

War as an "instrument of national policy" may therefore be defined as war in pursuance of national claims or in promotion of national interests whenever such claims and such interests do not bear a character involving the right of self-defense "inherent in every sovereign state." Assuming an honest intention on the part of the contracting states to live up to the obligation undertaken, there is still a wide field for the operation of the anti-war treaty. It has, for example, been the policy of the United States to afford special protection to the lives and property of its citizens in countries where the standard of law and order is regarded as below normal. The Kellogg-Briand treaty would preclude the United States from resorting to war, or using the threat of war, to enforce its views against Mexico in the settlement of a controversy such as the recent one concerning the legality of the Mexican land and petroleum laws of 1926. What would happen if the alternative procedure of arbitration offered by the treaty were rejected by Mexico or failed otherwise to adjust the controversy lies beyond the contemplation of the treaty.

It must be admitted that the disputes coming within the field of the treaty would in most cases not be likely to bring about a resort to force in the absence of the obligation of the treaty. Disputes over the extent of the marginal sea, riparian rights along boundary rivers, the privileges of merchant ships in foreign ports, communications and transit, even the status of aliens, have not in the recent past led to threats of war except in the rarer cases where there were present in the dispute the remoter elements of national defense. But if the Kellogg-Briand treaty does no more than raise the issue of the various grounds of war as a form of procedure for the settlement of international disputes it will have fulfilled a useful purpose. Like the arbitration treaties that have been growing in number since the opening of the twentieth century, it will have drawn in the loose ends of the present legal system nearer to the ultimate perfect circle.

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THE TREATY REGULATING TARIFF RELATIONS BETWEEN THE UNITED STATES AND CHINA

The sensible and satisfactory settlement of the unfortunate Nanking incident effected by an exchange of notes on April 3, 1928, between United States Minister MacMurray and General Hwang Fu, Minister for Foreign Affairs of the Government of China, formed the subject of an editorial comment in the July issue of this JOURNAL.¹ A similar recipe of diplomatic skill, compounded with common sense and inspired by good faith, has now been applied to the impasse with respect to the recognition of Chinese customs autonomy.

It will be recalled that the Nanking settlement was effected by the ex-

¹ Vol. 22, p. 593.

change of three sets of notes, the first exchange dealing with the Nanking incident proper, the second with the question of the protective barrage thrown by the American warships around Socony Hill at Nanking where the American Consul and other Americans had taken refuge, while the third exchange related to the general question of treaty revision. In this third exchange of notes the Chinese Minister for Foreign Affairs expressed the hope that "a new epoch will begin in the diplomatic relations between China and the United States" and suggested that further steps be taken for the revision of existing treaties "on the basis of equality and mutual respect for territorial sovereignty." Minister MacMurray in his reply, after pointing out that the question of treaty revision was scarcely germane to the question of the settlement of the Nanking incident, went on to refer to the statement of American policy toward China made by the Secretary of State on January 27, 1927, and to reiterate the sympathy of the American people with China's aspirations "for a sovereignty so far as possible unrestricted by obligations of an exceptional character" and the hope of the American Government that, with the disappearance of the conditions which had brought about such provisions in earlier treaties, opportunity for revision of "such treaty stipulations as may have become unnecessary or inappropriate" might from time to time be afforded. He added that the American Government looked forward to the development of a Chinese administration representative of the Chinese people, exercising real authority and capable of assuring fulfillment of the obligations necessarily incident to treaty revision.²

The statement of the Secretary of State of January 27, 1927 to which Mr. MacMurray referred in his answer to General Hwang Fu, was a general statement covering the entire Chinese situation and referring particularly to both the outstanding questions of extraterritoriality and customs autonomy. The greater portion of the Secretary's statement, however, was devoted to the question of customs autonomy. On this subject he said:

The United States is now and has been, ever since the negotiation of the Washington Treaty, prepared to enter into negotiations with any Government of China or delegates who can represent or speak for China not only for the putting into force of the surtaxes of the Washington Treaty but entirely releasing tariff control and restoring complete tariff autonomy to China.

The United States would expect, however, that it be granted most favored nation treatment and that there should be no discrimination against the United States and its citizens in customs duties, or taxes, in favor of the citizens of other nations or discrimination by grants of special privileges and that the open door with equal opportunity for trade in China shall be maintained; and further that China should afford every protection to American citizens, to their property and rights.

