Certain Problems of International Law with Reference to China

Agnes Ch‘en Fang-chih

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CERTAIN PROBLEMS OF INTERNATIONAL LAW
WITH REFERENCE TO CHINA

SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY,
IN THE FACULTY OF ECONOMICS AND POLITICS,
PRYOR MAWR COLLEGE.

By Agnes Ch'en Peng-chih.
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In the present monograph an attempt is made to study certain problems of international law with reference to their application in China. Whatever its pretensions in the realm of theory may be, the ultimate value of international law lies in its actual application by the nations in their relations with one another. As a sovereign state in the community of nations, China is entitled to be treated as the juristic equal of the other member states. Owing to her administrative and military weakness, however, China's jurisdictional rights have been frequently curtailed by the arbitrary acts of the so-called Great Powers. From the standpoint of China, the present study will exhibit the illegal limitations placed upon her juristic freedom as a result of the mistaken interpretations of international law by foreign states in their relations with China and their unjustifiable application of its rules. Viewed from the side of international law, the following pages contain many instances of violations of the established rules of conduct between nations.

The monograph does not purport to present original research in the facts of history. It is primarily an attempt to collect facts concerning China under certain heads of international law and to interpret or analyze those facts from a juridical point of view. The task is handicapped by the absence of case books and works on international law concerning China, and by the inaccessibility, due to present conditions in the Far East, of such government documents as _ts'ing tai ch'ou_
pan yi wu shih mo (Foreign Relations of the Ts'ing Dynasty),
tung hua lu (Imperial Records), and wai chiao kung pao (Gazette
of the Chinese Ministry of Foreign Affairs); and of documentary
studies as Chang Hsing-lang's chung hsi chiao t'ung kuan hai
shih (History of China's Intercourse with the West), and Wang
Yun-sheng's liu shih nien lai chung kuo yu je pen (Sino-Japanese
Relations during the Last Sixty Years). Consequently references
are frequently made to documents and other material in the form
presented in secondary sources available in this country. It
is believed, however, that the use of these secondary sources has
not lessened the value of the general analyses of points of law.

Nor does the present study cover the whole field of interna-
tional law. It is with regret that many problems in the larger
field have been omitted from this monograph owing to the limit
of time.

The writer wishes to acknowledge her gratitude to Professor
Charles G. Fenwick of Bryn Mawr College for his painstaking
supervision and criticism, and to Professor Roger H. Wells of
the same institution for making many valuable suggestions in
matters of style. She is also indebted to Dean Eunice Morgan
Schenck and the Department of Economics and Politics of Bryn
Mawr College for aids in the typing of the monograph.
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The value of Miss Chen's dissertation consists in its attempt to show the extent to which the rules which are generally regarded as "international law" have actually been observed in the relations of the Western Powers with China. While it would have been possible for Miss Chen to have delimited her field and to have written her entire dissertation upon one topic, e.g. Servitudes, this would have necessitated giving more time to historical research and less to the analysis and critical examination of legal problems, which has been Miss Chen's chief objective. Miss Chen's dissertation should be read, therefore, with consideration of the purpose she has had in mind and with account taken of the Chinese students whom she is seeking to instruct by her comprehensive survey of the subject. This will explain the presence of a number of minor sections which contain little or no new material, but which are included in order to round out the particular problem under consideration.

[Signature]
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CHAPTER X CONCLUSION

The existence of fundamental principles of international law is not confined to particular regions or nations in the world. It is essentially universal, based upon human conscience and the sense of justice. That China possesses one of the most ancient and unbroken civilizations in the world is an accepted fact. Long before Hammurabi ruled over Babylonia and Abraham appeared in Mesopotamia, the scholars in China were already busy in their pursuit of art and science. Here was recorded the first astronomical observation in the world: that of the eclipse of the sun on May 7, 2165 B.C.¹ Mathematics, physics, chemistry, geography and agriculture were systematically studied, and the marine compass, fire rockets and silk were made usable.

¹ See E. G. Creal, Sinica, Chicago, 1929, p. 5.
CERTAIN PROBLEMS OF INTERNATIONAL LAW
WITH REFERENCE TO CHINA

CHAPTER I
THE HISTORY OF INTERNATIONAL LAW IN CHINA

International law is a necessary consequence of the co-existence of states of whatever form of civilization. The neighborly cohabitation of human groups give rise to social, economic and political contacts. These in turn create moral and legal obligations, which in the course of time become concrete rules of conduct between groups as well as individuals. The rules which govern the relations between nations are known as international law.

The existence of fundamental principles of international law is not confined to particular regions or nations in the world. It is essentially universal, based upon human conscience and the sense of justice.

That China possesses one of the most ancient and unbroken civilizations in the world is an accepted fact. Long before Hammurabi ruled over Babylonia and Abraham appeared in Mesopotamia, the scholars in China were already busy in their pursuit of art and science. Here was recorded the first astronomical observation in the world: that of the eclipse of the sun on May 7, 2165 B.C.¹ Mathematics, physics, chemistry, geography and agriculture were systematically studied, and the marine compass, fire rockets and silk were made use of.

¹ See H.G. Creel, Sinism, Chicago, 1929, p.5.
some two thousand years before the Christian era. In the field of social sciences the economists debated the question of free-trade versus protectionism. Civil and criminal jurisdiction were distinguished. The doctrine of internationalism was expounded by the predecessors of Laozi and Confucius, before the "Golden Age of Chinese Philosophy." It is not surprising that international law, both in theory and practice, existed in China long before the appearance of civilization in the Western world. The subject of international law in China, particularly in ancient China, has been seriously neglected by Western publicists. Some of them have gone so far as to deny its very existence. As late as 1912, T.J. Lawrence asserted that international law "sprang up originally in Europe and extended its authority to states outside European boundaries as they adapted themselves to European civilization." In 1908 George B. Davis wrote, "International law can hardly be said to exist in ancient times. The absolute and crudely organized Eastern monarchies were intolerant of the very existence of neighboring nations, and lived in a state of constant warfare with them. Of distant nations they knew nothing, and as there must be communication or intercourse of some kind in order that rules may be

deduced which govern their relations with each other, it was impossible that a science resembling international law could have existed among them."

As another Western scholar, Baron S.A. Korff, admitted, the mistake of the European publicists of the nineteenth century was due to the fact that they were not acquainted with the history of ancient civilization. This fact led Martens, Wheaton, Lawrence and Phillipson invariably to commence their detailed investigations with the Treaty of Westphalia of 1648. Concluding from his own studies, Baron Korff declared that "the ancient peoples of Asia or Africa were acquainted with international relations and law," and that every civilization possessed whole systems of international law which "had everywhere many traits in common and do not belong exclusively, as was formerly supposed, to Europe."  

4. In September 1881 W.A.P. Martin presented his "Traces of International Law in Ancient China" before the Congress of Orientalists in Berlin. The article was re-written and printed in the International Review, New York, January, 1883, and reprinted in the Chinese Recorder, Shanghai, September and October, 1883. With further revision and its title amended to "International Law in Ancient China", it was included in his Hanlin Papers, 2nd series, Shanghai, 1894, and reprinted in his Lore of Cathay, London and New York, 1901. See American Journal of International Law (hereafter cited as A.J.I.L.), XXIX, 1935, p.535.


A. International Law in Ancient China: Eastern Chou or the Feudal Period (770-255 B.C.)

The recorded history of China is generally traced back to the twenty-fourth century before Christ. The first millennium, however, with its authenticity still remaining a subject of controversy among historians, does not as yet provide a fertile soil for research in international law. For this reason the Tung Chou period is conveniently chosen here as the genesis of international law in China.

King Wu, founder of the Chou dynasty (1122-255 B.C.), subdivided his kingdom into numerous hereditary feudal states, with the central government commanding the service of all. After some four hundred years of prosperity, the royal power fell into a decline. The kingdom was invaded by the Ch'uan Jung, a barbarian tribe; and in 770 B.C. the seat of government had to be moved from Hao to Loyang, then called the "Eastern Metropolis". From hence the dynasty was known as Tung Chou, or Eastern Chou. It marked the rise of the feudal states.

The history of Eastern Chou is divided into two parts. The first, called Ch'un Ch'iu or Lieh Kuo, "the Co-ordinating States," and characterized by pacific intercourse between the nations, corresponded roughly to Confucius' Ch'un Ch'iu Classics, which recorded the history from 722 to 481 B.C. The second, described in contrast as Chan Kuo, "the Warring States", was marked by international strife and ambition for conquest. It lasted till 255 B.C., when Ts'in Shih Huangti consolidated the Chinese Em-

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8. For the authenticity of its history see W. Hung, "Prolegomena to Index to Ch'un Ch'iu and Commentaries." Historical Annual, XI, 4, 1937, pp.19-96.
The Eastern Chou was a great age of chivalry, of letters and philosophy, and of diplomacy. At such an early date, the feudal states were already conducting an intercourse whose orderliness and moral standards in many respects surpass those which govern present international relations.

The international law, as applied by the feudal states, found its main source in the Chou Li, or Rites of the Chou Dynasty. It was promulgated by royal decree about 1100 B.C., when kingship was at the height of its glory. It defined the orders of nobility, and, among other things, prescribed the rules of etiquette to be observed in interstate relations. The foundation of these rules was laid on four corner-stones: comity, good faith, courtesy, and justice. They were applied and extended to every aspect of international life.


10. The orders were: Kung, Hou, Po, Tse, Nan, commonly translated as Duke, Marquis, Earl, Viscount, Baron. These orders also became the ranks of the feudal states, e.g., Duke, Marquisate etc. See E.H. Parker, Ancient China Simplified, London, 1908, p.135.


12. See K. Ch'en, chung kuo kuo chi fa su yuan (Sources of International Law in China), Shanghai, 1934, pp.9-17.
Conferences and Missions

Common phenomena in international relations were meetings and visits, both ceremonial and practical in character. Special missions were dispatched on all important occasions, of joy as well as misfortune. In time of calamity, such as flood and famine, mutual sympathy was expressed by generous response for the relief and rehabilitation of the unfortunate nation. In the year 567 B.C., the states of Ch'iu and Ch'en were at war. Upon the death of the Marquis of Ch'en, Ch'iu withdrew its forces and terminated war as a sign of sympathy. This practice became well established throughout the period.

Discourtesy was a grave offense in interstate relations. In 710 B.C., Lu contemplated making war on Ts'i because of the disrespect shown by the Marquis of Ts'i during a court visit. Even when the king himself neglected the prescribed rules of etiquette in 717 B.C., it so offended the Earl of Cheng that the nobles of Ts'i offered their good offices in order to re-establish friendly relations.

Envoys

Apart from special conferences and certain court visits in which the heads of states participated in person, the great bulk of interstate business was undertaken by diplomatic representatives. The rules and customs governing them find many parallels in modern practices. The person of an envoy was inviolable. He

13. For detailed examples see C. Hsü, hsin ts'in kuo chi fa chi yi chi (The traces of International Law in Ancient China), Shanghai, 1931, pp.220-8.


enjoyed extraterritorial privileges, including exemption from taxation and criminal and civil jurisdiction, immunity of official residence, and secrecy of correspondence. Violation of his immunity was a serious offence and could be a sufficient cause for war.

The envoy was received according to such ceremonies as were comparable to his dignity. In the diplomatic corps, his precedence was determined by the rank of his state, and in the case of states of the same rank, by his ruler's blood relationship to the king, or by the size of his state if it happened to be a great power. The envoy on his part was expected to observe the rules governing his rank, to accept no gift from the country to which he was commissioned, and not to conspire against the state receiving him. Failure to comply with these requirements resulted in his recall.

Treaties

Treaties of all kinds known to modern times were entered into among the states of ancient China. Their solemnity and sanctity were stressed in the formalities of their conclusion, with the offering of a sacrifice and the confirmation by an oath. A duplicate of the document was usually preserved

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carefully in a special chamber of the royal palace called Meng Fu, the "Palace of Treaties". 21

The wide scope covered by some treaties may be exemplified by that between Cheng and a number of other states concluded in 544 B.C. Economically, it stipulated for the free exportation of grain, the abolition of monopoly in international trade between the contracting parties, and mutual succor in case of famine. Politically, it provided for the extradition of criminal fugitives, mutual aid in the case of insurrection, and the common support of the Royal House as the symbol of authority. 22

Mediation

As long as the central government was sufficiently strong to maintain peace and order, differences between the feudal states were settled by arbitration of the king. When the king's power became weakened, however, the states felt more and more the need of collective responsibility, and they undertook to settle the differences themselves. The procedures they resorted to still find wide usage in modern diplomacy.

One of these procedures was mediation. It might take place before a rupture or after the commencement of hostilities. In

20. For detailed classification, see C. Shih, "ch'un ch'iu shi tai ti t'iao yo" ("The Treaties of the Ch'un Ch'iu Period"), she hui hsueh chi k'ian (Social Science Quarterly), Wuhan University, II, 1, 1931, pp.17-37.


714 B.C., Duke Yin of Lu mediated to restore the friendship between Ch'ü and Chi before any official rupture took place. In the same year Marquis Li of Ts'i offered his good offices to the warring states of Sung, Wei and Cheng, and succeeded in terminating hostilities which had lasted for four years between Cheng and the combined forces of Wei and Sung.

Mediation might be at the request of the states in dispute, or on the initiative of the mediator. In 578 B.C., Hua Yuan, a minister of Sung, voluntarily tendered his service as peacemaker to the states of Tsin and Chu. Through his effort they went so far as to conclude a treaty renouncing war between them. In 688 B.C., the Marquis of Chi requested the mediation of Duke Chuang of Lu when the state of Ts'i repeatedly encroached upon the territory of Chi.

From the above examples it may be seen that the mediator might be a prince or a minister. Although the international importance of the country to which the mediator belonged added weight to the mediation, the personality of the mediator also played an important part. The state of Ch'en was a small power.

Yet in 623 B.C., its ruler was requested to mediate in a controversy involving a number of states, including Tsin, a great power.27

**Arbitration**

Arbitration was another familiar procedure. Like mediation, it might be at the request of the disputing states or voluntarily offered by a third party.28 In 558 B.C., the dispute over a legal claim between Ch'en Sheng and Po Yu, two vassals of the king, led to a rupture. The king failed to bring about a settlement; whereupon Marquis Tao of Tsin, on his own initiative, sent his minister Shih Kai to arbitrate the case. Having accepted Shih Kai's jurisdiction, each party appointed its own pleader. The hearings took place in the royal court. The award, based upon documentary evidence, was given in favor of Po Yu.29 Similarly, in 553 B.C., the states of Cheng and Hsü requested Viscount Kung of Ch'iu to arbitrate their territorial dispute.30

**Intervention**

Intervention was a forceful means for seeking redress short of war. Generally it was employed for self-defense, but at times it served humanitarian as well as other unsel'fish purposes. It might be a sanction against breach of treaty obligations. The Treaty of Kuei-chiu of 651 B.C. provided that violation of its stipulations by any one signatory should call for the interven-

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27. See ibid., pp.244-5.
30. See ibid., pp.259-61.
tion of the rest. Similar provisions were found in the Treaty of Tu-chien of 632 B.C.

In 672 B.C., Ts'ien carried on a war against Cheng. Tsin, the neighbor of Cheng, intervened and drove the forces of Ts'ien out of Cheng. In a note to Ts'ien, the government of Tsin declared that the intervention was out of self-defense, since the attack of Cheng by Ts'ien seriously endangered Tsin's peace and safety.

On more than one occasion intervention took place on grounds of humanity. In 286 B.C., Sung was in a reign of terror under the tyranny of Duke Yen. It underwent the joint intervention of the states of Ts'i, Ch'u and Wei. For the same reason Ts'i took up the cause of the oppressed people of Yen in the reign of Prince Kuai.

The question of legitimacy in succession gave rise to numerous cases of intervention. In 642 B.C., Marquis Huan of Ts'i, forseeing quarrels over the succession to his throne, entrusted his heir-apparent Prince Chao to the care of Duke Siang of Sung. On the death of Marquis Huan, several princes incited insurrections to claim the throne. Duke Siang, true to his promise, intervened in behalf of Prince Chao and fought to restore him. Similarly in 546 B.C. the state of Ts'i made war on Yen to reinstate Duke Chien, and on many occasions the state of Ts'in determined the right of succession in Tsin. 31

Co-operative Defense

The history of the period recorded many precedents illustrating the co-operative defense of a group of states against a common enemy. The classical example was the "Vertical Alliance" versus the "Horizontal Alliance". In 333 B.C., the six states of Ts'ī, Ch'ū, Yen, Han, Chao and Wei, adopting the ingenious device of their common minister-at-large Su Ts'īn, organized a united front, known as the "Vertical Alliance", to repress the ambition of the state of Ts'īn. The alliance provided not only for mutual assistance in case of attack by Ts'īn, but also for punishment, by the rest, of any signatory that should fail to fulfil its duty. The alliance blocked Ts'īn successfully for fifteen years.

But Ts'īn was not behind in its diplomacy. Its able minister, Chang Yi, counter-devised the "Horizontal Alliance", by which the states were detached from the "Vertical" to adopt a policy of appeasement in favor of Ts'īn. The Horizontalists styled themselves pacifists. Intrigues, suspicion and corruption were infused into the "Vertical" bloc. Mutual jealousy bored from within and disintegration finally resulted. Shorn of their means of mutual assistance, the states one after another fell an easy prey to Ts'īn, thus enabling it to absorb them all and to build upon them an empire.

Laws of War

1. Cause of War

32. For examples see C. Hsū, op.cit., pp.212-8.

33. For details see Ssu-ma Ch'ien, shih chi (Historical Memoirs) 2nd. century B.C., Vols. 69, 70.
War was to a large extent a combat of forces according to rules of fair play and chivalry. The philosophy of the time was against war, and warfare was by no means freely resorted to. First of all, a war was not to be undertaken without a proper cause, "Shih ch’u yu ming." Thus, in 465 B.C., when the forces of Ts’i entered the territory of Lu without a legitimate cause, Minister Chan Hsi of Lu was able to effect their withdrawal by appealing to the faith and honor of Ts’i. Even Viscount Chuang of the "barbarous state" of Ch’u, who in 620 B.C. had the audacity to question the "weight and size of the Nine Tripods", had to withdraw his troops from Chou and leave the tripods unscathed for lack of a proper cause for war.

2. Declaration of War

"Solemnity", "justice", and "comity", were clearly manifested in the procedures leading to a declaration of war. In the first place, a declaration of breach of diplomatic relations, accompanied by the reasons for the rupture, was delivered to the state at variance, to give it a choice of peace or war. Next, the text of the declaration was made known to all neutral powers to acknowledge the matter as of public concern to the entire family of nations. Thirdly, the citizens of the country were informed by an official proclamation. Then, when war seemed inevitable and when both sides were deemed prepared, a formal "invitation

34. See below, Ch.II.

35. See Martin, op.cit., p.446.

36. The Nine Tripods were the symbol of kingship. They were said to have been cast by Yu the Great in 2301 B.C. See Hirst, op.cit., pp.221-2.

37. See Martin, op.cit., p.447
to war", giving the date for commencement of hostilities, was sent to the enemy state. When the time came, a pledge for the maintenance of justice was given by each to itself in the form of an oath and a sacrifice to the gods. It was not until after the sounding of a drum, which had become the established signal for battle, that the attack was to begin.38

An historic incident occurred in the war of 635 B.C., Duke Siang of Sung, though fully aware that the "barbarous state" of Ch'ū was employing means of deceit, insisted on following the recognized laws of war. When incurring defeat and reproached by his angry generals, the Duke said, "Since ancient times it was forbidden to assail an enemy who was not in a state to resist. I have come near losing my dukedom, but I would scorn to commence an attack without first sounding the drum." His sense of fair play has been highly praised by history commentators.39

3. Hostilities

The same code of chivalry was observed during hostilities. In the case of a battle on land, if the forces of one side should be crossing a body of water, combat would be suspended on both sides. When the enemy was routed, it was against international morality to pursue the retreating force. The purpose of war being to achieve victory within legitimate means, as many lives of the enemy as possible should be spared. Civilians were to be spared.

38. See C. Hsu, op. cit., pp.265-76;
left unmolested. The employment of water, fire, and other means of attack that would inflict injury en masse was forbidden.\textsuperscript{40}

That war was not a matter of personal animosity was a clearly recognized principle. Mention has already been made of the ending of hostilities upon the death of the enemy ruler. Even personal etiquette was observed on the battlefield. In 573 B.C., when Tsin was at war with Ch'ü and Cheng, the captains of Tsin dismounted and took off their helmets on seeing the enemy captains and princes. When it was suggested that the Earl of Cheng was exposing himself in a vulnerable position and could be captured, General Ch'ueh Chih said to his men, "It is forbidden to insult the head of a state."\textsuperscript{41}

4. Termination of War and Conclusion of Peace

The termination of war was again accompanied by much ceremony, to inform the gods, mourn for the dead, and pay respect to the enemy. The nations took pride in extending generous treatment to the captives, and they released them courteously when hostilities ended. Spies, however, were subject to execution. It was considered indecent to humiliate the enemy beyond what was necessary to bring about its defeat. The worst humiliation to a nation was the signing of a treaty of peace within thirty li of its principal city, "ch'eng hsia chih meng." Consequently, when the enemy acknowledged its defeat, chivalry

\textsuperscript{40} For detailed examples see C. Hsü, \textit{op.cit.}, pp.276-83.
\textsuperscript{41} Ibid., pp.287-9.
demanded that the victorious power withdraw its forces beyond
the thirty-li limit before the formal conclusion of peace.42

From the actual practice of the time it may be seen that
the sense of chivalry was so cherished in the hearts of men that
the rules of international conduct, both peace and war, differed
little, if any, from those governing the relationship between
individuals. Their high moral standards can hardly be over-
estimated in the light of modern practices.

B. The Chinese Empire as the "Celestial Empire."

With the absorption of the feudal states by Ts'in under
Shih Huangti in 255 B.C., China became a united empire, occupying
in Asia a position similar to the Roman Empire in Europe. For
the next two thousand years she developed a civilization of her
own in virtually complete isolation from other civilized nations.
Her contacts were mainly with peoples far inferior to her in cul-
ture. Practically all the petty states of eastern Asia accepted
her sovereignty or suzerainty out of respect for her culture and
fear of her strength. She appeared to them as well as to her own
people as the "Celestial Empire", the center of a world of its
own within which she was supreme and without a rival, a position
which was maintained through all the ages, broken only by rare
intervals of revolution.43

Under such circumstances, the conditions for the development

42. See K. Ch'yan, op. cit., pp.295-333.

of international rules of conduct were conspicuously absent. From even before the Ch'un Ch'iu period, the rulers of the Chinese states had not regarded the uncivilized races as being on an equal footing with the Chinese and with those assimilated to Chinese ways. This attitude was sanctioned by Confucius, who said, "It is advisable to treat after the manners of the barbarians the feudal lords who perform the rites and ceremonies of the barbarian, and to treat in the Chinese way those who have become assimilated as Chinese." 44

It is, however, erroneous to conclude that the Chinese regarded all foreigners as inferior to themselves. In the year 168 A.D., several foreigners, who claimed to be envoys of the Roman emperor Marcus Aurelius, were present at the Chinese court. 45 Their manners at once won the respect of the Chinese. The Chinese official records described the Romans as "tall, of a fine complexion, and like the Chinese" in culture; and called the Roman Empire "Ts'in" or the "Great Ts'in." 46 Unfortunately, the attempts to establish direct intercourse between the two empires resulted in

44. F. M. Russell, Theories of International Relations, N.Y., 1936, p.16. Russell's translation "in a barbarous way" appears somewhat misleading. Cf. below, Ch. II, section on Confucius.

45. F. Hirst and W.W. Rockhill (trans. and annotated), Chao Ju-kua, His Works on the Chinese and Arab Trade in the Twelfth and Thirteenth Centuries, St. Petersburg, 1911, p.5.

46. Ibid., p.106, Note 5.
failure. Otherwise, out of their commercial and diplomatic relations on terms of equality and mutual respect, international law might have developed.

Conditions being as they were, the only occasion calling for the application of international law was the trade relations between the Chinese and the peoples from foreign lands. In the absence of diplomatic and treaty relations, China naturally took into her own hands the establishment and application of such rules of conduct as she deemed fair and reasonable.

Since the year 120 A.D., traders from Parthia and later from Greece, Arabia and India visited South China to exchange their merchandise for the products of China. Gradually the Chinese allowed them to settle in Canton. The Arabs particularly became prosperous from the eighth century. By the ninth century Canton registered some one hundred and twenty thousand foreigners. Their control became a problem to the Chinese authorities.

It was a traditional principle in Chinese jurisprudence that religious and family affairs were in general regulated by customary rules, which might vary in different parts of the country.

47. See S.W. Williams, The Middle Kingdom, N.Y., 1895, II, p.411.
50. See Koo, op.cit., p.15.
On the basis of this principle, the criminal code of the T'ang dynasty (618-960 A.D.) specified that civil cases involving foreigners of the same nationality were to be judged according to the customary practice of their own country. In all other cases the Chinese law applied. This provision was followed by the subsequent dynasties down to the conclusion of the Treaty of Nan-king in 1842. 51

Accordingly, the Chinese authorities appointed a headman from among each group of foreigners. His duty was to maintain order among the members of his group and to administer their own customary rules in civil cases concerning themselves. He was also to urge them to pay tribute to the Chinese throne.

All criminal cases, whether involving foreigners or Chinese, were tried by the Chinese authorities at Canton according to the law of the land. The foreigners convicted were handed over to their own headmen to be punished as sentenced. But sentences of a grave character, entailing banishment or capital punishment, were carried out by the Magistracy Department of Canton. 52

Mixed civil cases, in which the parties were Chinese and foreigners, or foreigners of different nationalities, were handled by an officer under the Superintendency of Merchant Shipping, and the law of the land was applied. Non-payment of loans or interest was settled by doubling the amount lent. Payment could be

51. See C. T'an, kung han shih tai tuí wai jen chih ts'ai plan chuan (Jurisdiction as applied to aliens under the Go-hong System), Peiping, 1938, pp.8-9.

52. See Hirst and Rockhill, op.cit., p.17.
made in cash or in kind reckoned according to the market price at the time of settlement. 53

Foreign ships arriving at port were obliged to deliver their cargoes to the Superintendency of Merchant Shipping, to await the inspection of the Chief Commissioner and the Superintendent of Customs. An import duty of ten per cent and a small sales tax were levied. Smuggling and failure to meet the regulations were punished by confiscation of the cargo. By the twelfth century, by custom if not by law, foreign trade and residence were confined to Canton and Ch'uan-chow. 54

Although the aliens traded and resided in China not by right but on sufferance in the absence of diplomatic relations, they were given full protection by the Chinese government, and were treated practically on equal footing with the citizens. Thus the same traveling passes for identification and protection were issued to Chinese as well as foreigners. 55 Even public offices were open to foreigners, and honors were conferred upon them. 56 Olopum, a Nestorian, received the rank of High Priest and National Proctor from the Emperor Kao-chung of the T'ang dynasty. Marco Polo, the famous Venetian, served as Prefect of Yang-chow for three years during the Yuan period (1230-1367). Many other foreigners were knighted by the imperial government. 57

53. Ibid., p.17, note 5.
54. Ibid., pp.20-2.
56. For details see Hirst and Rockhill, op.cit., Pt.I, Ch. 22.
57. See Koo, op.cit., p.19.
But in her relations with other states China maintained and even enhanced her position as the "Celestial Empire" in the course of time. Her role in the Oriental world became that of a benevolent but authoritative super-state, whose due it was to receive tributes from all states as her vassals, to appoint or invest their rulers, and to settle their inter-state controversies, all according to rules prescribed by her, known as the Institutes of the Empire. 58

When the Portuguese came to China in the sixteenth century, the Chinese government was naturally inclined to regard them as another people from some tributary state. The good will of the Ming emperor, who was liberally disposed toward foreigners, was soon alienated by the acts of piracy committed by the newcomers in China's southern waters. Portuguese attempts to establish diplomatic relations with China consistently failed. Finally in 1727 a Portuguese embassy succeeded in obtaining an audience with the emperor, but it was treated as a tribute mission, merely to receive imperial orders, and not to negotiate treaties. 59 Nor did the Dutch and the British, who came later, meet with better success. 60 The Russian embassies, which failed to fulfil the tributary and ceremonial requirements, were barred from court. 61

58. See below, Ch. III, Sec.B.


60. See ibid., pp.47-58.

Down to the conclusion of the Treaty of Nanking, China persistently refused to give up the concept of the "Celestial Empire" and to accept the principle of the equality of states. The question received no better clarification in the Sino-Russian Treaty of Nerchinsk of 1889, the first treaty entered into by the Chinese empire. While the Latin and Russian texts stipulated that the frontier was defined between "the two Empires," the Chinese text contained no recitation of titles in its preamble, and in regard to the frontier it merely stated that "all south of the rivers belong to my dominion, and all north to the Russians" as though the latter were but a tribal community. Moreover, down to 1858 negotiations were entered into only grudgingly with Russia, and were conducted by the Department of Dependencies. China's attitude was resented by the nations of the West. A period of conflict ensued.

C. Chinese Jurisdiction in the Period of Conflict.

With the expansion of Europe towards the Orient in the beginning of the sixteenth century, a marked change took place in the relations between the Chinese and the foreigners. Reports from the Sultan of Malacca and the governments of other dependencies of China about the Portuguese and Spanish occupation of

62. Morse, op. cit., I, p. 60.
63. The conclusion of the Tientsin treaties.
parts of India and Malaya had already alarmed the emperor. When in 1506 the Portuguese appeared in the Chinese waters and fired their guns freely, and in the following years acted as pirates on the Chinese seas, the government saw definitely the necessity of a change in attitude toward the foreigners. The Chinese navy waged a series of battles against the Portuguese, and, after the unsuccessful attempts of the Portuguese to take the port of Canton, the government closed that center of trade to all foreigners in 1522.  

But economically foreign trade was desirable to China, particularly the customs dues as a source of national income. Moreover, smuggling sprang up with the formal prohibition of trade. Those provinces adversely affected petitioned the throne to reopen Canton. After some thirty years of struggle the government was won over by the protagonists of foreign trade.  

However, well taught by past experiences, the government cautiously kept the foreigners at some distance from Canton. As the island of Macao had been a center for smugglers during the prohibition period, foreign traders, then mostly Portuguese, were allowed to stay there. Like the Arabs in Canton in the earlier centuries, they were given a rudimentary government of their own for the maintenance of law and order in civil matters concerning themselves. But the Portuguese soon began to encroach upon

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65. See T. Chang, *Sino-Portuguese Trade from 1514 to 1644*, Leyden, 1933, pp.32-68.
66. See *ibid.*, pp.69-85.
the territorial jurisdiction of the Chinese authorities by electing their own judges, alderman, procurator and treasurer. This brought about protests from the provincial government with threats to sever trade. The Portuguese, through bribery, succeeded in inducing the Viceroy to tolerate their stay "subject to the laws of the Empire." 68 However, until the Treaty of 1887 the Chinese government consistently refused to recognize the legal status of the Portuguese government at Macao. 69

Criminal jurisdiction was exercised by the Chinese authorities in Macao since the beginning of the Portuguese settlement. The system closely followed that regulating Canton in former dynasties. The Portuguese were not permitted to try any criminal cases, not even those concerning themselves. 70 In 1749 trade was stopped for failure to deliver certain alleged criminals from a Portuguese convent. In the case of Francis Scott the Portuguese attempted to make a settlement, but it was discovered and annulled by the Chinese authorities, who conducted the trial anew and applied the Chinese law instead. 71 Nevertheless, owing to the negligence or ignorance of the Chinese magistrate, certain cases were adjudicated by the Portuguese and were considered by them as closed incidents. 72 This question of juris-

68. Ibid., pp.99.

69. See H.B. Morse and H.F. MacNair, Far Eastern International Relations, Boston, 1931, p.588.

70. See Morse, op.cit., I, pp.45, 100.

71. See Koo, op.cit., p.55.
dition became a source of controversy which was not finally settled until the Treaty of 1887.

By the end of the seventeenth century, Canton, by virtue of its geographic position, had again become the center of trade. The Dutch occupation of Formosa and the English display of force at Canton caused the Chinese to wonder about European respect for law and order. The Chinese merchants organized themselves into a guild known as the Cohong. It obtained from the government the monopoly of foreign trade, and acted as the sole intermediary between the government and the foreigners. It collected customs due to the government, and was responsible for the good behavior of the entire foreign population. Its only means of enforcing law was the threat to stop trade, but ordinarily this proved sufficiently effective.

The English, by reason of the monopoly, power and wealth of their East India Company, soon gained the upper hand among the foreigners in their trade with China. The supercargo of the company in the course of time became the representative of all foreign traders. Trade relations between them and the Chinese were regulated by agreements between the hoppo, collector of customs of the Cohong, and the supercargo of the East India Company.

This system made possible exactions on the part of the hoppo, and became a source of complaint until the beginning of the nineteenth century, when the East India Company obtained the right to address the Chinese government directly.

To maintain peaceful relations between the Chinese and the

73. See Koo, op.cit., pp.24-31.
foreign merchants, the Chinese government enforced several rules. Foreign ships of war were not allowed to enter the Canton River. Foreigners were required to retire from Canton to Macao or to their home countries when the trade season was over. They were not to wander in the streets without an interpreter, row on the river, or ride in sedan chairs. No women or firearms were to be brought to the factories.\textsuperscript{74}

With regard to jurisdiction over aliens, the general principles of the past centuries continued to be applied. The system of the Cohong in relation to the East India Company relieved the Chinese government of civil cases. Business disputes between foreigners themselves, as well as between Chinese and foreigners, were settled by direct negotiation between the parties concerned, in accordance with the Chinese practice of settling civil suits through the guild or by arbitration.\textsuperscript{75}

Criminal jurisdiction, on the other hand, was strictly retained by the Chinese government. Section 34 of the Penal Code of the Ts'ing dynasty provided that "all foreigners who come to submit themselves to the government of the Empire, when found guilty of offenses, [are to] be tried and sentenced according to established laws" of the land. In mixed criminal cases involving Chinese and foreigners, the trial and punishment were conducted by the Chinese authorities. In the cases of "The Defense", "The Royal George", "Terranova" and many others, the captain of the

\textsuperscript{74} See Morse, \textit{op.cit.}, I, pp.69-71.

\textsuperscript{75} See \textit{ibid.}, p.96.
ship or the supercargo of the East India Company was subject to
detention in case of failure to deliver the offender. At times
trade was suspended to secure enforcement of the law. 76

In criminal cases involving foreigners of the same or different nationalities, the same procedure applied. On several occasions the law was relaxed when the offender escaped outside the Chinese territory and was beyond the reach of the Chinese officials. But as far as possible the government always insisted upon the maintenance of justice according to the law of the land. 77

It has been contended that in certain instances, such as the scuffle between the English and the Dutch in 1778, the Chinese government waived its jurisdiction over criminal cases in which no Chinese were involved, and that therefore extraterritoriality may be said to have existed in China before the Treaty of 1842. 78 This contention seems groundless because the foreigners secretly settled the cases among themselves without the knowledge of the Chinese authorities. Instances were not lacking in which the punishment of offenses committed under palliating circumstances were turned over to the supercargo of the East India Company. But this was done only after the Chinese court passed full judgment upon the case. 79 On the whole the government acted consistently in the exercise of criminal jurisdiction over all within

76. See T’an, op.cit., pp.9-14.

77. See ibid., pp.15-8.


79. See T’an, op.cit., pp.18-23.
its territory, Chinese and foreigners alike.

But while China insisted upon the territorial jurisdiction of a normal independent state, the foreigners expected to treat China as they had already treated Turkey and India. They had come with no intention of observing her law or respecting her rights of sovereignty. The British in particular resisted the exercise of criminal jurisdiction by the Chinese government.

One of the alleged grounds for complaint was the deficiency of the Chinese law in that the criminal code did not distinguish different degrees of homicide. The texts of sections 290 and 292 of the code prove this to be unfounded. Sir George Staunton, himself an officer of the East India Company and a critic of Chinese jurisprudence, did not fail to remark that it defined different cases of homicide "with considerable accuracy." In the cases of "The Defense", "King George" and others, the differentiation was scrupulously applied. The acquittal of the foreigners accused in the case of "King George" and other cases contradicted a second accusation that the Chinese court discriminated against foreigners.

The most common criticism, however, was of the harshness of the Chinese law and the barbarity of the methods of punishment. Leaving aside Sir Chaloner Alabaster's conclusion that "the Chinese system may be characterized as less Draconian than ours,"
scholars of comparative jurisprudence have proved that the Chinese methods of punishment compared favorably with those prevailing in England of the same epoch. 84

The underlying cause for the defiance of Chinese jurisdiction by the Western powers seems to be sheer aggressiveness, as is exemplified by the report of Caleb Cushing to Secretary of State John C. Calhoun on September 29, 1844. Mr. Cushing recognized the fact that the Chinese civilization and political stability "are such as to give China as complete a title as many if not most of the states of Christiandom can claim". Yet he insisted that American citizens in China should not be subject to Chinese jurisdiction for the sole reason that China did not happen to be a Western power. 85 Mr. Cushing's contention that extraterritorial rights had existed in China before 1842 was, as has been shown, contrary to fact; and his argument has been repudiated by authorities on the subject. 86

Reasonable or otherwise, the British government continued the policy of the East India Company after the dissolution of the latter, and pressed for extraterritorial rights in China. The Chinese government was equally determined to maintain its territorial jurisdiction. This, together with China's refusal to legalize the opium trade and to establish direct diplomatic relations with the foreign powers, precipitated the Opium War of

84. See ibid., pp. 87-95.
86. See criticism of Koo, Willoughby, and Hinckley, ibid., II, p. 557, and footnote.
1841-1842. The defeat of China and the conclusion of the Treaty of Nanking gave birth to the system of unilateral extraterritoriality.

Before 1842 there existed a form of quasi-extraterritoriality between China and Russia, but it was reciprocal in character and was the result of a voluntary agreement. In 1889, to facilitate the maintenance of peace along their common frontier, the two countries concluded the Treaty of Nerchinsk by which fugitive criminals as well as other alien offenders found in the frontier regions were to be handed over to their own officers and punished by them. This system was confirmed by subsequent treaties of 1727 and 1851, and remained in force until the second Opium War, when Russia obtained from China the same rights as had been acquired by Great Britain, the United States of America, and France.

Similarly, as late as 1871, the first Sino-Japanese treaty provided that a national of one country charged with a crime in the other was to be tried before his consul and the territorial official sitting together, and according to the law of the country of the accused. Civil cases, on the other hand, were to be judged by the territorial official according to the law of the country in which the cases arose. This arrangement on the basis of reciprocity and equality was terminated by the Treaty of 1895 after the Sino-Japanese War, when China was defeated, and a unilateral extraterritoriality was conceded to Japan.

88. See Keeton, op. cit., I, pp. 88-95.
89. See Morse, op. cit., III, p. 36.
90. See below, Ch. VII, Sec. D.
D. The Principle of Equality and the Admission of China into the Family of Nations

The conclusion of the Treaty of Nanking brought an end to the concept of the "Celestial Empire". In the text of the treaty both China and Britain were styled "Great". The sovereigns of the two states were given places of equal dignity. The plenipotentiaries to the treaty affixed their signatures, the British first on the English text, and the Chinese first on the Chinese text. The high officers of the two states were to communicate on terms of equality. These provisions were embodied in the subsequent treaties concluded by China with the United States and France.91

The formal establishment of diplomatic relations between China and foreign states was recognized in the treaties of 1853 and 1860. Foreign envoys accredited to the Chinese court were not to be called upon to perform any ceremony derogatory to the dignity of their states. On their part the envoys were expected to pay due respect to the Chinese emperor. In Chinese official documents foreigners were not to be styled "yi" or barbarians.92

With the establishment of the principle of equality, it became incompatible for foreign affairs to be handled by the Department of Dependendencies. Consequently a new department was instituted. The short-lived "Soothing Office" (Fu Chu) was soon replaced in 1860 by the Tsungli Yamen or Foreign Office. In 1901 it was transformed into the Ministry of Foreign Affairs

91. See Morse, op.cit., I, pp.309-10.
92. See ibid., pp.561-2.
(Waiwu Pu), which, following the example of the United States of America, took precedence over the other ministries of state. Much of its organization has been retained by the Republic.

While China regarded the acceptance of the principle of equality as a concession on her part, the European states, on the other hand, were inclined to treat China as inferior to themselves. In fact, they considered themselves to be the charter members of the community of nations, which evolved out of the Peace of Westphalia, and whose membership was extended by their consent first to Russia and other European states and, since the nineteenth century, to the non-Christian states and states outside Europe, such as Turkey, Japan, and China.

Down to the end of the last century, certain Western publicists held to the doctrine of European consent and hesitated to accept China's full membership in the family of nations. Thus Hall, the English jurist, wrote in 1884:

Tacitly, and by inference from a series of acts, states in the position of China may in the long run be brought within the realm of law; but it would be unfair and impossible to assume, inferentially, acceptance of law as a whole from isolated acts or even from frequently repeated acts of a certain kind.

This doctrine, however, was condemned by other Western writers. Professor Philip M. Brown, an American publicist, said:

The idea that states like China and Japan are to be admitted to the privileges of international law only on the express consent of the nations of Europe is not only false, but ironical, when one recalls how cynically disreguardful of the basic principles of international law the European powers have been. It would seem ludicrous to assert that states do not exist and are subject to no rights under international law simply because they have not been recognized, and, as it were, given proper social standing. Nothing could be more unjust as well as arrogant than the claim that nations possessing European civilization were the sole arbitors of the rights and obligations of other nations under international law.
China's position as an independent state was rendered precarious by the Sino-Japanese War, by the scramble for concessions, and by the Boxer Uprising, all of which occurred during the closing years of the nineteenth century. For a time it looked as if the partition of the empire was impending. The tide receded only after the inauguration of the Open Door policy. Beginning formally with the Hay Note of September 6, 1899, which prohibited the collection by any foreign power of the Chinese customs revenues and which accorded to all foreign nations equality of treatment in tariff and harbor charges in China, the policy took a more definite shape in the Hay Circular of July 3, 1900, which, among other things, sought to "preserve Chinese territorial and administrative entity." 97

The Open Door policy marked a new era of good will and friendship. In 1902, by the MacKay Treaty, Great Britain expressed her willingness to relinquish her extraterritorial rights in China when Chinese judicial reform should prove satisfactory. 98


96. Quoted in M.T.Z. Tyau, China's New Constitution and International Problems, Shanghai, 1918, p.189.

97. For details see Willoughby, Foreign Rights, I, Ch.IV.

same promise was given by Japan, the United States, and Sweden.99 Thereafter China was regularly invited by the Western powers to participate in matters of international co-operation. She became a signatory to many international agreements, including the Hague Conventions of 1899 and 1907 and the Geneva Convention of 1906; and she adhered to the Universal Postal Convention and other international treaties.100 By the beginning of the twentieth century, China was accepted as a full member of the international circle.

At the outbreak of the World War, China took the course of neutrality. But she was not free to maintain the position. Not only was her neutrality violated by the Japanese occupation of Shantung, but Japan also served upon her the famous Twenty-One Demands which were calculated to reduce her virtually to the status of a Japanese protectorate.101 The notorious Group V of the demands, although not included in the final Treaties and Notes of 1915, was reserved for further negotiation. With a view to recovering her rights, China participated in the war on the side of the Allied and Associated powers.102

As far as China's hopes were concerned, the Paris Peace Conference was a complete failure. The Allied Powers, having committed themselves secretly to Japan, were unwilling to accede to China's demands. The Chinese question remained as it was

102. See T. F. Millard, *Democracy and the Eastern Question*, N.Y, 1912, (henceafter cited as Millard,
until the Washington Conference of 1921-1922.

The Washington Conference brought new light to the position of China. Of political significance were the formal abandonment by Japan of Group V of the Twenty-One Demands, and the renunciation by the nine powers of their claims to "spheres of interest" and "special interests" in China. In administration, the German concession of Kiaochow which had been occupied by Japan during the War, and the control of the Chinese postal service, were restored to China. Most important of all, China's status as an independent state received a formal and explicit definition. In the Nine Power Treaty the Open Door policy was clearly established and the powers engaged "to respect the sovereignty, the independence and the territorial and administrative integrity of China" and "to provide the fullest and most unembarrassed opportunity to China to develop and maintain for herself an effective and stable government".103

The improvement of China's international status may be seen in her relations with the League of Nations, of which she became a member in 1919. In 1921, 1926, 1931 and 1936 she was elected to the League Council as non-permanent member, and she has participated regularly in a number of international conferences and in other forms of co-operation.104 Had it not been for the Japanese invasion since 1931, China's position as a member of the international community would have been steadily improved.


