

## THE WAR IN THE ORIENT IN THE LIGHT OF INTERNATIONAL LAW.

In 1889 the late William Edward Hall, an eminent international lawyer, in prefacing a treatise upon the subject said: "I therefore look forward with much misgiving to the manner in which the next great war will be waged, but with no misgiving at all as to the character of the rules which will be acknowledged ten years after its termination, by comparison with the rules now considered to exist."<sup>1</sup>

Since that time the world has seen the Chinese-Japanese War (1894-1895), the Græco-Turkish War (1897), the Spanish-American War (1898), the British-Boer War (1899-1901), and the Russo-Japanese War, which began February 6, 1904, and is just ended.

Of all these national struggles the last named may be truly said to be the first great war, for while both the Spanish-American and the British-Boer Wars were momentous conflicts, still, neither had a valid claim to be considered of the first magnitude. Russia and Japan, however, have played a game for enormous stakes; Russia's preponderating influence in Manchuria, the Liao-tung Peninsula, and Corea was risked on the one hand, while the very existence of the Mikado's Empire was wagered on the other.

Although the war continued for only nineteen months, the first part of Mr. Hall's prophecy was strikingly fulfilled and his "misgiving" amply justified. Both of the belligerents by their actions have raised more questions upon points of international law than probably ever before have occurred in a period of such short duration. In order to discuss intelligently the various breaches of international law which, so it is alleged, have taken place since the war began, it is important to understand accurately what that code of national good breeding which we call international law really is.

To comprehend international law as an institution we must glance at its history.

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<sup>1</sup> Preface to third edition of "A Treatise on International Law," by William Edward Hall, M.A., page x.

In the days when Rome was mistress of the seas, from the sunny shores of the Mediterranean to the chalky cliffs of Dover, a special set of laws had been collated by her jurists for the settlement of disputes between aliens or between Romans and aliens. These laws were made by comparing the customs and regulations of all the principal Latin States and selecting therefrom such principles of right and justice as were universally acknowledged among them. This collection was called the *Jus Gentium*, and as a rivulet flowing from some tiny spring high up the mountain widens into the mighty river which traverses the plain below, so those usages and customs first sanctioned by the *Jus Gentium* have formed, with their natural increments, the main current of modern international law.<sup>2</sup>

Grotius, the father of this branch of jurisprudence, founded his "*De Jure Belli et Pacis*" upon the principles of the *Jus Gentium*. And this was at a comparatively recent day when the hordes of Attila and kindred chiefs were thought long before to have swept away the legions, the art, and the learning of Imperial Rome.<sup>3</sup>

But as to-day the wanderer on the Roman Campagna sees the ruined aqueducts of the Empire in silhouette against the evening sky, so the student finds on every hand unmistakable evidence that the great maxims of the civil law, containing as they do the germ of eternal truth, have endured through the years even unto the present time.

During the Middle Ages a strong effort was made to identify the law of nations with the Divine Will as revealed in that system known as Natural Law, and the advantage claimed for such a course was the sanction afforded by the universal respect paid by all nations to the Deity in whatever form recognized.

In more recent times another school has arisen which denies absolutely the basic principle of the Divine Will as a controlling influence of international law, and whose theory is that the law of nations consists merely of a series of precedents in national

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<sup>2</sup> See "Notes on International Law," Eaton, pages 13, 14; "The Whewell Lectures on International Law," by Henry Sumner Maine, K. C. S. I., page 20.

<sup>3</sup> Maine's "Whewell Lectures," page 22.

intercourse established by usage and custom between the powers of the earth. A weakness of sanction is inherent in this theory.<sup>4</sup>

Perhaps, however, the correct view is one occupying a middle ground. That is to say, it seems to be true that international law is founded upon ethical morality, but such morality is not confinable by religious lines, its principles are as easily deduced from the great maxims which experience has shown that man must obey to conserve his well-being as from the Bible, the Koran, or the works of Confucius. But although of moral foundation, it is only evidenced by actual occurrences, and it is from the history of international usage that we must ascertain the nature of international law.

In a word, international law is a system of national relationship founded upon abstract morality, evidenced by usage, and sanctioned by a national desire to conform to moral standards and a national dread of coercion, both sentimental and physical, at the hands of sister states.

The source of international law was the Roman *Jus Gentium*, whose principles were assimilated in greater or less degree by the barbarians and transmitted by them to the Mediæval nations. The recorders of international law have preserved, formed, and to some extent changed it. They stretch in a long line from Grotius to the present day, and include such names as Wolf, Vattel, Phillimore, Twiss, Kent, Wheaton, Pomeroy, Holland, Laurence, and Hall. The codification of international law is of very recent origin, and already it has exercised a greater influence upon this department of jurisprudence than any other agency.

The regulations which control the intercourse of nations are framed with regard to two conditions of national relationship, peace and war. With the former condition this article has nothing to do, for every event of which it will treat springs of necessity from the latter.

What, then, do we understand by the existence of a state of war?

Unquestionably, we understand something very different from the meaning which the phrase had for our forefathers.

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<sup>4</sup> Hall's "International Law," introductory chapter.

