

## **BRITAIN'S FIRST TRAITOR OF THE PACIFIC WAR: EMPLOYMENT AND OBSESSION**

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Dr. Thomas Baty, a British national and Japan's internationally reputed Foreign Legal Adviser in the Ministry of Foreign Affairs from 1916, assisted Japan in justifying and legitimizing its advance into East Asia from the outset of the Manchurian Incident of 1931.<sup>2</sup> He elected to remain in Japan when World War II broke out and assist the Japanese Ministry of Foreign Affairs. His reasons for collaborating with the enemy were associated with the material and social benefits accompanying his position as an established international lawyer in Japan and an obsession with the meaning of his law on peace and war, rather than a commitment to the ideology of a militaristic Japan.

### **Striving for Success**

Baty was born in Stanwix near Carlisle in Cumberland, England, close to the Scottish border, in 1869 into a middle-class environment.<sup>3</sup> Baty was an

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<sup>2</sup> For the designation 'Britain's first traitor of the Pacific War', refer to *New York Times*, February 10, 1954. At the end of the war, American and Australian journalists watched vigilantly that Baty, considered a member of the British establishment, would not receive special treatment. See documents on journalists' reactions in "British Civilian Renegades and Collaborators," 1946, FO 369/ 3551, Great Britain, Public Record Office. Also, *New York Times*, January 29, 1947.

<sup>3</sup> Thomas Baty, *Alone in Japan* (Tokyo: Maruzen, 1959), 185.

intellectually gifted youth, which was evident in his school studies. After graduating from state school in Carlisle, he was awarded a scholarship to attend Queen's College, Oxford in 1888. He proceeded his B.A. with honours in Jurisprudence in 1892.<sup>4</sup> John Wilson wrote of his pupil Baty, that he had obtained high honors in jurisprudence under his tutelage. He noted that "he has great ability and indomitable perseverance and industry."<sup>5</sup> Baty then advanced to studies in international law at Cambridge University where he was Whewell Scholar of Trinity College and in civil law at University College, Oxford where he was Civil Law Fellow. Henry Gourdy, Professor of Civil Law at Oxford, who also maintained an interest in international law, remembered Baty as one of the most distinguished law students of the university, who always took the liveliest interest in the scientific study of his profession.<sup>6</sup> He received his D.C.L. from Oxford in 1901 and his LL.D. from Cambridge in 1903. Although Baty was called to the English Bar of the Inner Temple, he was too unpretentious and lacking in ambition, according to his colleagues, to secure a permanent retainer from a leading firm of solicitors. To become an established barrister at that time according to one who achieved such an end required the aggressive pursuit of solicitor briefs and a strong desire to succeed inside and outside the court.<sup>7</sup> Baty himself admitted that he was too shy and gentle to become a success as a barrister and that his future lay elsewhere.<sup>8</sup> In fact, Baty's career preference was to obtain employment of a more academic sort as regards international law.

After completing his degree pursuits, Baty would lecture on international law at Nottingham University<sup>9</sup> and serve as law degree examiner at Oxford, London and Liverpool universities. At the time, his career objective in his academic pursuits was to succeed to the Chichele Chair of International Law of Oxford University held by Professor Thomas Holland, one of Baty's mentors, Baty having served previously as Holland's assistant.<sup>10</sup> More than likely, Holland had encouraged Baty to seek the position. Sir L. J. Grant, Professor of Public Law and the Law of Nations at Edinburgh, provided Baty with a written recommendation for the position in which he praised Baty's diligence in pursuit of research, proclaimed him "an acute thinker and a man of high juristic ability," and judged his overall contribution to international law as being of "such single merit and

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<sup>4</sup> See autobiographical sketch for education resume in *Ibid.*, 185-186.

<sup>5</sup> See recommendation provided for Chichele Chair, Oxford University, of John C. Wilson, May 27, 1902, included with Baty's application for Foreign Legal Adviser in *Honpo koyo gaikokujin kankei zakken* [Miscellaneous Matters Related to Government Hiring of Foreigners] Diplomatic Record Office of the Ministry of Foreign Affairs, Tokyo, File K.4-2-0/ 1-5.

<sup>6</sup> See recommendation provided for Chichele Chair of Henry Goudy, May 5, 1907 in *Honpo koyo gaikokujin kankei zakken*.

<sup>7</sup> John Simon, *Retrospect* (London: Hutchinson, 1952), 48-49.

<sup>8</sup> *London Times*, February 10, 1954.

<sup>9</sup> Baty would lecture at Nottingham until 1913.

<sup>10</sup> See resume of October 1910 for Chichele Chair included with Baty's application for Foreign Legal Adviser in *Honpo koyo gaikokujin kankei zakken*.

importance.” Grant concluded: “And now he has established his reputation as one of the foremost British publicists of the day by the publication of his treatise on International Law — a work which is remarkable at once for the varied and recondite learning which it exhibits, for its originality and freshness of view, and for manifold excellence of expression.”<sup>11</sup>

The list of books and articles attached to his resume for the Chichele Chair reveals Baty to be highly prolific in his writings and sustains the consideration that he was prone to academic endeavours rather than the world of court competition. Among his published books between 1900 and 1910, the two that concerned international law were *International Law in South Africa* (1900) and *International Law* (1909). Both were reviewed in prestigious journals and highly evaluated. From 1898 to 1910, Baty contributed some 35 articles to professional journals, including the *Law Magazine and Review*, *Juridical Review*, *Journal of the Society of Comparative Legislation*, *Law Quarterly Review* and *Revue de Droit International*, as well as more general magazines as the *Westminster Review*, *MacMillan’s Magazine* and *Murray’s Monthly Review*. One can surmise that Baty was a well-known name in international law circles. Baty’s status in such circles was heightened by his efforts on behalf of the International Law Association as joint honorary secretary, organizing conferences in Britain and on the continent. Baty’s references, therefore, included two Parisian jurists. In Baty’s words, “I have a considerable acquaintance-ship on the continent.”<sup>12</sup> He also garnered a recommendation from Lord Justice Walter Phillimore, the latter having served with Baty as honorary secretary.<sup>13</sup>

In spite of Baty’s considerable qualifications in the field of international law, he failed in his try for the Chichele Chair. Actually, Baty held the successful candidate, Sir Henry Erle Richards, eight years his senior, in the highest esteem and friendship and would offer him as a reference when he subsequently applied for the position of Japan’s Foreign Legal Adviser. In fact, the relationship between Oxford and Baty remained close and on the death of Richards in 1922, Holland on behalf of Oxford would invite Baty to assume the position. Nevertheless, it must have been a devastating blow to Baty in 1910 since his prospect of achieving similar status and income in the law via the courtroom as a barrister appeared quite dim.

Baty continued to lecture and write, while striving to be an established lawyer, hoping that the two endeavors would somehow come together to bring him the opportunity he desired. Between 1910 and 1916, Baty would publish these books on international law: *Britain and Sea Law*, *Arbitration and Sovereignty*, *Polarized Law* (Lectures at University of London on Private International Law) and *War: Its Conduct and Legal Results* (with co-author).

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<sup>11</sup> See recommendation provided for Chichele Chair of L. J. Grant, April 27, 1910 in *Honpo koyo gaikokujin kankei zakken*.

<sup>12</sup> See resume of October 1910 for Chichele Chair in *Honpo koyo gaikokujin kankei zakken*.

<sup>13</sup> See recommendation provided for Chichele Chair of Walter Phillimore, June 30, 1908 in *Honpo koyo gaikokujin kankei zakken*.

The reviewer of the book on the conduct of war for the *American Political Science Review* remarked that Baty's contribution was "scholarly, authoritative and in many respects brilliant."<sup>14</sup> He would also add ten more articles to his bibliography of publications. As for his activities in professional associations, he would expand his commitments. Regarding his accomplishments as a barrister during this time, he referred to an increase in cases from "one of the leading firms of maritime solicitors" in 1914 at the beginning of the war. These cases came before the Chancery and Admiralty (Prize Court) where he centred his practice. He, also, appeared as junior counsel in a high-profile prize case before the Privy Council. However, he had yet to establish and make a success of his practice.<sup>15</sup>

### **Establishing His Standing in Japan**

It wasn't until the beginning of 1915 that a second opportunity of achieving a certain eminence in his field of specialization arose. And it came within Baty's reach as a result of his participation in professional societies. The war had caused international law specialists worldwide to reassess the tenets of their profession in light of the popular distrust of law to forestall war and the want of confidence in international law to prevent the violations of its provisions by belligerents during a major conflagration. A new association, The Grotius Society, gathered together a group of England's top thinkers on international legal matters to chart reforms by reconsidering writings dating as far back as Hugo Grotius, the acknowledged 17<sup>th</sup> century father of international law scholarship. The society, founded in 1915, included Baty's former Oxford professor, Goudy, who served as vice president of the organization as well as close associates of Baty, such as Phillimore, and Richards. Naturally, Baty was among the original members. Also, among the original members was Isaburo Yoshida, the second secretary of the Japanese Embassy in London and an international law scholar from the graduate school of Tokyo Imperial University. It was Yoshida who informed Baty of Japan's search for a successor to the American Henry Willard Denison, who had served as Japan's Foreign Legal Adviser for 34 years until his death in 1914.<sup>16</sup>

The search had begun immediately after Denison's death. An expert of British nationality was desired in light of the Anglo-Japanese Alliance and World War I. The initial candidate of the Japanese minister in London in

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<sup>14</sup> See review by Linsay Rogers, *War: Its Conduct and Legal Results*, by Thomas Baty, *American Political Science Review*, Vol. 9 (1915), 605-608.

