

ance—that the raw materials and the markets of the world be made more readily accessible to all nations.

It may be that it is now too late to bring about that combination of military, economic, and moral disarmament which has been all along the one means of stemming the tide of international anarchy, but which has not been put into effect simply because of the lack of a determined will to do so. But the greater the danger that faces the nations, the more imperative it is that they make that last bold effort which, if it should succeed, would save our civilization from a calamity greater than any that has yet come upon it.

C. G. FENWICK

PEACEFUL WAR IN CHINA

Japan began her present military operations in China following an outbreak between Chinese soldiers and Japanese troops near Peiping on July 7, 1937. The Japanese thereupon attacked Shanghai, and since then hostilities in China have been increasing in extent and violence until it is said about a million troops are engaged on both sides with all the mechanical accessories of modern warfare and until all of the maritime provinces from Shanghai to Manchukuo are involved.¹

During the course of hostilities the Japanese forces have admittedly committed certain outrages against third Powers which it is difficult to reconcile with Japanese pronouncements. They include the military bombing and sinking of the *U. S. S. Panay* and three American steamers and the machine-gunning of the refugees, the assault on the diplomatic representative of the United States engaged in his official duties, the entry of American property and institutions and the removal of goods and employees therefrom, and the tearing down, burning or otherwise mutilating the American flag. Similar attempts have been made against the rights and interests of other Powers.

The rights of foreigners in China are governed by a series of treaties dating from about the middle of the last century when the Hermit Kingdom began to open its doors to Western intruders. The right of Americans or American institutions to establish themselves and to own property and to carry on business in China dates from the Treaties of 1844 and 1858.² This privilege was expanded by subsequent treaties and the most-favored-nation clause so that citizens may frequent, reside and carry on trade, industry and manufactures in the Open Ports and may rent, purchase houses, places of business

¹Meanwhile the Japanese Government was writing to the American Government, "The Japanese Government wishes to express its concurrence with the principles contained in the statement made by Secretary of State Hull on the 16th of July, 1937 concerning the maintenance of world peace."

²In addition, special "foreign residential areas," "settlements" and "concessions" were set aside by treaty in certain Open Ports for residence and use of foreigners under leaseholds. These areas are under their own local administration and not subject to Chinese laws.

and other buildings and rent or lease land and build thereon. They were also permitted to travel or trade in parts of the interior under passports of consuls countersigned by local authorities. Missionary societies have practically the same property rights in all parts of the former Empire.

Although the navigation of inland waters is generally reserved to domestic craft in other countries, China has by treaty dating from 1895 opened the inland waters of the Empire to all steam vessels, native or foreign, for the carriage of passengers and merchandise, which are especially registered for this purpose. This grant did not cover public vessels, but by virtue of the most-favored-nation clause the United States and other Powers claimed the advantages of Article 52 of the Sino-British Treaty of 1858 which states that "British ships of war coming for no hostile purpose or engaged in the pursuit of pirates shall be at liberty to visit all ports in the dominion of the Empire of China and shall receive every facility for the purchase of provisions, procuring water, and if occasion require, for the making of repairs."

By treaty provision, American consuls are permitted to reside in the Open Ports, now numbering some seventy-five, and enjoy the consular privileges of the most favored nation, and diplomatic representatives may reside at the capital and enjoy all the privileges and immunities of international law and of representatives of the most favored nation.

Besides the foregoing privileges, there grew up in China the system of extraterritoriality, whereby Americans and nationals of other treaty Powers are tried in criminal and civil cases by consular officers who apply the laws of the nationality of the defendant.³ American merchant vessels are also subject to the authorities of their Government, and citizens and their property shall not be subject to seizure and forcible detention on any "pretense of the public service."⁴

It is therefore evident that American citizens, institutions and property and American vessels are rightfully within Chinese territory, including Chinese rivers, by virtue of special treaty stipulations.

The first question to consider is by what right is Japan now carrying on hostilities in China with several hundred thousand men.

In communications to the Conference at Brussels called pursuant to the Nine Power Treaty to which she is a party, Japan, in declining to participate in the conference, stated in November, 1937, that her relations with China were a "measure of self-defense," that she desired the "material and moral development of the Chinese nation," that she wished to "promote cultural

³ Subsequently the United States by Act of Congress established the United States Court for China, similar to the British Supreme Court of China, without disturbing the original jurisdiction of the consular courts.

