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Japan's Colonization of Korea in Light of International Law 国際法から見た日本の朝鮮植民地化

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Introduction

At the centenary of Japan's Annexation of the Korean Empire in August 2010, speculation centered on whether Japan could achieve a radical departure from its traditional foreign policy of 'Datsu-A Nyu-Ou"[1], namely leaving Asia to become a Western style country. This policy, resulted in Japan's colonization of Korea in August 1910 and led further to the invasion of China and other Asian nations, ending in Japan`s utter defeat in August 1945.

The statement[2] by Prime Minister Kan Naoto released on 10 August 2010 ahead of the 29 August centennial of Japan's annexation of the Korean Peninsula went further than any other postwar Japanese PM. In it he said,

> "This year marks a significant juncture for the Japan-Republic of Korea relationship. In August precisely 100 years ago, the Japan-Korea Annexation Treaty was concluded, marking the beginning of the colonial rule of 36 years. As demonstrated by strong resistance such as the Samil independence movement, the Korean people of that time were deprived of their country and culture, and their ethnic pride was deeply scarred by the colonial rule which was imposed against their will under the political and military circumstances.
>
> I would like to face history with sincerity. I would like to have the courage to squarely confront the facts of history and to accept them with humility, as well as to be honest to reflect upon our own errors. Those who inflict pain tend to forget it while those who suffered cannot forget it easily. To the tremendous damage and sufferings that this colonial rule caused, I express here once again my feelings of deep remorse and my heartfelt apology."

Despite some positive points, however, Kan's statement failed to clarify one of the thorniest controversies between the close neighbouring countries. He remained silent on the illegal nature of the 1910 annexation treaty of Korea by Japan, despite the fact that not only the government, but also scholars as well as citizens of the Republic of Korea, have been strongly insisting that the 1910 Japan-Korea Annexation Treaty was ***null and void ab initio***.

The Prime Minister had another chance to move forward on this issue, when he spoke on foreign policy on 20 January 2011. Unfortunately, he again maintained silence on the issue of the invalidity of the 1910 annexation treaty. In it, he stressed mainly the importance of Japan-US relations and his efforts to strengthen cooperation in the areas of the economy and security in the Asia Pacific Region.[3]

Why is it so difficult for Japan to change its foreign policies towards Asian nations such as Korea? This paper focuses on serious violations of international law, violations which Japan has never properly admitted. These violations, and their subsequent denial, triggered a flood of further gross violations of international law by Japan.[4] Thus, Japan has failed to establish the most important foundations for a possible "Northeast Asian Community".

1. Current Status of Japan and the Author's Approach to the Issue

In 2010, Japan was in the process of political reform and faced rising demands for repentance for its colonial past.[5] However, the 'lack' of research on the imposed treaties over the past 100 years has formed an insurmountable wall blocking relations between South Korea and Japan, and North Korea and Japan.

The Japanese public, like frogs in a well, often preoccupied with domestic issues, has been little interested in 'humanity' as a whole. This makes it difficult to transform our historical perspective.[6] Japanese mass media and education are not fulfilling their original functions, either. They frequently provide misleading information, distorting important issues involving Japan and Korea.[7]

In the fall of 1992, I discovered a report published by the 1963 International Law Commission of the United Nations at the London University Library. The 1963 UN ILC report pointed to the 1905 Korea Protectorate Treaty as an example among four similar treaties that were ***null and void*** since they were the result of coercion by the Japanese of individual Korean state representatives. As a result, I started to look into the validity of this treaty.

In 2008, the author discovered three pieces of calligraphy signed by Ahn Jung-geun (a general of the Korean Independence Voluntary Army)[8], who was tried and executed by the Japanese in 1910 for having shot and killed Ito Hirobumi (former Resident-General of Korea). They were kept under lock and key in the Ryukoko University Library. While researching Ahn's trial,[9] I learned that its jurisdiction was based on the Korea Protectorate Treaty of 1905. This stimulated further research on the validity of the imposed treaties.[10]

2. Japanese Society's Response to the Old Treaties

2-1. Implications of an NHK Special Report

The public television network NHK aired a large-scale special on Ito Hirobumi and Ahn Jung-geun in April 2010.[11] Most viewers might have assumed that Ahn's trial was based on Japanese jurisdiction legitimized by the 1905 treaty.

Is it really possible, however, that a treaty depriving an independent state of diplomatic sovereignty and independence could have been concluded by the mere signature of the Foreign Minister? I think that the 1905 Korea Protectorate Treaty would have required the signature and/or ratification by Emperor Kojong of the Korean Imperial Government ('Ratification Required Theory'). The Japanese government, however, relied on a 'No Ratification Required Theory' according to which it was legally permissible under international law for the Foreign Minister to sign a treaty transferring Korea's diplomatic rights and independence without ratification by the Korean Emperor.

The NHK program was based on the 'No Ratification Required Theory' as propounded e.g. by Professor Unno Fukuju, who argued for the 'validity' of treaties forced upon the Korean Empire by Japan. The documentary did, however, create space for Professor Yi Tae-jin, who insisted that treaties lacking proper ratification were invalid, namely ***null and void ab initio***.

2-2. Silence and Absence of Research

NHK's documentary suffered from insufficient research by the Japanese side. The problem was not, however, that Japanese international law scholars were unwilling to address the process of concluding the annexation treaty. Prior to the Second World War, the authorities crushed academic freedom, and scholars faced persecution for `unwanted` research. However, such a `culture of silence' continued even after the military regime disappeared under the New Constitution, which guaranteed academic freedom.

