

IN DEFENSE OF JAPAN IN CHINA: ONE MAN'S QUEST FOR THE LOGIC OF SOVEREIGNTY

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The philosophy and thought of a British barrister shaped Japan's plea before the League of Nations during the controversial Manchurian intervention of the 1930s and the establishment of the state of Manchukuo. Thomas Baty, whose role in the controversy has been, for the most part, overlooked or neglected, was in the service of Japan's Ministry of Foreign Affairs at the time of the affair, working as the Legal Adviser. Baty was a long-term British expatriate, an internationally recognized scholar of international and civil law, a gifted conversationalist and writer and a highly regarded member of Tokyo's foreign community. His contribution to Japan's defense before the League arose from his creation of a Western legal instrument that conformed to Japan's policy in Manchuria but was not representative of the established perspective in law at the time. By applying his instrument to Japan's case, Baty furthered the radicalization of Japan's discourse with the West on Japan's national interests in East Asia.

BATY AND JAPAN

Thomas Baty was born in Stanwix near Carlisle in Cumberland, England, close to the Scottish border in 1869. When he was seven, his father died and Baty passed his formative years in a household with his widowed mother, his mother's two brothers and his young sister.¹ Baty's uncles financially supported the family. Baty's reminiscences of his childhood recreates a middle class home in which the tone and the routine centered on what Baty called the days of the "glorious girl"² or what one authority on gender in Victorian England has termed the "feminine home." The feminine home, in Victorian thinking, offered a place for nurture and love, a sanctuary for the

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¹ Baty, *Thomas Alone in Japan* (Tokyo:Maruzen, 1959), 45, 185.

² *Ibid.*, 50.

harried businessman concerned with efficiency and rationality to cultivate spiritual and emotional well being within an atmosphere of female dominance and idealized feminine virtue.³

In Baty's own words, regarding life in his "varied" household in late Victorian England, "I can say without the remotest hesitation that we had not any of us, the least shade of idea of feminine inferiority or submission to 'men'." Baty related that "men talk" revolved around business and politics, but he and the females of the family did not consider such conversation as entitling masculinity to superiority. Baty explained that "on the contrary, the girls distinctly compassionated 'men', as debarred from the heights of elegance and charm." He remarked that "they might admit that men were more self-sufficient and daring – but then they had not much admiration for daring and self-sufficiency, any more than they particularly admired an acrobat."⁴

As to the impact of his early years on his personality, Baty would refer to his lifelong adoration of the "Beauty and Sweetness" of the ladies.⁵ In a posthumously published declaration on love and marriage dated May 25, 1926 which he had distributed at the time to close friends, Baty confessed: "From my earliest years I hated sex. The reason was that I wanted to be a girl. I saw that ladies while admittedly more graceful and sweet than men, were also just as determined and noble. I could not bear to be relegated to the ranks of rough and stern men."⁶

Baty went to a state school in Carlisle, but being a high achiever he was able to attend Oxford on scholarship. He proceeded to his B.A. with Honours in Jurisprudence in 1892. On completing his D.C.L. at Oxford in 1901, he received a LL.D. from Cambridge University in 1903. Among the other titles he had collected before his arrival in Japan in May 1916 were those of Barrister of Law of the Inner Temple and joint honorary secretary of the International Law Association.

As to Baty's decision to accept employment in Japan, professional and personal reasons came into play. Firstly, here was an opportunity to cement his career as an international law specialist. Baty himself admitted that he was publicly too shy and gentle to ever become a success as a barrister and that his future lay elsewhere.⁷ Secondly, he was quite taken with the idea of living in a large ministry-provided house complete with servants. By this time, he was responsible for the physical well being of his mother and sister, with whom he still lived.⁸ Thirdly, Baty held a high opinion of Japanese society.⁹ One might surmise that his enthusiasm for Japan stemmed in part from his initial appraisal of Japanese liberality in the construction and performance of gender identities, at a time when England was disengaging from the ideal of the feminine home.¹⁰ Baty admitted that he expected naively to find in Japan "a sort of

³ Tosh, John *A Man's Place* (New Haven: Yale University Press, 1999), 47-50, 180-181.

⁴ Baty, *Alone in Japan*, 45.

⁵ Baty, *Alone in Japan*, 185, 195.

⁶ *Ibid.*, 188.

⁷ *London Times*, February 10, 1954.

⁸ Baty, *Alone in Japan*, 94-96.

⁹ *London Times*, February 10, 1954.