⁴ By mandate of May 4, 1931, China promulgated regulations for the abolition of extraterritorial jurisdiction, but they never became effective. (Millard, *End of Extraterritoriality in China* (1931), p. 3.)

For an excellent discussion of treaty rights in China, see W. W. Willoughby, *Foreign Interests in China* (1920), and *China at the Conference* (1922).

and economic coöperation" with foreign Powers in China and to "respect foreign rights and interests in that country."⁵

The encroachments of Japan on China began with the seizure of Korea at the beginning of this century. Later came the so-called Twenty-One Demands of 1915 which, if acceded to, would have made China a protectorate of Japan. Under the pressure of the Nine Power Conference in Washington, Japan signed the Nine Power Convention of 1922 whereby she with other Powers solemnly agreed to respect "the sovereignty, the independence and the territorial and administrative integrity of China."⁶ Japan was also a party to the Pact of Paris of 1928, thereby agreeing not to use armed force as an instrument of national policy. She is also a party to the Hague Convention for the Pacific Settlement of International Disputes. Her treaty engagements would make a war of conquest or tutelage impossible except to a nation whose plighted word is but a veneer of feudal propensities. The protestations of Japan as to her purposes in China are an affront to the intelligence of mankind and to a decent regard for her treaty obligations to the world. The common judgment of mankind is that her great armies are in China in violation of her solemn promises, and the hostile acts committed against the Chinese Government, against the defenseless noncombatants and against foreigners at large come under the ban of present-day covenants of right and canons of humanity.⁷ Under the classic standards of international law, a war of conquest was not prohibited and did not involve the legal or moral stigma of an international crime. Today, however, the conscience of the world has been awakened to the fact that wars, at least wars of conquest, are fundamentally at variance with the moral law and the desire of mankind to live in peace with the neighborhood.

If Japanese troops are wrongfully in China under the world treaties, are they there under some special arrangement with China or by virtue of international law?

I believe it may be properly said that there is no treaty authorizing the presence of Japanese troops in China, except the Boxer Protocol of 1901 providing for the stationing of garrisons at Peking to protect the legations and at points between Peking and the sea to keep open communications, and the temporary stationing of guards along the South Manchurian and the

⁵ On Sept. 4, 1937, the Imperial Message to the Diet stated that Japan had no other purpose than "securing swiftly the peace of East Asia." On the next day the Prime Minister before the Diet referred to "our great mission of establishing peace in the Orient."

⁶ Japan was also an original member of the League of Nations but gave notice of her withdrawal in 1932. While a member of the League, however, and contrary to its tenets, Japan took from China the province of Manchuria containing roughly 500,000 square miles of territory.

⁷ The report to the Assembly of the Far East Advisory Subcommittee, Oct. 5, 1937, showed that "the action taken by Japan is a breach of Japan's treaty obligations and cannot be justified." The conclusions of this report were adopted by the Assembly of the League and approved by the United States Government.

Chinese Eastern Railways in Manchuria. Nevertheless, through Japanese pressure, military and police control in Chinese districts has been greatly expanded from very small beginnings and based largely upon the excuse of the protection of Japanese subjects on account of local disorders. The Japanese forces have frequently remained after the alleged necessity ceased to exist even after protest and offer of full protection by the Chinese Government. It is true that several countries, including Japan, sent troops to Hankow in the revolution of 1911, but all withdrew their troops when the emergency was over, except Japan. International law allows the introduction of troops in a foreign country only in case of an emergency and to protect the lives and property of nationals when this cannot be done by local authorities, but international law insists that such troops be withdrawn as soon as the emergency is passed. It is believed that the excuses of the Japanese for continuing to maintain troops in China in the past have been without basis in international law and have not followed the practice of other countries in withdrawing troops from China. Moreover, the present Japanese armies in China are so disproportionate to the alleged purpose in view and to the requirements of international law that another objective must be attributed to the Japanese Government.

May the present extensive military operations of Japanese forces on Chinese soil be explained on the ground of war?

