Sovereignty and the Laws of War: International Consequences of Japan's 1905 Victory over Russia

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The Russo–Japanese War (1904–1905), recently commemorated with several international conference volumes, is identified by a majority of contributors as the first modern, global war. In making such a judgment, these scholars note its scale, its nationalism, its colonialism and geopolitical repercussions.[1] What is surprising, however, is that no one has remarked

1. *The Impact of the Russo-Japanese War*, ed. Rotem Kowner (London: Routledge, 2007); *Kenshō: Nichi-Ro sensō*, ed. Yomiuri shinbunsha shuzaidan (Tokyo: Chūōkōron shinsha, 2005); *Nichi-Ro sensō*, ed. Gunji shigakkai (Tokyo: Kinseisha, 2004–2005), vol. 1, *Kokusaiteki bunmyaku* [pub. as *Gunji shigaku* 40. 2–3 (2004)] and vol. 2, *Tatakai no shosō to isan* [pub. as *Gunji shigaku* 41.1–2 (2005)]; *Rethinking the Russo-Japanese War, 1904–05*, vol. 1, Rotem Kowner, ed., *Critical Perspectives*, and vol. 2, John W. M. Chapman and Inaba Chiharu, eds., *The Nichinan Papers* (Folkstone, Kent: Global Oriental, 2007); *Der Russisch-Japanische Krieg (1904/05)*, ed. Josef Kreiner (Göttingen: V&R Unipress; Bonn: Bonn University Press, 2005); *Der Russisch-Japanische Krieg, 1904/05: Anbruch einer Neuen Zeit?*, ed. Maik Hendrik Sprotte, Wolfgang Seifert, and Heinz-Dietrich Löwe (Wiesbaden: Harrasowitz, 2007); *Der Russisch-Japanische Krieg 1904/05 im Spiegel deutscher Bilderbogen/Yōroppa kara mita Nichi-Ro sensō: Hangashinbun, ehagaki, nishikie*, ed. Inaba Chiharu and Sven Saaler (Tokyo: Deutsches Institut für Japanstudien, 2005); *The Russo-Japanese War in Cultural Perspective, 1904–05*, ed. David Wells and Sandra Wilson (Basingstoke: Macmillan; N.Y.: St. Martin's,

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on another significance: it was the first war in which both belligerents pledged to adhere to the international laws of war. In that regard, the Russo–Japanese War marks a culmination of the tireless international diplomacy to secure legal limitations on warfare in the nineteenth century. In 1904, both Russia and Japan justified their operations according to international law, for the benefit of an international audience who had five years earlier celebrated some progress with the signing of The Hague Conventions in 1899.[2]

But more was at stake, because the Russo–Japanese War marked Japan's recovery of its sovereignty. The family of nations had certified in principle Japan's civilized status and sovereign equality in 1894. Japan's subsequent mastery of the laws of war, however, was proof that Japan could articulate its sovereignty with the full approval of its allies and the grudging respect of its enemies. Its ultimatum to Russia—that Japan would "take independent action" in Manchuria and Korea to protect Japanese rights and interests—was a legitimate assertion of Japanese sovereignty in defense of state interests. This article argues that admittance to the family of nations legitimized state will.

At the same time, Japan's victorious prosecution of the war demonstrated the complicity between international law and wars of aggression. Japan took advantage of the fact that state will had become normalized through collective attempts to integrate it into international law. In the absence of rules, a state was largely free to pursue its will, and Japan's aggressive assertion of sovereignty forced the family of nations to reexamine several issues at the Second Hague Peace Conference in 1907. Japan's commencement of the war, for example, persuaded international delegates to advocate a declaration of war prior to hostilities; and key violations of neutrality in the course of the war necessitated a review of the rights and duties of neutral powers. In fact, the Russo–Japanese War

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1999); *The Russo-Japanese War in Global Perspective: World War Zero*, vol. 1, ed. John W. Steinberg, Bruce W. Menning, David Schimmelpenninck van der Oye, David Wolff, and Shinji Yokote (Leiden: Brill, 2005) and vol. 2, ed. David Wolff, Steven G. Marks, and Bruce W. Menning (Leiden: Brill, 2007); and *The Treaty of Portsmouth and its Legacies*, ed. Steven Ericson and Allen Hockley (Hanover: Dartmouth College Press, 2008). See the review articles by Katō Yōko, "What Caused the Russo-Japanese War—Korea or Manchuria?," *Social Science Japan Journal* 10 (1) (2007): 95–103; and Yokote Shinji, "Nichi-Ro sensō ni kansuru saikin no Ō-Bei no kenkyū," in *Nichi-Ro sensō*, ed. Gunji shigakkai, vol. 1, 277–91.

2. A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War* (Cambridge: Cambridge University Press, 1909), 43; and Amos S. Hershey, *The International Law and Diplomacy of the Russo-Japanese War* (N.Y.: Macmillan, 1906), 295.

was the point at which Japan acted as it pleased—not from any predisposition to arrogance or intimidation, but precisely because it was a member of the club. Japan behaved as Britain, the United States, or others of the great powers did, because Japan understood how to assert its sovereignty. At the same time, Japan was a full partner to the Hague proceedings and quite willing to curb state will in the interests of a collective rule of law. Japanese leaders had correctly perceived that equality in the family of nations meant that Japan could impose its will on its fellows—diplomatically through negotiation, legally through international conventions, and directly through warfare.

Hence, this article undertakes a new look at the linkages among international law, sovereignty, and imperialist warfare. Where historians of Japan have emphasized the Russo–Japanese War as a seminal event in Japan's "drive for great power status" and a "turning point" in Asian relations, this article extends their work to explain how Japan's assertion of sovereignty and international law both assisted Japan's victory in the war and molded the new peace arrangements negotiated at The Hague in 1907.[3] Where historians of international relations have detailed Japan's attainment of the "standard of civilization," this article explains how sovereignty and mastery of the laws of war invited a civilized Japan to engage in both the aggressive warfare and the colonialism typical of its civilized fellows. The Russo–Japanese War, for example, initiated Japan's colonial subordination of Korea.[4] But unlike scholarship on law and colonialism, or international law and imperialism, I do not examine Japan as a subject of western impositions or Japanese sovereignty as it was subordinated to a western system of international law.[5] Instead, this article examines the role

3. See Bert Edström, *Japan's Fight for Great Power Status in the Meiji Period* (Stockholm: Center for Pacific Asia Studies, 1989), 8f.; Akira Iriye, "Japan's Drive to Great Power Status," *Cambridge History of Japan*, vol. 5, *The Nineteenth Century* (Cambridge: Cambridge University Press, 1989), 768; T.G. Otte, "The Fragmenting of the Old World Order," in *The Impact of the Russo-Japanese War*, 91–108; Peter Duus, "If Japan Had Lost the War," in *The Impact of the Russo-Japanese War*, 47–58; and two articles by Rotem Kowner, "Between a Colonial Clash and World War Zero," and "The War as a Turning Point in Modern Japanese History," both in *The Impact of the Russo-Japanese War*, 1–25 and 25–46 respectively.

4. See Gerrit W.Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon, 1984); Hidemi Suginami, "Japan's Entry into International Society," in *The Expansion of International Society*, ed. Hedley Bull and Adam Watson (Oxford: Clarendon, 1984), 185–99; and the important critique of this interpretation by Shogo Suzuki, *Civilisation and Empire: China and Japan's Encounter with European International Society* (London: Routledge, 2009).

5. See, for example, Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton: Princeton University Press, 2000); and Antony Anghie, *Imperialism,*

of international law "in history," to argue that Japan's very success at achieving parity with the west—Japan's victory in 1905—improves our understanding of how sovereignty, international law, and state alliances combined to legitimize aggressive warfare at the start of the twentieth century.[6]

The Russo–Japanese War and the Second Hague Peace Conference represent Japan's debut as a world power, soon ratified with Japan's participation in the Versailles Peace Conference and Japan's permanent membership on the Council of the League of Nations.[7] Yet Japan's success at demonstrating its status as a sovereign state was an ambivalent success: the international powers and their norms of state sovereignty encouraged Japan both as a valuable partner in the continued coordination of international order and, increasingly, as a colonial power in competition with Germany, Britain, and the United States in east Asia. Japan had mastered both the rules and how to play by them.

I. Sovereignty and International Law

Sovereignty, in the context of interstate relations in the nineteenth century, was understood to be an attribute of states, but was grounded in two different venues for the state. In the first place, state sovereignty was defined in terms of civilized status, which was determined by the family of nations responsible for international law. This "family of nations" was that group of western and self-appointed guardians of the international club who promoted both the common set of values and the community organized by the principles of international law. They accordingly denied to China, Japan, and all other subordinated or colonized peoples in Africa, Asia, and the Americas the sovereignty that accorded with this status as a civilized state. Only civilized statehood could earn a state the international recognition of its sovereignty, and civilized status depended upon the adoption of western-style constitutions and codes of law that granted to western sojourners in those foreign lands the same legal protections westerners could expect in their own lands. Because Japan had

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Sovereignty, and the Making of International Law (Cambridge: Cambridge University Press 2004).

6. See the recent review of approaches by Matt Craven, "Introduction: International Law and Its Histories," in *Time, History and International Law*, ed. Matthew C. R. Craven, M. Fitzmaurice, and Maria Vogiatzi (Leiden: Nijhoff, 2007), 1–25.

7. See Thomas W. Burkman, *Japan and the League of Nations* (Honolulu: University of Hawai'i Press, 2008).

established a constitutional government and revised its criminal and civil legal codes in the 1890s, it received the recognition of the western powers as a civilized state and, accordingly, was qualified for treatment as a sovereign equal in the family of states.

But at the same time, state sovereignty was defined by state will. Peoples had leaders and communities acted as one, and however primitive or civilized a state might be, it exerted its sovereignty insofar as it exerted its will to defend itself in an often hostile world. Such sovereignty was most often articulated as "self-defense," "state survival," "self-protection" or "necessity." If positive international law in the nineteenth century sought to supplant this older venue of state sovereignty with the civilized and progressive form praised by the international community, international law was nonetheless forced to recognize this sovereignty of state will. This was because the western powers had created international law hand-in-hand with the conquest of foreign lands and peoples, the violence of privateers upon European commerce and other such violations of innocent bystanders, and they had thereby produced the international state of nature in which state will was a necessary and legitimate venue for self-defense and state survival. In fact, as Antony Anghie, Anthony Carty, and others have argued, state will informed international law with the European conquest of peoples in the Americas; and this precedent in turn informed the European contacts with Japan that produced the unequal treaties of the 1850s and 1860s.[8]

There were, of course, other meanings of sovereignty in the nineteenth century, which saw the expansion of connections among sovereignty and peoples, races, and nations. But we will leave those meanings aside for now, in order to focus on the international law of the Russo–Japanese War. In the nineteenth century, as today, state sovereignty had a location—it was grounded in a territory—but state practices of sovereignty had no location. They were played out in several arenas, most violently and conclusively in warfare. The important point is that the concept of sovereignty was what William E. Connolly would call "contested" or what Michel Foucault would call a point of "diffraction," for it included venues that are both equivalent and antagonistic.[9] Sovereignty, as both civilized statehood and state will, informed the international law of the

8. Anthony Carty, *Philosophy of International Law* (Edinburgh: Edinburgh University Press, 2007), ch. 4; and Anghie, *Imperialism, Sovereignty, and the Making of International Law*, ch. 2.

9. William E. Connolly, *The Terms of Political Discourse*, 2nd ed. (Princeton: Princeton University Press, 1983); and Michel Foucault, *The Archaeology of Knowledge*, trans. A. M. Sheridan Smith (London: Tavistock: 1972), 65f.

nineteenth century, and these remained two meanings and practices that had accrued over time yet remained in conflict with each other.

State will posed an absolute limit to adherence to international law. As Immanuel Kant had argued in 1795, and as John Austin had argued in the 1830s—albeit for different reasons– international law could not be law because there was no authority in a position to punish lawbreakers. States are their own highest authorities, and the practice of state will repeatedly trumps international law.[10] An international convention such as those signed at The Hague in 1899, incorporated and protected the principle of state will when each state was allowed to place a formal reservation upon one or another article that it declined to support. For example, the action of Germany, Britain, Turkey, and the United States, in making a joint reservation against Article 10 of Hague Convention III of 1899, successfully struck it from the final treaty. Accordingly, the shipwrecked, sick, or wounded of one of the belligerents were—contrary to the original agreement—not to be barred from taking part in military operations anew.[11]

At the same time, two factors affected the relationship between international law and sovereignty during the Russo–Japanese War: military necessity and political considerations. International legality in a variety of adversarial situations, from Chinese and Korean neutrality to contraband found on neutral vessels, ran up against "military necessity." The latter, an expression of the sovereignty of state will, undercut the sovereignty of civilized statehood. After 1915, with the German violation of Belgian neutrality that arguably ignited the Great War, Germans would be blamed for their doctrine of *Kriegsraison* or "necessity of war" and held responsible for the general claim of "military necessity." But it has much earlier antecedents: the concept of *ius necessitatis*, the individual's right under natural law of self-defense for self-preservation, was extended by Grotius and Pufendorf to justify the state's seizure of another's property for its self-preservation. In the nineteenth century, self-defense was joined by similar justifications—rescuing nationals in peril, hot pursuit, and punitive expeditions. As we shall see, international legal authorities produced several vindications for Japanese military operations in what was officially neutral Chinese or Korean territory. In the Chemulpo and Chefoo

10. Immanuel Kant, "Perpetual Peace," in *Political Writings*, ed. H.A. Reiss, 2nd ed. (Cambridge: Cambridge University Press, 1991), 102–5; and John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge: Cambridge University Press, 1995), 123–25, 171, 175f.

