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## SOME QUESTIONS OF INTERNATIONAL LAW ARISING FROM THE RUSSO-JAPANESE WAR.

### I.

#### Failure to Declare War and Alleged Violation of Korean Neutrality.

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THE present Russo-Japanese War promises to present an exceptionally interesting and important field for the application of certain principles of International Law, more especially for some of those modern rules governing the rights and duties of neutral States and individuals<sup>1</sup> which are of comparatively recent origin and to the growth of which the United States has so largely contributed. Certain of these rules or customs may be said to be still in process of formation, or have not as yet been fully established by the general practice of nations; others are perhaps no longer observed, and are therefore of doubtful or decaying validity. International Law is in a state of constant growth as well as of decay; for its rules are the result of international practice which, although based upon fundamental principles, varies in different times and under different circumstances. The present war may serve either to strengthen such customs as are in a stage of formation or of imperfect development on the one hand, or to weaken such as are in a state of decay on the other. These introductory remarks may perhaps serve as a sufficient apology for a series of articles which aim to deal with certain questions suggested by the present struggle in the Far East, from the standpoint of International Law.

War is an abnormal relation between individuals as well as between States, and its outbreak brings into existence an entirely

<sup>1</sup> A number of nice and delicate questions relating to the laws and principles of neutrality have, in fact, already arisen at the present writing. Some at least of these will be discussed in later articles.

new set of rules which regulate the rights and duties of neutral States and individuals in respect to belligerent States and individuals, as well as the relations of the belligerents with one another, and which largely supplement or supplant those rights and obligations already in existence. In view of this fact, it becomes extremely important to fix upon a definite date for the beginning of these new and abnormal relations between neutrals and belligerents on the one hand and the two or more belligerents on the other.

A majority of the more recent authorities<sup>2</sup> on International Law hold that between belligerents a formal notice of intention or a declaration of war is no longer necessary prior or preliminary to the outbreak of hostilities. "An act of hostility, unless it be done in the urgency of self-preservation or by way of reprisal, is in itself a full declaration of intention; any sort of previous declaration therefore is an empty formality unless an enemy must be given time and opportunity

<sup>2</sup> A majority of the older authorities insisted upon the necessity of a declaration in some form. They were doubtless influenced by traditional views or customs which had their origin in the fetial law of the Romans or in the chivalry and ceremonies of the Middle Ages. The Romans, *e. g.*, were very strict in their observance of certain formalities connected with the declaration of war, and they largely measured the justice or the injustice of a war by the strictness with which these formalities had been observed.

For a very extensive citation of the older authorities and historical examples, see Hall, *Treatise on International Law* (3d ed.) pp. 376-79 and notes. Especially interesting is the citation from Burlamqui (note on p. 379), who naively says that "an enemy ought not to be attacked immediately after declaration of war, 'otherwise the declaration would only be a vain ceremony.'" This is a *reductio ad absurdum* of the view that a declaration of war is necessary.

to put himself in a state of defence, and it is needless to say that no one asserts such quixotism to be obligatory."<sup>1</sup> The date of the first actual or pronounced hostilities is, in fact, a better criterion of the commencement of a war than the date of formal declaration; for the declaration may have been preceded by acts of hostility, and in such cases difficult questions are bound to arise which may lead to great uncertainty and much long and useless controversy.<sup>2</sup>

Although the modern authorities<sup>3</sup> are still somewhat divided on this question, the gen-

<sup>1</sup> Hall, *op. cit.* p. 374.

<sup>2</sup> "In the eighteenth century declarations were frequently published several months after letters of marque had been granted, after general reprisals had been ordered, and even after battles had been fought; and disputes in consequence took place as to whether war had begun independently of the declaration, or from the date of the declaration, or in consequence of the declaration, but so as to date, when once declared, retrospectively to the time of the first hostilities. As the legitimacy of the appropriation of private property depends upon the existence of a state of war, it is evident that conflicts of this nature were extremely embarrassing and, where different theories were in play, were altogether insoluble. To take the state of war on the other hand as dating from the first act of hostility, only leads to the inconvenience that in certain cases, as for example of intervention, a state of war may be legally set up through the commission of acts of hostility, which it may afterwards appear that the nation affected does not intend to resent by war; and, as in such cases the nation doing hostile acts can always refrain from the capture of private property until the question of peace or war is decided, the practical inconvenience is small." Hall, *op. cit.* p. 375.

