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Studies in the Law of Naval Warfare: Submarines in General and Limited Wars

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

## CHAPTER II

### CLAIMS CONCERNING LAWFUL COMBATANTS

The most general claim concerning combatants in naval warfare is that it is lawful to use all efficient vessels, aircraft, and personnel against the enemy. As stated in Chapter I, submarines have been the subject of claims and counterclaims concerning their combatant status. If the claim to deny submarines lawful combatant status or to "abolish" them were successful, it would deprive the submarine officers and crew of status as lawful combatants. A related claim is that the submarine must be "limited" by law in some way.

#### A. WARSHIPS AS LAWFUL COMBATANTS

It is well known that not everyone may lawfully participate in combat during war or hostilities. Both public authorization and public control have been traditionally required in order to confer the status of lawful combatants.<sup>1</sup> Thus, soldiers, sailors, and airmen who are members of the public armed forces are typical lawful combatants.<sup>2</sup> They are authorized by their government to commit acts of regulated and controlled coercion and violence. "Lawful combatants" is used to refer to those individuals who, if captured by the enemy, must be accorded all the rights provided by international law for prisoners of war. "Unlawful combatants," in contrast, is used to refer to those individuals who, upon capture, are subject to punishment if they lack public authorization and control.

In land hostilities the individual is regarded as the basic unit of military force and, consequently, it is important that he be identified individually as having combatant status.<sup>3</sup> In sea and air hostilities the individual combatant is usually associated with a combatant unit such as a warship or

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<sup>1</sup> The customary law requirements stated in the text are reflected in Hague Convention VII (1907). Art. 1 requires both governmental "authority" and "control" over a warship which is converted from a merchant ship. These are the same requirements which apply to warships generally.

<sup>2</sup> Oppenheim-Lauterpacht 255. Army personnel, such as the crews of the Japanese Army submarines mentioned in the text of Ch. I accompanying note 30 are, of course, lawful combatants in naval war.

<sup>3</sup> The uniform is regarded as more important in land than in naval or air war. See Spaight 100-04.

military aircraft.<sup>4</sup> A warship or military aircraft is a lawful combatant unit since its personnel comply with the dual juridical requirements of public authorization and public control.

Where they are separated from their vessel or aircraft, as in a shipwreck or forced landing situation, naval officers and crewmen retain their status as lawful combatants. In the same way, such officers and sailors who conduct hostilities apart from warships and naval aircraft, such as the U.S. Navy's underwater demolition teams composed of swimmers,<sup>5</sup> are lawful combatants. There can be no doubt concerning the lawful combatant status in such a situation but, as a practical matter it may be particularly desirable for such combatants to carry military identification tags or to wear uniforms in order to facilitate their identification. If questions are raised concerning lawful combatant status, reasonable doubts in establishing identification should be resolved in favor of those claiming such status.

The necessity for according prisoner of war status to all lawful combatants is illustrated by the *Trial of Schoengrath*<sup>6</sup> before a British Military Court in Germany in 1946. In this case the defendants, seven members of the Nazi SS, were charged with committing a war crime "in the killing of an unknown Allied airman, a prisoner of war."<sup>7</sup> The facts concerned an airman who had descended by parachute from his bomber aircraft which had been flying westward over occupied Holland. The defendants, apparently acting on the assumption that he was an Allied airman, shot him shortly after his capture rather than accord him status as a prisoner of war. The defense contended that there was no case to answer because the prosecution had produced no evidence to show that the victim was in fact an Allied airman.<sup>8</sup> The prosecution replied that it was too far-fetched to assume that the bomber aircraft involved, in view of the facts, was a neutral aircraft.<sup>9</sup> The court convicted the defendants as charged even though the nationality of the airman was not proved. The decision is sound because the airman was entitled to prisoner of war status in the light of the facts which were shown. Even if he had been a neutral national serving in the air force of an Allied state, he would have been a lawful combatant.

Where an individual is entitled to status as a prisoner of war, he must not be subjected to discriminatory treatment. This doctrine is prescribed

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<sup>4</sup> Such combatant units typically display the national flag or emblem as an identifying mark.

<sup>5</sup> Factual description appears in Fane & Moore, "The Naked Warriors," 82 *Nav. Inst. Proc.* 913 (1956).

<sup>6</sup> 11 *Reps. U.N. Comm.* 83.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.* at 84.

<sup>9</sup> *Ibid.*

in appropriately broad terms in the Geneva Convention Relative to the Treatment of Prisoners of War (1949) :

Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications, all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria.<sup>10</sup>

Since the submarine warship is subject to the same public authorization and control as any other warship, it appears to qualify as a lawful combatant unit. If a submarine is a lawful combatant, its personnel are entitled to prisoner of war status if they are captured. Claims to abolish or limit submarines are based upon the implicit premise of their existing lawful combatant status.

## B. CLAIMS TO “ABOLISH” OR LIMIT SUBMARINES AS COMBATANTS

### 1. The Hague Peace Conferences

The primary work of the Hague Conferences was the legal regulation of warfare rather than the establishment of peace.

#### a. THE 1899 CONFERENCE

The Russian Emperor issued the first invitation for the 1899 Conference with stated objectives which included ending “these incessant armaments.”<sup>11</sup> Apparently the negative reaction of the powers required the second invitation which relegated disarmament, except that concerning submarines, to a secondary role.<sup>12</sup> The motivation for the Conference has been ascribed to the humanitarian personal characteristics of the Czar.<sup>13</sup> It probably was at least partly due to the superiority of other states over Russia in military and naval technology and armament. It was cautiously proposed in the first article of the second invitation that consideration be given to not increasing existing military forces and to making “a preliminary examination of the means by which a reduction might even be effected in the forces and Budgets [*sic*] above mentioned.”<sup>14</sup> Other subjects proposed as the second and third articles respectively were the limitation of guns and explosives to prohibit any more powerful than those

<sup>10</sup> Art. 16. Spaight 105–07 sets forth incidents demonstrating the lack of a “colour line” in air warfare.

<sup>11</sup> Rescript of the Russian Emperor (Aug. 24, 1898). 2 Scott 1 at 2.

<sup>12</sup> Russian Circular (Jan. 11, 1899). 2 Scott 3.

<sup>13</sup> By Prof. James Brown Scott. 1 Scott 39.

<sup>14</sup> 2 Scott 4.

then in use.<sup>15</sup> “The subjects to be submitted for international discussion at the Conference” included, as the fourth article, the proposal

To prohibit the use, in naval warfare, of submarine torpedo boats or plungers, or other similar engines of destruction. . . .<sup>16</sup>

The proposal was at a time when no new major war appeared to threaten the peace of the world and when the submarine or “plunger” was a relatively new and untried vessel.

