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# The Validity of Some Coerced Treaties in the Early 20th Century: A Reconsideration of the Japanese Annexation of Korea in Legal Perspective

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# **The Validity of Some Coerced Treaties in the Early 20th Century: A Reconsideration of the Japanese Annexation of Korea in Legal Perspective<sup>1</sup>**

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<sup>1</sup> This article has been published in *Korea Observer*, Vol.33, No.4, Winter 2002. pp.637~667.

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### □. Introduction

Ninety-two years have passed since the Japanese Empire seized the Korean peninsula, culminating in the annexation of Korea in 1910. And it has been 54 years since the Korea regained its sovereignty from the Japanese colonial control in 1948. But more recently, claims and counterclaims regarding the actual legality of the annexation itself have been discussed and reconsidered through many international meetings among historians and international law scholars.<sup>2</sup>

New documentary discoveries suggested that the agreement of annexation was reached under duress and some agreements reached prior to the 1910 annexation were similarly flawed. It seems that any final judgments and conclusions are yet to be reached. Papers studied by scholars from Japan and Korea —North and South—and documentary materials yet to be discovered and assessed, should be brought into further scholarly discourse. It goes without saying that the legal judgments must be reached according to the practices in effect at the time.

However, Korea and Japan have technically evaded this issue in their basic relations agreement in 1965.<sup>3</sup> It seems that a concluding findings with regard to

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<sup>2</sup> International Symposium. *Japanese Annexation of Korea: Reconsideration from Historical and International Law Perspectives*,

[The First Workshop] January 25~28, 2001. Alamoanna Hotel, Honolulu, Hawaii.

[The Second Workshop] April 26~29, 2001. Tokyo, Japan.

[The Third Workshop] November 15~17, 2001. Harvard University Asia Center.

<sup>3</sup> Article 2 of the Treaty of Basic Relations between Japan and the Republic of Korea of 22 June 1965

It is confirmed that all treaties or agreements concluded between the Empire of Japan and the Empire of Korea on or before August 22, 1910 are already null and void.

Official English text is reproduced in 4 *ILM* 924, 925.

this issue based on the rule of international law taking account of due historical evidences should have already been reached.

Korean Government's official stance is that the validity of the agreement of annexation and some agreements reached prior to the 1910 annexation has been explicitly denied from the outset in the 1965 Treaty. But Mr. Ushiroku Taroh, one of high officials in the Japanese Ministry of Foreign Affairs explained to the Japanese parliament,

“by putting the word 'already' in the article, we express our position that there was at least a period when these treaties and agreements were valid.”□<sup>4</sup>

One Japanese professor concluded that this difference of interpretation was a result from a deliberate choice of wording to allow the difference of the interpretations. Thus such dual interpretation was nothing but a coincidence of intentions of the political leaders of the two countries to secure domestic explanations for their own people respectively.<sup>5</sup>

A task of legal works in order to settle those pending issues between the two countries is indeed demanding. So it could never be over emphasized, if one stressed the necessity of streamlining the mutual relationship between Korea and Japan strictly based on a legally well defined theory.

Far more than such practical reasons, just for the legal considerations, a sincere and thorough analysis of the state practices regarding the law of treaties and the law of war, particularly, as applied to non-western States such as Korea and Japan is urgently required.

This essay pursues such an approach in the interest of contributing to contemporary scholarship.

## □. Historical facts Regarding the Annexation and Other Treaties Coerced by Japan

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<sup>4</sup> Yamada Shoji, “Today's problem of the ROK-Japan Treaty”□, extra issue of *Sakai*, 1992. p.54.

<sup>5</sup> Ishimoto Yasuo, “Grave Doubts about Korea-Japan Agreement- A Study of Its Legal Structure”, *Sakai*, □, No.241. (December, 1965), pp.31~32.

Prior to getting into the legal scrutinizing, regarding the treaty of annexation and other coerced treaties, a preliminary survey of the related historical facts is necessary. According to the historical records of Japanese aggression in Northeast Asia, on August 21, 1875, the Unyo-maru, one of the 30 Japanese warships dispatched to Korea, pulled into Kangwha Bay near Inchon Port, off the western coast of Korean peninsula. In the engagement between the Japanese amphibious assaulting force and the Korean coastal defense troops, Korea had been completely defeated suffering 35 casualties and 16 captured. After this initial military invading action of 1875, a series of political (or sometimes quasi-diplomatic) manipulations by Japan to annex Korea had been followed.

Throughout the whole proceedings of Japanese aggression to the Korean peninsula, there had been no declaration of war against Korea by Japan, no all-out military engagement between the two countries except this Unyo-maru incident, no subjugation had ever been announced explicitly.

Prior to the Treaty of Annexation in 1910, there were four other quasi-treaties concluded between the two countries.<sup>6</sup> These five quasi-treaties were logically inter related in the sequence of disposition. To verify the validity of the Japanese annexation of Korea, these must be reviewed sequentially. They were logically inter-related in the sequence of disposition. So, to verify the validity of the Japanese annexation of Korea, they should be reviewed all together in series.

### **A. Korea-Japan Protocol of February 23, 1904**

During the Russo-Japanese War that begun on February 6, 1904, the Japanese Army invaded Korean territory, ignoring the Declaration of Neutrality issued by the Korean Government on January 21st, 1904. Following seizure of Emperor's palace and the occupation of the entire peninsula, by the Japanese troops, the “Korea-

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<sup>6</sup> These controversial five quasi-treaties are as follows:

The Korea-Japan Protocol. Feb. 23, 1904. [Japanese free appropriation of strategic spots of Korean territory]

The First Korea-Japan Agreement. August 22, 1904 [Designation of diplomatic and financial Governor to control Korean Government]

The Second Korea-Japan Agreement. Nov. 17, 1905. [The coerced agreement to make the Korea into a Japanese protectorate]

The [Third] Korea-Japan Agreement. July 24, 1907. [The coerced agreement to make the Korea into a Japanese colony].

Treaty Regarding the Annexation of Korea to the Empire of Japan. August 22, 1910, [The coerced agreement to annex the Korea to the Empire of Japan]

Korea and the Japan concluded 52 bi-lateral agreements prior to the 1910 Annexation Treaty.

Japan Protocol” was signed between the two countries on February 23, 1904.

This first quasi-treaty was signed between Korean representative, Major General Jee-Yong Lee (Minister of Foreign Affairs *ad interim*) and Japanese representative, Ambassador Gonsuke Hayashi (Envoy Extraordinary and Minister Plenipotentiary), under immediate Japanese military threats, and in an obviously hastily arranged manner.<sup>7</sup>

### **B. The First Korea-Japan Agreement of August 22, 1904**

Japan had won a decisive victory against Russia, in the naval confrontation at the Yalu River estuary on August 10, 1904. On the basis of this naval victory, Japan sought to make its control of the Korean Government predominant to any other neighboring powers, by securing its aggressive intentions with this working level agreement with Korea. Had initially been deemed as an administrative memorandum rather than a legal treaty by Japan, the title of this agreement had not been clarified in any form on the document. This memorandum had abruptly been introduced as an “Agreement” by Japan when it was introduced to western powers like the Great Britain and the United States.<sup>8</sup>

The principal points of this agreement were as follows:

- ① The Korean Government shall be under the control and guidance of Japanese Financial Governor.
- ② The Korean Government shall be under the control and guidance of Diplomatic Governor, selected from among foreigners, designated by the Imperial Government of Japan.
- ③ Any treaties or agreements the Korean Government intends to make with other powers, shall be prior-consulted with the Imperial Government of Japan

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<sup>7</sup> -Professor Tae-Jin Lee of the Seoul National University contended that the final texts of this Protocol had been drafted *ex post facto*, unilaterally by the Government of Japan, and transmitted by telegram on February 25th, two days later than the official signature of this agreement.

Telegram dated February 25th 1904: [Transmitting the Preamble and Texts of the Japan-Korea Protocol] cited from Tae-Jin Lee, op. cit.; *The Japanese Diplomatic Documents*, (Nihon Kaiko Bunsho) Vol. 37, No.1. para. 5, p.381.

- But Japanese scholar, Professor Unno Hookuzu insisted that this contention was based on an erroneous reading of the telegram-head.

Unno Hookuzu, “A Historical Comprehension of the Japanese Annexation of Korea”, *Sekai*, vol. 666. October 1999.