¹⁰ The ideal of the feminine home was under attack from the end of the 19th century. Female purity and perfection were brought into question with revelations in the press of young girls

Japonicized England” of his Victorian youth in which men and women mixed quite freely and women did not submit to men.¹¹

After his mother died during their first summer in Japan, Baty’s imperious but rather sweet sister (so described by a friend of the pair) took charge of Baty’s domestic affairs to create a “Home Sweet Home” in Japan. She would accompany him socially in Japan and abroad.¹² They would spend summer vacations together at their cottage by Lake Chuzenji in Nikko. They remained devoted to one another until her death in 1944. The maternal character of the sister-brother relationship is brought out in a story concerning Baty’s enthusiasm for his claim to a Scottish ancestry. At his summer retreat, Baty always flew the red and gold Scottish flag but once his sister joined him, she immediately replaced it with the Union Jack, explaining to friends that there was not a drop of Scottish blood in the family.¹³

In terms of his personal demeanor, Baty effected effeminate mannerisms. Socially, he was an “active transvestite.” He was known to appear with women’s accessories or in women’s clothes.¹⁴ Whether because of his demeanor or because of the changing requirements of the ministry, Baty would never assume an active diplomatic role in the international community on Japan’s behalf as had his predecessor, the American Henry Willard Denison, who served in the post for thirty-four years. Instead his activities outside the ministry were dedicated to his own writings and to socializing, for the most part, within the expatriate and diplomatic corps’ social circuit. Baty and his sister were very much part of the parties and outings popular within a close circle of friends.¹⁵ As Baty himself related: “we had not come East for social activities, and it was only gradually that we slid into them.”¹⁶

When he arrived in Kobe in May, Baty discovered that the Okuma government, which had procured his services, had been replaced and the Terauchi cabinet had come to power. Nevertheless, Baty was warmly received. A dinner was given in his honor at the foreign ministry and together with his mother and sister, he was introduced to the staff of the ministry and

engaging in prostitution. See Robson, Catherine *Men in Wonderland: The Lost Childhood of the Victorian Gentleman* (Princeton:Princeton University Press, 2001), 4-5, 14, 156. Revelations of homosexuality, e.g., the Oscar Wilde trials of the 1890s, also encouraged reconsideration within the middle class of the high evaluation of the feminine home. See Tosh, *A Man’s Place*, 189-190 and Belford, Barbara *Oscar Wilde* (New York:Random House, 2000), 252-263. Baty himself was cognisant of the changes and critical of the modern gender roles as compared to those in Victorian days. He wrote that the modern girl was apt to think her “physical conformation” rather than her charm determined her character. Baty, *Alone in Japan*, 50.

¹¹ Baty, *Alone in Japan*, 60-61, 136.

¹² *Ibid.*, 92-102. Throughout his memoirs, Baty refers to friends as “our friends” rather than his friends, emphasizing a social life experienced with his sister.

¹³ Regarding Baty’s sister, see Keenleyside, Hugh *Memoirs of Hugh Keenleyside*, Vol. 1 (Toronto:McClelland and Stewart, 1981), 330-331.

¹⁴ Baty, *Alone in Japan*, 195. Keenleyside, *Memoirs of Hugh Keenleyside*, 331.

¹⁵ Kenneth Kirkwood Papers, August 7, 1932, National Archives of Canada, MG 27 III E3, Vol. 2, File: Diplomatic Journal, 1932. Keenleyside Collection, National Archives of Canada, Acc 1993-405, Album 3, 6. Keenleyside, *Memoirs of Hugh Keenleyside*, 330-331. For a discussion of personality vs. changing times in the altered nature of the Legal Adviser’s role after Denison, see Uchiyama Masakuma *Gendai nihon gaigoshiron* [Theory of Modern Japan’s Diplomacy] (Tokyo:Keio University Law Kenkyukai, 1971), 179-180.