Secretary of State Hay instructed the United States delegation on these points in no uncertain terms:

The second, third, and fourth articles, relating to the non-employment of firearms, explosives, and other destructive agents, the restricted use of existing instruments of destruction, and the prohibition of certain contrivances employed in naval warfare, seem lacking in practicability, and the discussion of these propositions would probably prove provocative of divergence rather than unanimity of views. It is doubtful if wars are to be diminished by rendering them less destructive, for it is the plain lesson of history that the periods of peace have been longer protracted as the cost and destructiveness of war have increased. The expediency of restraining the inventive genius of our people in the direction of devising means of defense is by no means clear, and, considering the temptations to which men and nations may be exposed in a time of conflict, it is doubtful if an international agreement to this end would prove effective. The dissent of a single powerful nation might render it altogether nugatory. The delegates are, therefore, enjoined not to give the weight of their influence to the promotion of projects the realization of which is so uncertain.<sup>17</sup>

The combined instructions and rationale just quoted fixed the position of the United States delegation. The views of the various delegations on the Russian proposal to ban submarines were expressed on May 31, 1899.<sup>18</sup> The German delegate, representing a state engaged in the construction of a great surface navy, favored interdiction conditioned upon unanimity. The Japanese and Italian delegates stated their opinions as being similar to the German. The British delegate, representing the preeminent naval power, favored prohibition providing only that the Great Powers agreed.

The lesser naval powers could be expected to take a different view. The delegate of Austria-Hungary represented a state which possessed no submarines but in the personal view of the delegate they “may be used for

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<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> 2 Scott 6 at 7–8.

<sup>18</sup> The views of the delegations summarized in the two textual paragraphs appear in Scott (ed.), *The Proceedings of the Hague Peace Conferences: The Conference of 1899* 367–68 (1920).

the defense of ports and roadsteads and render very important services.” The delegate of France, representing a country with a navy and a building program inferior to that of Great Britain or Germany, stated his country’s position “that the submarine torpedo [boat] has an eminently defensive purpose, and that the right to use it should therefore not be taken from a country.” The Netherlands delegate characterized the submarine as “the weapon of the weak”<sup>19</sup> and so not subject to prohibition. The delegate of Sweden-Norway concurred with the Netherlands views. The Turkish delegate wished to reserve the defensive use of submarines. The delegate of Siam wished to refer the matter to his Government since he had general instructions to favor humanitarian interests but believed that “the necessities of defense of the small nations must be taken into serious consideration.” The Danish delegate, perhaps surprisingly, thought that his Government, to which he referred the question, would favor prohibition conditioned upon unanimity. The attitude of Russia was not in doubt but its desire for prohibition was also conditioned on unanimity. The dominant view of the smaller naval powers was that submarines constituted a cheap means of defense and so could not be prohibited.

Three weeks later the question of prohibiting submarines was put to a vote in plenary meeting. The voting was recorded as follows:<sup>20</sup>

For prohibition with reservation (of unspecified character): Belgium, Greece, Persia, Siam, and Bulgaria (five states).

For prohibition with reservation of unanimity: Germany, Italy, Great Britain, Japan, and Roumania (five states).

Against prohibition: United States, Austria-Hungary, Denmark, Spain, France, Portugal, Sweden-Norway, Netherlands, and Turkey (nine states).

Abstaining: Russia, Serbia, and Switzerland (three states).

Thus the first attempt to make the submarine an unlawful combatant ended in failure.

### b. THE 1907 CONFERENCE

During the Russo-Japanese War, President Theodore Roosevelt took the initiative in calling the Conference of 1907<sup>21</sup> and, after the Peace Treaty of Portsmouth ending that war, the President allowed the Czar to become the nominal initiator as a matter of diplomatic courtesy.<sup>22</sup> By 1907 most of the major navies contained submarines and neither the

<sup>19</sup> That the submarine is the weapon of the weak is argued in Castex, “The Weapon of the Weak—A French View,” 77 *J. Royal United Serv. Inst.* 737 (1932). The contrary appears in Richmond, “The Weapon of the Weak,” 77 *J. Royal United Serv. Inst.* 497 (1932).

<sup>20</sup> The voting is recorded in Scott, *op. cit. supra* note 18 at 299.

<sup>21</sup> 1 Scott 91–93.

<sup>22</sup> *Id.* at 93.

diplomatic correspondence issued by the President nor that issued by the Czar suggested their abolition.

The Russo-Japanese War demonstrated the serious apprehensions of the Russian Navy concerning submarines. On April 13, 1904 two first-class Russian battleships struck Japanese mines off Port Arthur and one sank while the other was severely damaged. This event has been described as follows:

[The] disaster seems to have caused something approaching a panic in the Russian fleet. Ships began to fire wildly at the water round them, apparently under the impression that they were being attacked by submarine boats. . . .<sup>23</sup>

The 1907 Conference recognized by necessary implication the lawful combatant status of surface torpedo boats, surface torpedo boat destroyers, and also submarines. It did this by regulating their principal weapon, the self-propelled torpedo. Hague Convention VIII provided that torpedoes must be so constructed that those which miss their mark then become harmless.<sup>24</sup> Of course, where the target was missed the primary military value of the self-propelled torpedo was eliminated and the regulation only prevented its use as a floating mine. And so the stage was laid for the submarine to be used in World War I.

## 2. The First World War

### a. THE PUNITIVE TREATMENT OF CAPTURED PERSONNEL

In the early part of World War I, during the incumbency of Winston Churchill as First Lord of the Admiralty, the British Government adopted a system of punitive treatment for certain German prisoners of war in its hands. The prisoners of war involved consisted of thirty-nine officers and men who comprised the surviving crew members of two German submarines.<sup>25</sup> All of these submarine prisoners were segregated in naval detention barracks and some of them were held there in solitary confinement. The German Government promptly retaliated by placing an equal number of British Army officers in solitary confinement. Thereafter, the British Government changed its policy and treated captured German submarine personnel in the same way as other prisoners of war. The British claim to accord punitive treatment to German submarine personnel was in substance a claim that German submarines were unlawful combatants

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<sup>23</sup> 1 British Committee of Imperial Defense, *Official History (Naval and Military) of Russo-Japanese War* 94 (1910). In the same war Russia attempted to create a submarine flotilla in the Far East by transporting submarines in sections overland. 2 *id.* 639.

<sup>24</sup> Art. 1, paragraph 3.

<sup>25</sup> The textual statements are based upon 2 Garner 50–51.

and that their personnel, upon capture, were not entitled to nondiscriminatory treatment as prisoners of war.<sup>26</sup>

The case of Captain Fryatt, which also arose in the early part of the First World War, concerns the related issue of the status of merchant ship personnel.<sup>27</sup> Captain Fryatt of the British unarmed merchant ship *Brussels* refused to surrender to a German submarine and attempted, without success, to ram the submarine as it approached his ship. Subsequently he was captured and the German Government declined to accord him prisoner of war status. Following a court-martial he was executed on the charge of having committed “a *franc-tireur* crime against the sea forces of Germany.”<sup>28</sup> The official German statement announcing the execution stated that Fryatt was “not a member of a combatant force” and that he had been condemned to death because of his attempted attack upon a German submarine.<sup>29</sup> Thus the German claim rested upon the simple premise that Captain Fryatt was an unlawful combatant who violated the laws of war by his attempted attack. Professor Garner describes the execution as a “plain act of judicial murder.”<sup>30</sup>

#### b. THE PARTIAL “ABOLITION” OF SUBMARINES

During the First World War any doubts as to the efficiency of submarine naval vessels were removed. It is well known that Germany used submarines to bring Great Britain to the brink of defeat. The United States claimed that the German methods of submarine warfare were illegal but did not claim that the submarine was an unlawful combatant unit.<sup>31</sup>

Following the war, the Central Powers’ submarines existing or in process of construction were transferred to the Allies or broken up.<sup>32</sup> Submarines were abolished for Germany, Austria, Hungary, Bulgaria, and Turkey by prohibiting each of them to acquire submarines through an article employing the following uniform language which appeared in each peace treaty with the five states just named:

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<sup>26</sup> Prof. Garner’s account also states that the two German submarines involved had been “sinking British and neutral merchant vessels.” 2 Garner 50. Therefore, issues concerning objects and methods of attack may also be involved. The text, however, only considers the central issue concerning combatant status.