In the olden time war meant a tribal or national conflict *à l'outrance*. The persons and property of the belligerents were at the absolute disposal of whichever happened to be the victor. Destruction, desolation, and confiscation were inalienable incidents of war. For a long time the only effective restraining influence was the system of chivalry, and in those barbarous times the good resulting therefrom can scarcely be overestimated. Chivalry inculcated the principles of fair play, of good faith between enemies, of protection for women and for the wounded and the weak. The prototypes of the Table Round performed a glorious mission by helping to subjugate the brutal instincts of their fellows, the example of the noble Bayard had a like effect, and it was not in vain that Roland wound his horn at Roncesvalles!

But an even more powerful factor in the regulation and modification of warfare was the interest of commercial enterprise. From the days when the cities of the Hanscatic League dotted the coasts of Europe, and the great trading commonwealths of Venice and Genoa battled for supremacy in the Adriatic and in more distant seas, there has existed a strong sentiment for peace based upon the opportunity for legitimate gain which that condition affords.

Nothing is so inimical to trade as warfare.

Therefore, as the world's industrial progress became pronounced various limitations were placed by common consent upon the thitherto unbridled license of war. The roll of the drum was drowned by the whir of the loom. Then, too, advancing civilization made men more humane, and the theory of war has doubtless been altered through merciful motives as well as through those of commercial interest.

Grotius and the writers who succeeded him gave the earliest expression of this restraining influence. But the struggle was long and hard, and it was not until comparatively recent times that it was even measurably successful. At so late a period as the Napoleonic Wars England and France paralyzed trade by prohibiting neutral commercial intercourse with each other.

It remained for conventional international law to materially lessen the rigors of war.

One of the first important steps taken in that direction was the adoption of the famous Declaration of Paris by a majority of the more important powers on April 15, 1856.<sup>5</sup> Therein it was agreed that:

1. Privateering is and remains abolished.
2. The neutral flag covers enemies' goods, with the exception of contraband of war.
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.
4. Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

But it must not be supposed that the contents of this epoch-making agreement were of novel impression. For many years a code of rules governing the conduct of war had been in the process of formulation through long usage and general consent, and the Declaration of Paris merely gave expression to a few of them.

This Declaration, however, was only a prelude. In 1863 a number of persons representing private societies for the relief of the wounded met in Geneva largely as the result of the sufferings endured through lack of proper hospital facilities during the Italian War of 1859. The members of this Conference accomplished little beyond a general discussion of the subject, but before they dispersed they induced the Swiss Government to call a Diplomatic Congress of the powers to discuss the same question. This Congress met during the ensuing year and resulted in the famous Geneva Convention of 1864, which, briefly speaking, neutralized military ambulances and hospitals, whether belonging to the belligerents or to third parties, and the medical, clerical, and administrative staffs attached thereto, and provided for the inviolability of the wounded. It also ordained that those persons, other than the wounded, for whom the convention was

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<sup>5</sup> Wheaton's "International Law," Appendix G, page 803.

framed, should claim its protection by displaying a white flag with a red cross thereon (the flag of Switzerland, colors transposed), and by using the same emblem as a "brassard" or arm badge.<sup>6</sup>

In 1868 the Swiss Government recalled the Congress at Geneva to consider the advisability of revising the "Convention" of 1864. Certain "additional articles" were adopted by the Congress, but as they were never ratified by the powers their effect has been merely a moral one.<sup>6</sup>

The next international addition to the Code of War was made in the same year (1868) by "The Declaration of St. Petersburg." Several bullets possessing explosive qualities till then unknown had been offered to the Russian War Office for adoption. The Imperial Government, before initiating a means of destruction so much more terrible than anything in existence, called a military council of the powers to see if such an instrument of warfare could not be eliminated through a general agreement of abstention. The "Declaration" resulted, by which the Signatory Powers "engage mutually to renounce in case of war among themselves the employment by their military or naval forces of any projectile of a weight below four hundred grammes (approximately fourteen ounces), which is either explosive or charged with fulminating or inflammable substance."<sup>6</sup>

All of these meetings were called to consider special questions relative to the conduct of war, but in 1874 Alexander II, Czar of Russia, called an International Conference at Brussels for the purpose of codifying the whole subject. A long declaration of fifty-six articles was drafted by the Conference, but the time was not yet ripe for such an agreement, and while great attention was paid in all civilized countries to the result of the Conference the declaration was never ratified.<sup>7</sup>

It may not be out of place at this point to call attention to two purely national matters which are, however, of international

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<sup>6</sup>"The Laws and Customs of War on Land," by T. E. Holland, K. C., page 51 *et seq.*, appendix.

<sup>7</sup>"Studies in International Law," Holland, page 61.

importance in this regard. I refer to the British and American Enlistment Acts and to the American doctrine of the immunity during wartime of private property on the high seas.

The Enlistment Acts were adopted by both countries as a sequel to the Alabama claims agitation in 1870 and 1871, and they make it an "offence" and a "high misdemeanor" for the citizens of either to enter the military or naval service of a belligerent state with whom their country is at peace, or to fit out or engage in expeditions whose object is the assistance of such a belligerent.\*

Immunity for private property on the high seas was first provided for in the treaty made between the United States and Prussia in 1785. Since that time it has become a settled doctrine of American policy and was urged by this country for inclusion in the Declaration of Paris and The Hague Convention. It found, perhaps, its most reasonable expression in the treaty negotiated between the United States and Italy in 1871, where the corollary is wisely added "that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."†

After all these attempts to adopt a modified and uniform system of warfare a final effort was made at the close of the nineteenth century which was fated to result in a partial but, nevertheless, substantial success.