<sup>8</sup> Tae-Jin Lee, op. cit.

This treaty, the First Korea-Japan Agreement, was imposed to Korea unilaterally by Japan. Only Japanese-side had kept the documents in its archives. The representative status of the signatories had not been entrusted by the authority of full power. But professor Unno has defended that this agreement was originally a government level administrative agreement that did not have the seal of the Emperor, or any certification of full power.<sup>9</sup>

### **C. The Second Korea-Japan Agreement of November 17, 1905**

Immediately after the Portsmouth Treaty went into effect, Japan sent Hirobumi Ito to Korea and forced the Korean government to conclude the Second Korea-Japan Agreement.<sup>10</sup> This agreement was designed to make Korea into a Japanese protectorate. Japan and Great Britain revised the Anglo-Japanese Treaty of Alliance on August 12, 1905, and Japan obtained British consent to colonize Korea under the guise of protection. In the secret Taft-Katsura agreement on July 29 1905, Japan and the United States recognized Japan's paramount interests in Korea. The United States, Great Britain and Russia had eventually all gave acquiescence to Japanese takeover of Korea.

At the cabinet meeting on November 17th, convened to discuss this treaty, the consensus was to oppose this treaty. Ito who was informed of the negative atmosphere, accompanying with the garrison commanding general and the head of military police to make clear the Japanese stubborn threatening intention, intervened immediately. Among the seven members of the Korean Cabinet, only two, the Prime Minister, Kyou-Sul, Han and the Minister of Treasury, Young-Keo Min opposed the treaty and were placed in custody by the Japanese military police. The other five were so frightened that they resigned, refusing to either assent or dissent. However, Ito regarded the silence as approval. For final ratification, Ito had a Japanese soldier seize the seal of the Minister of Foreign Affairs and forced the Minister to sign the document.<sup>11</sup>

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<sup>9</sup> Unno Hookuzu, op. cit.

<sup>10</sup> *The Japanese Diplomatic Documents* (Nihon Kaiko Bunsho) Vol. 38, No.1. pp.450~51, 519~20, 526~27.

<sup>11</sup> McKenzie, *The Tragedy of Korea*, Hodder and Stoughton, 1906.; *The Japanese Diplomatic Documents*(Nihon Kaiko Bunsho) Vol. 38, No.1. pp.488~91, 531.; The Korea History Editing Committee, *The History of Korean Struggle for the Sovereign Rehabilitation*, 1965. pp.52~60. ; Hwang Hyon, *Maechun Yarok* (梅泉野錄), The Korea History Series I , (Seoul: 1955). vol.4,

By that time Seoul had already been occupied by a Japanese cavalry unit, an artillery battalion and a military police unit.<sup>12</sup> On November 17, 1905, Ito pressed the Korean government to sign the draft treaty designed to cripple the Korean government's ability to conduct foreign relations placing Korean diplomacy under the control of the Japanese Foreign Office. The treaty also established the Office of the Resident-General in Korea to enforce colonial rule.

The prescribed contents of the coerced agreement are as follows:

Article 1. The Government of Japan, through the Ministry of Foreign Affairs at Tokyo, will hereafter have control and direction of the external relations and affairs of Korea, and the diplomatic and consular representatives of Japan will have the charge of the subjects and interests of Korea in foreign countries.

Article 2. The Government of Japan shall undertake to see to the execution of the treaties actually existing between Korea and the other Powers, and the Government of Korea shall not engage to conclude hereafter any act or engagement having an international character, except through the medium of the Government of Japan.

Article 3. The Government of Japan shall be represented at the Court of His Majesty the Emperor of Korea by a Resident-General, who shall reside at Seoul, primarily for the purpose of taking charge of and directing matters relating to diplomatic affairs. He shall have the right of private and personal audience of His Majesty the Emperor of Korea.

The Japanese Government shall also have the right to station Residents at the several open ports and such other places in Korea as they may deem necessary. Such Residents shall, under the direction of the Resident-General, exercise the powers and functions hitherto appertaining to Japanese Consuls in Korea and shall perform such duties as may be necessary in order to carry into full effect the provisions of this agreement.

Article 4. The stipulations of all treaties and agreements existing between Japan and Korea not inconsistent with the provisions of this Agreement shall continue in force.

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<sup>12</sup> *The Japanese Diplomatic Documents* (Nihon Kaiko Bunsho) Vol. 37, Supplement.



Article 5. The Government of Japan shall undertake to maintain the welfare and dignity of the Imperial House of Korea.

No Seal of the Emperor was found in the official document of this agreement. In fact, Emperor Kojong declared that he had never given his consent to this treaty. He sent a special envoy, Ambassador Young-Charn Min, the resident ambassador to France, to Mr. Root, the U.S. Secretary of State<sup>13</sup>. He also requested Mr. Homer B. Hulbert, the editor of the *Korean Review* in Washington D.C. to convey his Declaration of Denial<sup>14</sup> to the President of the United States.

In all archives, no documents entrusting the full powers for this particular treaty to both of the signatories have not been found yet.<sup>15</sup>

#### **D. The Korea-Japan New Agreement of July 24, 1907.**

The Korean Emperor Kojong was eventually deprived off his throne because he sent a secret envoy to the Hague Peace Conference in 1907, to declare the invalidity of the Second Korea-Japan Agreement. Arriving at Hague on July 14th, 1907, Ambassador Chun Yi (李准) killed himself in the Hague in an anger at not being able to attend the Peace Conference and his failure to appeal the Emperor's Declaration of Denial of the Second Korea-Japan Agreement to the participating powers. On July 22 1907, the Japanese Empire forcibly placed the Korean Prince on the throne as the new Emperor. Taking advantage of such threatening atmosphere, in order to provide a legal basis for Japan's appropriation of Korea, Japan requested Korea to accept the Third Korea-Japan Agreement (“The Korea-Japan New Agreement”) on July 24th 1907.<sup>16</sup>

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<sup>13</sup> *Washington Post*, December 12th, 1905.; *Evening Star*, December 12th, 1905; *The Japanese Diplomatic Documents* (Nihon Kaiko Bunsho) Vol. 38, No.1. pp.669~71.

<sup>14</sup> The Emperor's Declaration of Denial:

I, the Emperor of the Korean Empire, declare that this Korea-Japan Agreement has no legal effect because this was concluded unlawfully by force. I did not sign the document and I will not sign it never.

Ibid. pp.671~2; *Evening Star* dated December 13th, 1905.

<sup>15</sup> Tae-Jin Lee, *The Annexation*.

<sup>16</sup> See for example, The Korea History Publishing Committee, *SeungChongWon Diary* [承政院 日記], Vol. 15. (Seoul: Tamgudang, 1969). ; *Kojong-Sunjong Silrock*, [高宗.純宗實錄] (Seoul: Tamgudang, 1970). ; Kim Chong-Myong, *Japan-Korea Diplomatic Materials –Making Protectorate of Korea and the Annexation* [Japanese version] 8 volumes, Tokyo, Japan, 1965. ; Centre for the Oriental Study of The Dangoon University, *The Tragic History of Korea*; ; The Park Eun-Shik's Memoirs, [Korean version] vol.III, Chapter 32. Seoul, Korea, 1975 .

With the conclusion of the Third Korea-Japan Agreement on July 24th 1907, a large number of Japanese officials were integrated into the executive and judicial branches of the Korean government, accelerating the Japanese scheme of complete rule. The Korean armed forces were disarmed and disbanded. The judicial system was reorganized to serve Japanese interests. Moreover, in a secret memorandum attached to the Third Korean-Japan agreement, it was stipulated that courts, newly constructed prisons, and the police would be turned over to Japanese management. This enabled the Japanese to assume actual judicial and police authority. Annexation the Korea to the Empire of Japan had almost been completed substantially. Only some procedural formalities of annexation had been remained.