<sup>27</sup> The textual statements are based upon 1 Garner 407–13.

<sup>28</sup> Quoted in 1 Garner 408.

<sup>29</sup> 1 Garner 408, note 1.

<sup>30</sup> *Id.* at 413. See Scott, “The Execution of Captain Fryatt,” 9 *A.J.I.L.* 865 (1916).

<sup>31</sup> Hyde 2007.

<sup>32</sup> The Treaty of Versailles with Germany, arts. 181, 188; the Treaty of St. Germain with Austria, arts. 136, 138; the Treaty of Trianon with Hungary, arts. 120, 122; the Treaty of Neuilly with Bulgaria, arts. 83, 84; the (unratified) Treaty of Sevres with Turkey, arts. 184, 185. The cited treaties appear in 1 & 2 Carnegie Endowment for International Peace, *The Treaties of Peace 1919–1923* (1924).

The construction or acquisition of any submarine, even for commercial purposes, shall be forbidden in \_\_\_\_\_.<sup>33</sup>

Thus partial abolition was obtained as one of the fruits of victory.

### 3. Naval Disarmament and Limitation Between the World Wars

#### a. THE WASHINGTON CONFERENCE (1921-1922)

An observer has stated that the United States was the only state in a position to call a conference on the limitation of armament following World War I.<sup>34</sup> The United States was building the largest navy in the world and was not a member of the League of Nations, which organization was therefore precluded from effective action.<sup>35</sup> The United States position appeared to be that it could achieve agreement on the limitation of naval armament by giving up its great building program.<sup>36</sup>

In addition to the United States, the United Kingdom, and Japan, the two principal European naval powers, France and Italy, were participants.

#### (1) *The Washington Naval Treaty (1922)*

The United States naval disarmament proposals presented by Secretary of State Hughes were comprehensive and specific.<sup>37</sup> They were based on four stated "general principles":<sup>38</sup> (1) the elimination of actual and projected capital shipbuilding programs; (2) additional reduction by scrapping of certain older capital ships; (3) regard for "existing naval strength"; (4) the existing capital ship tonnage as the basis for proportionate allowance of tonnage for other combatant vessels. It was specifically proposed that the United States and Great Britain would each be allowed 90,000 tons of submarines to 54,000 tons for Japan.<sup>39</sup> But before the question of limitation of submarines was considered, Great Britain, through Lord Lee, the First Lord of the Admiralty, proposed their abolition to the Committee on Limitation of Armament.

#### (a) ABOLITION

On December 22, 1921 Lord Lee presented an indictment of

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<sup>33</sup> The Treaty of Versailles art. 191; the Treaty of St. Germain art. 140; the Treaty of Trianon art. 124; the Treaty of Neuilly art. 86; the Treaty of Sevres art. 186.

The British approved dropping the ban on submarines of the Versailles Treaty in the Anglo-German Naval Agreement (June 18, 1935). See Watt, "Anglo-German Naval Negotiations on the Eve of the Second World War, Part I," 103 *J. Royal United Serv. Inst.* 201 (1958).

<sup>34</sup> Buell, *The Washington Conference* 147 (1922).

<sup>35</sup> *Ibid.*

<sup>36</sup> See *id.* at 152.

<sup>37</sup> *Wash. Conf.* 56-63.

<sup>38</sup> *Id.* at 56.

<sup>39</sup> *Id.* at 61.

the submarine.<sup>40</sup> The French view of the need for a large new French submarine fleet had already alarmed the British. In demanding the “total and final abolition” of the submarine, Lord Lee attempted to make it perfectly clear that the British had “no unworthy or selfish motives.”<sup>41</sup> On the contrary, they were fighting the battle not only of the allied and associated powers but of the entire civilized world.<sup>42</sup> He explained that the history of the recent war had demonstrated in convincing fashion that submarines constituted neither effective nor economical defense for the smaller powers.<sup>43</sup> During the World War, Germany had employed 375 submarines and 203 of these had been sunk. He pointed out that millions of British and American troops had been transported across the water without the loss of a single man excepting those on hospital ships. The submarine, in the British view, was effective only against merchant shipping. During the war over 12 million tons of such shipping had been sunk along with the killing of 20,000 noncombatant men, women, and children.

Before the end of his speech, Lord Lee admitted that antisubmarine warfare was a very expensive matter indeed. During the war the United Kingdom had maintained “an average of no less than 3,000 anti-submarine surface craft” in order to deal with no more than nine or ten German submarines operating at one time on the Atlantic approaches to France and Great Britain.<sup>44</sup>

A sense of realism concerning Lord Lee’s recommendation can best be conveyed by direct quotations from it:

It was a weapon of murder and piracy, involving the drowning of noncombatants. It had been used to sink passenger ships, cargo ships, and even hospital ships. Technically the submarine was so constructed that it could not be utilized to rescue even women and children from sinking ships. That was why he hoped that the conference would not give it a new lease of life.<sup>45</sup>

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The submarine was the only class of vessel for which the conference was asked to give—he would not say a license, but permission to thrive and multiply. It would be a great disappointment if the British Empire delegation failed to persuade the conference to get rid of this weapon, which involved so much evil to peoples who live on or by the sea.

To show the earnestness of the British Government in this matter, Lord Lee pointed out that Great Britain possessed the largest and

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<sup>40</sup> *Id.* at 264–69.

<sup>41</sup> *Id.* at 265.

<sup>42</sup> *Id.* at 268.

<sup>43</sup> The balance of the summary in the textual paragraph is taken from *id.* at 265–67.

<sup>44</sup> *Wash. Conf.* 268. See also the text of Ch. I accompanying note 19.

<sup>45</sup> *Wash. Conf.* 269.

probably the most efficient submarine navy in the world, composed of 100 vessels of 80,000 tons. She was prepared to scrap the whole of this great fleet, to disband the personnel, provided the other powers would do the same. That was the British offer to the world, and he believed it was a greater contribution to the cause of humanity than even the limitation of capital ships.<sup>46</sup>

The French, Italian, and Japanese delegations then joined with the British in deploring the illegal and inhumane use of submarines by Germany during the World War.<sup>47</sup> But each of them indicated that submarines were regarded as useful for defense and expressed the conviction that submarines could be used consistent with the law.<sup>48</sup>

Secretary Hughes then placed the United States on record as opposed to abolition by reading the report on submarines which had been prepared by the Advisory Committee of the American delegation. The report joined in condemning illegal uses of the submarine and considered uses regarded as legal in some detail.<sup>49</sup> It also stated:

The United States would never desire its Navy to undertake unlimited submarine warfare. In fact, the spirit of fair play of the people would bring about the downfall of the administration which attempted to sanction its use.<sup>50</sup>

On December 23, 1921 Admiral de Bon made formal reply to Lord Lee for the French Government.<sup>51</sup> He first emphasized the military efficiency and uses of submarines and referred to a number of examples drawn from the World War. His second and main point concerned the efficiency of the submarine against merchant vessels. It started with the usual denunciation of German methods and went on to claim the efficiency of the submarine even without the use of such methods.