On August 24, 1898, Nicholas II, the present Tsar of Russia, suggested the Peace Conference at The Hague, and its sessions began on the 10th of May of the ensuing year. It is undoubtedly true that the Conference tried to accomplish too much, and in fact accomplished too little. But even so, the conventions finally agreed upon were a long stride in advance of any previous international regulations. True, the plan for the limitation of armaments failed utterly, and many minor points, such as the American doctrine of immunity for private property at sea, were merely proposed as subjects of a future meeting, but notwithstanding such disappointments, the Conference

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\* Wheaton (fourth English Edition), Appendix C, pages 757, 769.

† "The Peace Conference at The Hague," Holls, page 309.

adopted three conventions which were afterwards generally ratified, and which provided in brief:

1. For the systematization of international arbitration and the establishment at The Hague of a permanent court for the adjustment of international disputes.
2. For the issuance of instructions by the Signatory Powers to their armed land forces in conformity with certain "Regulations Respecting the Laws and Customs of War on Land" adopted by the Conference and modelled by it upon the unratified Declaration of the Brussels Conference of 1874.
3. For the adaptation to maritime warfare of the principles of the Geneva Convention of August 22, 1864.<sup>10</sup>

To discuss the subject of these conventions would require much more space than is at my disposal, and I can only say that frequent reference will be made to their terms in considering the concrete examples involving the principles they represent, which have been supplied during the progress of the war.

The ratification of The Hague agreement has been the last united act of the powers with regard to the revision, affirmation, and establishment of the great principles of international law. Fate seems to have acted with more than usual irony in decreeing the occurrence of the Boer War and the mighty conflict we are now discussing while the great Peace Conference is still a vivid memory. However, it seems really fortunate, since so many of the points actually agreed to by the Conference related to war, and to peace not at all, that opportunities should be afforded so soon for testing the meaning and efficacy of the regulations adopted by it.

It may easily be seen, therefore, that the present is an especially favorable time for the solution of questions of international law relating to war. We have a mass of historical precedents

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<sup>10</sup> "The Peace Conference at The Hague," by Dr. Holls.



for purposes of comparison, we have a long list of eminent authors of approved authority for purposes of reference, and, finally, we have a new and untried Code framed with reference to the precedents, the authors, and numerous other attempts at codification, which needs more than anything else the crucial test of practical application.

Let us now examine the various events of the Russo-Japanese War which have raised questions relevant either to this Code or to the general principles of international law.

In our examination of events it would seem advisable to segregate them for consideration into classes in each of which the occurrences bear a certain generic resemblance to one another; that is to say, we shall consider:

1. The general question raised by Russia's objection to Japan's initiation of hostilities without a formal declaration of war.
2. Problems of land warfare as affecting (A) the belligerents, and (B) the belligerents and neutrals.
3. Problems of maritime warfare as affecting (A) the belligerents, and (B) the belligerents and neutrals.

With regard to the question raised by the commencement of hostilities the facts seem to be as follows: In December, 1903, the protracted negotiations between St. Petersburg and Tokio were obviously approaching a crisis. On December 25th Japan reiterated her demand that Russia recognize the territorial integrity and independence of China and Korea. This demand was answered in a qualified and negative manner on January 6, 1904. Japan made a last appeal on January 13th, and no answer having been made thereto prior to February 5th, she on that date demanded the passports of her Minister to Russia. On the same date Russia recalled Baron Rosen from Tokio. This was the exact state of affairs on February 8th, when, to quote from "The Annual Register," "the Russian fleet lying outside the harbor (of Port Arthur) was attacked by Japanese torpedo boats, when the battleships *Retvizan* and *Tsarevitch* and cruiser *Pallada* were

severely damaged. The attack was repeated in the night, and in the morning the Japanese fleet engaged the Russian squadron and the forts near the entrance to the harbor. The battleship *Poltava* and the cruisers *Diana*, *Askold*, and *Novik* suffered considerably, and the Japanese fleet withdrew, having in twenty-four hours so weakened the Russian squadron that the landing of Japanese forces in Korea could be proceeded with without fear of interruption."<sup>11</sup>

The result of this engagement was that Russia denounced Japan as a treacherous foe<sup>12</sup> for beginning the war without any warning either in the form of declaration or manifesto. Russia's denunciation was conveyed to the world through the *Czar's* address to the officers of his navy on February 10th and the official circular of the Foreign Office issued on February 22d.

The legal point involved is therefore clearly defined; was Japan guilty of a breach of international law because of the way in which she began the war?

To answer this question we must consider it historically. A formal declaration of war held an important place in the code of chivalry. It was the custom of a monarch who intended to enter into a conflict with another state to send a herald resplendent in all the varicolored panoply pertaining to his station to proclaim to the sovereign thereof his master's will. Even as late as 1635 France declared war against Spain at Brussels according to all the heraldic forms of the Middle Ages.

Since the beginning of the eighteenth century, however, the rule requiring a formal declaration of war before the commencement of hostilities has been more honored in the breach than in the observance. A few modern instances, arranged in tabular form, will illustrate this assertion.

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<sup>11</sup> "The Annual Register" for 1904, page 375.

<sup>12</sup> The Japanese contend that the first shot of the war was fired at Admiral Togo's fleet as it passed Chemulpo, Korea, on February 8th by the Russian gunboat *Korietz*.

