, VOL. II, THE HUNTED, 1942–1945 (1998), at xii, 820, citing TARRANT, supra note 37, at 148, 149.

159. Construction of what was to become the U.S. fleet submarine began with the Perch class, commenced in 1936. These were followed by the Salmon (1936), Sargo (1937), Tambor (1939–40) and Gato (1941) classes; ALDEN, supra note 29, at 60–103.

160. ROSCOE, supra note 135, at 19.

161. In this regard this author respectfully disagrees with the cynicism expressed by Professor Leslie Green (note 137). “Human rights” is not limited to protection of civilian lives. Nothing in the law of war places greater value on civilian lives than military, particularly where the “civilians” in question are traveling on a combatant vessel in a war zone, or otherwise taking an active part in hostilities. As this essay shows, abrogation of the rules stated in the 1936 Procès-Verbal by all submarine powers in the main lay in their ambiguity and impracticality.


164. M. Royse, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE (1928), at 141; and Consultation de M. W. Royse, in International Committee of the Red Cross, ed., LA PROTECTION DES POPULATION CIVILES CONTRA LES BOMBARDMENTS (1930), at 77.

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