104. See below, Ch. IV.
CHAPTER II

THE SCIENCE OF INTERNATIONAL LAW IN CHINA

The rise of many virtually independent princedoms during the Ch'ung Ch'iu period was accompanied by the development of certain fundamental precepts and theories of international conduct. However, no formal treatise on international law comparable to the De Jure Belli ac Pacis of Grotius or the Le Droit des Gens of Vattel in the West, has come down to posterity. Whether such writings existed in ancient China and whether they might not have perished in the "conflagration of the books" during the reign of Ts'in Shih Huangti (221-210 B.C.), is a problem awaiting historical research. Nevertheless, expositions on subjects of international law are found in the literature of the time. In that "Golden Age of Chinese philosophy"¹, many rules of international law were laid down by philosophers and scholars.

At the outset, it should be noted that the philosophers of the age occupied a place of influence and importance in the affairs of the state unparalleled elsewhere. Unlike many thinkers of the West, the Chinese philosophers found little interest in pure speculation. They were essentially practical in that they focussed their attention upon the art of social adjustment rather than upon inquiry into the origin of man and society. Their opinions were not only sought but frequently followed by the statesmen and princes of the time. Moreover, government service was regarded as

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¹ For a study of their political philosophy see K.C. Wu, Ancient Chinese Political Theories, Shanghai, 1929.
a natural and proper function of the scholar. Confucius, Mencius, Mozi and most other philosophers at one time or another held high public offices, which served as a direct channel for the actual practice of their philosophy. The result, as a Western scholar remarks, was that "the gap between theory and practice in public affairs was not likely to be so great in Ancient China as has usually been true in the Western world." The views of the principal philosophers of the age, in so far as they have a bearing on international law, may now be examined.

A. The Mysticist School

1. Laotze (604 B.C. to ?)

The philosophy of Laotze, founder of Chinese mysticism, represented the result of a direct reaction against the international strife and chaotic conditions of the later Ch'un Ch'iu period. Its primary aim was to end social disorder and human sufferings. To achieve this purpose Laotze advocated a return to nature, to "do nothing". The key to his philosophy is to be found in the word "tao", or "the Way", of which he said:

There is a thing made of the undefined, born before Heaven and Earth, still, solitary, alone, unchangeable, all reaching and everlasting. It may be regarded as the mother of all things. I do not know its name, and I call it "Tao". Arbitrarily I call it "the Great"....

Man takes his law from the Earth, the Earth from Heaven, Heaven from Tao, and Tao follows Nature.

2. See their biographies in Siu, op.cit.,


4. Laotze, tao teh king (The Way and Virtue), Sec.25.

Except otherwise stated, the quotations in this chapter are based on the translations of James Legge, The Chinese Classics, 7 vol., 2nd ed., Oxford, 1883, with modifications whenever, in the opinion of the writer, the Chinese text seems to require such.
International Disorder

Laotze traced the sources of international chaos to the selfish ambitions of the princes of his time. The only remedy, as he saw it, was to refrain from strife and instead to follow the way of nature.\(^5\)

Tao in its regular course does nothing and thereby leaves nothing undone. If kings and princes were to maintain it, all things would themselves be transformed by them.... Be at rest and free from ambition, and the world will of its own accord attain peace.

To restore international order, the states should treat one another with friendship and mutual respect. Such a principle consisted of "Three Precious Rules":\(^6\)

The first is charity; the second, simplicity; and the third, shrinking from taking precedence of others. Charity leads to chivalry. Simplicity breeds magnanimity. Shrinking from taking precedence of others brings the highest honor.

Internationalism

To ensure the establishment of permanent peace, Laotze turned to internationalism. He anticipated Plato's conception of the Philosopher King, and he took a step further in aspiring after a world government impartial to all. Laotze said: \(^7\)

The sage-king has no invariable ideas of his own. He accepts the ideas of the peoples. In order to sanctify virtue, he extends virtue to those that are good to him as well as those that are hostile. In order to sanctify sincerity, he is sincere to those that are faithful to him as well as those that are not. He seeks attentively after the ideas of the whole world, and treats all peoples as his children.

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5. Sec.37.
6. Sec.67.
7. Sec.49
War

Internationalism being Laotze's doctrine, it is only natural that he should condemn war as a national policy. He commented: 8

He who assisted [in the capacity of minister] a lord of men in accordance with Tao will not assert mastery over other nations by force of arms. Such a course will surely meet its proper returns. Wherever an army is stationed, briars and thorns spring up. In the sequence of great armies there are sure to be bad years [of famine and pestilence].

Again: 9

Arms, however splendid in glamor, are instruments of evil omen, hateful, it may be said, to all creatures. Therefore they who embrace Tao do not like to employ arms.

Force was resorted to only in times of utmost necessity. Even then the means of warfare should not exceed its purpose. Laotze declared:

The righteous strikes a decisive blow, and stops. He does not continue his operations in order to assert and complete his mastery.... He strikes it as a matter of necessity, and not from a wish for mastery. 10

Weapons of warfare are instruments of evil omen, and not the instruments of the superior man: he uses them only under the compulsion of necessity.

Laotze then went on to explain why according to the Chinese rites of ceremony the commander-in-chief of the army was given the seat of the mourner. "He who has killed multitudes of men should weep for them with the bitterest grief." 11

Upon the termination of war, Laotze appealed to the generosity of the victor for the sake of permanent peace: 12

8. Sec. 30
9. Sec. 31.
10. Sec. 30
11. Sec. 31.
12. Sec. 79.
When a reconciliation is effected after a great bitterness, there is sure to be a grudge remaining. How can this be repaired? To guard against the grudge, the sage keeps in his hand the tally of the record of the terms of peace, but does not insist on their speedy fulfilment by the other party. He who has the tribute of Tao regards the conditions of the engagement, while he who has not that tribute regards only the conditions favorable to himself.

The Way of Heaven knows no partiality; it is always on the side of the good.

The small state, on the other hand, should also contribute its share in bringing about international peace. Its life should be one of simplicity and contentment. In its endeavors to avoid war, it should, if circumstances required, pursue a policy of isolation, even at the expense of its economic enjoyment. Laotze said:

In a small state with a small population, even if there should be arms by the tens and hundreds, there should be no employment of them. Even when people shun death, they should not move to other countries just to avoid it.

Though they had boats and carriages, they should have no occasion to ride in them; though they had buff coats and sharp weapons, they should have no occasion to don or use them.

If necessary, the people should return to the use of knotted cords (instead of written characters). They should think their [coarse] food sweet, their [plain] clothes beautiful, their [poor] dwellings places of rest, and their common [simple] ways sources of enjoyment.

If there should be a neighboring state within sight so close that the voices of fowls and dogs could be heard, the people, even to old age and death, should not have any intercourse with it.

By living in simplicity and contentment, a people would not cherish the desire for conquest and glory which were the disturbing elements of peace in the world.

2. Chuangtze (335–257? B.C.)

13. Sec. 80.
Chuangtze, the greatest disciple of Laotze, followed up the philosophy of "Tao" and advocated a return to nature not only in action but in knowledge as well. Since, according to Laotze, by nothing there was left nothing undone, therefore, reasoned Chuangtze, only by knowing nothing could everything be known. This could be attained when prejudice and egoism were abandoned and things examined not from any particular angle but from all possible sides. In men's search for knowledge, nature was the only guide.  

**Intervention and the Equality of States**

Chuangtze was distressed by the prevalence of Machiavellian diplomacy among the nations in his days. He saw in each nation a value and a quality of its own. No one state should regard itself as superior to another either in strength or in virtue. Consequently Chuangtze denied the existence of a right of intervention in international relations. In the parables of "The Rulers of the Three Oceans" and "The State of Nature and the Sage Man" he expounded his belief that a nation could best promote its own welfare when free from foreign interference. Civilization could not be beneficially imposed by one people upon another. Interference with the affairs of another state, however sincere and well-meaning the motive, would only result in disorder and increase the suffering of mankind.

**International Trade and Isolation**

14. For an exposition of Chuangtze's political theories see Wu, *op.cit.*, Ch.V.


17. *Ibid.*, Ch.IX, Sec.2.
Chuangtze recognized the advantage of international trade. Division of labor enabled the best use of skill and resources. However, if the promotion of international trade should breed discontent, ambition and strife, then Chuangtze would rather advocate isolation as a national policy. Like Lao-tze he believed that competition and jealousy were the fundamental causes of war and should be removed at any cost. Only in peace could human beings attain happiness, though their living be crude and simple. In short, Chuangtze fully endorsed his master's idea of the small state.

B. The Motian School

Moti (500?-425? B.C.)

The Taoist concepts of equality of states, mutual respect, and war were shared by the Motian school. The latter, however, differed in its way of approach to the subject. Moti, or Motze, the founder of the school, considered the mystic return to nature an impossibility. He and his followers believed that man-made law was indispensable in any well-ordered state, although in its actual administration law should be regulated with justice and tempered with love.

The State

Moti dismissed the Taoist idea of the natural state as nonexistent. He anticipated Thomas Hobbes' conception of solitariness, confusion and selfishness in the pre-government era.

18. Ibid., Ch.I, Sec.7.
19. See Ibid., Ch.X, Sec.3,4.

20. The Works of Moti, Ch.XI. Quotations in this section are based upon the translations of K.C. Wu, in his work, op.cit., Ch.IX.
In ancient times, when human beings had just been created and when neither law nor government was established, every man had a different principle of conduct. ... As men became more numerous, so the more numerous became the principles. As every man considered his principle right and those of others wrong, so men wronged one another.... There was dislike and hatred, separation and dispersion.... There was great confusion in the world, and men were like beasts.

To relieve men of such misery, God ordained and created the state and government, whose function was to serve the well-being of mankind. 21

In ancient times God and the Spirits founded states and cities and erected chiefs and judges, not because they desired to elevate them to... indulgent positions of honor and wealth, but because they wanted them to establish what is beneficial to the millions of people, to do away with what is pernicious to them, to ennoble the humble, to enrich the poor, and to restore peace and order to states in danger and confusion.

The states being created by God, it was necessary that they observe the law of God in their relations—love and justice. When love and justice prevailed, international strife would end and peace established. "If all peoples under heaven practise the principle and love others as they love themselves..., there can be neither feud among families nor war among states." 22

To those who criticized the doctrine as idealistic and impracticable, Moti replied: 23

He who loves others will be loved by others. He who benefits others will be benefited by others. He who hates others will be hated by others. He who harms others will be harmed by others. What is difficult in the theory? The only impediment in its realization is not in the theory itself, but in that the sovereigns have not employed it as a principle of government....

21. The Works of Moti, Ch.XII.
22. Ibid., Ch.XV.
23. Ibid.,
War and Sanctions

Like Taoism, Moti's philosophy led to the condemnation of war, particularly war of aggression. Killing was a direct affront to the concepts of justice and love. If individuals were forbidden to steal and murder, the same standard should be applied in international relations. War was a crime against God, who ordained the creation of men. Moreover, from a materialistic point of view, war was extremely wasteful and destructive. It disrupted the peaceful pursuit of the people and the economy of the nations, only to breed more war and therefore misery for the victor and the victim alike. 24

Moti did not stop at mere denunciation of war. He advocated sanctions against it. He conceived of two kinds of sanctions. The first was chastisement from God himself, as was proved by history of the fate that befell the nations which resorted to war as their policy. The second sanction was more constructive. A state, to be truly great, should curb aggression in international relations by extending economic as well as material help to the victim nation. Although Moti did not formulate a definite program of collective responsibility, his doctrine clearly implied international sanctions against aggression. 25

24. See ibid., Chs. XVII-XIX.
25. For further discussion see Siu, op.cit., pp.92-4.
C. The Classical School

1. Confucius (552-479 B.C.)

Confucius, founder of the Classical School and China's greatest teacher, centered his philosophy on the activities of men. He aimed not only at the exposition of his principles but at their immediate practice by the people of his time. The system of international law as expounded by him was essentially practical in character. World order could be maintained only by the positive action of men. Law was distinguished from religion. Compared to the mysticism of Laotze and the idealism of Moti, Confucius may be said to have adopted a more legalistic attitude toward the conduct of international relations.

Human Relations and the State

Like many of his contemporary philosophers, Confucius conceived of a utopian world as the highest form of government, of "the Age of Great Universality", in which "the whole world is bent upon a common good."26 Confucius realized, however, that such a standard was beyond the reach of his time. In this respect he differed from the Taoists and the Motian school. Whereas they persisted in advocating universality, he gave way to practical considerations and concentrated his attention upon the intermediary state, "the period of Small Cheer"27 in which men still retained their selfish desires.

26. Li Kí (The Book of Rites), Bk.VII, Sec.1, Par.ii.
27. Ibid., Par.iii.
The state required the attention of men not as an end in itself but as one of the steps in the hierarchy of human relations which linked world peace to human happiness. Said Confucius in *The Great Learning*: 28

The ancients who wished to illustrate virtue throughout the world first ordered well their states. Wishing to order well their states, they first regulated their families. Wishing to regulate their families, they first cultivated their persons [themselves individually]. Wishing to cultivate their persons, they first rectified their hearts.

Their hearts being rectified, their persons were cultivated. Their persons being cultivated, their families were regulated. Their families being regulated, their states were well governed. Their states being rightly governed, the whole world was made tranquil and happy.

Since the state was but a part of the whole of human relations, its government should be subject to the same rules that regulated other human relations: namely, mutual respect and good faith. 29 In order to promote international friendship and good will, Confucius encouraged court visits and international conferences, which were to be conducted according to the established rules of the time. Aliens residing within the territorial domain of a state were to be given due protection and treated with cordiality. They should enjoy the same right to earn their living as the citizens. 30

Confucius regarded uncivilized tribes as on a footing different from the established nations. 31 The former, being inferior in culture and morality, could neither exercise the rights nor

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29. See *Analects*, Bk.I, Ch.5.

30. See *The Doctrine of the Means*, Ch.20, Sec.12-3.

31. See *Analects*, Bk.III, Ch.5.
fulfil the duties of a civilized state. However, it did not follow that the inferior tribes were to be subject to exploitation by the civilized states. On the contrary, the civilized states should foster them in order to better their welfare and to lead them toward higher virtues. 32

Pending the establishment of a world state, Confucius advocated the co-operation of the nations in the establishment of international peace and prosperity. Anticipating the ideals of the Holy Alliance in Europe after the Napoleonic era, Confucius said: 33

To restore the ruling house whose line of succession has been broken, and to revive states that have been extinguished; to reduce to order the states that are in confusion and support those which are in peril; to have fixed time for the official reception of their envoys, and to send them off with liberal treatment and welcome their coming with small contributions — this is the way to cherish the princes of the states.

War

Confucius condemned all wars of aggression. When he spoke of preparing the people for "war", he did not mean military training so much as instructing them in the duties of life and citizenship. Impliedly it may be said that Confucius justified defensive war. 34 But in general he abhorred the use of force. When Marquis Ling of Wei asked him about military affairs, Confucius was offended at the question and replied that he had not acquired any knowledge on the subject. 35 Instead, he turned to

33. The Doctrine of the Means, Ch.20, Sec.14; See also Li Ki, Bk.XXVIII, Sec.2, Par.xiii-xv.
34. See Analect, Bk.XIII, Chs.29-30.
35. See ibid., Bk.XV, Ch.1.
speak about Kuan Chung, the great minister of Ts'i, and lauded him for his diplomacy of peace. Confucius remarked, "Marquis Huan [of Ts'i] for nine times assembled the concert of princes without the presence of any weapons of war. It was all through the influence of Kuan Chung. Whose beneficence was like his?" Confucius attributed to Kuan Chung the development of China's civilization, which would have been impossible were the states to engage in war instead of submitting to the proposals of Kuan Chung.37

3. Mencius (372–289 B.C.)

Confucius's teaching found its most able advocate in Mencius, the "second sage" of China. Like his master, Mencius centered his philosophy on man's happiness through benevolence and righteousness. In personal as well as social and international relations, he taught, all ends and purposes were justified and determined by the standard of human welfare. According to Mencius, human nature was fundamentally bent toward virtue. A sage was not to be considered as an exception, but as a typical example of what man should and could be. Mencius acknowledged the existence of evil, but attributed it to external influences. Material necessity might compel a man to turn to evil and "perverse doctrines" which pseudo-scholars produced to confuse the understanding of men. Mencius believed that these influences were not inborn in men and could be removed by proper education.38

36. Ibid., Bk.XVI, Ch.17.
37. See ibid., Ch.18.
Rights of the People

In an era of feudalism, when public law was not distinguished from private law, Mencius came out boldly and asserted the rights of the people. He said, "The most important element in a nation is the people; next, the ruling house; the sovereign is the least." 39

In the opinion of Mencius, the function of a benevolent government comprised, on the one hand, the administration of an enlightened law to enable the people to pursue their proper employment, and, on the other, the education of the people towards filial piety, fraternity, respectfulness, sincerity and truthfulness. 40 Moreover, before world peace could be achieved, benevolence had to be extended to all nations. 41

Intervention

Having placed the welfare of human beings as the end of government, Mencius justified the intervention by one state in the affairs of another under certain conditions. In the first place, it should be preceded by the existence of unusual disorder or oppression in the state which was to be the object of intervention. Secondly, the intervention should be in accordance with the desire of the citizen of that state. Thirdly, the intervening power should have no other motive than reviving peace and prosperity for the suffering people and punishing those responsible for the misgovernment. Lastly, there should be no molestation of or exactions imposed upon the innocent. In short,

40. See ibid., Bk.I, Pt.1, Ch.5.
41. See ibid., Bk.IV, Pt.1, Ch.3.
intervention was not a right so much as a humanitarian duty. 42

Intervention in violation of the above rules was condemned by Mencius. Rebuking King 43 Hsuan of Ts'ı, Mencius said: 44

Now the ruler of Yen was tyrannizing over his people and your Majesty went and punished him. The people supposed that you were going to deliver them out of the water and the fire, and with baskets of rice and vessels of congee they met your Majesty's host. But you have slain their fathers and elder brothers, and put their sons and younger brothers in chains.... How could such a course be pursued? ... When... you do not exercise a benevolent government, this puts the arms of the kingdom of Yen in motion against you.

War and International Co-operation

In his ethics of benevolence Mencius required the states to respect each other's territorial integrity. He outlawed the forceful acquisition by one state of another's territory, 45 and denounced all wars of valor and propensity to warfare. He declared: 46

The most benevolent has no enemy in the world. If a prince of the most benevolent was engaged against another of the most unbenevolent, how could the blood of the people have flowed till it floated the pestles of the mortars? [The fact that there was such resistance proved the benevolent to be fraudulent.]

There are men who say, "I am skillful at marshalling troops. I am skillful at conducting a battle."--- They are the great criminals!

Mencius shared the Confucian ideal of the world state. As long as individual nations existed, however, he extolled political and economic co-operation among them to better the well-being of mankind. He cited the example of the Treaty of K'wei

42. See ibid., Bk.I, Pt.ii, Ch.10.
43. During the period of the "Warring States" most of the feudal princes assumed the title of King.
44. The Works of Mencius, Bk.I, Pt.ii, Ch.3, Sec.3.
45. See ibid., Bk.VI, Pt.ii, Ch.8.
Ch'iu by which the contracting powers settled the line of succession of their ruling houses, promised good treatment to aliens residing on their territory, and guaranteed free import and export of foodstuff in international trade. 47

Equality of States

Mencius differentiated the legal equality of states from their ethical inequality. Legally, all states were equal and one should not dominate another by reason of its sheer physical strength: "When the Way [of Confucius's Great Universality] does not prevail in the world, small powers are rendered submissive to the great and the weak to the strong." 48 But the true greatness of a nation was determined by its righteousness and benevolence. Here a great power contemplated not its advantages but its duty toward world order. In fact, the principle of benevolence would require the strong country to serve the weak, as exemplified by King T'ang serving Kuo and by King Wen serving the K'un barbarians. For a weak power to serve the strong was but a matter of fear and expediency, not of virtue. 49

D. Modern publicists

With the unification of the Chinese empire after the Ch'un Ch'iu period and the virtual isolation of China from other civilized nations for the next two thousand years, international law ceased to develop in the Oriental world. It was not until

46. Ibid., Bk. VII, Pt. ii, Chs. 3-4.
47. Ibid., Bk. VI, Pt. ii, Ch. 7.
48. Ibid., Bk. IV, Pt. i, Ch. 7.
49. See ibid., Bk. I, Pt. ii, Ch. 3.
contact with the West and the decline of the "Celestial Empire," that inquiry into the subject of international law attracted the attention of Chinese scholars and statesmen. In the beginning of that epoch an attitude of mutual suspicion existed between the East and the West. While many European publicists and statesmen denied the applicability of international law to the Eastern world on terms of equality, the Chinese, in view of the conduct of the Western nations toward China, were equally skeptical of the existence of international law in the Occident.50

For the bridging of that gap of misunderstanding, the efforts of Dr. W.A.P. Martin need be acknowledged. As professor of international law of the Imperial T'ung Wen College in Peking in 1862 and also its president in 186951, Dr. Martin supervised the translations into Chinese of Wheaton's Elements of International Law, De Marten's Guide Diplomatique, Woolsey's Elements of International Law, Blumchli's Völkerrecht, and a manual of the laws of war compiled by the European Institute of International Law.52 In the meantime, in order to reveal to the West the existence of international law in the Orient, Dr. Martin prepared an article which he presented in Berlin in 1881 as Traces of International Law in Ancient China. It was later revised and re-entitled "International Law in Ancient China", and was published in New York, Shanghai, and London.53

51. See Martin, ibid., p.294.
52. See ibid., pp.231, 233-5.
53. Included in his Hanlin Papers and The Lore of Cathay, see above, Ch.I, note 4.
Following Martin's example, Ting Wei-liang, a Chinese scholar, wrote *chung kuo ku shih kuo chi kung fa* (Public International Law in Ancient China) in 1884, which was reprinted in *hsi cheng ts'ung shu* (Compendium on Western Politics) in 1897. A comparative study of the international law of the East and the West was undertaken by Lan Kuang-ts'e, whose *ch'un ch'i'iu kung fa pi yi fa wei* (A Comparative Study of the Ch'un Ch'i'iu and Modern International Law) was published in six volumes in 1901.54

In recent years the field of international law in ancient China has been exploited by a number of publicists. Chang Hsien-cheng's *ch'un ch'i'iu kuo chi kung fa* (English sub-title: International Law in Ancient Orient) was published in 1924. Professor Siu Tchoan Pao (Hsū Ch'uan-pao) completed *Le Droit des Gens et la Chine Antique* (Tome I, "L'idée") in 1929, which was followed by his *hsien ts'in kuo chi kung fa chi yi chi* (Traces of International Law in Ancient China: Cases) in 1931. A smaller volume on the same subject is found in Professor Ch'en Ku-yuan's *chung kuo kuo chi fa so yuan* (Traces of International Law in China), published in 1934.55

As a general treatise on modern international law Professor Chou Keng-sheng's *kuo chi fa* (International Law), prepared in 1924,56 serves as a college text book. Similar in content is Mr. Li Sheng-wu's *kuo chi kung fa* (International Public Law),

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CHAPTER III

Legal Aspects of Japanese Pronouncements in Relation to China's Statehood

In the course of the last century, China was forced to give up the conception of herself as a super-state in favor of the principle of equality. For a time she even sank into a state of subjection, but finally regained the position of a sovereign state and was admitted into the family of nations with full membership. This position has since appeared to be accepted by the world community. In recent years, however, Japan has repeatedly challenged not only the political but also the legal aspects of China's statehood.

It is of importance to an understanding of the legal status of China to analyze this challenge, and along with it the reaction of the family of nations as expressed through the League of Nations and the United States of America.

In February, 1932, while the Sino-Japanese dispute over Manchuria was being referred from the Council to the Assembly of the League of Nations, the Japanese government suddenly took upon itself the competence to pass decision upon the status of China. In a letter of February 23rd, addressed to the President of the Council, Japan made the declaration that "the Japanese Government do not and cannot consider that China is an 'organized people' within the meaning of the League of Nations Covenant"; that, "affictions cannot last forever, nor can they be tolerated when they become grave.

56. Chung Hua Book Store, Shanghai, 1924.


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1 See above, Ch. I, Sec. D.
CHAPTER III

MEMBERSHIP IN THE COMMUNITY OF NATIONS

A. Legal Aspects of Japanese Pronouncements in Relation to China's Statehood

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¹. See above, Ch. I, Sec. D.
it might be possible to go on indefinitely respecting the fiction that the region is occupied by an organized people," but that since Japan has "enormous interests" there, it follows that "this anomalous state of things cannot but profoundly modify the application to Chinese affairs of the Covenant of the League."  

Such extraordinary encroachment upon the right of the community of nations of passing upon its membership not only aroused bitter resentment in China, but it was assailed immediately by the United States and by the entire League through its Assembly. In the famous open letter to Senator Borah bearing the same date as the Japanese declaration, Secretary of State Stimson recalled the development of the Open Door Policy. He reaffirmed the intention of the United States to rest its policy towards China "upon an abiding faith in the future of the people of China and upon the ultimate success in dealing with them of the principles of fair play, patience and mutual good-will." Furthermore, he intimated that the modification of the Nine Power Treaty might involve modifications of the disarmament and non-fortification agreements in the Pacific, and he encouraged international co-operation to frustrate Japanese ambitions that were in violation of treaty obligations. 

That the legal status of a nation cannot be dependent upon the judgment of individual members in the family of nations

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4. Ibid., pp. 249-53.
was unanimously recognized by the League Assembly in its special session of 1932. The opening clause of the Resolution of March 11th repudiated the contention that China was not an "organized people" and was therefore not entitled to the protection of the League Covenant. In concert with the United States the Assembly put forth the thesis that rights cannot be established by violation of existing treaty obligations, and it accepted for the whole League the obligation that "no infringement of territorial integrity and no change in the political independence of any member of the League brought about in disregard of Article 10 of the Covenant ought to be recognized as valid and effectual by members of the League of Nations." 5

The seriousness of the implications of Japan's declaration was fully apprehended by the League. The Lytton Commission was given the mandate to study not merely the Manchuria issue but Sino-Japanese relations as a whole. The first question taken up in the report of the Commission was that of China's status. Referring to "an argument which constantly reappears in the polemics of the present policy... that China is 'not an organized state', or, 'is in a condition of complete chaos and incredible anarchy,' and that her present conditions should disqualify her from membership of the League of Nations and deprive her of protective clauses of the Covenant," the report said, "In this connection, it may be useful to remember that an altogether different attitude was taken at the time of the Washing-

5. Ibid., pp. 299-301.
ton Conference by all participating Powers. 6 Without attempt-
ing to minimize the political, social and economic unrest in
China, the finding of facts led the Commission to conclude that
conditions in China in 1931-1932 were better than they had been
at the time of the Washington Conference. In the opinion of
the Commission, China's outlook was a hopeful one, if it were
not checked by foreign aggression; and the fact had been ap-
preciated by the League of Nations, including Japan, in the
election of China to the League Council prior to the Manchuria
issue in 1931. 7

Notwithstanding united world opinion, the Japanese govern-
ment continued to assume for itself the right to define the
nature of China's statehood. It went so far as to assert that
China had no right to deal freely with third states without
the consent of Japan, even in commercial and financial matters.
On April 17, 1934, the "unofficial spokesman" of the Japanese
Foreign Office issued a public statement, which declared that,
"Owing to the special position of Japan in her relation with
China, her view and attitude respecting matters that concern
China may not agree at every point with those of foreign nations,
but it must be realized that Japan is called upon to exert the
utmost effort in carrying out her mission to fulfilling her
special responsibilities in Eastern Asia." Denying China the
right to resist Japan, the statement went on to say that Japan

October 1, 1932, Geneva, 1932, p. 17.
7. See ibid., Ch. 1.
would oppose "any joint operations undertaken by foreign powers (with China), even in the name of technical and financial assistance," such as "the supplying to China of war planes, the building of airdromes in China, and the detailing of military instructors and advisers to China, or the contracting of a loan to provide funds for political uses."  

The statement was amplified by the Japanese Ambassador to the United States. On the ground that "the Japanese Government knows China better than any other nation in the world," he asserted that "Japan must act and decide alone what is good for China." Consequently Japan demanded "to be consulted before any important transactions between the Chinese Government and foreign interests are concluded." 

The legal aspects of such pronouncements have been fully analyzed by neutral statesmen and publicists. According to Professor G. C. Hyde:

If it be contended that the opposing of a barrier against the commission of most of the acts referred to in Mr. Amagur's statement does not constitute interference with that freedom from external control which is asserted and enjoyed by the most favored nations fairly to be regarded as possessed of independent statehood, the facts of international life afford a complete answer. The states that constitute that group, such as Japan herself, do not brook such external interference. Moreover, when any member of that group, through any process, yields to any other the right to restrict its freedom not to have recourse to such conduct, it necessarily, as a matter of fact, ceases to resemble the states constituting the most favored nation group, and accepts thereafter a lesser position.

Mr. William R. Castle, Jr., former Under Secretary of State, said:

The policy as enunciated would certainly seem to make China a vassal state to Japan, to close the door on foreign trade in China, to be a flat repudiation of the Nine Power Treaty of 1922, and, indeed, of all the treaties concerning China.

The position assumed by Japan in disregard of international law, needless to say, was not accepted by the victim state. The Chinese government reminded Japan that "no state has the right to claim the exclusive responsibility for maintaining international peace in any designated part of the world." It pointed out that as a member of the League of Nations China felt it her duty to promote international co-operation and achieve international peace and security; that China never harbored any intention of injuring the interests of any country, and that "China's relations with other nations in this regard have always been of such a nature as would characterize the relations between independent sovereign states."  

The Japanese position proved equally unacceptable to the other powers. Great Britain directed her ambassador at Tokyo to inform the Japanese government that the latter's policies as indicated in its statement contradicted the Open Door Policy and the Nine Power Treaty. After being assured by the Japanese government that it would observe treaty obligations, the

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British Foreign Secretary reported the matter to the House of Commons on April 30th and declared that the British government resolved to assist China in her progress. 13

On April 30th the American Department of State issued a statement to the public. 14 Concerning the Nine Power Treaty and the Paris Peace Pact, it said:

The relations of the United States with China are governed, as are our relations with Japan and other countries, by the generally accepted principles of international law, and the provisions of treaties to which the United States is a party...

The treaties are lawfully modifiable or terminable only by the processes prescribed and recognized or agreed upon by the parties to them.

As to the Japanese claims and assumptions, the statement declared:

Recent indications of the attitude on the part of the Japanese Government regarding the interests of Japan and other countries in China, and in connection with China, come from sources so authoritative as to preclude their being ignored...

In the opinion of the American people and the American Government, no nation can, without the assent of the other nations concerned, rightfully endeavor to make conclusive its will in situations in which are involved the rights, obligations and legitimate interests of other sovereign states.

France, in the communication of May 3rd, also emphasized the rights and obligations under general principles of international law as well as specific agreements. 15

The Italian government, through its official press, declared that Italy "feels the necessity of saying with frankness, that

15. Ibid., pp. 70-71.
a policy of monopolizing China would be dangerous;" and intimated that the colonizing spirit of the nineteenth century and the idea of "Pax Nipponica" should give place to a spirit of collaboration calculated to raise China to her proper rank as an independent state. 16

Down to the end of the nineteenth century, the Chinese empire embraced many dependent states within its suzerainty. As a rule they administered their own affairs with a high degree of autonomy, but recognized the overlordship of the Chinese court by the acceptance of investiture on the accession of their new rulers and by the dispatch of tribute-bearing missions to Peking at fixed intervals as determined by the suzerain. Thus Liu Chiu sent tribute twice every three years, Siam once every three years, Korea and Annam (Indo-China) once in four years, Nepal and Suju once in five years, and Burma and Laos once in ten years. 19

17. See Fenwick, op. cit., pp. 95-106.
18. See Li Hung-chang, et al. (compiled), Ta ts'ing hui tien, Institutes of the Great Ta'ping Dynasty), 2nd ed., 1886, sections on tributes.
16. Ibid., pp. 72-3.
B. Dependent or "Limited Sovereign" States.

In addition to full sovereign states, international law has recognized a number of states which may claim only limited membership in the community of nations. These dependent or "limited sovereign" states, whether vassals, protectorates, or members of a confederation, enjoy a large degree of autonomy in the government of their internal affairs, but are generally subject to some form of control by another state in respect to their relations with third states. The city of the Vatican, certain of the territories under the mandate of the League of Nations, and members of the British Commonwealth of Nations, are also usually also classified as "limited sovereign" states. 17

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17. See Fenwick, op. cit., pp. 95-106.
18. See Li Hung-chang, etc. (compiled), ta ta'ing hui tien, (Institutes of the Great Ts'ing Dynasty), 2nd ed., 1886, sections on tribute.
1. Korea before 1895.

Korea as a vassal state had the most intimate association with China. Scholars of the Chinese classics have claimed that before the reign of Yao (2357-2285 B. C.) northern Korea had been a part of the nine provinces of China. The peninsula was divided into several kingdoms until the year 936 A. D., when unification was achieved under the leadership of Wang Kien. In the name of the kingdom of Kaoli (Korea) he paid homage to the Emperor; and down to the Sung dynasty (960-1279) Korea enjoyed virtual autonomy in the management of its domestic affairs.

During the Yuan dynasty (1280-1367) the autonomy of Kaoli was seriously curbed by the imperial government. Not only was its king subject to deposition and exile, but his ministers were put directly under the order of the Peking court. By 1321 Kaoli had become more of a Chinese province than a vassal, and the king ruled only as a titular official of the central government.

When Hung Wu- ti ascended the throne as the first emperor of the Ming dynasty (1368-1644), the king of Kaoli willingly applied for investiture. To remind the king of his negligence in government, the emperor sent him books of the classics and history. Instead of practising vigilance, however, the king allowed the country to lapse into disorder and revolt. As a result he was deposed and his throne transferred to the House

of Li. The new ruler was designated by the imperial government in 1392, and the kingdom received the name of Chao-hsien.

Military aid in time of grave danger was a mutual obligation between China and her dependents. In 1592 and 1596, when Korea was confronted with Japanese invasions, China came to her rescue and drove the invaders back to their islands. Likewise at the beginning of the seventeenth century Korea sent troops to defend the empire against the Manchus. The same relations between China and Korea were maintained in the Tsing dynasty.

With the rise of Japan as an independent state the position of Korea became a problem for the Chinese empire. Hitherto Korea had rightly regarded Japan as an equal, since Japan had also accepted Chinese suzerainty since 1402. When, therefore, Meiji employed the term "His Imperial Japanese Majesty" and dispatched a mission to Korea in 1868, the Korean government refused to accept it on the ground that it encroached upon the dignity of their common overlord, the Chinese emperor.

Failing to make any headway, the Japanese turned to China for credentials for a mission to Korea. The Chinese government was willing to recognize the change of circumstances. The Japanese request was granted and a treaty was concluded between Japan and Korea with China's approval. Article I of the treaty declared that "Chao-hsien, being an autonomous state, shall enjoy the rights of equality with Japan." To China and Korea this was the assertion of established facts. But for Japan

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20. See ibid., pp. 25-35.
the failure to mention Chinese suzerainty in the treaty served her motive to encourage Korean independence. 21

The position of Korea became more complicated still, when, through the consent and good offices of China, she entered into treaty relations with the United States in 1882. This time the Chinese government, being mindful of its previous blunder in dealing with Japan, insisted on the insertion of a clause expressly declaring Chinese suzerainty over Korea. But this met with strong opposition of the American State Department. As a compromise, the clause was embodied in a letter from the King of Korea to the President of the United States. Dated May 15, 1882, it read: 22

Cho-sen has been from ancient times a state tributary to China, yet hitherto full sovereignty has been exercised by the Kings of Cho-sen in all matters of internal administration and foreign relations. Cho-sen and the United States, in establishing now by mutual consent a treaty, are dealing with each other upon a basis of equality. The King of Cho-sen distinctly pledges his own sovereign power for the complete enforcement in good faith of all the stipulations of the treaty in accordance with international law.

As regards the various duties which devolve upon Cho-sen as a tributary state to China, with these the United States has no concern whatever.

The anomaly of the status of Korea was further manifested in its establishment of legations abroad. In 1887 the King appointed an "envoy extraordinary and minister plenipotentiary" to the United States. This was opposed by the Imperial Trade Commissioner, and the matter was referred to Peking. The

21. See ibid., pp. 102-111.
imperial government ruled that Korean envoys abroad should assume the rank of minister resident and should function under the supervision of the envoys of the suzerain.

The appointment of the Korean minister as envoy extraordinary, however, had been gazetted. To avoid offending the United States, the Chinese government granted exemption in this particular case, on condition that the Korean envoy should call on the Chinese minister on arrival at the United States, and be presented to the Secretary of State instead of the President. Furthermore, the Chinese minister was to take precedence on state occasions, and to be consulted on matters of importance. The Korean envoy failed to carry out these instructions, and on his return was degraded as demanded by the Chinese government.

The perplexity of the American State Department in the matter was shown in the lengthy correspondence between the Secretary of State and the American minister to China. The latter noted the inconsistency of the recognition of Korea's co-equality with the United States and at the same time of Korea as a dependency of China. He wrote in part:

Vattel discusses, at page 2, the status of dependent states with reference to foreign powers. This discussion furnishes little information applicable to the peculiar relations existing between China and her dependent states. The text has little application to countries which, in their history, antedate international law, of which, also, they never had any knowledge. What unwritten law or tradition controls the relations of China with her dependencies remains unknown.

The Secretary concluded that since it was undesirable to agitate for Korea's complete independence of China, and since the interest of the United States government was not political but merely the observance of treaty obligations, the peculiar relations between China and Korea should not be interfered with. 25

Unlike the United States, however, the ambition of Japan lay far beyond that of commercial expansion. To fulfil her desire she waged the war of 1894-1895 upon China. In the peace treaty of Shimonoseki China's suzerainty over Korea 26 was signed away.

25. Bayard to Denby, Feb. 9, 1888, ibid., p. 255.
2. Annam before 1886.

Annam was another vassal of long standing in the Chinese empire. It constituted a part of the territory of Ling-nan under Chinese jurisdiction in the Ts'in dynasty (255-207 B.C.). In the year 9 A.D. a Chinese criminal colony was established in Cochin-China. On five occasions, the country was annexed to China, the last time being from 1407 to 1427. Otherwise it assumed the status of a vassal state, and loyally received investiture from the Chinese court and sent regular tributes until 1884.27

During the twenty years after 1862 both China and France claimed suzerainty over Annam. In that year France had availed herself of the opportunity afforded her by the Taiping Rebellion, and had forced the Annamese government to agree to the Treaty of Saigon by which Saigon, Pulu Condor, and three provinces in Cochin-China were ceded to France, and a French protectorate was established over Cambodia.

French filibustering bands continued to assault the rest of the country. Meanwhile China recovered from the civil war and dispatched troops to defend her vassal. Although the "Black Flags" succeeded in defeating the French in 1873, they failed to prevent the conclusion of the two treaties of 1874 between France and Annam. In these treaties France recognised the "independence of Annam" and guaranteed French support to Annam against external aggression as well as against internal disturb-

27. See Morse, op. cit., II, pp. 341-342; G. Li, nan-yang hua chiao shih (A History of the Chinese in the South Seas), Shanghai, 1929, pp. 111-4.
ances. China protested against the treaties and reminded France that since ancient times Annam had been a dependency of China. The king of Annam also expressed every desire of retaining Chinese suzerainty. Against French warnings he sent regular tributes to Peking in 1876 and in 1880. His envoys even completely ignored the French minister accredited to the Chinese court.

China was seriously hampered by not having established any permanent legations abroad. It was not until April 1878 that a minister was first accredited to France. In January 1880, Marquis Tseng approached the French government on the problem of Annam. The Foreign Minister M. de Freycinet declared that France had no designs on Tongking. This was confirmed by President Grévy in November. But in the next month, with the change of ministry, the French government reverted to its original position, and asserted that France regarded Annam as an independent state. This met with a Chinese protest against the disregard of Chinese suzerainty. But more surprising still, on May, 1881, when M. de Freycinet resumed the portfolio of the foreign ministry, he repudiated his previous stand and asserted that matters between France and Annam did not concern China. This proved unacceptable to the Chinese government. Both nations prepared for war.

On August 25, 1883, France again induced Annam to submit to the Treaty of Huế. This time the entire country was placed

under French protectorate, including its relations with China. The area of French Cochin-China was enlarged; Tongking was under the rule of French residents; Annam proper retained its native administration, except for customs, public works and foreign relations; French trading privileges were extended; and French military posts were established along the Red River.

China was then occupied with Korean affairs. France and Japan saw to it that she was kept busy between the two frontiers. After weighing the relative importance of the two vassals, China decided to abandon Annam. By the Li-Fournier Convention of May 11, 1884, China sanctioned the Treaty of Huế, thus relinquishing her claims over Annam in favor of France, who in turn waived any claim for indemnity.

But the question of evacuation of Chinese troops remained unsettled, and over this the two countries went to war. Hostilities ended with Chinese successes on land and French victory at sea. The Protocol of April 4, 1885, was concluded, and the two countries remained as they stood under the Li-Fournier Convention. 29.

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29. For details see H. Shao, Chung fa yueh nan kuan hsi shih mo (Franco-Chinese Relations in Annam), Peiping, 1935.

Burma came within the realm of Chinese suzerainty during the Han dynasty. In 802 it paid tribute under the name of Pyu. In 1106 it was known as the vassal state of Mien. During the Yuan and Ming dynasties it was twice incorporated into the Chinese province of Yunnan. In the middle of the nineteenth century Burma revolted against Chinese suzerainty and for nineteen years the Chinese forces failed to subjugate the country. In 1889 the Burmese ruler submitted, and after two years was formally invested as King of Burma. Since then, the vassal has dispatched regular decennial tributes to China. 30

In the same way that the French extended their influence in Annam, the British penetrated Burma. When France detached Cochin-China from Annam in 1862, Great Britain annexed Lower Burma to British India. Following the French annexation of the whole of Annam in 1885, Great Britain took the rest of Burma. If China was not in a position to resist the one, she was equally helpless in the case of the other. On July 24, 1886, an Anglo-Chinese convention was concluded, by which China recognized British freedom of action in the administration of Burma, while Chinese suzerainty over Burma was nominally retained in the continuance of the customary decennial tribute. In 1895 the periodic tribute was dispatched in due course. But with the outbreak of the Boxer Rebellion even the formality passed into history. 31

4. Siam before 1882.

The Chinese empire established its first relations with Siam during the Sui dynasty (581-617 A.D.), when the country was in its tribal state. The king of Siam was formally invested in 1378. Since the accession of Tak Sin to the throne of Siam in 1767, the relationship became more and more intimate between the suzerain and the vassal. The king himself was of Chinese origin, and many Chinese citizens served in the Siamese court. His successors paid regular homage to the emperor. During the Taiping Rebellion the Siamese tribute envoys were killed on their way to Peking. The weakness of China was further manifested in her dealings with the European powers. Encouraged by Great Britain and France, Siam declared her independence and terminated her tributary status in 1882.

5. Liuchiu.

Owing to its oceanic position, this group of islands was not reached by Chinese political influence until 1372. In that year the king of Liuchiu was invested as a result of his voluntary allegiance to the Ming emperor. The rule of biennial tribute was set for the islands. During the reign of Emperor Yung-lo (1403-1424) the king received from the Ming court the surname of Shang.

Japan, after its unification, also paid homage to China in 1402, and four years later the Japanese king received investiture. But at the decline of the Ming dynasty, Japan broke

32. See Li, op. cit., pp. 95-102.
off her tributary relations. For a time she even threatened Korea. In 1608 a Japanese feudal lord invaded Liuchiu and captured the king. As a ransom Liuchiu ceded two islands to Japan and paid an annual tribute. Although no help came from China, Liuchiu remained loyal to the empire.

Liuchiu was invaded again after the conclusion of the Sino-Japanese treaty of 1871. Japan made the king of Liuchiu a feudal lord of the "Japanese Empire". Three years later, Japan sent an expedition to Formosa with the complaint that a number of "Japanese subjects" had been murdered there by the aborigines. China, not wishing to make war, offered to compensate the families of the dead, and the incident was regarded as closed.

But those murdered in Formosa were Liuchuans. The Japanese government, claiming that China had thus recognized them as "Japanese subjects", asserted that Liuchiu belonged to Japan, and transferred the dealings of the affairs of Liuchiu from the ministry of foreign affairs to the ministry of the interior.