### **E. The Japanese Annexation of Korea and its Cumulative Effects**

Ever since the conclusion of the 1910 Annexation Treaty, even during the Japanese occupation, there were consistent expressions of the denial of the validity of the treaties by Korean people. Korean people had waged persistent resisting war against the Japanese Empire. Those were formidable military operations. Resisting the conclusion of the Second Korea-Japan Agreement of November 17, 1905, Oeebyong — a privately organized army of citizen volunteers — appeared all over the country. The most prominent troop in 1905, was the Young-Pung Oeebyong, the guerilla force of 3,400 soldiers operated in the Young-Pung Province, the southern part of the Korean peninsula. In resisting the conclusion of the Annexation Treaty of 1910, there had been 128 military engagements between the Korean Oeebyong forces and Japanese military forces in 1910 alone

After the Independence Movement<sup>17</sup> on March 1st 1919, the citizen guerilla forces had been reorganized as full-fledged armies. At the height of the Independence Movement, a provisional government of Korea was established in

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<sup>17</sup> A non-violent resisting movement against Japanese occupation throughout the Korean peninsula which was initiated by the mass gathered for the funeral of the late Emperor Kojong on March 1st 1919. At noon on that day, the Representative of the Korean Nation -33 prominent leaders- declared the Independence of Korea. Korean people had gathered unarmed in mass, they marched declaring the independence of Korea. This movement continued about three months.

Total participants; 2,023,089 persons. 7,509 were killed by Japanese military police forces. 15,961 were wounded. 46,948 were captured and put into the prison.

Kim Jun-Yoep, Park Young-Soup and et al, *The History of Korea Independence Movement* (Seoul: HankookIlbo-Sa, 1987) pp.130~32.

Shanghai on April 11, 1919.<sup>18</sup> Various citizens' voluntary armies operating in Manchuria were unified and placed under the command of the Korea Provisional Government in Shanghai, China. They were usually called as "Toklip-goon".<sup>19</sup> General Jwerchin Kim's army regiment<sup>20</sup> and General Chongchun Lee's army division were the most active combat forces in waging several historical military operations against the Japanese army, with record-breaking victories in infantry warfare.

As the representative organ of Korean people, and as the only independence organization speaking for them abroad, the Provisional Government, did its best to fulfill its legitimate obligations as the Korean Government in spite of financial difficulties and persistent attempts of suppression waged by Japanese Imperial Government. It declared war against Japan and established close cooperation with the Allied Powers during World War II.<sup>21</sup> For more than 26 years, until its return

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<sup>18</sup> The Provisional Government of Korea in Shanghai, made efforts to integrate its activities with those of other groups. It passed a resolution calling for integration with the Seoul government. The first cabinet meeting was convened on November 4, marking the start of the functioning of the Provisional Government.

<sup>19</sup> "Independence Army"□, the military organization for the independence of Korea.

A group of leaders met in Beijing in April 1921 to work out a plan for united military action, realizing that the most urgent task was to unite the independence armies acting in Manchuria. The conference later developed into the all-inclusive Council of National Representatives that held its first meeting in Shanghai in January 1923. Armed resistance under the leadership of the Provisional Government was given a firm basis, and the Korean troops in Manchuria continuously fought against the Japanese army, sometimes with spectacular success. In 1930s, in Manchuria area China, the total forces of this Korean resistant army had come to two division size, with a military academy, the military aviator training center and a nurse academy.

Ibid., Kim Yun-Whan, Park Yong-Ouk and et al., *The Military Engagements of the Independent Army* (Seoul: Minmoongo, 1995) Volume 4 of the Series of The History of Korean Independent Movement against Japan projected by the Society for the Rehabilitation of Nation History.

<sup>20</sup> They had the famous engagement with the Japanese cavalries in the valley of Chong-San-Lee, the southern part of Manchuria on October 16, 1920. In this engagement General Kim won a brilliant victory over the Japanese division. Japanese casualties were 118 cavalries, 3,300 division soldiers (including the Division Commander). Korean army recorded only 60 casualties, 90 wounded.

<sup>21</sup> ① Military cooperation with the Chinese Army

Due to the fact that the main operating area of the Korean Independence Army had been the Manchuria area and Northern Part of China, most of its combat activities had been carried out in the form of combined operation with the Chinese Army.

② Military cooperation with the British Army

In 1942, when the Japanese Imperial Army invaded into Indo-Burmese front line, the authority of the British Army suggested a combined operation with the Korean Independence Army. General Lee, Chong-Chun and the British Representative, Colin Mackenzie agreed the military cooperation in a document of 12 points, June 1942. From September 1942 to April 1944, the Korean Special Unit had joined the combat operations of the British Army -the 17th Division- in the area of Imphal, Chittagong and later to the amphibious operation attacking the Capitol Rangoon.

③ Military cooperation with the U.S. Army

The Provisional Government of Korea and the Korean Independence Army had actively tried to join the Allies Forces' military actions against the Japan ever since the Japanese surprise attack to the Pearl Harbor on December 8, 1941. But the meaningful contact with the U.S. Forces commenced with Mr. Chrence B. Weens of the U.S. Air Force Command resident in China, The combine actions with the U.S. Forces had proceeded mainly in the form of the special intelligent operations with Office of Strategic Service (OSS) during 1943~1944.

Kim Yun-Whan, et al., *The Military Engagements of the Independent Army* (1995) , pp.218~ 225.

home on November 23, 1945, after the Japanese surrender, the Provisional Government strove to represent the Korean people.

The painstaking activities of Provisional Government of Korea, could be evaluated as far more systematic and persistent than those by the General Charles de Gaulle's exile (provisional) government in London, in its efforts to rehabilitate the sovereignty of France.

### **□. The Second Korea-Japan Agreement: Issue of Coercion**

In reviewing the legality of the Japanese annexation of Korea and the related agreements prior to the 1910 Annexation Treaty, the aforementioned five treaties□are the principal subjects of analysis, because they are legally meaningful and logically inter-related. The Second Korea-Japan Agreement of November 17, 1905 is of particular interest because the treaty compromised the sovereignty of the Korean Empire.

According to international law in effect at that time, the use of force was not illegal and a war waged for the purpose of the acquisition of territory was not unlawful. Even in the case of Japanese annexation of Korea that had been procured by force or threat of force, the lack of consent of state could not be regarded as tainted with invalidity. But an expression of consent procured by the coercion of its representative through acts of force or threats directed against him, is generally agreed to be without legal effect, even prior to the establishment of the modern international law prohibiting the use of force or threat of force.

The attitude of law relating to use of force or threat of force in procuring a treaty has been changed successively and cumulatively. An ancient and historic title procured by force or threat of force, in the name of subjugation, prior to the Covenant of the League of Nations of 1919, the General Treaty for the Renunciation of War of 1928 and the Charter of the United Nations, could be permissible to plead.

However, it is necessary, to distinguish the coercion of the state itself<sup>22</sup>

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<sup>22</sup> Article 52 of 1969 Vienna Convention on the Law of Treaties.

and the coercion of a representative of a state.<sup>23</sup> As far as the later case is concerned, the validity of a coerced treaty could not be sustained with the excuses of the doctrine of inter-temporal law.

In examining the validity of the five coerced treaties between Korea and Japan concluded in the course of Japanese annexation of Korea, it seems necessary to analyze first, among other points, whether those five treaties, particularly the Second Korea-Japan Agreement of November 17, 1905 had been procured by the coercion exercised to the representatives of the state. The procedural formalities of the five treaties will be reviewed subsequently.

### **A. Arguments of the early French scholars**

The intensive and deliberate studies of the proceedings of Second Korea-Japan Agreement of November 17, 1905, by a few French scholars had come to the conclusion that the coercion exercised to the Korean representatives by the militant Japanese Empire, made the agreement *null and void*.<sup>24</sup>

Professor Francis Rey, of Paris Law School asserted;

...I have learned that the Japan-Korea Protectorate Treaty was imposed on the government of Korea by mental and physical violence. The signature on the treaty is nothing more than a thing obtained from the King and the Ministers under the pressure of the Japanese Army who guarded Mr. Ito Hirobumi and Mr. Hayashi Gonske....After two days' resistance, the Ministers were resigned to sign the treaty, but the King immediately sent a representative to the Great Powers to urge the invalidity of the treaty. ....Given such special circumstances when the treaty was signed, I have to acknowledge that the Protectorate Treaty is *null and void*.<sup>25</sup>

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<sup>23</sup> Article 51 of 1969 Vienna Convention on the Law of Treaties.

<sup>24</sup> Francis Rey, "La Situation Internationale de la Coree"□, *Revue Generale de Droit International Public*, Tome XIII, 1906; p.55. ; Tomsic , "La Construction du Droit International"□, *Libraire de la Cour D'appel et de L'ordre des Avocats*, 1931, pp.57~58.; J. De. Louter, *Le Droit International Public Positif*, Tom I , Imprimerie de L'Universite, 1920., p.479.