11. William Isaac Hull, *The Two Hague Conferences and their Contributions to International Law* (Boston: Ginn & Co., 1908), 119–24; and James Brown Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907*, 3d. ed. (N.Y.: Oxford University Press, 1918), 171, 179.

incidents, discussed subsequently in this article, military necessity was said to overrule international agreements that specified procedures for managing belligerent vessels in neutral ports.[12]

Where Pufendorf and others, in an earlier age informed by natural law, argued that necessity granted a right to commit acts otherwise forbidden by law, advocates of positive international law in the nineteenth century urged that the purpose of law was to eliminate necessity. As Lassa Oppenheim argued in 1906, necessity was at best a legal defense in response to a subsequent claim; it could not be a right because there was no corresponding duty on the part of the affected state to submit to the aggressor's measures. Hence, law would be relaxed or strengthened in order to contain necessity. Advocates of positive law saw that The Hague Conventions had encouraged the expectation that circumstances of necessity would be made the subject of definite regulation by the rules of international law. As international law matured and developed institutions of centralized authority, self-preservation and other claims of necessity would be foreclosed by a network of legal duties among states who agreed to be answerable to that higher authority.[13]

At several points during the Russo–Japanese War, these two grounds for Japanese sovereignty—state will and civilized statehood—gave rise to international disputes in which a second factor, politics, guided the interpretation of international law. Although all of the states involved in the war shared equal claims to civilized statehood—except China and Korea—alliances such as those between Britain and Japan, and France and Russia, compromised the non-belligerents' official claims of neutrality and, at the same time, reinforced the belligerents' claims of state will or military necessity. Such political considerations figure in this article, especially in relation to breaches of neutrality. As I will recount, Japanese violations of Korean territory in the Chemulpo incident and Chinese territory in the Chefoo incident invited intense debate among the powers, but solutions were not attempted until the Second Hague

12. John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), 238–44; Coleman Phillipson, *International Law and the Great War* (London: Fisher Unwin, 1915), 27–38; Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005), 239–41; Hugo Grotius, *De Jure Belli ac Paci Libri Tres*, trans. Francis W. Kelsey (Oxford: Clarendon, 1925), 599f.; and Samuel Pufendorf, *Of the Law of Nature and Nations*, trans. Carew (London, 1729; repr. Clark, N.J.: Lawbook Exchange, 2005), 202–12.

13. Lassa Oppenheim, *International Law: A Treatise*, 3rd. ed. (London: Longmans, Green and Co., 1920) 1:214–21; Burleigh Cushing Rodick, *The Doctrine of Necessity in International Law* (N.Y.: Columbia University Press, 1928), 1–25, 47, 119; and D.W. Bowett, *Self-Defense in International Law* (N.Y.: Praeger, 1958), 3–10. Westlake insinuated this point as early as 1894; see *Chapters on the Principles of International Law*, 266.

Conference in 1907. Japan proceeded to absorb Korea—as ally, then protectorate, and finally colony—with the diplomatic support of Britain and the United States and the indifference of the other powers. Likewise, Japan's alliance with Britain was brought to bear heavily on the matter of France allowing Russia's Baltic fleet to refuel at French ports around the globe, as the fleet made its way to the eastern theater of war. The joint pressure of Japan and Britain forced France to reconsider its neutrality policy. In other words, international law and customs of war were supported, ignored, or modified by the political interests of states who refrained from criticizing a belligerent's manifestations of state will. Their collective self-interest served to mediate international law and state will.

Because the two venues for sovereignty remain equivalent in descriptions of state sovereignty, they animated discussions of the legality of military operations and remain problematic in international relations still today. This article analyzes two types of outcomes. First were those in which Japan's state will prompted action on the part of the international community and produced new international agreements. The main examples here are the matter of whether or not declarations of war must precede hostilities, the freedom of neutral warships to rescue the shipwrecked and wounded combatants of any belligerent, and limitations on a belligerent's right to rest and refuel in neutral ports. The second type of outcome was that in which state will was left undisturbed, including Japanese violations of Chinese and Korean territory and Japan's absorption of neutral Korea. In nearly all of these matters, Japanese sovereignty prevailed and its provocations forced the international community to make changes. That Japan welcomed and fully supported these changes indicates that collective procedures for rectifying such problems of warfare through international law were largely successful.

II. International Publicists and Civilized Statehood

By the time of the Russo–Japanese War, over a decade of public testimony had supported Japan's place among the civilized nations. Two groups of experts were largely responsible for this favorable public opinion. One was the diplomatic corps and their legal counsel, whose confident presentation of Japan's development by 1894 had secured the decision to revise all treaties with Japan. In Britain, for example, the main source of legal advice for diplomatic personnel was the Law Officers of the Crown; in Japan, the Foreign Ministry had its own legal advisors. But their work was supplemented by another group of experts known in the nineteenth

century as "publicists". They sponsored and publicized discussions of international law and its bearing upon international events.

The primary group of publicists were practicing lawyers or university professors with a specialty in international law—a novelty in the nineteenth century. Unlike the expert or lobbyist of today, who comments on warfare or the Geneva Conventions because of a close relationship to the world of diplomacy and international relations, these legal publicists were usually acting in an unofficial capacity out of a shared interest in promoting international law, because they saw it as a rising star of hope that might well reduce the suffering produced by war. The two major organizations in which such publicists gathered were the International Law Association (ILA), which examined longstanding issues and discussed how international law might be used to ameliorate such issues, and the Institut de Droit International (IDI), which formally crafted on behalf of state governments the legal language for international treaties and conventions. Some publicists, like Takahashi Sakue in Japan or T. J. Lawrence in Britain, had served their respective states in some official capacity—Takahashi as legal advisor to the Japanese Navy during the war and Lawrence as a lecturer at the Royal Naval College. But their public pronouncements on the international legality of one or another state's conduct were made unofficially, as private citizens after the period of government service. Indeed, the majority of publicists had no ties to state service and prided themselves, for that reason, on their independence of action and objectivity of judgment. The ILA and the IDI did not take sides. Their collective purpose was the codification and expansion of the rule of law in international matters—particularly warfare.

As Martti Koskenniemi reminds us, these men were not pacifists opposed to war. They were "centrists," committed to the liberal reformism that grew in opposition to constitutional monarchy after the failures of the 1848 revolutions and, at the same time, to a moderate nationalism that accepted the legitimacy of warfare and imperialism. Their goal was to use law both to reform society and to impose humanitarian limits on warfare, a dual project that depended upon the cultivation of conscience and reason among citizens. Ideally, this cultivation would find its expression in a public opinion that could exert force upon states and thus advance civilization among the family of nations.[14] But unjust aggression on the part of one state rightfully deserved a strong response on the part of the victim.

14. Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), ch. 1. See also Michael Lobban, "English Approaches to International Law in the Nineteenth Century," in *Time, History and International Law*, ed. Craven et al., 65–90.

Takahashi, for example, was unapologetically a warmonger in the years leading up to the Russo–Japanese War; he felt that Russia's refusal to honor the agreement to withdraw its troops from Manchuria made a necessity of Japanese action against Russia. In addition to his activities as a professor of international law, Takahashi drafted the celebrated 1903 memo of a group of law professors who urged the government to declare war on Russia, not only to defend Japan's interests in Manchuria but also, as Katō Yōko has recently argued, to support the "open door" policy in China which the United States had advocated and to which Japan, Britain, and other states had agreed.[15]

During the Russo–Japanese War, the interests of Japan were represented by two specific groups of publicists. One was a group of Japanese who wrote in English-language publications in the United States and Britain and undertook to persuade Americans and English of the rightness of Japan's cause. Their activity was a novel development for Japan, and was certainly an effect of both the advent of a mature press in European and American societies, who were eager for news of the war, as well as of the sophistication of the Japanese government, which had learned that it could directly purchase favorable press from willing journalists and editors.[16] This group of publicists included both current and former Japanese diplomats and government officials, as well as scholars, students, and citizens living abroad, all of whom attempted to influence public opinion overseas. Among them were celebrated individuals such as Kaneko Kentarō, friend of Theodore Roosevelt who visited the United States during the war and gave many public lectures and wrote articles in prominent journals; another was Suematsu Kenchō, a former diplomat who did the same in England and whose public pronouncements were gathered into the volume *The Risen Sun* (1905). But there were many more Japanese individuals who wrote on behalf of Japan—Japanese Minister to the United States Takahira Kogorō, University of Chicago lecturer

15. Katō Yōko, *Sensō no ronri: Nichi-Ro sensō kara taiheiyō sensō made* (Tokyo: Keisō shobō, 2005), 34–75; this has been abridged in translation as "Japan Justifies War by the 'Open Door': 1903 as Turning Point," in *The Russo-Japanese War in Global Perspective: World War Zero*, vol. 2: 205–24. See also Shumpei Okamoto, *The Japanese Oligarchy and the Russo-Japanese War* (N.Y.: Columbia University Press, 1970), 63–67.

16. Robert B. Valliant, "The Selling of Japan: Japanese Manipulation of Western Opinion, 1900–1905," *Monumenta Nipponica* 29 (4)(1974): 415–38; Yomiuri shinbunsha shuzaidan, ed., *Kenshō: Nichi-Ro sensō*,161–71; and Douglas Howland, "The Sinking of the *S.S. Kowshing*: International Law, Diplomacy, and the Sino-Japanese War," *Modern Asian Studies* 42 (4) (2008): 678.

Ienaga Toyokichi, Columbia University Ph.D. candidate Hishida Seiji, and others.[17]

Much of their effort amounted to advocacy—today it would be deemed "propaganda." Kaneko and Takahira emphasized that Japan's interests were identical to those of the United States and Britain; in addition to the Anglo–Japanese Alliance signed in 1902, all three powers supported the principle of free trade and the American "open door" policy in China. Russia more than any other state represented a threat to this tenet of the civilized world, and Japan was willing to take measures to keep Russia in check. Kaneko sought to diffuse western worries about a "Yellow Peril" and emphasized Japan's commitment to modern civilization. He and Takahira anticipated Japanese cooperation with the United States in the Philippines, because Japan aspired to expand western civilization to Asia and would need to assume its responsibilities as a world power.[18]

Far more significant was the work of a second group of publicists: Japan's legal experts in France, who crafted careful arguments to explain Japanese actions in terms of international law, and for a European legal audience. The two most prominent individuals were Sugimura Yōtarō, a brilliant candidate for the doctorate of law at the University of Lyons, and Nagaoka Harukazu, who held a law degree from the University of Paris and served as an attaché to the Japanese legation in Paris. Both of them wrote arguments which were key to the international reception of Japan's opening of hostilities without a declaration of war and which,

17. See Kajima Morinosuke, *Nichi-Ro sensō* [= *Nihon gaikōshi*, vol. 7] (Tokyo: Kajima kenkyūjo shuppankai, 1970), 120–27; Yomiuri shinbunsha shuzaidan, ed., *Kenshō: Nichi-Ro sensō*, 24–28; Matsumura Masayoshi, *Nichi-Ro sensō to Kaneko Kentarō: kōhō gaikō no kenkyū*, rev. and enlarged ed. (Tokyo: Shin'yūdō, 1987), 13–15, 40, 110f., 140f., 491; Matsumura Masayoshi, "Yōroppa ni okeru 'kōhō dantō daishi' toshite no Suematsu Kenchō," in *Nichi-Ro sensō*, ed. Gunji shigakkai, vol. 1: 125–40; Ian Nish, "Suematsu Kencho: International Envoy to Wartime Europe," *International Studies Discussion Papers* (STICERD, London School of Economic and Political Science) May 2005: 12–24; Valliant, "The Selling of Japan," 422–29; John Albert White, *The Diplomacy of the Russo-Japanese War* (Princeton: Princeton University Press, 1964), 156–63; and Suematsu Kenchō, *The Risen Sun* (London: Archibald Constable & Co., 1905), vii–ix.

18. Kentaro Kaneko, "The Far East After the War," *The World's Work* 9 (February 1905): 5868–71; Kentaro Kaneko, "The Yellow Peril is the Golden Opportunity for Japan," *North American Review* 179 (November 1904): 641–48; and Kogoro Takahira, "Why Japan Resists Russia," *North American Review* 178 (March 1904): 321–27. See also Toyokichi Ienaga, "Japan's Claims Against Russia," *The Independent* 56 (Feb. 11, 1904): 303–4; Jihei Hashiguchi, "Japan's Fitness for a Long Struggle," *The World's Work* 9 (2) (November 1904): 5526–31; and Shigenobu Okuma, "Japanese Problems," *North American Review* 180 (February 1905): 161–65.

as noted earlier, prompted a discussion of the issue at the Second Hague Conference. A third important individual was Nagaoka's superior, Motono Ichirō, the Japanese minister in Paris, who was the most respected Japanese diplomat in Europe, and who was familiar to the diplomatic and legal communities for his prominent participation at the First Hague Peace Conference in 1899 and his induction into the IDI as an associate member in September 1904. Motono, with the support of Nagaoka, supervised the international legality of war operations, for he was in constant contact with Japan's representatives in other European capitals. His position in Paris gave him access to Russian authorities in St. Petersburg, and his proximity to London and Japan's ambassador there, Hayashi Tadasu, afforded quick communication with Japan's chief ally, Britain. These connections supported Japan's most successful diplomatic manifestation of state will during the war: the attack on French support of Russia's Baltic Fleet.