² The text of these notes was made public by the Department of State in a press release on April 3, 1928. They are quoted substantially in full in the editorial comment in the July JOURNAL, Vol. 22, pp. 593 *et seq.*

Mr. Kellogg proceeded to set forth in some detail the efforts of the Government of the United States to expedite the holding of the Special Conference on Chinese Customs Tariff, provided for by the Washington Arms Conference, and the liberal attitude of the American Delegation at the conference; pointing out that the American Delegation "affirmed the principle of respect for Chinese tariff autonomy and announced that they were prepared forthwith to negotiate a new treaty which would give effect to that principle and which should make provision for the abolition of *likin*, for the removal of tariff restrictions contained in existing treaties, and for the putting into effect of the Chinese National Tariff Law."³ The Secretary quoted the resolution recognizing China's right to enjoy tariff autonomy, adopted unanimously by the conference, and pointed out that the failure of the conference, when there was good prospect for its success, was due to disturbed political conditions in China. He then made this significant, specific and unambiguous statement:

The Government of the United States was ready then, and is ready now, to continue the negotiations on the entire subject of the tariff and extraterritoriality *or to take up negotiations on behalf of the United States alone*. The only question is with whom it shall be negotiated.³

Talleyrand is credited with the cynical observation that language is intended for the purpose of concealing thought, and according to Izaak Walton, Sir Henry Wotton defined an ambassador as "an honest man sent to lie abroad for the good of his country," and further advised a fellow diplomat to tell the truth and thus "put your adversaries (who will still hunt counter) to a loss in all their disquisitions and undertakings."⁴

In view of the repeated, consistent and public statements of the American attitude towards China hereinbefore set forth, it would seem that only those who take seriously the pessimistic views embodied in the witticisms attributed to Talleyrand and Sir Henry Wotton could have been surprised when the American Minister at Peking, on behalf of the Secretary of State of the United States, once more reiterated American policy towards China and brought it down to date in the following note addressed to the Minister for Foreign Affairs of the Nationalist Government of July 24, 1928, and made public in a press release by the Department of State on July 26, 1928:

Events in China have moved with great rapidity during the past few months. The American Government and people have continued to observe them with deep and sympathetic interest. Early in the year the American Minister to China made a trip through the Yangtze Valley region and while in Shanghai exchanged on March 30, 1928, with the Minister of Foreign Affairs of the Nationalist Government notes in

³ See statement by the Honorable Frank B. Kellogg, Secretary of State, released for publication on January 27, 1927, by the Department of State. (Italics supplied.)

⁴ Quoted in Satow's Guide to Diplomatic Practice, Vol. I, pp. 169-170.

settlement of the unfortunate Nanking incident of March 24, 1927. In pursuance of the terms therein agreed upon, a Sino-American Joint Commission has been entrusted with the appraisal of damages suffered by the American nationals during that occurrence.

On January 27, 1927, I made a statement of the position of the United States toward China. To it I have often subsequently had occasion to refer in reaffirmation of the position of this government. I stated therein that the United States was then, and from the moment of the negotiation of the Washington Treaty had been prepared to enter into negotiations with any government of China or delegates who could represent or speak for China, not only for putting into force the surtaxes of the Washington Treaty but for restoring to China complete tariff autonomy. Ever since, the American Government has watched with increasing interest the developments pointing toward coördination of the different factions in China and the establishment of a government with which the United States could enter into negotiations. Informed through press despatches and through official reports which have from time to time been released to the press, the American people also have observed with eager interest these developments.

In a note addressed by the American Minister to China to the Minister for Foreign Affairs of the Nationalist Government at Nanking on March 30th of the present year, in reply to a suggestion of the latter concerning revision of existing treaties, reference was made to the sympathy felt by the Government and people of the United States with the desire of the Chinese people to develop a sound national life of their own and to realize their aspirations for a sovereignty so far as possible unrestricted by obligations of an exceptional character, and it was stated that the American Government looked forward to the hope that there might be developed an administration so far representative of the Chinese people as to be capable of assuring the actual fulfillment of any obligations which China would of necessity have for its part to assume incidentally to readjustment of treaty relations.

In a communication addressed to me under date July 11, 1928, Mr. Chao-chu Wu informs me that the Nationalist Government has decided to appoint plenipotentiary delegates for the purpose of treaty negotiations and that he is instructed to request that the Government of the United States likewise appoint delegates for that purpose.

The good will of the United States toward China is proverbial and the American Government and people welcome every advance made by the Chinese in the direction of unity, peace and progress. We do not believe in interference in their internal affairs. We ask of them only that which we look for from every nation with which we maintain friendly intercourse, specifically, proper and adequate protection of American citizens, their property and their lawful rights, and, in general, treatment in no way discriminatory as compared with the treatment accorded to the interests or nationals of any other country.