<sup>15</sup> Thomas Baty to Isaburo Yoshida, Second Secretary, Japanese Embassy, London, August 6, 1915, *Honpo koyo gaikokujin kankei zakken*. *London Times*, February 10, 1954. *Who's Who, 1936* (London: A & C Black), 205-206.

<sup>16</sup> See members and founding rules of Grotius Society in *Transactions of the Grotius Society*, Vol. 1 (1916), vi-vii. Baty, *Alone in Japan*, 99. Thomas Baty to Isaburo Yoshida, February 19, 1915, *Honpo koyo gaikokujin kankei zakken*.

1914 declined the post, having already accepted an overseas advisory position at a salary much higher than the one offered by Japan.<sup>17</sup> No new candidate for the position appeared until Baty's letter of application of February 19, 1915. He wrote: "As a life-long admirer of the Japanese genius, I hope to be permitted to tender to Japan such services as I might be able to render as an international jurist?" He referred to his position as Honorary Secretary of the International Law Association for nearly ten years and to a recent foreign work that ranked him "among the eight or ten leading English authorities" in the field of international law.<sup>18</sup> Baty referred Yoshida to ten referees of notable jurists. Baty, also, benefited from the recommendation of Ernest Satow, former British ambassador to Japan, and Lord Reay, President of the Grotius Society, who extended their good offices on his behalf. Satow wrote to Ambassador Katsunosuke Inouye of his high opinion of Baty's written work.<sup>19</sup> Lord Reay informed Inouye that he knew Baty very well and definitely he was the right person for the job.<sup>20</sup> Lord Mersey, one of Baty's references, when contacted by Inouye, voiced a high opinion of Baty's accomplishments, especially in his grasp of international law. Lord Mersey referred to Baty as a "genius" in this regard. The only caveat mentioned was "poor appearance" — "not good looking and tall." (The Canadian diplomat, Hugh Keenleyside, wrote of Baty's appearance some 15 years later in this way: "He was in many ways unique: tall, white-faced, and with the general appearance of a slowly moving courthouse pillar....") But, in Lord Mersey's estimation, although you would not want to put Baty on the stage, he would be excellent as a legal adviser.<sup>21</sup>

Baty found the post highly attractive since it meant securing "success" finally in his field of specialization, international law. The Japanese ambassador reflected that Baty's interest in the post stemmed from the British concern with rank. He informed the foreign minister that the title of Foreign Legal Adviser was a significant acquisition in and of itself for Baty.<sup>22</sup> However, for Baty, the attractiveness of Japan did not rest on rank and money alone. By this time, Baty was responsible for the physical well being

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<sup>17</sup> Sutemi Chinda, Ambassador, London, to Komei Kato, Foreign Minister, September 16, 1914, *Honpo koyo gaikokujin kankei zakken*.

<sup>18</sup> Thomas Baty to Isaburo Yoshida, February 19, 1915, *Honpo koyo gaikokujin kankei zakken*.

<sup>19</sup> Ernest Satow to Katsunosuke Inouye, Ambassador, London, April 11, 1915, *Honpo koyo gaikokujin kankei zakken*.

<sup>20</sup> Katsunosuke Inouye to Komei Kato, June 8, 1915, *Honpo koyo gaikokujin kankei zakken*.

<sup>21</sup> Katsunosuke Inouye to Komei Kato, June 15, 1915, *Honpo koyo gaikokujin kankei zakken*. Regarding Keenleyside's observation, see Hugh Keenleyside, *Memoirs of Hugh Keenleyside*, Vol. 1 (Toronto: McClelland and Stewart, 1981), 330. In response to Inouye's inquiry, Lord Mersey referred to Baty's unpretentious manner in explaining Baty's lack of success as a barrister.

<sup>22</sup> Katsunosuke Inouye to Ministry of Foreign Affairs, August 4, 1915, *Honpo koyo gaikokujin kankei zakken*.

of his aging and fragile mother and his sister who remained in Cumberland while he worked in London and elsewhere and returned when he could.

The highly positive response of the Japanese government to Baty's application must have also gone far to relieve any anxiety he might have had about his decision to leave England and the Bar. The Japanese ambassador maintained his favourable posture on Baty's application even though Baty continued to demand a higher salary than the one initially requested at the first interview, which Inoue considered to be high. Baty's reason for his modification of his salary demands resulted from reservations voiced by his mother. Baty, early in the negotiations, informed Yoshida of the following: "I ought to say that, on talking matters over with my mother, I feel unable to proceed *to the East*, except at a much higher salary than that which I named at our interview. It is naturally a great break with her accustomed *milieu*."<sup>23</sup> Even once the salary matter was settled, Baty equivocated on making a firm commitment in view of his mother's health. Baty worried that he would have to forego the position if his mother was not fit to travel. Only after such confirmation was forthcoming following a medical examination was he able to inform the embassy of his resolve to take up the post. Throughout, the embassy remained patient and understanding of Baty's family concerns.<sup>24</sup>

Baty, who arrived in Japan in May of 1916, did not savour fully his new status in his profession since his mother passed away soon afterwards. He regretted that his mother never had the opportunity to live in the Tokyo house, "a substantial brick structure, close to the Foreign Office, the Belgian, Italian and Russian Embassies, with the benefit of isolation afforded by the Kasumigaseki Palace Garden opposite and the Minister's garden next door."<sup>25</sup> There was sufficient space for servants' rooms, guestrooms, his sister's boudoir, a storeroom and a butler's pantry. The dining room and drawing room allowed for tea and dinner parties for up to 16 "at a pinch." Everything from their home in Cumberland had been brought with them, "lock, stock and barrel," and "it was not long before we found ourselves comfortably installed." There was also a lodge at the side of the courtyard, which accommodated the cook and his family and other servants.<sup>26</sup>

With his home centred in the middle of embassy row, the Foreign Legal Adviser and his sister were immediately included in Tokyo's social calendar. Soon, they were entertaining mixed assemblages of important members of the foreign community, including lords and ladies and counts and countesses. Baty was an excellent conversationalist and a congenial host. His sister was the fastidious and devoted hostess. According to one observer, what made the Baty home so inviting was "the intriguing personality of the

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<sup>23</sup> Thomas Baty to Isaburo Yoshida, April 14, 1915, *Honpo koyo gaikokujin kankei zakken*. Also, see Thomas Baty to Isaburo Yoshida, August 6, 1915, *Honpo koyo gaikokujin kankei zakken*.

<sup>24</sup> Thomas Baty to Isaburo Yoshida, September 14, 1915, *Honpo koyo gaikokujin kankei zakken*.

<sup>25</sup> Baty, *Alone in Japan*, 94.

<sup>26</sup> *Ibid.*, 95-96.

host, and Miss Baty's robin-like perkiness, caustic wit, and underlying kindness, combined with the fact that their household included a really admirable cook."<sup>27</sup> The Baty home also became from 1923 a linkage for many of the new arrivals to Tokyo's expatriate society, to English-speaking Japanese Society. Baty had immediately set out to learn about Japanese culture at first hand and in so doing, he had made a number of well-to-do and highly cultured Japanese friends. According to F.S.G. Piggott, the British military attaché at the time, the foreign community owed a great deal to Baty's initiative in founding the Red and White Plum Blossom Society. The society sponsored walks to places of interest in Tokyo "where social intercourse between foreign and Japanese members took place in an informal and friendly manner."<sup>28</sup>

Baty found himself very much the honourable country gentleman from Cumberland living according to his situation and means in a city, if not London, Tokyo. But Baty, also, discovered that he could afford in time and money a leisure-class status in the countryside of Japan, which would have eluded him, if he had remained in England. In his first summer in Japan, prior to moving into his Tokyo house, Baty, his sister and mother journeyed to escape the heat of Tokyo to the resort of Lake Chuzenji, a 4,500 feet high crater-lake near Nikko. Here began an annual sojourn for Baty from July to September to his summer home where he would sail his boat the Ark and meet friends at the little dock of the Nantaisan Yacht Club. The seclusion of the resort provided it with an air of exclusiveness. Baty described the privileged journey in the following way: "At first our climb from the attractive town [Nikko] was effected by *zinrikisiyas*, (three men to each); while our luggage went up the 2500 feet on seven pack-horses led by smiling girls. It was a portent when some fifteen years later, a solitary and small motor-car appeared in Tiyuzenzi [Chuzenji]: a threat to our secluded peace."<sup>29</sup> The exclusiveness was accented by the occupants of the summer cottages at the time, being mainly British, German, Dutch or Scandinavian diplomats. The day at Chuzenji began at 10 A.M. with the daily sailboat race. Scores were kept and prizes awarded for particular events and season performance. One of the big races was for the Crown Prince of Sweden's Cup. Afternoons were left for reading and writing or tea with friends. Evenings were passed once again by entertaining or visiting friends.<sup>30</sup>

The diary of the young Canadian diplomat Kenneth Kirkwood gives some idea of how time was passed at the "Lake" some years later and how much Baty's presence was associated with, at least, the British Empire's summer season in Japan. In his entry for August 7, 1932, he wrote: "An early swim; and after breakfast, went sailing in Dr. Baty's famous old tub "The Ark" which must be 40 years old; he has owned it for 17 years." Kirkwood referred to his own try at the races and how "the 'Ark' as usual,

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<sup>27</sup> Keenleyside, *Memoirs of Hugh Keenleyside*, 331.