It remains striking that the English-language publicists were largely advocates, whereas those writing in French were more serious scholars of law. One explanation is that, given the support of Britain and the United States during the war, and given Japan's reliance on Anglo–American interpretations of international law, Japan was obliged to concentrate its legal expertise on appeals to the continental powers who may have supported Russia and objected to Japanese practices. But as Patrick Beillevaire has argued, France was not so united in its support of Russia and opposition to Japan as is commonly assumed; accordingly, the Japanese were not under such pressure to persuade the French of the rightness of Japan's cause.[19] So the concentration of Japan's best legal arguments for the international community in French more likely reflects the fact that the best Japanese students went to France to study law and chose to write in French for a larger European audience. Ariga Nagao, for example, who was the foremost Japanese scholar of international law at the time, had served as legal advisor to the Japanese army during the Sino–Japanese War and again during the Russo–Japanese War. He had studied international law in Germany and Austria early in his career, but then pursued further legal studies in Paris in 1895. As a result, Ariga published the definitive works on international law in both the Sino–Japanese and Russo–Japanese Wars, in Japanese and French editions. He was also a founder of the Japanese Red Cross and wrote a widely read work in English on the role of that organization in the Russo–Japanese War.[20]

19. Patrick Beillevaire, "The Impact of the War on the French Political Scene," in *The Impact of the Russo-Japanese War*, ed. Kowner, 124–36.

20. See Matsushita Sachiko, "Nichi-Ro sensō ni okeru kokusaihō no hasshin: Ariga Nagao o kiten to shite," in *Nichi-Ro sensō*, ed. Gunji shigakkai, vol. 1,195–210; Ichimata Masao,

III. The Conflict over Declarations of War

1. The Outbreak of Hostilities and State Will

In spite of the support for Japan's civilized status, the outbreak of hostilities in February 1904 was controversial. Although many wars in previous decades had erupted without declarations, the Russo–Japanese War captured the public's attention for several reasons. The exotic ferocity of "war in the east" encouraged tremendous journalistic coverage of the war. As the newest member of the civilized community and a noted participant at The Hague Conference in 1899, Japan was viewed with optimism among publicists and public opinion, and this now seemed challenged by the war. But perhaps the most important reason was the vigor of Russia's international protest: it demanded a hearing. Given all of the effort dedicated to reiterating Japan's status as a civilized state during the months leading up to and through the start of the Russo–Japanese War, it is striking that the war began in much the same manner as the Sino–Japanese War had a decade earlier, with a similar international response: the Japanese had precipitated hostilities by means of a surprise attack, without a declaration of war and therefore without regard for the international community. Which party had the support of the law—Russia or Japan?[21]

The facts of the case are relatively clear. Japan had grown increasingly exasperated with Russia's tardy inconclusiveness in responding to Japanese proposals for negotiations over the disposition of Russian forces in Manchuria, and with Russia's growing interests in Korea—among other things, Russia had purchased mining and timber rights. Russia had, after all, agreed at the end of the Boxer war in 1901 to remove its troops from Manchuria but then, under what many considered the pretext of a separate declaration of war upon China, had insisted that it was fighting a new war with China that necessitated the continued occupation of sections of Manchuria by Russian troops. On February 5, 1904, Japanese Prime Minister Katsura Tarō instructed Foreign Minister Komura Jūtarō to notify the Russian government that Japan was formally breaking diplomatic relations and intended to remove its ambassador from St. Petersburg.

Nihon no kokusaihōgaku o kizuita hitobito (Tokyo: Nihon kokusai mondai kenkyūjo, 1973), 67–80; and Ariga Nagao, *The Japanese Red Cross Society and the Russo-Japanese War: A Report* (London: Bradbury, Agnew, & Co., 1907).

21. Kaneko Kentarō recollected explaining to news reporters in the United States that a declaration of war was not required by international law, in *Nichi-Ro sen'eki hiroku* (Tokyo: Hakubunkan, 1929), 50. See also Douglas Howland, "Japan's Civilized War: International Law as Diplomacy in the Sino-Japanese War (1894–1895)," *Journal of the History of International Law* 9 (2) (2007): 179–201.

Komura accordingly sent two notes to Minister Kurino Shin'ichirō in St. Petersburg on February 5, which were delivered to Russian Foreign Minister Lamsdorff on the afternoon of February 6. The first announced that the Japanese government was terminating negotiations and reserved the right "to take such independent action as they may deem necessary to defend our position menaced by Russia and to protect our rights and interests"; the second announced that the Japanese government was breaking off diplomatic relations with Russia and that Minister Kurino would be leaving St. Petersburg (which he did on February 10).[22]

Was this an ultimatum and implicitly a declaration of war? Japan and its allies would argue that it was; Russia and its allies would argue that it was not. In any case, the notes were unquestionably a legitimate manifestation of Japan's state will, and a majority of the powers recognized the first note as a just expression of Japan's sovereign right, because many among the powers understood that Russia was interfering with Japan's interests in Korea and with everyone's interests in China's Manchuria. Moreover, a majority of the powers believed that Russia was behaving obstructively and that Japan had only one remaining course of action—to proceed with war. In the sober judgment of Francis Rey at the University of Paris, based upon his systematic analysis of all the Japanese and Russian charges and countercharges, Japan's actions had been regrettable but entirely legitimate.[23]

At this point, however, the facts have been muddled in the historical record. Historians typically overlook details that were central to the Japanese interpretation of events: on the morning of February 6, a Japanese squadron sailed from Sasebo naval base and, two hours later, commenced hostilities against Russia by capturing a Russian steamer, the *Ekaterinoslav*, in Korean coastal waters. The ship was eventually taken to the Japanese Prize Court in Sasebo, where it was condemned as prize of war. The important point, as Charles Leroux painstakingly reconstructed, is that this action occurred several hours *before* Lamsdorff in St. Petersburg received Kurino's two notes from Tokyo and therefore well before Russia was aware of Japan's decisions to break off negotiations

22. Kan'ichi Asakawa, *The Russo-Japanese Conflict: Its Causes and Issues* (1904; repr. Port Washington, N.Y.: Kennikat Press, 1970), 342–44; Nagaoka Harukazu, "La guerre Russo-Japonaise et le droit international," *Revue de droit international et de législation comparée*, 2nd series, vol. 6 (1904): 461–79; Suematsu, *The Risen Sun*, 64–70, 92–97; Teramoto Yasutoshi, *Nichi-ro sensō igo no Nihon gaikō* (Tokyo: Shinzansha, 1999), 15–30; and Gaimushō, *Nihon gaikō monjo*, repr. ed. (Tokyo: Nihon kokusai rengō kyōkai, 1950–63), vol. 51,1–4, 139–55. I abbreviate this last work as *NGM* herein.

23. Francis Rey, "Japon et Russie – guerre [Part 3]," *Révue générale de droit international public* 13 (1906): 612–27.

and formal diplomatic relations. Consistent with their interpretation of the laws of war, Japanese authorities subsequently declared that the departure of Japanese warships from Sasebo marked the official commencement of hostilities, so that the seizure of the *Ekaterinoslav* was a legitimate act that occurred after the official start of the war.[24] Questions of Korean neutrality, the vulnerability of merchant vessels, and the existence of a legal state of war depended for their satisfactory resolution upon this official version of the start of the war.

Nonetheless, a majority of historians erroneously state that the war began two nights later, on February 8, when the Japanese navy attacked the Russian fleet stationed in Port Arthur and damaged many vessels. As would be the case decades later at Pearl Harbor, the attack was not fully successful as a military operation but was quite controversial as to whether or not it constituted a surprise attack and whether or not such an attack substituted for a declaration of war. Two days after the attack, on February 10, the Japanese emperor issued a formal declaration of war against Russia, and on the same day, the Russian emperor publicized a manifesto that declared that he had ordered Russian armies to respond to Japan's challenge with force. On February 22, in a circular letter to the family of nations, Russia denounced the Japanese attack as an act of treachery and a violation of international law, in response to which Japan issued a pair of diplomatic notes explaining and justifying its actions.[25] Two debates dominated this public exchange. First was Russia's assertion of its purely peaceable intentions, which Japan refuted by pointing to Russian increases in naval and ground forces during the six months prior to February 1904. Second was the neutrality, independence, and integrity of Korea, which, Russia charged, had been violated by Japan. In its defense, Japan admitted that it had landed its troops in Korea "before the declaration of war was issued, but not before a state of war actually existed between Japan and Russia," and insisted that it had done so because one of its aims was to maintain the independence and integrity of Korea.[26] Other defenses of the invasion of Korea were subsequently offered, a point to which we

24. Charles Leroux, *Le droit international pendant la guerre maritime Russo-Japonaise* (Paris: Pedone, 1911), 3–12; Takahashi Sakue, *International Law Applied to the Russo-Japanese War* (London: Steven & Sons, 1908), 22–25; Ariga Nagao, *La guerre Russo-Japonaise au point de vue continental et le droit international* (Paris: Pedone, 1908), 30–32; and C.J.B. Hurst and F.E. Bray, *Russian and Japanese Prize Cases* (London: Her Majesty's Stationery Office, 1912–13), vol. 2:1–11.

25. Takahashi, *International Law Applied to the Russo-Japanese War*, 6–14. Note that the Russian emperor issued a second manifesto, similar in content to the first, on February 18,1904.

26. Ibid., 13; and *NGM*, vol. 51: 66–71; 77–80.

return. But Japan's initial explanations, of course, begged the question prompted by the course of events: When does a state of war begin—with a declaration of war or with a hostile act or with something else?

2. International Law and Declarations of War

Japan's night attack at Port Arthur galvanized the international community of publicists and legal experts, because many recalled the equally problematic start of the Sino–Japanese War in 1894.[27] Generally, the international legal discussion revolved around two sets of questions. First was the specific start of the Russo–Japanese War: did Japan's two diplomatic notes constitute a declaration of war and if not, what could be reasonably construed from them? Had Japan violated international law, and what was the international community to do in light of surprise attacks? Second was the more general issue of announcing hostilities: what were the specific effects of a manifesto, an ultimatum, and a declaration of war, particularly in relation to a conditional state of war, a de facto state of war, or a de jure state of war? And were these meaningful and legitimate distinctions? In addition to the many publicists writing on the matter, the Council of the IDI formed a committee to examine the opening of hostilities in September 1904 and eventually produced the IDI's resolution of 1906. This resolution was in turn taken up by the Second Hague Peace Conference in 1907 and incorporated in part into its Convention III.

French legal scholars were the most thorough of Japan's critics. Writing in 1907 and in preparation for the Second Hague Conference, Marius Maurel noted that the events of February 1904 drew the protests of international lawyers throughout Europe, because they judged that Japan had negated what a majority understood to be a generally accepted principle: the need for a formal declaration of war prior to the opening of hostilities. Moreover, they feared that Japan had jeopardized the progress achieved in the course of the nineteenth century, and that Japan's conduct threatened a return to natural law, or worse, outmoded tradition—the very principles that international law had sought to reform.[28] Both Maurel and Charles Leroux drew particular attention to the two Japanese diplomatic notes, the first warning Russia about its failure to negotiate and the second announcing the official rupture of diplomatic relations. Did either of these constitute an ultimatum or an implicit declaration of war? Maurel and Leroux insisted, no. Neither note performed the important function

27. Howland, "The Sinking of the *S.S. Kowshing*."

28. Marius Maurel, *De la déclaration de guerre* (Paris: Librairie générale de droit et de jurisprudence, 1907), 106; and A. Mérignhac, "Préface," in Maurel, xiii.

of notifying neutral powers of a war in northeast Asia and, as each side subsequently issued a formal declaration of warfare on February 10, neither note could be considered a Japanese declaration of war.[29] Even more reprehensible, to Leroux and to Frédéric de Martens, a leading Russian authority on international law, was the timing of the notes and the opening of hostilities on February 6. They concluded that Japan's conduct had been underhanded. Although both conceded that, historically, many wars in the previous two centuries had begun without formal declarations of war, they expressed their disappointment in Japan's provocation of an "unjust war" and its lapse as a civilized nation.[30] They concluded that Russia had been correct in denouncing the attack as an act of treachery and a violation of international law.

Japanese legal experts responded to this argument by protesting that the attack of February 8 had not been a surprise, nor had Japan violated international law. Nagaoka Harukazu, from the Japanese embassy in Paris, reiterated the historical argument that was repeated by every Japanese writer and Japan's supporters in Britain and the United States. The historical record demonstrates that most modern wars have begun without a formal declaration of war. There may well be an "English" custom, shared by the United States and Japan, such that a declaration of war is unnecessary, and a "continental" custom such that a formal declaration of war is preferred. But the facts show that only one war in the past century had begun with each belligerent issuing a formal declaration of war prior to hostilities—the Franco–Prussian War in 1870—and it was a prominent exception to common practice. In recent times, neither Japan nor Russia had issued formal declarations of war prior to the opening of hostilities, and therefore it could not be said that Japan had violated international law. Moreover, all argued, the attack of February 8 was neither unexpected nor a surprise. Japan had warned Russia repeatedly that it sought a satisfactory conclusion to negotiations; Russia had been building up its troops in

29. Maurel, *De la déclaration de guerre*, 290–93; and Leroux, *Le droit international*, 4–11. On problems created for neutral powers in the absence of a declaration of war, see Louis Féraud-Giraud, "De la neutralité," *Revue générale de droit international public* 2 (1895): 291–96.