3. The Atmosphere of Forced Silence

Postwar Japan has not established effective freedom for research that could challenge established taboos concerning the nation`s colonial rule. An intimidating atmosphere, which does not even exclude physical violence, has weighed on academics, the media and publishers.

3-1. Challenges in Researching the Old Treaty Issues

3-1-1. Challenges in Raising Issues

In 2006, I asserted in an academic journal that 'the Japan-Korea Protectorate Treaty' had been signed by the Korean Foreign Minister as a result of threats by Ito Hirobumi and the Japanese Army against individual representatives (including the Foreign Minister) of the Korean Empire, and that the Treaty was therefore ***null and void ab initio***, i.e. it was invalid from the start.[12]

The paper was based on material on the origin of colonial rule included in the 1963 Report of the UN International Law Commission (ILC).[13] Upon finding the ILC report of autumn 1992, namely 14 years before the publication of the above mentioned paper of 2006, I sent the draft paper to Socialist Party Diet member Sen. Motooka Shoji, inviting comments. His office warned me that publication of the paper could incur the risk "of being killed by terrorists." A journalist of my acquaintance shared this view. Why was the issue taboo in Japan? Submitted to the United Nations General Assembly, the ILC report of 1963 was not confidential. However, written in English, it was unknown to the Japanese media or people in general. The 1910 'Japan-Korea Annexation Treaty' was based on the 1905 'Japan-Korea Protectorate Treaty.'[14] If the latter was found to be void, then the former should also be judged void. Such an argument would, however, pose troublesome legal issues for those who continued to justify Japan's colonial rule over Korea, and naturally provoke strong resistance. As a result, it was necessary to postpone publication of the paper.

3-1-2. Resistance from the Government and the Conservatives

Rather than immediately publishing the paper in Japan, I worked on an NGO report to be submitted to the UN. This report examined the relationship between the validity of the 1910 Annexation Treaty and that of the 1905 Protectorate Treaty. Rene Wadlow, Main Representative of the International Fellowship of Reconciliation (IFOR) to the UN, Geneva, agreed to submit a written statement by IFOR in English assessing the argument in the 1963 ILC report (Invalidity of the 1905 'Protectorate Treaty'). The report was submitted to the UN Commission on Human Rights on 15 February 1993, and distributed as a UN NGO document.[15] The IFOR document was reported by a Japanese newspaper (Mainichi)[16] and a Korean English-language newspaper also cited it. In this way, it became known in Korea and Japan that the 1963 ILC report contained such an argument.[17] The following is the core of the written statement, which still seems relevant today.

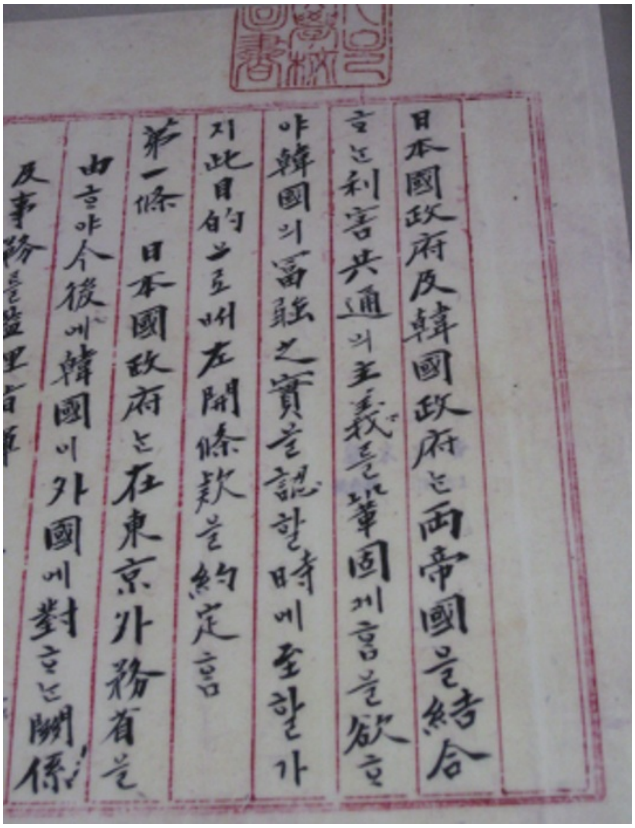
3-1.2-1. Contents of the IFOR written statement

(1). Korea was a sovereign country in 1905. Japan demanded that Korea accept the Japanese proposal of a protectorate treaty. The Korean Empire, however, resisted the Japanese demand to become a protectorate of Japan. According to the historian Carter Eckert,

"Japan sent its elder statesman, Ito Hirobumi, to conclude the protectorate treaty. Ito entered the palace with an escort of Japanese troops, threatened Emperor Kojong and his ministers, and demanded that they accept the draft treaty which Japan had prepared. When the Korean officials refused, Prime Minister Han Kyu-sol, who had expressed the strongest opposition, was dragged from the chamber by Japanese gendarmes.