With a deep realization of the nature of the tremendous difficulties confronting the Chinese nation I am impelled to affirm my belief that a new and unified China is in process of emerging from the chaos of civil war and turmoil which has distressed that country for many years. Certainly this is the hope of the people of the United States.

As an earnest of the belief and the conviction that the welfare of all the peoples concerned will be promoted by the creation in China of a

responsible authority which will undertake to speak to and for the nation, I am happy now to state that the American Government is ready to begin at once, through the American Minister to China, negotiations with properly accredited representatives whom the Nationalist Government may appoint, in reference to the tariff provisions of the treaties between the United States and China, with a view to concluding a new treaty in which it may be expected that full expression will be given reciprocally to the principle of national autonomy and to the principle that the commerce of each of the contracting parties shall enjoy in the ports and the territories of the other treatment in no way discriminatory as compared with the treatment accorded to the commerce of any other country.

As above stated, Minister MacMurray's note to the Chinese Minister for Foreign Affairs was dated July 24, 1928, and was released to the press both in China and the United States on July 26, 1928. On July 25, 1928, *i.e.*, the day following the date of his note to the Chinese Minister, Mr. MacMurray and Mr. Soong, Minister of Finance of the Nationalist Government of the Republic of China, signed a commercial treaty which was released for publication in America and in the Orient on July 27, 1928. Article one, which contains the substance of the treaty, reads as follows:

All provisions which appear in treaties hitherto concluded and in force between the United States of America and China relating to rates of duty on imports and exports of merchandise, drawbacks, transit dues and tonnage dues in China shall be annulled and become inoperative, and the principle of complete national tariff autonomy shall apply, subject, however, to the condition that each of the high Contracting parties shall enjoy in the territories of the other with respect to the above specified and any related matters treatment in no way discriminatory as compared with the treatment accorded to any other country.

The nationals of neither of the high contracting parties shall be compelled under any pretext whatever to pay within the territories of the other party any duties, internal charges or taxes upon their importations and exportations other or higher than those paid by nationals of the country or by nationals of any other country.

The above provisions shall become effective on January 1, 1929, provided that the exchange of ratifications hereinafter provided shall have taken place by that date, otherwise, at a date four months subsequent to such exchange of ratifications.⁵

The American note and the treaty appear to have been well-nigh universally approved by the public opinion of the two countries immediately concerned, the United States and China. But any step taken by any of the Western nations towards relinquishing its privileged position *vis-à-vis* China has an indirect, but often very powerful, effect upon the relations of the other Western Powers with China, and the liberal, forward-looking

⁵ See full text of the treaty printed in Supplement this JOURNAL, page 170.

action of the American Government in the present instance, as in the case of the Nanking settlement, has evoked criticism in the Japanese-controlled press in China and in the Japanese press at home which, however regrettable and unfounded, is perhaps not surprising or unnatural.

The Japanese criticisms, may be roughly summarized as follows: That the treaty is an "empty gesture" which costs the United States nothing and profits China as little;⁶ that it is a "secret treaty";⁷ that it is a "mean trick";⁸ that it was negotiated behind the backs of the other Powers in contravention of Article 7 of the Nine-Power Treaty,⁹ and is calculated to embarrass Japan in connection with China's recent action in terminating her treaties with Japan. In short, the Japanese press is of the opinion that the effect of the treaty is to deceive China and to embarrass Japan.¹⁰

It is believed that these criticisms are without merit. By way of a short answer to the argument that the treaty is of no value to China, it is sufficient to point out that it amounts to the recognition of the Nationalist Government as the *de jure* government of China.¹¹ Furthermore, while it is true that under the treaty China does not regain her customs autonomy *vis-à-vis* the United States until the other treaty Powers likewise surrender their privileged position, it is equally true that the treaty renders it morally certain that the assent of the other Powers will be given sooner, perhaps much sooner, than might otherwise have been the case. A definite breach has been made in the encircling wall of privilege through which equality will speedily find its way. The best evidence that the treaty is not "empty" is found in the very criticisms it has evoked. The other grounds of criticism heretofore enumerated have even less to recommend them. To speak of a treaty published two days after it was signed as a "secret treaty" is ridiculous.¹² To complain of a lack of frankness because the United States carries out as soon as consistency and reason permit, a portion of a program publicly announced at intervals for nearly two years, is clearly frivolous, even supposing that the Nine-Power Treaty had any relevancy in

⁶ *North China Standard* of Peking, July 27, 1928. ⁷ *Ibid.*, July 28, 1928.