<sup>25</sup> Francis Rey, op. cit., pp.55~56.

In sum, in view of the law of the treaty, there had been the coercion of a state and the coercion of the representatives, respectively. In 1905, the coercion of a state did not necessarily make a treaty unlawful. But the coercion of the representatives, especially such uncivilized, brutal manner of use of force exercised upon the representatives of a contracting party, shall hinder this treaty to be legally valid.

Particularly, in view of the Professor Rey, he raised another reason than the brutal coercion, for the treaty to be invalid; the contradiction between a promise guaranteeing the independence of Korea, made by the Japan in treaties concluded prior to the treaty<sup>26</sup> and the intention of renouncing it in the Protectorate Treaty was an additional reason for its invalidity. As for the coercion as the principal reason of the invalidity, the views of other French scholars were along similar lines.<sup>27</sup>

### **B. Harvard Report Drafting Convention on the Law of Treaties (1935)**

In 1935, the Faculty of the Harvard Law School prepared the drafts of conventions for the codification of international law.<sup>28</sup> The Part III of that research report was the draft of the Law of Treaties. In the Comment for the draft Article 32, Duress, cited the Second Korea-Japan Agreement of November 17, 1905 as one of three typical instances of the coerced treaties.<sup>29</sup> Actually, as for the coercion exercised by the Japan in 1905, the afore-mentioned arguments of the French scholars were totally accepted and referred in this Harvard Report.<sup>30</sup>

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<sup>26</sup> He concerned about 4 treaties;

- 1) The Japan-Korea Amity Treaty of August 26 1894. [Article 1]
- 2) The Japan-China Peace Treaty of April 17, 1895. [Article 1]
- 3) The West Rosen Treaty of April 25, 1898. [Article 1]
- 4) The First Anglo-Japan Allied Treaty of January 30, 1902. [Article 1]

Ibid. p.56. n.2.

<sup>27</sup> Paul Fauchille, *Traité de Droit International Public*, Tome I . Paris. 1926. p.299

<sup>28</sup> *Research in International Law*, Drafts of Conventions Prepared for the Codification of International Law, Supplement to the *AJIL* vol. 29, 1935..

<sup>29</sup> The three instances cited here were;

- 1) The surrounding of the Diet of Poland in 1773 by the Russian Army.
- 2) Coercion employed by the Japan with the aid of soldiers against the Emperor of Korea and his ministers to obtain the assent to the Treaty of November 17, 1905.
- 3) Coercion used by the U.S. against the Haitian Assembly in 1915.

<sup>30</sup> Supplement to the *AJIL* vol. 29, (1935). p.1157

### **C. Waldock's Second Report for the Discussions of the ILC in 1963**

After the World War II, the work of codification of the international law was continued by the International Law Commission. Discussion of the law of treaty in the ILC began in May 1963, with the draft submitted by the Special Rapporteur Waldock.<sup>31</sup> In his commentary on the Article 11 [Personal Coercion of Representatives of States or of Members of State Organs], he cited the Second Korea-Japan Agreement of November 17, 1905 as one of four typical instances of the coerced treaties.<sup>32</sup> Relying on the Harvard Report in 1935, Waldock added one more instance to the Harvard Report, Hitler's coercion applied to the President of Czechoslovakia, in order to force him to accept the arrangement of March 15, 1939, making Bohemia and Moravia region into a German Protectorate.<sup>33</sup>

### **D. Discussions at the International Law Commission Meeting**

At the actual discussion of the ILC Meeting on Waldock's report, no exchange of opinions about the Second Korea-Japan Agreement of November 17, 1905 took place. Indeed there was no exchange of opinions on coercion, except for the Hitler's coercion on the President of Czechoslovakia.<sup>34</sup> But this does not necessarily mean that the members of ILC had any difficulties in accepting the Waldock's citation, quoting the three instances, including the case of the Second Korea-Japan Agreement of November 17, 1905, as the typical cases of the coercion exercised against the state representatives. By condemning the Hitler's coercion as void on the grounds of the coercion committed against representative of the state, the commission acknowledged simultaneously the invalidity of the treaties cited by Waldock.

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<sup>31</sup> H. Waldock, *The Second Report on the Law of Treaties* (A/CN.4/156)

<sup>32</sup> *Ibid.* pp. 42-43

<sup>33</sup> Sir Humphrey Waldock, Special Rapporteur, *The Second Report on the Law of Treaties* Document A/CN. 4/156 and Add.1-3, in *Yearbook of the International Law Commission*, vol. II, p.50.

<sup>34</sup> 681st Meeting, May 16, 1963. in *Yearbook of the International Law Commission*, vol. I, pp.48-50.

The Japanese scholar, Professor Sakamoto, commented in his paper that, “regrettably, there is no evidence that opinions were exchanged on Waldock’s evaluation of the Japan-Korea Protectorate Treaty.”<sup>35</sup> He emphasized the fact that in the Commentary on the Draft Convention on the Law of Treaties in the Discussion of the ILC Meeting, only the Hitler’s coercion case was mentioned. In this connection, he even introduced the political – obviously, legally erroneous – comments by the Director of the Treaty Bureau, Japanese Ministry of Foreign Affairs; □ “We do not recognize that international society considers the 1905 treaty to be invalid as a consensus.”<sup>36</sup> However, his complicated discourse did not conclude that the 1905 treaty was not invalid. He prudently pointed out it was questionable that “the treaty concerned was not a treaty concluded under coercion committed to a state representative with only the fact that was not expressed in the Commentary.”<sup>37</sup>

### **E. Japanese counter arguments insisting the validity**

The rules of international law pertaining to this issue could be summarized as;

1) At the time of the conclusion of 1905 Treaty, a rule of customary international law that a treaty made under coercion applied to a state representative was *null and void*, had already been established. It was considered that the coercion mentioned above included mental coercion as well as physical coercion.

2) "There were some people at that time" (in Sakamoto’s words) who regarded the 1905 Protectorate Treaty as invalid on the ground that it was made under coercion applied to a state representative.

3) International law distinguished the legal effects of coercion as it applied to a state itself, from the effect of coercion applied to a state representative

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Sakamoto concluded his discourse with a similar summary, “almost”□

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<sup>35</sup> Shikeki Sakamoto, “The Validity of the Japan-Korea Protectorate Treaty”, *Kansai University Review of Law and Politics*, No.18, March 1997. pp.83~84.

<sup>36</sup> □ Ibid. ; The Records of the Committee on the Budget of the House of Councilors [in the Japanese Diet], No.7. March 23, 1993.

<sup>37</sup> Sakamoto op.cit., p.85.



accurately.<sup>38</sup> But he immediately raised a very controversial question as that in the concrete applications, particularly in the case, like Japan-Korea Protectorate Treaty of 1905, any such "dichotomy" could not practically be operative because the distinctions as between the coercion to a state itself and that applied to the state representatives would not be so clear.<sup>39</sup>

Sakamoto's research effort, however, appears to have come up short.

He might have argued coercion committed by the Government of Imperial Japan against the Korean Emperor and the ministers of the Korean Government amounted to a coercion to the state itself, so it need not be regarded as invalid.

Even prior to professor Sakamoto's contention, there had already been continuous and vigorous efforts on the part of the Japanese scholars<sup>40</sup> to justify the Imperial Japanese Government's disposition extorting the sovereignty of the Chosun Dynasty.

The structures of the contending theories adopted by these Japanese scholars could be classified as two kinds. The one is emphasizing the lack of criteria to distinguish the coercion against a state from that against an individual state representative. Most of the Japanese scholars seem to take this stance. The other is rather unique stance taken by Professor Ariga. He classified the coercion into two types, circumstantial and physical. He asserted that a treaty would be *null and void* if one forces a person to sign a treaty under the threats of physical violence. He also insisted that a treaty that was concluded under the pressure of circumstances was not *null and void*. He further argued that in concluding the 1905 Protectorate Treaty, there was circumstantial coercion against a state representative, but not physical coercion.<sup>41</sup> It seemed that he was desperately endeavoring to defend the validity of the 1905 Protectorate Treaty against all those western writers' opinions. But his theory is neither logical, nor persuasive. He had failed to convince even the Japanese professor Sakamoto by alleging that those intimidations and detention committed to the Korean Emperor and his ministers by Ito and his soldiers were nothing but a reasonable circumstantial coercion and they were not deprived of "freedom of action".<sup>42</sup>

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<sup>38</sup> Ibid. pp. 91~92.