Certainly the fruits of submarine warfare would have been smaller if they had been obliged to confine themselves to the limits of honorable warfare, but it is impossible to claim that there would have been none.<sup>52</sup>

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Our opinion is that it is especially the weapon of nations not having a large navy. It is, in fact, a comparatively cheap element in naval warfare which can be procured in large numbers at a cost far below that of capital ships.<sup>53</sup>

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<sup>46</sup> *Ibid.*

<sup>47</sup> *Id.* at 270-72.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Id.* at 273-77.

<sup>50</sup> *Id.* at 276.

<sup>51</sup> *Id.* at 278-85.

<sup>52</sup> *Id.* at 281.

<sup>53</sup> *Id.* at 282.

In conclusion, Admiral de Bon stated the French position unequivocally: "I believe that 90,000 tons is the absolute minimum for all the navies who may want to have a submarine force."<sup>54</sup> This was supported by saying that it would only mean ninety vessels of modern type of which, because of maintenance and repair requirements, only fifteen or twenty would be capable of simultaneous action.<sup>55</sup>

Mr. Balfour then made two replies to the French arguments.<sup>56</sup> In his second statement he pointed out that France had prevented any consideration of reduction of land armaments because of its need to maintain a great army against possible German military resurgence.<sup>57</sup> Now it was stated that France must also maintain a tremendous submarine fleet. He asked as to the value of a French submarine fleet if the German submarine fleet were rebuilt. In the British view, such a French submarine fleet would be of no value and, further, France would have to look to British Navy antisubmarine forces for protection as it had done before.<sup>58</sup>

Secretary Hughes, as chairman, then formally recognized that it was not possible to reach agreement on abolition.<sup>59</sup> After complimentary references to the substance and spirit of the British proposal, he expressed the hope that the discussions on the subject would lead to a denunciation of illegal methods of submarine warfare and an undertaking by the five powers to assure the application of the principles of international law to such warfare.<sup>60</sup> In the chairman's view, limitation should be considered unless further discussion of abolition was desired.<sup>61</sup> Mr. Balfour took the opportunity to place a brief summary of the British position in the record.

The British Empire delegation desired formally to place on record its opinion that the use of submarines, whilst of small value for defensive purposes, leads inevitably to acts which are inconsistent with the laws of war and the dictates of humanity, and the delegation desires that united action should be taken by all nations to forbid their maintenance, construction, or employment.<sup>62</sup>

Dr. Royse has summarized the outcome of the "submarine debates":

Utilitarianism appeared at the Washington Conference of 1921–22 as a dominating motive in the submarine debates. The same attitude was taken toward the submarine, by most of the Powers present, as

<sup>54</sup> *Id.* at 285.

<sup>55</sup> *Id.* at 284–85.

<sup>56</sup> *Id.* at 285–89, 295–98.

<sup>57</sup> *Id.* at 295.

<sup>58</sup> *Id.* at 295–96.

<sup>59</sup> *Id.* at 300.

<sup>60</sup> *Id.* at 300–02.

<sup>61</sup> *Id.* at 302.

<sup>62</sup> *Ibid.*

that taken by the United States Government during the late [First World] war, that the submarine was not an illegitimate weapon in itself.<sup>63</sup>

(b) LIMITATION

Chairman Hughes then turned to the limitation of submarines by making a concrete revised proposal on this subject. In lieu of the 90,000 tons of submarines first proposed for the United States and Great Britain, he now proposed 60,000 tons maximum for each. The remaining three powers would maintain the status quo and he understood this to be 31,452 tons for Japan, 31,391 tons for France, and about 21,000 tons for Italy.<sup>64</sup> When the meeting reconvened on December 24 the British delegation accepted the chairman's proposal.<sup>65</sup> Admiral de Bon referred to the French conception of ninety vessels as a minimum submarine fleet and said that the proposal was so far below this that it "was equivalent to abolishing the whole French program."<sup>66</sup> Consequently, the French delegation could not accept the proposals and must ask instructions of its Government.<sup>67</sup> Italy and Japan also rejected the United States proposals. Italy was willing, however, to accept a maximum of 31,500 tons on condition of parity with France.<sup>68</sup> Japan insisted on the original United States proposal of 54,000 tons in spite of the substantial reductions already accepted by the United States and Great Britain.<sup>69</sup>

Four days later Mr. Sarraut presented the considered views of the French Government. After referring to the French acceptance of inferior strength in capital ships, he stated that 90,000 tons for submarines constituted the minimum consistent with his country's vital interests.<sup>70</sup> Thus ended the attempt to restrict the total tonnages of submarine fleets. Chairman Hughes admitted his disappointment concerning the French position on submarines.<sup>71</sup> Mr. Balfour went further and said that the 90,000 tons of submarines were intended to destroy commerce.<sup>72</sup> In addition, the great submarine fleet to be built on the shores closest to Great Britain would necessarily be a menace to her.<sup>73</sup> Mr. Sarraut indignantly rejected the criticisms.<sup>74</sup> Mr. Balfour then attempted further explanation of the reasons

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<sup>63</sup> Royse 19 (footnote omitted).

<sup>64</sup> *Wash. Conf.* 303.

<sup>65</sup> *Id.* at 304.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> *Id.* at 305.

<sup>69</sup> *Id.* at 306.

<sup>70</sup> *Id.* at 309-10.

<sup>71</sup> *Id.* at 310-11.

<sup>72</sup> *Id.* at 312.

<sup>73</sup> *Id.* at 313.

<sup>74</sup> *Id.* at 314-16.

why submarines were a threat to Britain.<sup>75</sup> The records of the Conference do not reveal French sympathy for what was regarded as a British problem.

In addition to the failure to limit the size of submarine forces, the ratified Treaty on Limitation of Naval Armament<sup>76</sup> between the five naval powers states no limitation on the size or armament of individual submarines. This lack of restriction together with the provision in the Treaty permitting the stiffening of merchant ships' decks in time of peace to facilitate arming them in wartime<sup>77</sup> indicated the probability that both submarines and armed merchant ships would be used in the next general war. It was probable that aircraft would be used also. The discussions showed no interest in the "abolition" of military aircraft. Mr. Balfour, for example, stated:

Unlike the case of submarines, in the case of aircraft military and civilian uses were not sharply divided. There was practically no commercial civil use for a submarine, but there were many who thought that the development of aerial invention was going to exert an immense influence upon the economic development of mankind and upon intercommunication of different peoples. In the present stage of their knowledge of air matters it seemed quite impossible to limit aircraft designed for commercial uses . . . .<sup>78</sup>

(2) *The Submarine Treaty (1922): Submarine Personnel as Pirates*

After it became clear that there would be neither abolition nor limitation, as such, of submarines, Mr. Root, a distinguished former Secretary of State of the United States, proposed certain resolutions concerning the rules of submarine warfare. In his view, the resolutions should be clear and simple.<sup>79</sup> They were characterized by their terms as "the prohibition of the use of submarines in warfare"<sup>80</sup> but actually only prohibited their use against merchant ships.