<sup>28</sup> F.S.G. Piggott, *Broken Thread* (Aldershot: Gale and Polden, 1950), 158.

<sup>29</sup> Baty, *Alone in Japan*, 92. Baty's mother died during the first summer at Lake Chuzenji.

<sup>30</sup> Keenleyside, *Memoirs of Hugh Keenleyside*, 340-342.

came in next to last.” But in all Kirkwood was satisfied that it had been “a pleasant morning of sailing, with great white clouds of mists sweeping down on us from the mountains, partly obliterating the other boats.” Among the passengers were Baty and his friends, as well as German diplomats. In the afternoon, Baty, a friend and Baty’s cousin and her husband dropped in for tea at Kirkwood’s cottage. “Later the British Ambassador came in; but when ready to return through the woods, he had to roll up his trousers to his knees like a deck-swabbing sailor and walk home bare-legged and in *geta* because of the storm. Hergel, the Danish Charge d’Affaires, also dropped in and was persuaded to stay for dinner.”<sup>31</sup> There is a picture dated 1929 that shows Baty at the dock together with friends and dignitaries, especially the then British Ambassador John Tilley and his wife, with his arm leaning on the sail beam, dressed in his whites — white jacket, slacks, shirt, tie and hat, looking very much at 60 a man surrounded by the best that an anglicized Japan had to offer him.<sup>32</sup> Baty had gained by coming to Japan a small world that fit his mild personality very well.

Aside from offering Baty the status and the social life,<sup>33</sup> which he had craved, Japan offered Baty a position, as good or better than an academic one, for the exposition and publication of his thinking on international law at a time when a new international law was achieving pre-eminence. Baty’s understanding of his stature as a successful international lawyer was not merely his achievement of a position, but the special relevance of his legal reasoning to the problems of the day. With the establishment of the League of Nations at the end of the war, however, the juridical mainstream focused on the institutional structure of an orderly community of nations rather than maxims and principles concerning the logic of order. International law became more concerned with the practices of nations within an international forum and less with the logic of sovereignty based on principles of rights derived from customs and reason.<sup>34</sup> The general feeling was that the

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<sup>31</sup> Kenneth Kirkwood Papers, August 7, 1932, National Archives of Canada, MG27 III E3, Vol. 2, Diplomatic Journal 1932.

<sup>32</sup> Hugh Keenleyside Collection, Album 3, National Archives of Canada, Acc 1993-405, 2000586435.

<sup>33</sup> Baty was also able to indulge secretly his interest in feminism in Britain, funding the publication of a periodical *Urania* with his newly obtained financial resources. See Martin Gornall, “Dr. Thomas Baty, 1869-1954, Legal Adviser to the Japanese Foreign Ministry, 1916-1941,” in *Britain and Japan: Biographical Portraits*, Vol. 5, ed. by Hugh Cortazzi (Folkstone: Japan Society, 2005), 434. Also, in this regard, see Alison Oram, “Feminism, Androgyny and Love between Women in *Urania*, 1916-1940,” *Media History*, Vol. 7, No. 1 (2001), 57-62. According to Oram, since Baty, who was the main figure in exercising editorial control over this little known feminist periodical, he probably financed the venture as well. Oram notes that the periodical published three times a year from 1916 to 1940 never made any appeal for funds or exacted subscriptions. Oram notes the periodical claimed a circulation of 200 to 250.

<sup>34</sup> Quincy Wright, *Research in International Law Since the War* (Washington: Carnegie Endowment for International Peace, 1930), 1, 24-25. Josef Kunz, “The Law of Nations, Static and Dynamic,” *The American Journal of International Law*, Vol. 27 (1933), 630-



existence of the League of Nations gave international law a new reality, one that invited “the task of integrating the substantive law with the living processes” of this institution.<sup>35</sup>

Baty never made the “integrative” transition.<sup>36</sup> He maintained that a world legislative body such as the League of Nations would manifest the ills present in national legislatures and give rise to power struggles on an international level, thereby exasperating any peace-keeping objectives. His answer remained that the reform of international law must occur within the realm of the Law of Nations, not the League of Nations, to ensure a stable post-war peace. When one of the founding members of *The British Year Book of International Law*, a post-war reform-oriented law journal, reviewed Baty’s 1930 book entitled *The Canons of International Law*, he found it somewhat disconcerting and took it to task. In his book, Baty specified four canons that all international law should possess: Simplicity, Certainty, Objectivity and Elasticity. The reviewer agreed on the need for clarity in the formulation and application of international law. But the reviewer found Baty’s overall philosophy behind his categorical approach to be disturbing. He explained that Baty while elevating rules and their construction to the pinnacle of conciliation in international legal practice relegated the role of legislation and arbitration to the prospect of “grave embarrassments.” The reviewer concluded that Baty was “no believer in modern developments of international law...”<sup>37</sup>

While British international law was experiencing a new mainstream, Baty remained in his office in the Ministry of Foreign Affairs researching and writing about his various canons. In his office, he existed in splendid isolation, alone with his words and thoughts. From his arrival to the end of the 1920s, his job allowed him liberal amounts of time to pursue his other interests, intellectual and social.<sup>38</sup> Baty himself was amazed on how little he had to do in the ministry. Whereas his predecessor Denison performed as an active diplomat within the ministry, Baty would remain a back-office Foreign Legal Adviser, whether because of his personality or character or because of the changing requirements of the ministry.<sup>39</sup> When Baty arrived in Japan, he signed a five-year contract, which although ambiguous about the extent of his duties as legal adviser indicated he was to provide legal opinions and draft

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631. C. Howard-Ellis, *International Law* (London: George Allen and Unwin, 1928), 394-395. James Brierly, *Law of Nations* (Oxford: Clarendon Press, 1928), 39-45.

<sup>35</sup> Wright, *Research in International Law Since the War*, 27. Brierly, *Law of Nations*, 47.

<sup>36</sup> For a broader understanding of Baty’s place in the history of international law, see Peter Oblas, “Natural Law and Japan’s Legitimization of Empire in Manchuria: Thomas Baty and Japan’s Ministry of Foreign Affairs,” *Diplomacy and Statecraft* (March 2004), 41-44.

<sup>37</sup> See review by C., *The Canons of International Law*, by Thomas Baty, *British Year Book of International Law*, Vol. 12 (1931), 213.

<sup>38</sup> According to Uchiyama, Baty’s duties remained light with the exception of his time during the Manchurian crisis. Masakuma Uchiyama, *Gendai nihon gaigoshiron* [Theory of Modern Japan’s Diplomacy] (Tokyo: Keio University Law Kenkyukai, 1971)179-188.

<sup>39</sup> Baty, *Alone in Japan*, 93-94. Masakuma Uchiyama, *Gendai nihon gaigoshiron*, 179-180.

and revise diplomatic and other official correspondence.<sup>40</sup> Baty would never be included in policy matters or the internal politics of the ministry. His knowledge of Japanese would always remain rudimentary. His conversation ability included female expressions that he had picked up.<sup>41</sup> He lacked reading and writing skills.

Nevertheless, in his early years at the ministry, his legal skills whenever they were applied to cases or documents were greatly appreciated within the ministry. As indicated, Baty was awarded the Imperial Order of the Sacred Treasure, 3<sup>rd</sup> grade, in 1920 for his services to the government — testimony to his contribution to the work of the ministry. Two years later, when Baty was offered the post at Oxford University, the ministry decided suddenly to consider Baty's contract renewal since his five-year term had already expired. As it was, Baty was reluctant to leave his position and the ministry was reluctant to see him go. Instead, the ministry decided to make every effort to ensure that Baty would commit himself to another five-year period from April 1, 1923 to March 31, 1928. Baty was asked to accept a contract that provided a salary twice that of his initial wage. He was also granted an extended, paid leave of up to six months during the contract period.<sup>42</sup> In July of 1923, Baty and his sister returned to England for the first time since 1916, with their round-trip passage paid by the ministry.<sup>43</sup> In 1928, the ministry discontinued the contractual relationship with Baty and Baty, for all extent and purposes, became a permanent employee of the foreign ministry.