WAR.	HOW COMMENCED.
(1854) Crimean.	By declaration. <sup>20</sup>
(1870) Franco-Prussian.	France declared war July 18, 1870: first engagement at Saarbruck August 2, 1870. <sup>20</sup>
(1877) Russo-Turkish.	By invasion of Turkey by Russian army a short time before Russia declared war. <sup>20</sup>
(1885) Franco-Chinese.	By military operations without formal declaration of war. <sup>21</sup>
(1894) Chinese-Japanese.	By sinking of Chinese troopship by Japan a month before war was declared. <sup>21</sup>
(1897) Græco-Turkish.	By engagement on April 8, 1897, war being declared April 17th. <sup>21</sup>
(1898) Spanish-American.	By declaration. <sup>22</sup>
(1899) British-Boer.	By ultimatum on the part of the Boers amounting to a declaration. <sup>22</sup>

This table shows that the wars begun without formality have generally been those in which one of the belligerents was a semi-civilized nation, and it is interesting to note that in such cases the civilized state has generally been the aggressor.

Writers of authority are a good deal at variance on this subject,<sup>23</sup> but there seems to be a consensus of opinion that while precedent to a certain extent excuses the commencement of hostilities without a formal declaration of war or the more esoteric method of publishing a manifesto, still, fair play and the business interests of neutral nations demand that a definite time shall be fixed by the belligerents themselves as the starting-point of their controversy, and the only accurate and satisfactory way of fixing such time is by some kind of a declaration of war made prior to any military or naval operations whatsoever.<sup>24</sup>

<sup>20</sup> Wheaton's "International Law," fourth English edition, page 419.

<sup>21</sup> Wheaton's "International Law," fourth English edition, page 419; Hall's "International Law," page 383.

<sup>22</sup> Phillimore's "International Law," vol. iii, § 64.

<sup>23</sup> "The Annual Register" for 1885.

<sup>24</sup> "History of the War Between China and Japan," by J. I. Osaka, chapters 1 and 2.

<sup>25</sup> "The Annual Register" for 1897.

<sup>26</sup> "A History of the American People," by Woodrow Wilson, volume V, page 274.

<sup>27</sup> "Towards Pretoria," by Julian Ralph, Part II, p. 35.

<sup>28</sup> Hall's "International Law," page 381 *et seq.*

<sup>29</sup> The reasons which render a declaration of war imperative are largely historical.—the memory of the mediæval herald is still with us,—but in addition thereto there is the right which neutrals have to know from exactly what date they may deal in "contraband" at their peril.

It is idle to argue that war had been practically declared through the breaking off of diplomatic relations. It is quite conceivable in principle that severed diplomatic relations may be resumed, and hence this argument, which seeks to employ the reasoning of the well-known geometrical axiom, that "things equal to the same thing are equal to each other," fails utterly.

Russia's possible random shot (Korietz) does not challenge serious consideration, the real question is as to the legality of Togo's brilliant naval raid, and of that we can only say that while it is certainly excused by precedent it is just as certainly condemned by principle.

**Problems of  
Land Warfare  
Affecting the  
Belligerents  
only**

Such a problem which has arisen several times during the war is that of alleged mutilation of the dead. Each side has accused the other of this peculiarly revolting and atrocious action. It is hard to believe newspaper reports upon such a subject, and did they stand alone we might dismiss them from consideration, but such a well-known war correspondent and author as Frederick Palmer has spoken of such mutilation as an assured fact.<sup>23</sup> It seems, therefore, justifiable to accept the resulting question provisionally and to assume its truth merely for the purpose of considering the legal point which it involves.

It is impossible to deal with this matter except in a negative way, for respect to the dead is one of the foundation-stones of the edifice of human civilization. A modern general would as soon adopt the torture stake as show disrespect to the inanimate remains of a gallant foe. In all the long catalogue of cruel and unjustifiable actions which mark the reign of Charles II none is so generally reprobated as the disinterment of Cromwell and his associates and the exposure of their bodies in chains, followed by decapitation and burial at Tyburn.

The Hague Convention prohibits the employment of treachery or poison to kill the enemy and forbids the refusal of quarter. It also throws over the sick and wounded, like a sheltering man-

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<sup>23</sup> "With Kuroki in Manchuria," by Frederick Palmer, pages 173 and 174.

tle, the merciful provisions of the Geneva Convention.<sup>24</sup> Its very silence upon the point under examination, when considered in relation to the declarations just mentioned, makes it clear that the framers failed to contemplate an act of such gross barbarity as an incident of modern warfare. In concluding this most unpleasant topic we may be certain that if any such acts are ever provable they will remain for centuries an ineffaceable blot upon the escutcheon of the guilty nation, and, furthermore, they will constitute a fair ground for subsequent claims, through diplomatic channels, on behalf of the outraged families of the victims.