<sup>3</sup> For more or less extensive citations of the modern authorities, see Hall *op. cit.* pp. 379-81 and note on p. 380; Calvo, IV, § 1906; Pradier-Fodere, VI, § 2673. The great French publicist, Pradier-Fodere (VI, § 2677) is of the opinion that "if declaration is not an essential condition of a regular war, it is, at least, a useful formality which States ought not to omit." The great Russian publicist, De Martens (III, 205), thinks that "neither proclamation nor diplomatic notice are obligatory, provided that the state of relations is such that hostilities will not be a surprise. Hostilities which constitute a surprise, he characterizes as brigandage and piracy." The German Holzendorff (Handbuch, IV, §§ 82-84) holds neither declaration nor manifesto to be necessary, although he thinks that "a belligerent ought to give notice of some sort if he can do so consistently with his political interest and his military aims." The last two citations are given by Hall, note on p. 380.

eral practice of nations, at least since the sixteenth century, shows conclusively that declarations of war prior to the outbreak of hostilities have been comparatively rare and altogether exceptional.<sup>4</sup> So far as the writer is aware, the opinion of judges of prize courts (at least in the United States and England), who have been called upon to pass upon the validity of captures made prior to the declaration of war, is unanimous that war may exist without a declaration.<sup>5</sup>

<sup>4</sup> "Most of the wars of the seventeenth century began without declaration, though in some cases declarations were issued during their continuance." Hall, note on p. 377. "The nearer we approach to modern times the rarer do formal declarations become. There have been only eleven of them between civilized States since 1700, whereas the present century has seen over sixty wars or acts of reprisal begun without formal notice to the power attacked." Lawrence, p. 300. In a compilation of cases of hostilities extending from 1700 to the present time, Colonel Maurice of the British army, found but 11 out of 118 instances in which a declaration of war preceded hostilities. Snow *Manual*, p. 78. In most cases declarations have, however, followed the outbreak of hostilities.

For extensive citations of historical examples, see Hall, cited above; Phillimore, Commentaries, III, Pt. IX, c. 5; Calvo, IV, § 1908; Rivier, II, pp. 223-28. For an abstract of cases in which hostilities have occurred between civilized powers prior to declaration from 1700 to 1870, see Maurice, *Hostilities without Declaration of War* (1882), and a review of this work by Prof. Holland in the *Revue de Droit International*, 1885, No. 6, pp. 63-65. See also *Des Hostilités sans Déclaration de Guerre*, by M. Feraud-Giraud in the same review for 1885, No. 1, pp. 19ff. See also Owen, *Declaration of War*, 1899.

It should perhaps be noted that recent wars seem to have witnessed a return to the older practice, *e. g.*, those of 1870 and 1877. The practical futility of the declaration of 1877 is, however, shown by the fact that Turkish territory was invaded by Russia on the day of her declaration of war on April 24, 1877. In the China-Japanese war of 1894-5, hostilities were begun before the declaration, and in our own recent war with Spain war was formally declared by Congress on April 25, 1898, after the capture of several Spanish vessels and the blockade of the Cuban ports on the 22nd of April. The existence of hostilities was dated back to the 21st of April by the Declaration itself.

<sup>5</sup> See, *e. g.*, the opinion of Lord Stowell in 1 Dodson 247; of Sir W. Scott in the case of the *Eliza Ann*, 1 Dodson 244; The U. S. Supreme Court in *Bas v. Tinny*, 4 Dallas 37, and in *The Prize Cases*, 2 Black. 635; Lord Chief Justice Mellish in the *Teutonia*, 4 Privy Council Reports 171; and J. Locke in the *Buena Ventura* and *Panama*, 87 Fed. Rep. 927.

The utmost that nations in a state of peace have a right to demand is that they shall not be suddenly surprised or treacherously attacked without any intimation or warning whatsoever. But "the use of a declaration does not exclude surprise"; it only "provides that notice shall be served an infinitesimal space of time before a blow is struck. . . . The truth is that no forms give security against disloyal conduct, and that when no disloyalty occurs States always sufficiently well know when they stand on the brink of war."<sup>1</sup> War is usually preceded by a long period of negotiation which generally, although not necessarily, terminates in an ultimatum. Moreover, with modern facilities for telegraphic communication, a complete surprise would be well-nigh impossible.