¹⁶ Baty, *Alone in Japan*, 93-94.

their wives. His appointment and arrival in Japan came while the Anglo-Japanese Agreement was still in place, and Japan and England were close wartime allies. Many in the foreign ministry treated him as if he was Counselor to the British Embassy in Japan and there was some confusion initially as to what duties he should perform. Baty became close friends of the Japanese foreign minister, Viscount Ishii Kikujiro. The friendship would continue throughout the 1920s and 1930s when Ishii was Japan's ambassador to Paris and chief delegate to the League of Nations and at the time of the Manchurian Incident when Ishii was a member of the Privy Council and senior advisor of the ministry.¹⁷

From the outset, he was asked to provide opinions on legal cases involving Japan.¹⁸ Baty considered his work to be rather light, being confined to written opinions and office work, but his efforts at conveying the subtle distinctions of Western law when required were highly regarded within the ministry. In all, Baty represented a human resource for the ministry, an expert

¹⁷ According to Baty, his "warm" friendship with the foreign minister of the time, Viscount Ishii Kikujiro, continued even after Ishii ceased to be foreign minister. Ishii is perhaps best known for his role, as special envoy, in negotiating the Ishii-Lansing Agreement of 1917, which secured temporarily U.S. recognition of territorial propinquity as creating special interests for Japan in China. In the 1920s, Ishii served as ambassador to France and as Japan's chief delegate to the League of Nations. At the League, Ishii was given responsibility for assisting in the formulation of the mandate system for the former German colonies. The only instance prior to the Manchurian Incident in which Baty wrote a public legal treatise in support of the Japanese government was to bolster Ishii's stance on the mandate issue. In 1927, Ishii was delegated with Admiral Saito Makoto to represent Japan at the Geneva Naval Disarmament Conference. This would be the only time that Baty would appear overseas on Japan's behalf. Baty went as *komon* or consultant and would remain in the "back office" of the proceedings. He would not attend any of the sessions as either an unofficial observer or adviser. His presence as *komon*, though, testifies to a good working relationship with Ishii. In 1929, Ishii would rise to become a member of the Imperial Privy Council, but his involvement in ministry affairs would continue as an elder statesman as well as president of the League of Nations Association of Japan, not to mention as uncle of the influential, pro-militarist Shiratori Toshio who headed the Information Bureau at the time of the crisis. Ishii's hardline, written opinion on Manchukuo, "the new-born state," and the Manchurian question would be deliberated alongside Baty's memorandum and draft within the ministry in 1932. Baty's early acceptance within the ministry as an integral part of the day to day activities was perhaps due in some measure to his "warm" association with Ishii. As to Baty's reception, see, Baty, *Alone in Japan*, 99, 132-133. On the mandate issue, see League of Nations, *Official Journal*, Reel 1, Nov.-Dec. 1920; League of Nations, *Official Journal*, Reel 6, Aug. 1922, and Baty Thomas, "Protectorates and Mandates," *The British Year Book of International Law*, Vol. 2 (1921-1922), 121. See also Geneva sessions' attendance records in *Nihon gaiko bunsho* [Documents on Japanese Foreign Policy]: *Conference for the Limitation of Naval Armament Held at Geneva from June 20th to August 4, 1927, Special Volume* (Tokyo:Gaimusho, 1982). On Baty's *komon* status, see Jeniva kaigun gunshuku kaigi kankei ikken: Teikoku zenken hokoku [Geneva Conference for the Limitation of Naval Disarmament: Imperial Delegation Report] Diplomatic Record Office of the Ministry of Foreign Affairs, Tokyo, File B.10-4-0-1-9. Also, for Ishii's position on Manchuria, see Teikoku seifu ikensho sakusei ni itaru keika [The Procedure for Making Imperial Government Opinion Paper], Diplomatic Record Office of the Ministry of Foreign Affairs, Tokyo, File A.1-1-0-21-12-2-6-1 or Viscount Ishii K., *Manchoukuo and the Manchurian Question* (Tokyo:League of Nations Association of Japan, 1932). On history of the foreign ministry and the role of Shiratori Toshio, see Michelson, Mark *A Place in the Sun* (Ann Arbor:University Microfilms Int., 1979), 68-74.

¹⁸ Baty, *Alone in Japan*, 99.

whose credentials as an international law specialist were impressive and reassuring.¹⁹ Baty's first book on international law in 1900 was reviewed in the *American Journal of International Law* in a highly complimentary fashion. The reviewer wrote: "This little book is one of the most interesting which has appeared. There is always something particularly vigorous about a book which is based upon a series of lectures and in reading that 'the following studies were originally delivered at Oxford,' one is reminded of Sir Henry Maine's *International Law* which had the same origin."²⁰ The reviewer of his 1909 work on international law appraised it as "a series of brilliant essays" in the *American Political Science Review*. He wrote: "Mr. Baty's book is a contribution to the philosophical aspects of international law; it's thoroughly pleasant reading; and its proposals, if not always practical, are at least suggestive of much thought."²¹ In the book which was published the year prior to taking up his appointment in Japan entitled *War: Its Conduct and Legal Results*, Baty, together with his co-author Professor J.H. Morgan, of University College, London, was said to have provided the world with the first adequate consideration of the full effect of war on the laws of England. The reviewer also remarked that Baty's contribution was "scholarly, authoritative and in many respects brilliant."²² By the year 1916, Baty had written more than ten books. In addition to treatises on international law and maritime law, there were contributions to civil law. Also, his name appeared frequently as a contributor in prestigious journals of world affairs and law.²³