On February 10, 1904, the day Japan formally declared war, the United States of America, through her Secretary of State, John Hay, issued the following "Note," which was sent to our representatives accredited to the belligerent nations and copies of it "to all the powers signatory of the Protocol of Peking requesting each of them to make similar representations to Russia and Japan:

Problems of  
Land Warfare  
as Affecting  
Belligerents  
and Neutrals

"You will express to the Minister of Foreign Affairs the earnest desire of the Government of the United States that in the course of the military operations which have begun between Russia and Japan, the neutrality of China and in all practicable ways her administrative entity, shall be respected by both parties, and that the area of hostilities shall be localized and limited as much as possible, so that undue excitement and disturbance of the Chinese people may be prevented and the least possible loss to the commerce and peaceful intercourse of the world may be occasioned."<sup>25</sup>

Japan's reply was received on the 13th, and Russia's on the 19th of February. Each nation promised to respect "the neutrality and administrative entity of China" if its opponent faithfully observed the same.<sup>26</sup>

On January 13, 1905, Count Cassini, the Russian Ambas-

<sup>24</sup>"The Laws and Customs of War on Land," by T. E. Holland, K. C., page 18.

<sup>25</sup>Correspondence in re Russo-Japanese War published by the Department of State.

<sup>26</sup>See note 25.

sador at Washington, addressed a letter to Secretary Hay in which he accused China of frequent breaches of neutrality and Japan of disregarding the above-mentioned agreement.<sup>27</sup>

A long correspondence ensued to which Secretary Hay, Count Cassini, and the Japanese and Chinese foreign offices were parties. All of Russia's statements were denied and counter charges made. Both of the belligerents threatened to disregard their original agreement, but—and this is the important fact—except in isolated and comparatively insignificant instances neither did so. No army of either side marched through Chinese territory, none of that territory was pre-empted for purposes of war or aggrandizement. The statu quo of "The Middle Kingdom" was maintained in this time of unusual stress as a result of the definite, straightforward, and forcible policy of the American Government.

But the facts just stated, while they show how China has been protected by the United States in this war, do not explain the necessity for such protection, nor do they make it clear why this country should enter the lists as China's champion. To comprehend the reason therefor it is necessary to review briefly the historical relations of China with the Western Powers. It may seem that such a review is not germane to this article, but one needs only to remember that the policy of the United States with regard to China has been one of the most important events in international relations which the war has brought about in order to realize that a discussion of the historical development of this policy is not only relevant, but indeed necessarily incident to a comprehension of the conflict from the viewpoint of the international lawyer.

The 5th of July, 1840, marks an epoch in the history of the Chinese Empire. For centuries upon centuries the inhabitants of that vast portion of Asia comprised within its boundaries had led an esoteric existence, hedged in by a moral wall far more impenetrable than the wonderful one of stone which winds its

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<sup>27</sup> See Correspondence between the Russian Ambassador and the Secretary of State, published by the Department of State.

sinuous way over the hills and valleys of the land. In the words of Justin McCarthy, "The one thing which China asked of European civilization and the thing called Modern Progress was to be let alone. China's prayer to Europe was that of Diogenes to Alexander—'Stand out of my sunshine.'"<sup>28</sup>

China had no desire to acquire the civilization of the West. Indeed, she regarded it as the perfection of barbarism. Through the hereditary tendencies of her people as expressed in the writings of her sages and philosophers she had produced a wonderful civilization of her own and one differing in almost every particular from that of Christendom. It was objective in its relation to existence, it inculcated many excellent principles, but it recommended a life of negation devoted mainly to the acquisition of learning, philosophical contemplation, and ancestral worship.

Such a people could not but look with aversion upon the nervous energy and utilitarianism of Europe and America. For many years every effort on the part of the Christian states to establish commercial relations with China was defeated by the Chinese. Then came the Opium War, which began on the date before alluded to<sup>29</sup> and ended on August 29, 1842, when a treaty of peace was signed by the belligerents.

The immediate *casus belli* was discreditable to England, for the war resulted from her refusal to prohibit the East India Company from trading in opium with the Chinese despite the fact that the drug was admittedly poisonous and of moral destructivity, and, furthermore, had been excluded from China by the law of the land.<sup>30</sup>

The indirect cause, however, was China's policy of exclusion, which England saw could be overcome only by force of arms, and the result was the dislodgment of the first stones in what Mr. Foster aptly calls "China's crumbling wall."<sup>31</sup>

By the terms of the treaty the ports of Canton, Amoy,

<sup>28</sup> "A History of Our Own Times," by Justin McCarthy, volume I, page 130.

<sup>29</sup> July 5, 1840.

<sup>30</sup> "American Diplomacy in the Orient," by John Foster, page 65.

<sup>31</sup> Foster, chapter vii, page 203.

Foo-Chow, Ningpo, and Shanghai were opened to British trade and residence, a large indemnity was paid by China, Hong-Kong was ceded to England, and a tariff was agreed upon.<sup>32</sup> At this early date the United States initiated the policy it has since pursued, of reaping advantages from the military operations of sister states, while itself maintaining friendly relations with the Chinese Government. Commodore Kearny secured for the citizens of America an equal participation with those of England in the tariff concessions guaranteed by the treaty.

From this time on history records constant efforts on the part, chiefly, of England, France, Russia, and America to extend and amplify their commercial privileges in "The Flowery Kingdom."

The United States negotiated the treaties of 1844, 1858, 1868, 1880, 1888 (unratified), 1894, and was a party to China's treaty with the powers in 1901. The treaty of 1844 secured to us in an official form even more liberal concessions than the British had obtained two years earlier.<sup>33</sup>

The next fourteen years witnessed a series of desperate attempts by China to evade her treaty obligations. Every trick and subterfuge known to the Oriental mind was employed, and fraud and prevarication were freely used to prevent the observance of these sworn agreements.