### Beginning of an Obsession

Throughout the 1920s, Baty fine-tuned his scholarship on international law and continued to add to his list of professional publications. In view of his philosophical concerns regarding the future of international law, Baty's non-mainstream understanding of canons for peace found an event close to home, i.e., Japan's intervention in China, to exemplify the applicability of rules of simplicity and certainty. Baty applied his simple and certain principle of an organized public authority to test whether China was a state within the community of nations and therefore subject to the protection of the logic of

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<sup>40</sup> Katsunosuke Inouye to Ministry of Foreign Affairs, December 17, 1915, *Honpo koyo gaikokujin kankei zakken*. Contract — Kikujiro Ishii, Foreign Minister and Thomas Baty — June 1916, *Honpo koyo gaikokujin kankei zakken*.

<sup>41</sup> Baty, *Alone in Japan*, 195.

<sup>42</sup> Yukichi Obata, Minister, Peking to Yasuya Uchida, Foreign Minister, July 12, 1922, *Honpo koyo gaikokujin kankei zakken*. Contract — Tokichi Tanaka, Vice Foreign Minister, and Thomas Baty — April 1923, *Honpo koyo gaikokujin kankei zakken*. Tanaka was vice minister under Uchida, who was foreign minister from 1918 to 1923.

<sup>43</sup> Baty, *Alone in Japan*, 131.

sovereignty and for that reason, the international community.<sup>44</sup> He found China in the 1920s to be the sovereign ghost of an organized people. In his judgment, there was no unified control or authority throughout China to justify the recognition of a government of China in international law.<sup>45</sup>

Baty's non-mainstream philosophy found a receptive audience in the Japanese government after the Manchurian Incident of 1931 when Japan was called to defend its occupation of Manchuria before the League of Nations.<sup>46</sup> Baty's example of China as failing to meet the standard of an organized state became the substance of Japan's position before the League of Nations. Japan claimed that given the lack of an organized people in China, Japan's action in Manchuria did not constitute a violation of the Covenant of the League of Nations or any other pertinent agreement or treaty. In fact, China could not bring a case before the League since there was no state of China. When the League's investigative committee, the Lytton Commission, issued its report in 1932 rejecting Japan's defence, Baty essentially drafted Japan's rebuttal in the document, *The Manchurian Question: Japan's Case in the Sino-Japanese Dispute as Presented before the League of Nations*.<sup>47</sup> In light of his defence of Japan, Baty was upgraded to Imperial Order of the Sacred Treasure, 2<sup>nd</sup> grade, in 1936.

Baty's canons also made him somewhat of an "expert" celebrity within Japanese society at large during the Manchurian crisis, although not due to any intent on his part. In February of 1931, with the imminent arrival of the independent state of Manchukuo, Baty was asked to provide a legal opinion on a question of recognition. He was asked whether Manchukuo constituted "cause for complaint under the Nine-Power Treaty" of 1922, in which Japan had agreed to uphold China's administrative integrity. The report leaked by the army ministry made headline news in the Japanese and English-language press since Baty proclaimed that there was no reason why Manchukuo should not be admitted to the family of nations as a new state.<sup>48</sup> According to one Japanese pressman, Baty's report made him "almost a household word in Japan."<sup>49</sup>

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<sup>44</sup> Thomas Baty, "So-called 'De Facto' Recognition," *Yale Law Journal*, Vol. 31 (1921-1922), 470, 481. Also, see: Thomas Baty, "The Obligations of Extinct States," *Yale Law Journal*, Vol. 35 (1925-1926), 434. Thomas Baty, "Division of States: Its Effect on Obligations," *Transactions of the Grotius Society*, Vol. 9 (1924), 119-120.

<sup>45</sup> Thomas Baty, "The Suppression of War," *The Quarterly Review*, Vol. 253 (July 1929), 197. Thomas Baty, *The Canons of International Law* (London: John Murray, 1930), 105. Thomas Baty, "Can Anarchy Be a State," *The American Journal of International Law*, Vol. 28 (1934), 453.

<sup>46</sup> Regarding Baty and the evolution of Japan's defense before the League of Nations with references to resources in the archives of the Ministry of Foreign Affairs and the Library of Congress as well as sources such as the *Nihon gaiko bunsho*, see Peter Oblas, "In Defense of Japan in China: One Man's Quest for the Logic of Sovereignty," *New Zealand Journal of Asian Studies*, Vol. 3, No. 2 (December 2001), 77-84.

<sup>47</sup> *Ibid.*, 86-89.

<sup>48</sup> *Japan Advertiser*, August 17, 1932. *Asahi Shimbun*, August 13, 1932.

<sup>49</sup> See editorial in *Japan Times*, February 10, 1954.

The English-language newspaper, the *Japan Advertiser*, on releasing the original English report in its entirety on August 17 as provided by the Ministry of Foreign Affairs, introduced it with a series of headlines that captured the fervour of the Japanese mass media regarding the international dispute.<sup>50</sup> The *Japan Advertiser*, page one, read: “Recognition move approved by Baty,” “Legal Adviser see no violation of Nine-Power Treaty,” “Integrity is not unity,” “If Manchukuo movement spontaneous, Troops cannot be said to be promoting revolt.” What is evident in the long 24-point report is not just how significant Baty's legal counsel was to the Japanese government at the time in formulating its defence but how valuable the example of China was to Baty's understanding of the superiority of his doctrines and canons. Most significantly, however, the report underlined how Baty's self-esteem as a legal publicist was tied to his position as Japan's Legal Adviser. Baty not only argued in favour of Manchukuo's sovereign status in international relations but that his canons as written in his recently published book, *The Canons of International Law*, were the most modern and suitable instruments for resolving conflicts of interest in international law. Wilfred Fleisher, editor of the *Japan Advertiser*, maintained in an accompanying editorial that Baty's overall assessment represented an “authoritative rejoinder” to those who opposed recognition of an independent Manchuria.<sup>51</sup>

Nevertheless, the League of Nations neither concurred in Baty's logic or in Japan's case for recognition that was based on it. In 1933, Japan withdrew from the League. At this juncture, the Japanese government decided that diplomacy and alliances were more significant strategically than legal niceties.<sup>52</sup> Baty, however, wished to continue the legal argument in his private capacity during what was to be the last of his three furloughs to Europe. At the time, Baty was less concerned about the destabilization of East Asia and world peace and more about “The Threatened Chaos in the Law of Nations.”<sup>53</sup>

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<sup>50</sup> See report in *Japan Advertiser*, August 17, 1932.

<sup>51</sup> See editorial in *Japan Advertiser*, August 17, 1932.

<sup>52</sup> Uchimura holds that Baty ceased to be active in legal matters concerning Asian affairs after Japan's withdrawal from the League. Masakuma Uchiyama, *Gendai nihon gaigoshiron*, 196. Since legal arguments had failed to convince the Western powers of Japan's role in Asia, the perception even from within the ministry at the time was that Baty's activity in Asian affairs peaked with the Manchurian crisis. See Chief, Commerce Bureau, Ministry of Foreign Affairs to Chief, Foreign Exchange Bureau, Ministry of Finance, September 6, 1941, *Kakukoku ni okeru shisan toketsu oyobi eikyu kankei zakken* [Miscellaneous Matters relating to the asset freeze in each country and effects] Diplomatic Record Office of the Ministry of Foreign Affairs, Tokyo, File E. 2-3-1/10.

<sup>53</sup> For Baty's representations at the conferences in Europe, see Thomas Baty, “The Threatened Chaos in the Law of Nations,” *The Contemporary Review*, Vol. 148 (July 1935), 67-68.

## Work, Obsession, Treason

Back in Japan, in 1934, Baty settled into his routine office work once again and contented himself with defending the Law of Nations and Japan within overseas publications as a scholar. He also found himself associating his standing as a legal scholar with the appropriateness of Japan's actions in Asia.<sup>54</sup> During the China War, which followed from 1937, Baty donated 1,000 yen (a substantial sum) at five different times to funds to help the families of deceased and wounded Japanese soldiers in the China War. According to Baty, his motivation was purely humanitarian and intended to lighten the distress of worried and grieving mothers. Baty's open admission was framed in the context that the whole disastrous affair was totally avoidable if the Society of Nations had recognized the rationality of his canons and Japan's position.<sup>55</sup>

Baty's loyalty to Japan's policy in China was well known among friends as well as members of the British community in Japan. By the late 1930s, the Foreign Office and the British Embassy in Tokyo associated Baty with obstruction of efforts to resolve the Manchurian Crisis and nurture the authority of the League of Nations in preserving international peace. Consequently, an invitation for official messages from cabinet ministers, including the prime minister, to honour Baty and his work in Japan at his semi-official 70th birthday party in 1939 to be attended by leading members of the intellectual, political and military community was rejected. In the British Foreign Office's estimation, it was indisputable that all Japanese officials, particularly those in the Ministry of Foreign Affairs and the Japanese people in general held Baty in the highest esteem.