The next year Japan prohibited Liuchiu from sending a congratulatory mission to China and from adopting the new year-title on the accession of the emperor Kuang-hsü.

33. See above, section Bl.
34. See Hsü, Entity, pp. 34-6.
35. The emperor, upon his accession, assumed a National Title somewhat similar to the Tiara of a new Pope. That National Title became the Year Title of the empire and all the vassal states. E.g., Emperor Tsai-tien ascended the throne in 1875 and adopted "Kuanghsü" as his National Title, whereby the year 1875 was recorded in the empire as the First Year of Kuanghsü. See Williams, op.cit., I, pp.397-9.
The king of Liuchiu sent an appeal to China. The Chinese government also instructed its minister at Tokyo to protest to the Japanese government. He was shifted between the ministries of foreign affairs and of the interior, each declaring that the discussion of the affair lay outside its province. Similarly the Japanese legation in China refused to take up the matter.

In 1879, while Chinese protests were continuing, Japan deposed the Liuchuan king and annexed his country outright. Ex-President Grant of the United States and the Governor of Hongkong mediated, but without success. Informal discussion went on between China and Japan till 1886. But no agreement was ever reached, and the incident can be said to have been settled only by prescription.  


36. Ibid., pp. 87-89.
37. See R. F. MacNair, The Chinese Abroad, Shanghai, 1924, p. 3.
6. Others.

Besides those mentioned in the foregoing sections, history records numerous other cases of limited sovereign states within the Chinese empire. In 1292, as a result of Kublai Khan's expedition to Java, many small states existing in the territories of the present Dutch East Indies and British Malaya accepted Chinese suzerainty. Between 1405 and 1433, the ingeniously contrived enterprise of the diplomat-admiral Cheng Ho brought to the Peking court the presence of tribute missions from thirty-nine states, which covered territories from the Philippines across Malaya, India and Arabia to the east coasts of Africa. In the case of Ceylon, the king, Vijaya Bahu VI, was brought to Peking under arrest and deposed for his persecution of the Buddhist religion in 1412. All these states were subsequently absorbed by various European powers.

Likewise on the western, southern, and northern frontiers, many vassal states accepted Chinese suzerainty in the early years of the Tsing dynasty (1644-1911), but were subsequently either annexed by the European powers or came within their spheres of influence as the Chinese empire declined. China relinquished her suzerainty over Sikkim in 1890, Bhutan in 1910, and Nepal since 1912, all in favor of Great Britain. Afghanistan became a British sphere of influence from 1873, and another Chinese vassal, Badakshan, was added to it. During the eighteen-sixties some thirty-three Chinese vassals were

37. See H. Wen, Nan yang hua ch'iao t'ung shih (An analytical History of the Chinese in the South Seas), Shanghai, 1929, pp. 58-63.
38. Ibid., pp. 27-33.
39. See H. F. MacNair, The Chinese Abroad, Shanghai, 1924, p. 3.
annexed by Russia and incorporated in Russian Turkestan.  

Comparable to the set-up of the United States of America, the territorial entity of China consists of units of different administrative status. The provinces, like the American states, enjoy equal status in the national administration. The territories, for reasons of environment, have been given special forms of local government, and stand as special units distinct from the provinces in the administration of the national government. Like the tendency in the United States also, the special units have been administrated with the aim of becoming ultimately regular provinces. As a matter of fact, with the exception of Outer Mongolia and Tibet, all territories have acquired provincial status, one since 1884, three since 1907, and six since 1928.  

The governmental structure of a country is a matter of constitutional law, and as such the problems of Outer Mongolia and Tibet should lie outside the scope of international law. The administration of these territories, however, has been complicated by the intervention of third powers, which, with or without treaty sanction, has at one time or another created peculiar situations that may merit analysis in the light of international law.

At the height of the Chinese Revolution of 1911, the Dzungar of Urga declared Mongolia independent of China and

42. See P. C. Hsieh, op. cit., p. 521, Note 1.
43. See Tyan, Nationalist China, pp. 72-3.
C. The Case of Outer Mongolia.

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42. See P. C. Hsieh, op. cit., p. 321, Note 1.
43. See Tyau, Nationalist China, pp. 72-3.
established himself Khan on October 30th. Russia, which was
the real force behind the Mongolian movement, at once demanded
that China adopt no measures affecting the status quo of Mon-
golia without Russian consent.

Immediately after the establishment of the Republic in
February 1912, the President urged the Kutuktu to rescind his
declaration of independence. This met with no compliance,
and the Chinese government decided to take military measures.
Russia rushed troops and loans into Mongolia, and on November
3rd concluded an agreement with the latter by which, in return
for a number of concessions, Russia guaranteed to Mongolia the
preservation of its "autonomous regime", and recognised the
right of Mongolia to maintain a national army and to admit no
Chinese troops or Chinese colonization. On December 24th,
Mongolia entered into an alliance with Tibet which had similarly
seceded.

Protests and negotiations resulted in a Russo-Chinese
agreement, signed by the Chinese foreign minister and the Rus-
sian envoy on May 20, 1913. Article I read: "Russia, recog-
nising that Mongolia forms an integral part of the territory of
China, hereby engages not to be in the way of the continuance
of that relation, and to respect all rights China has had in
virtue of that relation." Russia also engaged not to despatch
troops to Mongolia except consulate guards, nor to enter into

45. See K.S. Weigh, Russo-Chinese Diplomacy, Shanghai, 1928,
    pp. 155-69.
47. See Weigh, op. cit., pp. 171-2.
48. For English translated from the Chinese text, see Hsi,
    Entiy, pp. 355-6.
agreement with Mongolia without the consent of China.

In return China promised not to alter the system of local self-government of Outer Mongolia. The maintenance of local military and police forces were permitted. Russia was granted a number of commercial privileges in Outer Mongolia. Both China and Russia engaged not to colonize the territory.

By these provisions the independence of Mongolia was in effect cancelled. The agreement, however, met with strong opposition from the Chinese legislature. It barely passed the House of Representatives after stormy sessions. When it reached the Senate, it was even rejected, whereupon the foreign minister tendered his resignation.

Meanwhile the Russian government also regretted having given too much to China. When it was approached by the new Chinese foreign minister, its terms became much more harsh. Strange as it may seem, the Chinese government gave in to terms far worse than those that had been obtained before. To avoid constitutional complications, the new agreement of November 5, 1915, was embodied in the form of a protocol and exchange of notes. 49 This time Russia recognized only the "suzerainty" of China over Mongolia. Both countries bound themselves not to intervene in the internal administration of "autonomous Mongolia", or to station troops there, or to colonize it. China's suzerainty was to be exercised in the form of the appointment of a "dignitary" to Urga, accompanied by the necessary suite and escort, and of the maintenance of certain agents

to look after the interests of the Chinese nationals. In the
establishment of Sino-Mongolian relations, the good offices
of Russia were to be sought.

These conditions were accepted by Mongolia in the Tripar-
tite Agreement of June 7, 1915. China and Russia in turn
recognized "the autonomy of Outer Mongolia forming part of
Chinese territory." On the same day the Kutuktu received in-
vestiture with the title of "Great Venerable Sacred Kutuktu
Khan" from the President of China. On January 10th of the
following year the Khan dispatched a tribute mission to Peking.
China appointed one resident-general and four assistant-resi-
dents to Outer Mongolia.

Chinese sovereignty was not formally restored until after
another eight years. During the Russian Revolution Outer
Mongolia became a Russian battlefield in spite of Chinese pro-
tests. The Mongolian princes and Lamas, finding conditions
intolerable, petitioned the Chinese government on November 17,
1919, to abolish their autonomous regime. This was favorably
accepted by China. In the meantime the Soviet government
was anxious for recognition. As a friendly gesture to China
several declarations were made to the effect that all concessions
and privileges hitherto made by China to Russia would be abro-
gated. While the struggle between the Reds and the Whites
waged on in Outer Mongolia, negotiations were slowly taken up

50. Ibid., II, pp. 1239-44.
52. See Hsu, Entity, pp. 360-1.
54. See Ibid., pp. 271-4.
between China and Russia.

For the next four years the representatives of both countries undertook to discuss the entire problem of Russo-Chinese relations. Finally, on May 31, 1924, two agreements and seven declarations were signed. As far as Mongolia's status was concerned, Soviet Russia "recognizes that Outer Mongolia is an integral part of the Republic of China and respects China's sovereignty therein." Russian troops would be withdrawn as soon as the questions of time-limit of the withdrawal and the safety of the frontiers were decided upon. The Sino-Russian Conference of August 1925, however, failed to settle the problem. Thus Chinese sovereignty over Outer Mongolia was formally restored, but the territory has remained under Russian domination.

On March 12, 1936, Soviet Russia and the autonomous government of Outer Mongolia concluded a Protocol of Mutual Assistance, primarily to forestall a possible Japanese invasion from Manchuria. The Protocol provides for consultation and joint action in the event of "the menace of attack" from a third party, and mutual military assistance when military attack upon the territory of either party should actually take place.

The conclusion of the Protocol brought a protest from China. The Soviet government was reminded that no foreign state had the right to conclude an international agreement with any

55. See Ibid., pp. 277-302.
57. Art. V, Par. II.
region or territory of China, and that under the agreement of 1924 Soviet Russia had explicitly recognised Outer Mongolia as an integral part of China and had undertaken to respect China's sovereignty therein. The conclusion by Soviet Russia of a protocol with Outer Mongolia was therefore declared to be illegal, being a violation of the Sino-Soviet Agreement of 1924 and an infringement of China's sovereignty.

In its reply the Soviet government stated that the Protocol did not constitute a violation of the Agreement of 1924. It declared further that Soviet Russia had no territorial claim in regard to Outer Mongolia or the rest of China, and confirmed that the Agreement of 1924 remained in force.

The Chinese government in a second note took cognizance of the pledge given by Soviet Russia in confirming the Agreement of 1924. It refused, however, to accept the Soviet statement that the Protocol did not constitute a violation of that Agreement.

58. For texts of the Protocol and notes on the Protocol see China Year Book, 1936, pp. 21-3.
D. The Case of Tibet.

Similar in position to Outer Mongolia, Tibet, by virtue of its racial and social peculiarities, enjoys a special form of local government in the Chinese national administration. As in the case of Outer Mongolia, its status has been rendered complicated by reason of foreign interventions, beginning in 1881. In that year disturbances broke out in Sikkim, a part of Tibet, bordering British India. Tibetan troops were sent into the area to restore law and order. But the government of British India suddenly dispatched troops across the frontier, drove out the Tibetans, and claimed Sikkim as British territory.

The question was taken up by China and Great Britain. By the Anglo-Chinese agreement of 1890, known as the Tibet-Sikkim Convention, China ceded Sikkim to Great Britain. Three years later, in the trade regulations concerning Tibet, China undertook to open the town of Yatung in Tibet as a trade mart, where British merchants could conduct commercial transactions directly with the local population. But official dispatches between Tibet and British India were to be transmitted through the Chinese Amban, the official representative of the Chinese national government in Tibet. In no case could a foreign government establish direct intercourse with any official of the

61. For text see Hertslet, I, No. 18.
62. Art. 2.
63. For text see Hertslet, I, No. 19.
territorial government. Thus China lost to Great Britain her jurisdiction over Sikkim, while Great Britain recognized Tibet as an integral part of China.

The native population of Tibet, however, resented the British annexation of Sikkim, and refused to promote trade relations with British merchants. In the meantime the central government in Peking was fully occupied with the affairs of the Sino-Japanese War of 1894-5, the Boxer Uprising in 1900, and the Russo-Japanese War of 1904-5. The government of British India availed itself of the opportunity, and, without the sanction of London, invaded Tibet in 1904.

On August 3rd the British forces entered Lhasa, the Tibetan capital, and drove into exile most of its officials, including the Dalai Lama. A provisional government was formed, and on September 2nd it concluded the Lhasa Convention with the invaders. In that convention Tibet agreed to trade with the British merchants, to regulate its tariff in favor of the latter, and to establish new trade marts when necessary. An indemnity of 75 lakhs (£500,000) was to be paid to the British government within seventy-five years, during which the Chumbi valley in Tibet was to remain under British occupation. All fortifications between the British frontier and the two Tibetan cities of Gyantze and Lhasa were to be demolished. Without the previous consent of Great Britain, no portion of Tibetan territory was

64. Art. 7.
65. See Lee, op. cit., pp. 18-49.
to be alienated or leased to any foreign power, no intervention by any foreign power in the affairs of Tibet was to be allowed, no representative of any foreign power was to be admitted into Tibet, and no concession in Tibet was to be granted to any foreign power or national. 66

The action of the British India government was subject to much criticism by the Home Government. This resulted in a modification of the attitude of the colonial officers toward Tibet. On November 11th, "as an act of grace", the Viceroy and the Governor-General of India issued a declaration reducing Tibet's indemnity from 75 lakhs to 25, and the British occupation of the Chumbi Valley from seventy-five years to three. 67

The news of the Lhasa affair was received by the Peking government with the utmost anxiety. It was natural that consternation should be aroused in China when a foreign country undertook to invade her territory, put the local officials to flight, and conclude a treaty of great political significance with unauthorized and self-acclaimed local agencies. But at that time China was in no military position to assert her sovereign rights over Tibet. A compromise was reached with Great Britain. The Anglo-Chinese agreement of April 27, 1906, carried the Lhasa convention as an annex, thereby confirming the concessions obtained by Great Britain. The British government in turn engaged "not to annex Tibetan territory or to interfere with the administration of Tibet." 68

66. For text see Hertslet, I, No. 20.
67. Ibid., I, No. 22.
68. Ibid., I, No. 31.
Thus, as far as the status of Tibet was concerned, the Anglo-Chinese agreement could have no other implication than that Tibet was an integral part of China, subject to the undertakings of non-alienation and certain trade restrictions. This position was further clarified in the Anglo-Russian agreement of August 18, 1907, in which the two contracting parties engaged "not to interfere with the internal administration of Tibet", "not to enter into negotiations with Tibet except through the intermediary of the Chinese government," and "not to send representatives to Lhasa."\(^{69}\) Both countries, however, recognized China as having "suzerainty" over Tibet. The term "suzerainty" was never accepted by China.

The question of the status of Tibet came up in 1911. During the Chinese Revolution a group of Tibetans declared independence and ejected the Chinese troops in Tibet. In the following year, when the Republic was established in China, the Peking government dispatched troops into Tibet in August and demanded revocation of its secession. Immediately Great Britain protested, and declared that Chinese interference with the internal administration of Tibet would not be tolerated. The Peking government yielded to diplomatic pressure and ordered the return of the Chinese expeditionary force. But it made declarations to emphasize that Tibet was an integral part of China, and it recognized the Panchan Lama, who had been driven into exile in China, as the head of the Tibetan people.

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69. MacMurray, I, p. 674.
Since then attempts have been made by China and Great Britain to settle the Tibetan problem. But so far no agreement has been reached.  

The organization of the League of Nations was welcomed by the people of China with the most eager enthusiasm. The idea embodied in the creation of an international system of co-operation found a natural ally in the traditional Chinese philosophy of peace, reason and justice. Moreover, the inauguration of a new order for a collective guarantee of the territorial integrity and political independence of the members of the community of nations coincided with the interest and aspiration of a nation which had been a victim of the old international system of force. 

China was associated with the League of Nations since plans for such a League were first formulated. As early as January 25th, 1919, the Chinese minister of foreign affairs expressed China's desire to adhere to the establishment of an international society. China was elected to the Commission on the League of Nations, and participated in the draft of the League Covenant. Dowing to the Shantung Question, China did not sign the Versailles Treaty. She became a member of the League, however, by adherence to the Treaty of St. Germain.  

70. See Lee, op. cit., pp. 70-9. 

2. See H. Park, China in the League of Nations, Harvard University Ph.D. thesis, typewritten, 1932, Ch. II.
CHAPTER IV

CHINA AND THE LEAGUE OF NATIONS

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1. See above, Chap. II.

2. See N. Park, China in the League of Nations, Harvard University Ph.D. thesis, typewritten, 1932, Ch. II.
A. Representation in the Council

In the organization of the League of Nations the principle of the equality of states was adhered to in one branch of the governing body of the League but not adhered to in the other. The composition of the Assembly represents the principle of equality, by which every member of the League is entitled to one vote. The Council, on the other hand, recognizes the dominant position of the Great Powers, primarily of the principal Allies surviving the World War. Membership in the Council consists of two categories, the permanent and the non-permanent. The permanent members are represented by the Great Powers, while the non-permanent are selected from time to time by the Assembly. Thus the only direct representation in the Council available to the lesser Powers lies in the election to its non-permanent membership. As such the question has called for the closest attention of China.

The Covenant provides no fixed rules for the selection of the non-permanent members of the Council other than that there should be four such members to be selected by the Assembly "from time to time in its discretion", and that their numbers may be increased. The formulation of some rule for the purpose was therefore necessary. Three principles have been advocated, namely, the rotation system, the free election by the Assembly without fixed rules, and the principle of geographic allocation. The last system has had the support of China.

3. Art. 4. The article named the first four non-permanent members to the Council pending appointment by the Assembly.
In asserting the principle of geographic allocation, China did not advocate distribution according to population or size of geographic areas. On the contrary she recognised the primacy of the Western world and proposed that of the four non-permanent members of the Council three should be selected from among the League members in Europe and the American continents and only one from among those in Asia and the remaining parts of the world. The purpose of such a distribution was to preserve and increase the prestige of the Council as a world institution rather than as a mere occidental one, at the same time maintaining the preponderent influence of the occidental members of the League.  

4. While negotiations were in progress, British Gambian

The three systems of election have been used from time to time by the League. Since 1926, the non-permanent seats of the Council have been increased to nine in number. Of these, five have been held by European members, three by Latin American states in rotation and one by an Asiatic state. China has been represented in 1921-1923, 1926-1928, 1931-1934,  

5. and since 1936.  

6. Instead of presenting the case on the basis of some specific articles of the League covenant, the Chinese delegation mentioned the occurrence of the incident during a discussion about the Chinese Encyclopaedia before the Assembly. This gave the British representative a chance to protest on grounds of procedure. The disposal of the case by pronouncing it on a question which

4. See Park, op. cit., Ch.V.


B. Chinese Questions before the League

Before the occurrence of the Mukden Incident of 1931, several issues concerning China had been brought before the League of Nations. Owing, however, to different reasons, to be discussed presently, none of these cases were settled by that international body.

1. The Washsien Bombardment

On August 29, 1926, a British armed vessel swamped two junks carrying Chinese soldiers and silver at Yunyang. In retaliation the commander of the Chinese army seized two British boats at Washsien. While negotiations were in progress, British gunboats sailed up the Yangtze and shelled the town of Washsien.7

The bombardment of an open city by the navy of a foreign state in time of peace was a matter of consequence in international relations. It was appropriate, therefore, that the Washsien incident should be brought to the attention of the League. The method by which this was carried out, however, is open to criticism. Instead of presenting the case on the basis of some specific articles of the League covenant, the Chinese delegation mentioned the occurrence of the incident during a discussion about the Chinese Encyclopaedia before the Assembly. This gave the British representative a chance to protest on grounds of procedure. The President of the Assembly disposed of the case by pronouncing that "it is impossible to open a discussion on a question which

7. See Morse and MacNair, op. cit., pp. 273-4.
is not on the agenda." 8

2. The Tsinan Incident.

The Tsinan incident occurred in May, 1928, when Japan intervened in the civil war in China. In order to obstruct the forth-coming unification of China under one, central government, Japanese troops landed at Shantung, massacred some five thousand Chinese, and occupied Tsinan and its railways and surrounding areas. No resistance was offered by the Chinese. 9

The situation became so serious that China appealed to the League of Nations. Declaring that the territorial integrity and political independence of China had been violated by Japan, the Nationalist Government of China requested the summoning of a meeting of the Council according to Article 11 of the Covenant.

On the ground that the Nationalist Government had not been recognised by any of the Powers, however, no action was taken by the League. On the other hand, while the Japanese account of the case was printed in the Official Journal, the Chinese documents were not published. 10

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9. See below, Ch. VI, Sec. 5, 6.
C. The Sino-Belgian Dispute and the Permanent Court of International Justice

The Sino-Belgian dispute arose as a result of China's denunciation of the Sino-Belgian Treaty of 1865. In her endeavours to restore her national rights as an independent state, China has included in the conduct of her foreign relations the program of eliminating the so-called unequal treaties and of replacing them with new treaties upon the principle of equality and reciprocity.\textsuperscript{11}

The Sino-Belgian Treaty of 1865, signed on November 2nd and ratified on October 27, 1866,\textsuperscript{12} granted to Belgium the right of extraterritoriality and other unilateral privileges seriously impairing the territorial jurisdiction and administrative integrity of China.\textsuperscript{11} On June 24, 1925, the Chinese government notified Belgium of its desire for the readjustment of the treaty, whose date of expiration was to fall on October 27, 1926. Negotiations were entered into between the two signatories, but no agreement was reached. On November 6, 1926, China, by Presidential Mandate, announced the abrogation of the treaty.\textsuperscript{13}

Concerning the question of expiration, Article XLVI of the treaty gave the right of revision unilaterally to Belgium. No provision was made for action that might be taken by China on the question. The article reads:

\begin{flushright}
\text{Meanwhile negotiations between China and Belgium were reopened,}
\end{flushright}

\begin{flushleft}
\text{5. See Tyau, \textit{Nationalist China}, pp.99-100.}
\text{12. For text, see Hertslet, II, No.34.}
\text{13. See Park, \textit{op.cit.},157-8.}
\end{flushleft}
Should the Government of His Majesty the King of the Belgians in the future consider it advisable to modify certain of the clauses of this Treaty, it shall to this end be at liberty to open negotiations after an interval of ten years from the date of exchange of ratification, but six months before the expiration of the ten years, it must officially inform the Government of His Majesty the Emperor of China of its intention to introduce modifications and of what such modifications will consist. Failing such official notice, the Treaty will remain in force unchanged for a fresh term of ten years and so on for further periods of ten years.

Both Belgium and China had accepted the Optional Clause of the Statute of the Permanent Court of International Justice. Upon the denunciation of the Sino-Belgian treaty by China in 1926, the Belgium government filed a unilateral application with the international Court, requesting the latter to give judgment that China was "not entitled unilaterally to denounce" the treaty, and pending judgment, to indicate such provisional measures as could be taken for the preservation of the rights of Belgium in China.

The Court set the dates for filing of documents, and declined to indicate interim measures to be taken pending judgment. But the Chinese government presented no counter-case before the Court. Thereupon the Court indicated interim measures, which consisted in the continuance of the exercise by Belgium of extraterritoriality in China, and the protection by the Chinese government of Belgian missionaries and property and shipping in China, as stipulated in the treaty of 1865.

Meanwhile negotiations between China and Belgium were reopened, and the World Court modified the dates for filing the case. China again failed to comply. As a result of direct negotiation,
however, she agreed to extend the treaty for six months as a 
modus vivendi. At the request of the Belgian government the 
Court revoked its order of interim measures.

The case was settled by the conclusion of a new Sino-
Belgian Treaty on November 22, 1928. The Belgian government 
informed the Court of the result and requested the withdrawal 
of its application. The proceedings of the case were declared 
terminated.14

However, the handling of the dispute by the League was not 
without significance. For the first time a Great Power received 
the unanimous condemnation of fifty nations for its acts of ag-
gression, and was trapped as transgressor against the spirit 
if not the letter of three great international treaties. For the 
first time also, a Great Power led to bow to the will of the 
League Assembly and withdraw its armed forces from a foreign city, 
Shanghai, it had occupied. As the facts clearly show, where the 
Great Powers were willing to act, in concert with world opinion, 
their efforts were never exerted in vain.

14. See M.O. Hudson, World Court Reports, II, 
1927-32, Washington, 1935, Series A, No.19,
D. The League and the Sino-Japanese Dispute

The Sino-Japanese dispute, which flared out on September 18, 1931, was the most serious test that confronted the League of Nations since the establishment of the system of collective security. The dispute occurred inopportune, at a time when the world was in the grip of an unprecedented economic depression, when the British Government was controlled by a party that favored isolation in international politics, and when central Europe was threatened with revolutionary upheavals. The reluctance on the part of the Great Powers to assume responsibility encouraged Japan to exploit every constitutional weakness in the structure of the League, and resulted in the failure of that international body to settle the dispute in the Far East.

However, the handling of the dispute by the League was not without significance. For the first time a Great Power received the unanimous condemnation of fifty nations for its acts of aggression, and was branded as transgressor against the spirit if not the letter of three great international treaties. For the first time also, a Great Power had to bow to the will of the League Assembly and withdraw its armed forces from a foreign city, Shanghai, it had occupied. As the facts clearly show, where the Great Powers were willing to act in concert with world opinion, their efforts were never exerted in vain.
Far East. The only Article XI, by which the Sino-Japanese dispute was submitted first to the League Council. From the very start an attitude of conciliation toward Japan prevailed among the great powers. When China was considering which of the provisions of the Covenant should be invoked in the procedure of bringing the case before the League, she was advised to pursue a moderate course.

Among the provisions the possibilities were Articles 3, 4, 10, 11, 15, and 16. Of these, the first two, which merely stipulated that the League "may deal . . . . with any matter . . . affecting the peace of the world", were essentially vague in their definitions, and gave no direction as to what action should be taken by the League with respect to the particular matter. Article 10, designed to check external aggression against the territorial integrity and existing political independence of the members of the League, described most appropriately the situation created in Manchuria by the Mukden Incident. But it was made known to China that the Great Powers in the Council would be most unwilling to take that view if they could possibly avoid it. Still less, then, could they be expected to pronounce the incident as a "resort to war" under Article 16. Even Article 15, which merely required the League to investigate and make a report, was considered premature for application pending the determination by the Great Powers of their policy toward the situation in the closed in advance. But in 1931 the Council decided to abandon

Far East. The only alternative open to China was Article XI, by which the Council could act without commitment. It was invoked by China with the hope that the Council might act vigorously as it did during the Greco-Bulgarian controversy.  

This last mentioned controversy had established the precedent that the Council, acting under Article 11, had the right to require the immediate cessation of military operations between the disputant members and to send supervising officers to the scene to watch the execution of its instructions. During the controversy the Council refused to listen to any explanation on either side until after hostilities were suspended and the facts of the situation investigated and reported by a neutral commission of inquiry.

This precedent was adopted by both the Council and the Assembly in 1927, when they passed the rule that the Council, acting under Article 11 in any controversy of whatever nature, had the right to dispatch a commission of inquiry to the scene of dispute, and that this could be done without the consent of either of the disputants in cases "where there is an imminent threat of war", but that in the absence of such a threat the consent of the territorial state should be obtained.

Thus, when the Sino-Japanese dispute broke out, every possible loophole whereby the procedure of inquiry by a neutral commission could be evaded under Article 11 seemed to have been closed in advance. But in 1931 the Council decided to abandon

its clearly established right of asserting a firm control over the Sino-Japanese dispute. To facilitate the policy of conciliation, the Council handed over the case to its "inner circle", a committee composed of the President of the Council and the representatives of Great Britain, France, Germany and Italy.\(^\text{18}\)

As Japanese military operations continued to spread, China urged the committee to follow the Greco-Bulgarian procedure in appointing a commission of inquiry to operate on the scene. But the Council failed to exercise even this minimum right of finding the facts. The British representative went so far as to declare that under Article 11 it was the responsibility of the disputants themselves to find a settlement, and accordingly he supported the Japanese insistence for direct negotiation. The Council thereupon adjourned with the resolution of September 30th.

Among other things it provided for a period of two weeks during which the disputants were to settle the case between themselves. Without fixing a definite date, the resolution also relied upon Japan to fulfil her promise of evacuation.\(^\text{19}\)

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18. For a discussion of the "inner circle" see *ibid.*, pp.381-9.

If two months later Japan herself requested the appointment of a commission of inquiry by the League, it was because she believed that she had created a situation to her own advantage in Manchuria. During those two months, while she was pursuing her obstructionist tactics on the Council, her forces subjugated the Chinese in Manchuria until practically the entire population was under her military pressure and control. More important still, the investigation to be conducted by the League was based on the condition that the commission "would not be empowered to intervene in the negotiations which may be initiated between the two parties, or to supervise the movements of the military forces of either." Moreover, the Chinese troops were required to withdraw behind the Great Wall, and a neutral zone was to be established around Chinchow which was to be policed and supervised not by the League but by Japan. This aroused the opposition of the small states on the Council, but again the policy of conciliation was carried through.  

In the Council the Japanese delegates became famous for their obstructionist tactics. The exploitation of the unanimity rule was resorted to on every possible occasion. As early as September 22nd Japan had accepted the principle of American co-operation with the League for the consideration of the Manchurian issue. When American support was assured and when

20. Ibid. p. 172.
22. See cable of President of the Council and statement of Japanese representative, Ibid., pp. 54-5.
formal invitation was to be sent by the Council in its October session, the Japanese representative discarded his previous assent and raised the question of the constitutionality of such an invitation. It had to be referred to a Committee of Jurists. The contention was voted down as a matter of procedure, but Japan succeeded in wasting two days of the session on that point.23

Japan continued to promise evacuation but did not carry it into effect. Even the Council grew impatient, and on October 24th passed a resolution requiring the withdrawal of the Japanese troops by November 16th.24 Upon this Japan made a declaration that by virtue of the Japanese vote of dissent the resolution would not be regarded as in existence.25 She also undertook to inform the Chinese government directly that "no resolution was adopted by the Council of the League of Nations on October 24th."26 Similarly, the unanimity rule reduced to a mere "appeal" the Council declaration of February 16, 1932 in regard to the non-recognition of "Manchukuo".27 Had the Council but followed the Greco-Bulgarian precedent in the beginning, the obstructionist policy of Japan would have had no opportunity to become effective.

23. Ibid., pp.89-103.
24. Ibid., pp.114-5.
25. Ibid., p.130.
Another method of impeding League action was by raising objection on every possible technicality with a view to bringing the main discussion before the Council to a standstill. After four months of deliberation under Article 11, nothing was achieved by the Council towards restoring peace in the Far East. On the contrary the situation was aggravated by the Japanese attack on Shanghai. The Chinese government became desperate and invoked both Articles 10 and 15 in the Council on January 29, 1932. At once Japan challenged the competence of the Council to take simultaneous action under more than one article of the Covenant. The neutral members had to refer to the opinion rendered in the affirmative by a Committee of Jurists in 1923 and endorsed by the Council in 1924. Japan was reminded that that Committee of Jurists was presided over by a Japanese judge, who was the president of the Permanent Court of International Justice in 1932.28

In the next two weeks the Council remained as impotent as before. On February 12th China requested the transfer of the controversy to the Assembly under Paragraph 9 of Article 15. The Japanese delegate again questioned the constitutionality of the convocation of a special Assembly session, and again necessitated the appointment of a Committee of Jurists to settle the problem. The committee decided against the Japanese opposition, but for that purpose another eight days were sacrificed.29

A third method of obstruction was the introduction of new

29. Morley, op.cit. pp.488-9
and disturbing elements into the situation to sidetrack or nullify
the attempts of the Council. On October 12, 1931, while the
Council was in adjournment awaiting the execution of the Japanese
promise of evacuation, the Japanese government startled both the
League and the United States by informing the Council that
before the evacuation could be carried out it was "essential to
agree upon certain main principles to form a foundation for the
maintenance of normal relations between the two countries (China
and Japan)." 30 What these "main principles" consisted of was not
disclosed.

When the Council met the next day, Japan persisted in re-
fusing to make known her "principles," 31 thus keeping the Council
in suspense throughout the session. China was highly apprehen-
sive of the Japanese designs, which reflected Japan's time-honored
secret diplomacy so frequently thrust upon China under cover of
military threat, as exemplified in the negotiations for the Pek-
ing Protocol for 1905 and the Twenty-One Demands of 1915. The
Chinese delegate on the Council offered to submit all questions
of treaty interpretation to arbitration or judicial settlement.
But this offer was rejected by Japan.

It was not until after the Chinese government refused to be
cajoled into secret terms, that Japan disclosed those principles.
Officially defined on October 26th, they were cloaked in diplo-

30. Willoughby, Controversy, p. 78.
31. Ibid., p. 129.
mastic language as follows: 32

1. Mutual repudiation of aggressive policy and conduct.
2. Respect for China's territorial integrity.
3. Complete suppression of all organized movements interfering with freedom of trade and stirring up international hatred.
4. Effective protection throughout Manchuria of all peaceful pursuits undertaken by Japanese subjects.
5. Respect for treaty rights of Japan in Manchuria.

The Council was then in adjournment. The President of the Council, perplexed by the ambiguity of the Japanese terms, made a reply calling attention to the fact that the resolution of October 24th retained its "full moral force" and that of September 30th remained juridically valid. 33

A second instance of the kind occurred while the dispute was being transferred from the Council to the Assembly. On February 23, 1932, the Japanese foreign minister informed the Council that his government did not recognize China as an "organized people" and that, short of such recognition, it could not but "profoundly modify the application to the Chinese affairs of the Covenant of the League." 34 This statement prompted the Assembly to act on the question immediately upon convening.

Thus, to the disappointment of all supporters of the League, the Council failed to settle the Sino-Japanese dispute that came up before it. It did succeed, however, in putting on record

32. Ibid., pp.132-4.

33. Ibid., pp.134-5.

34. For further discussion see above, Ch. III, Sec.A.
Japan's declaration of having "no territorial designs in China", as well as the Japanese pledge of evacuation. A commission of inquiry was appointed, although after undue delay, to investigate the whole situation in the Far East. Moreover, on three points the Japanese obstructions were overruled by the Council, namely, in the decision to invite the United States to sit with the Council, in the invocation of Articles 10 and 15, and in the reference of the case to the Assembly. Considering the constitutional weaknesses of the Council, the loopholes in the Covenant, the lack of co-operation between Great Britain and the United States, and the complex character of the controversy in which one of the disputants was a Great Power, it would be extreme to conclude that China's plea to the Council was arbitrarily dismissed.

35. For instances of lack of co-operation from the U.S., see Morley, op.cit. pp.442,450-1,462-3, 487; For Great Britain's refusal to co-operate with the U.S., see H.L. Stimson, The Far Eastern Crisis,N.Y., 1938, pp.162-4.
ii. The Assembly

When the controversy came before the Assembly, the small states, which dominated that body and whose national security depended greatly on a system of international co-operation, were most anxious to uphold the jurisdiction of the League. Their numerical strength counterbalanced Japan's capacity for obstructions. With the invasion of Shanghai even the Great Powers stiffened their attitude towards Japan. Moreover, the Assembly was convened under Article 15 and was free from the restraint of the unanimity rule. With these advantages, the Assembly "lost no time in bringing home to the Japanese delegate, in a way which the Council had never been able to do, the fact that it meant business." 36

The first question taken up by the Assembly was the evacuation of Shanghai. On March 2nd, the Bureau of the Assembly, acting upon the recommendation of the Council President for a round-table conference to be held at Shanghai, drafted a resolution for such a conference "which shall render definite the cessation of hostilities and regulate the withdrawal of the Japanese forces" in Shanghai. When the draft was presented to the Assembly on March 4th, the Japanese representative again followed the obstructionist tactics of his colleagues in the Council. But he was shouted down by the delegates of the small


37. Composed of the Assembly President and eight vice-presidents.
states. The pressure of a united League was so keenly felt by Japan that she gave way on that point. The resolution was adopted unanimously. \(^{33}\) Five weeks later, under the supervision of American, British, French and Italian negotiators, Japan agreed to the unconditional evacuation of Shanghai, "to conform with world opinion and to end the world-wide odium which has fallen upon us." \(^{39}\)

Next the Assembly deliberated upon the basic issues of the Sino-Japanese controversy. Again it was the small powers which were outspoken and attended to their work in full vigor. On March 11th the Assembly passed unanimously its second resolution. This time Japan refused to comply, and declared that she had raised objection before the Council to the invocation of Article 15. But, instead of casting a straight vote of dissent, the Japanese delegation informed the Assembly that it would "simply refrain from voting, in order not to oppose the adoption of the resolution." \(^{40}\)

As an assertion of League authority, the resolution \(^{41}\) was one of the most significant ever adopted by the Assembly. Of considerable length, it was divided into three chapters. The first chapter opened with a flat denial of the contention that China was not an "organized people" and not entitled to the protection of the League Covenant. This was followed by an assertion

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40. Willoughby, Controversy, pp. 302-3. China also failed to cast her vote, due solely to delay in the arrival of instructions from Nanking, which had decided in favor of the resolution.

41. For text see Willoughby, Controversy, pp. 299-303.
in the clearest terms of the applicability of Article 10 to
the Sino-Japanese conflict, with subsequent intimation that
Japan had ignored her obligations under this article and
Article 13. A direct citation was made of the Council's warning
note of February 16th to Japan. By proclaiming the binding
nature of the provisions stipulated in that note, the Assembly
formally accepted the Stimson non-recognition doctrine. Equally
significant was the declaration that the League Covenant was "in
full harmony" with the Pact of Paris, which was described as
"one of the corner-stones of the peace organization of the world".
This declaration clearly hinted at the common interest between
the League and those signatories to the Pact that were
not League members, particularly the United States and Soviet
Russia.

The second chapter affirmed the doctrine that rights could
not be established by violation of existing obligations,—another
phase of the Stimson doctrine aiming at the outlawry of armed
intervention as an instrument of diplomacy. The Assembly re-
called its own resolution of March 4th and reasserted the right
of the League to exercise, through the instrumentality of a
mandate, its police authority in an area of dispute.

From the constructive standpoint, the third chapter was
the most important. It overruled the Japanese contention that
only the Shanghai Incident and not the whole of the dispute
was referred to the Assembly. Most noticeable was the creation
of a Committee of Nineteen, of unlimited tenure, to execute the
resolutions of the Assembly, to watch the development of the Sino-Japanese dispute, and to "propose any urgent measure which may appear necessary". This committee consisted of the twelve neutral members of the Council and six other members of the Assembly, under the chairmanship of the President of the Assembly. Finally, the Special Assembly was to remain in session presumably until the settlement of the controversy.

The Japanese government, in spite of the indictment of a body so representative of world opinion, declared that "it retains the objections raised before the Council regarding the application of Article 15 of the Covenant to the present difficulties between Japan and China." 42

42. Ibid., p.308.
iii. The Lytton Report

The League Commission of Enquiry, known as the Lytton Commission, was appointed on December 10, 1931, to study "the immediate issue of conflict as well as any circumstance, which, affecting international relations, threatens to disturb peace between China and Japan."43 In carrying out its mission, the commission spent seven months in the Far East, holding investigations at Tokyo, Kyoto and Osaka in Japan, and Shanghai, Nanking, the Yangtze Valley, Peiping and Manchuria in China.44

At the end of its investigations, the Commission submitted a report to the League. It consisted of ten chapters and a separate volume of "supplementary documents". The first eight chapters dealt with the factual situation. It began with an outline of recent developments in China. The report noted that "the dominating factor in China is the modernization of the nation itself which is slowly taking place." Since her contact with the West in the last century, China incurred huge losses in territory and in administrative and commercial rights, resulting in economic, political and social unrest. But if in 1931 disruptive forces were still powerful in China, the conditions showed "considerable progress" from what they had been at the time of the Washington Conference in 1921-22. The prospect was a hopeful one, if not checked by foreign aggression. Referring to the argument that China was not an "organized people", the

44. Ibid., pp. 10-12.
report pointed out that even in 1922 the powers had found it possible to undertake to respect China's independence and territorial and administrative integrity.

As regards Chinese "nationalism", to which Japan had given wide publicity, the report deemed it "a normal aspect of the period of political transition through which the country is passing", an aspect which "would be found in any country placed in the same position." The report did complain, however, that in this nationalism there existed a "tinge of bitterness against all foreign influences, " due partly to the people's resentment against the numerous commercial and political privileges enjoyed by foreigners in China, and partly to the Kuomintang's early connection with the Communist party.

Speaking of the internal disorder in China, the report said that whatever irregular armed bands were in existence in certain localities, they were "no longer a menace to the authority of the central government." There was, however, a menace of a different source, namely Communism. But the report noted also the determination of the central government to suppress the influence of the Communists. In its judgment the efforts of the government were hampered by the lack of funds and by defective communications. "The problem of communism is thus linked up with the larger problem of reconstruction."

Japan, as China's nearest neighbor and largest customer, had, said the report, a peculiar interest in the political and social developments of the latter country. Consequently Japanese
interests in China "began to be more asserted as those of the other major powers receded into the background;" they were achieved by means of repeated military interventions in time of local disturbances in China, until "the claims of Japan have come to be regarded in China as constituting a more serious challenge to national aspirations than the rights of all the other powers taken together."

In this connection it may be commented that the picture of the Far East would have been more complete if the report had also devoted a chapter to the recent developments in Japan. As it stood the report left out the story of the struggle for power between the military group and the constitutionalists in Japan. From the viewpoint of that struggle, the Japanese military adventures in China were but one of the means by which the military elements diverted the attention of the masses away from internal politics and acquired power at the expense of the constitutionalists.

The report next took up the problem of Manchuria. It gave statistics to prove that politically as well as ethnically Manchuria had been an integral part of China and had been recognised as such by foreign powers, including Japan. This latter country, while admitting China's sovereignty over Manchuria, had on more than one occasion intervened in its internal politics with a view to segregating the local administration from that of the rest of China. These interventions aroused bitter anti-Japanese feelings on the part of the local population.

Turning to the Japanese assertion of a "special position"
in Manchuria, the report mentioned that Russia also enjoyed enormous interests there, over which Japan could not claim a monopoly. Moreover, the report recalled Japan's pledge under the Nine Power Treaty to abandon any claim of a "special position" in any part of China. It remarked, 45

The Japanese conception of this "special position" is not limited to what is legally defined in treaties and agreements either with China or with other states... Feelings and historical association... and pride in the achievements of Japanese enterprise in Manchuria... are an indefinable but real part of the Japanese claim to a "special position". It is only natural, therefore, that the Japanese use of this expression in diplomatic language should be obscure, and that other States should have found it difficult, if not impossible, to recognise it by international instruments.

As the report pointed out, such a claim "conflicts with the sovereign rights of China."

This conflict, the report continued, resulted in grievances on both sides and precipitated several incidents which led to the Mukden Affair of September 18, 1931. Those incidents, asserted the report, were amenable to peaceful solutions, and as a matter of fact "some efforts were being made to dispose of these questions by the normal procedure of diplomatic negotiations and peaceful means, and these means had not yet been exhausted, when the army circles in Japan forced their country to resort to arms.

As to the Japanese occupation of Mukden on the night of September 18th, the report decided that it was the execution of a carefully premeditated plan which came as a complete surprise to the Chinese. It "cannot be regarded as measures of legitimate self-defense". 46

The bombing of the city of Chinchow

45. Ibid., p.38.
by the Japanese air force was condemned as unjustifiable and illegal.

On the Shanghai Incident the report gave but a sketchy account, and the background of the situation was not entered into. This was due to the fact that the question of evacuation of Shanghai had been settled by the Assembly, and the Chinese government was anxious that the Commission should proceed to investigate the conditions in Manchuria as early as possible. 47

A detailed description was attached dealing with the establishment of the puppet state of "Manchukuo". It brought to light the fact that the entire movement was completely dominated by Japanese personnel. Against all difficulties placed by the Japanese in Manchuria upon the Chinese assessors 48 as well as the local population, the Commission was able to collect great masses of evidence to show that "there is no general support for the 'Manchukuo Government', which is regarded by the local Chinese as an instrument of the Japanese."

In its supplementary documents the report made an examination of the problem of boycott. Contradicting the Japanese argument that the anti-Japanese boycott in China was "war in disguise" and "as bad as actual war if not worse," 49 the report

46. For further discussion see below, Ch.V, Sec. E.
47. For a neutral account of the Shanghai Incident, see Stimson, op. cit., Part III.
49. Statement of N. Matsuoka before the Council, ibid., p.607.
said: "It seems difficult to contest that the boycott is a legitimate weapon of defense against military aggression by a stronger country, especially in cases when methods of arbitration have not previously been utilized, always subject, of course, to the condition that boycott methods employed do not infringe the law on the land."

The finding of facts ended with an examination of the economic relations between China and Japan. The Commission held the opinion that the maintenance of the Open Door in Manchuria would be advantageous to all countries concerned, Japan and China in particular.