In the ensuing discussion, Senator Schanzer, the head of the Italian delegation, thought it would be desirable to provide a definition of "merchant craft."<sup>81</sup> Mr. Root replied that, "Throughout all the long history of international law no term had been better understood than the term

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<sup>75</sup> *Id.* at 316-17. "There was no doubt that submarines were powerful for the destruction of lines of communication; but they were powerless to protect them." *Id.* at 317.

<sup>76</sup> The official text of this Treaty of Feb. 6, 1922 is in 43 Stat. 1655 (1923).

<sup>77</sup> Art. 14.

<sup>78</sup> *Wash. Conf.* 414.

<sup>79</sup> So that they could be understood by "the man in the street and the man on the farm . . ." *Id.* at 321.

<sup>80</sup> *Wash. Conf.* 322.

<sup>81</sup> *Id.* at 326-27.

‘a merchant ship’.”<sup>82</sup> Further, the term “could not be made clearer by the addition of definitions which would only serve to weaken and confuse it.”<sup>83</sup> Senator Schanzer later concluded for his delegation that the term “merchant vessel” as employed in the resolution was understood to refer to “unarmed merchant vessels.”<sup>84</sup>

The resolutions were subject to some change before they were written into A Treaty in Relation to the Use of Submarines and Noxious Gases in Warfare. Article I of the proposed treaty laid down certain rules of law, stated to be “an established part of international law,”<sup>85</sup> concerning visit, search, and seizure of merchant vessels as well as attacks upon them. Article I further provided:

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.<sup>86</sup>

Article III provided:

The Signatory Powers, desiring to insure the enforcement of the humane rules of existing law declared by them with respect to attacks upon and the seizure and destruction of merchant ships, further declare that any person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.<sup>87</sup>

As indicated by the excerpt quoted from article I, as well as by the negotiating history and the title of the treaty, the submarine was the principal subject. Article III had been broadened beyond submarine personnel but, in the light of the experience in the First World War, submarine personnel were the principal concern.

In substance the Root resolutions were an attempt to do indirectly what the Conference had declined to do directly, that is, make submarines and their personnel unlawful combatants. The attempt, however, was only successful in placing conditions upon the combatant status of submarines. When the specified rules concerning action against merchant ships are violated, the status of the submarine’s personnel is assimilated to that of

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<sup>82</sup> *Id.* at 328.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Id.* at 365.

<sup>85</sup> *Id.* at 887. Prof. G. G. Wilson has demonstrated the inaccuracy of the statement: *U.S. Naval War College, International Law Situations 1930* 34, 35 (1931)

<sup>86</sup> *Wash. Conf.* 887.

<sup>87</sup> *Ibid.*

unlawful combatants or pirates. The Root resolutions, including this provision, received unanimous assent in the Conference.<sup>88</sup> Thereafter, the French Government declined to ratify the Submarine Treaty and, consequently, submarines and their personnel remained lawful combatants unconditionally. In summary, the submarine came out of the Washington Conference with undiminished status as a lawful combatant.<sup>89</sup>

### b. THE GENEVA NAVAL CONFERENCE (1927)

For present purposes this Conference is important because the United States changed its position concerning the necessity for submarines which it had advanced at the Washington Conference and now favored their abolition. In instructing the United States delegation to the Conference, President Coolidge stated orally the difficulty of a three-power conference abolishing submarines but indicated that we should express our willingness to abolish.<sup>90</sup> The British were consistent in favoring abolition and the Japanese were consistent in favoring retention.<sup>91</sup>

The 1927 Conference may be described briefly as a failure. France and Italy refused to attend and Japan, the United Kingdom, and the United States accomplished little or nothing by attending. The United Kingdom and the United States became involved in fruitless controversy concerning the numbers and types of cruisers.<sup>92</sup>

### c. THE LONDON NAVAL TREATY (1930)

The failure of the 1927 Conference was doubtless one of the causes of the London Conference of 1930.

#### (1) ABOLITION

The British invitation to Japan, France, and Italy was shown

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<sup>88</sup> *Id.* at 367–84. Before voting on the provision including the phrase “act of piracy” Mr. Hanihara, speaking for the Japanese delegation, asked enlightenment as to its meaning. *Id.* at 385. He received but little clarification from Chairman Hughes and Mr. Root. *Id.* at 383–84.

<sup>89</sup> General description of the Washington Conference appears in Wright, “The Washington Conference,” 6 *Minn. L. Rev.* 279 (1922).

The submarine provisions are regarded as based upon “humane sentiments for the protection of lives . . .” in Anderson, “As If for an Act of Piracy,” 16 *A.J.I.L.* 260 (1922). They are criticized in Anderson, “Submarines and Disarmament Conferences,” 53 *Nav. Inst. Proc.* 50 (1927); Knapp, “Treaty Number Two at the Washington Conference,” 39 *Poli. Sci. Q.* 201 (1924); and Roxburgh, “Submarines at the Washington Conference,” 3 *Brit. Y.B.I.L.* 150 (1922–23).

<sup>90</sup> Memorandum by the Chief of the Division of Western European Affairs, June 1, 1927, [1927] *Foreign Rel. U.S.* 42 at 43 (1942).

<sup>91</sup> The view of each of the three parties is set forth in Dept. of State, *Records of the Conference for the Limitation of Naval Armaments Held at Geneva from June 20 to August 4th 1927 passim* (1927).

<sup>92</sup> *Ibid.* See Toynbee, 1927 *Survey of International Affairs* 43–82 (1929).

to the United States in advance and apparently approved by it.<sup>93</sup> It contained the following significant paragraph:

Since both the Government of the United States and His Majesty's Government in the United Kingdom adhere to the attitude that they have publicly adopted in regard to the desirability of securing the total abolition of the submarine, this matter hardly gave rise to discussion during the recent conversations. They recognize, however, that no final settlement on this subject can be reached except in conference with the other naval Powers.<sup>94</sup>

The proposal for abolition was made by Mr. Alexander, the First Lord of the British Admiralty.<sup>95</sup> His summary of the proposal contained five major points:

- (1) In the general interests of humanity.
- (2) In consideration of our view that these vessels are primarily offensive instruments.
- (3) In order to secure a most substantial contribution to disarmament and peace.
- (4) In view of the very important financial relief to be obtained.
- (5) In consideration of the conditions of service of the personnel and the undue risks which can be abolished.<sup>96</sup>

Mr. Alexander dealt with the humanity point briefly and referred to "the feelings of horror which the peoples had experienced as results of submarine action"<sup>97</sup> in the First World War. He referred to a number of uses of the submarine which were deemed to be offensive including the German war against commerce.<sup>98</sup> In connection with the economy point (4), he emphasized the indirect savings from the abolition of submarines which would be realized in destroyers and antisubmarine forces generally.<sup>99</sup> The last point (5) opened up a new subject. It was explained that working conditions in submarines were cramped and the sailors suffered

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<sup>93</sup> *London Conf.* 3. The proceedings and documents of this Conference also appear in United Kingdom Gov't, *Documents of the London Naval Conference 1930* (1930).