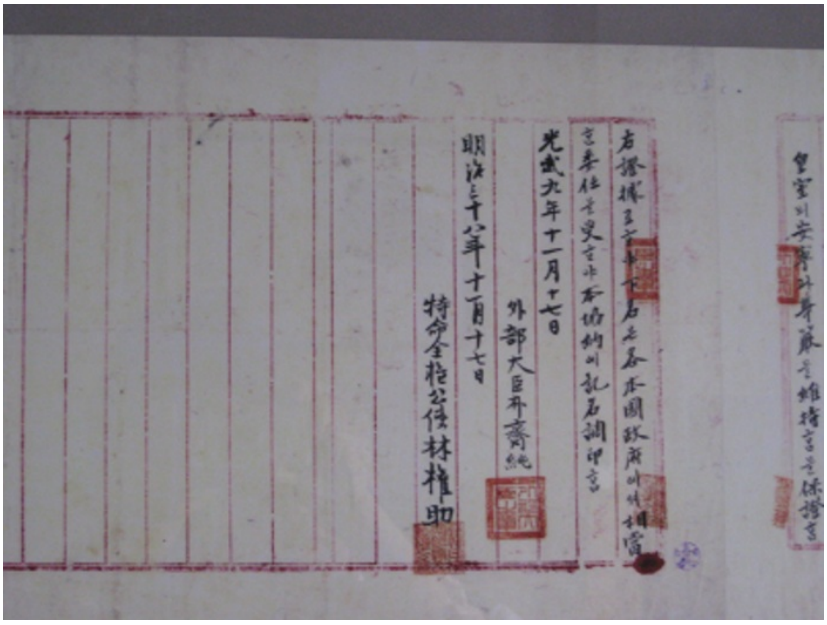
Deoksugung palace (formerly Gyeongungung): Japan sent its elder statesman, Ito Hirobumi, to conclude the protectorate treaty. On 17 November 1905, Ito entered the palace with an escort of Japanese troops, threatened Emperor Kojong and his ministers, and demanded that they accept the draft Protectorate treaty which Japan had prepared. Photo by the author, August 2010.

Emperor Kojeon refused to sign the 1905 Protectorate Treaty. Photo by the author, August 2010 at Jungmyeongjeon



日本國政府及韓國政府는 兩帝國을 結合
ᄒᆞᆫ 利害共通의 主義를 鞏固게 ᄒᆞᆷ을 欲ᄒᆞ
야 韓國의 富強之實을 認할 時에 至할가
지 此目的으로써 左開條款을 約定ᄒᆞᆷ
第一條 日本國政府는 在東京外務省을
由ᄒᆞ야 今後에 韓國이 外國에 對ᄒᆞᆫ 關係
及事務를 監理 指揮

The first page of a replica of the original Korean version of 1905 Protectorate Treaty kept in Seoul. The title is missing, suggesting that it was not completed but remained a draft. Photo by the author at Yi Jun Peace Museum, the Hague, 2007.



光武九年十一月十七日
外部大臣 朴齊純
明治三十八年十一月十七日
特命全權公使 林權助

The last page of a replica of the original Korean version of 1905 Protectorate Treaty kept in Seoul. There is no signature of Emperor Kojong and no Royal Seal. They were necessary for the treaty to become valid under international law of the time according to the author's research. No instrument of ratification by Emperor Kojong was ever found by the Japan Government. Photo by the author, Yi Jun Peace Museum, the Hague, 2007.

Replica of the original document for full power for the 1907 Hague Peace Conference given to Yi Jun and two other Korean envoys sent by Emperor Kojong. The signature and Royal Seal made by Emperor Kojong in this document are to be compared with the above 1905 treaty, which lacked them. Photo by the author at Yi Jun Peace Museum. the Hague, 2007.

Japanese soldiers then went to the foreign ministry to bring its official seal, which then was affixed to the document by Japanese hands on 17 November 1905."[18]

The treaty was signed by the Korean Foreign Minister, but not ratified by the Emperor.

(2). The treaty consisted of five provisions that deprived Korea of its sovereignty and independence and made a Resident General, appointed by the Japanese Emperor, the de facto ruler of Korea. Article 1 of the treaty states "The Government of Japan, through the Department of Foreign Affairs at Tokyo, will hereafter have control and direction of the external relations and affairs of Corea..." Article 2 prohibited Korea from concluding "any act or engagement having an international character except through the medium of the Government of Japan." Article 3 stipulated "The Government of Japan shall be represented at the Court of His Majesty the Emperor of Corea by a Resident General, who shall reside at Seoul, primarily for the purpose of taking charge of and directing matters relating to diplomatic affairs ..." Hereafter, despite desperate attempts by Emperor Kojong, Korea's requests for help from the Western nations or the international community to recover its independence were all ignored. On the basis of this treaty, Emperor Kojong's cabinet meetings and decisions were dominated by Resident General Ito. The Resident General forced Emperor Kojong to abdicate in favour of his son in 1907.

(3). IFOR concluded that this treaty did not take effect for the following reasons:

(a) The 1963 report of the United Nations International Law Commission[19] states, "There appears to be general agreement that acts of coercion or threats applied to individuals with respect to their own persons or in their personal capacity in order to procure the signature, ratification, acceptance or approval of a treaty will necessarily justify the State in invoking the nullity of the treaty." This statement concerning customary international law has generally been supported by international lawyers since the nineteenth century. In fact, article 51 of the Law of Treaties later confirmed that consent to a treaty that was obtained by coercion exerted upon the relevant representatives could not take effect. Article 51 provides "the expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without legal effect." Indeed, the United Nations International Law Commission raised the case of the 1905 Protectorate Treaty of Korea by Japan as one of the four major historical examples of this kind where treaties did not take effect because of coercion of the representatives.[20]

(b) As a result, IFOR held that the 1905 Protectorate Treaty forced upon Korea by Japan never took effect. The legitimacy of Japanese colonial rule and the Japanese Imperial jurisdiction, which was applied later in Korea rested on this Treaty and another treaty of 1910 whereby Japan annexed Korea. The first Japanese law enforced by Japan seemed to be the Imperial Ordinance proclaimed by the Japanese Emperor in 1905 to establish the Resident General system in Korea based on the Protectorate Treaty.