In the last two chapters the report made suggestions for a solution which the Commission deemed acceptable to both disputants. Here it may be noticed that the juridical attitude that might have been expected of the Commission gave way to a policy of conciliation. This was admitted by the Commission itself when it stated, "Throughout this review of the issues we have insisted less on responsibility for past actions than on the necessity of finding means to avoid their repetition in the future." 50

Accordingly the Commission set forth the principles that the solution should be compatible with the interests of all concerned, particularly China, Japan and Russia; and that it should conform to the provisions of the League Covenant, the Pact of Paris, and the Nine Power Treaty. But instead of strictly interpreting past treaties, China should make a compromise with Japan and make new treaties to restate and define

Japanese rights and interests in Manchuria, with provisions for prompt settlement of future disputes. Furthermore, China should make concessions in the administration of Manchuria by giving it a high degree of autonomy in so far as was consistent with the sovereignty and administrative integrity of the state. For the preservation of permanent peace in the Far East, China and Japan should enter into treaties on conciliation, arbitration, non-aggression and mutual assistance, and also new commercial treaties aiming at an economic rapprochement between the two countries. Lastly, in keeping with the will of the late Dr. Sun Yat-sen, the Commission suggested international co-operation in the reconstruction of China.

Without doubt the Lytton Report will go down in history as one of the most important international documents ever produced. As estimated by the League Assembly, "The first eight chapters ... present a balanced, impartial and detailed statement of the historical background of the dispute and of the main facts in so far as they relate to events in Manchuria." 51 No study of the Sino-Japanese controversy could be complete without a very careful examination of this famous document.

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iv. The Assembly and the Lytton Report

As a matter of procedure, the Lytton Report was submitted to the Council and then referred to the Assembly. Japan was full of laments. But this time the Assembly held firm to the principle that negotiations between the disputants should be conducted only under the auspices of the League. One last endeavor was made to conciliate the parties, but again it met with failure due to Japanese opposition. In accordance with Paragraph 4 of Article 15, therefore, the Committee of Nineteen prepared a report for the Assembly.

The Assembly Report was divided into four parts. It adopted "as part of its own report" all the findings of facts given in the Lytton Report. It gave an account of the course of the controversy as it had come before the Council and the Assembly. In the part entitled "Chief Characteristics of the Dispute" were presented the Assembly's decisions. Among other things it declared Manchuria to be an integral part of China, as recognized by all signatories to the Nine Power Treaty. Besides pronouncing that the Japanese military operations in Manchuria could not be regarded as measures of self-defense, it asserted the principle that the adoption of measures of self-defense did not exempt a state from the obligations of Article 12 of the Covenant.

As the first step of settlement, it "recommends" the evacuation of Japanese troops. Negotiations should take place with the assistance of a League committee, and the first object should be "to determine the methods, stages, and time-limits of the evacuation." Any solution of the dispute should conform to the League

52. Since the Commission was appointed by the Council.
Covenant, the Nine Power Treaty, the Pact of Paris, and to the principles set forth in the Assembly resolution of March 11, 1932. To prevent any demand for indemnity imposed upon China by Japan or third states, the Assembly stated clearly that "no question of Chinese responsibility can arise from the development of events since September 18, 1931."

The suggestions of the Lytton Commission in regard to an autonomous government in Manchuria were accepted in principle. The establishment of "Manchukuo" was condemned as "incompatible with the fundamental principles of existing international obligations and with the good understanding between the two countries on which peace in the Far East depends." Moreover, the members of the League were called upon "to abstain, particularly as regards the existing regime in Manchuria, from any act which might prejudice or delay the carrying out of the recommendations of the said [Assembly] report. They will continue not to recognize this regime either de jure or de facto."

Lastly, the signatories of the Nine Power Treaty and of the Pact of Paris who were non-members of the League were requested to associate themselves with these views of the Assembly, and "if necessary, [to] concert their action and their attitude with the Members of the League."

The report as submitted by the Committee of Nineteen was adopted on February 24, 1933 by the entire Assembly with the sole dissenting vote of Japan. The President declared it "unan-
imously adopted. To stress the importance attached to it, the entire text, some fifteen thousand words in length, was wired by the Assembly to the world.

Japan expressed her displeasure by declaring to the Assembly her intention to withdraw from the League. The official announcement to this effect was made on March 27th.

In order to carry out the recommendations of the Committee of Nineteen, particularly to provide for consultation and possible concerted action with states not members of the League on the situation in China, the Assembly, on the same day that it adopted the Committee Report, created a Far Eastern Advisory Committee, which consisted of the members of the Committee of Nineteen and of Canada and the Netherlands, and which was to invite the governments of the United States of America and of Soviet Russia to co-operate in its work.

The United States accepted the invitation as far as sending a representative to take part in the deliberations of the Advisory Committee, reserving, however, independence of judgment with regard to its proposals and decisions. The participation

54. Ibid., p.473.
55. See H. Latsuoka's declaration, Ibid., pp.482-3.
56. Ibid., p.507.
57. Ibid., pp.520-1.
of Soviet Russia, on the other hand, was not obtained until after her entrance to the League. 58

In its meetings the Advisory Committee considered the application of the undertaking contained in the Assembly's resolution not to recognize de jure or de facto the "Manchukuo" regime in Manchuria, such as the problems of postal service, currency, passports, and the position of consuls. The Committee recommended that "Manchukuo" should not be admitted as a member of the Universal Postal Union, that its currency should not be given official quotations in exchange markets, that foreign government agents should not visa any passport issued by the "Manchukuo" government, and that foreign consuls in Manchuria should "do nothing which could be interpreted expressly or by implication" as a recognition of the "Manchukuo" regime. However, the Committee suggested that some provisional or temporary measures could be adopted by individual governments or their agents to meet a practical situation that might necessitate action, such as the issue of a laissez-passer by a consul to an individual inhabitant of Manchuria. 59

After the creation of the Advisory Committee, discussion by the League of the Sino-Japanese dispute practically ceased,

58. Ibid., pp. 517-32.
59. See ibid., pp. 517-32.
until new developments came up again in 1937.60 In the meantime, the League showed its interest in China through technical and cultural co-operation, which as a matter of fact had developed even before the occurrence of the Sino-Japanese dispute and which was recommended in the Lytton Report.61

Following the Mukouchiao incident of July 7, 1937, Japan launched attacks upon various parts of China by land, sea and air. The development of the situation was communicated by China to the League on August 30th. The Chinese delegation emphasized that the recent Japanese invasion of China constituted a clear case of aggression, that in exercising the right of self-defense China was compelled to resort to force, that Japan's action was a continuation of her aggressive program started in Manchuria 1931, and that Japan had deliberately violated the League Covenant, the Pact of Paris and the Nine Power Treaty.62 Following the Shanghai Civic Center on September 13th, China appealed to the League for action. Invoking Articles 10, 11, and 17 of the Covenant, the Chinese delegation requested the Council to devise upon such means as might be appropriate for the situation.63

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60. See below, Section E.
61. See below, Section F.
62. For text see Royal Institute, Documents on International Affairs, 1937, London, 1938, p.652.
63. Ibid, p.874.
E. Development since 1937

1. The Far Eastern Advisory Committee

The outbreak of hostilities between China and Japan in 1937 was but a continuation of the conflict since 1931. But from the viewpoint of the League of Nations, a new complication arose in that one of the disputants had withdrawn from that international body and was no longer a member of it.

Following the Lukouchiao incident of July 7, 1937, Japan launched attacks upon various parts of China by land, sea and air. The development of the situation was communicated by China to the League on August 30th. The Chinese delegation emphasized that the renewed Japanese invasion of China constituted a clear case of aggression, that in exercising the right of self-defense China was compelled to resort to force, that Japan's action was a continuation of her aggressive program started in Manchuria since 1931, and that Japan had deliberately violated the League covenant, the Pact of Paris and the Nine Power Treaty.62

Following the fall of the Shanghai Civic Center on September 12th, China appealed to the League for action. Invoking Articles 10, 11, and 17 of the Covenant, the Chinese delegation requested the Council to advise upon such means as might be appropriate for the situation.63


63. Ibid., p.674.
By a decision of the League Council, on September 16th,\textsuperscript{64} the matter was referred to the Far Eastern Advisory Committee for examination. Three non-member states, the United States, Japan, and Germany, were invited to participate in its work. The American government instructed its minister to Switzerland to attend the meeting of the Advisory Committee, but refused to commit itself regarding policies or actions. Germany and Japan both declined the invitation. The Japanese government declared that the controversy should be settled by the disputants themselves.\textsuperscript{65}

Since the outbreak of hostilities, large squadrons of Japanese warplanes have carried out almost daily raids on open cities in China, causing unprecedented loss of civilian life and property. On September 19th, the Japanese Third Fleet announced its intention to bomb Nanking, the Chinese capital, and set a date for the evacuation from that city of all foreign diplomatic and consular officials and residents. The bombing took place the next day. Eighty Japanese airplanes took part in four raids. Thereafter the city was bombed almost daily.

This aroused world-wide criticism and protests. The United States notified Japan that the bombing of open towns was "unwarranted and contrary to the principles of law and of humanity."\textsuperscript{66}

\textsuperscript{64} Ibid., p. 672.
\textsuperscript{65} Ibid., pp. 880-1.
\textsuperscript{66} Ibid., p. 682.
The British government expressed "its profound horror at the bombing of open towns which is now taking place in China." The Advisory Committee of the League adopted a resolution on September 37th, expressing its "profound distress at the loss of life caused to innocent civilians, including great numbers of women and children, as a result of such bombardments". It declares that no excuse can be made for such acts, which have aroused horror and indignation throughout the world; and solemnly condemns them." The resolution was endorsed by the Assembly.

Next the Advisory Committee entrusted to a sub-committee the examination of the entire situation of the renewed armed conflict between China and Japan. This was accomplished in the form of two reports submitted by the sub-committee, one giving the facts of the situation and the other the opinion of the sub-committee in regard to the case.

The first report, after reviewing the situation in China, and giving the Chinese and Japanese versions of the case, concluded that while the two adversaries took very different views as to the grounds of the dispute,"it cannot, however, be challenged that powerful Japanese armies have invaded Chinese territory and are in control of large areas; that the Japanese government

has taken naval measures to close the coast of China to Chinese shipping; and that Japanese aircraft are carrying out bombardments over widely separated regions of the country. After the examination of the facts, the sub-committee declared itself "bound" to take the following view:

That the military operations carried on by Japan against China by land, sea, and air are out of all proportion to the incident that occasioned the conflict; that such action cannot possibly facilitate or promote the friendly co-operation between the two nations that Japanese statesmen have affirmed to be the aim of their policy, that it can be justified neither on the basis of existing legal instruments nor on that of the right of self-defense, and that it is in contravention of Japan's obligations under the Nine Power Treaty of February 8, 1922, and under the Pact of Paris of August 27, 1922.

In the second report 70 the sub-committee rendered its opinion on the case. Concerning the action taken by Japan, the committee pronounced it "a breach of Japan's treaty obligations which could not be justified". Repeating the Japanese assertion that the matter was of concern to Japan and China alone and not to be interfered with by the League or any other third party, the report declared that the observance of international law and treaty obligations were matters of vital interest to all nations, that the situation in China concerned all states, and that the League had "the duty as well as the right to bring about a speedy restoration of peace in the Far East, in accordance with the existing obligations under the Covenant and the treaties".

71. Art. VII.

72. For text see Royal Institute, Documents, op. cit., p. 700.

73. Ibid., p. 701.
The sub-committee held the opinion that constructive action should be taken to secure the restoration of peace as early as possible. Taking into account, at the same time, the fact that Japan was no longer a member of the League and had declined the latter's offer of co-operation, the committee proposed the invocation of the consultation provisions of the Nine Power Treaty by convening a conference of the signatory states of that treaty with a view to finding a settlement for the situation in China. As a first step it was suggested that the League Assembly invited those members of the League which were parties to the Nine Power Treaty to initiate the Consultation.

As an expression of moral support for China, the sub-committee proposed that the League Assembly "recommend that Members of the League should refrain from taking any action which might have the effect of weakening China's power of resistance and thus of increasing her difficulties in the present conflict, and should also consider how far they can individually extend aid to China".

The reports and recommendations of the sub-committee were approved by the Advisory Committee and unanimously adopted by the Assembly, the Polish delegation alone abstaining.

71. Art.VII.
72. For text see Royal Institute, Documents, op.cit.,p.700.
73. Ibid.,p.701.
from voting.74

The resolution of the Assembly was endorsed by the United States. In a statement issued by the State Department,75 the American government recalled the famous Chicago speech made by its President76 on October 5th.77 It condemned Japan as having violated the general principles of international law as well as the provisions of the Nine Power Treaty and the Pact of Paris, and it declared that the conclusions of the United States were "in general accord with those of the Assembly of the League of Nations".

74. Ibid., p.599.

75. Ibid., p.590.

76. Ibid., p.582. In the same speech the President advocated a "quarantine" of treaty-breaking nations.

77. The same day that the sub-committee reports were adopted by the Advisory Council and submitted to the League Assembly.
2. The Brussels Conference

Following the recommendation of the League of Nations, a conference was held at Brussels for the purpose of "examining in conformity with Article VII of the Nine Power Treaty, the situation in the Far East and to consider friendly methods for hastening the end of the regrettable conflict now taking place there". 78

The conference was called in a somewhat roundabout way. In "compliance with a request of the Government of Great Britain, made with the approbation of the Government of the United States of America", the invitation for the Conference was issued by the Belgian government on October 15, 1937, to all the signatories of and adherents to the Nine Power Treaty, 79 and later to Germany and Soviet Russia. 80

The invitation was accepted by all except Japan and Germany. 81 In its reply 82 the Japanese government expressed displeasure at the resolution of the League which had condemned Japan's actions in no uncertain terms and had expressed moral support for China. On the ground that the conference was called as a result of that resolution, the Japanese government declined the Belgian invitation.

78. Invitation from the Belgian Government, Oct. 15, 1937, Royal Institute, Documents, op. cit., p. 703.
79. See same.
80. Ibid., p. 703 note 1.
81. Ibid., p. 714.
82. Ibid., p. 703.
On October 3rd the conference held its opening meeting without the participation of Japan and Germany. From the start an attitude of conciliation toward Japan was assumed by the most neutral states represented at the conference. Four days later the conference addressed a note to the Japanese government, intimating that "it may be possible to allay Japan's misgivings", and inquired "whether the Imperial Japanese Government would be disposed to depute a representative or representatives to exchange views with representatives of a small number of Powers to be chosen for that purpose". The Japanese government was further assured that "such an exchange of views would take place within the framework of the Nine Power Treaty" and that what was desired by the states which met at Brussels was "a peaceful settlement".

In contrast to the tone of the above note, the Japanese government gave a blunt reply, rejecting the opinion of the conference as "not sufficient to persuade it [the Japanese government] to modify the views and policy clearly expressed in its last reply". As to the Nine Power Treaty, the Japanese government declared that it "adheres firmly to the view that its present action, being one of self-defense, forced upon Japan by the challenge of China, lies outside the scope of the Nine Power

83. Ibid., p. 714.
84. Ibid., p. 739.
Treaty, and that there is no room for discussion of the question of its application." The invitation was again declined.

Unable to secure Japanese participation in its discussions, the Brussels Conference adopted a Report and Declaration on November 24th. After reviewing the proceedings of the conference, the Report "strongly" reaffirmed the principles of the Nine Power Treaty, and "strongly" urged that hostilities in China be suspended. It ended with a declaration for the temporary suspension of the sittings of the conference, investing its president with the power of convening it again whenever he or any two of its members "shall have reported that they consider that its deliberations can be advantageously resumed".

Thus the conference was practically of no value. Not only was there no suggestion for common action or positive aid to China; but even a condemnation of the bombing of open towns, or of the violation by Japan of the Nine Power Treaty and other international agreements, or of Japan's resort to aggression, such as had been explicitly pronounced by the League of Nations and the United States, was conspicuously absent in the report and declaration of the conference. Its result, or rather lack of result, was rightly deplored by China and criticized by

85. Ibid., p. 749.

86. Ibid., p. 753.
Sweden, Norway, Denmark and Soviet Russia. It even provoked the ridicule of the Italian representative, who served as Japan's mouthpiece throughout the sittings.

White of the Health Section of the League Secretariat made a study of the epidemic diseases in the Far East. This aroused the interest of China, and correspondence was carried on between the Chinese government and the League for the establishment of direct contact between the Health Section and the Chinese Ministry of the Interior. In 1932 the Director of the Health Section went to China to discuss detailed projects with the Chinese government.

The scope of co-operation was widened in the course of time. The Chinese government created a National Economic Council with various schemes of national reconstruction. It sought the aid of the economic, finance, transit and communication sections of the League.

Formal request for such aid was sent by the vice-Chairman of the Chinese League on April 26, 1931. It received unanimous support of the council in its sixty-third session. It may be noted that on that occasion the Japanese delegate expressed his country's full sympathy with China's efforts.

In the fall of the same year the League dispatched to China a group of noted educationalists. Three professors remained in China to teach in the Central University of Nanking for two years.

87. Ibid., pp. 746, 747, 755.
88. See his statements, Ibid., pp. 724, 747.
F. China's Cultural and Technical Co-operation with the League

The cultural and technical co-operation between the League and China began in matters of public health. In 1922 Dr. Norman White of the Health Section of the League Secretariat made a study of the epidemic diseases in the Far East. This aroused the interest of China, and correspondence was carried on between the Chinese government and the League for the establishment of direct contact between the Health Section and the Chinese Ministry of the Interior. In 1929 the Director of the Health Section went to China to discuss detailed projects with the Chinese government.

The scope of co-operation was widened in the course of time. The Chinese government created a National Economic Council with various schemes of national reconstruction. It sought the aid of the economic, finance, transit and communication sections of the League.

Formal request for such aid was sent by the vice-Chairman of the Executive Yuan to the League Council on April 25, 1931. It received unanimous support of the Council in its sixty-third session. It may be noted that on that occasion the Japanese delegate expressed his country's full sympathy with China's efforts.

In the fall of the same year the League dispatched to China a group of noted educationalists. Three professors remained in China to teach in the Central University of Nanking for two years.
Meanwhile the Transit and Communication Organization appointed for co-operation with China a special committee of public works, which included such distinguished specialists as the Director-General of the German Railway Company, the Electric Commissioner of England, the Chief Engineer of the Italian Civil Engineer Corps, and members of the General Council of Public Works in France, the Swedish Academy of Technical Science, and the Netherlands Shipowners' Association. This committee acted as an advisory body to the National Economic Council.

Similarly the Economic and Finance Committees of the League despatched to China experts on agriculture, banking, flood-control, telephone and telegraph service, and public administration. Loans to the amount of 490,000 Swiss francs were advanced by the League for payment of these experts.

Two schemes for extensive national reconstruction, one a three-year plan and the other a ten-year plan, were formulated. A group of officers in the Chinese civil service was sent out for training in Europe and America. Others were invited by the League to work on its various cultural and technical committees.

Since 1933, especially after the withdrawal of Japan from the League, the assistance given to China by the League was extended to all important fields of reconstruction, such as health, education, shipping, road-building, hydraulic work, farming, and rural reconstruction. To co-ordinate these objects the League
Council appointed another special committee which was composed of the President of the Council and the representatives of Great Britain, China, Czechoslovakia, France, Germany, Italy, Norway, and Spain. In its first session held in Paris on July 18, 1933, the committee declared that the co-operation between China and the League was of a purely technical and non-political character.\footnote{For detail accounts, see Y.C. Hoe, \textit{The Program of Technical Co-operation between China and the League of Nations}, (type-written pamphlet) 1933; L. Rajchman, \textit{Report of the Technical Agent}, Geneva, 1934; R. Haas, \textit{Report submitted to the Secretary-General}, Geneva, 1935.}

The development of such relations between China and the League was watched by Japan with antipathy. In 1934 she went so far as to intervene in the matter by issuing the famous note of April 17th in which she claimed for herself a "special position" in the whole of China and declared that she would oppose "any joint operations undertaken by foreign powers (with China), even in the name of technical and financial assistance."\footnote{See above, Ch. III, Sec. A.} The statement aroused world-wide resentment.\footnote{See \textit{ibid}.} The League and China decided to ignore the Japanese warning and to continue their projects.

With the new Japanese invasion of 1937, much of the work done by the League experts in China was interrupted. But up to
the present the League has been able to lend China invaluable assistance in combat of epidemics in the devastated areas. Recently the League Council has decided to extend its health service in China for the next year, i.e., 1940, and has appropriated a sum of 1,500,000 Swiss francs for the purpose.\footnote{92}

To measure up to the League's determination, Japan put forth a novel thesis in the history of the law of war. On May 9, 1939, through her spokesman in Shanghai, she announced that "hereafter the Japanese would prevent third-power relief organizations from supplying food and medicine to Chinese refugees in cities under attack." On the same day 300 bags of American Red Cross rice and medical supplies were refused landing at the port of Ningpo. The Japanese spokesman declared, "The policy of the Japanese Navy is to prevent the landing of such supplies."\footnote{93}

It remains to be seen how long the world will tolerate such flagrant violations of international law and the moral code of humanity.

\footnote{92. China Information Committee, \textit{News Release}, March 2, 1939.}
\footnote{93. \textit{N.Y. Times}, May 10, 1939.}
CHAPTER V

THE PROBLEM OF SELF-DEFENSE

In the theory of international law, the principle of self-defense as the ultimate guarantee of the right of national existence is generally recognized. But until the establishment of the League of Nations there was no conception of a collective responsibility on the part of the family of nations as a whole for the defense of its individual members. Each state had to look to its own security and in doing so it took the law into its own hands. Consequently the line of demarcation between acts of aggression and acts of self-defense could be drawn only with the greatest difficulty. However, in certain cases, such as the coalition formed against Napoleon in 1805, when it appeared that the rights of neighboring states were being ruthlessly violated and that no choice was left to them but to fight for their existence, the plea of self-defense received general sanction. In other cases, like the German invasion of Belgium in 1914, in which the element of aggression clearly exceeded any menace to Germany's security, the plea was generally rejected.¹ Thus, even in the absence of the system of collective security, the distinction between defense and aggression was not impossible when the facts of a case clearly pointed in one direction or the other.

A. Wars of Self-defense

1. The Russo-Japanese War

In 1904–1905 Japan made war on Russia and invaded the Chinese

¹. See Fenwick, op.cit., pp.159-173.
territory of Manchuria on the ground that the presence of Russian troops in Manchuria constituted a menace to Japan's national security. Setting aside the question of the justifiability of attacks against indirect menace, the existence of the alleged menace, and the circumstances which led Japan "to defend her menaced position and to protect her rights and interests" remain to be examined.

During the Boxer Rebellion Russia, by marching a large body of troops into Manchuria, apparently harbored motives beyond that of the rescue of her nationals in China. As a price for evacuation, the Russian government demanded such commercial and military privileges as would create virtually a Russian protectorate out of parts of Manchuria and Mongolia. In the spirit of the Hay Note which sought to "preserve Chinese territorial and administrative entity", the Allied powers, with the exception of France, voiced strong opposition to the Russian move. 3

It was not at this crucial point that Japan found it necessary to intervene in self-defense. Russia, confronted with the antipathy of the Allies, promptly retraced her steps and on April 8, 1902, three months before the conclusion of the Anglo-Japanese Alliance, signed a convention of evacuation without severe terms. The convention provided for the withdrawal of Russian troops from Manchuria in three stages. China in turn promised to notify the Russian government as to the number of Chinese troops to be stationed in the evacuated area. The two governments were to consult each other in the event of the need for consideration in respect to the extension of the South Manchurian Railway. 4

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2. Correspondence Regarding the Negotiations between Japan and Russia, 1903–1904, translation in HeSh, Entity, p.273.
As far as the Russian demands were concerned, the critical period was thus ended. But the Russian authorities continued to irritate world opinion with their diplomatic activities.

At the second stage of the evacuation, the Russian Far Eastern Suddenly presented to the Chinese government a new set of demands. Although bearing the appearance of bad faith, however, these demands were not so serious in substance as has been often alleged. They were as follows:

1. Non-alienation of the territories restored to China.
2. Non-alteration of the existing form of government in Mongolia.
4. Non-employment of foreigners other than Russians in administrative matters in Manchuria and Mongolia.
5. Retainment by Russia of the existing telegraphic line between Port Arthur and Mukden.
6. The Russo-Chinese Bank to be used as customs bank at Nanchang.
7. The appointment of a sanitary committee at Nanchang.

But even these demands were more than the Russian government was ready to support. The Foreign Minister and the Russian representatives abroad denied their existence. In meeting the Russian demands, the Chinese government on its part did not go further than making a statement that China never intended to cede Manchuria.

5. For text see U.S. For. Rel., 1930, p. 56.
that for the present there was no contemplation of a change in
the administrative system of Mongolia, that the opening of treaty
ports depended on the development of trade, and that no foreign
advisers were then employed in Manchuria. The Russian envoy
expressed satisfaction, and the evacuation of troops was resumed.6
Contrary to the Japanese contention at a later date,7 the with-
drawal of Russian troops was witnessed by the British consul at
Nischwang and by the British envoy at Tokyo.8 As representatives
of Japan's partner in the alliance formed against Russia, their
reports of Russian evacuation may be assumed to be statements of
fact.

But at this point Japan still did not concern herself with
any Russian menace. On the contrary, when General Kuropatkin
visited Japan to observe the attitude of the Japanese government
toward Russia, he met, in his own words, with "the most cordial
and kind-hearted reception", and "became convinced that the gov-
ernment desired to avoid a rupture with Russia, but that it would
be necessary for us to refrain from interference in the affairs of
Korea."9 This led the Port Arthur Council, held under his super-
vision, to decide against the idea of annexing Manchuria or of
interfering with Korea.

Simultaneously as the Russian troops evacuated, the Russian
and Chinese authorities resumed their negotiation with regard to
minor commercial privileges desired by Russia. It was at this


7. See debate between Chinese and Japanese delegates at the Ins-
stitute of Pacific Relations, Kyoto Conference, 1929:
Y. Matsuoka, Reply to Prof. Shuhai Hsü's Criticism and Observa-
tions, Kyoto, 1929.

juncture that Japan most suddenly demanded that Russia make an "examination of affairs in the Extreme East where their interests meet, with a view to a definition of their respective interests in those regions." In the name of the maintenance of the Open Door in China and Korea, Russia was asked to recognize "Japan's preponderating interests in Korea," including the exclusive right to give political and military advice to the Korean government. As a quid pro quo Japan offered to recognize "Russia's special interests in railway enterprise in Manchuria." 10 Nothing indicated Japan's apprehension of any Russian menace.

The Russian government declared its willingness to accept the proposals, on the conditions that Japan should not use Korea for strategic purposes and should recognize Manchuria as outside her sphere of interest. Owing to Japan's refusal to accept the first condition, the two governments failed to agree on the definition of Japan's position in Korea. On January 13, 1904, Japan submitted her last proposal, and between the 23rd and the 30th she pressed for a definite reply from Russia. After that events moved rapidly. On February 5th the Russian government was informed that negotiations were considered terminated. The next day Japan severed

8. See Townley to Lansdowne, May 8, 1903; MacDonald to Lansdowne, June 11, 1903, British Parliamentary Papers, China No.2, 1904, pp.67, 80.


10. Ibid., pp.268-9.
diplomatic relations with Russia. In forty-eight hours, without any warning or declaration of war, the Japanese forces attacked the Russian fleet at Port Arthur and invaded the Chinese territory of Manchuria.  

11. War was not declared until February 10th.

2. Japanese Occupation of Shantung during the World War

In August, 1914, while the belligerents in the Great War were engaged in their struggle in Europe, Japan raised the question of self-defense by attacking the German leasehold in Shantung and subsequently occupying not only the leasehold but also the surrounding territories. The justification offered was that Japan found it necessary "to safeguard the general interest contemplated by the agreement of alliance between Japan and Great Britain." 13 It is necessary to examine three problems in this connection: first, whether the interests of either Japan or Great Britain were menaced by the conditions in the Far East; second, the reaction of Great Britain to the Japanese application of the treaty of alliance; and, third, whether the measures employed by Japan in this case were proportionate to the danger contemplated.

When the War broke out in Europe, Great Britain, France, Russia, and Germany all had troops and naval bases on the Chinese coast as well as in their respective Pacific possessions. The balance of power, however, weighed heavily on the side of the Allies, even before the participation of Japan. Germany had 3,000 troops and a small fleet at Kiaochow. But the British forces in China alone outnumbered the German strength. In addition Russia had a garrison of 8,000 men at Vladivostok, and France and Russia kept considerable naval forces in the Far East. 14 As against Kiaochow the Allies held Weihaiwei, Hongkong, Kowloon and Kwangchowan, not to mention their possessions in Siberia, Indo-China, and the British Malay, which overwhelmingly outmatched

the German islands in the Pacific. The German forces were too weak to look beyond escape from capture. Least of all was there any probability of a German menace to the neutral nation of Japan.

As far as China was concerned, two days after Great Britain entered the War, the President expressed the sentiment of the country and declared neutrality.15 From the standpoint of China, the simplest solution to the maintenance of peace in the Far East was for the belligerent powers to neutralize all of China, including foreign settlements and leased areas. The Chinese government first approached the United States on the subject on August 3rd,16 and received its unhesitating support. The American minister to China was instructed "to participate in proposed arrangements to neutralize all foreign settlements in China." As to the rest of China, including leased areas and marginal waters, "the Department [of State] is giving the matter full consideration."17

China's neutrality was also favored by Great Britain, the ally of Japan and one of the major foes of Germany. On August 7th the American ambassador at London reported to the State Department that the British foreign secretary desired "to prevent fighting in China or in Chinese waters." The foreign secretary said that the maintenance of the status quo in China "would be a great advantage if agreed to," but "he must consult the British cabinet before committing himself." In the opinion of the American ambassador, "there is little doubt about the cabinet's acceptance."18

15. For text see F.D. Djanق, The Diplomatic Relations between China and Germany since 1898, Shanghai, 1936, p.174.
17. Bryan to MacMurray, Aug. 7th, ibid., p.165.
18. Page to Bryan, Aug. 11th, ibid., p.185.
Great Britain's support failed, however, when twelve hours later her foreign secretary informed the American ambassador that "Japan finds herself unable to refrain from war with Germany." 19

Germany on her part also manifested every desire to keep peace in the Far East. In view of the vulnerable position of her small force in China, the German government offered to return to China complete authority over the leasehold of Kiaochow. 20 When communications between Germany and Eastern Asia were cut off, the German ambassador at Tokyo sought the medium of the American government on August 11th to inform his government that he advised neutralization of the Orient to prevent any attack by the Japanese. 21 The American government refused to serve in that capacity, 22 but on the same day undertook to make inquiries in Germany on its own account. 23 The German government replied favorably with the following proposals: 24

1. Germany does not seek war with Japan.

2. If Japan, on account with treaty with England, asks that Germany do nothing against British colonies, warships, or commerce in the East, Germany will assent in return for a corresponding promise from England.

3. England and Germany reciprocally agree that either all warships of both in the East leave eastern waters or remain inactive as against the other, if remaining there.

4. Japan, England, and Germany to agree that none of these three shall attack warships, colonies, territory, or commerce of any of the others in the East.

5. The East to mean all lands and seas between parallels London 90° east and all of the Pacific to Cape Horn.

19. Same to same, ibid., p.167.


24. Gerard to Bryan, ibid., p.139.
These proposals were transmitted to Tokyo. But the Japanese government persisted in pursuing its policy of war.

In the interval between Japan's ultimatum of August 15th and her declaration of war on the 23rd, Germany made their last efforts to avoid hostilities in the Far East. It was arranged that Germany would immediately retrocede Kiaochow to China. Japan forthwith intervened and warned the Chinese government "to discontinue such pourparlers."26

China next prepared to declare war on Germany in order to take over Kiaochow herself to avoid Japanese military operations. On August 20th the Chinese foreign office received the Japanese statement that "the Kiaochow matter no longer concerns the Chinese Government."27 In desperation, the Chinese government requested the United States to take over Kiaochow with the consent of Germany and Great Britain, and then to transfer it back to China.28 But the commencement of Japanese military actions was impending, and the American government declined the proposal.29

The second question to be examined is Great Britain's attitude toward Japan's application of the treaty of alliance. As early as August 1st Great Britain informed Japan that "we did not see that we were likely to have to apply to Japan under our Alliance, or that interests dealt with by the Alliance would be involved."30

The British stand seemed to be fully understood by the Japanese government, when it replied that it would come to the assistance of Great Britain "if called upon to do so, leaving it entirely to His [Britannic] Majesty's Government to formulate the reason for, and the nature of the assistance required." 31

To make sure of the provisions of the Alliance, the British foreign secretary sought the technical advice of the foreign office and received the opinion that only in the event of an attack upon Weihaiwei or Hongkong, should Japanese aid be brought in. 32 This opinion was communicated to the Japanese government. 33

To the surprise of the British government, Japan replied that in cases "involving perhaps a question of Chinese or Russian territorial waters, the Imperial Government would wish to have the opportunity of considering it and consulting with His Majesty's Government before taking definite action." 34 This offer was forthwith declined by the British government. To make clear Great Britain's attitude toward the suggested application of the Anglo-Japanese Alliance, the British foreign secretary explained: 35

I told the Ambassador [of Japan] how much I had been impressed by the way in which Japan, during the Russo-Japanese War, demanded nothing of us under our alliance with her except what was strictly in accord with the Treaty of Alliance.... I had thought that a fine attitude of good faith and restraint; and now we in turn should avoid,

32. See note by Sir William Tyrell, Aug.3rd., ibid., p.295.
33. Grey to Greene, Aug.4th., ibid., p.327.
34. Greene to Grey, Aug.4th., ibid., p.329.
if we could, drawing Japan into any trouble.

In his memoirs the British foreign secretary noted that the course chosen by Japan was "repugnant to Australia and New Zealand," and was "a matter of some embarrassment and even anxiety" to the British government. 36

The third problem to be analyzed is the relation between the Japanese operations in Shantung and the necessities of the situation. The objectives of the operations were clearly defined in the ultimatum 37 of August 15th, in which the Japanese government demanded of Germany:

First, to withdraw immediately from Japanese and Chinese waters German men-of-war and armed vessels of all kinds and to disarm at once those which cannot be so withdrawn; and

Second, to deliver at a date not later than September 15th to the Imperial Japanese Authorities, without condition or compensation, the entire leased territory of Kiaochow with a view to the eventual restoration of the same to China.

The first objective had been attained before demanded. As soon as the hostile attitude of Japan became known, the commander of the German Far Eastern Squadron decided that "any idea of engaging his fleet in cruiser warfare in the Eastern Asia areas should be given up," 38 and accordingly he directed the fleet to escape to Ponape in the Caroline Islands. 39

What remained to be achieved, then, was the occupation of Kiaochow. The manner in which this was carried out was described by a neutral observer, Dr. Stanley K. Hornbeck, who noted: 40

36. Viscount E. Grey, Twenty-Five Years, 1892-1916, N.Y., 1925, II, p.10

37. See above, note 13.


39. See ibid., Ch.YII.

In the prosecution of the military operations against Kiaochow the Japanese landed their forces at a port on the northern coast of Shantung nearly one hundred miles away and used the intervening Chinese soil as a base of operations. There was no suggestion of "by your leave" to the Chinese government; no consideration was shown either for China's rights as a neutral or for the persons and property of the Chinese subjects who were so unfortunate as to live along the line of march and in the zone of operations. The Chinese government protested against the violation of its sovereign rights but made no resistance, and then, following the precedent set in the Russo-Japanese War, voluntarily declared the area within which the Japanese had begun to carry on their operations a war zone. Before long, however, the Japanese sent military forces westward, first to Weihsien, which was outside the war zone, and then to Tsinanfu, the capital of Shantung, thus occupying the whole of the line of railway to the capital. As Tsinanfu is 256 miles from Kiaochow, and as all the Germans who could have anything to do with the war were shut up in Kiaochow, anyone with a little knowledge of Shantung Province and the conditions of the war will realize that the occupation of Weihsien and points west was not at all necessary to the reduction of Kiaochow and the destruction of the German military base.

The same observer also pointed out that the Tsinan-Kiaochow Railway was a private Sino-German enterprise, which had not been under the administration of the German government. For the occupation of that railway the Japanese government pleaded military necessity. This was repudiated by the American minister to China, who wrote, "As this railway had never had German military guards, and as the portion near Tsingtao was already held by Japanese troops, the military necessity of such further occupation was by no means apparent." Two months after the surrender of Kiaochow, the Chinese government informed Great Britain and Japan that as hostilities had

41. See ibid., pp.298-9.
42. Reinsch, op.cit., p.124.
43. To keep up the spirit of the Alliance, Britain sent some troops to the aid of Japan in the Kiaochow operations. See Hornbeck, op.cit., p.281.
ceased and as there was no more occasion for military action, the declaration of the war zone was cancelled. It also requested the withdrawal of all Japanese and British troops from the area. To this the Japanese government replied that it "would not permit the movement and actions of their troops within a necessary period to be affected or restricted by such act of cancellation" of the war zone.

The real intent and purpose of Japan's occupation of Kiaochow was officially acknowledged within a week, when the Japanese government served the famous Twenty-One Demands upon China. In the ultimatum delivered later the Japanese government declared that "in the acquisition of Kiaochow the Japanese Empire sacrificed much blood and money, and, after the acquisition the Empire incurs no obligation to restore it to China." She was particularly vulnerable because of the propinquity of Peking to the naval base of Port Arthur. For the defense of her capital she now sought the intervention of third powers.

The result was the retrocession of the Liaotung Peninsula to China, brought about by the triple intervention of Russia, France, and Germany. This, however, was not done without quid pro quo. In addition to the indemnity already agreed upon, China paid to Japan another sum of Yens 30,000,000.

China next entered into a defensive alliance with Russia in which they were engaged to support each other in the event of military actions directed by Japan against either of them or to conclude peace in concert. During such military actions, granted to Russia the right to construct a railway across Manchuria and the use of the railway free of charge for the transpor-
B. The Balance of Power in the Far East

Toward the end of the last century the Great Powers formed a series of groupings and alliances among themselves based upon the conception of a balance of power as essential to the defense of their national interests in China. In the pursuance of their objectives, China's rights of independence were often disregarded by them.

1. China's Attempts at a Balance

The Sino-Japanese War of 1894-1895 brought upon China the worst disasters that ever threatened her national existence. Aside from the indemnity which pledged her to foreign financial control, the destruction of her navy and the loss of the territories of Korea, the Liaotung Peninsula, Formosa, and the Pescadores exposed her entire coastal area to attack from the sea. She was particularly vulnerable because of the propinquity of Peking to the naval base of Port Arthur. For the defense of her capital she now sought the intervention of third powers.

The result was the retrocession of the Liaotung Peninsula to China, brought about by the triple intervention of Russia, France, and Germany. This, however, was not done without quid pro quo. In addition to the indemnity already agreed upon, China paid to Japan another sum of Tls. 30,000,000.

China next entered into a defensive alliance with Russia in May, 1896. The two nations engaged to support each other in the event of an attack directed by Japan against either of them or Korea, and to conclude peace in concert. During such military operations all Chinese ports should be open to Russia. China also granted to Russia the right to construct a railway across Manchuria and the use of the railway free of charge for the transpor-
tation of Russian military provisions and troops in both peace and war. The alliance was to last for fifteen years. Its effect, however, was soon nullified by Russia's actions. Instead of helping China to resist the aggression of France and Germany, the Russian government took part in the "battle for concessions." The spirit of the Russo-Chinese Alliance was finally killed by Russia's intrigue with Japan after the Russo-Japanese War.

2. China and the Two Hostile Camps: Anglo-Japanese Alliance versus Franco-Russian Entente

The grouping of powers began during the Boxer Rebellion. In order to check the Russian designs in Manchuria, Great Britain concluded an agreement with Germany on October 16, 1900, to maintain the pre-Rebellion status quo of China. But Germany soon declared that the agreement did not include Manchuria. Finding no support from Germany, Great Britain turned to another power, and on July 30, 1902 the Anglo-Japanese Alliance was formed. The two parties declared that the alliance was "entirely uninfluenced by any aggressive tendencies in either country." They, however, possessed "special interests," Britain in China, and Japan in China as well as Korea. In Korea Japan was "interested in a peculiar degree politically as well as commercially and industrially." If in the defense of these interests either party should be involved in war with another power, the other promised to remain strictly neutral. But if another power should join in hostilities against that ally, the other would come to its

48. For text see Mackurray, I, pp. 81-2.
49. The "battle" represented another phase of the balance of power. It is excluded from the present discussion in view of the fact that it bears little direct relations to the problem of self-defense.
50. For text see Mackurray, I, pp. 337.
assistance. The alliance was to be effective for five years.\textsuperscript{51}

To this Russia and France, as members of the Entente in Europe and also having interests in the Far East, replied that they "reserve to themselves the right to consult...as to the means to be adopted" in case "either the aggressive action of a third Power, or the recurrence of disturbances in China, jeopardizing the integrity and free development of that Power, might become a menace to their own interests."\textsuperscript{52}

The balance of power met its test during the Russo-Japanese War. The defeat of Russia destroyed the equilibrium.

3. The Great Powers in a United Front

For a time after the Russo-Japanese War, the Great Powers formed a united front in the Far East, ostensibly to defend their rights in that region, but in reality to further their interests at the expense of China.

After joining hands with Russia\textsuperscript{53} and renewing the alliance

\textsuperscript{51}\textit{Ibid.}, pp.324-5.

\textsuperscript{52}\textit{Ibid.}, pp.325-6.

\textsuperscript{53} Japan and Russia concluded peace in the Treaty of Portsmouth of Sept. 5, 1905. In that treaty the two countries engaged to evacuate Manchuria and to restore "all portions" of it "to the exclusive administration of China"(Art.III). But in the annex to the treaty, without the consent of China, they agreed between themselves to have the right to maintain railway guards in Manchuria.(Additional Art.I). Russia also recognized the domination of Korea by Japan (Art.II), thus nullifying the effects of the Russo-Chinese Alliance, which normally was still in force.

For text of Portsmouth Treaty see Mackurray, I, pp.522-8.
with Great Britain, Japan entered into an agreement with France on June 10, 1907 by which the two contracting parties promised "to support each other for securing the peace and security" of those regions of the Chinese empire adjacent to their respective possessions. In the same year Russia and Japan engaged to "sustain and defend the maintenance of the status quo" of their interests in China, which included not only rights obtained with the consent of China, but also those created by "special conventions concluded between Japan and Russia" without Chinese assent. These links between Great Britain, France, Japan and Russia made possible an Anglo-Russian rapprochement; and the differences hitherto existed between Great Britain and Russia with regard to Tibet were smoothed out in the agreement of August 31, 1907.

The last to fall in line was the United States. In the Root-Takahira agreement of November 30, 1908, the Japanese and American governments, "uninfluenced by any aggressive tendencies," undertook to maintain "the existing status quo" in the Far East, including "the free and peaceful development of their commerce in the Pacific Ocean". In the event of any threat to their common policies, the

54. The Alliance was revised on August 12, 1905 to recognize the Japanese claims in Korea. The military obligation of the Alliance was made comprehensive. For text see MacMurray, I, pp.516-8.

55. Ibid., p.640.

56. Russo-Japanese Agreement, July 30, 1907. MacMurray, I, p.658. In another secret agreement signed on the same day the two powers each recognized the interests of the other, Japan in Korea and Russia in Mongolia. Furthermore, a line was drawn across Manchuria marking out two spheres of influence for themselves. See A.L.P. Dennis, The Foreign Policy of Soviet Russia, N.Y., 1934, p.371.

57. MacMurray, I, pp.789-791.
two governments promised "to communicate with each other in order to arrive at an understanding as to what measures they may consider it useful to take." 58

The united front resulted in the predominance of Japan and Russia. Not only did they renew their agreements of 1907 59 and further strengthen the political ties between them, 60 but they succeeded in destroying the Knox Neutralization Plan for Manchuria 61 and frustrate the Anglo-American efforts in the Consortiums. 62 Furthermore, Japan was able to secure British 63 and American 64 recognition of her "special interests" in China.

58. Ibid., pp. 769-71.


60. Russo-Japanese Treaty of July 3, 1916. MacMurray, II, pp. 1327-8. In this agreement Russia and Japan promised that each should not be party to any arrangement or political combination directed against the other. (Art. I).

61. For details see Hsi, Entity, pp. 326-46.

62. See ibid., pp. 392-400.

63. Preamble, Anglo-Japanese Alliance, July 13, 1911, MacMurray, I, p. 900. The Alliance was revised to omit the provisions on Korea, since that country had been annexed by Japan in 1910. The third Alliance retained the obligations regarding mutual military assistance in war. By that time, however, the Alliance became more of a hindrance than a help to Great Britain. It antagonized not only the Dominions in the Pacific but also the United States, and it was renewed only to prevent Japanese aggression in India. See Buell, op.cit., Ch. IV.