<sup>39</sup> Ibid. p.69. , p.92.

<sup>40</sup> Tachi Sakutaro, *Theory of International Law in Time of Peace* (1923). ; Taoka Ryoichi, *General Principles of International Law*, (1942) ; Ariga Nagao, "The Japan-Korea Treaty and the Problem of Duress", □ *Gaiko Jiho*. No.102, pp.64~68

<sup>41</sup> Ariga Nagao, op.cit.

<sup>42</sup> Sakamoto Shikeki, op.cit., p.76.

## **F. Coercion against State Representatives**

As for the other Japanese contending theory to justify the validity of the 1905 Protectorate Treaty, which is rather popular one among them, some prudent and straight forward review shall be needed.

The real consent and freedom of consent of a state party to a treaty are the essential conditions of the validity of the treaty. This was the prime doctrine of international law, even prior to the establishment of the modern international law prohibiting the use of force or threat of force. Basically, there has been no change of attitude in regard to this prime rule of international law of treaty.<sup>43</sup>

A treaty of peace, however, can be imposed upon the defeated by the victor without regard to the free will of the defeated. International law as it existed prior to the establishment of the modern international law prohibiting the use of force or threat of force, disregarded the effect of coercion against a state in the conclusion of a treaty procured through the threat or use of force. This was an important exception to the rule of the real consent,<sup>44</sup> and a necessary corollary of recourse to force in international relations in that time.<sup>45</sup>

This important exception, however, does not mean a resignation or negation of the prime rule of mutual consent and the freedom of consent in concluding a treaty. As a principle which was “introduced with the consent of nations”<sup>46</sup>, a coercion against a state itself and that directed to a state representative had different effects that were assumed to be distinguishable. The Comment in the Harvard Report in 1935, explained this distinction succinctly.<sup>47</sup>

The term “duress” as used in this Convention does not include the employment of forces or coercion by one State

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<sup>43</sup> Ian Brownlie, *International Law and the Use of Force by States* (1963), pp.404~6.; Delupis, *International Law and the Independent States* (2nd ed. 1987) pp.141~223.; Guggenheim, *Recueil des cours, Academie de Droit International de La Haye*, 74 (1949), i, pp.194~236.

<sup>44</sup> Hugo Grotius, *De Jure Belli ac Pacis*, lib. II, ch. XVII, sec.19. (*Classics of International Law*, Kelsey trans., pp.435~798.); E. Vattel, *Droit des Gens*, lib.IV, ch IV, sec.37, (*Classics of International law*, Fenwick trans., p.356.)

<sup>45</sup> Sir Robert Jennings, Sir Arthur Watts ed. *Oppenheim's International Law*, 9th edition. (Longman, 1992), sec. 641. p.1290.

<sup>46</sup> Grotius, op. cit.

<sup>47</sup> Supplement to the *AJIL* vol. 29, (1935). p.1152.

against another State for the purpose of compelling the acceptance of a treaty. The treaty making representatives of the latter State may as a result of its defeat in war or the use of force against it, or as a result of other circumstances such as an immediate bankruptcy or financial distress when they would not otherwise do so, find themselves under the necessity of giving their consent to a treaty. Such indirect compulsion is not, however, “duress” as the term is used in this Convention.

However, one Japanese scholar denied the very conception of “duress” defined in Article 32 of the Draft Convention in the Harvard Report of 1935, and the whole context of explanation in the Comment, by asserting a criticism in a conclusive tone.<sup>48</sup> he asserted,

This explanation lacks accuracy. Since a state does not have a natural will. But its will always represented by some individuals. It is impossible to distinguish duress against a state from that against an individual. 'Coercion forced on a state' as stated in this theory, means precisely an act of threatening the head of state, representing the state, and influencing his will and his power with ruination of a state and damage to national interests.

The regime distinguishing a coercion directed to a state itself and that addressed to a state representative has obviously been accepted and practiced as an undeniable rule of international law.<sup>49</sup> Thus, denying the very conception of “duress” defined in Article 32 of the Draft Convention in the Harvard Report of 1935, and rejecting the whole context of explanation in its Comment is not acceptable.

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<sup>48</sup> □ Taoka Ryoichi, op.cit. pp.399~400.

<sup>49</sup> Bluntschli, *Droit International Codifié* (Lardy trans. 1881), sec.409.; F de Martens, *Traité de Droit International* (Leo trans., 1883), sec. 108.; Pradier-Fodere, *Traité de Droit International Public* (1885), sec.1076.; Woolsey, *International Law* (6th edition, 1899), sec.104.;

Westlake, *International Law* (1910). He holds that the rule of freedom of consent means only freedom against force and intimidation practiced on the contracting agent of the State, but not that which is practiced on the will of the State itself.

Oppenheim, *International Law* (4th edition, 1928), p.711. He emphasized that freedom of consent as an essential element of a binding treaty means only the freedom of the representatives of the contracting States, and does not apply to treaties concluded under circumstances of urgent distress such as defeat in war or the menace of a strong State against a weak one.

F de Visscher, “Des Traités Imposés par la Violence”, 12 *Revue de Droit International et de Legislation Comparee*, 3rd ser. (1931), p.515ff. pp.520~21.

Between the two principal elements of international law in concluding a treaty, namely, the freedom of a state concluding a treaty and real consent by the parties, the former one should have been refrained in some manner to fulfill the necessary condition to allow the recourse to war. The rule of international law, in effect until about the year of 1910, this regime had an exception, as a necessary corollary to allow the recourse to war in international relations. Sir Robert Jennings explained this;

However, with regard to the freedom of action of the state as such, international law as it existed prior to the Covenant of League, the General Treaty for the Renunciation of War, and the Charter of United Nations, disregarded the effect of coercion in the conclusion of a treaty procured through the threat or use of force. This rule, although obnoxious to a general principle of law, and although challenged from time to time, by writers and governments, was a necessary corollary of the admissibility of recourse to force in international relations; force being a legitimate means of compulsion, consent given in pursuance thereof could not properly be regarded as tainted with invalidity.<sup>50</sup>

The Comment in the Harvard Report described it as an “indirect compulsion”. Vattel explained this very vividly, as follows;<sup>51</sup>

If a Nation finds it prudent to procure, by a disadvantageous treaty, a necessary peace; if it delivers itself from imminent danger, or from complete destruction, by making great sacrifices, whatever it thus saves is an advantage which it owes to the treaty of peace; it freely chooses a loss that is present and certain, but limited in extent, in preference to a disaster, not yet arrived, but very probable, and terrible in character.

From this vivid explanation it is quite clear that while the freedom of consent rule was inevitably refrained to make a treaty of peace valid, but the principle of real consent by the parties, was kept intact. According to the rules of international

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<sup>50</sup> Sir Robert Jennings, Sir Arthur Watts ed. *Oppenheim's International Law*, 9th edition. (Longman, 1992), sec.641. p.1290.

<sup>51</sup> Vattel, op.cit.

law, even prior to the renunciation of war, real consent rule was not supposed to refrained in any manner.

This exceptionally refrained rule of the freedom of consent is obviously obnoxious to the general principle of law. Upon the establishment of the modern international law, prohibiting the use of force or threat of force, *raison d'etre* of the regime of dichotomy —distinguishing the coercion addressed to the state itself from that directed to the state representative— has gradually been diminished. And the obnoxiously refrained rule of the freedom of consent has no longer been tolerated since the renunciation of war. Instead of the dichotomy, the contemporary international law seems to prescribe general condition for the validity of a peace treaty, namely, “the conformity with the principles of international law embodied in the Charter of the United Nations.”<sup>52</sup>

Interestingly enough, it seemed that precise legal comprehension for the clear distinction of the two coercions, one addressed to state itself, and the other directed to state representative, had once been flawed and confused in the discussion of the contemporary rule of the law of treaties in the International Law Commission Meeting.<sup>53</sup>

The interesting question raised by professor Sakamoto emphasizing the lack of criteria to distinguish the coercion against a state from that against an individual state representative had already been raised and discussed. Weinschel argued that force could not be used against a State for the purpose of compelling the acceptance of a treaty without its being necessarily directed against the persons or organs in whom or in which the treaty making power is vested. In his opinion, at least indirectly, those persons or the organs are subjected to “duress”.<sup>54</sup>

However, there is no “duress” in the legal sense of the term as far as the state representatives are free to refuse to sign the treaty and accept instead the other alternatives.<sup>55</sup> Even prior to the renunciation of war, William. E. Hall, a prominent writer in 19th century, pointed out that the use of force against another State is recognized by international law as a permitted means for “redressing wrongs”.<sup>56</sup> The Kingdom of Korea did not do any wrong to the Japan except that it was too weak to

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<sup>52</sup> Article 52 of the 1969 Vienna Convention on the Law of the Treaty

<sup>53</sup> Comment of Mr. Barto, *Yearbook of the International Law Commission*, vol. I, 681st meeting (1963), p.47. para.18.