This course of action led to the second Anglo-Chinese War in 1858, at the end of which the United States shared in the fruits of victory, as she had done before. Then for the first time were the foreign diplomatic representatives promised that they should be allowed to come into personal touch with the Chinese Emperor. As was to be expected, the terms of all the treaties negotiated by the powers in 1858 were far more liberal than those of former conventions.<sup>34</sup>

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<sup>32</sup> "History of Our Own Times," McCarthy, page 139.

<sup>33</sup> Foster, page 87.

<sup>34</sup> Mr. Foster says at page 242 of his book: "The four treaties, negotiated separately, have a general similarity in their stipulations, and as each contains the 'most favored nation' clause, the special stipulations of any became effective



Ten years later Anson Burlingame, the retiring Minister of the United States to China, was commissioned by the Emperor as Special Ambassador to the Foreign Powers, and commenced one of the most picturesque and spectacular missions recorded in the annals of diplomacy. Attended by a semi-barbarous retinue resplendent in the varicolored trappings of the Orient, he journeyed to Washington, London, Berlin, and St. Petersburg, where death brought his progress to a close. Burlingame was a man possessing great personal magnetism and considerable ability. In Eastern affairs he was an optimist, and believed that with equal treatment and opportunity China would soon take her place in the family of civilized nations. His purpose was to secure a general revision of the treaties of 1858 in ways favorable to China.

The best result of his labors was the treaty of 1868, which he negotiated between China and the United States.<sup>22</sup>

The subsequent treaties of 1880 and 1894 have dealt with the problem of excluding coolie labor from this country. They form the only serious impediment in a long series of friendly relations.

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for all the powers. The important features of the Treaties of Tientsin of 1858 over those of 1842 and 1844 were the concessions, first, as to diplomatic privileges, second, as to enlarged trade and travel, and, third, as to religious toleration. Direct means of access to the government were provided, and the right of visit and residence of diplomatic representatives at Peking was secured. The stipulations as to trade, travel, residence, ownership of property, duties, etc., which had proved so defective or inefficiently enforced under the earlier treaties were enlarged and made more specific in their terms." It may be of interest to note here that perhaps the greatest stumbling-block to diplomatic intercourse with China was her demand that foreign diplomats should prostrate themselves, or at least bow the knee, to the Emperor. As late as 1873 the question came up, and in his instructions to our minister, the Secretary of State then said "that while questions of ceremony were not usually seriously considered in the United States, in the case of China it involved the official equality of nations and became a question, not of form merely, but of substance, requiring grave consideration." This was said because had our minister kneeled the Chinese would have considered and attempted to treat the United States as a tributary nation. As a matter of fact the Emperor did not receive the diplomats in audience until 1873, when they were presented in an unsatisfactory way. A somewhat more dignified audience was accorded them in 1891. But only since the punitive expedition of 1900 have they been treated with the courtesy which is their due.

<sup>22</sup> Foster, pages 265, 266.

To sum up the facts of history: The United States has never declared war against China; instead, she has allowed other nations, notably England and France, to do the fighting while she held aloof and shared with them the fruits of victory so far as trade privileges were concerned. The United States never tried to force the opium traffic upon China, but, instead, helped her to suppress it, and finally, in 1880, prohibited its importation by citizens of the United States.<sup>36</sup>

The United States possessed in Anson Burlingame a Minister who wielded an enormous influence over the Chinese and inspired in them an abiding feeling of amity towards us which he cemented by negotiating on their behalf the liberal treaty of 1868. Finally, of late years this country alone has showed a disinterested desire to treat China fairly. We represented her in Japan in 1894, and it is a recent memory that after the Boxer outbreak in 1900 we asked merely reasonable money compensation, and not only refused to join the other powers in their land grabbing and treasury looting performances, but used our best efforts to modify their demands and control their rapacious greed.

For all these things China is not ungrateful, she looks to us as her best friend, and we on our part in intervening in her behalf merely carried a settled diplomatic policy to its logical conclusion.

Our motives, it is true, were not entirely altruistic, though none can deny that we stand for fair play and common honesty among the nations, but, besides the question of fairness, the United States in issuing the circular of February 10, 1904, had clearly in mind the necessity for maintaining the integrity of the Chinese Empire in order to secure freedom of trade to all nations, commonly known as "the open door." This country could not but view with alarm the gradual territorial encroachments of the European powers in recent years. With the French in Cochin China, the English at Wei-Hai-Wei, and the Germans at Kiau Chau, not to mention numerous other settlements, it was felt

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<sup>36</sup> Foster, page 295.

that the Russo-Japanese War would afford an opportunity not only to the belligerents but to neutral states for territorial aggression, and perhaps even for denationalization of the great, tottering Empire of the East.

America, therefore, spoke in clarion tones, and to her everlasting credit preserved inviolate and unharmed, throughout a world crisis, an ancient nation which for many years has figured among the powers of the earth as a lamb among wolves.

The next question for consideration is that involved in the landing of troops by Japan at Won-San and Chemulpo, Korea, on February 16, 1904. Of the illegality of this proceeding there is no doubt. Wheaton says: "The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral state, which is the common friend of both parties. This exemption extends to the passage of an army or fleet through the limits of the territorial jurisdiction, which can hardly be considered an innocent passage, such as one nation has a right to demand from another."<sup>37</sup>

It is earnestly contended by Japanese apologists that it is farcical to regard Korea as an independent state; that she was in fact, the gage of battle, and that it was a necessary military measure to occupy her territory and oust the Russians from it because Korea's national identity depends entirely on the state who, by force of arms, is able to preponderate in her affairs, and hence she may be Russian to-day, Japanese to-morrow, but Korean never.