No declaration of war has been made by either side in the conflict, although the Hague Convention of 1907, to which China and Japan are parties, provides that hostilities should not commence without previous and explicit warning to the other party and notice to neutral Powers. The exercise of belligerent rights of blockade, visit, search and capture have not been resorted to by either side. Diplomatic relations have not been broken off although the heads of missions retired after the fall of Nanking. Consuls generally remain at their posts and commercial intercourse has continued, although naturally on a much reduced scale. On the other hand, extensive military operations have been in progress between the Japanese and Chinese armies since early July, 1937. Something like a million troops are said to be engaged on both sides, and something over thirty-five warships have taken part in the operations. Bombardments by warships, heavy artillery and war planes have been extensive and destructive to life and property. As early as August 25 Admiral Hasegawa declared a blockade of certain Chinese coasts against Chinese vessels, and Chinese vessels running the blockade have been captured and sunk. Provisional governments in the nature of military governments supported by armed forces have been set up by Japan in the conquered territory. Neutrals have been warned to withdraw from areas of hostilities, and encroachments have been made by Japanese forces upon the foreign settlement areas.

Can it be said that this situation does not represent war?

The authorities are clear that up to the time of the Hague Convention,

above mentioned, hostilities usually began without a declaration of war and that a subsequent declaration, if made, was essentially for the purpose of warning the nationals of the belligerent. To disregard the Hague requirement as to a declaration of war and the stipulations of the anti-war pacts not to resort to armed force would not make hostilities any the less a war. It might be an illegal war in origin but it might be carried on according to the international laws of warfare and be recognized by belligerents and neutrals alike as a public war. Bootleg liquor is liquor nevertheless. As hostile acts by one nation may be considered as war-like or not by the recipient, it would seem that the attitude of the latter might determine the result. Here China is opposing force with force and is contesting by military measures the right of Japan to invade her territory and to enforce her demands. It would seem these acts indicate the intention of China not to submit and the intention of Japan to insist on submission. Indeed, Japan now claims the fruits of conquest.⁸ Says the United States Supreme Court with reference to the hostilities between the United States and France, "Every contention by force between two nations in external matters under the authority of their respective governments is not only war but public war."⁹ And again the same court says, "War has been defined to be 'that state in which a nation prosecutes its right by force'."¹⁰ The courts and the writers pretty well agree that the fact of actual hostilities is the essential element necessary to constitute a state of war. Pitt Cobbett writes, "War is a question of fact and once it exists in fact then all its legal incidents will attach irrespective of the legality of its commencement."¹¹

If war exists, is Japan's position in China that of a military occupant, entitled to the rights and privileges thereof in the territory within her positive control?

The Hague Convention of 1899, in force between China, Japan and the other Treaty Powers, provides that "Territory is considered occupied when it is actually placed under the authority of the hostile army." Occupation then is a question of fact and follows the army. The convention goes on to state that "the authority of the legitimate power having actually passed into the hands of the occupant," he shall have certain rights and obligations. In general these obligations include, among other things, respect for personal and property rights, the preservation of order and safety, the prevention of pillage, the protection of the property of institutions dedicated to religion, charity, education, art and science, subject of course to the necessities of war.

⁸ According to an Associated Press despatch from Tokio, March 22, 1938, Premier Konoye told the Diet, "I can tell you we will never give up an inch of the areas already occupied. We must do our utmost to develop industry and the economic condition of the occupied areas, paralleling this work with cultural efforts."

⁹ *Bas v. Tingy* (1800), 4 Dallas 34, 40.

¹⁰ *The Prize Cases* (1862), 2 Black 635.

¹¹ Cobbett, *Leading Cases on International Law*, Vol. II, p. 10.

According to certain precedents, it seems that a military occupant has a right to exercise the fullest measure of control in the territory under his hand and that the inhabitants who remain owe a temporary allegiance and are bound to submit to his will.¹² In the case of Castine it was held that the sovereignty of the United States was temporarily suspended and substituted by that of Great Britain and that the laws of the United States could not be enforced there and were not obligatory on the inhabitants. While private rights of individuals with respect to each other are generally allowed to continue unmolested by the invader subject to military necessities, the relations of individuals to the government, which is now the military occupant, are modified where necessary. Foreign consuls are subject to the regulations of the invader, but, as the occupant is governed by international law, he must treat diplomatic agents of third Powers accordingly.