(c) The 1910 treaty was concluded between the then Prime Minister of Korea, instructed by the then Resident General, and the same Resident General who represented the Japanese Empire. The Resident General concluded the 1910 treaty, substantially representing both nations Japan and Korea. Consent was not given by former Emperor Kojong, who was illegally deprived of his authority by Japan.

According to international law, Emperor Kojong`s authority must have continued to exist, as the 1905 treaty could not enter into effect. The Resident General position has to be regarded as non-existent under international law, since the 1905 treaty which created the position did not take effect. As a result, the 1910 treaty which was not based on Emperor Kojong`s *de facto* ruling power should be regarded as ***null and void*** and as having no legal validity.

(d) Thus, there was no legal basis under international law for Japanese colonial rule from 1905 to August 1945 when Japan surrendered to the

Allied Powers. As a result, we must conclude that the entire edifice of Japanese laws and regulations imposed on Korea lacked a legal foundation under international law.

3-2-2-2. Debate in the Diet and Government Resistance

After learning about the media reports, Upper House member Motooka Shoji requested that the government provide the Diet with information on the issue. The Head of the Treaty Bureau of the Ministry of Foreign Affairs strongly urged him not to submit any questions. Sen. Motooka, however, pursued his information request in the face of strong resistance from the Ministry.[21]

The Ministry of Foreign Affairs stated that the 1966 ILC report, which followed up on the 1963 ILC report, did not raise the issue of the validity of the 1905 treaty. This was aimed at weakening the impact of the 1963 report's discussion of problematic arguments of the Japanese government. The Ministry of Foreign Affairs failed to mention the fact that the 1963 ILC report was adopted in the UN General Assembly.[22]

Sen. Motooka gathered strong evidence through his visit to Korea and other research, and later published a document[23] through the Research Institute of International Human Rights which he headed.

4-1-3. Silence

The repercussions of the disclosure of the 1963 ILC report proved significant. The long-time taboo was broken and fiery disputes over the treaty question ensued between Japanese and Korean historians. The Japanese journal *Sekai* published the research of Prof. Yi Tae-Jin of Seoul National University,[24] while Professor Unno Fukuju (Meiji University, Modern History of Korea-Japan Relations)[25] and Prof. Sakamoto Shigeki (Kansai University, International Law)[26] of Japan raised counter-arguments, leading other historians to participate in the debate. However, they failed to reach a consensus.

Professor Unno initially stated in print that 'the absolute invalidity argument' that I had raised over the 1905 treaty seemed "to leave no room for controversy", following our discussion of the issue while visiting Korea together.[27] Later, however, he dropped his support of my argument based on the 1963 ILC report. He then held that "it cannot be said that all international treaties contain an instrument of ratification, and its absence does not constitute a reason for invalidity."[28] He judged the treaty to be "unfair but valid". As a result, he concluded that "the annexation of Korea was valid in its form, meaning that it was legitimate under international law and Chosun (Korea) became an internationally recognized colony of Japan."[29] Professor Unno, returning to Japan after conducting research overseas, changed his position to conform to the dominant view of Japanese historians, accepting the 'validity' of the old Japan-Korea treaties. Professor Sakamoto recognized the existence of the customary international law that the 1963 ILC report put forward, but stated that it was hard to determine whether the historical circumstances constituted coercive actions against individuals representing Korea.[30]

It was anticipated that Japanese international law (treaty law) scholars including Prof. Sakamoto would examine the treaties in more detail, but this has not occurred.[31] As a result, in 1996, (then) Prime Minister Murayama went no further than responding to the Diet that Japan had political and ethical responsibilities, but went on to say that, "I recognize that the Annexation Treaty was concluded legally and is valid within the framework of historical circumstances such as the diplomatic dynamics of the time." Thus the gap between the Japanese and Korean positions on the validity of the treaties has remained wide.[32]

4-2. Absence of Research on the old Japan-Korea Treaties

4-2-1. Issues in question

There are three lines of argument contesting the legal validity of the Korea Protectorate Treaty of 1905: 1) The 1963 UN ILC report identified it as an absolutely invalid treaty which was forced upon individual delegates of a foreign state;[33] 2) Prof. Yi Tae-jin, the leading Korean historian, maintains that the Japanese government fabricated the treaty;[34] and 3) The late Korean Prof. Baek Chung-hyun, the leading international law scholar at SNU, promoted the 'Ratification Required Theory', noting that the five Japan-Korea treaties including the 'Korea Protectorate Treaty' of 1905 and the 'Korea Annexation Treaty' of 1910[35], were never ratified by the Korean Empire and hence were ***null and void ab initio***. The following concentrates on the third line of argument.

4-2-2. Status of 'Ratification' under International Law

Article 2 of the Vienna Convention on the Law of Treaties (1969) stipulates that, where ratification is required, "ratification,… means in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty." But what was the status of customary international law around 1905?

4-2-3. Treaty Conclusion Procedures (Ratification) and Validity of Treaties under International Law

4-2-3-1. 'Legitimacy' of Treaty Conclusion Procedures under Domestic Laws and Validity of Treaties under International Law

Unno's position, advocating the 'No Ratification Required' theory, is that the 1905 'Korea Protectorate Treaty' was valid without ratification by Emperor Kojong, since 'nations can conclude Type 2 treaties which do not require ratification' according to standards of "procedures for concluding treaties and international agreements with other countries" (1936) as stipulated by the Treaty Bureau of the Ministry of Foreign Affairs of Japan.