30. Frédéric de Martens, "Les hostilités sans déclaration de guerre – à propos de la guerre Russo-Japonaise," *Revue générale de droit international public* 11 (1904), 148–50; and Leroux, *Le droit international*, 9f. See also Ernest Nys, "La guerre et la déclaration de guerre - quelques notes," *Revue de droit international et de législation comparée*, 2nd series vol. 7 (1905): 517–42. German jurists differed as to whether a declaration of war was necessary prior to the opening of hostilities; more typically "continental" was Emanuel von Ullmann, "Der Krieg in Ostasien und das Völkerrecht," *Die Woche* (Berlin) 6(8) (1904): 322–23; and more sympathetic to Japan was [Dr.] Siehl, "Der Angriff der Japaner gegen Russland im Lichte des Völkerrechts," *Deutsche Juristen-Zeitung* 9 (6) (1904): 281–85.

Manchuria and along the Korean border; and foreign legations in the area had been making preparations in case of war as early as January 1904. Accordingly, Nagaoka insisted, Russia should have taken the first Japanese note as an ultimatum: war was bound to follow.[31] Ariga Nagao, legal advisor to the Japanese army, outlined the official argument that the war had begun with the departure of the Japanese fleet from Sasebo on the morning of February 6. That fact reinforced the position that the attack which occurred two days later was no surprise.[32]

All publicists in the United States and Britain supported the Japanese position; so did postwar accounts by United States and British international lawyers. They first dismissed the claim of a surprise attack. In agreement with Nagaoka, many admitted that a formal rupture of diplomatic relations is a strong indication that military action will follow. To the dismay of IDI members, these United States and British writers argued that such a rupture constituted sufficient notification of war—as if all withdrawals of diplomats led to war![33] Meanwhile, Suematsu Kenchō disseminated the dubious "fact" that the Russian fleet had not been anchored in the harbor at Port Arthur on the night of February 8, but was in battle formation outside the harbor as if awaiting a Japanese action.[34] There was no surprise. Second, American and English publicists argued that a declaration of war was useless. Given the speed of modern communications and the open organization of modern societies, it would be impossible for a military unit to act in secret; accordingly, a declaration of war issued by telegraph, for example, might well precede a military action only by minutes. In keeping with this line of reasoning, the third argument for many publicists was that a declaration of war is simply unnecessary. Invoking the historical argument, they insisted that, to the degree that international law is based upon a description of the behavior of states, the preceding century

31. Nagaoka, "La guerre Russo-Japonaise et le droit international," 475–79; and Nagaoka Harukazu, "Étude sur la guerre Russo-Japonaise au point de vue du droit international," *Revue générale de droit international public* 12 (1905): 603–5. See also J.F. Maurice, *Hostilities without Declaration of War* (London: Her Majesty's Stationery Office, 1883).

32. Ariga, *La guerre Russo-Japonaise*, 23–32. Two recent analyses of military intelligence concur that the Russians were not likely surprised; see Bruce W. Menning, "Miscalculating One's Enemies: Russian Intelligence Prepares for War," and Aizawa Kiyoshi, "Differences Regarding Tōgō's Surprise Attack on Port Arthur," both in *The Russo-Japanese War in Global Perspective: World War Zero*, vol. 2, 45–80 and 81–104 respectively. For a variant of the latter, see Aizawa Kiyoshi, "Kishū dankō ka iryoku teisatsu ka? – Ryojunkō kishū sakusen o meguru tairitsu," in *Nichi-Ro sensō*, ed. Gunji shigakkai, vol. 2, 68–83.

33. "Commencement de la guerre au XXe siècle: déclaration de guerre," *Annuaire de l'Institut de droit international* 21 (1906): 34–36.

34. Suematsu, *The Risen Sun*, 99.

of warfare demonstrated that states usually opened hostilities without a declaration of war. Hostile action was itself a sufficient declaration of war.[35] As Takahashi Sakue put the point, a formal declaration of war might invoke de jure war, but hostile action was itself a declaration of de facto war, and the majority of wars in the past century had begun in a de facto manner.[36]

This disagreement merely underscored the perceived need for some common approach to declarations of war, which was on the agenda for both the IDI annual meeting in 1906 and the Second Hague Conference in 1907. In spite of the overwhelming support for Japan's position in the United States and Britain, the fact remained that the majority of publicists in Europe and the Americas supported the "continental" position—that a formal notification of war should precede the opening of hostilities. They did not find Japan in violation of international law, nor could they judge Japan's opening of hostilities to be legally wrong, but this pair of conclusions inspired a collective desire to reform expectations and practices. Ellery Stowell presented the general rationale with admirable simplicity. There is a longstanding sense of chivalry, shared by both primitive and civilized peoples alike, such that a fight must be fair. The problem in recent decades has been a "growing feeling that the state must secure its victories at the least cost" and hence, standing armies, fortified frontiers, and a readiness for attack have become normal conditions. Japan upset the status quo when it struck first and managed to defeat Russia; consequently, public opinion shifted in favor of a declaration prior to hostilities.[37]

Henri Ebren and Marius Maurel put forth the best argument for the necessity of a declaration of war. First, the absence of a declaration of war is contrary to the notion of an international community organized by the rule of law. Insofar as a declaration formally marks the opening of hostilities, it serves an eminently practical set of purposes: it marks the assumption of the rights and duties of both belligerents and neutrals; it alerts neutral powers and their subjects to new conditions of conduct, particularly regarding trade with the belligerents; and it invokes the legal relations and obligations that follow from international treaties and conventions. In that regard, a declaration of war conforms to recent developments

35. Hershey, *The International Law and Diplomacy*, 58–61, 66–70; T.J. Lawrence, *War and Neutrality in the Far East*, 2nd ed. (London: Macmillan, 1904), 26–36; and F.E. Smith [Birkenhead] and N.W. Sibley, *International Law as Interpreted during the Russo-Japanese War* (London: Fisher Unwin, 1905), 51–58.

36. Takahashi, *International Law Applied to the Russo-Japanese War*, 20–25; see also Leroux, *Le droit international*, 10f.

37. Ellery C. Stowell, "Convention Relative to the Opening of Hostilities," *American Journal of International Law* 2 (1) (1908): 52f.

in international law. Second, the absence of a declaration of war is often contrary to the notion of national sovereignty, insofar as constitutions generally intend some joint action on the part of the executive and legislative powers to indicate the people's will to go to war. The efforts of impulsive or passionate individuals may be checked by an examination of the people's will in a legislative assembly, and therefore a formal declaration of war would encourage reasonable deliberations prior to such an expression of national sovereignty. And third, the absence of a declaration of war undermines the notion of war as a last resort (*ratio ultima*)—that war can only be legitimate when it is absolutely necessary. To treat hostile action as a legitimate start to war threatens to normalize the violence of belligerent aggressors, and such a development would undermine the security of human livelihoods and public finances and would go against all progress made in the laws of war during the nineteenth century. The effort to normalize conduct in war as a systematic group of requirements was intended to treat war in the context of law and obviate traditional arguments between "just" and "unjust" wars. Therefore, Ebren and Maurel argued, a declaration of war must precede hostilities.[38]

This argument informed the consensus reached by the IDI in 1906 and the Second Hague Conference in 1907. William Hull aptly summarized the argument at The Hague, when he asserted that an international agreement requiring a declaration of war was desirable because it was not yet required by positive international law. Such a requirement would serve

> to relieve governments of the necessity of remaining fully armed . . . against sudden attack in time of peace; to enable them to reduce their effective armaments in time of peace, and thus to reduce the financial burden of armies and fleets; to prevent an unexpected attack upon commerce; to give expression to the modern belief that every war, before it is commenced, should be justified or explained to the . . . society of nations by the statement of definite causes; and to afford an opportunity to neutral governments of offering their good offices to end the dispute, or of persuading the disputants to submit their difference to the Permanent Court of Arbitration at The Hague.[39]

Accordingly, Hague Convention III provided that hostilities "must not commence without previous and explicit warning, in the form of either a reasoned declaration of war or of an ultimatum with conditional declaration

38. Henri Ebren, "Obligation juridique de la déclaration de guerre," *Revue générale de droit international public* 11 (1904): 133–48; Maurel, *De la déclaration de guerre*, 124–45. See also Charles Dupuis, "La déclaration de guerre," *Revue générale de droit international public* 13 (1906): 734; and Antoine Pillet, "La guerre doit-elle être précédée d'une déclaration?" *Revue politique et parlementaire* 40 [no. 118] (1904): 50–57.

39. Hull, *The Two Hague Conferences*, 263.

of war." States that choose war must give their reasons for doing so, whether directly or in the form of the condition specified by an ultimatum. Moreover, the Convention took pains to guarantee that neutrals would be duly informed of the existence of a state of war. Neutrals must be informed "without delay" and the existence of a state of war "shall not take effect in regard to them until after the receipt of a notification, which, may, however, be given by telegraph."[40]

Much more controversial was the matter of a mandatory delay between the declaration of war and the commencement of hostilities. The IDI had resolved such a measure in 1906, with the hope that such a delay might embolden cooler heads to change the course of events, especially if third parties offered to mediate, and might better protect neutrals in the vicinity of the theater of war. But IDI members could not agree upon a suitable length for the delay, and acknowledged that the longer the delay, with armies poised for action, the greater the opportunity for some precipitous hostile action. Their resolution thus recommended merely "a delay."[41] Delegates to The Hague Conference, by contrast, refused the measure. To their reasoning, the requirement that belligerents formally state their reasons for war was a sufficient limitation upon their actions, and neutrals were adequately protected by formal notification. As the second article was written, the rights of neutrals were safeguarded because the article specified the exact point at which their responsibilities began. The Japanese delegation, along with those of Germany and France, were specifically opposed to a mandatory delay because it might be utilized by neutrals to commit acts contrary to rules of neutrality, such as the sale of warships to belligerents.[42]

Ratification of Hague Convention III thus promised to assuage the shock dealt to the international community by the commencement of the Russo–Japanese War. Although formal announcements would thenceforth precede acts of war, questions lingered. Recalling the invasions of Beijing in 1860 and 1900, for example, the Chinese delegation voted against Hague Convention III in committee because, they argued, the committee could not provide an accurate definition of war. China "had had its navy destroyed, its ports bombarded, and its capital occupied by foreign troops,

40. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1918), 96.

41. *Annuaire de l'Institut de droit international* 21 (1906): 48–53.

42. Hull, *The Two Hague Conferences*, 264f.; James Brown Scott, *The Hague Peace Conferences of 1899 and 1907: A Series of Lectures Delivered Before the Johns Hopkins University in the Year 1908* (Baltimore: Johns Hopkins University Press, 1909), vol. 1: 519f.; and Deuxième Conférence Internationale de la Paix, *Actes et documents* (La Haye: Nijhoff, 1908), vol. 3: 172–78.

when the perpetrating nations declared their acts not war, but only *expeditions*."[43] Such technicalities were not easily ignored. Takahashi Sakue, for example, dismissed Hague Convention III as irrelevant. Drawing on the authority of his friend John Westlake, Takahashi noted a loophole in the Convention: where a *contractual* arrangement might have guaranteed that contracting parties would issue a declaration, the wording of the Convention committed parties merely to a *recognition* that such conduct was preferred. Therefore the opening of hostilities without a declaration remained a possibility.[44] In spite of Japan's ratification of Hague Convention III, Takahashi remained apparently committed to the historical argument: history shows that declarations of war are not necessary. Even James Brown Scott and other observers were somewhat unsettled; Scott admitted that "the convention is very modest, for it leaves the Powers free to declare war at their pleasure, provided only that the pretext can be capable of formulation."[45]

3. Sugimura Yōtarō's "Declaration of Conditional War"

Sugimura Yōtarō approached the problem in a more sophisticated fashion. He presented Japan's behavior in the Russo–Japanese War in relation to a principle that he borrowed from earlier authorities of international law—Hugo Grotius and Christian Wolff, who had described a state of "conditional war." Sugimura developed a novel theory of conditional war, such that a declaration of conditional war opened a state of conditional war. In fact, Sugimura's declaration of conditional war developed what Wolff had presented as a "conditional declaration of war" in 1749: it stated clearly the aggressor's demands, the response expected, and the time frame within which the response was expected.[46] The ultimatum recommended by Hague Convention III of 1907 required only the aggressor's demands, and to Sugimura, this was an inadequate notification to the enemy and therefore an inferior legal form.

43. Report of Andrew White, quoted in Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1, 179; Stowell, "Convention Relative to the Opening of Hostilities," 55; see also Higgins, *The Hague Peace Conferences*, 205.

44. Takahashi, *International Law Applied to the Russo-Japanese War*, 6; and John Westlake, "The Hague Conferences," in *Collected Papers of John Westlake on Public International Law* (Cambridge: Cambridge University Press, 1914), 540f.

45. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1, 522; and Higgins, *The Hague Peace Conferences*, 205.

46. See Yotaro Soughimoura [sic], i.e., Sugimura Yōtarō, *De la déclaration de guerre au point de vue du droit international public* (Paris: A. Rousseau, 1912), 289; Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, trans. J.H. Drake (Oxford: Clarendon, 1934), 366f.; Theodore D. Woolsey, *Introduction to the Study of International Law*, 4th ed. (N.Y.: Charles Scribner & Co, 1874), 442–46; and Thomas Baty, *International Law* (London: John Murray,1909), 246–49.