In this view, what becomes of the treaty rights of third Powers in the territory of occupation—for example, the rights of Americans, American institutions and American vessels in China? Can alien residents claim from the occupant the same rights and privileges that they claim from the legitimate government? Can consular courts of the United States continue to function? Do treaty tariffs and trade privileges continue? Do treaty rights of navigation subsist? It would seem in principle, on the theory that the military occupant is supreme, that they do not, without his consent and approval, particularly the rights as to residence, travel, trade, tariffs, and the like. It is true that certain other treaty rights, such as extraterritoriality, may be claimed on the ground that they are derived from a special grant of a portion of the sovereignty of China and that therefore the military occupant takes subject to them. But it is doubtful whether he can be thus circumscribed by prior contracts. The precedents on this point are few and not very clear. In the case of the military occupation of Madagascar by the French in 1883 it appears that consular jurisdiction was superseded, but in the case of the military occupation of Samoa in 1889 by Germany, consular jurisdiction was permitted to continue perhaps as a matter of grace. In a later case in Madagascar in 1895 the jurisdiction of the French authorities under martial law was apparently admitted.¹³ In the case of the German deserters from the French Army in Morocco, the Hague Arbitration Court appeared to hold that the jurisdiction of the military occupant had the preference over that of the consul clothed with extraterritorial jurisdiction.¹⁴

This situation may be assimilated to that of the so-called leased areas in China where the lessee exercises jurisdiction but the titular sovereignty remains in China. In such cases the precedents indicate uniformly that consular courts cannot function and that even the ordinary consular

¹² Moore, *Digest of International Law*, Secs. 21–22, 1143–55; Spaight, *War Rights on Land*, p. 320 ff.

¹³ Moore, *op. cit.*, II, pp. 204, 644.

¹⁴ *Scott's Hague Court Reports*, p. 110.

privileges cannot be exercised without an exequatur from the lessee government.

On the other hand, if the rights of navigation on the inland rivers are rights *in rem*, like servitudes or easements, derived from grants of the legitimate sovereign, then such rights may perhaps follow the territory and become a limitation on the fee in the hands of the military occupant.¹⁵

If the present adventure in China is not a war, the responsibilities of Japan will be quite different and they may well be sufficient to impel her ultimately to admit (if she has not already done so) that this affair with China is and has been from the beginning a public war, albeit by Japanese logic a "peaceful" war.

L. H. WOOLSEY

THE ROBINSON CASE

Mr. Adolph Arnold Rubens, not known to be an American citizen, obtained an American passport for himself and one for his wife, Mrs. Ruth Marie Rubens. He also obtained in New York two other fraudulent passports issued in the names of two deceased children, Donald Louis Robinson and Ruth Norma Robinson.¹ By using the Rubens passports the couple proceeded to France and later entered Russia early in November by means of the fraudulent Robinson passports for which an authentic Soviet visa had been obtained. At Moscow they established themselves at a hotel two doors from the American Embassy, but did not visit the Embassy. When Mr. Rubens disappeared and the matter was brought to the attention of the Embassy officials, they made a call on Mrs. Rubens, known as Mrs. Robinson, late in the afternoon, to see if they could assist her in her distress. When they returned the following day to complete the investigation they found that Mrs. Rubens, alias Robinson, had also disappeared. Whereupon a request for information was made to the Soviet authorities. While the Embassy awaited a reply to its request, the Department of State, as a result of its investigation, learned that the Robinson passports were fraudulent and so informed the Soviet authorities. On January 21, the American Chargé d'Affaires at Moscow, Mr. Loy W. Henderson, was informed over the telephone by a member of the Foreign Office that he had been instructed to inform Mr. Henderson as follows:

(a) The woman in question entered the country in possession of a passport in the name of Ruth Norma Robinson; (b) her Soviet visa was valid; (c) the internal authorities state that it would be inconvenient for the Embassy to visit her in prison until after their investigation of her had been completed. He added that the internal authorities permit the representatives of no foreign country to visit their nationals in prison

¹⁵ Magoon's Reports, pp. 328-331.

¹ Press Releases, U. S. Dept. of State, Dec. 18, 1937, p. 472; Jan. 22, 1938, p. 133; Jan. 29, 1938, p. 173; Feb. 12, 1938, p. 260; New York Times, Dec. 30, 1937; Dec. 31, 1937; Jan. 23, 1938; Jan. 26, 1938; Feb. 11, 1938.