The mere recall and dismissal of ambassadors or ministers or, in other words, the breaking off of diplomatic relations, is not and ought not in itself to be regarded as equivalent to a declaration of a state of war;<sup>2</sup> but such acts indicate that the relations between the States in question are very much strained or altered, and they often form a sort of transition from a state of peace to that of war. They are generally preceded by an ultimatum or final note which usually prescribes a definite time within which a favorable answer must be returned in order to prevent a resort to force. In such cases the ultimatum amounts to a conditional declaration of war, *i. e.*, conditional upon the rejection of the terms proposed or failure to accept them within the time specified.

For the convenience of neutrals, as also to warn citizens or subjects of the belligerent State, it is however customary, in lieu of or in addition to a declaration, to issue a pro-

<sup>1</sup> Hall, p. 381. See also Lawrence, pp. 301-02; Woolsey (6th ed.) pp. 189-90; Walker, *The Science of International Law*, p. 242; Pradier-Fodere, VI. § 2676; Rivier, II. p. 222; Funck-Bretano et Sorel, *Precis*, p. 245; De Martens, *Traite*, III, 205.

<sup>2</sup> Pradier-Fodere, VI. § 2678; Rivier, VII. p. 220; Funck-Bretano et Sorel, p. 243.

clamation or manifesto which usually sets forth the causes or motives of the war, but even these are sometimes omitted.

The foregoing rules or customs are so well known to students of International Law and their practice is so generally observed by modern States that it might perhaps be deemed unnecessary to restate them here were it not for the charges of "treachery," "piracy," "bad faith," and "breach of International Law" which have been made in certain quarters—high as well as low—against Japan in consequence of the Japanese attack upon the Russian fleets at Chemulpo and Port Arthur on February 8th prior to the formal declaration of war by Japan against Russia on February 10th. Not only have these charges been noised abroad by the apparently unanimous voice of the French as well as the Russian press, but the same opinion is said to be held by leading authorities on International Law in Paris and St. Petersburg. Most serious of all, the Czar himself is said to have made himself the mouthpiece of these charges in public as well as private utterances, and they have been presented to the whole world through the medium of the Czar's formal Manifesto of February 10th and Count Lamsdoff's Circular Note to the Powers of February 22d.<sup>3</sup>

A brief review of the facts ought to convince the most prejudiced or the most skeptical that the conduct of Japan in this matter was entirely correct. It is not our intention to enter upon a discussion of the causes of this war with reference to their justice or injustice; for International Law as such is indifferent to causes—it does not consider the justice or injustice of a war. As far as International Law is concerned, all wars are equally just or unjust; or, more properly speaking, they are neither. International Law merely takes cognizance of the

<sup>3</sup> For these documents, see *London Times* (weekly ed.) for February 12th and February 26, 1904.

existence of war as a fact and prescribes certain rules and regulations which affect the rights and duties of neutrals and belligerents during its continuance. The justice of war in general or of a certain war in particular are questions of the gravest importance and the most vital interest, but they belong to the domain of international ethics or morality rather than to that of International Law.<sup>1</sup>

In order to justify the propriety of the Japanese attack upon the Russian fleets from the standpoint of International Law, it is enough for us to show that all peaceful or diplomatic relations between Japan and Russia had been severed a sufficient time before the attack, and under such circumstances as to guard against all reasonable danger of a surprise. It must have been reasonably clear to all concerned for months prior to the outbreak of hostilities that war was inevitable unless important concessions should be effected or a compromise agreed upon which neither State seemed willing to make. This fact must have been realized at St. Petersburg as well as at Tokio, and the long Russian delays<sup>2</sup> in answering the Japanese notes during the period of negotia-

<sup>1</sup> Bluntschli (*Droit International Codifié*) 5th ed., § 515, p. 293) expresses a different view. He says, "War is just when International Law authorizes recourse to arms; unjust when it is contrary to the principles of law." He adds in a note, "this principle is not only a rule of morality, it is a true principle of law." He admits, however, that it has no great practical value, inasmuch as each of the belligerents is sure to affirm the justice of its cause, and because there is no judge to pronounce upon the value of these assertions.

But, as Funck-Bretano et Sorel (*Précis*, p. 232, 2nd ed.) says, "it is only an abuse of words, in relying upon the law of nations, to qualify wars as just or unjust. The law of nations only considers States in their relations with each other. . . . It is with wars between States as with combats between men; they only commence when all notion of reciprocal right and justice ceases. . . . War is a political act. . . ."