<sup>54</sup> H. Weinschel, “Willens-magel bei volerrechtlichen Verträgen”, 15 *Zeitschrift für Völkerrecht* (1929~30), p.446 ff.

<sup>55</sup> Supplement to the *AJIL* vol. 29, (1935). p.1154

<sup>56</sup> William. E. Hall, *A Treaties on International Law*, Oxford Univ. Press,(1890), p.326.

overcome the vigorous intention of aggression of the Japanese Imperialism.

Thus, the 1905 Protectorate Treaty is to be regarded as invalid from the out set, on the ground that it was made under coercion applied to the state representatives. This conclusion would lead to an immediate argument that the Korea-Japan Annexation Treaty of 1910 based upon the premise of the validity of the Protectorate Treaty, is also valid.

## □. Procedural Defects of the Five Treaties

### A. The Korea-Japan Protocol of February 23, 1904

As for the Korea-Japan Protocol of February 23, 1904, it had originally been prepared as the form of a memorandum by the Japanese Government. But at the last moment of publicizing to the western powers, it had abruptly been named as a “Protocol”□. Even within the Japanese Government, this irrelevantly simplified form of the treaty created some difficulties. The Privy Council of the Japanese Government was very angry at the fact that this particular treaty had escaped from their agenda even without the authorization of the Japanese Emperor. The fifteen members of the Privy Council appealed to the Japanese Emperor that the Minister of the Foreign Affairs should be punished for the breach of the Japanese Constitution.<sup>57</sup>

Professor Lee has raised similar contentious point. He asserted that the Government of Japan intentionally chose such a simplified form of treaty in concluding this “Protocol”, to escape the burden of legal formalities, like ratifying by the Emperor. He insisted that such an evasion of law should render it invalid.<sup>58</sup> But the answer from the Japanese scholars responding this assertion of the Korean historian, seemed rather easy and firm. They replied that the high contracting parties could choose whatever form of treaties they want. There is no rule of international law that makes an agreement invalid for the reason of irrelevance of the form of the treaty.<sup>59</sup>

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<sup>57</sup> Comment by the Professor Unno Hookuzu at the International Symposium discussing the Japanese Annexation of Korea at Tokyo, in 1993.

<sup>58</sup> □□Tae-Jin Lee, “Only Treaties Relating to the Invasion of Korea, Violated Formal Requirements□, *Sekai* (March 1999), No.659. pp.249~268.

<sup>59</sup> Unno Hookuzu, “Professor Lee's Argument for non-existence of the Annexation of Korea revisited”□, *Sekai*

But this controversy seems not so easy to come resolve. This “Protocol” was obviously concluded under the manifest coercion against the state itself, the old Empire of Korea. But in 1904, there were no rules of international law nullifying a treaty implemented by coercion of the state itself.

In this treaty, it was stipulated that the Japanese Imperial Army shall have the rights to use freely any part of Korean territory, as it were tactically or strategically demanded.<sup>60</sup> The treaty also prescribed that the Korean Government shall not conclude with any third Power such an arrangement which may be contrary to the principles of this Protocol.<sup>61</sup> Needless to say, this unilaterally imposed agreement constituted infringement on the territorial integrity and denying the sovereignty of diplomatic discretion of Korean Empire. As a matter of historical facts, the Imperial Japan had commenced the full-court operation of territorial extortion throughout the Korean peninsula with the excuse of this Protocol. Vast tracts of land were forcefully occupied by the Japanese Army. Japan appropriated the exclusive titles for the railroad construction, wilderness exploitation all over the land jurisdiction, and the fishery right all along the adjacent sea area.<sup>62</sup>

Imperial Japan had procured this unilaterally imposed treaty in a swift and clandestine manner, evading the ratifying by the seal of Emperor. This was neither a treaty of peace, nor a legitimate subjugation. Could such an act of aggression, deliberately plotted political flim flam, disguised as an international treaty, be justified by the rule of international law effected in those days?

Even as for the coercion exercised to the state itself, the doctrine of inter-temporal law must be applied within a given framework of reasoning and due rational limitations. The so-called “inter-temporal law”□ could be defined as; the general rules of international law in force at the time of certain treaty's conclusion. The international law has a principle that a juridical fact must be appreciated in the light of the law contemporary with it and a treaty's terms are normally interpreted on the basis of their meaning at the time of the treaty was concluded<sup>63</sup> and in the light of circumstances then prevailing.<sup>64</sup> This doctrine of inter-temporal law is an axiomatic

(October 1999), pp. 260~274. ;Sakamoto Shikeki, “Japan and Korea Should not Fall into the Pitfall of Past Treaties”□, *Sekai* (September 1998), pp.193~206.

<sup>60</sup> Article 4. The Korea-Japan Protocol. (February 23, 1904.)

<sup>61</sup> Article 5. of the Protocol

<sup>62</sup> Sun-Keun Lee, *Korean History*. vol.8, (Seoul: ShinTaeyang-Sa, 1973), pp.309~10.

<sup>63</sup> If a state accedes later to a treaty, its terms will be applied to that state in the light of the circumstances prevailing at the date of its accession and not of those at the time when the treaty was concluded.

Aerial Incident Case, ICJ Rep. (1959),

<sup>64</sup> *Rights of United States Nationals in Morocco*, ICJ Rep. (1952), pp.176,189.: ;*South West Africa Cases*, Ibid. 1966,

principle in international law. But it goes without saying that this established principle should be accepted within a given framework of reasoning and due rational limitations.

Hugo Grotius and Emerich de Vattel recognized that treaties of peace which are often imposed by a victorious belligerent upon a state which has been defeated in war, could be a possible exception to the general rule of freedom of consent. For the common safety and the welfare of Nations, such treaties of peace could be deemed to be valid, exceptionally.<sup>65</sup>

This is the legal theory to validate a coerced treaty even in case of use of force or threat of force. Coup de main administered by the Imperial Japan, in a swift and clandestine manner, to the old Empire of Korea early in 20th century could not possibly be an exception to the prime rule of consent under international law.

### **B. The First Korea-Japan Agreement of August 22, 1904**

Upon concluding the First Korea-Japan Agreement of August 22, 1904, the Japanese intention to deprive the Korean Government of its sovereign rights, particularly pertaining in the diplomatic and financial affairs, had drawn the strong repulsion and criticism among the members of the Korean Government. It was quite natural that the stronger the Korean criticism, the more intense the coercion on the part of Japan. In another words, there were obvious coercion against the state representatives of Korea. This First Korea-Japan Agreement was another typical case of a treaty that was concluded under the manifest coercion against the state itself, the old Empire of Korea. An evasive manipulation in a swift and clandestine manner, by the Imperial Japan in procuring this agreement was just the same as in the case of the Protocol of February 22, 1904.

This First Korea-Japan Agreement was nothing but an act of aggression, a political flim flam committed by the Imperial Japan, in a swift and clandestine manner, to the old Empire of Korea early in 20th century. And it could not be the possible exception of the prime rule of freedom of consent for the common safety and the welfare of Nations, as well.

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pp.6, 23.:pp.127, 142-5.: Jennings, op.cit., pp.1281~82.

<sup>65</sup> Hugo Grotius, *De Jure Belli ac Pacis*, (1646), lib. II, ch.XVII, sec.19. (*Classics of International Law*, 1913. Kelsey trans., pp.435~798.); E. Vattel, *Droit des Gens*, (1758) lib.IV, ch IV, sec.37, (*Classics of International law*, 1916. Fenwick trans., p.356.)