Throughout his extended term as legal adviser, Baty was treated with the highest regard and respect within the ministry, irrespective of the political changes in the government. After all, Japan had an adviser in place who had been offered a professorship in law at Oxford University, but who had opted to serve Japan as Legal Adviser. In 1941, Baty released himself from government service. However, he was allowed to remain in Japan in the house provided by the ministry. Moreover, he was able to move around rather freely because of ministry intervention. He resumed the post after World War II in what would appear to be an honorary capacity shortly before his death in 1954 at the age of 85.²⁴

BATY AND THE EVOLUTION OF JAPAN'S DEFENSE

In 1929, thirteen years after his arrival in Japan and two years prior to the eruption of a Japanese Empire in Manchuria, Baty, while engaging in scholarship on the law of war and peace, set forth what was to become the

¹⁹ *Ibid.*, 92. Uchiyama, *Gendai nihon gaigoshiron*, 179-180.

²⁰ See review by Ellery C. Stowell, *International Law in South Africa* by Thomas Baty, *American Journal of International Law*, vol. 2 (1908), 711.

²¹ See review by C. G. Fenwick, *International Law* by Thomas Baty, *American Political Science Review*, Vol. 4, No. 3 (August 1910), 437.

²² See review by Linsay Rogers, *War: Its Conduct and Legal Results*, by Thomas Baty, *American Political Science Review*, Vol. 9 (1915), 605-608.

²³ Baty, *Alone in Japan*, 194.

²⁴ *Ibid.*, 160-164, 186, 194. Uchiyama, *Gendai nihon gaigoshiron*, 181.

main thrust of Japan's legal case on sovereignty and China. Utilizing this argument on the absence of organized public authority in China, the Japanese government pleaded not guilty before the League on charges of breach of the peace and appealed for world recognition of its Manchurian puppet state. However, on February 24, 1933, the League adopted recommendations that while not explicitly condemning Japan as an aggressor did censure Japan. Japan was called upon to acknowledge the constitution of an autonomous Manchuria under China's sovereignty, to withdraw Japanese troops to the treaty rights area, to enter into negotiations with China to settle the dispute and to accept the international non-recognition of Manchukuo as a sovereign state.

As a result, Japan withdrew from the League. At the time, Baty's "legal" role went unrecognized by the West. Even today, Baty's name is not fully associated with the making of a case that led to Japan's withdrawal from the League. Uchiyama Masakuma has credited Baty with providing the Western veneer of expressive language for Japan's challenge to the League's investigative commission's (Lytton) report in 1932 without acknowledging Baty's work on sovereignty.²⁵ According to Ogata Sadako, Japan's denial of China's sovereignty in its case before the League signified a marked break in the commitment to Pan-Asianism in Japanese thinking, i.e., the idea of two sovereign states, Japan and China, working together to build a new Asia. Although Ogata identified a Western influence, she did not associate a Western adviser with the new China argument.²⁶ According to Ogata, the contention, which took the form that "China was not an organized state," served as "the major diplomatic weapon in answering the world accusation that Japan was, in bringing about the separation of Manchuria, violating her treaty obligations to uphold the administrative integrity of China."²⁷

Ogata dates the debut of the legal weapon to Japan's reply to League criticism on February 23, 1932, wherein Japan declared that it could not continue to treat China as it had by common consent as an "organized people" within the meaning of the League of Nations Covenant."²⁸ This reference by the Japanese government to the covenant pertained to the preamble, not the expository articles. Herein, it was proclaimed that the high contracting parties sought to promote international cooperation and the achievement of international peace in the dealings of organized peoples with one another.²⁹ Although the term "organized peoples" was used, the covenant did not refer to "organized" as synonymous with "political control of territory" nor did it indicate that organized peoples represented an implicit test for the recognition of sovereignty. Japan, nevertheless, found in the preamble latitude for countering the action against it within the League, expounding that "chaos should not be treated as order."³⁰

²⁵ Uchiyama, *Gendai nihon gaigoshiron*, 187-188.