The Foreign Office also observed that aside from the British ambassador and the scholar-diplomat George Sansom, "he is the most eminent British subject in Japan." But the advice of the Foreign Office to the Prime Minister's office was that there was no need for HMG to honour someone who had done nothing to facilitate or further British interests and whose ultimate loyalty was to his employer rather than his country of nationality. The Foreign Office further imputed Baty's loyalty by offering the following criticism concerning the legal adviser's sympathies: "He has become more Japse [sic] than the Japse [sic] and is best known for his defence of Japan's aggression in Manchuria and for his attack on the Lytton Commission." In summary, the Foreign Office characterized Baty, even in the pre-war period, as having done his country a "disservice," a determination that would easily form a judgment of treason in a war setting given Baty's official status. The following was emphasized in regard to his disservice: "we have some reason to believe that Craigie [ambassador] and Sansom, the

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<sup>54</sup> Thomas Baty, "Can Anarchy Be a State," *The American Journal of International Law*, 453.

<sup>55</sup> Chief, Commerce Bureau, Ministry of Foreign Affairs to Chief, Foreign Exchange Bureau, Ministry of Finance, September 6, 1941, *Kakukoku ni okeru shisan toketsu oyobi eikyu kankei zakken*.

Japanese Counsellor, would not be sorry to see him replaced by some less biased adviser."<sup>56</sup>

The Foreign Office, in the end, informed the Prime Minister's Office that whatever services Baty had rendered had been to Japan and Japan alone and "to us he may be regarded as having done disservice rather than otherwise."<sup>57</sup> The British government decided that it would be best not to send a letter of congratulations from the Prime Minister to Baty.<sup>58</sup>

Baty was unaware of the thinking of the British government, but he would not have objected at least to the evaluation that he served his employer loyally. Regarding his loyalty to Britain, Baty believed that his support of the Japanese position on the situation in China served all countries, including his own, by upholding the Law of Nations and therefore world order. He did not expect Japanese militarism to last and did not consider that the situation in the Pacific in the 1930s would lead to a crescendo of violence engulfing the Western world. On the eve of World War II, Baty discussed the prospect of war between Japan and Britain with, in his description, a veteran member of the British mission. The official agreed with him that war was unlikely. Baty observed that "neither of us realized the fuzzy mentality of the militarists nor the appalling extent to which they had clamped down their grip on the country."<sup>59</sup> Baty's loyalty to his employer did not extend to the support of aggressive militarism.

But Baty's decision to refuse repatriation at the start of the Pacific War was a composite of perspectives, his material requirements, his intellectual self-respect as well as a loyalty to an employer who had sustained him economically and recognized his canonical skills. Baty's monthly salary in the beginning of the 1940s was some 3,000 yen. In addition, he had the benefit of a house, personal secretary, servants and a high-society situation in Japan. The average salaried worker had an income of 114 yen a month. Baty's salary could pay for the marriage expenses for almost six couples per year with such expenses averaging close to 500 yen.<sup>60</sup>

In August of 1941, when Japan froze the assets of the nationals of the United States and Britain in Japan in retaliation for economic sanctions directed at Japan after Japanese forces moved into southern Indochina, many foreigners separated from their income and livelihood left Japan.<sup>61</sup> But Baty's assets remained untouched. Baty had asked the Ministry of Foreign Affairs to intervene on his behalf and it had. On September 18, 1941, the Ministry of Finance made it public that Dr. Thomas Baty had been granted special consideration and exempted from the Foreigners' Transactions

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<sup>56</sup> Minutes, November 14-17, 1938, FO 371/22193, Great Britain, Public Records Office.

<sup>57</sup> F. R. Hoyer Millar, Foreign Office, to Jasper Rootham, Prime Minister's Office, November 19, 1938, FO371/22193.

<sup>58</sup> N. B. Ronald, Foreign Office, to J. L. Dodds, British Embassy, Tokyo, November 24, 1938, FO371/22193.

<sup>59</sup> Baty, *Alone in Japan*, 156.

<sup>60</sup> *Japan Weekly Chronicle*, July 10, 1941.

<sup>61</sup> *Japan Weekly Chronicle*, September 11, 1941.

Control Ordinance. The ministry put forward the following official explanation: “Dr. Baty, a Briton, had been in Japan for the past twenty-six years and has contributed a great deal towards the country. He was decorated with the Order of the Sacred Treasure for meritorious services rendered during the Manchurian Affair and was given a special privilege last year when he was allowed to attend the official ceremony of the 26<sup>th</sup> centenary of the founding of the Japanese Empire.” The finance ministry made known that it would exempt all foreigners who like Baty had contributed to the Japanese Empire.<sup>62</sup> With minor inconveniences, the quality of Baty’s life in Japan remained unchanged in the winter of 1941. He explained that he wrote regularly to English friends and reported that he and his sister wanted for nothing and were busy with planning excursions in the countryside. Baty acknowledged that if he had left Japan prior to the Pacific War, he would have had to leave behind all his valuables and possessions.<sup>63</sup>

At the time of Pearl Harbour, Baty was still denying the likelihood of engagement. Baty was at home on December 8, 1941 when his domestic secretary came after breakfast as usual and informed him that there had been a great battle in the Pacific. He remembered: “I took this to be one of the many *canards* that were flying about, and went in due course to my office where all my books, notes and memoranda were. About mid-day, his official secretary, who shared the office, entered and gave him a message from the foreign minister’s private secretary to the effect that war had been declared with Great Britain and the United States. ‘But,’ he had added, ‘we will protect you’ — [according to Baty] a very necessary addition, it seemed, in view of the readiness of extremists to resort to violence against foreigners and particularly alien enemies.”<sup>64</sup>

Baty, at 72, remained in Japan to serve the fabric of his life and identity. He had considered just prior to the war the option of leaving Japan when the British government was advising all residents to depart but had advanced the justification that “to quit would have amounted to an admission

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<sup>62</sup> *Japan Weekly Chronicle*, September 18, 1941. On Baty’s request, see *Honpo koyo gaikokujin kankei zakken*.

<sup>63</sup> Baty, *Alone in Japan*, 157-158.

<sup>64</sup> *Ibid.*, 160. A more dramatic but propaganda-based account of the notification appeared in the *Yomiuri Shimbun* in January 1943 as part of a seven-part series on foreigners’ views. Baty was the seventh individual who was focused on. The series’ emphasis was on boosting morale of the home front and the article on Baty had a banner headline of “Fighting Japan.” The title headline was “Persevere!” There was an old proverb for the subheading of “fall down seven times and pick yourself up eight times.” In the article, it was described how a messenger from the ministry wakened Baty at home, told him of the declaration of war and assured him that no harm would befall him. The story began with this sense of urgency and left readers with the impression of one foreigner’s perseverance in the war effort, a foreigner who was calling on them to persevere in trying times. See *Yomiuri Shimbun*, January 15, 1943. See notes by Dr. Arthur Waley on this article, together with the original article itself, in FO 371/35966, Great Britain, Public Records Office.

of all hope of peace was given up.”<sup>65</sup> Once war was declared, such a justification would have seemed to be no longer convincing to Baty and in his autobiography, there would be no mention of his reasons for refusing repatriation with the British embassy staff after hostilities had been declared. His actions and his words, instead, demonstrated a desire to return to normalcy in his life in spite of the conflict. In an article in the *Yomiuri Shimbun* in 1943, he not only acknowledged that he was still working at the Ministry of Foreign Affairs, but also, that he had rejected repatriation.<sup>66</sup>

The British Foreign Office found Baty’s continued employment in the Ministry of Foreign Affairs reason enough to consider him liable for treason. In 1943, the Foreign Office had not only as evidence the article in the *Yomiuri*, although of dubious legal value since it was not written by Baty, but also, an intercepted letter of his sister, Anne, to her cousin, describing how Baty continued to go regularly to the office.<sup>67</sup> There were also the observations of embassy staff. Sir William Eric Beckett, legal adviser in the Foreign Office, concluded that “there is no doubt that Dr. Baty has committed treason and if we wish to prosecute him I imagine the essential and necessary evidence would be that of our members of our Embassy or Consulate staffs in Japan who would be able to swear on oath that after the outbreak of war Dr. Baty continued to work at the Japanese Foreign Office and declined to be repatriated.” However, Beckett’s opinion was that it would be improbable that “we shall want to prosecute this old man who will then be about 75” at the end of the war.<sup>68</sup>

The British Foreign Office’s opinion at the time that Baty continued to be an employee of the Japanese government would not have been contradicted by the Japanese authorities, if they could have been asked. Also, Baty’s routine belied any assertion to the contrary. He continued to go to the office, receive his salary, reside in a ministry house and travel freely inside and outside Tokyo under ministry protection. From 1941 to 1943, Baty’s understanding of “going to the office” as meaning private rather than official pursuits might seem plausible, given Baty’s disposition to maintain the routine that he had become accustomed to observe over the years. According to Baty, he kept his books and notes at the office and he had become accustomed to “researching” from his office.<sup>69</sup> In any event, during this time, he did engage in his writing and research on the threat to international law and other matters of interest.<sup>70</sup>

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<sup>65</sup> Baty, *Alone in Japan*, 158.