Can one therefore conclude that treaties are 'valid' under international law, if Japan complied with the 'legitimate' procedures under Japan's **domestic practice** standards as specified by the Ministry of Foreign Affairs when signing the treaty?

Procedures for concluding treaties are determined by Japan`s **domestic law** under the Constitution,[36] treaty procedures under **Korean domestic law**, and **international law** governing treaty conclusion by parties to international treaties.

The validity of international treaties is an issue of international law that governs the international community. Prof. Unno, however, bases his argument solely on the procedures of Japan's Ministry of Foreign Affairs (i.e. **domestic law**) concerning the issue of ratification, and completely ignores the role of **international law**.

At the time Korea's domestic law included provisions for concluding treaties which stipulated that signed treaties had to be approved and

ratified by Emperor Kojong through his signature and seal.[37] But with respect to the 1905 'Korea Protectorate Treaty', no such procedures were followed. Emperor Kojong neither signed nor attached his seal. As a result the treaties were completely 'invalid' under Korean domestic law. However, it cannot simply be asserted that the 'treaty' was also **'null''** under international law.

Further research into **'international law'** is required to determine whether the 'treaty' was valid 'under international law' and could have come into effect even without 'ratification' by Emperor Kojong, who had the authority to conclude treaties. In the absence of agreement between Japan and Korea on these issues, the two sides have remained far apart in their long dispute.

4-2-3-2. Treaty Conclusion Procedures under International Law ('Ratification Required' Theory) and Validity of Treaties under International Law

'Ratification' of treaties is an important legal act that serves as a link between domestic laws and international law. Prof. Baek Chung-hyun promoted the 'Ratification Required' theory,[38] claiming that "the provisions of all five treaties with which Japan deprived Korea of its sovereignty," including the 1905 'Korea Protectorate Treaty and the 1910 'Annexation Treaty of Korea,' "are directly related to restricting national sovereignty," and that "without a doubt, they should have met all requirements for the process of treaty conclusion including commission of full powers and ratification procedures." Prof. Baek's theory is the standard interpretation of international law. If Japan were to accept this theory, the conflict between the two countries would gradually ebb.

To address the issue, academic writings regarding interpretation of international law at the time around 1905 need to be examined, but thus far, no such research has been conducted. Professor Unno relied on the 'validity' under Japanese domestic law of 1936, not 1905, and made no reference to academic writings of the time about interpretation of international law addressing the necessity for ratification.

4-2-4. Research on the Interpretation of International Law around 1905

Did treaty making require ratification? Was research on the interpretation of international law conducted in Japan around 1905 on a sufficiently high level to provide an answer to this question? To find the answer, I examined academic works of the time at the Osaka University Library and the National Diet Library of Japan.

4-2-4-1. "Public International Law of Mr. Hall" (1899)

In his "Public International Law of Mr. Hall" published in Japanese in 1899, William Edward Hall, an influential English scholar of international law, explained the 'Ratification Required' theory for an international treaty, arguing that "ratification by the supreme treaty-making power of the state is necessary to its validity."[39]

【William Hall, translated by Tachi Sakutaro, *Public International Law by Mr. Hall* (translation of 4th edition of the original work) (right) published by Tokyo Institute of Legal Studies, distributed by Yuhikaku Shobo, July 10th in the 32nd year of Meiji (1899) was available at Osaka University Library. The original book (centre) was published in England in 1895; its reprint (left) was published in Japan in 1896. Photo by the author, Osaka University Library in 2009.

It should be noted that the 1905 'Korea Protectorate Treaty' provisions did not explicitly specify the necessity for ratification. However, Hall argued that a treaty signed by the representative with full authority, unless specified otherwise, in general requires explicit ratification. He pointed out: "Express ratification, in the absence of special agreement to the contrary, has become requisite by usage whenever a treaty is concluded by negotiators accredited for the purpose."[40]

Hall`s is a representative mainstream interpretation of customary international law at the time. The original English version[41] was published in the UK in 1895, an English reprint version was published in Japan in 1896 before the Japanese translation was released (1899),[42] which is evidence that the book was widely distributed in Japan.

4-2-4-2. Research into Other academic writings

I conducted a survey of other contemporary academic books on international law in the National Diet Library in which I included more detailed (or newer) works, as well as all textbooks on public international law used by leading law schools at that time.

Although they varied in terms of explanation or description, almost all of them (21 textbooks) contained descriptions supporting the 'Ratification Required' theory, while not a single one advocated the 'No Ratification Required' theory.[43]

I would like to highlight the remarkable Public International Law textbook[44] by Kurachi Tetsukichi. Kurachi was a senior elite official who became Head of the Political Affairs Bureau in the Ministry of Foreign Affairs in 1910. He is an important historical figure who is known for having plotted to put General Ahn Jung-geun of the Korean Independence Volunteer Army on trial and having him executed in Lushun.[45] He was also an influential scholar of the time who taught public international law. The book was published prior to the 1905 'Korea Protectorate Treaty'. Kurachi was said to have created a new legal term, 'heigo', namely 'annexation' on the occasion of the 'Annexation of Korea' in 1910 as Head of the Political Affairs Bureau in the Ministry of Foreign Affairs.[46]

Interestingly, his book advocated the 'Ratification Required' theory in line with the prevailing academic opinion of the time. While quoting Kurachi's Public International Law in the aforementioned book,[47] Professor Unno inexplicably never mentioned Kurachi's academic opinion endorsing the 'Ratification Required' theory.