64. "The Government of the United States recognizes that Japan has special interests in China, particularly in the parts to which her possessions are contiguous." Lansing-Ishii agreement, November 2, 1917, MacMurray, II, pp. 1394-8.
4. The Nine Power Treaty and the End of the Groupings

The consequence of the World War and the Twenty-One Demands created for Japan a position of supremacy in China and proved to the other Great Powers the ineffectiveness of the grouping of the powers as a system for the defense of their rights and interests. The groupings were terminated at the Washington Conference of 1921-1922. The Lansing-Ishii Agreement and the Anglo-Japanese Alliance were formally cancelled, and the claim to "spheres of interest" was abandoned. With a view to putting an end to secret diplomacy, all past engagements concerning China that were still in force were to be published, and all future engagements were to be similarly made known. To make the maintenance of the Open Door in China a collective engagement, a clear definition of the policy was given and was embodied in the form of a multilateral treaty. Furthermore, in the Nine Power Treaty the powers engaged "to respect the sovereignty, the independence and the territorial and administrative integrity of China," to provide "the fullest and most unembarrassed opportunity" for her to maintain and develop an effective and stable government, to use their influence for the maintenance of the principle of the Open Door in China, and to refrain from taking advantage of conditions in China to seek special rights to the exclusion of other states. These powers also promised "not to enter into any treaty, agreement or understanding either with one another, or, individually or collectively,"

with any other Power or Powers which would infringe or imperil" these engagements. By the Four Power Pact the United States, Britain, France and Japan agreed to confer jointly in any difference or controversy arising out of any Pacific question. All these engagements were calculated to prevent the recurrence of past rivalries and misunderstandings, and to maintain an open and fair balance of power for the legitimate defense of the interests of the powers in China.

66. See Willoughby, Conference.


68. Ibid., App.VI.

The Pact of Paris, in its renunciation of war, does not prohibit acts of legitimate defense on the part of the powers giving their adherence to it. Though not stated in the text itself, this is evident from the correspondence attending the signing of the Pact. There the signatories definitely reserve the right to defend themselves against invasion or impending threats of attack.\(^{67}\) The clearest statement of this reservation may be found in Secretary of State Kellogg's note of June 23, 1928 addressed to the original signatory governments. Quoting from a previous speech made by him, he said:\(^{68}\)

That right [of self-defense] is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require war in self-defense. If it has a good case, the world will applaud and not condemn its action.

It might seem that the right of self-defense is described here in the broadest terms, particularly with the assertion that each nation alone is competent to decide whether a resort to it is necessary. Upon closer examination, however, it may be seen that Secretary Kellogg spoke solely of the defense of a nation's territory against attack or invasion. Furthermore, the sentence, "If it has a good case, the world will applaud and not condemn its action," may seem to imply that, as a corollary, the propriety

\(^{67}\) See J.T. Shotwell, \textit{op.cit.}, Pts II, III; App.V,VI.

\(^{68}\) Ibid., App.VI.
of the measures taken by a state in the name of self-defense is subject to examination and possible condemnation by the other signatories.

The doctrine that a state has the sole and final judgement upon the legitimacy of its exercise of the right of self-defense has been condemned by well-known publicists. The argument is forcefully set forth by Professor Lauterpacht. Holding that the conception of self-defense is a legal conception—"it becomes so, inter alia, by forming part of a treaty or of declarations originally connected with it"—he dismisses the doctrine of unilateral decision as juridically unsound. For, like the corresponding right possessed by individuals under municipal law, the right of self-defense in international law is not merely recognized but also regulated by law. Under the Pact of Paris the question of the right to have recourse to war in self-defense is amenable to judicial decision. To hold otherwise would be to reduce the legal effect of the Pact to a mere theoretical change in the conception of war as a recognized form of international procedure. "If that were so," says Professor Lauterpacht, "the treaty would stamp as unlawful such wars only as the belligerents might openly declare to be undertaken with the intention of aggression." Professor Lauterpacht refuses to entertain such an ignoble estimation of the Pact.

Regardless of the opinions of scholars of international law,

69. See Willoughby, Controversy, pp. 554-5.

those signatories of the Pact of Paris which are also members of
the League of Nations have accepted for themselves a special
obligation in their recourse to self-defense. In 1930 the League
Assembly, in order to bring the Covenant into harmony with the
Peace Pact, designated a special committee to study the problem.
The committee submitted a report, which was adopted by the First
Committee of the Assembly prior to the occurrence of the Sino-
Japanese dispute and was unanimously reaffirmed by the 1931
Assembly. Paragraph 7 of the report reads:

The use which a State claims to make of the right of
self-defense is a matter which may be considered by the other
States concerned and, in the case of the Members of the League
of Nations, it is subject to the appreciation of the Council.

At the time of the adoption of the report, Japan was a mem-
er of the League and also represented on the special committee.
Furthermore, the Japanese government dispatched a communication
to the League expressly accepting the report "in principle". When,
therefore, Japan attempted to evade the obligation during
the discussion of the Sino-Japanese controversy before the League,
the argument of Japan was refuted by M. Politis of the Greek dele-
gation who had served as chairman of the Committee to Harmonize
the Covenant with the Paris Pact. M. Politis pointed out that
by the adoption of his report Japan had accepted two established
rules:

71. League Document A.36.1931.V.


74. Willoughby, Controversy, p. 557.
The first rule is that a State which adopts measures of self-defense does not and cannot evade the discussion of its action by other States, and that, as regards the States Members of the League, it is subject to the sovereign appreciation of the Council or of the Assembly as the case may be. 

Every act of violence does not necessarily justify its victim in resorting to war and does not release him from the specific obligations laid down in Article XII and the following of the Covenant. He is not so released unless he were the victim of a flagrant aggression of such a serious character that it would obviously be dangerous not to retaliate at once.

The second rule is that legitimate defense implies the adoption of measures proportionate to the seriousness of the attack and justified by imminence of the danger.

In its famous resolution of March 11, 1932 in regard to the Sino-Japanese dispute, the League Assembly declared that the Covenant was in full harmony with the Pact of Paris.75 The same resolution affirmed that the Japanese invasion of China was "contrary to the spirit of the Covenant"76. Reading the two declarations together, it might be inferred that by the same act the spirit of the Pact of Paris was also violated.

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75. Ch.I. For text see ibid., pp.299-301.
76. Ch.II.
D. The League Covenant and Self-Defense

While the League Covenant does not preclude the exercise by a member state of the right of self-defense in the face of imminent danger of attack, it does impose certain limitations beyond which that right cannot be exercised legitimately. Thus Articles 12, 13 and 15 pledge the members to submit a dispute arising between them either to adjudication or to inquiry by the Council. Article 10 obliges the members to respect and preserve, as against external aggression, the territorial integrity and existing political independence of all member states.

During the Sino-Japanese controversy Japan pleaded self-defense before the League Council, and was reminded by the British delegate that in the Greco-Bulgarian Case of 1925 the Council, including Japan, had held the opinion that no defense measures against danger of any sort could include the armed invasion by one nation of another, and that no solution of any controversy between League members, however urgent, could exclude the conciliation of the League.76a

Even in the Corfu Case of 1923, in which the League, for purely political reasons, fail to take appropriate action, the opinion given by the Committee of Jurists in this connection did not assert that coercive measures could include armed invasion. On the contrary, it pronounced that those measures were subject to the judgment of the Council.77

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77. Ibid., p.548.
Japan's argument that her invasion of China in September, 1931, was within legitimate bounds of self-defense was rejected by the entire League, first in the Council and then in the Assembly. The Council Resolution of October 24, 1931, called upon the Japanese government to withdraw its troops and to complete the evacuation by November 16th. In the appeal of February 23, 1932, it again reminded Japan of her obligation under Article 10 of the Covenant, and it adopted the Stimson Non-recognition Doctrine for violation of that article.

When the case was brought to the Assembly, Japan's claim of self-defense was denounced in the strongest terms hitherto employed in the League. The small states, in particular, openly declared that Japan had violated both the League Covenant and the Pact of Paris. The Swiss representative asserted that "the principle of withdrawal of the Japanese forces could no longer be questioned." The condemnation culminated in the Assembly Resolution of March 11, 1932, which incorporated the decisions of the Council and the Stimson Doctrine and declared that "it is contrary to the spirit of the Covenant that the settlement of the Sino-Japanese dispute should be sought under the stress of military pressure."

78. Par. 4a, ibid., p. 114. Since the Council was still acting under Art. 11 which required unanimity, the Resolution, with the sole dissenting vote of Japan, possessed only moral force. See above, Ch. IV, Sec. D, i.

79. See Willoughby, Controversy, p. 240.


82. Willoughby, Controversy, pp. 299-301. This Resolution was passed unanimously. See above, Ch. IV, Sec. D, ii.
E. The Mukden Incident and Self-Defense, as Reported by the Lytton Commission

The Mukden Incident of September 18, 1931, which led to the present invasion of China, has been studied and reported upon by the League of Nations Commission of Enquiry, known as the Lytton Commission.83

According to the Japanese version, on the night of that date, the Japanese troops84 were "practising defense exercises along the track of the South Manchuria Railway to the north of Mukden. . . . They heard the noise of a loud explosion . . . and . . . they discovered that a portion of one of the rails on the down track had been blown out. . . creating a gap of 31 inches. . . The patrol was fired upon from the fields. . . and returned the fire. The attacking body, estimated at about five or six, then stopped firing and retreated northward. The Japanese patrol at once started in pursuit and, having gone about 200 yards, they were again fired upon by a larger body. . .", whereupon fighting took place which ultimately led to the occupation of Manchuria by Japan.85

According to the Chinese version, "the Japanese attack was entirely unprovoked and came as a complete surprise. . . . Instructions had been received from Marshal Chang Hsueh-liang that special care was to be taken to avoid any clash with the Japanese troops. . . . The Japanese had been carrying out night manoeuvres around the Chinese barracks on the nights of September 14th, 15th, 16th, and 17th. . . . At 10 p.m. [of the 18th] the sound of a loud explosion was heard, followed by rifle fire. . . . While the [Chinese] Chief of Staff was still at the telephone [receiving a report of the fire] . . . the Japanese were attacking the barracks. . . ." In accordance with their instructions the Chinese troops offered no resistance.
The Japanese occupied Mukden and subsequently the whole of Manchuria. 86

The Lytton Commission, after a thorough inquiry of six months in the Orient, drafted its famous Report to the League Council. The facts of the case were virtually identical with those in the Chinese version. In regard to the clash between the two armies, the Report said: 87

Tense feeling undoubtedly existed between the Japanese and Chinese military forces. The Japanese, as was explained to the Commission in evidence, had a carefully prepared plan to meet the case of possible hostilities between themselves and the Chinese. On the night of September 18th-19th, this plan was put into operation with swiftness and precision. The Chinese, in accordance with the instructions referred to on page 68, had no plan of attacking the Japanese troops, or of endangering the lives or property of Japanese nationals at this particular time or place. They made no concerted or authorised attack on the Japanese forces and were surprised by the Japanese attack and subsequent operations.

Speaking of the explosion, which was referred to in both the Japanese and Chinese versions, the Commission stated:

An explosion undoubtedly occurred on or near the railroad between 10 and 10-30 p.m. on September 18th, but the damage, if any, to the railroad did not in fact prevent the punctual arrival of the south-bound train from Changchun, and was not in itself sufficient to justify military action.

These facts led the Commission to come to the conclusion that

The military operations of the Japanese troops during this night, which have been described above, cannot be regarded as measures of legitimate defense.

It added:

In saying this, the Commission does not exclude the hypothesis that the officers on the spot may have thought they were acting in self-defense.

To this last statement by the Commission the Japanese have attached much importance, and have argued that the observance of it should modify the verdict pronounced by the Commission. 88 As
is pointed out by Professor W. W. Willoughby, the observation at
best could have no significance beyond possibly acquitting the
officers concerned of deliberate attack. For, granted that those
officers sincerely believed that they were acting in self-defense,
the fact still remains that their belief was erroneous, and that
by those acts they had put their government in the wrong. 88 In the
Dogger Bank Case of 1904, the commission of enquiry reported that
the Russians believed they were firing upon hostile vessels, and that,
therefore, they might be exculpated from having deliberately at-
tacking friendly British vessels. Nevertheless the Russian govern-
ment was held responsible for their act and had to make good the
damage done. 90

83. See above, Ch. IV, Sec. D, iii.

84. For the presence of these troops in violation of treaty obliga-
tions, see below, Ch. IX, Sec. E, 3.


86. Ibid., pp. 69-71.

87. Ibid., p. 71.

88. See Mr. Matsuoka's speech in the Assembly, Dec. 6, 1932.
Willoughby, Controversy, p. 480.

89. See ibid., p. 582.

90. Ibid., note 4.
CHAPTER VI

INTERVENTION

Intervention takes place when one state interferes in the domestic affairs of another state without the consent of the latter. It constitutes a direct violation of the territorial jurisdiction of the state to which it is applied, and it is regarded as an exception to the generally recognized right of independence of that state. The justification of intervention is usually an act of alleged self-defense. But not infrequently it has been motivated by ulterior designs for political control; and, since precedents are too irregular and inconsistent to establish a definite rule of law, publicists have disputed whether intervention is ever justified in international law.¹

It is generally agreed that the right of intervention, if exercised at all, must be construed in the strictest terms, particularly when it calls for the employment of armed forces. In the Caroline Case, Daniel Webster made the historic statement that while "respect for the inviolable character of the territory of independent states is the most essential foundation of civilization, there were exceptions to this inviolability growing out of the great law of self-defense"; but that such exceptions should be limited to cases in which the "necessity of that self-defense is instant, overwhelming and leaving no choice of means and no moment for deliberation."²

¹ See Fenwick, op.cit., p.164; Hall, op.cit., 7th ed., Ch.VIII.
A. Intervention as a Measure of Self-Defense:

The Boxer Rebellion

An instance of intervention in self-defense may be found in the Boxer Rebellion in 1900, when anti-foreign riots in China extended beyond the control of the central government and when the foreign powers dispatched troops into the Chinese capital to rescue their nationals. However, the background of the uprising, the subsequent action taken by the foreign troops, the atrocities committed on both sides, and the terms of the settlement, complicated the situation and raised the issues beyond the scope of self-defense.

The genesis of the Boxer Uprising may be traced back to the unhappy relations existing between China and foreigners after the Opium Wars. The presumptuous attitude on the part of the victors, the persistence of the French Catholic missions in meddling with Chinese internal politics, and above all, the extortion of concessions which were begun in the name of religious grievances, all worked toward creating among the Chinese population a bitter feeling against Christianity. Foreign missionaries were popularly regarded as agents of Western Imperialism. In 1898, as the "battle for concessions" threatened to break up the empire, anti-Christian and anti-foreign feelings spread in various parts of China, particularly in Shantung where Kiaochow was the first concession seized and where the provincial government was subjected to humiliation by the Germans. On March 22, 1899, three German engineers were attacked by a mob. In retaliation the German government dispatched troops to burn the villages in which the assailants lived. This served only to inflame the anger of the people. Local militia began to take
part in the anti-foreign movement. Many government officials, who had suffered at the hands of foreigners, became their leaders.

By the following spring, the movement spread beyond the control of the government and became literally a rebellion in and around Peking in which Chinese as well as foreign Christians were attacked and their houses and shops looted and burned indiscriminately. The storm gathered to a head on June 11th, with the murder of Mr. Sugiyama, chancellor of the Japanese legation. On June 16th, the foreign naval commanders at Tangku sent an ultimatum to the Chinese garrison demanding immediate surrender of the forts. On the same night fire was exchanged and by dawn all the forts were taken by the foreign troops. They then pushed their way to the Chinese capital.

On the morning of the nineteenth, the North China Daily News of Shanghai, a foreign paper, printed an editorial denouncing the empress dowager "and her gang". This played into the hands of the rebels. In the afternoon of the same day, while the Grand Council was in session in Peking, a forged dispatch from the foreign ministers, using the most insolent language, was delivered to the empress dowager. This, together with the news of the seizure of Tangku, so exasperated her that she swore vengeance upon all the eight states that took part in the operations at Tangku.

For the first time troops in uniform openly took part in the attack. They were, however, refused munitions by the minister who took charge of the imperial arsenal. The foreign community had concentrated in three quarters, which were in a state of semi-siege. Negotiations took place between the foreign envoys and the Chinese government. On the twentieth, the German minister was on his way to the Tsungli Yamen when he was killed by the Boxers, and the news shocked the world.
From that day on the rebellion got out of control. Outside of Peking some two hundred foreigners were killed. Unable to reach the foreigners in Peking, the Boxers massacred hundreds of Christians. A body of rebels burst into the palace and clamored for the emperor, whom they denounced as the "foreigner's friend". But he had been escorted to safety.

If the Boxers committed unpardonable atrocities, the foreign troops spread terror to a far greater extent. In Manchuria, for the loss of twelve lives, the Russians slaughtered many thousand men, women and children. When the foreign troops entered Tientsin and Peking, they set to work to sack the cities. As was described by Western writers, "The disorder continued for several weeks," in which the foreign troops "distinguished themselves as highway robbers.... Military raids were made in all directions, and... it is certain that the three shortest of the Ten Commandments were constantly violated on an extensive scale." After committing these acts of lawlessness, the foreign powers not only required China to restore order and to punish the Boxers, but imposed upon China such humiliating terms as the empire had never experienced. Punishment for the rebellion was inflicted upon people of all ranks, from imperial princes to individual citizens. Prince Tuan and Duke Fu-kuo, princes of imperial blood, were given death sentences, commuted to life-imprisonment in exile to Turkestan. Prince Chuang and the Presidents of the Court of Censors and the Board of Punishments were condemned to commit suicide. The Governor of Shanhsi, the President of the Board of Rites, and the ex-Vice-President of the Board of Punishments, were condemned to 3. See B.L. P. Weale, *Indiscreet Letters from Peking*, London, 1906, pp.227-301.

death. Posthumous degradation, including confiscation of property, was inflicted on the President of the Board of Works, Grand Secretary Hsu Tung, and the ex-Governor-General of Szechuen. A total of ninety-six punishments on high officials was inflicted. To extend the reprimand to the public at large, an imperial decree suspended official career examinations for five years in forty-five cities.

As reparation due for the assassination of the German minister, an imperial prince of the first order was sent to Germany to express to the Kaiser the regret of the Chinese emperor and government. A memorial monument and an arch were erected at the scene of the murder. For the murder of the Japanese chancellor, the Vice-President of the Board of Revenue was dispatched to Japan on a similar mission.

The next item was an indemnity of Tls. 450,000,000 at 4% annual interest, which was calculated to pledge the Chinese customs to foreign control for forty years, by the end of which a sum total of Tls. 982,238,150 would be paid. Besides, for the evacuation of Tientsin, a sum of Tls. 60,000 and another annual sum of Tls. 230,000 for twenty years, purported to be for harbor improvements, were to be paid. The whole indemnity, even discounting the sum subsequently remitted to China for cultural purposes, still stands as the heaviest ever paid by China, in war or in peace.

To prevent recurrence of similar outrages on the part of the Chinese, the importation of arms and war material was prohibited for two years. The legation quarter in Peking was made defensible. It was placed under exclusive foreign control, and no
Chinese might reside therein. The right of maintaining permanent legation guards was recognized, the total for eight states being proposed as 2,100 men. All forts which stood in the way of free communication between Peking and the sea were razed, and twelve places were to be occupied by foreign troops for the maintenance of such communication.

The Tsungli Yamen, or "Office of Foreign Affairs", was transformed into the Waiwu Pu, or "Ministry of Foreign Affairs," which, moreover, was to take precedence over all other ministries as a sign of respect for foreign affairs. Finally, to grant further privileges to foreigners, the existing commercial treaties between China and the powers were subject to revision. 5

Thus, "for a brief outburst of midsummer madness, made serious by the support of nobles and ministers, China had been required to pay a heavy price" 6, heavy particularly when the powers had agreed, as early as July, 1900, not to recognize the rebellion as a state of war, but instead to "regard the condition at Peking as one of virtual anarchy, whereby power and responsibility are practically devolved upon the local provincial authorities." 7 The final settlement, which was embodied in a Protocol, further served to indicate that the agreement was not a treaty of peace. It is established beyond doubt that from the viewpoint of international law the atrocities done to the German minister, the Japanese chen-


cellor, and the foreign residents in China were crimes of the most serious character, for which the Chinese government should shoulder full responsibility. However, considering the circumstances that led up to the commission of the atrocities, the wholesale slaughter, burning and looting resorted to by the foreign troops, and above all the terms exacted from China so fabulously out of proportion to the damages incurred, it would seem difficult to justify the settlement even on the basis of retaliation. It may more reasonably be regarded as a case in which the original motive of self-defense yielded to the demand for vengeance.

As one Western writer appropriately remarked in 1938, "Seldom does a month pass without assurance from a respectable quarter than none of the powers has any thought of intervening in China. Seldom does a month pass without action by foreign diplomats and military officers in China that is tantamount to intervention." A few outstanding cases may be selected as illustrations.

1. Kukri and Ili (1871-1881)

In 1864, while the Peking government entered upon the fourteenth and the last year of struggle against the Taiping regime, insurrections broke out in Sinkiang (Turkestan) and Kansu. As soon as the government could divert its forces from central China, troops were dispatched in 1887 to quell the rebellion in the west.

B. Intervention as an Instrument of Aggression

Since her contact with the West in the last century, China has met with numerous instances of foreign intervention in her domestic affairs in which there was no provocation or violation of foreign rights which demanded self-defense. Such interventions have been resorted to purely as an instrument of aggression for the advancement in China of the interests of the intervening state. On such occasions the intervening state has acted in accordance with the tenets of Machiavellian diplomacy rather than on the principles of international law. Had these interventions occurred in a state which was in a position to assert its rights, they would have been regarded properly as acts of war.

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tern provinces. Four years later, when Kansu was practically recovered, Russia moved troops across the frontier and occupied the territory of Ili, with the declaration that the occupation was temporary and that the territory would be restored to China when the latter was in a position to maintain order in it.

As soon as the Chinese forces completed the pacification of Sinkiang in July, 1878, Russia was notified that China was ready to take over the administration of Ili, and that Chunghow was appointed ambassador extraordinary to St. Petersburg to negotiate with the Russian government.

On September 15, 1879, Chunghow signed the Treaty of Livadia. When the terms were made known, they were "received with amaze-
ment in Europe and with consternation in China". By this treaty the richer and larger part of Ili and the passes through Tien Shan were ceded to Russia; great trading privileges and traveling facili-
ties were granted to Russian subjects; moreover, China was to pay five million rubles to Russia. All these conditions were im-
posed without war and defeat.

Feeling ran high in China. The treaty was disavowed by the Chinese government. The war veterans in Sinkiang clamored for settlement by force. Chunghow, struck with terror, returned to Peking without awaiting an imperial decree. He was arrested and tried by an imperial commission, and condemned for leaving his post without permission from the court. This was regarded by


10. According to the law, no minister could leave his post without an imperial mandate.
Russia as an insult. Upwards of ninety thousand Russian troops were moved into and around Ili.

To ease the tension between China and Russia, the Queen of Great Britain appealed to the Chinese government for clemency toward Chunghow; and in response the court reprieved him. This made possible the reopening of negotiations between China and Russia. The Chinese minister to London and Paris was appointed special envoy for the mission. The determination of the Chinese government and the diplomatic skill of the new envoy brought about the conclusion of the Treaty of St. Petersburg.11 By this treaty Russia still retained a part of Ili; but a large portion was restored to China. In turn China agreed to increase the indemnity to be paid to Russia from five to nine million rubles. As to the commercial privileges, Russia was given the right to establish consulates in certain cities of Sinkiang and Mongolia; and Russian nationals might purchase and erect buildings for residence and trade in those cities, and might trade free of duty in Sinkiang and Mongolia as far as the Great Wall for a period of time to be determined by the two governments.

11. February 24, 1881. For text see Hertslet, II, p.483. For facts of the case see Weigh, op.cit., pp.151-2; Morse, op.cit., II, Ch.XVI.
2. The Knox Neutralization Plan and Russo-Japanese Intervention

After the Russo-Japanese War, China turned her attention to the development of Manchuria. A system of railways was projected. The contract for the first section to be constructed, that between Hsinmintun and Fakumen, was awarded to a British firm in the autumn of 1907. Protest came from the Japanese minister at Peking, on the ground that the line would parallel the South Manchuria Railway and therefore would violate China's commitments at the Peking Conference in 1905. China in reply referred to the minutes of the conference to prove that no such commitments had been made; that, according to the minutes, the representatives raised the question of "parallel lines" but refused to give a definition to the term because they feared "it might create the impression in other countries that there was an intention to restrict Chinese railway enterprise;" and that, in fact, "they added a declaration that Japan would do nothing to prevent China from any steps she might take in the future for the development of Manchuria."12 Notwithstanding the legal evidence, the British government, for political reasons, discouraged its nationals from undertaking the project.

Failing to enlist British support, China turned to the United States for financial assistance. In 1909, the State Department submitted to the British government a project for the "practical application of the policy of the Open Door" in Manchuria. The project, better known as the Knox Neutralization Plan, contained two alternatives: first, to commercialize all railroads and highways in Manchuria and to invest their ownership in China through

an international fund under impartial administration; or, second, to employ that fund to support China in the construction of the Chinchow-Aigun railway and to purchase for China such existing lines as might be offered. 13

The British government was favorably disposed towards the scheme and suggested that the second alternative should be adopted. Next the American State Department submitted the proposal to China, Japan, Russia, Germany and France. 14 Russia was the first to voice opposition to the plan. With regard to the first project, she asserted that the Chinese Eastern Railway was of national importance to her as a route of communication between Western Europe and the Far East, the maintenance of which was a considerable expense to the Russian government. As to the Chinchow-Aigun railway, she declared that its strategic and political significance could not be regarded by her with indifference. She demanded that the precise terms of the proposition be made known to her before any decision was made. 14a

The Russian protest was followed by that of Japan. Unable to find any other reason, the latter note stressed the importance of the Portsmouth Treaty, which Japan regarded as "the highest guarantee of enduring peace and repose" in Manchuria. The Knox Plan was objectionable because in the eyes of the Japanese government it "contemplates a very important departure from the terms of the Treaty of Portsmouth." 14b

14a. Ibid., pp. 245-255, Documents.
14b. Ibid.
of that treaty were thus subject to violation, no specific mention was made.

In Peking the Russian and Japanese ministers presented virtually identical notes warning China to conclude no agreement on the Knox scheme without previous consultation with their respective governments. The Washington government was also notified that no agreement should be made concerning that scheme before Russia had an opportunity to express her view on the matter. Later she informed the United States that the Chinchow-Aigun Railway would be "exceedingly injurious both to the strategy and to the economic interests of Russia"; and that in 1899 China had promised to use no foreign capital other than Russian in the reconstruction of railroads to the north of Peking.

The American government refused to recognize the alleged agreement between Russia and China, as it would constitute a violation of the Open Door in Manchuria. While negotiation was still going on, Russia and Japan concluded on July 4, 1910 a treaty of alliance which reaffirmed the 1907 alliance and promised mutual assistance for the maintenance of the status quo in Manchuria. Thus the Knox plan passed into history.

14c. Fletcher to Knox, Feb. 7, 1910, ibid., p. 257.
14e. Same, Feb. 24th, ibid., p. 261.
14g. See above, Ch. V, note 59.
3. The Chengchiatun Incident

The Chengchiatun Incident, according to an English authority on China, represents a typical instance of "foreign aggression." In 1914, Japanese soldiers had, without any treaty rights and despite Chinese protest, moved into the city of Chengchiatun, some sixty miles west of the Southern Manchuria Railway. They gave concern to the Chinese government by subsidising members of the Manchu Restoration Party and notorious brigand-chiefs, such as the famous Mongolian Babachapu, and by conducting military manoeuvres in the district.

On August 13, 1916, a Japanese civilian beat a Chinese boy for refusing to sell fish at a price dictated by the former. A Chinese soldier of the 28th Division saw this and intervened. A scuffle commenced, in which the Japanese was roughly handled. This was reported to some Japanese soldiers, who rushed to the Chinese barracks and a fracas took place, resulting in the death of seven Japanese and four Chinese, with a number of wounded. The Japanese called out the entire detachment and fired for many hours at anyone they saw. No attempt was made by the Chinese soldiers to advance against them.

In the night, in order not to aggravate the situation, the local magistrate proceeded in person to the Japanese barracks to tender his regrets. He was arrested and locked up by the


Japanese commander, and not released until his son took his place as hostage. To avoid further clashes the Chinese soldiers were withdrawn five miles outside the city. The Japanese, on the other hand, called in more troops from the South Manchuria Railway, while their government filed the following demands for redress:

1. Punishment of the general commanding the 28th Division.

2. The dismissal of officers at Chengchiatun responsible for the occurrence as well as the severe punishment of those who took direct part in the fracas.

3. Proclamations to be posted ordering all Chinese soldiers and civilians in South Manchuria and East Inner Mongolia to refrain from any act calculated to provoke a breach of peace with Japanese soldiers or civilians.

4. China to agree to the stationing of Japanese police officers in places in South Manchuria and East Mongolia where their presence was necessary for the protection of Japanese subjects. China also to agree to the engagement by the officials of South Manchuria of Japanese police advisers.

And in addition:

1. Chinese troops stationed in South Manchuria and East Inner Mongolia to employ a certain number of Japanese military officers as advisers.

2. Chinese military cadet schools to employ a certain number of Japanese military officers as instructors.

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3. The military governor of Mukden to proceed personally to Port Arthur to the Japanese military governor of Kuantung to apologize for the occurrence and to tender similar personal apologies to the Japanese consul general in Mukden.

4. Adequate compensation to be paid by China to the Japanese sufferers and to the families of those killed.

After negotiations which lasted for six months, in which China showed considerable tenacity, the case was closed on the following conditions:

1. The general commanding the 28th Division to be reprimanded.

2. Officers responsible to be punished according to law. If the law provides for severe punishment, such punishment will be inflicted.

3. Proclamations to be issued enjoining Chinese soldiers and civilians in the districts where there is mixed residence to accord considerate treatment to Japanese soldiers and civilians.

4. The military governor of Mukden to send a representative to Port Arthur to convey his regret when the military governor of Kuantung and Japanese consul general at Mukden were there together.

5. A solatium of $500 to be given to the Japanese merchant, Yoshimoto.

The Japanese government promised that the additional troops sent to reinforce the original detachment at the time of the incident
would be withdrawn. But the rest remained as "consular police". The right to maintain such police forces was never admitted by China or any other power having extra-territorial jurisdiction in China.

It may be seen that, throughout the incident, Japan had completely disregarded treaty obligations and violated the law of nations. In the first place, if Japanese troops had no treaty right to be stationed along the South Manchuria Railway, still less could they proceed into the interior of China. Secondly, as observed by neutral witnesses, both the scuffle and the fracas were started by the Japanese. Yet it was the Chinese that had to tender their apology, withdraw their troops, punish their commanders, and make reparation to the Japanese. Thirdly, the demands for the employment by China of Japanese military instructors and advisers were not only reprehensible as extraneous issues bearing no relation whatsoever with either the cause or the consequence of the incident, but were in direct derogation of China's rights and dignity as an independent state. It clearly manifested a desire on the part of Japan to revive the fifth group of the Twenty-One Demands.

17. This fact seems to have been overlooked by J.B. Scott. Cf. his comment on the incident, A.J.I.L., XI. 1917, p. 633.
18. See Willoughby, Conference, Ch. XI.
19. See Scott, op. cit., p. 631-2; below, Ch. IX, Sec. E, 3.
Commenting on the incident, an English writer said: "We believe that no impartial tribunal, investigating the matter on the spot, could fail to point out the real aggressors and withal lay bare the web of a most amazing state of affairs. It is a fact", he continued, "that in Chinese affairs Japanese diplomacy has been too long dictated to by the Military Party in Tokyo and attempts nothing save when violence allows it to tear from China some fresh portion of her independence." 20

The policy of divide and rule has been carried out most rigorously by Japan. It has been continued practically without relaxation since the Chinese Revolution of 1911.

In that year, through the port of Osaka alone, Japan supplied munitions to the revolutionists to the amount of 5,000,000 yen, according to General Ishimoto's statement in the Japanese Diet. 21 To Japan's disappointment, however, the revolutionists soon began to establish a republic with the prospect of maintaining order in a united China. This immediately brought about a change of policy in the Japanese government. Towards the end of the year it informed the United States and Great Britain that it was essentially difficult in a country like China to adopt a republican form of government", and that the best solution would be to establish "practically a Chinese rule


21. See above, Ch. III, Secs. C, D.

22. Duell, op. cit., p. 44.
4. Divide and Rule

Another form of intervention commonly resorted to by certain great powers in their dealings with China is the policy of divide and rule. It seeks to further the objectives of those powers by instigating and perpetuating political disintegration in China. The British intervention in Tibet and the Russian intervention in Mongolia are well known instances already described. 21

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21. See above, Ch. III, Secs. C, D.

22. Buell, op. cit., p. 44.
under the nominal reign of the Manchu Dynasty" to be guaranteed by "the concert of Powers having important interest in China". 23 Japan's policy of divide and rule had been verified by the American envoy at Tokyo. He reported to Washington that "the Japanese Government expects to be asked by the Chinese Government to put down the rebellion by force" and that "whatever she [Japan] does will be with a view to making herself indispensable to the future government of China". 24

Great Britain and the United States acted sagaciously, and Japan was warned against meddling with the revolution. 25 But scarcely a month had passed, when news came from the War Department in Tokyo that Japan and Russia were ready for armed intervention in Manchuria. It was stopped temporarily only by the concerted effort of Germany, the United States and Great Britain. The Washington government was particularly outspoken. It declared against "interference in China's domestic affairs"; referred to the assurances given by the powers "to respect China's integrity, sovereignty, and open door"; trusted that both sides in the revolution "will unconditionally defend lives and property


24. American Charge d'Affaires at Tokyo to the Secretary of State, Oct. 15, 1911, ibid., p.50.

of foreign population", and that "future reason for interference will also be lacking"; and suggested that even in case anything contrary to this should occur, "only concerted action of all powers could enter into question".26

Failing to gain British and American support in crushing the republic, Japan turned to subsidize all possible disturbances that might upset the unity of China. Between 1911 and 1918, 437,000,000 yen were spent to achieve that end.27 The most notorious items were the Nishihara loans of 166,500,000 yen, advanced to the Anfu Club between 1917 and 1918. The purposes of the loans were alleged to be for the construction of Chinese railways and for Chinese participation in the Great War, but were in reality to enable the Anfu Club to subjugate the constitutional legislature and to establish a military rule in Peking.

26. Ibid., pp.283-5.

27. See Paul S. Reinsch, "Japanese Yen in Chinese Politics", Asia, XXII, 1922, pp.14-6; Millard, Democracy, Ch. VIII.
5. The Tsinan Incident and Its Aftermath

The Tsinan Incident was another direct outcome of the Japanese policy of divide and rule. The seriousness of its nature may justify an examination in greater detail than in the case of the foregoing instances.

In the spring of 1927 the North Expeditionary forces of the Nationalists were on their way along the Peking-Hankow and Tientsin-Pukow railways toward Peking. By a series of victories they threatened the power of the Mukden Government which was then in control of the Peking-Tientsin area. In this Japan saw another occasion for bargaining with both sides. When the Nationalists occupied the Lunghai Railway, Japanese troops were rushed to Shantung and stationed at points between Tsinan and Kiaochow.

At Tokyo a conference was held on June 27th, attended by the important officers in the War and Navy ministries, the commander-in-chief of the Kuantung Army, the governor of Kuantung, the minister to China and the consuls-general at Mukden and Shanghai. Policies were formulated in regard to China, particularly Manchuria and Mongolia. On July 7th, at the close of the conference, the Premier issued a statement clearly intimating intervention. He said in part:

28. The Peking Leader, July 9, 1927. See also Hsü, Essays, pp.97-8
(Manchuria) in their own hands. Any plan which will respect our special position in Manchuria and Mongolia and devise measure for stabilizing the political situation there will receive the due assistance of the Japanese Government.

If the disturbances spread to Manchuria and Mongolia, ...thereby menacing our special position and rights and interests in those regions, we must be determined to defend them, no matter whence the menace comes.

Having brought the Nationalists to a temporary halt, Japan took up with the Mukden government the question of extending Japanese interests and influence in Manchuria. A loan was sought in New York for the purpose. But the Mukden authorities proved to be no followers of the Anfu Club. Instead of entertaining the Japanese proposals, they came out openly against the loan. As usual the Chinese people resorted to the only method of protest open to them: they staged demonstrations throughout the country to voice their opposition to the Japanese intervention.

In the following spring the Nationalists resumed military operations with Peking as their goal. Alleging that the lives of her 1,600 nationals were thus endangered, Japan despatched 24,000 troops to Shantung. On the first of May the Nationalist forces entered Tsinan, and for thirty-six hours peace prevailed in the city. As late as May 4th the correspondent of the Manchester Guardian telegraphed from Tsinan: "the Southerners [Nationalists] appear to be friendly disposed toward foreigners, all of whom were safe." 29

On that day, however, the Japanese troops, complaining that shots had been fired by the Chinese, charged down the market centre and opened fire at the civilians. To avoid clash, the Chinese commander ordered his forces to withdraw within the walled city. While the Chinese were making investigation as to the cause of the Japanese act and the casualties suffered by the civilian population resulting from it, the Japanese army sent an ultimatum to the Chinese commander on the 7th at 4 p.m. consisting of the following terms:

1. Punishment of responsible Chinese officers and men who started the trouble;

2. Disarming of the Chinese troops concerned;

3. Evacuation within twelve hours of all Chinese troops from a zone seven miles on each side of the Tsinan-Kiaochow Railway.

The Chinese commander found it physically impossible to comply, and requested for an extension of time to communicate with the commander-in-chief who was not in the city. No reply came from the Japanese. Instead, at 3:55 A.M., the Japanese forces began to dislodge the Chinese troops. The method by which the Japanese occupied Tsinan deserves mentioning. Against the protests of neutral consular officers, they bombarded the walled city, and after making their entrance, engaged in house

to house slaughter. Some five thousand Chinese, including
soldiers and civilians, were murdered. According to the
testimony of foreign Christian missionaries, the patients of the
Red Cross Hospital were killed in bed. The fact that the Japanese
incurred a total loss of twenty-one killed and seventy-nine
wounded was sufficient to indicate that there was no concerted
resistance offered by the Chinese troops.

The most barbarous act was done to the Chinese commissioner
of foreign affairs. He was arrested from his office, subject to
indescribable methods of torture, and shot with his entire staff.

The climax was still to be reached by a Japanese demand
to the Chinese government in the following terms:

1. Assumption by China of full responsibility for the
Hankow and Nanking Incidents.

2. Recognition of Japanese rights acquired in Kiaochow and
the Tsinan-Kiaochow Railway.

31. The Japanese gave the casualties as follows:
Chinese, 24,000;
Japanese, 54 killed and 158 wounded.
Morse and MacNair, op.cit., p. 743, note one.
See also Committee on Christian International Relations,
The Tsinan Affair, (Pam.) Shanghai, 1928.
For Chinese version, see C.C. Wang, "The Shantung Inter-

32. For description, see Nanking appeal to League of Nations,

33. See below, Ch. VIII.

4. Recognition of the unsecured loans made by Japan to the Northern government.

Having completed the occupation of Tsinan and Kiaochow and the railway between them, the Japanese decided to cut the main line of communication between the north and the south. The Yellow River Bridge was blown up and the entire section of the Tientsin-Pukow Railway running through Shantung was subject to blockade. Within the fourteen-mile "neutral zone" established by the Japanese on both sides of the Tsinan-Kiaochow Railway, some 10,000 Northern troops were harbored and accorded facilities to attack the Nationalists.

The Japanese next seized control of the local administration. Local administrative departments functioned under the supervision of Japanese "assistants" and "advisers". In Kiaochow the Police Department had two such advisers, the Wharf and Harbor Administration three, the Port Commission six, the Waterworks two, and a large number controlled the railways and the Maritime Customs.34

The Nationalist government at Nanking appealed to the League of Nations for action under Article 11, and declared its readiness to submit the case to an international inquiry or arbitra-

34. See editorial paragraphs, Ch. Wk. Rev., XLV, 1928, pp. 277-86.
tion. The Council refused to take up the case, since the Nanking government had not been recognised by the powers. The Japanese Memorandum was circulated and printed in the League's Official Journal, while the statement from Nanking was suppressed. For the same reason the Nanking appeal to the United States and other signatories to the Pact of Paris proved of no avail. 35

If the Japanese succeeded in intersecting the shortest route between Nanking and Peking, they failed in preventing the unification of China. The Nationalists abandoned Shantung and approached Peking from Honan and Shanhs. The Mukden government, instead of inviting foreign aid, decided to make peace with the Nationalists. This called forth a change of policy on the part of Japan. On May 18th, she sent identical notes to both sides, stating in part the following: 36

Should the disturbances develop further in the direction of Peking and Tientsin and the situation become so menacing as to threaten the peace and order of Manchuria, the Japanese Government, on their part, may possibly be constrained to take appropriate and effective steps for the maintenance of peace and order in Manchuria.

On the previous day the Japanese government had also delivered to the United States, Great Britain, France and Italy the following statement: 37

35. See Morse and MacNair, op. cit., pp. 740-3.
36. The Peking Leader, May 19th, 1928.
37. Ibid.
Should the life and property of foreigners residing in Peking and Tientsin be endangered, the Imperial Government will not only undertake to protect Japanese residents, but will endeavour to assist in the protection of lives and property of foreigners. Should Manchuria and Mongolia come to be involved in the disturbance, the Imperial Government will prevent, as much as possible, defeated troops or those in the pursuit of them, questioning not whether they are southern or northern troops, from entering the territory. as such is necessary for the protection of the special position of the Imperial Government in Manchuria and Mongolia.

Accordingly the Japanese garrison at Tientsin was increased from 462 to 4,500 men; while in Manchuria the headquarters of the Kwantung Army were moved from the leased territory to Mukden.

On June 2nd the Mukden government ordered the abandonment of Peking and the general retreat of the northern army in favour of the Nationalists. Marshal Chang Tso-lin, head of the Mukden government and General Wu Chü-shen, Governor of Heilungkiang, left Peking for Manchuria early on the 4th. When their train passed under the bridge of the South Manchuria Railway outside of Mukden, a bomb exploded, and both the marshal and the governor were killed.

According to Reuter and American reports, from Mukden, the area in which the bombing took place had been patrolled by

38. Morse and Macnair, op. cit., p.744.


a permanent body of Japanese railway guards. They were particularly active during the days immediately preceding the bombing, to keep all passersby at a distance. Sandbag barricades were put up within a few feet of the spot where the explosive was touched off. At daybreak, just before the explosion took place, the Japanese guards retired to a nearby log-cabin which had been reinforced by earthen ramparts to make a complete bomb-proof shelter.

Shortly after the occurrence of the incident, the Japanese government announced that an investigation was being conducted, and that the findings of the investigation would be made public "within a few days". They remained undisclosed.

To Japan's disappointment, the unification of China was quietly resumed. On June 8th the Shanhsi troops entered Peking. Meanwhile the Mukden government, instead of sinking into disintegration, was able to maintain peace and order throughout Manchuria. Moreover, it immediately identified itself with the Nationalists. Owing to further Japanese opposition, however, it was not until December 29th that the Nationalist Flag was hoisted in Manchuria.41

Facing a united China, the Japanese policy of divide and rule was temporarily called to a halt.42 But before long it was

41. See Morse and MacNair, op.cit., p.744.

42. The Tsinan Incident was finally "settled"by and exchange of Notes between the Chinese Foreign Minister and the Japanese Minister to China on March 28, 1929 as follows:
CHAPTER VII

replaced by intervention of another form. In 1931 the world witnessed the Japanese invasion of Manchuria, which has been so clearly described by the Lytton Commission. Since July, 1937, the invasion has been extended to other parts of China and has developed into the present armed conflict between China and Japan.

42. (cont'd.)

(1) Within two months from the date of signing, the Japanese Government will withdraw its troops from Shantung. The National Government will assume full responsibility for the protection of all Japanese lives and property in China according to international law.

(2) A Sino-Japanese Joint Commission, of equal number of commissioners from each country appointed by their respective governments, will be established for investigation and adjustment of the question of losses sustained by both countries.

(3) Both governments deplore extremely the unfortunate Tsinan Incident of May 3, 1928, and regard unhappy feeling resulting from the Tsinan Incident as past.