<sup>66</sup> *Yomiuri Shimbun*, January 15, 1943.

<sup>67</sup> See *Yomiuri Shimbun* article in FO FO371/35966 and refer to intercepted letter from Anne Baty to Mrs. Eric Lewis, March 19, 1943, FO371/35966.

<sup>68</sup> See minutes, FO 371/35966.

<sup>69</sup> Baty, *Alone in Japan*, 160-167, 182-183.

<sup>70</sup> Among Baty’s research projects during the war was one that sought to describe the past literary output on Japan by foreign writers. After the war, he completed this project and it appeared in two parts in *Monumenta Nipponica* in 1951 and 1953.



There is also the matter that Japan did not need “a lawyer” with the outset of war and Baty’s role in the ministry in any case had been one of low profile even prior to the war. There is every reason to believe Baty’s explanation for his regular appearance at the ministry. His presence was definitely not required. Within weeks after the war began, he was planning to escape from militarist Tokyo to the bucolic countryside of his lakeside cottage, from which the war was still quite distant. He wrote that at the Lake, he and his sister could escape the war. “At our Lake, we could escape all this [news of the war], and the village people, whom we had known for over twenty years, were uniformly kind.”<sup>71</sup> Here, Baty and his sister could have neighbours, such as his Danish and Swedish diplomatic friends, and there were the boat races for entertainment.<sup>72</sup> When in the city, both Baty and his sister longed for a return to the past social life they had enjoyed. His sister remarked that when in Tokyo, “we are very quiet as most of our foreign friends have left.”<sup>73</sup> As if corroborating his inactive role at the ministry, the ministry had secured for Baty a six-month license in 1942 to spend from May to October at the Lake for as long as the mild climate remained.

Yet, Baty’s writings at the time were not merely for his personal satisfaction. Baty was intent on continuing to argue and gain public recognition for the validity of his legal principles, which in view of events were irrelevant and reflected an obsession with validating the legal principles on which he had built his reputation. Baty maintained under interrogation after the war that his contributions represented a “spontaneous expression of his own opinions as an international lawyer and a student of politics.”<sup>74</sup>

### **Obsessed with International Law in Decline**

The Japanese government provided him with the opportunity to argue his principles in an international, English-language publication of the Foreign Affairs Association of Japan, *Contemporary Japan: A Review of East Asiatic Affairs*, to be read by the more academically inclined inside and outside Japan. Included among the members of the governing council of the publication was an influential figure on foreign affairs in the past who had concurred in Baty’s legal approach at the time of the Manchurian Crisis, Viscount Ishii Kikujiro. Baty and Ishii maintained a close and personal friendship in the Ministry of Foreign Affairs from the time when Baty first arrived in Japan and Ishii was Japan’s foreign minister.<sup>75</sup> Also, on the council

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<sup>71</sup> *Ibid.*, 167

<sup>72</sup> *Ibid.* Anne Baty to Mrs. Eric Lewis, March 19, 1943, FO371/35966.

<sup>73</sup> Anne Baty to Mrs. Eric Lewis, March 19, 1943, FO371/35966.

<sup>74</sup> See John Figgess to Oscar Morland, January 31, 1943, “British Civilian Renegades and Collaborators,” FO 369/ 3549, Great Britain, Public Record Office.

<sup>75</sup> Oblas, “In Defense of Japan in China: One Man’s Quest for the Logic of Sovereignty,” 76.

was another member of the old guard of Japanese diplomacy, Baron Shidehara Kijuro. Although there is no direct evidence linking Baty's association with Ishii to his contributions to the Association's foreign policy review, the link with the ministry was evident in the notes about contributors in the review. Baty's articles of 1942-44 were prefaced in this section with reference to his standing as Japan's Foreign Legal Adviser. Both the ministry and Baty were aware that his articles appeared in the review in his capacity as a government official.

The review's editorial policy was propagandistic, exercising two government truths: 1) Japan was not responsible for the Pacific War, the Western powers having forced Japan into a corner in which it had no choice but to fight; 2) Japan would substitute freedom and cooperation for colonialism in Asia. Whatever Baty wrote in his articles on law and politics, they reinforced the overall editorial contents of each issue relating to the propriety of Japan's cause in the Pacific conflict by knowledgeable authorities. The articles, other than those by Baty, bore titles such as "Pearl Harbour Raid and Roberts Report," "War Aims of America," "New Order and East Asia Assembly," "Great East Asia International Law," "Why Co-prosperity?," "The Goal of 'Burma for Burmans'". The Pearl Harbour article was written by Sakutaro Tachi, publicist, lecturer in international law (Tokyo University), and former foreign affairs ministry legal consultant. In the article, the author criticized the U.S. commission's report that Japan in attacking Pearl Harbour had violated international law. The author stated: "Japan, on its part, is quite satisfied that, by undertaking the Pearl Harbour raid, it did not transgress international law and custom in the least; it merely frustrated the pre-arranged plan of the American High Command to carry hostilities to its shores at an opportune moment."<sup>76</sup> Yasaka Takagi, a professor of American Constitutional History and Diplomacy at Tokyo University, in his article on America's war aims, wrote that Japan's war aims were not like America's, "the ultimate enslavement of the rest of the world." He exclaimed that Japan was "fighting for her right to live" and to pursue "her legitimate aspirations" to develop as a nation in cooperation with the peoples of a greater East Asia.<sup>77</sup>

Baty's articles would at times rivet on the policy themes of the review, as had the Tachi and Takagi contributions. It would be in these instances where Baty would take the Allies to task for their "laxity" (or deviation from canons) in international law and the resulting historical misunderstandings about Japan's behaviour.<sup>78</sup> In "A Maker of Trouble," Baty considered an old

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<sup>76</sup> Sakutaro Tachi, "Pearl Harbour Raid and Roberts Report," *Contemporary Japan: A Review of East Asiatic Affairs*, Vol. 12, No. 4 (April 1943), 417.

<sup>77</sup> Yasaka Takagi, "War Aims of America," *Contemporary Japan: A Review of East Asiatic Affairs*, Vol.12, No.12 (December 1943), 1581.

<sup>78</sup> Baty's other articles would reflect past concerns with academic thinking, for example, on how to define state and nation or on current reading of past works about Japan by foreigners who had lived in Japan. See, for example: Thomas Baty, "Why State," *Contemporary Japan: A Review of East Asiatic Affairs*, Vol. 11, No. 2 (February 1942),

book from World War I days by an American writer who was editor of the *China Press*. In detailing the false message that the writer was communicating concerning Japanese diplomacy at the time, Baty argued that Japan's Twenty One Demands of China in 1915, which would have made China a Japanese protectorate, was not a dreadful act at all. He held that it was merely advice "calculated to save her from anarchy and dismemberment and to take her into a fair co-partnership on the only terms possible."<sup>79</sup> Baty was pursuing his principle of the importance of the organized state in international law and whether China could be considered anything more than a continent with varied populations.<sup>80</sup> In "Navalism' in the Twentieth Century," Baty argued with the American authors of *Toward a New Order of Sea Power*, which appeared in the 1920s, who "speak" of a Japanese program of territorial expansion in conflict with American interests as far back as 1920-1922. Baty explained that at the time "Japan was heading for parliamentary government, 'democratic' control, universal suffrage, a labour party and Westernization generally," not a policy of expansion.<sup>81</sup> He wrote that only when "Western nations insisted in seeing in China, not (as was the fact) 'a congeries of warring militarists,' but a coherent nation, and on supporting this self-styled 'China' in their own interests against Japan" that "a movement for Asian independence" began in 1931 in Manchuria.<sup>82</sup>

In "International Law and Modern Conditions," Baty was much more direct in setting forth his case for laxity in international law or "the imaginary persistence of States" as the cause of the Pacific War. He referred to the assumption in "nearly all recent writings on foreign affairs that a State is indivisible and indestructible."<sup>83</sup> He held that even today China remained China even though there was no government there while people discussed the integrity of China though the state had disintegrated. He queried how long could international relations continue with an international law based upon imaginary nations.<sup>84</sup> He continued: "Can a preponderant faction be invested with the rights and duties of the whole—and how greatly preponderant must it be? If different foreign nations choose to single out one party as so invested, how are the inevitably resultant conflicts between them to be decided?"<sup>85</sup> In relating this and other current laxities in international law and the resulting confusion in the relations of nations, Baty returned to what he wrote in his 1930 book, *The Canons of International Law*, explaining that

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219-229. Thomas Baty, "Gleanings of Ansei Era." *Contemporary Japan: A Review of East Asiatic Affairs*, Vol. 12, No. 12 (December 1943), 1598-1610.