4-2-4-3. Current Theories and the 'Ratification Required' theory: "Oppenheim" (9th Edition)

Oppenheim's International Law is a prestigious reference book in international legal studies, widely read in Japan. The 9th edition (1996)[48] supports the 'Ratification Required' theory while explaining that the ratification system has gone through dramatic changes in function over the last three centuries.[49]

My research on Japanese academic writings on international law makes clear that all international law scholars prior to 1905 supported the 'Ratification Required' theory, and that this position has not changed even today. There is no one in Japan who denies that the five Japan-Korea treaties identified by Prof. Baek Chung-hyun, including the 1905 and 1910 treaties, were not ratified by the Korean Emperor. Therefore, it can be fairly said that these five Japan-Korea treaties, in particular the 1905 'Korea Protectorate Treaty' and the 1910 'Korea Annexation Treaty', were invalid from the beginning, namely ***null and void ab initio*** under international law.

5. Limitations to Overcome

5-1. The Situation in Japan after the end of LDP rule

In 2009, Japan experienced the advent of the DPJ and a new administration led by Prime Minister Hatoyama Yukio was launched on September 16th. Despite reiteration of its intention to promote the 'East Asian Community' concept, there are still unresolved conflicts between South Korea and Japan, as well as North Korea and Japan. Great progress has been made toward a better understanding of the history of East Asia since ancient times.[50] It was also expected that Japan, aided by the recent grassroots 'Korean Wave', would make major steps forward in 2010.

In 2009-10, however, NHK aired a 9-part drama, based on "Saka no ue no Kumo" (Clouds over the Hill) written by Shiba Ryotaro, which expressed no regrets about Japan's past colonialism.[51] Many continue to resist coming to terms with Japan's misconduct in the course of the colonial rule of Korea.

To this day, the Japanese government has failed to accept the invalidity of the five Korean treaties, the foundation for Japan's colonization of that nation. Although certain positive developments have extended nearly to the point of changing Japanese perceptions of its colonial rule of Korea, the trend seems to be fading, partly because of absence of research on the validity of the Japan-Korea treaties. The result is a lack of decisive political measures to improve the international relations in the Northeast Asia.

These failures may have been aggravated by Japan's public education system, which continues to promote the nationalism of the 'Japanese people', not as a part of 'humanity' as stipulated by the Universal Declaration of Human Rights. Attempts to investigate Japan's colonization of Asia continue to be stymied. Can Japan overcome such forms of nationalism in the coming 100 years?

Totsuka Etsuro was Professor of International Human Rights Law at Ryukoku University until his retirement in March 2010. Dr. Totsuka dedicated his legal career to defending human rights. He brought the issue of the 'comfort women' to the United Nations in 1992 and has written extensively on the issues. He advocates for mentally ill patients in Japan and was instrumental in amending the 1987 Mental Health Act. He frequently appears before United Nations bodies in defense of victims of human rights abuses, and represents United Nations NGOs, such as the International Fellowship of Reconciliation (IFOR) and the Japan Fellowship of Reconciliation (JFOR).

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Articles on related themes:

Mark Caprio, Neo-Nationalist Interpretations of Japan's Annexation of Korea: The Colonization Debate in Japan and South Korea.

Notes

[1] 「脱亜入欧」。The policy pursued by Japan since the Meiji era, was advocated by Fukuzawa, Yukichi.

[2] "Text of Kan's statement on Korean annexation", Kyodo News, cited from *The Japan Times*, Wednesday, 11 August 2010. Accessed 24 January 2011.

[3] Link, visited on 24 January 2011.

[4] The author worked on violations of human rights both in Japan and at the UN as a practicing lawyer and author of many articles and some books. This article suggests that many post-war violations of international human rights law by Japan may have their roots in pre-war violations of international law.

[5] (1) 'Annexation of Korea' 100 Years Civil Network, "Reexamining the Annexation of Korea: Origin of Coercion, Violence, and Colonial Ruling" Published by Agenda Project, March 26, 2010. (2) Wada Haruki, 'Centenary of Annexation of Korea and Japanese' *Shisou* No. 1029, 2010-1, pp. 239-254. (3) Kyodo News Agency, "Annexation of Korea was initially null and void: Jointly Signed by Korean and Japanese Intellectuals" 10 May 2010, 19:11.

[6] An extreme case of many such examples illustrative of the mentality of Japanese conservatives that is deeply rooted in Japanese society is well described in Mark Caprio, "Neo-Nationalist Interpretations of Japan's Annexation of Korea: The Colonization Debate in Japan and South Korea," *The Asia-Pacific Journal*.

[7] For example, it is increasingly difficult to find references in textbooks to the so-called 'comfort women'. I first learned about this issue when Senator Motooka Shoji raised the question of the 'comfort women' in 1990. In February 1992, I brought the issue before the UN Commission on Human Rights.UN Doc. E/CN.4/1992/SR.30/Add1, para. 14-18. The UN summarized the author's oral statement as follows: "… One example was the situation of Korean girls and women abducted by Japanese forces during the Second World War for use as sex slaves. …. In January 1992 the Government of Japan made an apology to the Korean People but offered no compensation or other effective remedy to the victims as required by article 8 of the Universal Declaration of Human Rights.…"

[8] The brief calligraphy pieces in Chinese were made by Ahn Jung-geun, who wished to convey deep philosophical messages to the Japanese, while waiting for execution in prison. Ryukoku University was reluctant to make them public, fearing attack by rightists. To treat Ahn Jung-geun respectfully might reverse the understanding of the standard history recognition in Japan, as Ahn had been recognized as one of major criminals in Japan, while he was considered to be one of the most symbolic heroes, who sacrificed his life to recover independence in Korea.