<sup>94</sup> *London Conf.* 3 at 4.

<sup>95</sup> *Id.* at 78–82.

<sup>96</sup> *Id.* at 81.

<sup>97</sup> *Id.* at 78. Compare the quoted views with those expressed in Thuillier, "Can Methods of Warfare be Restricted?" 81 *J. Royal United Serv. Inst.* 264 at 267–68 (1936):

If it were possible to induce other nations to forego the use of submarines it would be a great advantage to us, since it would rid us of fear of a weapon which very greatly neutralizes the power and scope of action of our battle fleets, and one which in the late war very nearly brought about our total defeat. But we should distinguish between proposals based on the plea of humanity and those based on self-interest.

<sup>98</sup> *London Conf.* at 79.

<sup>99</sup> *Id.* at 80.

from poor air when submerged. This was not in keeping with the improved standards urged generally for industrial workers.<sup>100</sup> In addition, peacetime submarine accidents presented a grim peril. He pointed out that since 1918 there had been twelve major disasters in the submarine forces of the five Powers represented at London with a loss of at least 570 men.<sup>101</sup> Such losses, in the British view, could not be prevented by lifesaving equipment.

Secretary of State Stimson, the chairman of the United States delegation, supported abolition in a short speech with the following central paragraph:

The essential objection to the submarine is that it is a weapon particularly susceptible to abuse; that it is susceptible of use against merchant ships in a way which violates alike the old and well-established laws of war and the dictates of humanity. The use made of the submarine revolted the conscience of the world, and the threat of its unrestricted use against merchant ships was what finally determined the entry of my own country into the conflict. In the light of our experience it seems clear that in any future war those who employ the submarine will be under strong temptation, perhaps irresistible temptation, to use it in the way which is most effective for immediate purposes, regardless of future consequences. These considerations convince us that technical arguments should be set aside in order that the submarine may henceforth be abolished.<sup>102</sup>

The only elaborate statement of opposition to abolition came from Mr. Leygues, the French Minister of Marine.<sup>103</sup> In the French view, the submarine was to be regarded as any other warship and it was sometimes more efficient than other warships and sometimes less so.<sup>104</sup> The World War had proven the effectiveness of submarines against surface warships.

Must it disappear because it disturbs the habits and the honored traditions of surface ships? It may happen to-morrow [*sic*] that every type of warship in the various navies will belong to the submarine class.<sup>105</sup>

In the French view, the submarine was deemed the defensive weapon of the smaller navies.<sup>106</sup> It would supplement the comparative weakness of

<sup>100</sup> *Id.* at 80–81.

<sup>101</sup> *Id.* at 81.

<sup>102</sup> *Id.* at 82.

<sup>103</sup> *Id.* at 84–88.

<sup>104</sup> *Id.* at 85.

<sup>105</sup> *Id.* at 85–86.

<sup>106</sup> *Id.* at 86. Compare the view expressed in Richmond, *Sea Power in the Modern World* 167 (1934):

It is natural that the attitudes which the several Powers have taken regarding the submarine should have been governed by considerations of the advantages and disadvantages which would accrue to each from its abolition or retention.

the French surface fleet and provide scouts for it. It would maintain lines of communication between France and its overseas territories. In addition, alleged barbarity is to be ascribed to particular users of the submarine and not to the vessel itself.<sup>107</sup> The development of the submarine was regarded as making it more capable of conforming to the rules applicable to surface ships.<sup>108</sup> The French Government believed that unrestricted submarine warfare against commerce should be outlawed,<sup>109</sup> but France could not accept abolition of the submarine.<sup>110</sup>

The Italian Foreign Minister stated that the abolition of submarines would favor the more powerful navies.<sup>111</sup> Italy, however, did not object to abolition, in principle, provided that all the naval powers concurred and that it would bring about a drastic reduction of other armaments.<sup>112</sup>

For the Japanese delegation, Admiral Takarabe argued for the retention of submarines because of Japan's geographical situation:

Japan, consisting, as she does, of so many islands scattered so widely on the sea extending from the tropical to the frigid zones, sees in such kind of arm a convenient and adequate means to provide for her national defense. With this comparatively inexpensive war craft she can contrive to look after her extensive waterways and vulnerable points. Japan desires to retain submarines solely for this purpose.<sup>113</sup>

## (2) *Limitation*

Submarines were treated similarly to the other principal types of warships by the Conference. Article 7 of the Treaty, applicable to all five Powers, provided the general rule that each submarine was to be limited to a maximum displacement of 2,000 tons with no gun above 5.1 inch caliber.<sup>114</sup> Three larger submarines with greater caliber guns were permitted for each Power.<sup>115</sup> Article 16, applicable only to the United States, Great Britain, and Japan, limited the total submarines of each to 52,000 tons.<sup>116</sup> France and Italy did not accept limitations upon total tonnage.

In summary, the limitations recognized the lawful combatant status of submarines by implication. The failure of abolition, even though the United

Those attempts to arrive at a decision on the basis of its 'offensive' or 'defensive' character resulted in nothing more than special pleading.

<sup>107</sup> *London Conf.* 87.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Id.* at 88.

<sup>111</sup> *Id.* at 89-90.

<sup>112</sup> *Id.* at 91.

<sup>113</sup> *Id.* at 92.

<sup>114</sup> *Id.* at 208.

<sup>115</sup> Art. 7, paragraph 2.

<sup>116</sup> *London Conf.* 215.

States supported the consistent British position,<sup>117</sup> recognized their lawful combatant status more directly. Article 22 of the London Naval Treaty of 1930<sup>118</sup> set forth rules regulating submarines and other warships in their actions against merchant ships. Its subject, therefore, concerns the lawfulness of the objects and methods of belligerent attack and assumes lawful combatant status.

#### d. *THE LONDON NAVAL TREATY (1936)*

In the opening speech of the Conference, British Prime Minister Baldwin mentioned that the British "still press for the abolition of the submarine."<sup>119</sup> This consistent objective was supported by the United States<sup>120</sup> and opposed by France.<sup>121</sup> In the technical subcommittee Vice Admiral Robert of the French delegation stated that the question of the abolition of the submarine "should be buried forever."<sup>122</sup> The result was no further consideration of abolition during the Conference.

A measure of qualitative limitation of submarines was achieved in the Treaty. It was provided that future submarines were not to exceed 2,000 tons standard displacement or carry a gun in excess of 5.1 inches in caliber.<sup>123</sup> Other warships were limited analogously.

### 4. The Spanish Civil War and the Second World War

#### a. *THE NYON AGREEMENT (1937)*

During the Spanish Civil War in 1937 attacks without warning were made by unknown submarines against non-Spanish warships and merchant ships.<sup>124</sup> The United Kingdom and France took the lead in calling a special conference at Nyon in order to condemn submarine attacks upon such ships and to provide sanctions to deter the attacks.<sup>125</sup> The ensuing nine-Power agreement provided:

Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against

<sup>117</sup> The interest of the British legal profession is illustrated by "Discussion on the Abolition of Submarines," 11 *Grotius Trans.* 65 (1925).