<sup>79</sup> Thomas Baty, "A Maker of Trouble," *Contemporary Japan: A Review of East Asiatic Affairs*, Vol. 12, No. 10 (October 1943), 1258.

<sup>80</sup> *Ibid.* 1263.

<sup>81</sup> Thomas Baty, "Navalism in the Twentieth Century," *Contemporary Japan: A Review of East Asiatic Affairs*, Vol 12, No. 4 (April 1943), 412.

<sup>82</sup> *Ibid.* 413.

<sup>83</sup> Thomas Baty, "International Law and Modern Conditions", *Contemporary Japan: A Review of East Asiatic Affairs*, Vol. 13, No. 2 (February 1944), 155.

<sup>84</sup> *Ibid.*, 155-160.

<sup>85</sup> *Ibid.*, 160.

one should repeatedly emphasize that international law requires clear and simple rules. The differences in cultures and outlooks among the nations of the world, in his estimation, made such an approach a necessity and consequentially, long ago, nations gave up on applying normative assessments of good or bad governments, replacing them with the measure of an actual government in place.<sup>86</sup>

The article, which the Foreign Office, after the end of the war, would find the most inflammatory and treasonable in its opposition to Allied war aims, also, hinged on Baty's advocacy of a return to first principles. The article entitled "The War Kaleidoscope" was the last of Baty's articles for the review and appeared in December 1944. It was an effort by Baty to evaluate the legal status of the new governments that were appearing in Europe as Germany rolled back its forces to its own territory. In the introductory paragraph, Baty made known that he was going to investigate the legitimacy of the new governments established in the wake of the Allied advance in Europe by referring to the fusion of European and Pacific conflicts three years ago. He referred to the British and American blunder into war with Japan through persisting to see the "quondam rebel Chiang Kai-shek as the legitimate ruler of all China."<sup>87</sup> Baty, for example, would proceed to question General de Gaulle's claim to be the head of the legitimate government of France in the context of the Allied "incarnation of their ideal "China." "One can call oneself whatever one likes—but one cannot displace a regularly established Government [Vichy government] by a word, even if one is in more or less precarious occupation of a portion of its territory."<sup>88</sup>

### **Investigated for Treason**

With the end of the war, Baty's contributions to *Contemporary Japan* would form a body of evidence against him when the British government considered whether to try him as a traitor. The United Kingdom Liaison Mission in Japan also sought information more directly related to his continued employment by the Japanese government during the war, but was unable to collect incriminating documentation. The mission was either thwarted from bureaucratic laxness or inefficiency in the confusion at the end of the war or more likely from the positive intent of Baty's colleagues in the ministry.

The Central Liaison Office, which had been created as an external bureau of the Foreign Ministry under Douglas MacArthur's direction for the purpose of managing communications between the Japanese government and SCAP, undertook the processing of UK liaison commission's request for details of Baty's employment. In point of fact, the CLO staff members, who were all foreign ministry officials, were being asked to hand over information

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<sup>86</sup> *Ibid.*, 157

<sup>87</sup> Thomas Baty, "The War Kaleidoscope," *Contemporary Japan: A Review of East Asiatic Affairs*, Vol. 13, No. 10-12 (October to December 1944), 869.

<sup>88</sup> *Ibid.* 875

about one of their oldest members. Did they intervene? In the case of Baty, there was a “corporate family” reason to interfere with the UK request since the Foreign Legal Adviser of some thirty years was part of the ministry’s history and tradition. According to Eiji Takemae, in his book *Inside GHQ*, CLO staff acted “as interested intermediaries” and “sometimes stubbornly resisted instructions they found objectionable” in fielding requests from the occupying powers.<sup>89</sup> This overview adds understanding to why the CLO could find only a duplicate of Baty’s original contract of employment when requested for details of Baty’s terms of engagement from the beginning of his employment when his entire personnel record was available, including all contracts. Baty’s personnel file would have documented that Baty was no longer employed on a contract basis.

If the documents had been provided as requested, the UK liaison mission would have learned that beginning in 1944, a ministry official of the documents section, about once a month, would journey north to his wartime home in Nikko to deliver documents to Baty. The official house in Tokyo, with its Cumberland furniture, was destroyed in the war.<sup>90</sup> By June of 1945, the amount of business deserving Baty’s attention had increased substantially and the ministry was preparing for more frequent journeys on a more regular basis with longer stays on the part of this official.<sup>91</sup> In the last two years of the war, Baty was more than a nominal employee of the ministry, and he had connections with government officials during the war. The CLO had answered in the questionnaire regarding Baty’s official activities during the war: (1) Baty nominally retained the title of Foreign Legal Adviser from December 7, 1941 to September 2, 1945, “but the Japanese Government refrained from asking for his opinions, in view of his nationality, since the outbreak of the war;” (2) “Dr. Baty had no connections with Japanese Government personnel during the war.”<sup>92</sup> If the mission had obtained what

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<sup>89</sup> Eiji Takemae, *Inside GHQ* (New York: Continuum, 2002), 113.

<sup>90</sup> Document Section, Ministry of Foreign Affairs, to High Court, June 28, 1945, *Honpo koyo gaikokujin kankei zakken*. *Japan Times*, February 15, 1954. Baty, *Alone in Japan*, 174-176. There is the matter of Baty’s notes and memos regarding the documents sent to him in 1944-45. What happened to the notes or memos in his possession? The files of the Office of the Foreign Legal Adviser and Baty’s files at home in Tokyo probably fell victim to the war. Did these records also disappear because of the confusion and destruction of the war?

<sup>91</sup> Document Section, Ministry of Foreign Affairs, to High Court, June 28, 1945, *Honpo koyo gaikokujin kankei zakken*. The delivery of documents raises the question of what specific documents Baty drafted during his career. The Office of the Foreign Legal Adviser existed outside of the official regulations and structure of the ministry. Drafts and opinions done in the office appeared in correspondence and other documents under the name of the officer or department responsible for the matter. Generally, only lengthy opinions on cases or matters from the adviser’s office requiring departmental approval would circulate under Baty’s signature and perhaps survive as an archival file. The Manchurian crisis was an instance where Baty’s opinion was filed.

<sup>92</sup> See Central Liaison Office, January 30, 1946, to SCAP Headquarters, FO 369/3549. Gornall concurs that Baty was no more than a nominal employee but does not refer to

they sought, they might have posited that from the foreign ministry's point of view, at least, Baty's presence at the office in the war years provided them with a kind of envoy and minister plenipotentiary<sup>93</sup> without portfolio who could be engaged when necessary. Such a consideration of employment was not uncommon within the Ministry of Foreign Affairs in the period leading up to the Pacific War.

In all, even if the mission had been able to complete a thorough search of the evidence, their judgment probably would not have been any more severe than it was given the Foreign Office's predilections regarding Baty's age and disloyalty. The Foreign Office considered Baty's statements provided under interrogation by military intelligence and his writing in *Contemporary Japan* as the obsessive eccentricities of an old man in Japan's cause who had thrown his lot with Japan long before the Pacific War. Consequently, the Foreign Office was unable to give credence to what Baty had said under interrogation. Firstly, the officials dealing with the Baty case chose not to accept Baty's claim that he believed his employment had been terminated at the outbreak of the war.<sup>94</sup> Instead, they accepted the Japanese government's statement that Baty was a nominal employee as sufficient cause to try him for treason. Secondly, Baty's admission that he had written the articles in *Contemporary Japan* was not seen as corroboratory evidence of their authorship. Henry Sawbridge, of the consular department, who had seen diplomatic service in Japan, in examining the content of the articles, noted that Baty's pursuit of Japanese interests dated back to Manchuria and "these articles are, therefore, true to form." He continued: "They are a sustained and insidious attack on British and American policy which, under the name of an international lawyer of some standing, cannot have failed to be consoling to the Japanese ruling classes." Sawbridge, however, was wary of relying on Baty's statement of authorship. This disposition was perhaps enhanced by his knowledge that military intelligence (M.I.5.) regarded Baty "as a senile eccentric" and were "not, at present, contemplating putting his case before the Public Prosecutor."<sup>95</sup> He therefore dismissed the articles from allegations of treason since "there was nothing to show [i.e., original manuscripts] that they appear in the form in which Dr. Baty wrote them."<sup>96</sup>

In spite of an initial disposition revealed in the Foreign Office minutes to send Baty to India or England to stand trial, the Foreign Office once again deferred to the legal expertise of its legal adviser, Beckett. The case was after all one that would have to be decided in the courts on the basis of law,

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Japanese archival materials. Gornall, "Dr. Thomas Baty, 1869-1954, Legal Adviser to the Japanese Foreign Ministry, 1916-1941," 431-442.