Treaties, 1919-29, p.274.
CHAPTER VII

JURISDICTION OVER INDIVIDUALS

International law is a law between states exclusively, and does not deal with the individual citizens of the state. Relations between the individual and the state are primarily domestic questions which are outside the scope of the international law. These questions, however, may become international by reason of a possible conflict between them and the obligations of the state in international law. Such conflict arises because international law recognizes the "personal supremacy" of every state in claiming the allegiance of its subjects when in foreign countries, and at the same time, it recognizes also the "territorial supremacy" of every state to exercise jurisdiction over all persons, both its own nationals and aliens, within its national domain. ¹ Under such circumstances individuals become international problems as being objects of international law.

A. Nationality.

One of the conflicts in connection with the jurisdiction of the state is that of the determination of nationality. It is a matter of municipal law for the state to decide who shall and who shall not be considered its subjects. The international problem arises from the conflicting claims made by more than one state upon the same individual, either in his enjoyment of the rights of citizenship or in his performance of the corresponding duties. These claims may be equally valid, and the individual is held to have more than one nationality. In the international law the term nationality expresses his membership in a given state.

The principal method of acquiring nationality is by birth. But the practice of nations follows no uniform rules concerning this matter. The Anglo-American system adheres primarily to the principle of *jus soli*, by which nationality is conferred by birth upon the soil, irrespective of parentage. The continental states in Europe, on the other hand, follow primarily the principle of *jus sanguinis*, by which children acquire the nationality of their parents, irrespective of their place of birth. The problem becomes more complicated still, when most states assert primary as well as secondary claims of allegiance by holding in varying degree to both systems.  

1. The Chinese Nationality Law.

The Chinese nationality law 3 is among those systems which seek to mitigate the complexity of double allegiance. In the first place, the law is based primarily upon the principle of parentage. A child takes the nationality of his father either by birth or by adoption, and, in default of certainty as to his identity, it follows that of his mother. 4 The only application of the principle of *jus soli* is in cases where parents are unknown or without nationality. 5 The sole purpose of this pro-


3. Promulgated March 28th, 1909 (customary law in use prior to that date); revised Nov. 18th, 1912; December 30th, 1914; and February 5th, 1929. For text of 1923 law, see ibid., pp. 175-78.


vision is the prevention of statelessness.

Secondly, to minimize conflict with the nationality law of other countries and to reduce the instances of double nationality, the Chinese law provides for exceptions to automatic acquisition of Chinese nationality. According to the law, an alien woman acquires Chinese nationality by marriage to a Chinese national; but if under the law of her native country she retains her original nationality, then she does not acquire Chinese nationality. Similarly, the wife and minor children of a naturalized national acquire Chinese nationality by reason of his naturalization, if the provision of the Chinese law conflicts with the law of the native country of his wife and children.

Besides nationality by birth, international law recognizes acquisition by naturalization, by which a person born in one state voluntarily obtains the citizenship of another state. As prerequisites for naturalization, the Chinese law stipulates a minimum of five years continuous domicile; age above twenty; legal capacity as defined by the Chinese law and the law of the native country; good moral character; and possession of sufficient property or ability for self-support. Special terms are granted in favour of those having rendered exceptional service to China, or born of former Chinese nationals, or married to Chinese nationals, or born on Chinese territory, or of long residence in China.

7. Art. VIII.
9. Art. III - VI.
One marked feature in the Chinese law is that, except where specially granted otherwise by the government under certain conditions, naturalized nationals are subject to a number of political disabilities. They are incapable of holding any of the high executive and legislative positions. Most of the posts in the civil and military services are closed to them. The explanation of these seemingly harsh limitations is found in the existence of extraterritoriality by which many aliens in China are subject to the jurisdiction of their own courts. The maintenance of this extraterritorial jurisdiction confers upon them privileges over the Chinese nationals, and renders it unprofitable for them to acquire Chinese nationality. Consequently, it is assumed that those who wish to acquire Chinese nationality at all will be doing so for some special reasons or advantages. It is to check the influx of persons of evil intent that the law places those limitations upon naturalized subjects. At the same time, in order to rectify the discrimination against desirable subjects, the law provides for the possible removal of the limitations by special government permission.

The principle that the acquisition of a new nationality ipso facto releases an individual from his previous allegiance is not recognized by the Chinese law. This is again necessitated by reason of the system of extraterritoriality, not so much in its existence as in its abuse. For political and pecuniary reasons, the authorities of certain European colonies

10. Art IX.
11. See below, Section D.
near China, notably the Portuguese at Macao, have liberally granted naturalization papers to Chinese citizens. Without revealing their acquisition of foreign nationality, they continue to reside in China and enjoy all civil and political rights as Chinese nationals. Then, when circumstances arise under which foreign protection could be invoked to their advantage, they declare their change of allegiance and are removed from Chinese jurisdiction. 13

To counteract the abuse, the law recognizes expatriation only as sanctioned by the Ministry of Interior. Permission will be withheld from a person who is in civil or military service, or has not fulfilled his military obligations when so required by law, 14 or is under obligation in a civil or criminal law-suit or in public law. 15

Similarly, repatriation is recognized only when permitted by the Ministry of the Interior. Persons who have thus recovered their nationality are, for the first three years of their repatriation, subject to the same political disabilities as naturalized nationals. 16

13. See ibid., pp 405-6; MacNair, op. cit., pp 113-3.


15. Nationality Law, Art. XIII.

16. Nationality Law, Art. XV-XVIII.
2. Indelible Allegiance and Associated Problems Relating to the Koreans in Manchuria.

The Korean residents in Manchuria have become a source of trouble for the Chinese government as a consequence of Japan's assertion over them of the principle of indelible allegiance. The assertion has been regarded by China as an unfair practice, since it contravenes Japan's own nationality law, which provides that "A person who acquires foreign nationality voluntarily loses Japanese nationality." Such discrimination against the Koreans among Japanese nationals would be a purely domestic question but for the fact that, being Chinese subjects until the Sino-Japanese War of 1904-5, large numbers of Koreans migrate yearly into China. While insisting upon their indelible allegiance, Japan demands that the Koreans residing in China should enjoy all rights and privileges accorded by China to Japanese nationals, inter alia, the rights of extraterritoriality. Japan's peculiar interpretations of

17. For text see Flournoy and Hudson, op. cit., pp. 382-8.

18. Art XX, Sec. 1. No further specification is made on the question of expatriation. Judging by the rest of the article, it is only reasonable to conclude that the intention of the law was to pursue a liberal policy on the matter. For, it stipulates that those who acquire foreign nationality by birth in certain American countries lose their Japanese nationality retroactively from their birth, unless the intention to retain Japanese nationality is duly announced. The same applies to Japanese born in other countries. But in the latter cases, the sanction of the Ministry of the Interior is required to effect renunciation of Japanese nationality.
such rights, and of the treaties of 1915, have created the most serious problems of administration in Manchuria and afforded occasions for constant Japanese interventions which culminated in the invasions since 1931. This complicated situation requires further analysis.

Owing to the existence of the rights of extraterritoriality, foreigners enjoying these rights, with the exception of missionaries, are confined to the treaty ports in their residence and trade.\textsuperscript{19} In 1905 exception was granted to the Koreans in the border region, since they had settled in that region in great number in their pre-"independent" days. According to the Sino-Japanese agreement of that year,\textsuperscript{20} China recognized the residence of Korean subjects, as heretofore, on agricultural lands lying north of the Tumen River (the boundary between China and North-East Korea) within certain limits.\textsuperscript{21} These Koreans "shall submit to the laws of China and shall be amenable to the jurisdiction of local Chinese officials", while the Japanese consulate was to be represented at all court proceedings, to receive previous notice in the hearing of important cases, and to apply for new trial when "a decision has been given in disregard of law."\textsuperscript{22}

\textsuperscript{19} See below, note 100.

\textsuperscript{20} MacMurray, I. pp. 796-7.

\textsuperscript{21} Art. III.

\textsuperscript{22} Art. IV.
As a result of the Twenty-One Demands in 1915, the Treaty Respecting South Manchuria and East Inner Mongolia was concluded. It provided that "Japanese subjects in South Manchuria may, by negotiation, lease land", and that they "shall be free to reside and travel in South Manchuria and to engage in business and manufacture."  

Aside from the question of the validity of the Treaty, it is evident from the geographic situation, that the Tumen region, which is located in eastern Manchuria, does not come within the realm of "South Manchuria" as mentioned in the 1915 treaty. The Chinese government consistently adhered to the 1909 treaty, and insisted that since the right of "residence" did not provide for lease or ownership of land, such lease or ownership would be granted, according to Chinese law, only to Chinese nationals or naturalized subjects. Korean subjects residing in the Tumen region might acquire land only through naturalization.

These regulations were necessitated by the conditions in the Tumen region. Of the Japanese subjects in the interior of Manchuria, 3/5 were Koreans, and of these Koreans more than two-thirds were found in the Tumen region, in which they comprised 72% of the population, and in which their number had increased five fold since 1909 as a result of Japanese oppression in Korea.

24. Art. II and III.
25. See Hsi, Essays, Ch. XIV.
27. See T. Chen, tung sheng han min wen t'ı (The Problem of Koreans in Manchuria), Peiping, 1931, pp 33-35.
Unless they become Chinese subjects, their ownership of land would constitute a vexing problem to local administration.

But this was only the beginning of the complications. Japan has most arbitrarily insisted that the term "South Manchuria" mentioned in the 1915 treaty should cover not only South Manchuria but East Manchuria as well, and that consequently the Tumen region, which is situated within the latter, should be subject to the provisions of the 1915 treaty in supersession of the treaty of 1909. Accordingly, Japan asserted that the Koreans should have the right to trade, reside, and purchase land in the Tumen region as extraterritorial aliens.

But even the treaty of 1915 was violated by Japan. The treaty stipulated that inland Japanese subjects "should (also) submit to the police laws and ordinances and taxation of China." Since the Chengchiatun affair of 1913, however, Japanese gendarmes, under the name of "consular police" were introduced in Manchuria as a "corollary of the right of extraterritoriality". Concerning these police forces, the Lytton Report says:

The Japanese claim of right to maintain consular police in Manchuria as a corollary of extraterritoriality became a source of constant conflict where the Koreans were involved. Whether the Koreans desired such Japanese interference, ostensibly in their behalf, or not, the Japanese consular police, especially in the Chientao (Tumen) District, undertook, not only protective functions, but also freely

28. Art V.
29. See above, ch. VI, Section on the Chengchiatun Incident.
assumed the right to conduct searches and seizures of Korean premises. The Chinese police, for their part, frequently came into collision with the Japanese police in their efforts to enforce Chinese laws, preserve the peace, or suppress the activities of "undesirable" Koreans. The actual state of affairs was really one of constant controversy and friction. Such a situation was bound to cause trouble.

The problem of jurisdiction over Koreans in Manchuria became one of the immediate causes contributing to the Sino-Japanese crisis in 1931.

The problem becomes an international issue, however, when discrimination is directed against the citizens of particular states. The legality of discrimination becomes all the more contestable when it is put into effect in violation of specific treaty obligations.

1. The United States

Chinese immigration was for a time welcomed by the United States, especially by the State of California, which needed abundant labor for the development of its resources. In 1888, by the Burlingame Treaty, the United States and China "cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantages of the free migration and emigration of their citizens and subjects respectively, from one country to the other." 33

31. See Fenwick, cit., p. 190.


33. Art V., Hertslet, 1, No. 98.
B. The Exclusion of Chinese Aliens

It is a well-established principle in international law that a state may forbid the entrance of aliens within its national domain, or admit them only in such cases and on such conditions as it may choose to prescribe. When exclusion is applied against certain types of immigrants, such as idiots, paupers, and political agitators, which are classified irrespective of nationality or race, it falls within the realm of domestic jurisdiction and provides for no ground or complaint in international law. 31

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31. See Fenwick, op. cit., p. 190.
This was regarded as a triumph for the United States, since China had hitherto refused to grant to Chinese subjects the right of emigration.\textsuperscript{34} In order to encourage the Chinese to go to the United States, the American government also promised that "the subjects of China shall enjoy the same privileges, immunities and exemptions in respect to travel and residences as may be enjoyed by the citizens of the most favoured nation."\textsuperscript{35}

But soon, for economic reasons, anti-Chinese feeling began to take root and spread in the United States, and resulted in the "sand-lot" agitation of 1876 and the Denver Riot of 1880. Considering the difficulties of the American government, China agreed to the Treaty of November 17, 1880, which provided that the United States "may regulate, limit, or suspend" the immigration of Chinese laborers, "but may not absolutely prohibit it"; and that "the limitation or suspension shall be reasonable" and applicable only to Chinese laborers.\textsuperscript{36}

In return the American government promised to secure to the Chinese in the United States all rights and privileges enjoyed by the subjects of the most-favoured nations, and to exercise its utmost diligence to protect them in case of ill-treatment.\textsuperscript{37}

\textsuperscript{34} See MacNair, op. cit., pp. 1-18.

\textsuperscript{35} Burlingame Treaty, Art VI.

\textsuperscript{36} Art I, Hertslet, 1, 97.

\textsuperscript{37} Art III.
On the basis of this treaty the first Chinese Exclusion Act was passed on May 8, 1882, and amended on July 5, 1884, by which Chinese labourers were prohibited from coming into the United States for ten years. The term "Chinese" included both nationals of China and subjects of Chinese origin in other states.38

Another law, known as the Scott Act, was passed on September 13, 1888, and was directed against Chinese labourers already admitted into the United States. According to the act, it was unlawful for these labourers to return to the United States once they departed therefrom. This was in contradiction to the most-favoured nation provisions stipulated in the treaties of 1868 and 1880, and met with protest from the Chinese government and opposition of the American president. But its validity was upheld by the American judiciary.39

The Exclusion Act of 1882 was to expire in ten years, but it was renewed for another ten years by the Geary Act of May 5, 1892, which was amended by the McCreary Act of November 3, 1893. In these acts the most-favoured nation clause was further repudiated. In the first place, special definitions were given to the term "labourer" and "merchants" and were applied solely to Chinese. The former is "construed to mean both skilled and unskilled manual labourers, including Chinese employed in mining, fishing, huckstering, peddling, laundermen", and those engaged in fishing for any purpose. A merchant is a "person engaged in buying and selling merchandise, at a fixed place of

38. See ibid., pp 233-9.
"business, which business is conducted in his name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labour, except such as is necessary in the conduct of his business as such merchant".

Secondly, the establishment of their status must be proved according to special procedures devised for them only. A Chinese merchant must "establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business". All Chinese labourers must apply for a certificate of residence within six months of the passage of the McGreary Act, failing which they become subject to arrest and deportation. The laws were administered with the strictest interpretation, and in many cases they were accompanied by incredible harshness and corruption.40

On March 17, 1894, another treaty was signed between China and the United States. By this the Chinese government undertook to prohibit for a period of ten years the migration of Chinese labourers into the United States. The American government, on the other hand, allowed the return to the United States of those going back to China, providing they had a wife, child, or parent, or property worth $1,000 in the United States.41 This was again subject to the strictest interpretation. In 1898, against Chinese protests, it was decided "not that all Chinese persons may enter this country who are not forbidden, but that only

40. See MacNair, op. cit., pp. 173-82.
41. See Garis, op. cit., p. 302.
those are entitled to enter who are expressly allowed". 42 Under this clause not only merchants and students but also diplomatic officers have been subject to rough treatment. 43

The treaty expired in 1904. In view of its abuse the Chinese government served notice of its termination. But by an act of April 27th of the same year, Congress permanently excluded Chinese labourers from the United States without any reference to treaty obligations. 44

The Chinese exclusion acts were extended to the territory of Hawaii by a joint resolution of the two Houses of Congress on July 7, 1898, and to the Philippines and other territories and dependencies by the act of April 29, 1902. 45

Towards the end of the century the systems were gradually

42. See MacNair, op. cit., p. 184.
43. For examples, see ibid., pp. 185-201.
44. See Garis, op. cit., p. 304.
45. See MacNair, op. cit., pp. 85-92.
2. Australia, New Zealand and South Africa

Immigration restriction against the Chinese were first enacted in Australia in 1855. In that year Victoria passed an act using the tonnage and poll-tax systems. These were adopted by Queensland in 1877, New South Wales in 1881, and Tasmania in 1887. According to the systems, the number of Chinese to be carried by any vessel coming to Australia was limited to one for every one hundred tons, and each Chinese entering the colony was required to pay a tax of ten pounds. New South Wales subsequently increased the tonnage to three hundred and the tax to one hundred pounds. China protested against the discriminations and the British colonial office attempted intervention, but to no avail.46

Towards the end of the century the systems were gradually abandoned in favour of the language test, a device originating in South Africa known as the Natal Law, by which restriction of immigration could be achieved without the appearance of discrimination against any particular nation or race. After the formation of the Commonwealth of Australia, a uniform immigration act for the entire federation was passed on December 23, 1901, and subsequently amended several times up to 1925.

By this act any person may be refused admission to the Commonwealth "who fails to pass the dictation test: that is to say, who, when an officer... dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer or authorized person".

46. See ibid., pp 68-72.
Furthermore, to give the government the power to expel those already admitted but considered undesirable, it provides that "any immigrant may at any time within three years after he has entered the Commonwealth, be required to pass the dictation test, and shall, if he fails to do so, be deemed to be a prohibited immigrant offending against this act". Immigration officers may without warrant search any place or arrest any person to ascertain the status of aliens residing in the country.

In 1920 an arrangement was made between China and Australia by which Chinese students, tourists and merchants were exempted from the language test. However, the term "merchant" has been so defined as to include only those engaged in overseas trade; and since Chinese tourists and students rarely visit Australia, the number included in the exempted class is very small.

The immigration act of 1925 was drafted in the most sweeping terms. It conferred upon the Governor General the discretionary power to prohibit or limit the immigration of any specified nationality, race, class or occupation who in his opinion are "unsuitable for admission". Should the literal wording of the statute be applied, the discrimination on grounds of race or nationality might give rise to diplomatic issues.

Immigration restrictions of the same pattern exist in the Union of South Africa and in New Zealand. In the latter case, the poll-tax and tonnage systems are still in use besides the language test.

48. See MacNair, op. cit., pp. 158-162.


The present Immigration Act of Canada (1910-24), supplemented by a number of orders in council, forms a highly complicated hierarchy of regulations classified according to nationality and race. It divides "mankind" into two classes: those who are of Chinese origin and descent, and those who are not. Then, subdivisions are made of immigrants acceptable to Canada. In the order of preference, first come Canadian citizens, with those of Chinese origin in an inferior position; secondly, the non-Asiatic British subjects from Great Britain and the self-governing dominions except Rhodesia; thirdly, the non-Asiatic citizens of the United States; fourthly, the nationals of Japan as regulated by existing agreements; fifthly, the non-Asiatic nationals of European countries; sixthly, the non-Chinese Asians; and lastly Chinese subjects who are under special laws and restrictions.

50. See MacNair, op. cit., pp. 74-8.
3. Canada.

Following the lead of Australia, the Canadian government first imposed poll-tax and tonnage restrictions upon Chinese immigrants in 1886. By an order in Council of December 8, 1913, Chinese labourers, both skilled and unskilled, were prohibited from landing at any ports in British Columbia. In the meantime, certain classes of Chinese immigrants, generally limited to diplomatic officials and their families and suites, student and merchants, were exempted from payment of the poll-tax. 50

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50. See MacNair, op. cit., pp. 74-9.
The Chinese Immigration Act of 1923 provides that, irrespective of allegiance or citizenship, the only persons of Chinese origin or decent who may be admitted to Canada are:

(a) Member of the Diplomatic and Consular services, and their suites and families.

(b) The children born in Canada of parents of Chinese origin or decent, who have left Canada, and whose identity has been proved to the satisfaction of the controller at the place of entrance.

(c) Merchants, who, as officially defined, include only those who have at least $2,500 invested in a business dealing exclusively in exporting Canadian goods to China or in importing Chinese goods to Canada, and who have conducted the business for a period of at least three years.

(d) Students coming to Canada to attend universities or colleges authorized by law to confer degrees.

A person of Chinese origin or decent must choose Vancouver or Victoria as his port of entry. His identity is determined by the controller of the port, whose decision as to his rejection or deportation on grounds of health or mental defect is final. In other cases an appeal may be made to the Minister of Immigration and Colonization, but not subject to court review. Even a decision by the controller that a Chinese who was born in Canada does not possess Canadian citizenship cannot be reviewed by the courts on certiorari.
As in the case of Australia, the governor in council is vested with the discretionary power of limiting or prohibiting the immigration to Canada of persons of "any nationality or race", or of "any specified class or occupation," for any reason whatever.  


In all English-speaking countries, in the United States the Act of 1882 provided that "no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."  

The law of Canada does not single out Chinese as debarred from naturalization. However, since the Secretary of State of Canada exercises absolute power in the granting of naturalization, and since he may withhold it from any person without giving any reason, the possibility of excluding Chinese is within his discretion. In actual practice discrimination has been directed against the Asiatic race, particularly the Chinese. Since 1888, few, if any, Orientals have been naturalized in Canada.  

The same system exists in New Zealand, where the Minister of Internal Affairs exercises the discretionary power to an even wider extent. Not only can he refuse granting naturalization papers, but those already issued may be revoked by him when in his opinion the holders have been disloyal to New Zealand.

52. Char, cit., p. 504.
54. See ibid., pp. 509-10.
C. Other Discriminations against Chinese Aliens.

Aside from immigration restrictions, Chinese aliens in certain countries have been denied a number of civil and political rights enjoyed by other aliens. Like the immigration restrictions, these discriminations clearly constitute a violation of the principle of the equality of states.

1. Naturalization

Chinese are excluded from naturalization in practically all English-speaking countries. In the United States the Act of 1882 provided that "no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed." 52

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52. Char, op. cit., p. 504.
54. See ibid., pp. 509-10.
Australia has recently followed the steps of the United States. The naturalization act of 1930 declared aboriginal natives of Asia, Africa, and islands of the Pacific except New Zealand, as ineligible to Australian citizenship. Moreover, as in the case of New Zealand, naturalization may be revocable by the government.\textsuperscript{55}

2. Occupation.

Many occupations in these same countries are closed to Chinese. In the United States, while many legislatures have been inclined to pass discriminatory acts against Chinese, the judiciary has on many occasions upheld the most-favoured-nation clause provided in the treaties of 1868 and 1880, and has decided against laws which discriminated against Chinese as such or which contravened the due process and equal protection clauses of the Fourteenth Amendment of the Federal constitution.\textsuperscript{56} To avoid conflict with treaty stipulations, the legislatures have resorted to the "ineligible-to-citizenship" clause. By this Chinese are barred from fishing, agriculture, and other occupations in various states.\textsuperscript{57}

In Canada Chinese have been singled out by law as the subject of many discriminations. In Saskatchewan no white woman is allowed to reside, or work in a public apartment or frequent any restaurant, laundry other place of business or amusement owned, kept or managed by Chinese. In Quebec, Chinese laundries are

\textsuperscript{55} See ibid., pp. 511-2.

\textsuperscript{56} For examples see T. Sze, China and the Most-favoured-nation clause, (N.Y. 1925), pp. 88-9.

\textsuperscript{57} See Char, op. cit., pp. 613-20.
subject to discriminatory taxation. In numerous occupations such as fisheries, public works, mining, lumbering, and the professions of law and pharmacy, Chinese are barred or restricted as Asiaties.\textsuperscript{58}

As in immigration restrictions, Australia and New Zealand have devised methods by which discriminations in occupation are directed against Chinese in a non-proactive but effective way. The hours of opening and closing of shops, the working hours of employees, and the closing-day and half holiday of the week are regulated by the local authorities of each district. Exceptions may be granted only through petition, which may be made by British subjects only.\textsuperscript{59} Moreover, in Australia, special laws and regulations are applied to Asiaties in business and employment.\textsuperscript{60}

In the Transvaal, where reside most of the Chinese in South Africa, Asiaties are classified as "coloured people", and as such they are required to live and carry on business within certain locations designated by the municipal government. They may not engage in mining or deal in precious metals.\textsuperscript{61}

3. Property Ownership

In the United States, Chinese, by reason of being ineligible to citizenship, are denied the right of ownership of real property in seven states.\textsuperscript{62}

\textsuperscript{58} See \textit{ibid.}, pp. 620-6.
\textsuperscript{59} See \textit{ibid.}, pp. 626-31.
\textsuperscript{61} See MacNair, \textit{op. cit.}, p. 160.
In Australia they are subject to the same discrimination in all
the states except Victoria and Tasmania.  In South Africa they
may not acquire any interest in immovable property in any place
where their residence is unlawful.  Canada and New Zealand place
no restrictions in property rights upon aliens once they are ad-
mitted within their domain.

4. Miscellaneous

In addition to the above restrictions, there are other
discriminations in various countries directed against Chinese
on grounds of either nationality or race.  In the United States
fourteen states prohibit intermarriage between whites and Mon-
golians, and San Francisco requires Chinese and Japanese children
to attend the Oriental schools.  The laws in South Africa ex-
clude Asians from the use of sidewalks in thoroughfares and
of the same post offices, tramcars, or railway carriages as
those used by Europeans.  They may not be about the streets
after 9 P.M.  In the Dutch East Indies, Chinese aliens involved
in criminal cases are under the jurisdiction of native courts as
distinguished from European courts.

62. See C.K. Young, "Real Property Rights of Aliens in China and
64. See Mac Nair, op. cit. p. 160.
66. See ibid., p. 640-2.
67. See MacNair, p. 160.
68. See F. Ch'en "ho su tung yin tu yu hua chiao"
(Chinese in the Dutch East Indies) Wai Chiao Yueh Pao
(Foreign Affairs Monthly), XII, May, 1936, pp. 45-58.
D. Extraterritoriality

While the Chinese abroad are subject to numerous discriminations in the enjoyment of rights granted normally to aliens, China's jurisdiction over foreign nationals within her territories is seriously restricted by virtue of the existence of the rights of extraterritoriality, which many lawsuits involving foreign nationals are removed from local law and local authorities. Granted first to Great Britain in the General Regulations attached to the Sino-British Supplementary Treaty of 1843, the system of extraterritoriality was amplified by the Sino-American Treaty of 1844, the Tientsin Treaties with the United States and Great Britain in 1858, the Chefoo Agreement of 1878, and the Sino-American Treaty of 1880.

As existing today, extraterritorial rights in China involve different classes of cases, the provisions for the adjudication of which are as follows:

a. Exclusive cases.

1. In cases in which the parties are either Chinese or are nationals of Powers not enjoying extraterritorial rights, Chinese jurisdiction is complete, and Chinese laws and procedure are applied.

89. For China's jurisdiction before 1843, see above, Ch. I, Sec. C.
70. See Keeton, op. cit., I, pp. 174-199, 283-343.
2. Over controversies between nationals of the same foreign power enjoying extraterritoriality, the jurisdiction belongs exclusively to the consular or other courts of that power established in China with the latter's permission. The method of adjudication is determined by the power concerned.

3. Suits which involve nationals of different foreign powers all enjoying extraterritorial rights are governed by such laws and procedure as those powers have agreed to among themselves.

b. Mixed cases—the adjudication of these cases follows the nationality of the defendant.

1. Controversies in which the defendants are either Chinese or are nationals of non-extraterritorial powers are adjudicated in the Chinese courts according to Chinese law, irrespective of whether or not the plaintiffs are nationals of foreign powers enjoying extraterritorial rights.

2. Suits in which the defendants are nationals of powers entitled to extraterritorial rights, and the plaintiffs are Chinese, are subject to the jurisdiction of the courts of those powers. The same applies when the plaintiffs are nationals of non-extraterritorial powers.

The existence of such a system creates in itself conditions which make impossible a satisfactory administration of justice—the very complaint which foreign countries have against the Chinese judicial system.

Judicial powers over aliens in China have been exercised by their respective consuls, who have little or no judicial training, and whose primary function is to protect the commercial in-
terest of their own nationals. The evil has been corrected to a considerable extent by some powers, notably Great Britain and the United States. But even under their present systems serious defects are still found in their administration of justice.

In the case of the American system, the court of first instance is either the consul, or the United States Court for China which ordinarily sits at Shanghai. Appeals may be made only to the United States itself, to the Circuit Court of Appeals of the ninth judicial circuit, and in certain instances to the United States Supreme Court. The complexity involved in the procedure may be readily seen.

An even more unsatisfactory condition is to be found in the application of law. In the American courts, the sources of law applicable are: acts of Congress, the common law, special decrees and regulations, and Chinese law. In so far as the first category is concerned, as there is very little substantive law in the acts of Congress applicable to the ordinary affairs of private life, all federal statutes that could be appropriated for use, irrespective of whether or not they have any bearing upon conditions in China, such as the Criminal Codes of Alaska and the District of Columbia, are applied in China.

72. See ibid., Ch. XXIII.
To cite an example of the arbitrary nature of justice, American citizens in China are considered by American law to have acquired extraterritorial domicile, by which they retain permanently their American citizenship and are deprived of the right of expatriation. More illogical still, a Chinese minor in China may acquire American citizenship by a decree of adoption issued by an American court in China,\textsuperscript{74} while a Chinese citizen may never be naturalized in the United States however long he may have resided there.

Yet American courts represent one of the two best developed systems of extraterritorial adjudication in China. The administration of law becomes almost an absurdity when persons of different nationalities are involved in the same lawsuit, which necessitates the application of different legal systems. Not infrequently, to the injury of Chinese and foreigners alike, it is found that there is no law applicable to certain transactions, especially criminal cases. In other cases more than one country may claim jurisdiction. Contracts may be valid according to the law of one power, void according to that of another, and illegal by that of a third. As the courts of each nationality enforce only the laws emanating from their respective governments, and have jurisdiction only over their own nationals, parties of different nationalities to the same case will be prosecuted differently and receive different judgments. The uncertainty of law and the inconvenience and ex-

\textsuperscript{74} Re Adoption of Wu, \textit{ibid.}, p. 635.
pense of prosecution discourage individuals from seeking justice in the law courts, and this in turn discourages commercial intercourse of an international character.

Contrary to the principle of *in dubio mitius*, the rights of extraterritoriality have been interpreted by foreign countries to cover a variety of claims at the expense of China. Some powers place under their extraterritorial jurisdiction subjects of foreign powers not enjoying such rights, and even Chinese nationals, by claiming them as either naturalized subjects or protégés. A more complicated situation arises from the protection of Chinese subjects of treaty powers. These subjects enjoy all civil rights and privileges in China like Chinese citizens. Yet when they come into conflict with Chinese laws they can invoke extraterritorial rights. Other powers, including Great Britain and the United States, hold that Chinese employed by foreigners may not be arrested by Chinese officers, either inside or outside the premises of the employers, without prior reference to the foreign consul. Arrests in foreign settlements of resident Chinese, whether under foreign employment or not, may be made only with warrants countersigned by the senior consul, and the actual arrests effected by the settlement police. Until recently preliminary

75. "The principle, *in dubio mitius*, must be applied in interpreting treaties. If, therefore, the meaning of a stipulation is ambiguous, that meaning is to be preferred which is less onerous for the party assuming as obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties." Oppenheim, *op. cit.* I, p. 762.

76. The system of protégés has never been accepted by China. See Koo, *op. cit.* p. 205.
trials of resident Chinese were conducted in the settlement. None of these conditions has been contemplated in the treaties concerning either extraterritoriality or foreign settlement.

Under the rights of extraterritoriality, the nationals of the treaty powers merely receive the privilege, in case of lawsuit, of being prosecuted in their own courts according to their own laws and procedures. China has not thereby relinquished the power of legislation, nor exempted foreign nationals from the law of the land. Even in the controversial Sino-Japanese Treaties and Notes of 1915, it is specified that Japanese subject "shall also submit to the police laws and ordinances and taxation of China." However, as pointed out in the Report of the Extraterritorial Commission, the jurisdiction of foreign courts in China "does not as a rule extend to the enforcement of Chinese subsidiary legislation, such as regulations relating to traffic, taxation, and press. From the immunity of foreigners in this respect, an anomalous situation arises, which has been a source of friction between them and the Chinese authorities."

77. See the case of Li, Willoughby, Foreign Rights, II, p. 575. See also pp. 574-77


80. See below, section on Abrogation.

The most serious abuse of extraterritoriality is its employment as a shield for acts of aggression. Numerous instances of such aggression have taken place. To cite only a few familiar examples, illegal protection has been extended to Chinese Christians by foreign missionaries, particularly prior to the Boxer Rebellion.\(^{32}\) The Shanghai and Canton Massacres of 1925 originated in the refusal of the settlement authorities to accord redress to Chinese workers.\(^{33}\) Foreign troops and police have been stationed in China on arbitrary interpretations of extraterritoriality, and have made possible such aggressions as the Chengchiatung Affair, the Tsinan Incident, and indeed the present invasion of China.\(^{84}\) Gigantic campaigns of smuggling, illicit traffic in drugs and narcotics, and fishing in Chinese territorial waters, have been conducted by Japanese nationals in many parts of China under the open protection of the Japanese consular and military officers.\(^{35}\) Even in cases in which the

82. See Morse, op. cit., II, pp. 239-42; III, pp. 180-2.

83. A total of 84 Chinese were killed and a great number wounded by the British armed forces in Shanghai and Canton; the foreign casualties were 2 civilians wounded. See M.J. Bau, The S-park That Set the Nation Afire (Pam.), Honolulu, 1927.

84. Ibid. See also Willoughby, Foreign Rights, II, p. 861 ff.

abuses are practised by foreign nationals without being directly sponsored by their governments, "one cannot shut his eyes to the fact that there is usually a strong bias in favour of his own nationals upon the part of the consul or other foreign official who tries the case." 86

The existence of such an anomalous state of affairs has been strongly resented by China. Besides rendering impossible a satisfactory administration of justice, it is in serious derogation of the dignity and independence of the Chinese state. Creating an imperium in imperio in China's judicial administration, it stands diametrically opposed to the principles put forth in the Nine-Power Treaty, in which the signatory states undertake to respect China's sovereignty, independence, and territorial and administrative integrity. While other countries like Japan, 87 Turkey, and Siam 88 have been able to abolish the system, its maintenance in China is regarded by her people as a national humiliation.

That extraterritoriality was not meant to be conferred as a permanent right may be seen from the fact that it was granted only in commercial treaties. At the conclusion of the Opium War, the terms of settlement such as the cessation of Hongkong, the payment of indemnity, the opening of treaty ports, and the

88. See Ibid., pp. 175-182.
89. See Ibid., pp. 215-217.
liberty to appoint consuls, were stipulated in the peace treaty of Nanking of 1842. The right of extraterritoriality, on the other hand, was contained in the General Regulations of Trade attached to the Sino-British supplementary treaty of 1843. Similarly other powers obtained the right through commercial treaties with China.

Another point of significance is that the most-favoured-nation clause in treaties concluded between China and other states does not apply to extraterritoriality, which is not a general right granted to all foreign nations having treaty relations with China, but a restricted privilege obtained by certain powers through special treaty agreements with China. Moreover, each of these powers enjoys the right in such respects as are stipulated in its particular treaty or treaties, with the result that there exist varied forms of extraterritoriality in China.

Since the system of extraterritoriality has been created as a temporary arrangement, and since its operation has resulted in numerous disadvantages and evils, it is only natural that its maintenance should be actively resisted by China. The movement for abrogation met with foreign support first in 1902, when Great agreed that she would "relinquish her extraterritorial rights


The variety should be reduced with the abolition of the use of assessors.
when she is satisfied that the state of Chinese laws, the arrangement for their administration, and other conditions warrant her in doing so." 92 Similar promises were made by Japan, the United States and Sweden. 93

The first cases in which extraterritoriality was terminated came in 1917 when China entered the World War against Germany and Austria-Hungary and declared abrogated all her treaties with those two countries. This unilateral action on the part of China was formally ratified in the peace treaties of Versailles, St. Germain, and Trianon, and confirmed in subsequent treaties entered into between China and Germany and Austria. 94

In 1920 Russia's extraterritorial rights were suspended by China in a Presidential Mandate declaring the "suspension of recognition of the Russian minister and consuls in China." 95 This was done owing to the fact that through the Bolshevik Revolution Russia no longer had a government recognized by China and consequently had no consuls competent to exercise extraterritorial authority. In the same Mandate China undertook to protect the lives and property of Russian subjects


94. See ibid., pp. 577-9.

within Chinese territory. By the Sino-Russian Agreement of 1924, the Soviet Government formally relinquished its extraterritorial rights in China.96

At the Paris Peace Conference of 1919 China urged an immediate modification and early abrogation of extraterritorial rights by the treaty powers. A memorandum was presented to show the defects of the existing system, the advantages to China as well as foreign powers of its abolition, and the progress made in law and in the administration of justice in China. No action was taken by the Conference.97

The case was presented by China again at the Washington Conference of 1921-22. The statements made in 1919 were repeated and amplified. Reference was made to the promises of abrogation pledged by various powers. In particular, the Chinese delegation pointed out the efforts made by China in the establishment of modern courts, the training of judges and lawyers, and the preparation of new law codes with the assistance of foreign experts.

This time the treaty powers declared themselves "sympathetically disposed" towards the Chinese aspiration. But pending the abrogation of extraterritoriality, the state of facts in regard to the administration of justice in China was to be subject to international enquiry. For

96. Declaration VI, Treaties, 1919-1922. p. 139.
this purpose the powers appointed an Extraterritorial Commis-
sion which was to meet in Peking on or before May 6, 1922.

But the Commission did not meet until almost four years
later. On September 16, 1926, it submitted a unanimous re-
port. It recommended that China on her part should complete
new laws, extend the system of modern courts and prisons,
and maintain an effective and independent judiciary. Prior
to reasonable compliance with these demands but after the
principal items had been carried out, the powers might con-
sider the relinquishment of extraterritorial rights by some
progressive scheme. When extraterritoriality was completely
abrogated, China should open the entire country to foreign
trade and residence.99

In the meantime, pending such abolition, the powers
should administer Chinese laws in their consular courts insofar
as practicable. Mixed cases in which the defendants were

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98. The delay of the first year was requested by the Chinese
government in order to translate the Chinese Codes. After
that, however, it was due to pressure from the French govern-
ment which withheld the meeting of the Commission until
China consented to pay the French Boxer Indemnity in gold
francs instead of following the treaty stipulations—a wholly extraneous demand. See Willoughby, Foreign Rights,
II, p. 678, note 8.

99. As long as extraterritoriality exists, foreigners except
missionaries may reside only in the treaty ports, since
outside these ports there are no foreign consuls to ex-
ercise jurisdiction over them.
Chinese should be tried before the modern Chinese courts without the presence of a foreign assessor. The powers should correct their abuses in the exercise of their extraterritorial rights. There should be cooperation with the Chinese government to effect an efficient administration of justice. Finally, foreigners in China should be required to pay taxes in China prescribed by the law of the land.

Since then, particularly under the National Government, China has carried on her abrogation movement with increasing vigor. In 1929 new commercial treaties were concluded with Belgium, Italy, Denmark, Spain and Portugal, all containing clauses relating to the relinquishment of extraterritorial rights. Belgian nationals would be amenable to Chinese jurisdiction as soon as a majority of the extraterritorial powers had agreed to abandon their extraterritoriality. The extraterritorial rights of the other four states were conditioned upon like promises from all other original signatories to the Washington Treaty.

In the following year Mexico abandoned unconditionally her extraterritorial rights. In a declaration, the Mexican government expressed its "complete sympathy with China's aspirations to exercise sovereign jurisdiction as a free and independent State".

100. See Willoughby, Foreign Rights, II, p. 673, 683.
As the commercial treaties with most of the other extraterritorial powers were soon to expire, the National Government issued a mandate on December 29, 1898, containing the principle that all foreign nationals within Chinese territory would be subject to Chinese jurisdiction beginning on January 1, 1930.

The treaties with Japan, Sweden and Peru were due for renewal. Japan signified her willingness to give up jurisdiction over her nationals in civil cases. China insisted upon the abandonment of criminal cases as well. The negotiations reached a deadlock.

Those extraterritorial powers whose treaties had not yet expired were Great Britain, the United States, France, the Netherlands, Norway and Brazil. Of these, the three latter expressed sympathy for China's demand, but intended to go no further than following the lead of the great powers. China's success depended, therefore, upon the assent of Great Britain, the United States and France.

Negotiations had been conducted with those three states since 1933. By that time China's law codes were so revised and completed that no further complaints in that direction were made by those powers. However, while expressing their appreciation of the efforts made in China to assimilate Western judicial and legal systems, according to reliable sources, the powers indicated their criticisms upon the administration of the judiciary in China. But their criticisms were intended rather as evasion than as constructive steps towards abandonment of their rights. The
British government, for instance, made the ambiguous statement that it was "necessary that Western legal principles should be understood and be found acceptable by the people at large, no less than by their rulers". 102

To meet the criticism of the powers, the Chinese government promulgated regulations to carry out a concrete scheme for the treatment of aliens in China. Special districts were created in important cities such as Shanghai, Tientsin, Hankow, Canton, Mukden, Tsingtao, Foochow, Yunnanfu and Chungking, where special courts were to be established for the trial of cases involving foreigners. The jurisdiction of these courts extended also to similar cases that took place in the interior of China. Foreign advisers, at the discretion of the Ministry of Justice, might be employed by these courts, but their functions would be strictly of an advisory character. Foreigners charged with a criminal offense were to be handed over to the special courts within twenty-four hours after arrest. In civil as well as criminal cases foreign lawyers might be employed to conduct their defense. Special detention houses and prisons, in which foreign food was served and special attention given to conditions of sanitation, were prepared for foreigners. Beginning on January 1, 1932, all foreigners were to be subject to the *

According to reliable sources, 103 the powers indicated their

102. For text, see ibid., 1928-30, pp. 910-12.


* jurisdiction of the Chinese courts.
willingness to relinquish extraterritoriality under the following limitations:

1. Evocation, meaning that in cases involving their nations, appeals might be made from the Chinese courts to their own courts.

2. Jurisdiction over civil cases would be turned over to the Chinese courts, but that over criminal cases would be retained by the foreign courts for a number of years.

3. Foreign judges should be appointed to sit with Chinese judges in cases involving foreign nationals.

4. Extraterritorial jurisdiction should continue in areas within fifty li of the four ports of Shanghai, Canton, Tientsin, and Hankow for a number of years.

Apparently these were unacceptable to China. The limitations were so comprehensive as to render the abrogation close to meaningless. The Chinese government intimated that failure to meet China on her minimum terms would lead to unilateral action of abolition, in accordance with the precedent set by Turkey.

Slowly the powers conceded. The first three points of the limitations were rescinded. In the fourth point Canton and Hankow were not insisted upon. But while negotiations were focussed on the exemption of Shanghai and Tientsin, the Japanese invasion of Manchuria broke out. In the same year the most disastrous floods swept over central China. Faced with external aggression and internal calamity, the Chinese government was induced to abandon temporarily the movement for the abolition of extraterritoriality. It need scarcely be
said that since that date China's task of maintaining her national existence has become increasingly difficult.

One important result was achieved, however, in connection with China's efforts to recover her jurisdictional sovereignty. The "Mixed Court" at Shanghai was returned to China. Originally established by China for the trial of Chinese and non-extraterritorial foreign offenders within the settlement, since the Chinese Revolution of 1911, it had been taken over by the consular body at Shanghai which assumed the right to appoint its judges. The situation became a source of grievance among the Chinese. In 1914 the diplomatic body at Peking signified its willingness to restore the court to China under certain conditions, but no agreement was arrived at with the Chinese government. In 1925, after the Shanghai Massacre, the diplomatic body compromised upon China's demand for its rendition. The court was replaced by a Provisional Court and a Court of Appeal. The judges were appointed by the Chinese government, but in criminal cases a deputy appointed by the Senior Consul might sit to watch the proceedings. On February 17, 1930, an agreement was signed between China and the foreign powers by which the provisional courts and the Deputy system were abolished and in its place were established a regular Chinese District Court and a Branch High Court. The prisons and detention houses in the settlement were either transferred to Chinese control or subject to Chinese inspection.105

104. See Willoughby, Foreign Rights, II, Chi. XXI.
CHAPTER VIII

THE PROTECTION OF ALIENS

International law recognizes the general principle that in admitting aliens within its territory, a state assumes the obligation to extend to them a degree of protection comparable to the protection which it gives to its own citizens. The act of admission implies certain fundamental rights of person and property which the aliens may expect to enjoy. It is generally agreed, however, that they may not claim a privileged status over and above that which is enjoyed by citizens, but must submit themselves to the law of the land and receive protection accordingly.

It is only when local methods of redress, while open to the citizen, are refused to the alien, or when discrimination is used against the alien as such, that his treatment becomes a diplomatic question in which his home government may claim concern.