<sup>118</sup> Article 22 is set forth in the text of Ch. III accompanying note 114.

<sup>119</sup> Dept. of State, *The London Naval Conference 1935: Report of the Delegates of the United States of America, Text of the London Naval Treaty of 1936 and Other Documents* 49 (Conference Series No. 24, 1936).

<sup>120</sup> *Id.* at 95.

<sup>121</sup> *Id.* at 59.

<sup>122</sup> *Id.* at 330.

<sup>123</sup> Art. 7. *Id.* at 32. The official text of this Treaty of March 25, 1936 is in 50 Stat. 1363 (1937).

<sup>124</sup> Padelford, "Foreign Shipping During the Spanish Civil War," 32 *A.J.I.L.* 264 at 270 (1938).

<sup>125</sup> *Id.* at 271.

merchant ships not belonging to either of the conflicting Spanish parties; and

Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of April 22, 1930 with regard to the sinking of merchant ships and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy . . .<sup>126</sup>

The remainder of the Agreement specified "certain special collective measures against piratical attacks by submarines" including:

Any submarine which attacks such a [merchant] ship in a manner contrary to the rules of international law referred to in the International Treaty for the Limitation and Reduction of Naval Armaments signed in London on April 22, 1930, and confirmed in the Protocol signed in London on November 6, 1936 shall be counter-attacked and, if possible, destroyed.<sup>127</sup>

Article 22 of the London Naval Treaty of 1930, the juridical basis for the Nyon Agreement, provides certain rules for warships, both surface and submarine, to observe with regard to merchant ships. As a general rule, it is prescribed that such warships "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."<sup>128</sup> Unlike the abortive Treaty Concerning Submarines and Noxious Gases,<sup>129</sup> the London Naval Treaty makes no provision for assimilating naval personnel to pirates. The Nyon Agreement, therefore, goes beyond the London Treaty in this respect.<sup>130</sup> The juridical result of the Nyon Agreement is to deprive the personnel of the submarines concerned of status as lawful combatants when they carry out the attacks proscribed in the Nyon Agreement and deemed to be "piratical acts." The scholars have differed as to whether or not the Nyon Agreement is a proper extension of the law of piracy.<sup>131</sup> The present significance of the Agreement, although it was an *ad hoc* arrangement for the Spanish Civil War, is that it was a high point in the international

<sup>126</sup> International Agreement for Collective Measures Against Piratical Attacks in the Mediterranean by Submarines, Nyon, Sept. 14, 1937, *United Kingdom Treaty Series* No. 38, p. 2 (1937); 31 *A.J.I.L. Supp.* 179 (1937).

<sup>127</sup> *Ibid.*; 31 *A.J.I.L. Supp.* 179 at 180 (1937). The Nyon Supplementary Agreement of Sept. 17, 1937 extended the piracy concept to surface war vessels and aircraft. 31 *A.J.I.L. Supp.* 182 (1937).

<sup>128</sup> The full text of art. 22 appears in the text of Ch. III accompanying note 114.

<sup>129</sup> See the text accompanying notes 86, 87 *supra*.

<sup>130</sup> On the Nyon Agreement see generally 2 Hackworth 692-95.

<sup>131</sup> 1 Oppenheim-Lauterpacht, *International Law: Peace* 613 (8th ed. 1955) and Padelford, *op. cit. supra* note 124 view it as a proper extension of piracy. The contrary view appears in Anonymous, "The Nyon Arrangements: Piracy by Treaty?" 19 *Brit. Y.B.I.L.* 198 at 207-08 (1938) and Genet, "The Charge of Piracy in the Spanish Civil War," 32 *A.J.I.L.* 253 at 263 (1938).

acceptance of the British juridical claim to make submarines and their personnel unlawful combatants.<sup>132</sup>

### *b. THE UNDECLARED ATLANTIC NAVAL WAR (1941)*

On September 4, 1941 the United States destroyer *Greer*, en route to Iceland, was the object of an unsuccessful torpedo attack by a submerged German submarine.<sup>133</sup> President Roosevelt stated that, "This was piracy, legally and morally"<sup>134</sup> and "when you see a rattlesnake poised to strike, you do not wait until he has struck before you crush him."<sup>135</sup> The President described the German attack as an aggression against "the freedom of the seas"<sup>136</sup> and stated that the United States would continue to defend this freedom by ordering the U.S. Navy to attack German or Italian vessels which entered "waters the protection of which is necessary for American defense . . . ."<sup>137</sup>

The United States claim enunciated by President Roosevelt has been described as a defense measure against piratical attacks which were contrary to international law.<sup>138</sup> The use of the piracy terminology could be construed as a claim to deprive the particular submarine personnel of status as lawful combatants. In view of the context, including the lack of a declared war, it is probably more plausible to interpret the President's piracy wording as a part of a claim for the U.S. Navy to initiate attack in appropriate circumstances. Professor Lauterpacht, however, has approved the United States claim as a claim concerning piracy and stated:

There is substance in the view that, by continuous usage, the notion

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<sup>132</sup> In view of the prior French role in preserving the lawful combatant status of submarines, French agreement alone would have been significant. In addition to France and the United Kingdom the parties to the Agreement were: Bulgaria, Egypt, Greece, Roumania, Soviet Union, Turkey, and Yugoslavia. The Nyon Agreement cited *supra* note 126 at 8-9, 31 *A.J.I.L. Supp.* 179 at 181 (1937).

<sup>133</sup> Factual description appears in Karig, *Battle Report: The Atlantic War* 67-70 (1946).

It should be noted that the *Greer* was a 1,200 ton flush deck four pipe World War I destroyer of the same type as the fifty U.S. destroyers transferred to the United Kingdom in 1940 pursuant to the Churchill-Roosevelt Agreement. From a tactical standpoint it is thus possible that the attacking German submarine could have mistaken the *Greer* for a British destroyer. The Churchill-Roosevelt Agreement is set forth in 34 *A.J.I.L. Supp.* 183 (1940). Commentary appears in Borchard, "The Attorney General's Opinion on the Exchange of Destroyers for Naval Bases," 34 *A.J.I.L.* 690 (1940) and Briggs, "Neglected Aspects of the Destroyer Deal," 34 *A.J.I.L.* 569 (1940).

<sup>134</sup> Address by the President (Sept. 11, 1941), *U.S. Naval War College, International Law Documents 1941* 15 (1943).

<sup>135</sup> *Id.* at 22.

<sup>136</sup> *Id.* at 19.

<sup>137</sup> *Id.* at 24.

<sup>138</sup> Oppenheim-Lauterpacht, *op. cit. supra* note 131 at 613.

of piracy has been extended from its original meaning of predatory acts committed on the high seas by private persons and that it now covers generally ruthless acts of lawlessness on the high seas by whomsoever committed.<sup>139</sup>

*c. THE PARTIAL "ABOLITION" OF SUBMARINES (1945)*

During the Second World War submarines with increased efficiency were employed by, *inter alia*, Germany, the United States, and the United Kingdom. The principal claims and counterclaims relating to submarines concerned other legal issues than combatant status.