²⁶ Ogata Sadako *Defiance in Manchuria* (Berkeley:University of California Press, 1964), 182.

²⁷ *Ibid.*, 172.

²⁸ *Ibid.*

²⁹ Willoughby, Westel W., *Sino-Japanese Controversy and the League of Nations* (New York:Greenwood Press, 1968), 673.

³⁰ For the official text of the Japanese government's statement, see *Japan Advertiser*, February 24, 1932. On the reaction of the League's members to the Japanese defense of

Inherent in the portrayal of a torn China was a two-pronged defense: 1) Japan was not in violation of the peace machinery or its treaty obligations, i.e., the League Covenant, the Kellogg-Briand (renunciation-of-war) Pact, or the Nine-Power Treaty (the agreement to uphold China's administrative integrity concluded at the Washington Conference of 1922); 2) China was not entitled to the protection of the League. It was the entitlement thrust that caught the attention of the *New York Times* and resulted in a banner headline for Japan's "daring" reply.³¹ Regarding the anomalous state of affairs in China, Japan had countered that the covenant's application to developments in China must be "profoundly modified." Japan held that "instead of a single organized people, we have the various rudimentary nuclei of organization," the inference being that China was without a legal claimant, i.e. a sovereign state, to present a case before the League. The statement continued: "The Japanese Government do not pretend that it is easy to work out the implications and consequences of the situation. It is not easy but it is necessary. We must face the facts; and the fundamental fact is that there is no unified control in China, and no authority which is entitled to claim entire control in China."³²

The development of Japan's position on the absence of an organized and coherent state, in Ogata's assessment, dated back to an undelivered speech prepared for the Japanese delegation to the League on November 14, 1931 by the Ministry of Foreign Affairs. Subsequently, the Japanese delegation proposed on December 30, 1931 that Japan's presentation to the League's investigative committee should be centered on the stand of China as an unorganized people.³³ However, the origin of the defense reaches back to Baty's article on the "Suppression of War" in an establishment British publication, *The Quarterly Review*, in July of 1929 and to Baty's book, *The Canons of International Law* which he was busy preparing for publication at the time of the article. The book would be published in Britain the following year.

In *The Quarterly Review*, Baty's case in Japan's favor, although before the fact, centered on his answer to the question of when is a war not a war. Since in the article he earmarked China as a state where there was patently no government, an expansionist China/Manchuria policy by Japan at the time would not have contradicted his academic conclusions. His well-nurtured international legal axioms would have led him to argue that such action did not constitute an act of war and therefore did not violate the peace machinery or Japan's treaty obligations.³⁴

In the *Canons*, he referred to the Japanese attack on Tsinan in Shantung Province in 1928 to counter the growing influence of Chinese nationalism in the North, specifically, the gains of the Nationalists' Northern Expedition that threatened Japanese interests in Manchuria. His defense of Japanese actions in the *Canons* bears striking similarity to the logic and content of Japan's 1932 reply. Instead of assailing the fiction of Chinese unity, Baty flailed at the

"organized people," see Willoughby, *Sino-Japanese Controversy and the League of Nations*, 245-255.

³¹ *New York Times*, February 24, 1932.

³² *Japan Advertiser*, February 24, 1932.

³³ Ogata, *Defiance in Manchuria*, 234-235.

³⁴ Baty Thomas, "The Suppression of War," *The Quarterly Review*, Vol. 253 (July 1929), 197.

sovereign ghost. He claimed that “only the crowned ghost of an ideal united China was sovereign there.” He continued: “International Law takes no account of ghosts. It doesn’t consider China ‘China’ when ‘China’ is only a memory and an aspiration.” In the *Canons*, Baty categorized China in 1928 as a geographical expression with settled governments in Nanking (the Nationalists) and Mukden (the warlord Chang Tso-lin), with the former attacking the latter. For Baty, the rest of China, including Tsinan, was legally a no-man’s land and Japan had every right to intervene to protect its citizens in the region. He noted that the territory could have been annexed if Japan had so desired.³⁵ His intent was not to defend Japan *per se*, but to use the case of Tsinan to highlight his importance of “canons” in international law. According to Baty, international law should satisfy four canons. It must be simple, embodying only a few broad principles; certain, since it cannot sustain novelty and subtlety; objective, capable of application to facts that are easily ascertained; flexible, suitable to changing times.³⁶ Tsinan represented a telling example of the application of the canon of certainty to identifying a legitimate government. The incident exemplified the difference between an established, though weak government and a movement of hopes, ambitions and recollections. Baty thought it was dangerous for world peace to confuse the two. Weak governments deserved protection; an amorphous mass did not.³⁷