### C. The Second Korea-Japan Agreement of November 17, 1905

This agreement was signed between Korean representative, Minister of Foreign Affairs, Che-Soon, Pak and the Japanese representative, Ambassador Gonske Hayashi. Professor Lee has also raised the issue of validity of this agreement based on its form of treaty. He has asserted that the Government of Japan intentionally chose the simplified form of Protectorate Treaty, in order to avoid the burden of ratifying by the Emperor. He insisted that such an evasion of law should make this agreement invalid.<sup>66</sup>

Professor Lee had raised three controversial points in relation with this issue, the form of the treaty. The first point was the full power. In all archives, no documents entrusting the full powers for this particular treaty to both of the signatories have not been found.<sup>67</sup> The Japanese scholars responded to this assertion of the Korean historian, with same easy and firm manner. According to their defending theory,<sup>68</sup> the Korean representative, Che-Soon Pak had the treaty making capacity, *ex officio*, as a Minister of Foreign Affairs, even without any formal instrument of full power. As far as the modern rule of international law is concerned, this defending theory is correct. However, in accordance with the customary rule of international law in effect at that time, such an easy and firm explanation could not be justified.

Regarding the second contending point, Professor Lee insisted that this Protectorate Treaty of 1905, should have been ratified with the Seal of the Emperors. However, the Japanese scholars argued that the high contracting parties could choose whatever form of treaties as they wish. In this case, they agreed in the treaty that no ratifying was required.

Again, these Japanese assertions should be reviewed from the view of inter-temporal law. According to the spirit of the Constitution of the Chosun Dynasty, and the state practice maintained by the persistent attitude of the Emperor Kojong at that time, the treaty making capacity was supposed to be exercised by the Emperor, by

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<sup>66</sup> Tae-Jin Lee, "Only Treaties Relating to the Invasion of Korea, Violated Formal Requirements", *Sekai* (March 1999), No.659. pp.249~268..

<sup>67</sup> Tae-Jin Lee, *The Annexation*.

<sup>68</sup> Sakamoto Shikeki, "Japan and Korea Should not Fall into the Pitfall of Past Treaties", *Sekai* (September 1998), pp.193~206

himself. According to the Constitution of the Chosun Dynasty<sup>69</sup>, and the unique stipulations of the newly formulating state practices among the Empire of Japan and the Empire of Korea at the dawn of the 20th century, the treaty making capacity resided only in the Head of State, the Emperor.

At that time –the early beginning of the 20th century–, the treaty making power of States is, as a rule, exercised by their Heads. Only when the heads of States do not act in person, they authorize the representatives to act for them. If the representatives conclude a treaty by exceeding their powers or acting contrary to their instructions, the treaty is not a real treaty, and is not binding upon the State they represent. A treaty of such a kind is called a *sponsio* or *sponsiones*. At that time, when the custom of ratification for the validity of treaties was not yet in general, the difference between real treaties and *sponsiones* was very important. *Sponsiones* may become a real treaty and binding upon the State, only through the Head's approval.<sup>70</sup>

As far as this Protectorate Treaty of 1905 is concerned, an important historical fact should be taken into account. Korean Emperor Kojong had earnestly declared that he had never given any consent to this treaty. He was deprived off his throne by Japan, because he sent a secret envoy to the Hague Peace Conference in 1907, to declare the invalidity of the Second Korea-Japan Agreement. Nevertheless, the official stance of Japanese Government was that Ito had received the consent of the Korean Emperor at that time. But what kind of consent it could have been ? An oral consent ?

Since the Korean Emperor's personal genuine consent can not be proved, the absence of the official Emperor's Seal, make this treaty a *sponsiones* that could never be binding upon the high contracting States.

The third point he raised was in connection with the name of the treaty.<sup>71</sup> Generally speaking, there is, or has been, no rule of international law that a name of treaty however it be absurdly selected, shall make the treaty invalid, by itself. Nonetheless, the Protectorate Treaty of 1905 did not have a name.<sup>72</sup> And the Protocol of

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<sup>69</sup> Article 3 of the Fourteen Prime Codes of the State [Hombum 14 Cho; 弘範14條]

This Constitution of the Chosun Dynasty had been proclaimed on January 7th 1895.

*Chosun Dynasty Official Gazette*. the state-year of 503rd dated December 12th. ; Han Oukwen, *The Korean History* (Seoul: Ulyou-Moonwha-Sa, 1985) pp.481~82..

<sup>70</sup> Lauterpacht, ed., *Oppenheim's International Law*, 8th Edition. Vol. I, (1958) pp.884~5. pp.887~89. ; Yamamoto Shoji, *International Law* Tokyo, 1985.p.505.

<sup>71</sup> Tae-Jin, Lee, *Hankook byonghabeun sunglip hagianhata*. [The Japanese annexation of Korea had not been established.] (Seoul: Taehakssa, 2001), pp.39~40. p.50. p.54.

<sup>72</sup> According to Professor Lee's bibliographic evidences, at the Head of the Instrument of the 1905 Protectorate Treaty, the title of the treaty had not been filled, and left as blank.

Tae-Chin, Lee, op. cit. pp.45~49.

1904, the First Korea-Japan Agreement had only irrelevant name or form of the treaty<sup>73</sup>.

With all those historical evidences of the abnormalities, Professor Lee contended that the Protocol of 1904, the First Korea-Japan Agreement, and the Protectorate Treaty of 1905 could not be done as valid treaties, *ab initio*.

Precisely speaking, though, this is not a matter of any general rule of the law of treaty. This is a matter of historical fact as an evidence of Japanese plot to extort Korean sovereignty in a hastily, unjustifiable manner. No name of the treaty in case of the original text of the Korean version of the Protectorate treaty of 1905, irrelevant name or form of the treaties in case of the Protocol of 1904, the First Korea-Japan Agreement, are all the vivid evidences for the haste and the clandestineness of the criminal plot committed by the Japan to annex the old Kingdom of Korea.

#### **D. The Third Korea-Japan Agreement of July 24<sup>th</sup>, 1907**

The Third Korea-Japan Agreement was signed between Hirobumi Ito, the Resident-General in Korea and Wan-Yong Lee, the Prime Minister of Korean Government.

The office of the Resident-General in Korea had created by the Second Korea-Japan Agreement. As far as that treaty was not legally valid, the office of the Resident-General in Korea was likewise defective. Therefore, Ito should have been entrusted with the full power to negotiate and conclude this treaty in a separate credential.

Prime Minister Lee, did not have the capacity, *ex officio*, either without being granted the negotiating power for this particular treaty by Korean Emperor. The abnormal change of the crown had been proceeded, in such a criminal manner by the Imperial Japan, that the legitimacy of the new Korean throne had been questioned between the two governments at the time. So the new Korean Emperor Sunjong could not have had any competency to issue the credentials entrusting the full power. No documents granting the full power to negotiate and sign this treaty to either of the signatories has yet been found in any archives.<sup>74</sup>

This Third Korea-Japan Agreement had been done just two days after

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<sup>73</sup> Ibid. pp.38~39. ; Tae-chin, Lee, "Only Treaties Relating to the Invasion of Korea Violated Formal Requirements", *Sekai* (March 1999), No.659. pp.249~268.;

<sup>74</sup> Tae-Chin Lee, *The Annexation*

the forcible change of the Korean throne by Japanese invaders. Disbanding the Korean Army, and reinforcing the Japanese garrison force with a new strengthened infantry brigade had been proceeded simultaneously with this conclusion of the treaty by the Japanese Empire. The coercion of a state exercised by the Japan to conclude this particular agreement was nothing less than an overwhelming military invasion itself.<sup>75</sup>

It is noteworthy that no records have been found indicating Japan had tried to make the Korean representative, Wan-Yong Lee, the Prime Minister, accept this agreement. In other words, coercion of the representative had not been committed for the conclusion of this treaty. Needless to say, it was not necessary for Japan to put any pressure on the puppet Prime Minister of Korea.

The Japan forcibly overthrew the Korean throne in order to make this agreement. The puppet Prime Minister of Korea employed by the Japanese Government and the Korean Prince who had been forced to receive the throne by the Japan could not have possibly been recognized as the competent authority representing the Government of Korea. In fact, upon the conclusion of the Second Korea-Japan Agreement, the Korean Government had been completely isolated internationally by depriving of its sovereignty. No outside power could have recognized this puppet Empire, given the political circumstances and his ascension to the throne, at the special occasion of the abnormal change of the crown, neither conceptually, nor practically.