In the diplomatic protection of nationals abroad the governments of certain great powers have asserted the rule that there is an international standard of justice to which the municipal law of all states must conform. If this standard is higher than that which is usually maintained by the national courts, the result is to put the aliens in a privileged position by giving them a greater degree of protection than that enjoyed by the citizens of the country.

The insistence upon such a standard is not without justification when the country to which it is applied possesses an apparently corrupt or despotic system of judicial administration. Apart from this, the variety of legal systems existing in different countries will give rise to many difficulties, as for example in the case of a totalitarian state, in which the conception of public rights and duties and of crimes against the state are often unacceptable to
the so-called democracies.

Given an international standard of justice for the protection of aliens, the next problem is to determine the circumstances under which the state becomes responsible for an injustice suffered by an alien. No government could in actual practice exercise absolute control over its territory at all times and places, however complete the legal control it may claim. Consequently the mere fact that an alien is injured does not of itself warrant the assertion on the part of the alien's government of the right to intervene for his protection. The responsibility of the state consists primarily in the redress of the wrong. Hence the alien must first exhaust all the remedies provided by the law of the land before there is ground for his government to intervene in his behalf. "The phrase responsibility of the state in this connection may, therefore, be defined as the secondary obligation of the state to make reparation to another state for the violation of its primary obligation to afford the proper protection due to the aliens."

Since the state can express itself only through the acts of individuals who are its agents, it assumes responsibility for such acts in degrees varying according to their official character. For the acts of its primary agents, such as the executive head of the government and the national legislature, the responsibility of the state is direct and immediate. For the acts of high administrative and judicial officers, the responsibility is likewise direct, but less immediate, and the state is free to disclaim their acts while assuming responsibility for them. As

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1. Fenwick, *op.cit.*, p.198. See also p.197.
for the unlawful acts of petty officers and private individuals, the state is responsible only in so far as it fails to prevent the violation of its laws and to punish the offender in the administration of justice.

In a number of treaty engagements with foreign states China has promised the protection of foreigners residing within her territory engaged in peaceful pursuits. These agreements also state, however, that such foreigners shall receive their protection to the same extent as Chinese subjects. The American treaties of 1844 and 1858, for example, provide that citizens of the United States in China peaceably attending to their affairs are "placed on a common footing of amity and good will with the subjects of China". In the Boxer Protocol of 1901 China pledges herself to suppress all anti-foreign movements and to be responsible for same. Such responsibility is limited to movements directed against foreigners as such, and cannot be interpreted to cover injuries suffered by foreigners as accidental victims.

In spite of these treaty provisions, China has been compelled on many occasions to assume responsibility for the acts of her officers and individual citizens to a degree unparalleled in customary international practice. Demands of the most appalling character have been made, and have had to be complied with under duress. As in the case of intervention, the question of the protection of aliens in China has frequently conflicted with the established

2. For a list of such treaties see Koo, op.cit., pp.338-7.
rules of international law. Happily, since the beginning of this century, and particularly since the Washington Conference of 1921-1922, the attitude of many foreign states toward China has become more reasonable, and is an encouragement to those who uphold a general or even minimum standard of international justice.

A. Anti-Foreign Riots

1. The Tientsin Massacre

After the second Opium War of 1853-1860, the behavior of the French in China aroused the bitter resentment of the Chinese population. The imperial palace at Tientsin was occupied by the French and used as their consulate. On the site of the imperial temple, doubly holy in the eyes of the Chinese, a Roman Catholic cathedral was erected and Chinese officials were constrained to participate in its consecration in 1869. To make matters worse, the sisters of Mercy, in their well-meaning but dangerous efforts to foster Chinese orphans, offered a premium for each child brought to them. This resulted in serious waves of kidnapping of children in and around Tientsin. Furthermore, the priests and sisters also indulged in the habit of holding out inducements to have children brought to them in the last stages of illness, for the purpose of being baptized in articulo mortis. Most of these children died and were buried in the Catholic cemetery. The local population, excited over the kidnapping and mystified at the baptism and burial, built up the theory that the children were used for superstitious and horrible purposes. A frenzy of fear and


hatred prevailed.

An angry mob gathered in the middle of May, 1870. They raided the cemetery and found the bodies of thirty or forty children. Several kidnappers were caught and executed by the mob. Even the gentry was led to the belief that the sisters were guilty of murder. The district magistrate, pressed by the people, presented the case to the Imperial Commissioner and demanded an inquest. Meanwhile most Chinese Catholics deserted the Church, but so far no violence had been committed against the French or the missionaries.

The local magistrate took up the matter with the French consul. Instead of negotiating for a solution, the latter threatened to hold him responsible as the instigator of the mob. In the morning of June 20th, the Imperial Commissioner called on the consul. It was agreed that an investigation should be made. A settlement seemed forthcoming when in the afternoon trouble broke out, in which may be said with fairness that the French consul was the sole instigator. The incident, as reported by the Chinese commissioner and supported by the English commissioner of customs, happened thus: 6

I [the Chinese commissioner] suddenly heard that a disturbance had risen between some people belonging to the cathedral and a crowd of idlers. I sent a military officer to suppress the trouble, when I heard that M. Fontanier [the French consul] had come to the yamen. On going out to receive him, I saw that the consul, whose demeanor was furious, had two pistols in his belt, and that a foreigner who accompanied him, was armed with a sword. They rushed towards me, and as soon as M. Fontanier came up to me he began to talk in indecorous manner, drew a pistol from his belt, and fired it in my presence; the shot fortunately did not take effect, and he was seized. To avoid personal collision, I withdrew. On entering the room he began to break the cups and other articles on the table, keeping up at the same time an incessant torrent of abuse. I went out again to see him, and told

him that the crowd outside had a very threatening aspect; that... I was afraid of a disturbance and advised him not to go out of the yamen. But, reckless of his life, he rushed out of the yamen, I sent men after him to escort him on his way. M. Fontanier on his way met the Hsien, who was endeavoring to control the mob, and who tried to keep him from proceeding; but he fired at the Hsien, hitting one of his servants. The mob, enraged at this outrageous conduct on the part of the consul, at once pursued, surrounded, and killed him. They then set fire to the cathedral. They also destroyed the establishment of the Sisters of Charity and the Protestant chapels inside the city.

The disorder lasted for three hours, during which eighteen French nationals, including the consul and his escort, and between thirty and forty Chinese employed in the mission, were killed. Three Russians were murdered by mistake.

The news spread throughout China and was followed by destruction of mission chapels at eight other cities. Catholic and Protestant church property suffered indiscriminately, but no further loss of foreign lives occurred. The outrages were suppressed and the rioters punished with vigor. 7

Next came the question of redress and settlement. In this connection several episodes were unprecedented in the history of international relations. In the first place, the foreign circle at Tientsin gathered themselves together and formed a volunteer guard to protect themselves. The Imperial Commissioner prepared to send troops to protect them, but to his surprise the offer was "declined with thanks." 8 Secondly, in view of the fact that the attack was primarily against the French, the Chinese government regarded the destruction of the property of other nationalities as incidental, but it nevertheless assumed full responsibility and requested the owners to present their claims for damage done. This was again refused. Instead, the missionaries expressed "their surprise that,

7. The Viceroy at Nanking was assassinated for his vigorous suppression and punishment of the mob.

prior to the settlement of the more important questions which are still impending, the subject of monetary compensation should be entertained at all," and added that they desired "not to be separated from our suffering French brethren in any settlement of these unhappy troubles."9 Even the American minister at Peking found it difficult to understand their attitude. He reported to his home government the following:10

Both the American and English missionaries appear to be impressed with the belief that they are somehow specially charged with diplomatic functions by their government, in addition to their self-imposed task of taking care of the spiritual welfare of the Chinese; and, according to their diplomatic judgment, a war between France and China must first take place before it is proper to adjust any claims for property destroyed in the late riot at Tientsin.

The foreign community continued to press for vengeance. The North China Herald, their press and mouthpiece, said:11

This sad and execrable massacre of Tientsin is one that concerns all nations having relations with China; and, unless a severe reparation be exacted, every one will rue the apathy that would permit such atrocities to go unpunished. No money indemnity can satisfy the demand for justice. The lives of all the authorities concerned ought to be forfeited. In particular, Chunghow [the Imperial Commissioner] should suffer death.... If he is allowed to escape, disaster may be expected for every European in this country.

In spite of the cause of the riots, the due diligence exercised by all central and local officers concerned, and the refusal on the part of the foreign community of protection and monetary compensation offered by China, the imperial government assumed full responsibility and issued a decree ordering the Viceroy of Chihli to investigate and punish the guilty. It declared specifically that, with the exception of the Imperial

9. Quoted ibid., p.250.
10. Low to Fish, Aug.18th., U.S. For. Rel., 1870, p.371.
11. Aug.11, 1870.
Commissioner who was charged with the control of foreign trade and was not responsible for the preservation of order, all regional officers, the taotai, fu and hsien would be accountable, since "their delinquency admits of no palliation." Accordingly, they were dismissed from office, degraded from their rank, and handed over to the Board of Punishment for trial.

To this the foreign powers replied by dispatching warships, five French, one American, and three British to Tientsin; and two French, one Italian, and three British to Chefoo. The French government presented an ultimatum demanding the decapitation of the two local officers and General Chen Kwo-jui "who were suspected [by the French] of complicity in the riot." In default of this, the French envoy "should feel himself at liberty to withdraw his legation and the French subjects from Peking, turning the whole matter over to the admiral, who would take such action as he deemed necessary to enforce the demand and maintain the honor of France." The Chinese government was caught between a determined foreign group and an angry nation. The British were informed that it was impossible for the government to decapitate the three officers as demanded by the French. "They don't see how the Emperor could face his people and explain why he ordered those heads to fall." Amidst the dilemma the Franco-Prussian War

13. Low to Fish, Aug. 22nd., ibid., p. 377.
15. Low to Fish, see above, note 13.
broke out, and the French demands upon China became less severe.

Finally a settlement was reached on October 5th. The prefect and the magistrate were banished for life to the penal settlements on the Amur. Twenty rioters were condemned to death by decapitation, six to banishment for ten years and twenty-five for three years. An indemnity of Tls.250,000 was paid as compensation for the dead and the destruction of property. Furthermore, the Imperial Commissioner was dispatched to France on a mission of apology, to express to the French president the personal regret of the Chinese Emperor. For all these reparations, the Chinese government received comments to the effect that the settlement had never been regarded as satisfactory by the foreign community.17

2. The Boxer Uprising

Mention has been made above of the origin and causes of the Boxer Uprising.18 For the participation of high government officials in the rebellion, the Chinese government assumed immediate and direct responsibility. Several princes of the blood and a great number of high officials were condemned to death or banishment. Special missions of apology were sent to Germany and Japan. A total indemnity of some one billion taels was paid as compensation for injury and expenses for the allied intervention. A defensible legation quarter was created in Peking. The communication between the capital and the sea were maintained free from fortifications. The foreign office of the Chinese government was reor-

17. See ibid., pp.257-60.
18. See above, Ch.VI, Sec.A.
ganized to show respect for foreign affairs. All commercial
treaties between China and the powers were subject to revision.
As was customary in the conduct of the foreign powers in their
relations with China, the settlement was concluded on the basis
of armed force rather than as the fulfilment of obligations
under international law.

In this respect China has gone a long way beyond the usual
procedure. As a rule the government guarantees compensation to
the alien before the case actually comes before the court. This
is done in order to avoid foreign intervention, but it places the
alien in a privileged position above the citizen. Yet, whenever
such cases arise, even when Chinese and foreigners suffer alike,
foreign states invariably attempt to hold the Chinese government
directly responsible for the acts of its individual citizens.
Moreover, their protests are frequently accompanied by irrelevant
demands.

1. The Margary Case

In 1875, a group of British nationals explored the mountains
bordering the Chinese province of Yunnan and British Burma. The
frontier region had been in armed rebellion for some twenty years,
and the bordering tribes, mostly savages, had not been under com-
plete control of the Chinese government. The British explorers
were informed of the conditions, and warned not to proceed to
places of danger. But nothing could stop them from carrying out

10. See Fenwick, op. cit., p.189.
B. Unlawful Acts of Individuals

In the matter of the protection of aliens it is generally agreed that the state is only indirectly responsible for the acts of its individual citizens. When an alien suffers at the hands of individuals, the customary procedure is for him to seek redress through the courts of the country of residence. It is only when justice is denied that he may seek the intervention of his government. Even then his government may not claim redress beyond compensation for the damage done to him.19

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their plan of crossing the frontier.

On February 25th one of the explorers, Mr. Margary, and five Chinese aides, were reported killed. The murderers could not be identified.20 The Burmese, the border savages, and the Chinese were all suspected. But Great Britain decided to lay the blame on China, particularly on the Acting Viceroy of Yunnan and Kweichow,21 and the following demands were served on the Chinese government:22

1. The Chinese Government to send a commission of investigation, the inquiry to be conducted in the presence of British officers.
2. The Indian Government to be allowed to send a second expedition.
3. The sum of Tls. 150,000 to be paid.
4. Article IV of the Treaty of Tientsin to be so interpreted as to give to the British Envoy a "fitting and satisfactory" audience with the Emperor.
5. Arrangements to be made for freedom of British trade from tariff in certain areas.
6. The Viceroy and other officials of Yunnan to be held personally responsible for the murder.

The first three demands were acceded to by the Chinese government. But the extraneous terms, particularly regarding the responsibility of the viceroy, were refused.

The method with which the British envoy conducted his negotiations afforded a striking resemblance to the French during the Tientsin Massacre. Twice he presented an ultimatum and hauled down his flag. According to the American minister, he "called upon the Foreign Office with his full staff of secretaries and attendants... This meeting was reported to be rather stormy and electric." A French writer reported, "Mr. Wade returned to

21."But which was the leader in the plot... is comparatively unimportant; suffice it that Her Majesty's minister fixed, on grounds which satisfied him, though of course on inferential evidence only, the instigation of the crime on the Governor-General Tsen Yu-ying," Michie, The Englishman in China, quoted, ibid., p.290, note 22.
22. Ibid., pp.291-2.
Peking... with the most bellicose intentions." A Chinese official recorded, "It is impossible to take seriously what Mr. Wade says ---now this, now that---today yes, tomorrow no...the rages, the suks, the outbursts...." Finally the British envoy himself confessed: "For my frequent loss of temper in argument, I put forth no excuse. For the matter, the Chinese Government leaves me, in my judgment, little option."23

The inclusion of extraneous demands was resented by China as well as the other powers. The American minister at Peking wrote:24

He [the British envoy] also intimated ... that he should press for a better adjustment of the audience question and of issues connected with the collection of likin. In common with my colleagues of Russia, Germany and France, I was anxious to give the British minister the moral support in his demand for redress in the Margary massacre...; but I was decidedly opposed to complicating the case with other issues which, if it is thought necessary to take them up at all, can better be treated separately, on their own merits.

The final settlement was embodied in the Chefoo Convention of September 17, 1875.25 To meet the British demands and at the same time to indicate that the extraneous terms were granted apart from the reparation for the injury, the convention was drawn up in three sections. The first, under the title of "Settlement of the Yunnan Case", specified that official publications with regard to the case were to be submitted for the approval of the British minister. Regulations were to be drawn up for the conduct of frontier trade between Burma and Yunnan, and for five years British official representatives might be stationed in Yunnan for

24. Avery to Fish, April 1, 1875, U.S. For. Rel., 1875, I, p.310.
the supervision of trade. A second expedition might be sent from India. A compensation of Tls. 200,000 was to be paid by China, and a mission was to be dispatched to London to express regret.

The second section, entitled "Official Intercourse", provided that a code of etiquette was to be prepared for the treatment of diplomatic representatives. The system of assessors was introduced into extraterritoriality.

In the third section, headed "Trade", China agreed to open four treaty ports in which foreign goods could be imported free of likin. The foreign settlement area at each port was to be defined by mutual agreement. Six other places were opened as "ports of call". A consulate could be established at Chungking, which, however, was not to be opened to foreign trade before steamers had access to the port. Inland transit trade and the collection of duty and likin on opium were to be regulated.

A separate article provided for a proposed British expedition from China through Tibet to India.

The conclusion of the second and the third sections gave rise to protests from the other powers, which asserted that the matters were of common concern and should not be determined by Great Britain alone. Instead of endeavoring to bring about their cancellation, however, all the powers took full advantage of the concessions granted therein.26

26. See Morse, op. cit., II, pp. 304-5.
2. The Tsaochowfu Incident

On November 1, 1897, a band of robbers plundered the village of Kiachwang, in Tsaochowfu, Shantung, and killed two German Catholic missionaries among other Chinese victims. The provincial authorities acted promptly and executed justice on the scene of the crime. The news reached the German government nine days later. The swiftness with which German action was taken surprised the world. Without any previous demand or warning, a German force reached Tsingtao (Kiaochow) on the fourteenth and seized the port. The German press agitated for permanent occupation of Kiaochow Bay. On the twenty-second, the German government presented its demands upon China as follows:

1. An imperial tablet to be erected to the memory of the murdered German priests.
2. An indemnity to be paid to their families.
3. The retiring Governor of Shantung, Viceroy-designate of Szechuen, to be cashiered and dismissed from public service.
4. Repayment of the expenses incurred in the occupation of Tsingtao.
5. Germans to have sole right to construct railways and open coal mines in Shantung.
6. Germany to be granted a naval base at Kiaochow.

At once the German government introduced a navy bill in the Reichstag and dispatched a fleet under high command to China. In vain did China protest that the occupation of Kiaochow by Germany constituted a violation of international law.\footnote{See \textit{ibid.}, III, pp.106-10.} The German demands were acceded to, but only at the point of the sword.

Unable to check the German aggression, China sought to obtain a more reasonable interpretation of the "responsibility of the state". As a result the two parties followed the example of the Margery Case in separating the reparation for the injuries from
the extraneous demands. In the settlement of the Tsaochowfu incident, the Chinese government paid indemnities to the German Catholic Mission for the building of three cathedrals at Tls. 66,000 each, and the erection of a missionary residence at Tls. 22,000. Each family of the murdered received another sum of Tls. 3,000. Furthermore, the retiring Governor of Shantung was dismissed from office and permanently degraded. 28

The lease of Kiaochow and the construction by Germany of railways in Shantung were granted in a separate convention. In the preamble it was specifically declared that the Tsaochowfu incident had been closed, and that the concessions mentioned in the convention were granted by China as a compensation to Germany for the latter's efforts in the Liaotung intervention following the Treaty of Shimonoseki of 1895. 29

3. The Lincheng Incident

On the morning of May 6, 1923, a band of brigands wrecked a train near Lincheng, Shantung, and carried off for ransom more than one hundred Chinese and thirty-two foreign passengers, including British, American, French, and Mexican nationals. One foreigner, who resisted the bandits, was shot dead.

Troops, ordered out by the provincial government, surrounded the outlaws, but could not open fire owing to the presence of the foreign captives for whose safety, it was known, the Chinese government was customarily held responsible. Because of this reason


29. See Convention for the Lease of Kiaochow, MacMurray, I, p.112.
the government had to negotiate with the brigands. The Commissioner of Foreign Affairs at Nanking was dispatched for the purpose. The immediate result was that all foreign women were released, while the rest of the captives, both Chinese and foreign, were detained on a mountain. After tedious negotiations, the government paid ransom to the brigands for the release of the foreigners, who were all set free by June 12th.  

The diplomatic corps at Peking protested to the Chinese government. It demanded an indemnity; invoked the Boxer Protocol of 1900 which provided that "whenever fresh anti-foreign disturbances or any other treaty infractions occur, which are not forthwith suppressed and the guilty persons punished", all local officials concerned "shall be immediately removed and forever prohibited from holding any office or honour"; and proposed the formation of a special Chinese police under foreign supervision.

In reply the Chinese government expressed regret, but declined to admit the applicability of the Boxer Protocol. It pointed out that there was no anti-foreign motive or feeling involved in the case, for not only foreigners but a much larger number of Chinese were among the victims. As facts had manifested, the provincial government had done everything within its power to


32. Art. IV, 10, b, MacMurray, I, p. 310.

suppress the offense, had rescued the foreigners, and was prevented from punishing the criminals by the very presence of the foreign captives.

In the final settlement the Chinese government, while denying liability, paid an indemnity amounting to $600,000 Chinese currency. This covered (a) compensation for the foreigner killed --- $30,000; (b) compensation for the loss of liberty of those detained by the brigands --- $500 per day during the period of captivity; (c) compensation for the loss of personal effects; and (d) compensation to cover the amount expended in shipping relief to the victims. No punishment was inflicted upon the provincial officials. However, the Tuchun of Shantung had to resign "voluntarily".

... been in favor of compensation for direct losses only. The claims awarded amounted to $29,480,000 Chinese currency. These included (a) expenses incurred by foreign municipalities for "protection and defense" of their property; (b) money and documents of commercial value, salaries and other payments due under contract to foreigners in the Chinese government service or institutions, unpaid owing to the revolution; (c) losses for non-fulfilment or delay in execution, owing to the revolution, of contracts and other engagements entered into by foreigners with the Chinese government including freight, re-shipment, storage insurance and loss or deterioration of goods; (d) traveling expenses of foreigners in Chinese official service to places of safety and return journey, extra living expenses and rent of houses; (e) deposits of money

34. See S. Shu, Chung Fe wai chia qin (A History of Franco-Chinese Diplomacy), Shanghai, 1928, pp. 104-8.
C. Protection of Aliens during Civil War

1. The Chinese Revolution of 1911

During the Revolution of 1911, the civilian population, and among them some resident aliens, sustained material damages. Inasmuch as the Republican Government was newly established and anxious for recognition, the foreign powers availed themselves of the opportunity to demand a heavy indemnity for the losses incurred by their nationals.

An International Claims Commission was appointed by the diplomatic body at Peking to determine the awards. The powers held out for compensation for indirect as well as direct losses, and this opinion prevailed over that of Great Britain and the United States which had been in favor of compensation for direct losses only. The claims awarded amounted to $32,480,000 Chinese currency. These included (a) expenses incurred by foreign municipalities for "protection and defense" of their property; (b) money and documents of commercial value, salaries and other payments due under contract to foreigners in the Chinese government service or institutions, unpaid owing to the revolution; (c) losses for non-fulfilment or delay in execution, owing to the revolution, of contracts and other engagements entered into by foreigners with the Chinese government, including freight, re-shipment, storage insurance and loss or deterioration of goods; (d) traveling expenses of foreigners in Chinese official service to places of safety and return journey, extra living expenses and rent of houses; (e) deposits of money

or investment in Chinese government banks or departments, not recovered; (f) loss in industrial enterprise, resulting from suspension or delay in working, owing to local disturbances; (g) rents not recoverable and rents paid in advance, where occupation and use were prevented by military operation or acts of Chinese soldiers. 35

Speaking of the basis on which the claims were made, an American authority on the subject has said, "Their rule represents the widest measure of damage assessable against a government." 36

2. The Nanking Incident

The Nanking Incident represents a case in which China was treated more on the basis of equality and in which extraneous demands were absent throughout the negotiations for settlement.

During the seige of Nanking by the Nationalists in March, 1927, the retreating Northern army and the communists, including some nationalist troops, in a simultaneous uprising on the 24th and the 25th, resorted to looting and burning in the city. Many civilians, including foreign residents, were injured. The American, British, and Japanese consulates were violated, and the British consul wounded. In their sufferings the foreign residents received much aid and sympathy from the local Chinese. 37

In retaliation the British and American warships, which had been anchored near the city, dropped a barrage for twenty minutes during which ten Chinese civilians were killed and damage done to the city. When the turmoil was over, it was discovered that six


36. Ibid., p.426.

37. See Morse and MacNair, op.cit., p.737.
foreigners were also killed: three Britishers, one American, one French, and one Italian. Whether their deaths occurred before or after the barrage has been a matter of controversy.  

The United States, Great Britain, Japan, France, and Italy presented a joint protest to the Nationalist government demanding the following:

1. Adequate punishment of the commanders of the troops responsible for the murders, personal injuries, and indignities, and material damage done, as also of all persons found to be implicated.

2. Apology in writing by the Commander-in-Chief of the Nationalist armies, including an express written undertaking to refrain from all forms of violence and agitation against foreign lives and property.

3. Complete reparation for personal injuries and material damage done.

This was accompanied by a threat that unless the terms were promptly complied with the foreign powers "will find themselves compelled to take such measures as they considered appropriate."  

The Nationalist government was willing to accept responsibility, but declared that negotiations would be entered into only in a spirit of equality, without coercion from the outside and without extraneous demands on the part of the powers. Therefore, it refused to deal with them en bloc. The negotiations were carried on and settlements were made with each state individually.

In similar but separate notes to the powers, the Nationalist government took up the demands point by point. In regard to reparation, it promised full compensation for the damage done to the consulates, irrespective of the source of the misconduct. As to the injuries incurred by the foreign nationals, it assumed responsibility for those inflicted by the Nationalist troops, but not for


those caused either by the British-American bombardment or by the Northern army.

The Nationalist government criticized the demands for punishment of the commanders of the troops responsible for the incident and for written apology by the Nationalist commander-in-chief as necessarily assuming the guilt of the Nationalist forces. However, the powers were informed that a rigid government inquiry was being conducted to ascertain the facts of the case, and that as a matter of fact a number of those found implicated had been executed. The Nationalist government proposed joint inquiry on the entire situation, and declared that it was the government’s settled policy to protect foreign lives and property and that it "naturally cannot countenance the use, in any form, of violence and agitation" against them.

Against the bombardment of Nanking by the British and American navy, the Nationalist government lodged its protests, and reminded Great Britain and the United States that "the laws of nations and settled practices of civilized states prohibit the massacre of the citizens of a friendly state, the more so when such citizens are in their own territory, and also prohibit the bombardment of the cities of friendly states." In the note to Britain references were made to the outrages committed by the British armed forces at Shanghai, Shameen and Wanhaisen in the preceding years. It proposed that all these incidents be subject to international inquiry.

Finally the Nationalist government declared that the most effective protection of foreign lives and property lay in the removal of unequal treaties between China and the foreign nations, since such treaties were the source of friction between them.\footnote{Treaties, 1919-1929, pp.216-23.}
The first power to settle the case with China was the United States. By an exchange of notes of March 2, 1928, the Nationalist government expressed regret at the indignities to the American consulate and the injuries done to the American residents. It was agreed that the incident was entirely instigated by the communists prior to the establishment of the Nationalist government at Nanking, which "nevertheless accepts the responsibility therefor." Orders were issued to both civil and military authorities for the effective protection of American lives and property in China. The American government was informed that the troops which had taken part in the communist uprising had been punished, and the particular company disbanded. The Nationalist government undertook to make good all damage done, to be verified and assessed by a Sino-American joint commission.

The American government in turn "deeply deplores that circumstances beyond its control should have necessitated the adoption" of the measures of bombarding the city of Nanking. It also expressed itself willing to consider the question of treaty revision, "although the question... can scarcely be considered germane" to the Nanking incident.

Similar agreements were concluded by China with the other powers concerned.

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42. Ibid., pp.223-6.
43. 51 persons: 19 soldiers and 32 "local desperados", were executed.
44. For texts, see China Year Book, 1929-1930, pp.897-902.
D. Special Protection Due to Foreign Officers

International practice recognizes the duty of a state to give special protection to the officers of foreign nations on mission within its territory, and to exercise the utmost diligence to prevent the commission of acts injurious to them. Failure to fulfill such duty would be regarded as a national offense, the gravity of which is as a rule determined by the rank of the injured officer.45

References have been made to several occasions on which personal injuries were inflicted upon foreign officers in China. In the case of the murder of the French consul and his aide during the Tientsin incident of 1870, it may be said that since it was the consul who first committed wrongful acts by firing at the Imperial Commissioner and upon the Chinese crowd, and since he persisted in venturing in the streets against the warning of the local authorities, the Chinese government could hardly be held responsible for his death at the hands of the crowd upon which he had open fire. However, besides being called upon to indemnify the loss, the Chinese government was required to send a special envoy to France to make apology.

During the Boxer Uprising,47 although the condition at Peking was one of virtual anarchy and was so regarded by the foreign powers, the murder of the chancellor of the Japanese legation and of the German minister by the rebels was held to constitute grave neglect on the part of the local authorities. Special acts of apology were required of the Chinese government and fulfilled accordingly. Where-

45. See Fenwick, op.cit., p.200.
46. See above, Sec.A,1.
47. See above, Ch. VI, Sec.A.
ther or not the final settlement of the entire incident was proportionate to the damages done is another question.

In the Nanking Incident of 1937, the Nationalist government assumed full responsibility for violations of the foreign consulates, irrespective of the source of injuries done. The special importance attached by the Nationalist government to the official character of the consulates was evidenced in the separation of their damages from other damages inflicted upon the ordinary foreign residents.

A recent important issue arising out of the problem of protection of foreign officers in China was the Nakamura case. Captain Shintaro Nakamura, a Japanese military officer, was on a mission under the orders of the Japanese Army. In the summer of 1931 he traveled in Manchuria and presented himself as an agricultural expert. When his passport was examined at Harbin, the Chinese authorities warned him that the area which he intended to visit was infested by bandits and unsafe for travel. This fact was registered on his passport. He was armed, and carried medicine which the Chinese believed to be narcotic drugs for illegal purposes.

In spite of the warning given, Captain Nakamura and three assistants entered the specified region. As they approached Taonan he and his company were detained and then shot by the Third Regiment of the Chinese Reclamation Army, which claimed that Captain Nakamura was killed in his attempt to escape while his passport was being examined, that he had with him a military map and diaries which proved him to be serving in the capacity of a spy.

The incident received prompt and serious attention from the Chinese government. The governor of the province in which the

48. See above, Sec.C,2.
execution took place promised to make an immediate investigation, and was assisted by investigators specially appointed by the Chinese foreign office and the commander-in-chief of the Manchurian armies. The commander of the regiment responsible for the shooting was court-martialed and brought to Mukden for trial. A high official was sent to Japan to assure the Japanese government that China was sincerely desirous of an early and amicable settlement.

As late as September 12th, the Japanese consul-general at Mukden and the correspondent of the Nippon Dempo Service reported that a satisfactory solution was in sight and that the Chinese government was sincere in its promise. But the army elements of Japan continued to accuse the Chinese government of lack of faith, and clamored for settlement by force. On September 18th, the Mukden Incident took place. When the Japanese occupied the city, they found the commander of the Reclamatory Army held in a military prison.49

They conform to the universal rule applicable to jura in se aliena. Whether they be customary or contractual in their origin, they must be construed strictly. If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent of nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden of proving its claim beyond doubt or question.

Since her entrance into treaty relations with foreign states China has been subject to a vast number of servitudes of the most complicated kind, involving both commercial and political engage-ments. From the standpoint of international law, however, the


1. See Penwick, op. cit., p. 283.
CHAPTER IX  SERVITUDES

Servitudes may be defined as obligations on the part of a state to permit a certain use to be made of its territory by or in favor of another state or states. They may be regarded as practical restrictions upon the rights of sovereignty normally exercised by the state in possession of the territory, but they do not as a rule result in any loss of theoretical jurisdiction of the state over its territory, which is the mark of sovereignty.¹

With the exception of customary servitudes, such as the right of innocent passage through territorial waters, servitudes are creatures not of law but of compact. They must be set up by express agreement between the parties. Pronouncing upon their legal aspects, Professor Hall gives the following opinion.²

They conform to the universal rule applicable to jura in re aliena. Whether they be customary or contractual in their origin, they must be construed strictly. If, therefore, a dispute occurs between a territorial sovereign and a foreign power as to the extent or nature of rights enjoyed by the latter within the territory of the former, the presumption is against the foreign state, and upon it the burden lies of proving its claim beyond doubt or question.

Since her entrance into treaty relations with foreign states China has been subject to a vast number of servitudes of the most complicated kind, involving both commercial and political engagements. From the standpoint of international law, however, the complexity has been created primarily by the broad and arbitrary

¹. See Fenwick, op. cit., p. 238
interpretations asserted by certain foreign powers in the contracts by which the servitudes are set up. As a matter of fact not only is there a lack of conformity to the universal rule applicable to jura in re aliena, but on many occasions, claims maintained by the foreign powers against China constitute flagrant violations of their express agreements with her.

A leading exception to this rule of international law is found in the case of China. Not only do foreign nationals enjoy the right to trade and navigate in China's inland waters and along its maritime coast, but as a matter of fact the greater share of such trade and navigation is in the hands of foreigners.

In China, where only specified treaty ports are open for the trade and residence of foreign nationals, the terms "coasting trade" and "inland navigation" have special meanings. The former signifies trade between treaty ports. Since some treaty ports are not on the coast but up the rivers, coasting trade may extend inland. Similarly, since not all coasting ports are treaty ports, "inland navigation" is applied to trade between non-treaty ports even though they may lie along the coast.

A. Coasting Trade and Inland Navigation.

It is a generally accepted rule of international law that the trade between two ports in the same country is normally reserved for vessels flying the national flags. Rivers within the territory of a single state are also under the jurisdiction of that state, which generally reserves for itself or its own nationals the right of navigation of those rivers. Under international law no foreigner can lay claim to the privilege of such trade and navigation.3

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The privilege of coasting trade, by virtue of its nature, was granted in connection with the opening of treaty ports. The Anglo-Chinese Treaty of Nanking, which opened the first five ports, stipulated that British merchants were to be permitted "to carry on their commercial transactions with whatever persons they please". The privilege of coasting trade received a more precise definition in the Sino-American Treaty of Yanghia of 1844. It was confined to the inter-port trade of the existing five treaty ports. Entrance to or trade with any other port would subject the vessel to confiscation by the Chinese government. The nationals of the other powers which had treaties with China containing the most-favoured-nation clause enjoyed the same privilege.

Between 1858 and 1880 eleven other ports were opened, including Hankow and two others on the Yangtze River. Four ports were added in 1874. The Sino-Japanese Treaty of 1895 opened the upper Yangtze as far as Chungking, and the canal from Shanghai to Soochow and Hangchow. The opening of the West River was secured by Great Britain in 1897. Many other ports, especially in Manchuria, were thrown open to foreigners between 1902 and 1905.

Inland navigation was regulated by the Chefoo Convention of 1876. The term "inland" was defined to apply "as much to places

8. See E. Tai, Treaty Ports in China, N.Y., 1918, Ch. II-V.
on the sea-coasts and river shores, as to places in the interior not open to foreign trade." As distinguished from coasting trade between the treaty-ports, inland navigation applied to the "ports of call" listed in the convention. These latter ports were not open to foreign residence or to the establishment of consulates. Foreign vessels were permitted to call for purposes of trade, but passengers and cargo were to be transported to the shore by Chinese vessels.

A series of rules concerning inland navigation was promulgated in 1898 and revised in 1902. In accordance with these steamship owners are given the right to lease warehouses and jetties on the banks of waterways, subject to the sanction of the nearest commissioner of customs. These warehouses and jetties are liable to taxation and to contributions on the same footing as similar properties owned by Chinese. Foreign merchants may visit their warehouses, but only Chinese employees are to reside therein.

All vessels must be registered. A Chinese steamship Company registered under Chinese Law is not entitled to fly a foreign flag, even if foreigners hold shares therein. A registered foreign steamer may ply between recognized places of trade only. Cargo and passenger boats may be towed by steamers. The helmsmen and crew of any boat towed shall be Chinese.

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9. Hertslet, I, No. 12, Sec. 3, "Trade".


11. For a list of such ports see Koo, op. cit., pp. 265-6, Note I.
These regulations have been embodied in subsequent treaties with Great Britain, Japan and the United States, and made unalterable except by mutual consent.¹²

The rights of coasting trade and inland navigation, particularly the latter, have been resented by China, and their abrogation has been one of the aims of China's foreign policy. Besides being in contravention to the general principle and practice of international law, the rights have been so developed as to impair China's national defense as well as her territorial and administrative integrity. In the first place, the existence of extraterritoriality removes the foreign vessels and the foreign members of its crew from Chinese jurisdiction in any lawsuit that may be prosecuted against them. Moreover, by trust arrangements and other means foreign flags have been used to cover ships financed by Chinese capital. Secondly, foreign warships, which have the responsibility of protecting foreign lives and property, follow the foreign trading vessels into the inland waters of China where foreign nationals do not have the right of residence and where, without the right of inland navigation, foreign vessels and foreign warships would have no right to appear.¹³

The navigation of the Amur, the Sungari and the Ussuri Rivers has been a subject of controversy between China and Russia. The Amur forms a boundary between the two countries in its upper

¹² See Bau, op. cit., p. 9.
¹³ See ibid., pp. 20-1; Chamberlain, op. cit., pp. 17-22.
course, while its lower course runs through Russian territory. The Ussari, a tributary of the Amur, forms a boundary between the two countries throughout its course. The Sungari, another tributary of the Amur, lies wholly within China. By the Treaty of Aigun of 1858, Russia and China agreed that the three rivers should be open for navigation to the vessels of the two countries or their nationals but not to third powers or their nationals. The right of navigation includes the right to trade in the ports of either country on both banks of the three rivers.\textsuperscript{14} With the construction of the Chinese Eastern Railway the navigation of the Sungari River was largely controlled by the Railway Company, a Russo-Chinese enterprise.

In 1924 China and Soviet Russia agreed to annul, at a conference to be held immediately, all treaties and agreements concluded between China and Soviet Russia.\textsuperscript{15} The two countries also promised to regulate questions relating to the navigation of waters "common to their respective frontiers."\textsuperscript{16} But China and Soviet Russia have never agreed on the question of the control of the railway. On January 23, 1925, the Mukden government promulgated a mandate excluding foreign vessels from the inland waters of Manchuria. In 1926, following the charge that

\textsuperscript{14} Arts. I and II. Hertslet, I. No. 6. p. 13.

\textsuperscript{15} Art. III, Agreement on General Principles. \textit{Treaties,1919-1929}, p. 133.

\textsuperscript{16} Ibid., Art. VIII.
Soviet Russia had used the railway for the spread of communist propaganda, which was forbidden by the Russo-Chinese agreement of 1924, the Mukden government took over the control of certain departments of the railway, including the shipping department. When Soviet Russia protested, the Mukden authorities pointed out to the fact that several years before the Soviet government had seized the barges of the railway company at Vladivostok. The problem remains among the many questions awaiting solution between the two countries.

B. Leased Areas.

1. Kiaochow

The first area leased to a foreign power was that of Kiaochow Bay, which was obtained by Germany in 1898. It is of interest to note that the Chinese text of the treaty was entitled kiao ao chu chieh t'iao yo, which should be translated as, Convention respecting the "Concession" of Kiaochow. This would seem to indicate that originally the "concession" of Kiaochow was regarded by China as the same as other concessions already in existence, such as the concessions in Shanghai.

The lease of Kiaochow Bay, with the right of fortification thereof, was granted for a term of ninety-nine years, for the purpose that Germany, like other Powers, should hold a place on the Chinese coast for the repair and equipment of her ships. In order to avoid the possibility of conflict

18. For background see above, Ch. VIII, Sec. B. 2.
21. Art. II.
between the two countries, China would abstain from exercising "the right of administration" in the leased territory during the period of lease, leaving the same to Germany.  

Surrounding the Bay of Kiaochow a neutral zone of one hundred li (fifty kilometers) was created. China reserved to herself all rights of sovereignty within the zone, but German troops were given free passage in it. The right to use the bay was to be enjoyed by Chinese ships of war and merchant ships on the same basis "as the ships of the other nations on friendly terms with Germany." Germany engaged never to sublet the lease to any third power. Should Germany return the lease to China before the expiration of ninety-nine years, China engaged to refund to Germany the expenditures incurred at Kiaochow, and to lease to Germany a more suitable place.  

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22. The Chinese text is "chih li" which means "the right of administration" and is distinct from the term "tsu chu chih ch'uan" which means "the right of sovereignty." In MacMurray's translation both terms are given as "the rights of sovereignty." Yet in Art. IV of the Convention for the Liaotung Lease, the term "chih Li" is given as "Supreme civil administration." MacMurray, I, p. 119.

23. Art. III.


25. Art. III

26. Art. V.
During the World War Kiaochow was forcibly seized by Japan. In 1922, as a result of the Washington Conference, however, it was restored to China.

2. The Liaotung Peninsula.

Immediately following the lease of Kiaochow, the Liaotung Peninsula was leased to Russia, but for a shorter term of twenty-five years. It was declared that the lease "in no way violates the sovereign rights of H.M. the Emperor of China to the above-mentioned territory."

During the period of the lease, the military command of the land and naval forces and the administration of the territory were given over to the Russian authorities, but the title of governor or governor-general was forbidden to be used. Chinese land forces were excluded from the entire leased area. Its fortification was to be undertaken by Russia. But Port Arthur was made a naval port exclusively for the use of China and Russia. Similarly a part of Talienwan was closed to the vessels of third powers. The rest of Talienwan was to be a trading port in which the vessels of all countries would receive the same treatment.

27. See above, Ch. V., sec. on the Japanese occupation of Shantung.


30. Art. I.
Chinese inhabitants retained the right to reside within the lease. In the event of any Chinese committing an offense, he was not to be prosecuted by Russian authorities, but to be handed over to the nearest Chinese magistrate for trial and punishment in accordance with Chinese laws. 31

A neutral zone was established to the north of the leased area. The civil administration within the zone was to remain in the hands of the Chinese authorities; but Chinese troops would be admitted only with the consent of the Russian authorities. 32 China further agreed that within the neutral zone no concession would be granted and no ports opened to third states. 33

As a result of the Russo-Japanese War of 1904–5, the lease of the Liaotung Peninsula was transferred by Russia to Japan, 34 subject to the consent of China. The transfer was effected by the Sino-Japanese Treaty of Peking, in which Japan engaged "to earnestly observe the original agreements entered into between China and Russia respecting the lease," and "to promptly consult and determine with the Government of China as matters come up in the future." 35 It may be noted that in the subsequent English translation made by the Japanese government the phrase "as far as circumstances permit" has been added. 36

31. Art. IV, VI.
32. Art. V.
35. Art. II.
The term of the lease was to end in 1923. Before its expiration, however, Japan coerced the Chinese government, by means of the famous Twenty-One Demands, to extend the term of the lease to ninety-nine years, or the year 1937. In view of the fact that the agreement was concluded under duress and by unconstitutional procedure, its validity has not been recognized by China.

Since the transfer of the lease to Japan the administration of the area has been placed under an officer vested with the title governor. The naval bases have been used exclusively by the Japanese. During the recent Japanese invasion of Manchuria the leasehold served as a convenient base of operation.


In the same year France obtained the lease of Kwangchouwan, as a "naval station with coaling depot", for ninety-nine years. It was understood that the lease did "not offset the sovereign rights of China over the territory." 40

As in the case of the German and Russian leases, the right of administration in Kwangchouwan was to be exercised by French authorities during the period of the lease. France was permitted to fortify the area for defensive purposes. Ships of China and


38. Exchange of Notes respecting same. Ibid., p. 1221.

39. See Hsu. Essays, Ch. XIV.

third powers were to be treated within the leased area in the same manner as in the open ports of China. 41


Following the steps taken by France, Great Britain acquired from China, as "an extension of Honkong territory" and necessary for its "proper defense and protection", a lease for ninety-nine years of certain islands and a portion of the mainland opposite Honkong.

It was agreed that in the leased area Great Britain was to have jurisdiction, but that within the city of Kowloon the Chinese officials should continue to function "as far as may be consistent with military requirements for the defense of Honkong." Taking advantage of this qualification the British government soon ousted the Chinese officials. 42

The landing place near Kowloon city was "reserved" for Chinese war-ships and merchant vessels. In Mirs Bay and Deep Bay, both included in the leased area, Chinese warships, whether neutral or otherwise, also retained the right to use those waters. 43

5. Weihaiwei

To balance the Russian lease of Liaotung, Great Britain obtained the leasehold of Weihaiwei for the purpose of being provided "with a suitable naval harbor in North China and for the better protection of British commerce in the neighboring seas." The lease

41. Arts. III-V.

42. See Willoughby, Foreign Rights, I, p. 477

was to endure "for so long a period as Port Arthur shall remain in the occupation of Russia." Great Britain was to have "sole jurisdiction" within the area, but in the walled city of Weihiwei Chinese officials would continue to function as far as was consistent with the defense of the leased territory. Great Britain also acquired the right of fortification within a certain area, in which Chinese administration would not be interfered with and in which only Chinese and Britain troops were allowed. Chinese warships, whether neutral or otherwise, retained the right to use the waters within the leased area.\footnote{44}

That the leased areas are Chinese territory under Chinese sovereignty has been recognized by the powers from the beginning.\footnote{45} From the conditions stated above, it may be seen that the leaseholds differ fundamentally from cessions both in fact and in law. The leases were all limited to a fixed term of years. Though the rights of administration were entrusted to the lease during the period of the lease, the sovereignty of China over them was reserved in all cases. Neither by their express terms nor by implication were they transferable to a third power without the consent of China. Chinese inhabitants retained their Chinese nationality and their allegiance to China, and in certain cases were subject to Chinese law and authorities. Specified areas within the leaseholds were reserved or opened to Chinese warships both in peace and war.