As a statement of facts the above argument is pretty nearly correct, but are these facts such as the international lawyer can regard? Obviously they are not. The Kingdom of Korea is, and always has been, a theoretically independent state, so far as its foreign relations are concerned.<sup>38</sup> That it is really subject

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<sup>37</sup> Wheaton's "International Law," page 578.

<sup>38</sup> Foster, chapter ix.

to domination by other states is purely adventitious, and therefore we must regard the use which Japan has made of it to facilitate the debarkation and passage of her troops to the scene of war as a technical violation of a well-established principle, which, however, may have been morally justified by reason of Korea's weakness, lack of national identity, and her character as bone of contention between the belligerents.

There is probably no class of persons connected with warfare which causes so much anxiety and annoyance to the belligerents, and yet is of such international importance, as the representatives of the press.

In the days of Archibald Forbes and his confrères the war correspondent had a comparatively free foot. There was some attempt at censorship, but, on the whole, he might go where he liked, see what he pleased, and report what he could. Even as recently as the British-Boer War we find a large number of efficient writers in the field, to whom both sides gave ample opportunity to pursue their work. But things have been very different during the Russo-Japanese War.

The smoke of Togo's guns had hardly rolled from Port Arthur on the evening of his fateful raid when the cables—the nerves of the world—were bearing many curt messages to far-off lands. Back they came, the correspondents, from India, China, and the Philippines; others roused themselves from the comforts of life in London, Paris, and New York, and in an incredibly short space of time a large detachment was speeding towards Tokio, while another section hastened towards the Russian headquarters in Manchuria.

Trouble began immediately; the suave Japanese did everything for the correspondents except let them see the war. There was a long succession of heart-breaking delays before they were allowed to start at all. When they did arrive in Manchuria they were carefully guarded at all times and permitted to move only in a certain restricted area. They were allowed to see small and unimportant parts of battles from distant hilltops, and it was not unusual for a Japanese officer to call them together and with the aid of a blackboard and interpreter to explain a glorious victory

which had occurred some time before, and which, except in this ingeniously vicarious way, they had no opportunity to see.<sup>39</sup>

So far as the correspondents accompanying their armies were concerned the Russians showed no disposition to reduce their privileges beyond the usual limit, but the Japanese policy just referred to has raised a very important international question, namely, to what extent may a nation control war correspondents accompanying its armies?

There is no question that a state may control its own correspondents pretty completely, but the control of the correspondents of neutral nations presents a different proposition.

Of course, in the present instance Japan justified everything she did on the ground of military necessity, but there is little reason to doubt that she exaggerated such necessity, and imposed so many restrictions upon the correspondents that in many instances they were unable to report anything except at second hand.

It would seem, however, that as international law stands to-day Japan acted quite within her rights. A correspondent belonging to a neutral nation who obtains permission to accompany the army of a belligerent to the seat of war becomes himself a unit of the force, and must obey without question the orders of the commanding general. So completely is he recognized as an integral part of the army to which he is attached that Article 13 of The Hague Convention regarding "The Laws and Customs of War" reads as follows: "Individuals who follow an army without directly belonging to it—such as newspaper correspondents and reporters, sutlers and contractors—who fall into the enemy's hands, and whom the latter see fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army which they were accompanying."<sup>40</sup>

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<sup>39</sup> See "Following the Sun Flag," by John Fox, and "With Kuroki in Manchuria," by Frederick Palmer.

<sup>40</sup> "The Peace Conference at The Hague," Holls, page 148.

And Mr. Atlay in his note to Hall's International Law <sup>41</sup> says: "Mr. Bluntschli, the American instructions, and the Project of Declaration (of Brussels) include correspondents of newspapers among persons liable to be made prisoners of war. Probably it is only meant that they may be detained if their detention is recommended for special reasons. All persons, however, can be made prisoners for special reasons; newspaper correspondents in general seem hardly to render sufficiently direct service to justify their detention as a matter of course, and they are quite as often embarrassing to the army which they accompany as to its enemy. Perhaps it is unfortunate that they are enumerated as subjects of belligerent right together with persons who are always detained. The 'Manual of the Institut de Droit International' (Art. 22) directs that newspaper correspondents shall be detained for so long only as military necessity may dictate."

Mr. Atlay unquestionably has the right idea with regard to the status of correspondents, and the terms of The Hague Convention should be interpreted in accordance with his view.

That is to say, the phrase which gives correspondents the "right" to be treated as prisoners of war was evidently framed for their protection, probably to avoid their classification as spies under certain circumstances, but was not intended to make them an integral part of the belligerent army which they happen to accompany.

Notwithstanding, however, the probable intention of the framers of the convention, its effect, coupled with usage, has been to subject correspondents to discipline almost as severe as that governing the troops they follow, and to identify them with the force to which they are attached, for in order to enjoy the privileges of prisoners of war which the convention guarantees to them, they are rendered liable to the same hardships of capture and imprisonment which are the natural lot of the belligerents, and of the belligerents alone.