⁸ *Tokio Hochi*, July 28, 1928. ⁹ *North China Standard* of Peking, July 29, 1928.

¹⁰ See *Tokio Asahi*, July 28 and 30, 1928; *Tokio Jiji* of the same date; the *Osaka Asahi* of July 29, 1928; *Tokio Nichi-Nichi* of July 29 and 30, 1928; *Kobe Asahi* of July 29, 1928. It is fair to add that some of the Japanese newspapers complimented the negotiators of the treaty, making their praise, however, a vehicle for criticism of the Japanese Ministry and its handling of the situation.

¹¹ See Moore, *International Law Digest*, Vol. I, Sect. 27, p. 73. Hall, *International Law*, 4th ed., p. 87; 8th ed., p. 103. Oppenheim, *International Law*, 2nd ed., Sect. 71, pp. 117-118; *United States Daily* of September 29, 1928.

¹² In this connection, it may be recalled that the United States went to Paris in 1919 without adequate information as regards the arrangements between Japan and several Allied Powers concluded in 1917 concerning the disposition of Germany's rights (or rather wrongs) in Shantung. (See MacMurray, *China Treaties*, II, pp. 1167-1168; U. S. Senate Committee on Foreign Relations, 66th Cong. 1st sess., *Hearings on Versailles Treaty*, pp. 147, 148, 215-219, 525, etc.)

connection with giving up foreign rights in China which it would seem is quite a different thing from acquiring rights.

The treaty needed no explanation or justification to foreign Powers or the world beyond that given in the statement of the Secretary of State of January 27, 1927, and the note of the American Minister of March 30, 1928 made public on April 3, 1928. But the foreign Powers naturally could not be prejudiced by having been given still another notice as to the intentions of the United States on July 24, 1928—and the length of time which was allowed to elapse between this further notice and the contemplated action was of course immaterial, or, to put it in another way, it would have been perfectly proper to have given the note of July 24th and the treaty of July 25th to the press at the same time. The latent assumption that the real work of the negotiation of the treaty could have been accomplished in twenty-four hours, whatever might have been the actual mechanics of signature brought about by the presence of Minister Soong in Peking, etc., is too naïve to have been entertained seriously by anyone.

The innuendo that the treaty was timed for the purpose of embarrassing Japan needs no answer, but the conservative British *Peking and Tientsin Times* has pointed out (July 28, 1928) that it was so-timed as to be of very material assistance to the moderate party in Chinese politics and thereby of assistance to all the Western Powers in their negotiations with China. As for breaking the "accord of the Great Powers" the same paper (July 28, 1928), reminds its readers that this was first done (and in the opinion of the present writer, to the ultimate advantage of all concerned) by the British Foreign Office Memorandum of December 18, 1926, which expressed the opinion that not enough attention had been paid to the "realities of the situation" in China.

When all is said, however, the fact remains that America's material interest in maintaining control over Chinese customs is much smaller than that of Japan, and it is therefore easier for us than for Japan to do the obviously right and necessary thing in agreeing promptly to Chinese customs autonomy. A consideration of this circumstance in the light of the ordinary frailties of human nature and of the Japanese press comment, suggests the inevitable difficulty which America must face and overcome in endeavoring to do her duty by one great people without giving offense to another.

The words "Done in Peiping" in the attesting clause of the treaty are certainly not without interest and possible significance. By accepting this phraseology, the United States is the first nation to give treaty recognition to the new Nationalist name for Peking, and whatever sentimental regret may be felt that Peking, the capital of Kubla Khan and many another conqueror, has, like St. Petersburg, lost both its name and its status, the desire of the Nationalists to rid themselves of the associations of the Legation Quarter at Peking is quite understandable. It may be assumed that there is no disposition on the part of the United States to oppose the transfer of

the Capital to Nanking. Incidentally it may be remarked that the removal of the capital to Nanking, if made permanent, is likely to yield one fortunate by-product in the opinion of all those who have succumbed to the lure of old Peking; namely, it will probably enable the old walled city of Peking to be preserved as one of the great monuments of antiquity, something which would have been less likely to happen if Peking had remained the capital of modern China.