\footnote{44}{Convention for the Lease of Weihiwei. \textit{Ibid.}, pp. 152-3.}
\footnote{45}{See Willoughby, \textit{Foreign Rights}, I, \textit{p.} 481.}
It was but natural that in her struggle to regain her rights of sovereignty China should desire the return of these leased areas. During the Washington Conference the Chinese delegation reviewed the history of the leases, pointing out that they originated from Germany's aggressions and that the other powers followed suit in order to maintain their balance of power in the Far East. For a number of reasons, China requested the relinquishment by the powers of their leases. In the first place, the German and Russian menace in the Far East had been removed since the World War. Secondly, the misrule of the Manchu dynasty had disappeared. Thirdly, the existence of the leased territories, by reason of their situation at strategical points along the Chinese sea-coast, had greatly prejudiced China's territorial and administrative integrity, and had hampered her work of national defense by constituting a virtual "imperium in imperio" in China.

Fourthly, the leased areas had caused rivalry among the lessee powers and had more than once brought about hostilities in the Far East, such as the Russo-Japanese War and the Japanese occupation of Shantung during the World War, in which China had always been the main sufferer. Lastly, some of the leases had been utilized with a view to economic domination over the adjoining regions, in contradiction to the Open Door Policy as pledged by all. In the interest of all nations, and for the maintenance of peace in the Far East, China asked for the early termination of these leases. Pending their termination they
should be demilitarized, and the powers were requested not to make use of their respective areas for military purposes of any kind whatsoever.\textsuperscript{46}

The French delegation shared with China the view that the leases had been made for the purpose of maintaining the equilibrium of powers. It declared that France was ready to join in the collective restitution by all lessee powers of the territories they held from China,\textsuperscript{47} and that even if this surrender could not be secured, France would be willing to arrange with the Chinese government the conditions under which the restitution of Kwangchouwan should become effective.\textsuperscript{48}

The Japanese government promised the restoration to China of Kiaochow which it had forcibly seized from Germany during the World War. As to the lease of the Treaty of 1915, Japan stood firm and declared that she had "no intention at present to relinquish the important rights she had lawfully acquired and at no small sacrifice."\textsuperscript{49}

Great Britain treated the leases of Kowloon and Weihaiwei on separate bases. Regarding the former, she was unwilling to effect its surrender, on the ground that it was indispensable to the defense of Hongkong. In respect to Weihaiwei, the British government declared that it would be restored to China on similar

\textsuperscript{46} Willoughby, \textit{Conference}, pp. 181-3.

\textsuperscript{47} \textit{Ibid.}, p. 184

\textsuperscript{48} \textit{Ibid.}, p. 182

\textsuperscript{49} \textit{Ibid.}, p. 185
conditions as those agreed upon with reference to the
leasehold of Kiaochow.

After the close of the Conference Kiaochow was returned to
China. The French promise in regard to Kwanhsouwan has not been
carried out. Great Britain retained Weihaiwei for another eight
years. Its rendition was effected on April 18, 1930, by a con-
vention concluded between China and Great Britain. The British
government turned over to China without compensation all lands
and buildings belonging to it in the former leased territory
together with the Chefoo-Weihaiwei cable and certain government
stores, the civil hospitals, and all existing aids to navigation
such as lighthouses and signals. China in return promised to
maintain "so far as possible" existing regulations concerning the
land and house taxes, sanitation and policing. The area was to
remain open for international trade and residence unless the
Chinese government decided to use it exclusively as a naval base.
Certain lands were leased for the use of the British consulate
and residents. For a period of ten years a summer resort on
Liukung Tao was leased for the use of the British navy, whose
ships might visit there between April and October. In the
event of war involving either China or Great Britain, however,
the British warships would be withdrawn from such waters.

50. Ibid., pp. 188-91.
51. For text see China Year Book, 1931, pp. 483-6.
Thus the leaseholds that remain to be restored are the French lease of Kwanghauwan, the Japanese lease of Liaotung Peninsula, and the British lease of the extension of Hongkong, known as "concessions" or "settlements."

The rights of residence and trade are defined in a number of treaties. The Sino-American Agreement of 1863 contains the following provisions:

Citizens of the United States may frequent, reside, carry on trade, industries and manufactures, or pursue any lawful avocation, in all the ports or localities of China which are now open or may hereafter be opened to foreign residence and trade; and, within the suitable localities at those places which have been or may be set apart for the use and occupation of foreigners, they may rent or purchase houses, places of business, and other buildings, and rent or lease in perpetuity land and build thereon.

China's sovereignty over the concessions or settlements has been expressly reserved. Article I of the Sino-American Treaty of 1889 reads:

His Majesty the Emperor of China being of opinion that in making concessions to the citizens or subjects of foreign powers of the privilege of residing on certain tracts of land or resorting to certain waters of that empire for purposes of trade, he has by no means relinquished his right of eminent domain or dominion over the said lands and waters hereby agreed. It is further agreed that if any right or interest in any tract of land in China has been or shall hereafter be granted by the Government of China to the United States or their citizens for purposes of trade or commerce, that grant shall in no event be construed to divest the Chinese authorities of their right of jurisdiction over persons and property within said tract of land, except so far as that right may have been expressly relinquished by treaty.

52. See supra, op. cit., pp. 53-55.
54. Hart slet, I, No. 94.
C. Concessions and Settlements.

The rights of foreign nationals to trade and reside in China are limited to the open ports. Within some of these ports certain areas have been delimited for their purposes, and have been known as "concessions" or "settlements."

The rights of residence and trade are defined in a number of treaties. The Sino-American Agreement of 1903 contains the following provisions:

Citizens of the United States may frequent, reside, carry on trade, industries and manufactures, or pursue any lawful avocation, in all the ports or localities of China which are now open or may hereafter be opened to foreign residence and trade; and, within the suitable localities at those places which have been or may be set apart for the use and occupation of foreigners, they may rent or purchase houses, places of business, and other buildings, and rent or lease in perpetuity land and build thereon.

China's sovereignty over the concessions or settlements has been expressly reserved. Article I of the Sino-American Treaty of 1858 reads:

His majesty the Emperor of China being of opinion that in making concessions to the citizens or subjects of foreign powers of the privilege of residing on certain tracts of land or resorting to certain waters of that empire for purposes of trade, he has by no means relinquished his right of eminent domain or dominion over the said lands and waters hereby agrees... It is further agreed that if any right or interest in any tract of land in China has been or shall hereafter be granted by the Government of China to the United States or their citizens for purposes of trade or commerce, that grant shall in no event be construed to divest the Chinese authorities of their right of jurisdiction over persons and property within said tract of land, except so far as that right may have been expressly relinquished by treaty.

52. See Sze, op. cit., pp. 52-55.


54. Herst. I, No. 34.
The establishment of a settlement does not confer any new right of jurisdiction upon its occupants, but only gives a residential area, which remains Chinese territory and is subject to Chinese sovereignty. The legal position of the foreign residents within the area is the same as that of those residing elsewhere in China. Foreigners holding real estate in the settlement pay a land tax to the Chinese government. Likewise Chinese residing in the settlement are subject to Chinese jurisdiction and Chinese courts as those residing outside. They owe the same allegiance to the Chinese state.

The significance of a concession as a special international servitude lies in the fact that the foreign residents have set up for themselves local administrative organs for police purposes, sanitation, road-building and maintenance and the like, in most cases, without the permission of the Chinese government.

The most important settlements are those established in Shanghai. The rights of municipal administration were not granted by treaties. The Treaty of Nanking merely provided that the right of residence was to be accorded to British subjects in the five treaty ports, and that consular officers were to be stationed therein as the medium of communication between the for-

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55. For different methods of land-holding in the different concessions see Willoughby, Foreign Rights, I, pp. 485-8.

56. For a period the Chinese within the settlements at Shanghai were subject to the jurisdiction of the "mixed courts," which, however, were abolished in 1930. See above, Ch. VII, Sec. D.
eign residents and the Chinese authorities.\textsuperscript{57} By the Sino-
British agreements of 1843 and 1858, it was agreed that premises
needed by British subjects should be acquired from their owners
at equitable and prevailing prices.\textsuperscript{58} The same right of residence
was granted to the United States and France.\textsuperscript{59} Nothing resembling
the present systems of municipal administration was provided for.

The international government of the settlement had its origin
in the "Land Regulations." The first regulations, the only ones
ever submitted to the Chinese government for its approval, were
promulgated in 1845 by the British consul. They conferred upon
the foreign land-renters the rights to build and repair the bridges,
maintain, cleanse and light the streets, establish fire engines,
open ditches, and hire watchmen. Accordingly a "Committee of
Roads and Jetties" was elected by the foreign land-renters. Still
no definite provision for a municipal government was made.

During the Taiping Rebellion, the city of Shanghai was occupied
by the insurgents between 1853 and 1855. To meet the new cir-
cumstances, the British, French and American consuls drew up a
new set of Regulations in 1854. Chinese inhabitants were ad-
mitted into the settlement. The consuls were given the right of
control over the sale of liquor and over Chinese places of enter-
tainment. They also exercised the right of punishing breaches of
the regulations.

\textsuperscript{57} Art. II.

\textsuperscript{58} Art. VII, Supplementary Treaty, 1843; Art. XII, Treaty of
Tientsin, 1858.

\textsuperscript{59} See Morse, \textit{op. cit.}, I, pp. 347-50
A rudimentary municipal government was set up. Any matter connected with land would be discussed in a meeting composed of the foreign rent-payers under the chairmanship of the senior consul. Their decision must be submitted to the consuls for approval. By this method the foreigners imposed taxation upon the Chinese residents, but gave them no vote in the municipal meetings. The use of watchmen developed into a police force. These regulations were never submitted to the approval of the Chinese government. 60

In 1862 the French decided to establish a separate municipal council. The American residents obtained a new settlement for themselves, but in the following year this was amalgamated with the British settlement and was henceforth known as the International Settlement, as distinguished from the French Concession. 61

As against the clamour by the foreign communities for the establishment of a "Free City" in Shanghai, the Diplomatic Body in Peking decided upon the following principles in 1864.

1. That whatever territorial authority is established, it shall be directly derived from the Chinese Imperial Government through foreign ministers.

2. That such shall not extend beyond simple municipal matters, roads, police, and taxes for municipal objects.

3. That Chinese not actually in foreign employ shall be wholly under the control of Chinese officers, as much as in the Chinese city.

60. See ibid., pp. 350–6.
61. See ibid., II, pp. 120–4.
62. See ibid., pp. 124–6
4. That each Consul shall have the government and control of his own people, as now the municipal authorities simply arrest offenders against the public peace, hand them over, and prosecute them before their respective authorities, Chinese and others as the case may be.

5. That there shall be a Chinese element in the municipal system to whom references shall be made, and assent obtained, to any measure affecting the Chinese residents.

But many of these principles were ignored in the third set of Land Regulations of 1863. They were promulgated without the collaboration or approval of the Chinese government. No provision was made for participation by the Chinese in the government of the settlement.

The Regulations provided for a Municipal Council of nine members, elected by the foreign rate-payers of the International Settlement in their annual meeting. The reports and budget of the municipal administration and the by-laws or amendments to the Regulations were passed upon by the meeting, subject to the approval of the Diplomatic Body at Peking. In addition to the police, there was also recruited a Volunteer Corps of the Settlement.

In spite of the fact that the Chinese residents overwhelmingly outnumbered the foreigners and owned a considerable proportion of the property in the International Settlement, for more than seventy years they had no voice in its government. After 1920 the Chinese Rate-payers' Association elected members to an Advisory Committee, which, however, had no vote in the governing bodies.

64. See ibid., pp. 516-7.
The movement for Chinese participation in the Municipal Council did not succeed until 1926. In the previous year, after the May 30th Massacre, the Chinese residents demanded representation in the council in proportion to their contribution to the municipal revenues. In 1926 the Council admitted three Chinese to its membership and six more to its various administrative committees. In 1930 the Chinese members in the Council were increased to five, the number of the foreign members remaining stationary at nine.65

In the French Concession the administrative authority is concentrated in the hands of the consul-general. The Municipal Council has only advisory powers.66

Outside of Shanghai there are sixteen other concessions or settlements: one International at Kukingsu; three British, at Shameen, Tientsin, and Newchwang; three French, at Shameen, Tientsin, and Hankow; one Italian at Tientsin; and eight Japanese, at Hankow, Chung king, Shasi, Foochow, Soochow, Amoy, Tientsin, and Hangchow.67

Attempts have been made by the foreign settlements to extend their boundaries. Sometimes the extension was granted by the Chinese government, but when permission was no longer given, the settlement authorities resorted to illegal means. Foreigners serving as agents purchased strips of land adjacent to the settlements; roads were laid out, and police sent to

65. See Pollard, op. cit., pp. 384-5


67. For a brief account of their status, see Millard, Extraterritoriality Appendix J, pp. 280-70.
patrol them; the municipal lighting and power and telephone systems were extended to those areas; and the residents compelled to contribute to the municipal revenue. In Shanghai the "external roads areas" cover territories twice the size of the legitimate settlement. The recognition of the extensions has been flatly refused by the Chinese government, and clashes of jurisdiction have become frequent.  

The most peremptory demand for the extension of a settlement was made by France in 1916. The authorities of the French Concession at Tientsin coveted a piece of adjoining territory, known as Lao-hsi-kai, and requested the Chinese government to add it to their concession. The Chinese authorities were confronted with the problem that the Chinese owners of the land did not wish to be under French administration. The French Consul drew up an ultimatum and demanded compliance within twenty-four hours. When this was not accepted, French troops were dispatched to occupy the territory by force.  

As in the case of leased areas, China has embarked upon a movement for the rendition of the foreign settlements. The Open Door policy has been accepted by China, and many ports have been voluntarily opened for international trade. The administration of these settlements has been open to much abuse.

68. See ibid., pp. 146-7.
69. See Weale, Republic, pp. 304-6.
70. See Tai, op. cit., section on Ports voluntarily opened by China.
71. See Millard, Extraterritoriality, pp. 142-8.
Many of the rights exercised by the settlement authorities can claim no legitimate basis. Gambling, white slave and drug traffics, and other social vices prosper in the settlements against the efforts of the Chinese government for their abolition. Political criminals and revolutionary plotters seek refuge in the foreign concessions. For many years the "mixed courts" encroached upon China's jurisdiction over her own nationals within the concessions. Despite Chinese protests, the foreign authorities have denied China her right of eminent domain in the settlements, such as the passage of Chinese troops. The May 30th and the Shakee Massacres have stood as typical examples of the terrorism spread by irresponsible settlement authorities. Since 1932 Japan has been using her concessions as bases of operation in her invasion of China.

Several concessions have been restored to China since the Republic. The Chinese government has acquired the administration of the German and Austro-Hungarian concessions at Tientsin and Hankow in 1917, and the Russian concessions in the same ports in 1921. The British concessions at Hankow, Kiukiang and Chinkiang were returned to China in 1927, and that at Amoy in 1930. The rendition of the Belgium concession at Tientsin was effected in 1929.

72. See Kao Ch'eng-yuan; kuan chou wu han ke ming wai chiao wen hsien (Documents relating to the Revolutionary Diplomacy during the Canton and Wuhan Period), 2nd Ed., Shanghai, 1933, pp. 37-8

With the outbreak of the Japanese invasion of Manchuria in 1931, however, China's efforts for the restoration of the other concessions, as well as her efforts for the recovery of other territorial and administrative rights, have been interrupted.

74. See Millard, Extraterritoriality, pp. 148-54.
D. The Legation Quarter at Peking.

As a result of the Boxer Uprising in 1900, China granted to the treaty powers certain special rights for the protection of their legations at Peking. A "Quarter" was set aside for the use of the legations. Each power was given the right to maintain a permanent guard for the protection of its legation in the quarter. Chinese residents were excluded from the area, which was made defensible.

The administration of the Legation Quarter is controlled by a commission which is appointed by the various diplomatic representatives and which exercises authority as delegated by those representatives. It levies taxes on the residents for the maintenance of roads and bridges and the employment of the police corps. The policemen are Chinese, but they are not under the control of the Peking municipal authorities.

With the removal of the Chinese capital and with it the foreign representatives to Hankow since 1926, the original intent and purpose of the maintenance of the Legation Quarter in Peking, renamed Peiping, would seem to have disappeared. Yet the old Legation quarter continues to enjoy its special status, with legation guards still patrolling the area. The case certainly calls for the application of the principle of rebus sic stantibus, if the principle is to be recognized at all in international law.

77. See R. M. Duncan, Peiping Municipality and the Diplomatic Quarter, Peiping, 1933, pp. 83-120.
E. Foreign Troops.

The presence of foreign troops in China constitutes not only a serious derogation from China's sovereign right as an independent state, but is in many instances a direct violation of it.

The only cases which may claim to have treaty basis are, first, those in the leased areas; and, secondly, those between Peking and the sea, as stipulated in the Boxer Protocol.

1. Leased Areas.

The stationing of foreign troops in the leased areas has not been expressly granted in the leased conventions. However, the rights of fortification and defense would necessarily imply the employment of armed forces, and their presence in the leased areas has not been challenged by China.


The Boxer Protocol creates two distinct bases for the maintenance of foreign troops. The first, granted to "each Power" of the Allies severally, consists in the maintenance by the power of a permanent guard for the defense of its legation within the Peking legation quarter as delimited in the Protocol. The second, granted to "the Powers in the Protocol" collectively, has for its purpose "the maintenance of open communication between the capital and the sea", which comprises the following points: Huang tsun, Langfang, Yangtsun, Tientsin, Chunliang-cheng, Tangku, Lutai, Tangshan, Lanchow, Changli,

73. See above, Sec. B.

Chinkwangtao, and Shanghaikwan. By subsequent interpretation the Peking-Tientsin and Tientsin-Shanghaikwan railways are included.

During the negotiations for the Protocol, China insisted upon the determination of the number of foreign troops to be thus maintained. This met with the support of the Allies, and according to the Allied agreement of April 6, 1901, it was decided that the total number of legation guards was to be fixed at 2,000 men. Of this number France, Germany, Japan, and Russia were allotted 300 each; Great Britain 250; Austria-Hungary and Italy 200 each; and the United States 150.

The total number of the troops to be stationed at the points between the capital and the sea was limited at 6,200. Of this 2,000 were for Tientsin, 1,500 for Shanghaikwan and Chinghwangtao, and 2,700 for the other nine points. As among the various powers, the 6,200 troops were allotted as follows: Great Britain, France, Germany and Japan, 1,350 each; Italy, 500; and Russia 300.

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80. Art. IX.


Since the Chinese Revolution of 1911 the United States has also dispatched troops to the area.

With the exception of period of the Revolution, the number of foreign troops stationed between Peking and the sea has been about half the total agreed upon by the powers.

For some time after the May 30th and the Shantung Affairs of 1925 the powers dispatched large forces to China, particularly to the port of Shanghai. This aroused vigorous protests from the Chinese government.

In the spring of 1926 Japan increased her troops in the Peiping-Tientsin area to the unprecedented number of eight thousand men. It goes without saying that this was contrary to the allied agreement of 1902 and to the practice of the powers since that date.

A subject of controversy has arisen in regard to the use of Tientsin by China for military purposes. In 1902 the Allies, in restoring the administration of Tientsin to China, demanded that with the exception of a body-guard of three hundred men for the viceroy and a body of river police, no Chinese troops should be stationed within twenty li of the city or of the foreign garrison there. Moreover, the railway from Peking to the sea was to be subject to foreign military control to the extent of two miles on each side of the railroad.

84. Ibid., p. 15
85. See tables given in ibid.
86. See ibid., pp. 19-20.
87. See ibid., p. 10.
Such arrangements were proposed, it was declared, in order "to avoid as far as possible occasions of collision between the foreign troops and those of China."

These demands were accepted by China with the understanding that the military control of the railway should relate only to offense against the railroad or telegraph lines, or against the Allies or their property.

However, China has maintained that the relinquishment on her part of the right to station troops in Tientsin was only a temporary arrangement to "avoid as far as possible occasions of collision" during the period of the evacuation by the Allies of Tientsin and the surrounding districts. Moreover, the right of Chinese troops to make use of the railway was recognized by the Allies during the Chinese revolution in 1912. The Allies agreed that "both Chinese Imperial and Revolutionist troops are at liberty to utilize the railway line and adjoining piers and wharfage for the purposes of transportation, landing or embarkation and will not be interfered with."

Since the Republic, military operations have taken place at or near Tientsin during civil wars and have cut communication between Peking and the sea. Against the protests made by the foreign powers, it has been contended that such use of the area


89. Reply to above, ibid., p. 318.

for purposes of civil war was not directed against foreigners and therefore did not call for the application of the provisions of the Boxer Protocol.

3. Railway Guards.

A vexing problem existing between China and Japan has been that of the stationing of Japanese railway guards along the South Manchuria Railway. The contract for the construction of the railway stipulated that "the Chinese Government will take measures to assure the safety of the railway and of the persons in its service against attack." 92

After the Russo-Japanese War, Russian interests in the South Manchuria Railway were transferred to Japan. Without the consent of China the two states reserved for themselves "the right to maintain guards to protect their respective railway lines in Manchuria" the number of the guards "not to exceed fifteen per kilometer". 93

This met with protests from China. Consequently Japan promised to withdraw all her troops and railway guards in Manchuria "in view of the earnest desire expressed by the Imperial Chinese Government" to see to such withdrawal. To that effect two conditions were laid down: "in the event of Russia agreeing to withdrawal ... when tranquility shall have been established in Manchuria 94 and China shall have become herself capable of afford-

93. Additional Art. I, Portsmouth Treaty, ibid., p. 526
94. The Russo-Japanese War had been fought in Manchuria.
ing full protection to the lives and property of foreigners, Japan will withdraw her railway guards simultaneously with Russia." In case other agreements were concluded between China and Russia concerning same, Japan would take similar steps. 95

If the "tranquility" contemplated in the above agreement denotes the restoration of a normal condition in Manchuria, and this is only reasonable, considering the post bellum conditions under which the agreement was concluded as a result of the Russo-Japanese war, it goes without saying that it must have taken place not long after the cessation of hostilities between Russia and Japan. The other condition also has been fulfilled. Soon after the termination of the Russo-Japanese War, Russian troops were withdrawn from Manchuria. Moreover, in 1924 China and Soviet Russia that in respect to the Chinese Eastern Railway "matters affecting the right of the National and Local Governments of the Republic of China, such as... matters relating to... military administration...shall be administered by the Chinese Authorities." 96

Not only has Japan failed to take similar steps, but she has even undertaken to increase her railway guards.

Another special problem created by Japan has been that of the Japanese consular police. Such police have been attached

to the Japanese consulates in China, notably in the Manchurian provinces. The Japanese government claimed that the right to maintain these police was a corollary to the right of extraterritoriality; that these police were necessary to protect and discipline Japanese subjects. This position advanced by Japan was contrary to the general practice of other powers having extraterritorial rights, and has been always contested by China.


The question of foreign troops in China was brought forward at the Washington Conference. Upon the basis that it constituted a violation of China's sovereignty and territorial and administrative integrity, the Chinese delegation requested the powers to withdraw all their troops which were stationed in China without the sanction of treaty.

The result was the unanimous adoption on February 1, 1922, of the "Resolution Regarding Armed Forces in China". It recognized the fact that while the powers had stationed armed forces in China to protect lives and property of their nationals, "it appears that certain of these armed forces are maintained in China without the authority of any treaty or agreement". It declared the intention of the powers to withdraw these troops whenever China should assure the protection of the lives and property of foreigners within her territory. It noted the assurance pledged by the Chinese government to that end. Finally

it was resolved that whenever China should so request, the entire problem of foreign troops in China be subject to an inquiry to be conducted jointly by the Chinese government and the representative of the powers concerned.

The resolution was accepted by China with the understanding that international law did not sanction the stationing of troops by one country within the territory of another.\textsuperscript{98}

\textsuperscript{98} See Willoughby, \textit{Conference}, pp. 133-56.

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\textsuperscript{100} See above, Cha. I, Sec. 8.
\textsuperscript{101} A trade treaty as distinguished from the peace treaty signed at Beijing in the previous year.
\textsuperscript{102} Art. XII.
\textsuperscript{103} See above, Cha. VII, Sec. D.
F. Foreign Warships.

The admission into national waters of the armed vessels of foreign states in time of peace is recognized in international law as a matter of comity and not of absolute right. Until 1843 China refused to extend such comity to the warships of any foreign nation. In the General Regulation concluded with Great Britain in that year, however, China granted to Great Britain the right to station one British cruiser within each of the five treaty ports, for the purpose "that the consul may have the means of better restraining sailors and others and preventing disturbances". It was also stipulated that the arrival and departure of such a cruiser was to be reported by the consul to the superintendent of customs. Considering the provisions in reference to the right of extraterritoriality which was granted by the same treaty and also confined to the five treaty ports, it would seem that the stationing of a cruiser was conceded as subsidiary to the right of extraterritoriality.

With the increase of treaty ports, the admission of foreign armed vessels was extended accordingly. The British Treaty of Tientsin of 1858 contains the following provision:

"British ships of war coming for no hostile purpose or being engaged in the pursuit of pirates shall be at liberty to visit all ports within the dominions of the Emperor"


100. See above, Ch. I, Sec. C.  

101. A trade treaty as distinguished from the peace treaty signed at Nanking in the previous year.

102. Art. XII.  

103. See above, Ch. VII, Sec. D.
of China, and shall receive every facility for the purchase of provisions, procuring water, and if occasion requires, for the making of repairs." According to the context of the treaty the word "ports" clearly refers to open ports or treaty ports. For it is only within these open ports that foreigners acquire the rights of residence, trade and extraterritoriality. The presence of foreign warships in Chinese waters outside the open ports exceeds, therefore, the limit of the treaty stipulations.

In the case of the "Villababus" in 1903, both the Chinese government and the American minister at Peking held the opinion that the navigation by American warships of the upper Yangtze was unauthorized by treaty. The commander of the American fleet, while recognizing that "there may be no expressed stipulation in various treaties with China, covering the matter" and that he "may, therefore, be unable to point out any specific paragraph granting this general authority", nevertheless, claimed the right on the ground that since the Yangtze waters outside the open ports "have been visited by the gun-boats of other nationalities", the same right should be enjoyed by the American warships by virtue of the application of the most-favoured-nation clause. 104

The viewpoint of the commander was sustained by the American State Department, which pronounced that "even if this right [of navigating the inland waters of China] were not explicitly granted to us by treaty, Rear-Admiral Evans is unquestionably right in using it when like vessels of other powers are doing so". It added further that in its opinion the British Treaty of Tientsin of 1858 gave full authority for the action of the American commander.

From the standpoint of law it seems hardly convincing to justify an illegal act on the ground that a similar act has been committed by other parties. That the alleged right goes beyond the stipulations of the Sino-British treaty of 1858 has been discussed.

105. Ibid., p. 85.

A distinction may be made between the political and non-political purposes aimed at in the creation of the various railway concessions. To the former class belong the Russian and Japanese lines in Manchuria, the German system in Shantung which was subsequently restored to China, and the French line in South China. It has been China's aim to commercialize all these lines.

106. See Morse, ch. iii, 111, Ch. IV.
G. Railways

The creation of servitudes in respect to the construction and operation by foreign countries of railways through Chinese territory originated in the development of spheres of interest in China. By the Russo-Chinese secret Treaty of 1896, Russia obtained the right to construct the Chinese Eastern Railway across Manchuria. In 1898 Germany secured a concession for the building of the two railway lines in Shantung. In the same year the construction of the Yunnan-Tongking line was granted to France, the Hankow-Canton line to the United States, and the Shanghai-Nanking and the Shanshi railways to Great Britain. The Russian interests in the South Manchurian Railway, originally a branch of the Chinese Eastern Railway, were transferred to Japan in 1905 after the Russo-Japanese War. Subsequently the right to construct several other lines in South Manchuria was also obtained by Japan. In 1911 the Chinese government sanctioned the application of capital from the Four Power Consortium for the building of the Hu-Kuang railways.106

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106. See Morse, op.cit., III, Ch.IV.
The Chinese Eastern Railway

The most vexing problems of railway concession may be found in the Chinese Eastern Railway. The construction of this line had its origin in the Russo-Chinese Alliance of 1906, concluded for the defense of Manchuria, Korea, and Siberia. ¹⁰⁷ By a contract signed between the Chinese government and the Russo-Chinese Bank (later Russo-Asiatic Bank) in the same year, the Bank, of which China became a shareholder to the amount of Tls. 5,000,000, was entrusted with the construction and operation of a railway between the city of Chita and the Russian South Ussuri Railway.

A railway company was established under the name of the Chinese Eastern Railway Company with its seal given by the Chinese government. The shares of the company were to be acquired only by Chinese or Russian subjects. The president of the company was to be appointed by the Chinese government. It was his duty to see to the scrupulous fulfilment of the obligations of the bank and the company towards China, to be responsible for their relations with the Chinese government, and to examine all the accounts of the Chinese government with the bank.

The company was to have the complete and exclusive right to operate the railway for eighty years, at the expiration of which the line was to pass free of charge to the Chinese government. At the end of thirty-six years the Chinese government was to have the right to repurchase the line.

The protection of the railway and its employees was to be assumed by the Chinese government. All lawsuits were to be handled

¹⁰⁷ For text of Treaty of Alliance, see MacMurray, I, p.81.
¹⁰⁸ For text of contract, see ibid., p.74.
by Chinese authorities in accordance with treaties.

The company might acquire lands necessary for the construction, operation and protection of the railway, as also lands in the vicinity of the line necessary for procuring sand, stone, etc. These lands were to be exempt from taxation, and to be managed exclusively by the company, which was to have the right to construct thereon buildings, works, and telegraph lines for the exclusive use of the railway.

Russian troops and war materials were to be allowed free passage at all times, on the condition that they were to be carried through directly "beyond the borders" without stopping on the way longer than necessary.

After the Russo-Japanese War the Russian interests in the line between Chengchun and Port Arthur, henceforth known as the South Manchuria Railway, were transferred to Japan.109

It was furthered agreed that with the exception of the lines within the Liaotung Lease, the Russian and Japanese railway concessions in Manchuria were to be exploited "exclusively for commercial and industrial purposes and in no wise for strategic purposes."110

In addition to the lands actually used for the construction, protection, and operation of the railway, the Chinese Eastern Railway Company in the course of time obtained, without treaty sanction, large areas of adjoining lands upon which settlements, mostly populated by Russians, began to grow. Over these settle-


ments the Russians exercised the functions of municipal government, including the maintenance of police.

This called forth protests from China,111 and other powers, especially the United States.112 To meet the Russians half way, the Chinese government came to an agreement in 1909,113 in which it was provided that some form of municipal government was to be maintained in certain settlements. All residents irrespective of nationalities were to enjoy the same rights and to be subjected to the same obligations, including with certain qualifications the right to vote. The municipal government was to consist of an assembly of delegates and executive committee. Their decisions were to be subjected to the joint approval of representatives of the Chinese government and the railway company. The agreement, however, was never faithfully kept by Russia.

After the outbreak of the Bolshevik Revolution in Russia, disorder spread into the Chinese Eastern Railway zone. As the territorial sovereign China dispatched troops into the zone, and appointed a president for the railway company, a right which she had not exercised since the days of the Boxer Uprising. The management of the railway continued without interference. The Russian guards and police were also allowed to remain, but were placed under Chinese command.114

During the Allied Intervention in Siberia, it was found desir-

114. See Hsd, Essays, pp.73-4.
able, from the standpoint of military and economic expediency, to unify the control of the Trans-Siberian Railway system, including the Chinese Eastern Railway. Consequently an Inter-Allied Committee was created in which all the Powers including Russia having military forces in Siberia were represented. Under it, a Technical Board and an Allied Military Transportation Board were established. In order to make clear the temporary nature of the arrangement, it was agreed that the Allied control of the railway would terminate upon the withdrawal of the foreign military forces from Siberia. 115

Action by China was called for again in 1920, when disorder prevailed owing to a strike on the part of the railway employees against the general manager. The Chinese government stepped in and caused the general manager to resign. On the basis of an agreement entered into on October 2nd of that year with the Russo-Asiatic Bank, the Chinese government disarmed the Russian guards and police and assumed control of the railway and the administration of the zone. 116

The grounds for such action, as given in the agreement, were: first, that the Chinese government was co-owner of the railway according to the railway contract of 1896; second, that the Bolshevik Revolution had rendered it temporarily impossible for the railway company to maintain regular operation; third, that China had rights of sovereignty over the railway; and last, that the Chinese government was under obligation not only for the maintenance of the peace and order of the area, but also for the pro-

115. See ibid., pp.77-8.
116. For text see Treaties, 1919-1929, p.133.
tection of the railway and its property. The question of the control of the Chinese Eastern Railway was brought up at the Washington Conference of 1921-1922. The Allied Powers claimed trusteeship resulting from the assumption by them of the control of the railway. China on the other hand emphasized her rights of territorial sovereignty. This necessitated examination and interpretation of the treaties and contracts involved in the question. Attempts to that effect, however, were blocked by Japan. In the meantime the Allied Powers insisted upon holding China responsible for all financial obligations of the railway towards foreign creditors, while China was disposed to recognize only those obligations that the Russian government had hitherto assumed.117

The anomalous situation was clarified in 1924 by the agreements concluded between China and Soviet Russia upon Chinese recognition of the Soviet government.118 The Chinese Eastern Railway was declared to be a purely commercial enterprise. All matters other than business operations, "such as judicial matters, matters relating to civil administration, military administration, police, municipal government, taxation and landed property (with the exception of lands required by the said Railway itself), shall be administered by the Chinese authorities."

The Soviet government assumed full responsibility for the financial claims against the railway incurred prior to the Bolshevik Revolution. The future of the railway was to be determined by China and Russia "to the exclusion of any third party or parties".119

117. See Willoughby, Conference, Ch.XVIII.

118. For text see Treaties, 1919-1929, p.133. Similar agreements were concluded by Soviet Russia with the local Mukden government.

119. Art. IX, General Principles.
China protested against the sale of the railway. On the ground that according to the agreements of 1924 the future of the railway was to be determined by China and Russia to the exclusion of any third party, the Chinese government declared the transaction "illegal and without binding force, and that as such the sale cannot affect Chinese rights and interests in whatever manner." 123 The protest was also communicated to the governments of Great Britain, the United States, France, Japan, Italy, Portugal, Belgium, and the Netherlands. 124


Since the transfer of the South Manchuria Railway, however, the pledges given by Japan have never been fulfilled. Instead of operating the railway as a Sino-Japanese enterprise under the supervision of a commissioner appointed by the Chinese government,

126. In the official English translation subsequently made by Japan, the phrase "as far as circumstances permit" was arbitrarily added. Cf. Yenchin Treaty series, No.11, p.10; Mackinlay, p.88.
3. The South Manchuria Railway

The South Manchuria Railway, as has been mentioned, was originally a branch of the Chinese Eastern Railway subject to the same contract that governed the latter. In 1905 the branch, a line between Changchun and Dairen, was transferred from Russia to Japan with the consent of China. Japan engaged to exploit the line "exclusively for commercial and industrial purposes and in no wise for strategic purposes." 125 She also undertook to "observe earnestly the original agreements entered into between China and Russia respecting ... the construction of the railway, and to consult and determine with the Government of China as matters come up in the future." 126

During the Russo-Japanese War the Japanese had built a light military railway between Antung and Mukden. With the consent of China, it was allowed to be maintained as a branch of the South Manchuria Railway for a period of fifteen years, to 1923, when it would be subject to repurchase by China. Like the main line it was to be operated exclusively for commercial purposes. Following the example for the presidency of the Chinese Eastern Railway, a Commissioner was to be appointed by the Chinese government to look after the business relating to the railway. 127

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126. In the official English translation subsequently made by Japan, the phrase "as far as circumstances permit" was arbitrarily added. Cf. Yenchings Treaty Series, No.11, p.20; Mackurray, I, p.556

the Japanese government undertook to organize the South Manchuria Railway Company in 1906, and to appoint its president, vice-president, directors and supervisors. The company has become a Japanese property and is placed under the supervision of the Governor of Kwantung.

Without China's consent the Japanese government has authorized the company to engage in mining, water transportation, electric enterprises, warehousing, factories, harbor works, iron foundries, shipping, electric and gas services, hotels and ceramic works. It finances a large number of private Japanese enterprises in Manchuria, and has made loans to one political faction or another to augment civil wars in China.128

As mentioned before, Article VI of the contract of 1896 provided that the railway company may acquire land, but only "for the construction, operation and protection of the railway," and "for procuring sand, stone, lime etc." Against such limitations the South Manchuria Railway Company has marked out areas on which railway settlements are established. Within these settlements police jurisdiction is exercised by the Kwantung Governor through his secretaries; while other rights of municipal administration are exercised by the "local department" of the railway company. Japanese postal and telegraphic services are also maintained.129

Japan has claimed the right of municipal administration by an arbitrary interpretation of Article VI of the contract of 1906. Paragraph two of this article, upon which Japan has based her claim, reads: "La Société aura le droit absolu et exclusive de l'adminis-

129. See Hatt, Essays, p.164.
tration de ses terrains." The terms of paragraph one makes it clear that only business administration or management was contemplated, for they clearly refer to "the lands actually necessary for the construction, operation and protection of the line", and also "for procuring sand, stone, lime, etc." Furthermore, the Chinese text gives the term "l'administration" as "ching li", which clearly means "management" rather than "administration" in English, and which cannot by any usage be construed to include political or municipal administration. It is evident from the text of the article, either French or Chinese, that the contract does not grant any right of municipal administration.\textsuperscript{130}

Another violation of her pledges is found in Japan's maintenance of railway guards along the South Manchuria lines. Against repeated protests from China, these guards have remained since the termination of the Russo-Japanese War. The promise of their withdrawal, given since 1905, still awaits fulfilment.\textsuperscript{131}

It has been noted that according to the original contracts the South Manchuria Railway was subject to redemption by China. The Dairen-Changchun line was repurchasable thirty-six years after it was opened for traffic, that is, in the year 1939, or it was to pass to China free of charge at the end of eighty years, that is, in the year 1983. The Mukden-Antung line was repurchasable fifteen years after the completion of the reconstruction, or in the year 1923. Under the terms of the Twenty Demands of 1915, however, Japan undertook to extend the dates to ninety-nine years, fixing the year 2002 as the date for the restoration of the Dairen-Changchun line, and the year 2007 for that of the Mukden-Antung line.\textsuperscript{132} The binding force of the treaties and notes of 1915 has always been challenged by China.
130. For further discussion see ibid., pp. 285-294.

131. See above, Sec. E, 3.


International law existed in ancient times in the Orient. Both in theory and practice the rules of conduct governing the relations between those states find many parallels in modern international law. With the unification of the Chinese empire and the establishment of its position as a super-state in the Eastern world, however, the conditions calling for the application of international law ceased to exist. It was not until contact with the West in the last century that questions of international law again confronted China.

In respect to the position of China as a member of the family of nations the issue has been raised whether China, in view of the restrictions imposed upon her, is entitled to the status of a fully sovereign state. In point of law the determination of membership in all of its phases in the community of nations is a right which belongs solely to the community as a body, and no action by a single member of the community can detract from the recognition given by others. China's juridic status as a fully sovereign state has been established beyond doubt and has been many times formally declared by the other states. When in recent years Japan undertook to pass judgment upon the status of China's statehood, the action aroused bitter opposition of China and at the same time met with condemnation from the entire community of nations.

The principle of self-defense as an inference from the right
CHAPTER X

CONCLUSION

International law existed in ancient times in the Orient when China comprised a number of virtually independent feudal states. Both in theory and practice the rules of conduct governing the relations between those states find many parallels in modern international law. With the unification of the Chinese empire and the establishment of its position as a super-state in the Eastern world, however, the conditions calling for the application of international law ceased to exist. It was not until contact with the West in the last century that questions of international law again confronted China.

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The principle of self-defense as an inference from the right
of national existence, is generally recognized in international law. In the absence of an effective system of collective responsibility, each state must protect its own national life, and must determine for itself whether circumstances require recourse to self-defense. However, such a right is conditioned upon the equal enjoyment of the right of existence by other states. Before the establishment of the League of Nations the line of demarcation between acts of self-defense and acts of aggression was by no means distinct; but even then it was generally agreed that resort to forcible measures in self-defense could be justified only when facts clearly established the existence of a menace endangering the security of the state concerned, and when the measures of self-defense were proportionate to the danger contemplated.

In the name of self-defense many acts of aggression have been committed by the Great Powers in China in ruthless violation of the rules of international law. The powers also concluded between themselves a number of alliances and secret treaties for the alleged defense of their interests in China, but in reality to further those interests without China's consent. These concerted policies of the powers came to an end in the agreements entered into at the Washington Conference.

The establishment of the League of Nations imposes important limitations upon the member states in their exercise of the right of self-defense. The qualified guarantees given by the Covenant to the territorial integrity and political independence of the member states, and the obligations placed upon the members to submit their disputes to pacific settlement, restrict the possi-
bility of a resort to self-defense within the narrowest limits. During the Sino-Japanese dispute of 1931 the League repudiated Japan's claim to the right of being the judge in her own case and of taking the law into her own hands. The League declared in clear and specific terms the sanctity of its Covenant, and condemned the Japanese invasion of China as unwarranted and illegal. What the League failed to do was to put into effect sanctions against the aggression of Japan.

While the Pact of Paris does not prohibit legitimate acts of self-defense, it is clearly implied that the justification of self-defense offered by a signatory power is subject to examination by the others. It has been shown that when Japan violated the League Covenant by her invasion of Manchuria, she also violated at the same time the Pact of Paris.

In the course of her relations with foreign states, China has been a frequent victim of intervention. From the standpoint of the intervening state, the justification is usually an act of alleged self-defense. It is a generally accepted principle in international law that intervention, if resorted to at all, must be limited in the strictest way. The necessity should be imminent and the measures applied should be proportionate to the danger concerned. In numerous cases in China, however, not only was the alleged danger proved to be non-existent, but China's territorial and administrative integrity was flagrantly infringed. Moreover, China was frequently forced to submit to such demands as were unheard of in peace-time international relations. These interventions should rightly have been regarded as acts of war, had China been in a position to assert the principles of international law.
In respect to the principle of the legal equality of states, the facts presented in this study indicate frequent violations of the rule that no discrimination should be directed against a particular group of aliens on grounds of nationality or race. The principle of equality has been disregarded by many countries in their treatment of Chinese nationals residing within their territory. These Chinese nationals have been subject to special immigration restrictions, and have been denied certain rights enjoyed by other alien groups. The discriminations become all the more unjust when they violate special treaty obligations.

By reason of the existence of the system of extraterritoriality, China has been required in many cases to discriminate against her own nationals in favor of aliens residing on her soil. Moreover, certain powers have not contented themselves with the enjoyment of their extraterritorial privileges as granted in treaty provisions; but they have extended their jurisdiction over Chinese citizens in certain parts of China, have stationed police and troops within Chinese territory, and have engaged in illicit trades, all without treaty basis.

Perhaps some of the most conspicuous violations of international law in respect to China have been in connection with claims made by certain foreign powers in regard to injuries alleged to have been inflicted upon their citizens. China has been compelled in many instances to assume responsibility to a degree unparalleled in customary international practice. Despite general principles of international law, and specific treaty provisions by which foreign states have agreed to placed their nationals in China "on a common footing" with Chinese subjects, China has been held
directly and immediately responsible for the acts of its individual citizens. Furthermore, she has at times been required to make compensation above and beyond an amount presented by the injuries suffered by the aliens.

It has been shown that China is subject to a number of servitudes of the most complicated nature. The complexity, however, is created primarily by the arbitrary claims maintained by certain foreign states in their enjoyment of servitudes in China. These claims not only disregarded the rule applicable to *jura in re aliena*, but in certain cases they diametrically contravene the treaty obligations of those states toward China.

The problems presented in this monograph bring out clearly the fact that China has not been accorded her just rights under international law in her relations with foreign states. In fact, the impairment of her rights as an independent state has been so frequent and so general, that her status as a full member in the community of nations, however expressly recognized by other member states, has amounted in certain cases of pronounced aggression to little more than mere legal fiction. If the community of nations claim to base its organization upon an international standard of justice and good faith, the application of international law in China requires serious rectifications in the conduct of the Great Powers.
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