Practically this agreement could not be deemed as an ordinary international treaty between two sovereign states, in view of the procedural formality normally expected between the two high contracting parties in international law and naturally, does not have any valid effect in international law.

### **E. The Annexation Treaty of August 22<sup>nd</sup> 1910.**

On October 26th 1909, Ito had arrived at Harbin in Manchuria for the meeting with Vladimir N. Kokovtsov, the Russian representative, to confirm the Russian acquiescence to the Japanese annexation of the Korea. He was shot dead by the young patriot, Chung Geun An, at the train station. On July 7, 1910, the Japanese Cabinet had adopted the official draft of the Treaty Regarding the Annexation of Korea to the Empire of Japan, without consulting the Korean Government. The main document of

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<sup>75</sup> See Sir Robert Jennings op.cit., section 641. pp.1290~92.

the Annexation Treaty was signed on August 22, 1910, between Masadake Terauchi, the Resident-General in Korea and Wan-Yong Lee, the Prime Minister of Korea. It was ratified and promulgated on August 29.

Japan had endeavored to carefully fulfill the procedural requirements of an international treaty, this time. But a recent bibliographical review on the relevant archives relating to this Annexation Treaty of 1910, conducted by the Korean scholars has found some evidences enough to raise serious questions about the validity of this agreement.<sup>76</sup> According to Professor Lee, the Royal Mandate of Korean Emperor Sunjong to promulgate the Annexation Treaty, obviously functioning as the essential instrument of ratification, had been fabricated by the Imperial Japan.<sup>77</sup> On the other hand, Professor Unno responded that this Treaty had already been authorized by the both Emperors as prescribed in the treaty provision,<sup>78</sup> and no ratification signatures were ever needed.<sup>79</sup>

He insisted that Article 8 of the Annexation Treaty could be appraised as a renunciation of ratification, in accordance with the rule of the law of treaty. Generally speaking, it may happen that the parties of a treaty provide expressly for the sake of a speedy execution that it shall be binding at once without ratifications. But as far as this Annexation Treaty is concerned, “the statement of promulgation”□is necessary condition of the taking effect of the treaty. Although the Emperors of both contracting States promulgated it, the Korean Emperor's Royal Mandate of promulgation was fabricated.

The puppet Prime Minister of Korea, Wan-Yong Lee had granted full power from Korean Emperor, Sunjong to sign the Annexation Treaty. The credential, issued to him stated, “I, the Emperor of Korea decided to concede to my utmost confident His Majesty the Emperor of Japan of all rights of sovereignty over the whole of Korea”. According to Professor Unno, in addition to Article 8 of the Annexation Treaty, this credential confirmed the Korean Emperor's genuine intention to accept the annexation treaty, at the early moment of the appointing the plenipotentiary envoy for

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<sup>76</sup> Taejin Lee, “The Japanese Annexation of Korea was not validated legally; Extortion of the Korean Sovereignty by Japan and the Coerced Treaties ( I ) and ( II )”□, *Seikai*, July-August 1998, ( I ), pp.300~310. ( II ) pp.185~196.;

<sup>77</sup> Tae-Jin, Lee, *Hankook byonghabeun sunglip hagianhata*. [The Japanese annexation of Korea had not been established.] (Seoul: Taehakssa, 2001), pp.56~61.

<sup>78</sup> Article 8 of the Treaty of Annexation.

This Treaty, having been approved by His Majesty the Emperor of Japan and His Majesty the Emperor of Korea, shall take effect from the date of its promulgation. In faith whereof the respective Plenipotentiaries have signed this Treaty and have affixed thereto their seals.

<sup>79</sup> Unno Hookuzu, op. cit

this annexation treaty.<sup>80</sup>

The exact draft of this extraordinary text of the credential had been handed to the puppet Prime Minister of Korea, Wan-Yong Lee by Terauchi on August 18, four days prior to the conclusion of the treaty.<sup>81</sup> Professor Unno Hookuzu also confirmed this fact.<sup>82</sup>

. There are two possible explanations. One is that the Prime Minister had been shrewd and wicked enough to make a fool of the Korean Emperor to accept the shameful descriptions of the Japanese draft for the credential. The other is that the Korean Emperor himself was incapacitated and therefore not competent to exercise the power of his office and merely rubber-stamped the Royal Instruction. The Korean scholars' bibliographic study had also found the fact that the last puppet Emperor Sunjong confessed, on his death on April 26, 1926, that he had virtually been held captive, under the sharp surveillance of the Japanese Government and was forced to sign the treaty.<sup>83</sup>

According to Professor Lee, the Royal Mandate of Korean Emperor Sunjong to promulgate the Annexation Treaty had been fabricated, while the instrument of the credential was genuine, bearing the relevant Seal of Emperor and his personal signature. From the legal point of view, appraising the freedom of consent in concluding a treaty, there is no meaningful difference between these two cases.

Judging from all those evidences and the related historical facts, coercion had been employed against a state representative, and the Head of State, the Korean Emperor. According to the law of treaty in effect at that time, such lack of the freedom of consent shall nullify the validity of the Annexation Treaty.

## □. Conclusion

Japanese colonial control of Korean territory fortified by the Annexation Treaty was not based on any international legal title but sustained by a belligerent

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<sup>80</sup> Ibid.

<sup>81</sup> Tae-Jin Lee, op.cit., p.201.

<sup>82</sup> Unno Hookuzu, op.cit.

<sup>83</sup> *Shinhan Minbo*, July 8, 1926. [A community news paper published by Korean residents in the area of San Francisco] Cited from Tae-Jin Lee, ed. *The Japanese Annexation of Korea was not validly established*. (Seoul: TaeHakSa, 2001), pp.206~209.

occupation.<sup>84</sup>

In considering the validity of a treaty made under the coercion of a state, even prior to the changes in international law regarding the threat or use of force, the forcible seizure of territory during an aggressive war, did not confer valid title to the aggressor unless the results of the war were declared with a legitimate subjugation and legally specified in a peace treaty.<sup>85</sup>

In theory, the annexation of Korea by Japan had never been legally established as a matter of international law. Even if the use of force by Japan in the course of the Japanese aggression were accepted as lawful, based on the principle of the inter-temporal law of 1910, no valid legal title had been conferred. The seizure of the Korean territory by the Japan ever since the breakout of Russo-Japanese War, until the end of the World War Two, was sustained only by Japanese aggressive force. As far as the Japanese territorial jurisdiction on the Korean peninsula is concerned, no legal effects was established and maintained that need to be renounced by the San Francisco Peace Treaty of September 8, 1951 and which entered into force on April 28, 1952.

Japan's military and political force upon the Korean peninsula ended immediately and completely, with the unconditional surrender of the Japanese Empire on September 2nd of 1945.

Since the declaration of unconditional surrender, all the Japanese colonial controls in the Korean territory had commenced to be abolished in the due course of the provisions of Potsdam and the Surrender Terms formally ratified by the Japan. As Ambassador Dulles succinctly summarized, the renunciations contained in Article 2 of Chapter II, had actually been carried into effect 6 years before the entry into force of the Peace Treaty and it should have strictly and scrupulously conformed to that Surrender Terms.<sup>86</sup>

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<sup>84</sup> *Oppenheim's International Law* 7th Edition 1952. edited by H. Lauterpacht, vol. II, p.437.; 1956 US Department of the Army, *Field Manual on the Law of War*, Whiteman vol. 1., p.947.; Jennings, vol. I, Section 265, Subjugation distinguished from belligerent occupation. ; Ibid. Section 250. pp.686~688.

<sup>85</sup> Lindley, M. F., *The acquisition and government of backward territory in international law; being a treatise on the law and practice relating to colonial expansion*. New York, Negro Universities Press [1969], pp.161~64.;

Following cases of annexation were cited as to be premature and unlawful in Jennings, op.cit., Section 265. p.700. note 1 & 2.

- ① The annexation of the Orange Free State in May 1900,
- ② Annexation of the South African Republic in September 1900, by Great Britain during the Boer War;
- ③ The annexation of Tripoli and Cyrenaica by Italy during the Turco-Italian War in November 1911;
- ④ The annexation of Ethiopia by Italy in 1936

<sup>86</sup> The Ambassador Dulles' Summary:

Marjorie M. Whiteman. *Digest of International Law*, vol. III. (Washington D.C.: U.S. Government Printing Office, 1964.) p.539..

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