Whereas other publicists at the time might have minimized Sugimura's contribution to legal theory, by finding his "declaration of conditional war" to be roughly equivalent to a manifesto or an ultimatum, Sugimura was in fact posing a critique of the development of international law. He did not approve the nineteenth-century trend toward distinguishing between "acts of war" and a "state of war," and the fact that legal organizations such as the IDI and the Hague Conference approached the laws of war from such abstract perspectives. In particular, he criticized the practice of legally defining war as the "state of war," because such a practice meant that "acts of war" committed during what was technically peacetime were purely criminal and illegal acts. Moreover, such a definition of war begged the question of whether or not a belligerent could produce a state of war by declaring war against an enemy.[47] As the Chinese delegation had asked at the Second Hague Conference: What if the enemy refused to respond in kind to its aggressor? Would this constitute a war, legally defined?[48]

Sugimura insisted that his "declaration of conditional war" offered the best solution. It forced the aggressor to state its demands clearly to the enemy and to provide guidelines as to how and within what time frame the enemy was expected to satisfy those demands. Moreover, by providing a public announcement of how and when the demands were to be satisfied, the declaration of conditional war alerted other states to consider their choices in declaring themselves allies or neutrals and in informing their subjects of their neutral obligations and when those would go into effect. In fact, this interval of the time limit demanded by the declaration of conditional war was what Sugimura defined as the "state of conditional war." This was a special moment: a clearly demarcated passage from peace to war in which all parties could attend to their legitimate defenses. Sugimura realized that this state of conditional war put the aggressor at a military disadvantage, because the time interval allowed the enemy to make preparations, but he argued that such a potential disadvantage was reasonable compensation for what many considered at the time to be the overwhelming rights of belligerents. To Sugimura, the state of conditional war improved upon several efforts undertaken by international lawyers in the nineteenth century: it created a special state of peace in which a principle of armistice dominated. Military action was delayed until the time limit expired, and this invited the good offices and mediation of third parties. Moreover, it maintained the freedom of commerce: neutrals could

47. Sugimura, *De la déclaration de guerre*, 190f., 212f., 264f., 284-88.

48. Report of Andrew White, quoted in Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1, 179; and Stowell, "Convention Relative to the Opening of Hostilities," 55.

anticipate the future interference of contraband rules, but the time delay allowed neutrals to plan in advance so that the damage done to commerce might be minimized.[49]

Unlike the abstract direction taken by international law in the late nineteenth century, Sugimura argued, a declaration of conditional war was based upon practice and custom—how states had behaved in the past. Sugimura thus understood his proposal to constitute a return to the empirical grounding for international law more typical of the eighteenth and early nineteenth centuries. Rather than quibble over abstractions such as the proper commencement of war in order to validate the legality of belligerent and neutral rights, Sugimura sought to establish a legal principle that would have corrected what Japan had done in February 1904 and promised a sound basis on which international law and state practice could proceed. For Sugimura regretted Japan's opening of hostilities in the Russo–Japanese War. Japan's action of breaking diplomatic relations with Russia and warning Russia that it would take independent action in Manchuria and Korea did not constitute a declaration of conditional war: Japan had failed to clearly provide Russia with the response Japan expected and the time frame within which its demands were to be met. Had Japan done so, it would have created a state of conditional war that compelled an unambiguous response from Russia. When that response failed to occur, Japan could have proceeded with acts of war that drew no protest from the international community.[50]

Charles Dupuis at the University of Nancy had anticipated this empirical turn of thought. Dupuis took seriously the historical argument that minimized declarations of war, and concluded in 1906 that declarations of war were not necessary. The only remedy was to establish an international convention. Like Sugimura, Dupuis was concerned about the putative illegality of acts of war during formal peacetime. When, for example, he considered events of the Russo–Japanese War such as the capture of the *Ekaterinoslav* on February 6, Dupuis noted that contrary to what one would expect, such seizures of ships prior to a declaration of war had never been and would likely never be considered acts of piracy. On the one hand, it was precisely the great maritime powers—Britain, the United States, and Japan—who were opposed to mandatory declarations of war and whose power dissuaded other countries from treating such captures as acts of piracy. On the other hand, the 1856 Declaration of Paris had abolished privateers and established national responsibility for ships flying those national flags. National states enjoyed a monopoly on violence and

49. Sugimura, *De la déclaration de guerre*, 284–308.
50. Ibid., 420–27, 441–61.

their acts were accordingly acts of war (if not accidents or errors).[51] In the same manner, a mandatory and formal declaration of war would eliminate any confusion. As a member of the IDI committee on declarations of war, Dupuis advocated an agreement of positive international law.[52]

If Dupuis and Sugimura agreed on the need for a positive law, Sugimura took Dupuis and his colleagues to task for their language of international morality. Dupuis and members of the IDI spoke repeatedly on the need for "international loyalty" among the civilized nations. As a strong alternative to uncertainty, a formal notification of war would support their solidarity and common interests, and encourage their confidence in each other. Community building, in other words, was central to their motives.[53] Sugimura, by contrast, suspected that this French valorization of *loyauté* resembled the British valorization of custom: both esteemed past moralities and practices and both substituted political for legal concepts. Loyalty was a moral and political notion insofar as it appealed to confidence and solidarity, and custom represented a political affront to legal argument—it was its own justification in league with British power. Sugimura saw his work with international law as the forging of a new legal ethos, committed to treating the legal nature of war as a fact and making judgments according to standards of justice and humanity.[54] The turn to positive international law should suspend all precedent practices—whether British, French, or Japanese—in order to forge a new legal order truly common for all nations. Such a belief would animate his subsequent work as one of Japan's preeminent diplomats at the League of Nations in the 1920s.[55]

In sum, the argument regarding the opening of hostilities, which had been generated by Japan's behavior in the Russo–Japanese War, validated Japan's practice of state sovereignty. Japan had justified its behavior with an expert understanding of international law and then, as an equal among the civilized family of nations, had participated in deliberations that led to a change in international law, one which promised to foreclose Japan's prior practice yet with which the Japanese state agreed. This was exactly how the advocates of international law had imagined legal progress.

51. Dupuis, "La déclaration de guerre," 732f.; see also his comments in the *Annuaire de l'Institut de droit international* 21 (1906), 41f.

52. See the 1905 committee report in the *Annuaire de l'Institut de droit international* 21 (1906): 23, 63.

53. *Annuaire de l'Institut de droit international* 20 (1904): 64, 68; *Annuaire de l'Institut de droit international* 21 (1906): 29, 44, 46, 49, 70, 276; and Dupuis, "La déclaration de guerre," 733f.

54. Sugimura, *De la déclaration de guerre*, 210–15; see also Leroux, *Le droit international*, 261f.

55. Burkman, *Japan and the League of Nations*, 111–18, 172.

IV. Violations of Neutrality

A second set of cases, violations of neutrality, further elucidates how Japanese sovereignty was manifested as a combination of state will and civilized statehood, and impelled the growth of international laws of war. In the first place, Japan exercised its state will when it exploited the lack of definite rules within international law or simply took advantage of the weak. After all, neutrality for much of the nineteenth century was especially a matter of being at the mercy of a belligerent. As Japan had learned when it declared neutrality during the Franco–Prussian War in 1870, unless a state was prepared to use military might to enforce its will against a belligerent who violated its neutrality, the state had no remedy—and Japan had been humiliated in 1870 by its inability to force France to obey Japan's rules of neutrality.[56] As a belligerent in the Russo–Japanese War, Japan was arrogant to Korea and China on account of their weakness—an attitude shared by some of the western powers—and demonstrated in the Chemulpo and Chefoo incidents that it felt relatively free to exploit the weakness of others, particularly when Japan invoked the justification of military necessity.

In the second place, however, Japan was a member of the civilized states, and during the Russo–Japanese War, Japan enlisted the support of its allies to enforce its will. Japan's absorption of Korea proceeded from a military occupation to a diplomatic accord with the eager support of Britain and the United States. Although obviously contrary to Korean interests, it was an act of colonialism that followed western legal precedents—to criticize Japan would have threatened the regime of colonialism so integral to the community of civilized states. At the same time, Japan's diplomatic triumph of civilized statehood during the war was the Japanese offensive against France for its hospitality to the Russian fleet in French colonial ports. This was an expression of sovereignty that had nothing to do with military necessity, but successfully changed public attitudes regarding the neutral practice of coaling belligerent ships. Like the matter of declarations of war, these Japanese actions pushed the international community to determine a positive rule at the Second Hague Conference, and Japan ardently supported its fellow nations to produce agreements that asserted the rights of neutrals in wartime.

But Japanese actions also contributed to the redefinition of neutrality underway at the Second Hague Conference. Two main issues were

56. Douglas Howland, "Japanese Neutrality in the Nineteenth Century: International Law and Transcultural Process," *Transcultural Studies* 1 (2010):14–37. See http://archiv.ub.uni-heidelberg.de/ojs/index.php/transcultural/article/view/1927. Takahashi reminds readers of the issue in *International Law Applied to the Russo-Japanese War*, 422f.

informed by Japan's prosecution of the Russo–Japanese War. One arose from Japanese violations of Korean and Chinese territory in the Chemulpo and Chefoo incidents respectively: did a neutral's right to be free of the molestation of belligerents include a corresponding duty to defend that neutrality from the violations of belligerents? And if the neutral power failed to fulfill that duty, had the belligerent in fact infringed the neutral's right of neutrality? The second arose from French assistance to Russia's Baltic Fleet as it slowly journeyed to east Asia. Did neutrality mean that the neutral power was bound to shun all belligerents to a conflict? Or did it mean that a neutral power should offer aid to both belligerents equally? As the Japanese state pursued its rights and interests aggressively in the theater of war and within the international diplomatic community, it began to frame some answers to these questions.

1. The Chemulpo Incident

We might think that the inviolability of neutral territory is a primary principle of neutrality in international law, but the Russo–Japanese War was peculiar in that it was fought mainly upon the neutral territory of non-belligerents—Korea and China. Both Russia and Japan claimed to have only honorable motives toward Korea and Manchuria; both declared their intentions to protect the sovereignty and territorial integrity of China and Korea. Yet the war began, in the official Japanese version, on February 6 with what many observers judged a violation of Korean territorial waters—the seizure of the *Ekaterinoslav*. It continued with further violations: the landing of a Japanese army on Korean soil on February 8, and a Japanese naval action in the Korean port of Chemulpo (Inchon) on February 9—the "Chemulpo incident."

The Japanese government was hard-pressed to justify these actions. Takahashi Sakue simply noted the precedents of colonial actions of the European powers, and asserted that Japan was free to march its troops into uncivilized territory.[57] Nagaoka Harukazu and Hishida Seiji, by contrast, based their argument on the opening of hostilities: Japanese troops went to Korea in order to protect it from Russia, and therefore, with the landing of those troops, everyone should have known that a state of war existed and that Chemulpo was no longer a neutral port.[58] But such reasoning belied the fact of Korea's recognized independence—marked by

57. Takahashi, *International Law Applied to the Russo-Japanese War*, 20f.

58. Nagaoka, "La guerre Russo-Japonaise et le droit international," 490f.; and Seiji G. Hishida, *The International Status of Japan as a Great Power* (N.Y.: Columbia University Press, 1905), 70f.

several bilateral treaties with western powers—and its official position of neutrality, announced earlier on January 25. As a result, European opinion tended to coalesce against Japan.[59]

Ariga Nagao offered an official Japanese explanation. He began by noting that the three main theories for a Japanese presence in Korea were based upon the neutrality or non-neutrality of Korea: that Japan had disembarked troops on Korean territory in violation of Korean neutrality; that Korea had consented to the presence of Japanese troops and ceased to be neutral; and that Korea was simply not neutral, so that Japan's actions were right and just. Contrary to these three theories, Ariga asserted the principle of military necessity: In the manner of the "extraordinary detachments" sent by the international community to Beijing in 1900, Japan was authorized to land troops in Korea in order to protect Japanese nationals in Korea. Like other legal scholars writing at the time, Ariga declared that a state has the right to protect its interests and its security. In order to protect both Japan and Korea from Russia, Japan had undertaken a military occupation of Korea and had sent its armies to guard Korea's ports and its northern border.[60] Soon thereafter, Korea's position shifted: as the site of a temporary Japanese military occupation, it became Japan's ally for the duration of the war and eventually Japan's protectorate. From the start of the war, it was never neutral.

But the Chemulpo incident caused much international protest. Japanese admiral Uryū had threatened a pair of Russian cruisers in the harbor at Chemulpo, the *Variag* and *Korietz*—he would attack them if they did not depart the port. Uryū also requested the captains of four other neutral warships in the harbor—flying the flags of Britain, France, Italy, and the United States—to leave the port as well, lest they suffer harm. When the *Variag* and *Korietz* attempted to escape, they were fired upon and seriously damaged, and the British, French, and Italian warships took on board the shipwrecked and wounded men from the Russian warships. Admiral Uryū refused the neutrals permission to take the Russian wounded to the Red Cross hospital in Chemulpo and demanded that they take the Russians to Shanghai and intern them there for the duration of the war, in order to prevent them from returning to combat. Although the captains of the three neutral warships complied with the demand, they loudly denounced the Japanese action as a violation of Korean neutrality.[61]

59. Leroux, *Le droit international*, 194. Japanese diplomacy regarding Korean neutrality, first raised on January 16 with the Italian minister, is reprinted in *NGM*, vol. 47: 310–32.