At the close of World War II the remaining German and Japanese submarines were destroyed or divided among the principal victorious Allies.<sup>140</sup> In 1966 the German Federal Republic<sup>141</sup> had submarines but apparently East Germany did not. In 1966 both Japan<sup>142</sup> and Italy<sup>143</sup> had submarines.

*d. THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG (1946)*

Admiral Donitz, who was one of the defendants in the trial before the International Military Tribunal at Nuremberg, had served first as head of the German submarine arm and then as commander in chief of the Navy.<sup>144</sup> The argument of his counsel to the Tribunal referred briefly to the retention of an "effective weapon":

The prosecution will perhaps take the standpoint that, in lieu of this [use of submarines inconsistent with article 22 of the London Naval Treaty of 1930], submarine warfare against armed merchant vessels should have been discontinued. In the last war the most terrible weapons of warfare were ruthlessly employed by both sides on land and in the air. In view of this experience the thesis can hardly be upheld today that in naval warfare one of the parties waging war should be expected to give up using an effective weapon after the adversary has taken measures making the use of it impossible in its previous form.<sup>145</sup>

The Tribunal's Judgment applicable to Admiral Donitz did not respond expressly to the quoted claim. It is clear, however, that the Tribunal regarded submarines as lawful combatants. Its analysis was limited to other

<sup>139</sup> *Id.* at 613–14 (footnotes omitted).

<sup>140</sup> *A Decade of American Foreign Policy, Basic Documents, 1941–49*, S. Doc. No. 123, 81st Cong., 1st Sess. 41 (1950).

<sup>141</sup> *Jane's Fighting Ships 1965–66* 103; *Les Flottes de Combat 1966* 45–46.

<sup>142</sup> *Jane's Fighting Ships 1965–66* 160; *Les Flottes de Combat 1966* 275.

<sup>143</sup> *Jane's Fighting Ships 1965–66* 147; *Les Flottes de Combat 1966* 264–65.

<sup>144</sup> 1 *I.M.T.* 310.

<sup>145</sup> 18 *I.M.T.* 315.

legal issues than combatant status but these other issues could not have been considered as they were except upon the implicit holding of the lawful combatant status of submarines.<sup>146</sup> Apparently no question was raised concerning the lawful combatant status of military aircraft and their personnel.<sup>147</sup>

### C. SUBMARINES AS LAWFUL COMBATANTS

The rejection of the claims to abolish the submarine have confirmed its lawful combatant status. In the same way the limitation of the submarine by international agreement where other types of warships were subject to analogous restriction has also recognized the lawful combatant status of submarines and their personnel. Even the attempt to make submarines conditional unlawful combatants, as where they fail to comply with particular rules concerning action against merchant ships, has been dropped.

Combat interactions between submarines and merchant ships characterized both World Wars. It is important, therefore, to examine briefly the combatant status of merchant ships and their personnel. The Geneva Conventions of 1949 accord prisoner of war status and thus status as lawful combatants to the personnel of belligerent merchant ships.<sup>148</sup> The Geneva Sea Convention includes among those entitled to prisoner of war status:

Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.<sup>149</sup>

It is particularly significant that merchant seamen are accorded prisoner of war status without regard to whether their ships are armed or not. In the same way no qualification is made concerning the action of merchant ships and, consequently, even Captain Fryatt,<sup>150</sup> who attempted to ram a German submarine, would now be entitled to prisoner of war status. Thus, the personnel of belligerent merchant ships are now entitled to prisoner of war status like the personnel of belligerent submarines.

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<sup>146</sup> 1 *I.M.T.* 310–15.

<sup>147</sup> See the judgment concerning Marshal Goring, the commander in chief of the German Air Force. 1 *I.M.T.* 279–82.

<sup>148</sup> To state that merchant ships and their personnel are lawful combatants is not to state that they are entitled to initiate attack against the enemy as if they were warships. As a tactical matter such initiation of attack is unlikely anyway. See Colombos 479–82 and Bellot, “The Right of a Belligerent Merchantman to Attack,” 7 *Grotius Trans.* 43 (1922).

<sup>149</sup> Art. 13(5). The same provision appears in the Geneva Prisoners of War Convention art. 4(5).

<sup>150</sup> See the text accompanying notes 27–30 *supra*.

## 1. General War

The submarine's status as lawful combatant has been retained because of the national interests or supposed national interests of some of the major naval powers and particularly of France.<sup>151</sup> These national interests have included the use of the submarine as a militarily efficient warship and, particularly, its use in general war. The United States and the United Kingdom have upon occasion agreed to abolition of the submarine conditioned upon the agreement of other powers. The same two states, however, later manifested their national interests by employing submarines in general war.

In the contemporary era of nuclear armed and propelled submarines there are no governmental proposals to abolish the submarine.<sup>152</sup> The principal thrust of contemporary disarmament proposals is directed at nuclear and thermonuclear weapons.<sup>153</sup> These are the weapons which comprise the principal military capability of fleet ballistic missile submarines. Effective nuclear disarmament would not, however, deprive submarines of lawful combatant status. Thus, for the foreseeable future, submarine warships and their personnel will continue to have status as lawful combatants.

## 2. Limited War

It is clear that submarine warships and their personnel have the same *de jure* status as lawful combatants in limited war which they have in general war. Nevertheless, the strategic and tactical uses of submarines as a component of naval power may be expected to be considerably less in limited wars than in general wars. Professor Halperin has stated: "Submarines have not been used extensively, if at all, in local wars . . ." <sup>154</sup> Apparently submarines were not used in the Korean War. The Soviet Union, which was in effect fighting the war by proxy,<sup>155</sup> did not directly employ its submarines even though they could have constituted a major threat to the seaborne logistic support of the United Nations command. The United States, which also sought to limit the war in other ways, did

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<sup>151</sup> See Royse 19–20.

<sup>152</sup> Gaddis Smith, *Britain's Clandestine Submarines, 1914–1915* (1964) describes the secret shipping of submarine sections from the neutral United States to belligerent Canada where they were assembled and completed. This suggests that if international abolition of submarines were to be successful it would require effective international inspection.

<sup>153</sup> See generally U.S. Arms Control and Disarmament Agency, *Agenda Item—Peace* (1964); *Arms Control: Issues for the Public* (Henkin ed. 1961).

<sup>154</sup> See Garthoff 114.

<sup>155</sup> Halperin, *Limited War in the Nuclear Age* 35 (1963).

not employ its submarines.<sup>156</sup> There is no indication that submarines have been used in the war in Vietnam.

The result is that, although submarines are *de jure* entitled to combatant status, they are not extensively employed in limited war. The nonuse, or at the most the very restricted use, of submarines is one way of keeping a war limited.<sup>157</sup> Where the submarine is used for the same general purposes for which surface warships are used, as for gun bombardment of the shore, there is no reason that such action should increase the intensiveness or extensiveness of a limited war.

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<sup>156</sup> Cagle & Manson do not record the use of United States submarines.

<sup>157</sup> Osgood 241-43 stresses the importance of limiting "military means."