<sup>2</sup> The Japanese proposal of August 12, 1903, was not answered by a counter-proposal until October 3d. The answer to the Japanese proposal of October 30th was delayed until December 11, 1903. For a history of the negotiations, see *London Times* (weekly ed.) for February 12, 1904.

tions which preceded the outbreak of hostilities can hardly be explained on any other theory than that Russia desired time for the completion of her military preparations and the concentration of her land and naval forces.<sup>3</sup> The Russian reply to the last Japanese note of Jan. 13, 1904, had not been received by February 6th in spite of a request on the part of the Japanese Government for a prompt response on account of the gravity of the situation, and in spite of the repeated requests for an answer on the part of the M. Kurino, the Japanese minister at St. Petersburg.<sup>4</sup>

Under these circumstances the only matter for surprise is that the Japanese Government should have delayed so long (unless it, too, required more time for military preparations), and it is therefore no cause for adverse criticism that diplomatic relations with Russia were abruptly severed on Feb. 6th. The Russian Government was informed that "the imperial Government (of Japan) have no other alternative than to terminate the present futile negotiations. In adopting this course the Imperial Government *reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests.*"<sup>5</sup> This was undoubtedly a sufficient declaration of intention on the part of the Japanese Government, and if the Russian fleet or the Russian Government allowed themselves to be surprised after such a plain, albeit diplomatic, intimation of hostile inten-

<sup>3</sup> For evidence on this head, see the Japanese reply to the Russian charges in *London Times* (weekly ed.) for March 4, 1904.

<sup>4</sup> See the Japanese statement of the case in the *London Times* (weekly ed.) for Feb. 12, 1904. So far as we are aware, the Russian Government has not denied these facts. The burden of the Russian complaint is that Japan did not await the receipt of the last Russian note which, it is alleged, was on the way to Tokio at the moment of the rupture of diplomatic negotiations; but it is not alleged that this note conceded any appreciable portion of the Japanese demands.

<sup>5</sup> See *N. Y. Times* for Feb. 13, 1904.

tion, the fault, if any, can certainly not be laid at the door of Japan. Russia can hardly be accused of such ignorance or inexperience of the methods of modern diplomacy as is implied in her complaint that Japan began the attack on Port Arthur without "previously notifying (us) that the rupture implied the beginning of warlike action."<sup>1</sup>

The Japanese attack on the Russian fleets at Chemulpo and Port Arthur occurred on February 8th,<sup>2</sup> *i. e.*, over two days after M. Kurino, the Japanese minister at St. Petersburg, had informed the Russian Government that Japan had decided to sever diplomatic intercourse with Russia, and that she reserved to herself the right to "take such independent action" as was deemed proper for the protection of her rights and interests. Surely there is here less cause for the charges of "surprise," "bad faith" and "treachery" than if Japan had patiently awaited the Russian note, carefully preserved the appearance of diplomatic relations, then suddenly declared war, and immediately followed this declaration by an attack on the Russian fleet.

Russia also complains of another serious infraction of International Law on the part of Japan—*viz.*, of the violation of the neutrality of Korea. In a circular note to the Powers, sent on Feb. 22d, Count Lamsdorff, the Russian Minister of Foreign Affairs, charges Japan with "an open violation of all customary laws governing the mutual relations between civilized nations." "Without specifying each particular violation of these laws on the part of Japan," he calls the most serious attention of the Powers to the acts committed by the Japanese Government with respect to Korea, the "independence and integrity" of which "was recognized by all

<sup>1</sup> See the Czar's Manifesto in *London Times* (weekly ed.) for February 12, 1904.

<sup>2</sup> It is claimed by the Japanese that the first shot of the war was fired by a Russian vessel at Chemulpo; but this point is entirely immaterial, inasmuch as it was Japan that made the first aggressive movement.

the Powers." In thus violating the neutrality of Korea, Japan is accused, not only of a violation of treaties, but of a "flagrant breach of International Law," as well.<sup>3</sup>

There can be no doubt but that, according to the strict letter of the law, Japan has been guilty of a violation of one of the most fundamental rules of International Law,—*viz.*, the right of a sovereign State to remain neutral during a war between other members of the family of nations,<sup>4</sup> and to have its neutrality and territorial sovereignty respected by the belligerent States. On the other hand, as the Japanese Government is careful to point out in its official reply to the Russian note, "the maintenance of the independence and territorial integrity of Korea is one of the objects of the war, and, therefore, the dispatch of troops to the menaced territory was a matter of right and necessity, which had the distinct consent of the Korean Government."<sup>5</sup>