60. Ariga, *La guerre Russo-Japonaise*, 46–53; and Maurel, *De la déclaration de guerre*, 173f.

61. *NGM*, vol. 51: 95–127, 129–38; Smith [Birkenhead] and Sibley, *International Law as Interpreted*, 112–16; Takahashi, *International Law Applied to the Russo-Japanese War*,

However, the international legal response collectively dismissed the complaint, on two grounds. Several international legal scholars, as well as the United States naval commander on the scene, declared that the ship captains had no grounds for protest. The matter concerned only the power whose sovereignty had been violated—Korea—and the two belligerents. Moreover, these legal authorities doubted the gravity of Japan's infraction of Korean territory. On the one hand, Korea was not a member of the family of nations; on the other, its sovereignty and independence were so marginal as to be fictive. Takahashi's assertion of the privileges of civilized states and Ariga's assertion of military necessity apparently held sway; Korea was not in a position to defend itself and therefore its rights of neutrality were negligible.[62]

But Japan's interference with the neutrals' rescue of Russian sailors—because it involved the great powers—received more significant international attention. Did a belligerent's rights extend to the enemy shipwrecked and wounded? Did neutrality prohibit neutrals from rescuing belligerent forces? Could Japan compel the neutral captains to hold the Russian sailors for the duration of the war or to turn the sailors over to Japan as prisoners of war? These questions were formally taken up at the Second Hague Conference in 1907, whose Convention X reflects a quite technical compromise: belligerent warships *may* demand that any rescue ship hand over shipwrecked, sick, or wounded men, but a neutral warship that takes on board such men *must* see that they do not again take part in military operations. When such men fall into the hands of an enemy belligerent, they become prisoners of war and the belligerent captor decides whether to place them in a home port, a neutral port, or even an enemy port; but in the last case, repatriated prisoners may not take part again in military operations.[63]

This compromise spoke to two prior issues: One was the general wish motivating both Hague conferences to extend to naval warfare the Geneva conventions operable in land warfare. Thus captured sailors, like their soldier counterparts, could be repatriated or kept as prisoners of

462–66; Jean-Marie de Lanessan, *Les enseignements maritime de la guerre Russo-Japonaise* (Paris: F. Alcan, 1905), 197f.; United States Department of State, *Papers Relating to the Foreign Relations of the United States: 1904* (Washington, D.C.: Government Printing Office, 1905), 780–85.

62. Lawrence, *War and Neutrality in the Far East*, 2d. ed., 63-76, 81f.; Smith [Birkenhead] and Sibley, *International Law as Interpreted*, 116; Hershey, *The International Law and Diplomacy*, 66–70; Matsumura, *Nichi-Ro sensō to Kaneko Kentarō*, 12–14; and Leroux, *Le droit international*, 194–98, 205f.

63. Convention X, Articles 12–14, in Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1918), 170.

war. They could also be placed in neutral territory, but neutral powers did not welcome the responsibility of maintaining either belligerent soldiers or sailors and preferred that they be repatriated. The other was the ongoing dispute between the rights of belligerents and those of neutrals. A majority of states were willing to grant belligerents the right to demand rescued enemy sailors, lest the belligerent enforce its more invasive right to search, seize, and confiscate neutral ships carrying enemy combatants. But the neutral warship was an exception—a point insisted upon by French delegates as a result of the Chemulpo incident: As neutral territory, the neutral warship possessed an extraterritorial right to freedom from belligerent search, and therefore it was free to choose whether to take on board belligerent sailors or not. The only restriction placed on that choice by the Hague Conference participants was that the neutral warship was obliged to keep rescued sailors out of further combat for the duration of the war.[64] As we have seen with declarations of war, Japan's assertion of state will in the absence of standard practices led to a debate and general agreement at the Second Hague Conference.

2. The Chefoo Incident

The incident at Chefoo (Zhifu), by contrast, was generally seen to be a violation of international law. This incident took place in August 1904 and involved the Russian warship *Ryeshitelni*, docked in neutral Chinese territory. The *Ryeshitelni* had fled to the Chinese harbor at Chefoo on the night of August 10; Chinese authorities ordered the captain to disarm the ship or to depart the port within 24 hours. Reportedly, the ship began to disarm under a guard of Chinese marines. However, the *Ryeshitelni* was discovered by Japanese warships on August 11, whose commander reiterated the demand that the ship disarm or depart Chefoo. On August 12, the Japanese returned to board and search the ship, and a scuffle broke out between the Japanese and Russian commanders, who fell overboard. Shortly thereafter, a series of explosions destroyed the ship's engines. The Japanese then captured the *Ryeshitelni*, towed it away, and took Russian prisoners. Eyewitness accounts could not be certain whether Russians or Japanese had caused the explosions—although each belligerent blamed the other—but Russian bodies subsequently washed ashore

64. Hull, *The Two Hague Conferences*, 124–26; Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1: 608–10; Higgins, *The Hague Peace Conferences*, 390; and Leroux, *Le droit international*, 206f.

proved to have died by gunshot, presumably the victims of Japanese guns.[65]

Unlike the Chemulpo incident, the Chefoo incident was strongly protested by the neutral power whose territory had been violated—China. Most British and United States publicists agreed that Japan had violated Chinese territory and neutrality, and Kaneko Kentarō's efforts to defend Japan in the United States press reportedly came to no avail.[66] Japan's supporters publicly regretted Japanese actions, but instead of criticizing Japan's error in judgment, they blamed China and Russia. Hershey minimized Japanese actions in Chefoo, for they paled by comparison to Russia's violations of Chinese territory in Manchuria. Lawrence declared that the problem was less a matter of Japanese excesses than of the weakness of China, which was unable to defend its neutral territory.[67] One eyewitness reported that the Chinese naval officer Sa, in charge of the Chinese fleet at Chefoo, had ordered Japanese ships to stay away from the port when their patrols dramatically increased in August 1904, but he was unable to enforce his command. Had the United States or France or Britain given such an order, the Japanese ships would have been sunk for violating neutrality. China was simply too weak to enforce its neutrality.[68]

The official Japanese explanation highlighted three justifications, starting with the charge that China did not have full control over all of its territory. The ambiguities arising from Russian-occupied territories in Manchuria and Liaodong, which in the course of the war were falling to Japanese occupation, meant that a Russian ship sailing from Russian-occupied territory such as Port Arthur to a Chinese port such as Chefoo carried with it the hostile character of the theater of war. The *Ryeshitelni* could reasonably be construed as hostile territory, even in a neutral port. Second, the Japanese government argued that Chefoo itself was not fully neutral. Russia had already violated the neutrality of the area when it set up a telegraph station connecting the Russian consulate in Chefoo to the Russian base in Port Arthur, Liaodong. Indeed, witnesses in Chefoo noted both the presence of the telegraph station and repeated

65. Louis Livingston Seaman, *From Tokio through Manchuria with the Japanese* (N.Y.: Appleton & Co., 1905), 174–93; *NGM*, vol. 52: 102–81; Takahashi, *International Law Applied to the Russo-Japanese War*, 437–44; and *Papers Relating to the Foreign Relations of the United States: 1904*: 139f.

66. Matsumura, *Nichi-Ro sensō to Kaneko Kentarō*, 152–56; and Kajima, *Nichi-Ro sensō*, 173–85.

67. Hershey, *The International Law and Diplomacy*, 260–65; Lawrence, *War and Neutrality in the Far East*, 2nd ed., 292–96; and Smith [Birkenhead] and Sibley, *International Law as Interpreted*, 116f.

68. Seaman, *From Tokio through Manchuria with the Japanese*, 175f.

Japanese requests that the Chinese authorities shut it down. (In the wake of the Chefoo incident and under threat of Japanese bombardment, the station was dismantled on August 31.) And third, the Japanese government argued that the Russians on board the *Ryeshitelni* had been the aggressors in the struggle; instead of relying on the power of Chinese authorities in the port, they had lawlessly attacked the Japanese who visited the ship. Japan could only respond in the interests of self-preservation and proceed to capture the ship.[69]

Japanese officials reminded their allies that Japan had heeded the encouragement of the United States and Britain in agreeing to respect the neutrality of China—on condition that Russia do so too. Ariga Nagao pointed out that in international law, there are two modes of redress when a belligerent violates the neutrality of a third party. The violated belligerent can ask the government whose neutrality has been violated to take some measure against the violator of neutrality, in order that the violator make some redress or to cease the harmful activity. Or the violated belligerent can act directly against the violator. Japan had requested of China both the removal of Russia's telegraph station and the *Ryeshitelni* from Chefoo, to no avail, and therefore it acted against Russia.[70] Although Russia lodged strong diplomatic protests through its ministers overseas, the French minister in Tokyo dismissed the Russian protest out of hand and United States Secretary of State John Hay, declining to adopt any "individual course of action," deferred to some future international conference.[71] In the turmoil of war, Russia and China could only suffer Japanese actions at Chefoo.

At the Second Hague Conference, however, some delegates noted that Japan had violated international law at Chefoo and that no apology or satisfactory response was ever made.[72] Accordingly, conference participants set out to forestall such future situations with a pair of legal guidelines. These represent the general effort on the part of the Hague Conferences to expand the rights of neutral powers vis à vis the rights of belligerents. The convention on neutrals in war on land began with an assertion of the inviolability of neutral territory, and the convention on neutrals in

69. Ibid., 425; and Takahashi, *International Law Applied to the Russo-Japanese War*, 442–44.

70. Ariga, *La guerre Russo-Japonaise*, 505–8; and Takahashi, *International Law Applied to the Russo-Japanese War*, 441f. A rare supporter of Japan was Edwin Maxey, "The Russo-Japanese War and International Law," *American Law Review* 39 (1905): 344.

71. Takahashi, *International Law Applied to the Russo-Japanese War*, 440; and U. S. Department of State, *Papers Relating to the Foreign Relations of the United States: 1905* (Washington, D.C.: Government Printing Office, 1906): 760.

72. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1, 625; Higgins, *The Hague Peace Conferences*, 463.

war on sea began by binding belligerents to respect neutral territory and neutral waters.[73] It is important to note that this work proceeded with the encouragement and assistance of the Japanese delegation.

The first effort, regarding land war, prohibited belligerents from trespassing on neutral territory. More specifically, and with direct reference to the Russian trespass at Chefoo, belligerents were prohibited from erecting any installation either for military or communication purposes, such as "a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea." [74] Although Japan and Britain wanted to go further and prohibit neutrals from permitting any and all communications on behalf of belligerents, a majority of delegates found such a position extreme and agreed that neutrals were obliged to be impartial in permitting belligerents access to neutrals' communications facilities.[75]

The second effort, regarding maritime war, sought to establish what James Brown Scott called a "modern theory of neutrality": belligerents were bound to respect the sovereign rights of neutral powers and abstain from all acts in neutral territory or waters which would violate that neutrality.[76] The Second Hague Conference prohibited all belligerent visits and captures in neutral waters, so that incidents such as those at Chemulpo and Chefoo, and that involving the *Ekaterinoslav*, would no longer be allowed. The problem that concerned delegates, of course, was how injured belligerents and neutrals might redress violations of both neutral territory and the law. They turned to prize court as a remedy. A ship seized within neutral waters was legally under the jurisdiction of the neutral power, who would have to employ whatever means at its disposal to force the belligerent to relinquish the ship. As had always been the case, ship owners and belligerents could make their respective claims in prize court.[77] The important point is that a neutral such as China was now obliged to use force to redress violations of its neutral sovereignty. According to the international community, neutrality became an armed impartiality—not only must neutrals make no rule that favored either belligerent, but it must be prepared to use its own force against a belligerent who did not comply with its rules of neutrality.

73. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1918), 133, 209.

74. Ibid., 133; and Higgins, *The Hague Peace Conferences*, 291.

75. Hull, *The Two Hague Conferences*, 202–4; and Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1, 54–45.

76. Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1, 621.

77. Hull, *The Two Hague Conferences*, 149f.; Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1, 621–25; and Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1918), 210.

3. Japan's Absorption of Korea

Unlike the Chemulpo and Chefoo incidents, the final two issues with neutrality in this article highlight the role of diplomacy and the participation of Japan's allies in the legitimization of Japan's state will. The first, Japan's absorption of Korea, was a logical outcome of the argument that Korea was not neutral. Japan's actions did not violate international law, but followed a course of colonization that had been agreed upon by the western powers at the Berlin conference of 1884-86.[78] The second, Japan's effort to force France to cease its assistance of the Russian Baltic fleet as it traveled eastward, addressed not a case of action contrary to international law but a difference in general practice: where Britain, the United States, and Japan did not permit belligerents to coal at a neutral's ports within ninety-day intervals, France and Russia did. In both of these cases, the support of the United States and especially Britain legitimized Japanese action.

Japan's absorption of Korea occurred at a point when nearly all of the "uninhabited land" or "backward territory" in the world had been claimed by the western powers. As M.F. Lindley noted in his analysis of the issues, none of this terminology had any standing in international law—uninhabited land, backward territory, or acquisition by conquest or discovery. Where the Spanish had once asserted possession by right of conquest, and the English by right of discovery, these were in the nineteenth century matters of fait accompli. International law did not say that acquisition of territory was legitimate or not, but simply recognized the results of such acquisition.[79] By the time of the Russo–Japanese War, two developments were underway. First, the great powers had begun to negotiate bilateral treaties that recognized "spheres of influence" in overseas territories. This measure was intended to minimize conflicts among the great powers. Second, the international community was developing a formal method of "occupation" (or "cession") as a legitimate means of acquiring backward territory. This involved the concluding of a bilateral treaty that assigned sovereign rights to the western power and the status of protectorate to the "uncivilized" territory. As the practice evolved, effective administration of the protectorate became the minimal criterion for the legitimacy of the protectorate. But because international law had no rules protecting the rights of "backward" peoples, it faced a conundrum that unsettled any protectorate arrangement: To deny legal rights and sovereignty to "backward" peoples in order to absorb and improve their territory contradicted the assumption of legal rights and sovereignty vested in those putatively

78. M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, Green, & Co., 1926), 143–48.

79. Ibid., v–vi, 47.

"backward" peoples as independent parties to a treaty. International lawyers debated several resolutions of the conundrum, to no solution because, ultimately, such acts of colonialism were effects of state will and not international law.[80] As it happened, Japan's absorption of Korea was one of several such transfers of territory at the turn of the twentieth century. It was facilitated by Korea's "uncivilized" status in the world of states, the general recognition among the powers of Japan's special interests in Korea, and a widespread belief, shared by Japan and the western powers, that Koreans were a "backward" people.[81]

Since an initial series of problems between France and Korea from 1836 to 1866, when French missionaries attempting to proselytize in Korea were massacred, much fretful editorializing persisted in the western press over the "backward" state of Korea. Some solution was needed. Korea had been a focus of three armed conflicts, two already between China and Japan in 1882 and 1894, and then the Russo–Japanese War. As Terao Toru, Japanese professor of international law and the first Japanese associate of the IDI, put the matter to the international community in 1894, it was imperative that some administrative reform be undertaken in Korea so that society and government could be stabilized. Japan's international security depended upon that.[82] Great Britain agreed strongly with this viewpoint, and its subsequent alliances with Japan in 1902 and 1905 acknowledged Japan's special interests in Korea and encouraged Japanese leadership in Korea.[83]

With the Russo–Japanese War, Britain and the United States were quite willing to allow Japan to manage Korea. Given that both countries had signed treaties with Korea and thereby affirmed Korea's independence and sovereignty, the contempt that British and United States publicists and diplomats held for Korea is striking. T. J. Lawrence was surely most outspoken when he wrote, "I have no doubt that in the long run Korea will be annexed by one or the other of her powerful neighbours. It is the

80. Ibid., 32–46, 169–77; and Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 67–82, 93–96. See also Charles G. Fenwick, *Wardship in International Law* (Washington, DC: Government Printing Office, 1919); and Paul Keal, "Just Backward Children: International Law and the Conquest of Non-European Peoples," *Australian Journal of International Affairs* 49 (2) (November 1995): 191–206.