The treaty does not refer to the abolition of extraterritoriality. Extraterritoriality in China is doomed sooner or later by evolutionary or revolutionary processes.¹³ Evolution is always preferable to revolution. In his statement of January 27, 1927, the Secretary of State referred to this subject as follows:

The United States is prepared to put into force the recommendations of the Extraterritoriality Commission which can be put into force without a treaty at once and to negotiate the release of extraterritorial rights as soon as China is prepared to provide protection by law and through her courts to American citizens, their rights and property.

In an editorial in this JOURNAL in 1924 (Vol. 18, p. 781), attention was called to the suggestion theretofore made that the first step in the gradual elimination of extraterritoriality should be the putting into force in the foreign extraterritorial courts of the new Chinese codes as rapidly as possible. This suggestion has since been adopted and embodied in the recent report of the Commission on Extraterritoriality in China, one of the recommendations being that, pending the abolition of extraterritoriality, "the Powers concerned should administer, so far as practicable, in their extraterritorial or consular courts such laws and regulations of China as they may deem it proper to adopt."¹⁴ Congressional legislation will be required before this and other similar recommendations of the Commission could be put into force by the United States, and it is submitted that such legislation should be enacted at the approaching short session of Congress in order that our promise and performance in the matter of extraterritoriality may not suffer by comparison with our record just made up in the matter of tariff autonomy.

In general it is submitted that from the point of view of the international relations of the United States with China and with the treaty Powers,¹⁵ our new commercial treaty with China is altogether admirable. Our action and

¹³ See editorial in this JOURNAL, Vol. 18 (1924), p. 781.

¹⁴ "Report of the Commission on Extraterritoriality in China," published by the Department of State, p. 108. See this JOURNAL, July 1927 (Vol. 21, No. 3), p. 58 at p. 64.

¹⁵ There are certain other technical questions which are suggested by a perusal of this treaty, such as its possible effect on the tariff policy of the United States and the question of the revision of the treaty in view of the absence of any express provision for revision, which do not fall within the scope of this editorial. See an editorial on "Chinese Termination of Unequal Treaties," this JOURNAL, April, 1927 (Vol. 21), p. 289, and particularly a note of the Chinese Government to Belgium of April 16, 1926, therein quoted.

its reception by its critics recalls the story of Columbus and the egg, or to adopt a reference more germane to international relations, it recalls a famous remark of Lord Palmerston:

It is a true saying, and has often been repeated, that a very moderate share of human wisdom is sufficient for the guidance of human affairs. But there is another truth, equally indisputable, which is, that a man who aspires to govern mankind ought to bring to the task, generous sympathies, and noble and elevated thoughts.¹⁶

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THE CHICAGO SANITARY DISTRICT CASE

The right of the Chicago Sanitary District to divert the waters of the Great Lakes into a sanitary canal for sewage disposal purposes is being vigorously contested, not only by the Canadian Government but by several States of the Union which are affected by the diversion.

In January, 1925, the Supreme Court of the United States affirmed a decree of the District Court, enjoining the Sanitary District from diverting water from Lake Michigan in excess of 4167 cubic feet per second, without prejudice, however, to any diversion permit that might be issued by the Secretary of War in accordance with the law. (*Sanitary District of Chicago v. U. S.*, 266 U. S. 405.) On March 3, 1925, the Secretary of War issued a permit to the Sanitary District allowing a diversion not to exceed an annual average of 8500 cubic feet per second, upon certain conditions and extending to December 31, 1929.

In October following, the State of Wisconsin filed a bill against the district amendatory to an earlier one, to which the States of Minnesota, Ohio and Pennsylvania became complainants. The bill alleged that the diversion at Chicago had caused a lowering of the levels of the Great Lakes and of the rivers connecting them, including also the St. Lawrence River, to an amount not less than six inches, to the serious injury of the complainants—this in violation of the law and of their rights. The bill asked for an injunction restraining the defendants from diverting any water from Lake Michigan for sanitary purposes, or in case the canal should be used as a navigable waterway, from diverting any water for such purposes in excess of the amount which the court should determine to be reasonably required for navigation of the canal, without injury to the navigable capacity of the Great Lakes and their connecting waters. Against the bill the State of Illinois filed a demurrer, and the States of Missouri, Kentucky, Tennessee, Louisiana, Mississippi and Arkansas, at their request, were admitted as intervening co-defendants. Later, bills were filed against the State of Illinois by Michigan and New York. The demurrer was overruled and the motion to dismiss the bill was denied by

¹⁶ Viscount Palmerston, speaking in the Don Pacifico debate (*Hansard, Parliamentary Debates, 3rd Series, Vol. 112, page 387*).