The correspondent to-day is laboring under two difficulties,

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<sup>41</sup> Hall's International Law, page 407.

namely, the absolute control of the general he accompanies, and a status, in case of capture, identical with that of a belligerent.

It is clear that the first difficulty ought never to be removed, but there is much to be said in favor of its modification. While the true military necessity of a belligerent state often calls for the suppression of information regarding its land and naval forces, still, it is not conceivable that such necessity should decree a system of press garroting and unbroken secrecy. It is not for the sake of idle curiosity that such men as the late Julian Ralph and G. W. Stevens give their lives, but from a far nobler motive. The world has a right to know the principal events of a great war just as they take place. Were this not the case a powerful state might overwhelm a weak neighbor and the rest of the earth be none the wiser. A war waged in silence is a harmful, a dangerous, war. It will be an important question for the next Hague Conference to decide whether warfare shall not be surrounded by the utmost publicity compatible with the military exigencies of the belligerents, and by what rules and regulations such a result can be secured.

The second difficulty can be removed with little trouble by simply following out Mr. Atlay's thought and safeguarding correspondents not by putting them on the same footing as the belligerents, but by partly or wholly neutralizing them, just as surgeons and chaplains were neutralized by the Geneva Convention.

It is not a far cry from war correspondents to the instruments of their craft, and the questions connected with ocean cables and wireless telegraphy are especially interesting because of recent origin.

The Paris Convention of March 14, 1884, protects submarine cables outside of territorial waters during times of peace, but there is not as yet an international agreement safeguarding them in time of war.

There was little or no interference with cables during the war, but that this was so was merely adventitious and it would

seem wise to restrict the power of belligerents so that except in cases of the most urgent military necessity neutral cables at least shall be inviolable.<sup>42</sup>

Wireless telegraphy, the infant of the world of science, gave rise to two noteworthy discussions. When Nogi was drawing his net of flame closely about stricken Port Arthur messages of vital importance to the garrison were flitting daily through the seemingly impenetrable cordon of the besieging army. A word from Major Seaman, an American surgeon who was in the *Chinese* port of Chefoo at the time, goes far towards explaining the mystery: "Almost within sight of Consular Hill stood a building. . . . It was the headquarters of the wireless telegraph station established and used by Russia. I have heard the pulsations of the dynamos whereby electrical communication was maintained between Port Arthur and the Russian Consulate in Chefoo. That building was less than ten miles from Chefoo, much less, and a report of its establishment and working may be found on file in certain government archives."<sup>43</sup>

How do such actions on the part of China square with her alleged position as a neutral power? The answer seems very simple. Professor Holland says: "A state is neutral which chooses to take no part in a war, and persons and property are called neutral which belong to a state occupying this position."<sup>44</sup> Surely the maintenance of such a station was a gross breach of neutrality on China's part. She could hardly be said to be taking no part in the war when a spot in her territory formed a necessary link in that strange, invisible chain over which the beleaguered garrison flashed news of their condition and prayers for aid. In future wars it would seem that "wireless" stations should be as carefully watched and treated in the same manner as the ordinary telegraph and cable lines of the belligerents.

But the most surprising development in connection with wireless telegraphy arose during April, 1904, when Admiral

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<sup>42</sup> Wheaton (fourth English Edition), page 722.

<sup>43</sup> "From Tokio through Manchuria with the Japanese," Seaman, page 177.

<sup>44</sup> "Studies in International Law," Holland, page 271.



Alexieff, the Czar's Viceroy in Manchuria, induced his Government to issue a circular to the powers which read as follows: "I am instructed by my Government, in order that there may be no misunderstanding, to inform your Excellency that the Lieutenant of his Imperial Majesty in the Far East has just made the following declaration: 'In case neutral vessels, having on board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions should be arrested off Kwang-tung or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prizes.'"

It is true that it has been asserted that the word "are" was used in the above circular instead of "may" before "communicating," and if such was the case Russia would have been justified in making offending correspondents prisoners of war, but under no circumstances would she have had any justification or authority for treating them as spies.

Article 29 of The Hague Convention on The Laws and Customs of War declares that: "An individual can only be considered a spy if, acting clandestinely, or under false pretences, he obtains, or seeks to obtain, information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party."<sup>45</sup>

Now Russia was signatory to the above article, and how she can reconcile her circular with the definition of a spy therein contained passes human understanding. Correspondents, especially those on press-boats, act openly and without any deceit in gathering news, and their despatches are conveyed to the outside world over neutral cables. There is no case on record of a reputable correspondent taking advantage of his position in relation to one belligerent to assist another. The fact that "wireless" is used by a correspondent is apparently sufficient to make him a spy, so we must attribute all the necessary facts of the definition to the silent child of De Forrest and Marconi. This is, of course,

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<sup>45</sup> Wheaton (fourth English Edition), page 559.

ridiculous, and it puts the circular in its true light. The truth is that Russia in this remarkable document was merely giving vent to her spleen against England by threatening, under the flimsiest of pretexts, to hang the correspondent of the London *Times*, who was then cruising near the seat of war on a boat equipped with a "wireless" outfit.

Obvious though its purpose was, the circular should not be allowed to pass without strong rebuke, for it sought, in terms at least, to legalize a gross infraction of international law.

In a subsequent article we shall consider problems connected with the maritime warfare of Russia and Japan.

*Theodore J. Grayson.*