81. Lindley, *The Acquisition and Government of Backward Territory*, 217–19; and Leroux, *Le droit international*, 195–99.

82. Terao Toru, "La question coréenne," *Revue politique et parliamentaire* 1 (1894): 449–57; see also Brahm Swaroop Agrawal, "The Opening of Korea and the Kanghwa Treaty of 1876," *Korean Observer* 11 (1980): 139–55.

83. The English texts of the Anglo-Japanese agreements are available in John M. Maki, ed., *Conflict and Tension in the Far East: Key Documents, 1894–1960* (Seattle: University of Washington Press, 1961), 16–18.

fate of small, weak, and corrupt states to fade out of the political map . . . But we may be allowed to hope that, if the Japanese receive her as the prize of victory, they will develop an aptitude for governing subordinate peoples which history shows to have been wanting to them in the past."[84] Lawrence boldly asserts the prerogative of civilized states to engage in colonial enterprises, and he understood that Japan's alliance with Britain encouraged Japanese colonialism in Korea. Accordingly, Japan's actions in Korea in 1904 and afterward went largely unchallenged. A number of American missionaries and educators working in Korea protested vigorously with the United States government, but they were soon silenced by Japanese colonial authorities.[85]

The British and United States governments, and Lawrence and other legal experts, fully supported and encouraged the Japanese absorption of Korea. Amos Hershey is worth quoting at length for his equivocations, which finally rest upon the natural law basis of sovereignty, state will

> This seems to be one of those not altogether rare although exceptional cases where reasons of policy or motives of national interest, if not the necessity of self-preservation, intervene to prevent a strict observance, or necessitate a positive violation of law. Japan had long since included Korea within her political "sphere of influence" or protection, and Korea was one of the main objects of the war. It was, therefore . . . impossible for Japan to respect the neutrality of Korea. . . . The complaints of Russia on this score, although theoretically sound, were therefore practically absurd. Korea, although in theory sovereign and independent since 1876-82, was really a dependent state under the protection of Japan.[86]

Hershey denies a theoretical Korean sovereignty and independence for the sake of the more potent reality: Korea was always within Japan's sphere of influence and must give way to military necessity and obvious practicality, which excuse Japan's apparent violation of international law.

84. Lawrence, *War and Neutrality in the Far East*, 2nd ed., 23.

85. F. A. McKenzie, *The Tragedy of Korea* (London: 1908; repr. Seoul: Yonsei University Press, 1969), 209–40. See also the statement of Mr. Stevens, American advisor to the Korean government, on February 14, 1905, in *NGM*, vol. 49, 631–34, and reports of United States rejections of Korean complaints in *NGM*, vol. 49, 669–72.

86. Hershey, *The International Law and Diplomacy*, 72; see also Lawrence, *War and Neutrality in the Far East*, 2nd ed., 274–85; and C.I. Eugene Kim and Han-Kyo Kim, *Korea and the Politics of Imperialism, 1876–1910* (Berkeley: University of California Press, 1967), 125–28. Wolfgang Seifert discusses the German support for Japan's actions in "Japan Großmacht, Korea Kolonie – völkerrechtliche Entwicklungen vor und nach dem Vertrag von Portsmouth 1905," in *Der Russisch-Japanische Krieg 1904/05*, ed. Sprotte, et al., 55–82 (esp. 72–78).

Korea became, in the judgment of these international legal experts, a legitimate prize of war.

Japan's allies were sufficiently convinced by the argument and forthwith annulled their treaties with Korea and vacated their diplomatic offices in Seoul. In a recent analysis of the diplomacy surrounding the event, Kim Ki-Jung underlines the eager support shown to Japan by United States President Roosevelt, the British Foreign Office, and many government personnel in both countries.[87] Accordingly, Japan's absorption of Korea was accomplished in a visibly legal manner and with the public support of its allies. They made much of the February 23, 1904 protocol, which was signed two weeks after the Chemulpo incident and, because it created a formal Japan–Korea alliance, reinforced the belief that Korean neutrality had not been violated.[88] With several additional protocols signed in the course of eighteen months, the Korean government gradually relinquished to Japan all rights of government, from foreign affairs to domestic administration. With the November 1905 Korea–Japan treaty, Korea became Japan's protectorate.[89] Russia, too, was soon mollified. Having been defeated militarily in the region, Russia subsequently signed a 1907 agreement with Japan which acknowledged Japan's protectorate of Korea and solidified Russia's support for the new status quo.[90] The powers were in

87. Kim Ki-Jung, "The War and US-Korean Relations," in *The Russo-Japanese War in Global Perspective: World War Zero*, vol. 2, 467–89. See also Claude MacDonald to the British Foreign Office, December 29, 1903, in *British Documents on Foreign Affairs: Reports and Papers from the Foreign Office Confidential Print*, Part I, Series E, Volume 8, Ian Nish, ed., *The Russo-Japanese War, 1904-1905* (n.p.: University Publications of America, 1993), 159; Tyler Dennett, *Roosevelt and the Russo-Japanese War* (Garden City: Doubleday, Page, & Co., 1925), 96–117; the Katsura-Taft Agreement of July 1905 in *NGM*, vol. 49, 448–52; Teramoto, *Nichi-ro sensō igo no Nihon gaikō*, 116–27; and United States Secretary of State Elihu Root's note to Japanese authorities on United States severance of relations with Korea in *NGM*, vol. 49, 673–75.

88. According to Ariga Nagao, Korea would have signed the protocol a month earlier, had Russia not protested; see *La guerre Russo-Japonaise*, 56. Japanese diplomatic records of the February 23 agreement are reprinted in *NGM*, vol. 47, 333–49.

89. English translations of the agreements are available in McKenzie, *The Tragedy of Korea*, 269–310; and The Carnegie Endowment for Peace, *Korea: Treaties and Agreements* (Washington, D.C.: Carnegie Endowment for Peace, 1921), Pamphlet Series no. 43. Japanese versions and diplomatic records are reprinted in *NGM*, vol. 47, 350–79, and vol. 49, 519–89. The diplomacy is reviewed in Kajima, *Nichi-Ro sensō*, 230–70.

90. Huajeong Seok, "Russo-Japanese Negotiations and the Japanese Annexation of Korea," in *Rethinking the Russo-Japanese War, 1904–05*, vol. 2, 401–12; Teramoto, *Nichi-ro sensō igo no Nihon gaikō*, passim; and Yasutoshi Teramoto, "Japanese Diplomacy Before and After the War," in *The Treaty of Portsmouth and Its Legacies*, ed. Ericson and Hockley, 24–40.

support of Japan's "great power" status and the new balance of power in east Asia.

One dissenting voice was Francis Rey at the University of Paris, who denounced the November 1905 treaty on the basis of a "fundamental contradiction." He carefully emphasized the legitimacy of protectorates, favorably comparing Japan's actions in Korea to France's actions in Tunisia, Madagascar, and Vietnam. Everything that Japan had done was in the spirit of and in keeping with western precedents—except for the treaty of November 1905 that established the protectorate. Rey argued that protectorates were a provisional arrangement that marked a transitional stage in the development of a people and territory; when the civilized stage was reached, the protectorate ended. The Japanese arrangement with Korea saw no such end. Rey was bothered by the weak position of Korea in signing the series of protocols, and was suspicious of the final treaty, having received reports that Korean diplomats had been coerced to sign the treaty and had subsequently renounced their agreement. But he was ultimately convinced of the illegitimacy of the final treaty because of its damning contradiction: it attempted to undo key provisions of the protocols signed in 1904—Japan's commitment to guarantee both Korea's independence and the sovereignty of the Korean emperor. The protocols marked a hypocritical intention to subvert Korea to Japan's domination; legal procedures could not mask the act of conquest.[91]

Nonetheless, Rey's dissent was ignored and Japan went ahead with its plans. When a group of Koreans attempted to be seated at the Second Hague Conference in 1907, claiming to be an official Korean delegation, the loud protest of Japan, supported by Britain, prevailed and turned the group away. Korea was legally a Japanese protectorate.[92]

91. Francis Rey, "La situation international de la Corée," *Revue générale de droit international public* 13 (1906): 40–58. A recent critique of the treaties likewise raises formal errors; see Unno Fukuju, "Kankoku heigō jōyaku-tō kyū-jōyaku mukōsetsu to kokusaihō – jōyaku no keishiki to teiketsu teitsuzuki nitsuite," *Nihon shokuminchi kenkyū* 14 (June 2002): 21–33.

92. Shinya Murase, "The Presence of Asia at the 1907 Hague Conference," in *Actualité de la Conférence de La Haye de 1907, Deuxième Conférence de la Paix*, ed. Yves Daudet (Leiden: Nijhoff, 2008), 85–101; Alexis Dudden, *Japan's Colonization of Korea: Discourse and Power* (Honolulu: University of Hawai'i Press, 2005), 7–20; and Kim and Kim, *Korea and the Politics of Imperialism*, 144f. By 1919, the protectorate status of Korea was an unproblematic fact in international law, in spite of United States President Wilson's rhetoric encouraging an independence movement in Korea; see W. W. Willoughby and C. G. Fenwick, *Types of Restricted Sovereignty and of Colonial Autonomy* (Washington, DC: Government Printing Office, 1919), 55f.; and Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (N.Y.: Oxford University Press, 2007), 119–35, 197–213.

4. French Neutrality and the Baltic Fleet

Unlike Japan's absorption of Korea, which was a diplomatic nicety in the wake of a military occupation, Japan's action regarding French neutrality was a peaceable manifestation of state will through its diplomats overseas. This was the most effective deployment of Japanese diplomacy in the Russo–Japanese War. Japan used its good relations with Great Britain to maximum advantage, in an attempt to force France to rescind its hospitality to the Russian Baltic Fleet in French colonial ports as it sailed to the Asian theater of war. The main problem was the absence of a common rule in international law. Britain, the United States, and other powers agreed with Japan that neutrals such as France should not offer unlimited coal and hospitality in its ports to belligerent vessels. Although this was a growing understanding within the international club, a majority had simply not agreed to any limit—so a state was in fact free to enact whatever restrictions or accommodations it chose. France refused belligerents the use of French ports for military operations, but it did not restrict belligerent ships as to length of stay or quantities of food or coal taken aboard in French ports.[93] Japan, having been ill-used by France during the Franco–Prussian War in 1870, was determined to marshal its allies against France on this point of neutrality.

In the background of this issue was the fact that neutral support of belligerent vessels potentially interfered with the advantages of the great maritime powers in prosecuting war, to whose ranks Japan aspired. The technological advance in the nineteenth century was the steamship, which meant that ships no longer moved by sail alone and required a supply of coal. Countries without colonial ports—such as Russia—needed to coal their ships on distant voyages, and a belligerent without colonial ports was at a disadvantage in fighting a long-distance war. As several international legal authorities noted, the control of colonial ports across the globe gave a significant advantage to powers such as Britain, who could fight a global war from its home and colonial ports combined. If belligerent vessels were allowed to coal freely in neutral ports, it would become possible for any state to make war anywhere across the major oceans.[94]

93. Smith [Birkenhead] and Sibley, *International Law as Interpreted*, 461; and *NGM*, vol. 51, 450–53. The Japanese–French diplomacy is reprinted in *NGM*, vol. 51, 443–599.

94. Albert de Lapradelle, "La nouvelle thèse du refus de charbon aux belligérants dans les eaux neutres," *Revue générale de droit international public* 11 (1904): 531–64; Smith [Birkenhead] and Sibley, *International Law as Interpreted*, 129f.; Hershey, *The International Law and Diplomacy*, 202f.; Lawrence, *War and Neutrality in the Far East*, 2nd ed., 126–32; and Nagaoka, "Étude sur la guerre Russo-Japonaise," 630.