[9] Totsuka Etsuro, "Illegality of Ahn Jung-geun's Trial and East Asian Peace" Issue 2, Volume 42 of *Ryukoku Hogaku*, 2009, pp. 1-27.

[10] See (1) Totsuka Etsuro 'Instead of a Final Lecture: Looking back at the Origin of 100 Years since the Annexation of Korea – Was the Korea Protectorate Treaty of 1905 Fabricated?' *Ryukoku Hogaku*, Issue 3, Volume 42, pp. 311-336. (2) The paper was published in the previously mentioned "Reexamining the Annexation of Korea." (3) Totsuka Etsuro, lecture: Kyoto Jiyu University Special Lecture (Jointly organized by the university and 'Annexation of Korea' 100 Years Civil Network) 'Centenary of Prosecution of Ahn Jung-geun (excuted on March 26th, 1910)' "Looking back at the Origin of 100 Years since the Annexation of Korea – Was the Korea Protectorate Treaty of 1905 Fabricated?" 26 March 2010, Kyoto Jiyu University.

[11] "NHK Special: Japan and Korean Peninsular Episode 1: Road to Annexation of Korea – Hirobumi, Ito and Ahn Jung-geun," 18 April 2010.

[12] Totsuka Etsuro '100 Years since Establishment of Resident General and Illegality of Eulsa Protectorate Treaty: Surrounding 1963 UN ILC Report' *Ryukoku Hogaku*, Vol. 39, No.1 (2006), pp.15-42.

[13] UN Document:-A/CN.4/163, *Yearbook of the International Law Commission*: 1963, vol. II, p. 139.

[14] See Totsuka '100 Years since Establishment of Government General'.

[15] UN Doc. E/CN.4/1993/NGO/36. COMMISSION ON HUMAN RIGHTS Forty-ninth session Agenda item 19, REPORT OF THE SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES ON ITS FORTY-FOURTH SESSION, Written statement submitted by the International Fellowship of Reconciliation, a non-governmental organization in consultative status (category II) [15 February 1993].

[16] *Mainichi Shimbun* (February 16th, 1993) 'Comfort Women Issue - Human Rights Organization of Switzerland "Japan-Korea Protectorate Treaty is Invalid" 1963 UN Commission Report'.

[17] The author is grateful for the cooperation of IFOR, in particular Mr. Rene Wadlaw, in submitting the written statement to the CHR. The NGO written statement did not carry my name as its drafter and the media reports mentioned only the name of the NGO, IFOR and its Main Geneva Representative. It is true that Mr. Wadlaw submitted it to the UN Secretariat as the Mainichi reported.

[18] C. J. Eckert et al., *Korea Old and New a History*, 1990, Harvard University Press, p. 239.

[19] 1963, Part II, p. 197.

[20] *Ibid*.

[21] Meeting Minutes No.7 of Senator Budget Committee held on March 23rd 1993, p8-13.

[22] The UN General Assembly on November 18th, 1963 adopted Resolution 1902 (XVIII) on the 1963 ILC report.

[23] Research Institute of International Human Rights (Chairman: Motooka Shoji), "Was the 1905 Korea Protectorate Treaty Valid?" (1993). This was not a formal publication of an academic or commercial nature but was used as material for political campaigns. My Japanese report (draft paper mentioned above) was included with my name among several documents.

[24] Yi Tae-jin, 'Japan-Korea Dialogue: Annexation of Korea was Not Valid (Vol. 1) Japan's Deprivation of Korean Empire's Sovereignty and Forced Treaty,' *Sekai*, July1998, pp. 300-310. Yi Tae-jin 'Dialogue: Annexation of Korea was Not Valid (Vol. 2) Japan's Deprivation of Korean Empire's Sovereignty and Forced Treaty,' *Sekai*, August 1998, pp. 185-196.

[25] Unno Fukuju, 'Reexamination of Professor Yi's 'Invalidity of Annexation of Korea,' *Sekai*, October 1999, pp, 261-262.

[26] Sakamoto Shigeki 'We Should Not Fall in the Trap of Japan-Korea Treaties,' *Sekai*, September 1998, pp. 193-206.

[27] Unno Fukuju, '2nd Japan-Korea Treaty of 1905', *Sundai History* 91, 1-34, 1994-03-3. See pp. 2-8 and p. 31 of the paper supporting the author's argument (Invalidity of the 1905 treaty relying on the 1963 UN ILC Report).

[28] Unno Fukuji, *Annexation of Korea*, Iwanami Shoten 1995, pp. 164-165. Professor Unno advocates the 'No Ratification Required Theory' in the aforementioned *Sundai History* paper and has made no change in his theory concerning ratification.

[29] Unno, Iwanami Shoten, p. 244.

[30] Sakamoto Shigeki, 'Effectiveness of Japan-Korea Protectorate Treaty: From the Perspective of Forced Treaty,' *Kansai University Legal Study Collection* 44 (4・5), pp. 869-932, 1995-01.