This seems to be one of those not altogether rare, although exceptional, cases where reasons of policy or motives of national interest, if not the necessity of self-preservation, intervene to prevent a strict observance or necessitate a positive violation of law. The "Monroe Doctrine" of Japan has long since included Korea as within her political "sphere of influence" or protection, and Korea is one of the main objects of the present war. It was, therefore, just as impossible for Japan to respect the neutrality of Korea after the opening, or in contemplation of hostilities, as it would be impossible for the United States to respect the neutrality of a Spanish-American State under similar

<sup>3</sup> It is now claimed that it was Russia who first violated the neutrality of Korea by sending troops across the Yalu on February 2d. See *London Times* (weekly ed.) for April 1, 1904.

<sup>4</sup> This right was scarcely recognized in practice before the modern period and it has often been violated even in modern times; but it may now be regarded as one of the best-established and most fundamental rules of international law.

<sup>5</sup> See the *London Times* (weekly ed.) for March 11, 1904.

circumstances, *e. g.*, if threatened by a European Power. The complaints of Russia on this score, although theoretically sound, are practically absurd.

Russia's real motive in entering this protest is probably to be found in the conclusion of Count Lamsdorff's note. "At the same time, the Imperial Government (of Russia) considers it necessary to issue a timely warning that, owing to Japan's illegal assumption of power in Korea, the Government declares all orders and declarations which may be issued on the part of the Korean Government to be invalid." In order to raise her position in Korea above that of a mere military occupant or a vulgar conqueror, Japan has negotiated a treaty with the Korean Government in which she "guarantees the independence and integrity of the Korean Empire," (Art. III.) and agrees to protect Korea against the "aggressions of a third Power or internal disturbances."<sup>1</sup>

The Russian Government claims that this treaty is invalid because made under duress.<sup>2</sup> This raises a very interesting question. Is the duress here alleged of such sort as to render the treaty and all acts performed under its sanction invalid? The rule which applies in such cases is perfectly clear, although we are not fully informed as to the facts in this particular case. One of the antecedent conditions upon which the validity of a treaty depends is "freedom of consent." But "the freedom of consent, which in principle is held as necessary to the validity of contracts between States as it is to those between individuals, is understood to exist as between

the former under conditions which would not be thought compatible with it where individuals are concerned. In International Law force and intimidation are permitted means of obtaining redress for wrongs, and it is impossible to look upon permitted means as vitiating the agreement, made in consequence of their use, by which redress is provided for. Consent, therefore, is conceived to be freely given in international contracts, notwithstanding that it may have been obtained by force, so long as nothing more is exacted than it may be supposed that a State would consent to give, if it were willing to afford compensation for past wrongs and security against the future commission of wrongful acts. And as International Law cannot measure what is due in a given case, or what is necessary for the protection of a State which declares itself to be in danger, it regards all contracts as valid, notwithstanding the use of force and intimidation, which do not destroy the independence of the State which has been obliged to enter into them. When this point, however, is passed, constraint vitiates the agreement, because it cannot be supposed that a State would voluntarily commit suicide by way of reparation or as a measure of protection to another. The doctrine is of course one which gives a legal sanction to an infinite number of agreements, one of the parties to each of which has no real freedom of will; but it is obvious that unless a considerable degree of intimidation is allowed to be consistent with the validity of contracts, few treaties made at the end of a war or to avert one would be binding, and the conflicts of States would end only with the subjugation of one of the combatants or the utter exhaustion of both."<sup>3</sup>

In the treaty between Japan and Korea, the "independence and territorial integrity" of Korea are carefully and explicitly provided for, so that there can be no objection to the validity of the treaty on this score.

<sup>3</sup> Hall, *op. cit.*, 3d ed., pp. 325-26.

<sup>1</sup> See the London *Times* (weekly ed.) for March 4, 1904, for the text of the treaty between Japan and Korea.

<sup>2</sup> The Russian *Novosti* has published a statement from the Ministry of Foreign Affairs declaring that "Russia does not consider Korea as a belligerent State, but simply as a neutral State acting under violent pressure from Japan and deprived of the power of free action." For this reason, it is said, "Russia cannot regard as valid any treaty concluded by Korea for the benefit of Japan, nor any abrogation of Russian concessions." See London *Times* for March 25, 1904.