Accordingly, in the late nineteenth century, a new doctrine of neutrality was evolving under the sponsorship of Britain and the United States, one intended to restrict neutral support for maritime belligerents. In the 1871 Treaty of Washington, Britain and the United States agreed that neither state would permit a belligerent to make use of its neutral ports for offensive purposes. This was, however, a bilateral treaty and thus municipal law; it did not create international law.[95] But Britain, the United States, and other countries such as Japan, Holland, and Spain, began to include in their neutrality declarations restrictions against belligerents remaining in a neutral port longer than twenty-four hours, and limitations on both asylum in neutral ports and the quantity of coal a belligerent vessel might take on board in a neutral port. The Spanish–American War in 1898 and a resolution of the IDI in the same year did much to promote such restrictions. As regards Japan's dispute with France during the Russo–Japanese War, a principle had begun to evolve, such that a belligerent vessel could load only enough coal to reach its nearest home port.[96] But this was not yet a rule of international law, and Japan's pressure upon France contributed much to making it so at the Second Hague Conference in 1907.

When Russia deployed its Baltic Fleet in 1904, half of which proceeded through the Mediterranean, the Suez Canal, and along the east coast of Africa, while the other half proceeded down the west coast of Africa, Japanese diplomats in Europe protested the coaling of the fleet along the way. From November 1904 through January 1905, ambassadors Hayashi Tadasu in London and Motono Ichirō in Paris coordinated a diplomatic offensive against those powers who supplied the needed coal. Hayashi first raised the issue with the British Foreign Office in early November, as a request for information regarding the official policy of the Egyptian government on access to coal near the Suez Canal. Hayashi followed this query with a formal complaint in mid-December, after the Egyptian government had supplied coal to the Russian fleet. Yet in a formal memo to Hayashi, the British Foreign Office exonerated Egyptian authorities by pointing out that the canal regulations permitted all vessels to be sufficiently coaled in order to reach a next port.[97] Later in November,

95. William Edward Hall, *A Treatise on International Law*, 8th ed. (Oxford: Clarendon Press, 1924), 724–27; and Oppenheim, *International Law: A Treatise*, 3rd ed., vol. 2, 453–56.

96. Elbert J. Benton, *International Law and Diplomacy of the Spanish-American War* (Baltimore: Johns Hopkins University Press, 1908), 190–94; and James Brown Scott, ed., *Resolutions of the Institute of International Law Dealing with the Law of Nations* (N.Y.: Oxford University Press, 1916), 154f.

97. Foreign Office to MacDonald, November 9, 1904, in British Foreign Office Archives, F.O. 46/634: [149f.]; Foreign Office to MacDonald, December 14, 1904, in F.O. 46/635:

Japan laid identical complaints against the governments of Denmark and Spain for having allowed Russian vessels weeks earlier to coal in Danish waters and the Spanish port of Vigo, respectively. Again, the Foreign Office advised both the Danish minister and the Spanish chargé d'affairs in London that each country had complied with its own neutrality proclamation and incurred no fault. Foreign Minister Lansdowne pointed out that the generous Spanish rule allowing warships of either belligerent to coal and make repairs in Spanish ports conformed to Japan's own declaration of neutrality during the Spanish-American War.[98]

While Hayashi insinuated the British Foreign Office into these arbitrations of neutrality, Motono in Paris increased the pressure on the French government to desist from supplying coal to the Russian fleet as it had in its African colonies of Dakar and Djibouti.[99] Negotiations between Motono and French Foreign Minister Delcassé were stimulated by increasingly irate reports from Japan, where newspapers and public opinion charged France with violating neutrality and aiding Russia, and suggested that Japan too had a right to use French ports for warlike purposes. The *Jiji shimpō* raised the possibility of treating France as a third belligerent, while the *Tokyo Asahi* recommended that the Japanese fleet proceed to French Saigon in order to confront the Russian fleet there.[100] This growing agitation alarmed the British Foreign Office, some members of which worried that Japan might formally invoke the Anglo–Japanese Alliance and demand British military support against France.[101]

But courtesy and calm prevailed in Paris, where Suematsu Kenchō reminded readers of the longstanding friendship between France and Japan.[102] The French government argued that, in keeping with French neutrality regulations, they were furnishing the Russian fleet with coal not to

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[266f.]; "Memorandum Communicated to Viscount Hayashi," December 13, 1904, in F.O. 46/636: [246]; and *NGM*, vol. 51, 690–704.

98. For Denmark, see Foreign Office to Lieck (?), December 10, 1904, in F.O. 46/635: [170]; on Spain, see Algerton (?) to Foreign Office, December 22, 1904, in F.O. 46/635: [440]; MacDonald to Lansdowne, November 15, 1904, in F.O. 46/635: [476-81]; and Lansdowne to Nicolson, March 1, 1905, in F.O. 46/637: [240f.].

99. *NGM*, vol. 51, 487–506; MacDonald to Lansdowne, November 17, 1904, in F.O. 46/634: [257]; and MacDonald to Lansdowne, November 15, 1904, in F.O. 46/635: [476–81]. See also Patrick Beillevaire, "Preparing for the Next War: French Diplomacy and the Russo-Japanese War," in *Rethinking the Russo-Japanese War, 1904-05*, vol 2, 73–87; and Kajima, *Nichi-Ro sensō*, 195–218.

100. See translation from *Jiji shimpō*, November 11, 1904, in F.O. 46/635: [482–86]; MacDonald to Lansdowne, November 17, 1904, in F.O. 46/635: [487f.]; and translation from *Tokyo Asahi*, November 17, 1904, in F.O. 46/635: [489].

101. MacDonald to Lansdowne, November 15, 1904, in F.O. 46/635: [476–81].

102. Suematsu, *The Risen Sun*, 298–311.

reach the seat of war but to reach its nearest home port. The Russians were not using French ports as a base of operations, but merely as a consequence of unavoidable stays.[103] Several international legal experts acknowledged that France was within its rights to define its neutrality as it saw fit, and the British government approved of French measures.[104] However, as Nagaoka Harukazu pointed out, since the purpose of the Baltic fleet was entirely hostile, and France allowed Russian *warships* to maintain and prepare themselves in French ports, French behavior surely represented a failure to maintain a strict impartiality toward the two belligerents.[105] In a gesture to mollify Japan, French authorities did agree to turn the Russian fleet away from Madagascar in January 1905 (although it anchored in international waters at Nosy Be, just outside Madagascar's three-mile limit), but French hospitality toward the Russian fleet in Saigon in April 1905 revived Japanese animosity against France and would have prompted a second dispute—had the entire fleet not been destroyed at the battle of Tsushima in May 1905.[106]

As we have seen with the Chemulpo and Chefoo incidents, the diplomatic review of neutrality generated by Japan's offensive against France promoted an international hearing of the issues at the Second Hague Conference in 1907. Japan insisted that neutrality means abstention from conflict, and in his impassioned speech to conference participants, Japan's first delegate Tsuzuki Keiroku presented the issue as the difference between humanitarian asylum and the abuse of hospitality. He argued that, except in cases of life-threatening distress to the crew and the security of the ship, a belligerent warship should not be allowed into neutral ports

103. Monson to Lansdowne, November 19, 1904, in F.O. 46/636: [22]; and Hershey, *The International Law and Diplomacy*, 194–97.

104. Lapradelle, "La nouvelle thèse du refus de charbon," 537f. (esp. 538n5); Hershey, *The International Law and Diplomacy*, 197; Lawrence, *War and Neutrality in the Far East*, 2nd ed., 120–24; Smith [Birkenhead] and Sibley, *International Law as Interpreted*, 459–63; T. Martens, "Extract from the *Journal de Saint-Pétersbourg*," May 10, 1905, in F.O. 46/639: [115f.], and Prime Minister Alfred Balfour, in "The Appropriation Bill," *Times* (London), August 12, 1904, 5.

105. Nagaoka, "Étude sur la guerre Russo-Japonaise," 625–30.

106. *NGM*, vol. 51, 506–10, 518–34; Bunsen to Lansdowne, January 6, 1905, in F.O. 46/636: [86]; Lansdowne to Bertie, January 11, 1905, in F.O. 46/636: [160]; Lansdowne to MacDonald, January 11, 1905, in F.O. 46/636: [166]; MacDonald to Lansdowne, January 17, 1905, in F.O. 46/636: [183]; and Hershey, *The International Law and Diplomacy*, 192–94. On the passage and demise of the Baltic Fleet, see Herwig Lorenz, *Krieg im Gelben Meer: Der Russisch-Japanische Krieg 1904-1905* (n.p., 2005),104–46, 156–76; Toyama Saburō, *Nichi-Ro kaisen shinshi* (Tokyo: Tokyo shuppan, 1987), 205–24; J. N. Westwood, *Russia against Japan, 1904-05* (London: Macmillan, 1986), 137–51; and Toyoda Yasushi, *Nisshin - Nichi-Ro sensō* [Nihon no taigai sensō: Meiji] (Tokyo: Bungeisha, 2009), 339–43, 360–63.

at all, nor should a belligerent ship be allowed to coal or take on provisions in a neutral port.[107] This extreme definition of neutrality as abstention was duly tempered in discussion, as Britain and Japan argued for significant restrictions on belligerents in neutral ports and Russia and Germany opposed all such limits.[108] As it happened, the compromises reached in 1907 approximated the general principle that had been evolving by 1898, and which Japan wanted to assert as normative during the Russo–Japanese War. Convention XIII of the Second Hague Conference restricted belligerent warships to a stay of twenty-four hours in neutral ports (with exceptions for extenuating circumstances) and limited a belligerent to loading only enough coal to reach its nearest home port (unless a country's neutrality laws specified otherwise). Moreover, such a ship could not coal at a neutral's ports more often than once every three months.[109]

Despite these caveats, Convention XIII largely represented the interests of the maritime powers, for states with colonial ports would remain better prepared for global warfare. More important, the agreement represents a significant victory for Japanese sovereignty. Japan had successfully used its status as a civilized state—its membership in the international community and its alliance with Britain—to impose its will on its fellows. Japan first persuaded France of Japan's view of neutrality during the Russo–Japanese War and then, at The Hague, Japan had lobbied for the enactment of an international rule that fit Japan's interests. Japan had enforced its sovereign will and demonstrated its equality within the international community.

V. Conclusions

Sovereignty, in the nineteenth century, was expressed through a combination of state will, which looked for legitimacy to natural law, and civilized statehood, which was based upon an acceptance of western and international law as ratified by the family of nations. Because the point of this article was to illustrate Japanese success in asserting its sovereignty in the prosecution of the Russo–Japanese War, we have necessarily focused on points of contention between Japan and its fellows in the international community. These events, in which the Japanese state aggressively pursued its will, occurred often in the absence of international

107. Deuxième Conférence Internationale de la Paix, *Actes et documents*, vol. 3, 460–63.

108. Hull, *The Two Hague Conferences*, 150–56; and Scott, *The Hague Peace Conferences of 1899 and 1907* (1909), vol. 1, 634–44.

109. Scott, *The Hague Conventions and Declarations of 1899 and 1907* (1918), 213.

rules and, except for the Chefoo incident, were deemed legally defensible and legitimate actions in the judgment of the international community.

My argument is that Japan's admittance to the family of nations, and the ratification of Japanese sovereignty because of its status as a civilized state, both encouraged and permitted Japan to pursue its state will during the Russo–Japanese War. This article has focused on the ratification of Japan's sovereignty as state will, because, as with so many similar actions on the part of the other powers in the nineteenth century—such as the absorption of Korea—state will became normalized through international attempts to integrate it into international rules of law.

Certainly two additional factors assisted this encouragement of Japan's state will. One was a general disapproval of Russia among powerful members of the international community, particularly Britain and the United States. They were outraged by Russian rules of contraband and the Russian practice of sinking neutral prize ships. Even Russia's usually loyal defender, Germany, was angered by the Russian treatment of German merchant ships in the course of the war. Compared to Russia, Japan was a better friend to the international community. Hence a second significant factor was Japan's persistent adherence to international law. Many aspects of Japan's prosecution of the war were, so to speak, done by the book, and facilitated by the attachment of international legal advisors to each army in the field: Japanese treatment of prisoners of war was impeccable, and Japan received much praise for its creation of a bureau to manage prisoners—in the exact manner prescribed by the 1899 Hague Conference. Also praised by the international press was Japanese treatment of the sick, the wounded, and the dead, as well as Japanese Red Cross facilities, operations, and first aid. Japan's conduct of the siege and capitulation of Port Arthur was noteworthy for the care with which Japan protected Russian life and property there. The manner of the Japanese prosecution of the war was said to be a model of gentlemanly behavior—and this praise for Japan was of a piece with the otherwise distracting incidents examined in this article.[110] With the Russo–Japanese War, Japan demonstrated a command of international law and a commitment to its principles. This mastery not only certified Japan's status as an equal among the civilized states but also invited Japan to participate in world affairs in the same manner as its fellows—by resorting to state will in situations defined by legal ambiguity or military necessity.

110. Ariga, *La guerre Russo-Japonaise*, and Takahashi, *International Law Applied to the Russo-Japanese War*, understandably praise Japanese conduct, but see also Paul Fauchille, "Préface," in Ariga, vii; Hershey, *The International Law and Diplomacy*, 301, 319–24; and Smith [Birkenhead] and Sibley, *International Law as Interpreted*, 8f.

Japan had mastered the rules of international law, as well as the knowledge of how to use them. If the diplomatic offensive against French support of the Russian fleet was a constructive use of diplomacy, Japan's absorption of Korea was not as beneficial a development. With a Korean protectorate, Japan joined the ranks of the civilized nations in their quest for overseas territories and set its sights on special interests in China. In less than a decade, Japan would begin to aggressively assert itself in Chinese affairs, simply because China was weak. The western powers had done as much. We might say that this internationalization of the family of nations by so capable a newcomer as Japan marked the end of a status quo that had afforded the west a confidence and unity it never recovered.