[31] The author's major field is international human rights law (practices), not treaty law. (2) Prof. Sasagawa is a specialist on the constitution. In a joint study (Sasagawa Norikatsu and Yi Tae-jin, eds., *International Joint Study: Annexation of Korea and Reexamination under Modern History and International Laws*, Akashi Shoten, 2008, he presented in-depth research supporting the descriptions in the 1963 ILC report on the invalidity of a treaty forced on national delegates. Prof. Sakamoto Shigeki is a specialist in international law (treaty law) (4) Prof. Unno Fukuju is a specialist in the modern history of Chosun and Korea-Japanese relations. (5) Prof. Arai Shinichi has been conducting crucial research in legal positivist criticism based on historical methods (Arai Shinichi 'Japan's Diplomacy toward Korea and Implementation of International Law,' included in the aforementioned "International Joint Study" by Sasagawa and Yi, pp. 258-292). His specialty is international relations.

[32] Prime Minister Murayama Tomiichi's response (1995) to the Senate. Meeting Minutes No. 4 of the Senate General Meeting of October 5th, 1995, 134th Plenary Session, October 5th, 1995.

[33] Totsuka, "100 Years since the Establishment of the Government General."

[34] (1) Authored by Yi Tae-jin, translated by Toriumi Yutaka, *Korea History Told to Tokyo University Students: Question of the Validity of Colonial Rule in Korea*, Akashi Shoten, 2006, pp. 159-219 in particular. (2) Sasagawa and Yi, "International Joint Study." (3) Yi, Tae-jin, *The Dynamics of Confucianism and Modernization in Korean History*, Cornell University Press, 2007.

[35] The three other treaties were signed on 23 February 1904, 22 August 1904 and 24 July 1907.

[36] Article 13 of the Constitution of the Empire of Japan provides that 'the Emperor shall declare wars, pursue reconciliations, and conclude all types of treaties', thereby granting the Emperor the authority to sign treaties. Japanese domestic law established procedures to sign treaties. Prof. Unno cited evidence written in 1936, but he failed to examine the Japanese Foreign Ministry's practices in 1905.

[37] Sasagawa and Yi, "International Joint Study," p. 109 refers to research by Prof. Yi, Tae-jin related to Article 8.4 of Rules on the Executive (eui-jung-bu) that provides for the conclusion of treaties under Korean domestic law at that time. See pp. 125-131.

[38] Baek Chung-hyun 'Review of Japan's Annexation of Korea from the Perspective of International Law,' in Sasagawa and Yi, "International Joint Study," p. 389.

[39] Authored by William Hall and translated by Tachi Sakutaro, *Public International Law by Mr. Hall* (translation of 4th edition of the original work) published by Tokyo Institute of Legal Studies, distributed by Yuhikaku Shobo, 32nd year of Meiji (1899), p. 433 (in Japanese translation). Mr. Hall, p. 345 (in original English version). The author also cited an exception: 'when an international contract is personally conducted by a sovereign or other person exercising the sole treaty-making power in a state, or when it is made in virtue of the power incidental to an official station'. The 1905 'Korea Protectorate Treaty' was not signed by Emperor Kojong. No organization existed with authority equal to that of Emperor Kojong.

[40] Hall, p. 433 (in Japanese translation.); p. 345 (in original English version).

[41] William Edward Hall, "A Treatise on International Law," Oxford: Clarendon Press (1895). The sentence in point is found on p. 345. "Except….. ratification by the supreme treaty-making power of the state is necessary to its validity."

[42] William Edward Hall, "A Treatise on International Law" Tokyo: Sanseido (1896). Published on May 19th, the 29th year of Meiji (1895) by Sanseido Shoten

[43] The details of this research were published in Japanese. Totsuka Etsuro, "The 100th year anniversary of Annexation of Korea and International Law: Research on academic writings of the time for 'Ratification Required' theory in relation to the invalidity of the old Japan-Korea Treaties", *Gendai Kankoku Chosun Kenkyu* No. 10 (Nov. 2010), pp. 27-37.

[44] Kurachi Tetsukichi, *Public International Law*, published by Tokyo/Nippon Law School, 32nd year of Meiji (1899), Lecture Notes of 4th Session of Nippon Law School. Accessed on January 8th, 2010.

[45] Totsuka Etsuro, 'Illegality of Ahn Jung-geun's Trial and East Asian Peace', Issue 2 Volume 42 of *Ryukoku Hogaku*, 2009, pp. 1-27.

[46] Cabinet Document Administration of the Ministry of Foreign Affairs 'Circumstances Surrounding Annexation of Korea Observed by Kurachi, Tetsukichi', *Modern Diplomacy Memoir* 4 Yumani Shobo, 2000, pp. 163-182.

[47] Unno Fukuju, "Japan-Korea Treaties and Annexation of Korea" Note (2) on p. 10. Prof. Unno's quotation was from p. 197 concerning forced conclusion, and my reference is from pp. 198-199 and pp. 201-202 in support of the 'Ratification Required' theory.

[48] Robert Jennings and Arthur Watts, (eds.), *Oppenheim's International Law Ninth Edition Vol. 1 Peace Parts 2 to 4*, Longman, 1996, pp. 1226-1230.

[49] Refer to author's other papers for omitted parts.

[50] ROK Ambassador to Japan, Kwon Chul-hyun, Open Lecture titled 'Historical Developments of Korea-Japan Exchanges and Future Tasks', on Tuesday, June 16th, 2009, given for the Author's class at Ryukoku University.

[51] NHK Matsuyama Station 'Special Drama: Clouds over Hills'.