<sup>93</sup> The commerce bureau chief in September 1941 referred to Baty's grade as similar in rank to an envoy and minister plenipotentiary in the ministry. Chief, Commerce Bureau, Ministry of Foreign Affairs to Chief, Foreign Exchange Bureau, Ministry of Finance, September 6, 1941, *Kakukoku ni okeru shisan toketsu oyobi eikyū kankei zakken*.

<sup>94</sup> Oscar Morland to Foreign Office, May 23, 1946, FO 369/ 3549.

<sup>95</sup> See minutes, FO 369/ 3549. John Figgess to Oscar Morland, January 31, 1943, FO 369/3549

<sup>96</sup> See minutes, FO 369/ 3549.

not the opinions of government officers. Beckett agreed with his colleagues that Baty had committed treason, but he maintained that he should not be prosecuted. As for the grounds for his opinion, he held that Baty was “old and senile.” In addition, he asserted that while retaining British nationality, he had for many years identified himself with Japan and cut himself off from Britain. He explained in conclusion the following: “He was an employee of the Japanese Government and he simply served the Japanese Government. This does not render him not guilty, but it would be a factor which the courts, if the case came to trial, would, I think, almost certainly regard as a substantial mitigation.”<sup>97</sup>

Beckett brought to the Foreign Office’s attention the recent case of Norman Baillie-Stewart as a precedent showing how the courts would be disposed in adjudicating the charge of treason against Baty. The Director of Public Prosecutions brought Baillie-Stewart before the Central Criminal Court in London on the charge that he had adhered to the King’s enemies elsewhere than in the King’s realm, to wit the German realm. The trial for treason took place from October 1945 to January 1946 just prior to the Baty investigation. Baillie-Stewart had worked for the German Foreign Office and the German propaganda broadcasting system, to translate and write commentaries and to broadcast over the radio under the name of “Lancer” criticisms of the English social system and the Allied bombing.<sup>98</sup> In the Baillie-Stewart case, the judge asked the defense whether Baillie-Stewart would be willing to return to Germany and never again set foot in Britain, explaining that a view for consideration was “the sooner the man is gotten away from this country the better for this country.”<sup>99</sup> The judge, however, found this option was closed by certain circumstances. Most importantly, the Allied forces in Germany were opposed to having him back in Germany. Also, although Baillie-Stewart applied for naturalization in Austria before the war, his request was not processed until the war broke out and under British law, a citizen could not change his nationality to a nation with which the country was at war. Therefore, Baillie-Stewart could not escape punishment and prison in Britain. He was sentenced to prison for five years.<sup>100</sup>

Beckett familiarized his colleagues with the ramifications of the Baillie-Stewart case for the present handling of the Baty affair by noting that in both cases, the offence of treason was not in doubt. He explained, however, that notwithstanding the treasonable act, the judge really wished to let Baillie-Stewart off altogether and deport him to Germany “on the ground that Baillie-Stewart had for years done all he could to shake the dust of England off his feet and make himself German.” He explained that since immediate deportation to Germany was not possible, “the judge sentenced him to a rather short term of imprisonment with some recommendation that he should be deported to Germany and treated as a German as soon as the

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<sup>97</sup> *Ibid.*

<sup>98</sup> *London Times*, October 23, 1945, November 3, 1945.

<sup>99</sup> *London Times*, January 10, 1946.

<sup>100</sup> *London Times*, January 11, 1946.

sentence had expired.” According to Beckett, Baty’s case was not as strong as the one against Baillie-Stewart in two respects: (1) Baty had not done anything as bad as Baillie-Stewart; (2) Baty’s efforts to shake the dust of Britain off his feet were not as evident since Baty did not attempt to surrender his British nationality. Nevertheless, Beckett judged that given Baty’s age and the sufficient similarity between the two cases, the conclusion should be against prosecuting Baty, but instead to follow an action that would leave Baty in Japan and treat him as far as possible as a Japanese national.<sup>101</sup>

The Home Office, after gaining the concurrence of the Director of Prosecutions, agreed with the Foreign Office’s recommendation. The UK liaison mission was told to inform Baty that “passport facilities and all other forms of protection as a British subject have been withdrawn from him.” SCAP was also to be informed and the mission was told to make publicly known that Baty no longer enjoys British protection.”<sup>102</sup> Baty, who had intended to move to Bombay to establish his legal practice there, was consequently unable to do so.<sup>103</sup>

### **Conclusion: Remaining in Twilight in Post-War**

In his later years, Baty would reflect on all he had lost in the war. All his comfortable homes had been lost: his office, his official residence in Tokyo and his cottage by the Lake. He would dwell on all that had been taken away from him—from his furniture and books to his sister who had passed away in October 1944. “I was reduced to nil, I have nothing.”<sup>104</sup> The refrain at the end of his posthumously published memoirs completed at the end of the war is quite telling of the loneliness of his post-war years: “And I am more Alone in Japan than ever.”<sup>105</sup> The day after his 85<sup>th</sup> birthday on February 9, 1954, Baty died some distance from the center of his once eminent social circle in Tokyo at his residence in Ichinomiya, Chiba Prefecture.<sup>106</sup>

Throughout the latter years of his life in post-war Japan, he held fast to his belief that Japan and he himself had been treated unfairly by the Allied

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<sup>101</sup> See minutes, FO 369/3549. Esler Dening responded to Beckett’s reference to his stand on Baty’s removal from Japan as having misread his minute. He stated that he had held in his minute that Baty should not remain in Japan, but he conceded to Beckett’s general conclusion that it was not worth trying Baty and reversed his previous view.

<sup>102</sup> Foreign Office, September 25, 1946, to United Kingdom Liaison Mission in Japan, “British Civilian Renegades and Collaborators,” FO 369/ 3550, Great Britain, Public Record Office.

<sup>103</sup> United Kingdom Liaison Mission in Japan, September 9, 1946, to Foreign Office, FO 369/3550.

<sup>104</sup> *Japan Times*, February 15, 1954. Also, see, Baty, *Alone in Japan*, 176.

<sup>105</sup> Baty, *Alone in Japan*, 182.

<sup>106</sup> On February 13, 1954, Baty was given an official Ministry of Foreign Affairs’ funeral with Foreign Minister Katsuo Okazaki presiding. *Japan Times*, February 11, 1954. Okazaki was former head of the CLO.



powers. He continued to explain the East Asia and Pacific Wars as exemplifying the twilight of international law. Even during the time that he was being investigated for acts of treason in 1946, he was openly providing advice to Takayanagi Kenzo, who was the defense counsel at the Tokyo war crimes trials.<sup>107</sup> Just prior to his death, with the assistance of the Ministry of Foreign Affairs, he secured a publisher for his final work, *International Law in Twilight* (1954), where he would seek to update the clarity of his international law principles to present international relations. He obsessed that “all the troubles of the Far East during the last thirty years flow directly from the unscientific and feeble idea of statesmen that there must always be a China: — that is, that the territory of the old Empire, which vanished in 1912, must always be a sovereign and indivisible international unit.”<sup>108</sup> As for his personal treatment at the hands of the British government after the war, Baty always thought the treatment was too stern and never admitted to doing anything that warranted such a punishment. He maintained: “Certainly, I had no relations during the war which could be thought improper. It could only be because my outlook is cosmopolitan and my judgment critical and independent.”<sup>109</sup>

But contrary to his protestations, Baty did have relations during the war that could be thought to be improper. And his actions before and during the Pacific War were more deeply rooted in material concerns and matters of self-esteem than could be surmised by his reference to an outlook of cosmopolitanism. Baty’s ample livelihood and high social status in Japan, and his preoccupation with the correctness of his principles underlying his defence of Japan at the time of the Manchurian Incident precipitated actions that the British government identified as treasonable.

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<sup>107</sup> See minutes, FO369/3549. Also, Uchiyama, *Gendai nihon gaigoshiron*, 198.

<sup>108</sup> Thomas Baty, *International Law in Twilight* (Tokyo: Maruzen, 1954), 22. In the Preface, Baty acknowledged that the book would not have been published without the assistance of the authorities of the Ministry of Foreign Affairs. Baty remained until his death a living tradition of the Ministry of Foreign Affairs.

<sup>109</sup> *Japan Times*, February 15, 1954. Also, see, Baty, *Alone in Japan*, 176.