Baty argued in the *Canons* that the state in international law was coterminous with an idea rather than with people, culture or even an indivisible territory. According to Baty, even if a country disregarded its roots and ethnicity or replaced its people, “it would nevertheless certainly remain a state as long as it retained its organization.” It was within this logical framework that Baty set forth the rule of “organized people,” as the test of sovereignty to guide international recognition of the existence of a state. He defined an organized people simply and concisely in the *Canons* as “an assemblage of human beings among whom the will of an ascertainable number habitually prevails.”³⁸ Consequently, Baty’s understanding of the state as an idea is premised on the consciousness of mutual reliance among an assembly of individuals, resulting in the superiority of one set of individuals over others in controlling the affairs of state. As Baty reflected, “in every civilized state, there are some who manage, and some who are managed: and in that simple fact lies the whole essence of sovereignty.”³⁹

Moreover, Baty’s position on the international law of sovereignty was no different in 1929 than it was in 1909. In other words, Baty’s “organized” frame of reference when confronted with the issue of the violation of sovereignty and the existence of aggression in China was based as much on his learning as his position in the Japanese government. When Baty took pen in hand in 1929 to consider international sovereignty in relation to the law of nations in the *Suppression of War*, he was not abandoning the principles upon which he had developed his career to accommodate a Japanophile attitude. Baty had never been inclined to find solutions to war and peace in legislatures,

³⁵ Baty, Thomas *The Canons of International Law* (London:John Murray, 1930), 105.

³⁶ *Ibid.*, 27-29.

³⁷ *Ibid.*, 105.

³⁸ *Ibid.*, 9-10.

³⁹ *Ibid.*, 15.

courts or codes. His international law in the post-World War I period was not in sync with mainstream considerations of sovereignty and war and peace, although like many of his colleagues, he shared a normative interest in the avoidance of another World War. In other words, war was to be eliminated as an instrument of public policy.⁴⁰

The predominant concern of international law at the time, however, was deemed to be the maintenance of peace by means of a league and the articles of a covenant, not by the application of a universal principle of sovereignty. It was expected that “open diplomacy” within an “open forum” would reinforce conformity to a standard of appropriate behavior recognized by the community of states and insure world peace. In this respect, international law experts were expected to concern themselves with the constitutional structure of the League of Nations and concentrate on proposals for “improving and strengthening methods of legal adjudication between states and for making states more civilized or democratic.”⁴¹

However, Baty held fast to a purely state-centric rather than standard of behavior approach. State-centrism had governed the understanding of sovereignty within international law until the appearance of the League, with issues such as whether a state could legitimately invade temporarily the sovereignty of an autonomous state under the guise of “pacific violence.” Baty, in his understanding of the State as an actor, was not so very far removed from the post-World War II realist school of international relations. Baty recognized the nation state as the main actor in international relations and constructed his understanding of international relations based upon the egotistical, aggressive, power-seeking nature of nation states.⁴²

As early as 1909, Baty was wrestling with “national interest” cum realism as the root of the problem in arriving at peace. However, for Baty,

⁴⁰ Long, *Toward a New Liberal Internationalism* (New York:Cambridge University Press, 1996), 306. Quincy Wright, in his report to the international relations committee of the Social Science Research Council, detailed the extensive changes that occurred in the field of international law as a result of WW I. He covered public institutions, the teaching of international law, research, publications, procedures and methods of analysis. Two conditions which he saw as giving rise to the new international law were the general distrust which pervaded international law as a result of the reliance on force and the lack of confidence in its provisions on account of numerous violations during the conflict. See Wright, Quincy *Research in International Law Since the War* (Washington:Carnegie Endowment for International Peace, 1930), 1-2. For a theoretical analysis of the differences between old and new international law, see Kunz, Josef “The Law of Nations, Static and Dynamic,” *The American Journal of International Law*, Vol. 27 (1933), 630-644. The *British Year Book of International Law* which was founded after the war in response to what it saw as a loss of faith in international law, proclaimed international law as a “living force.” The Year Book’s objective was to work for the “firm establishment” of international law as the actual conduct of states in order to achieve under the covenant of the League international peace and security. See introduction in *British Year Book of International Law*, Vol. 1 (1921). One of the founding members of the Year Book in 1931, referred to Baty as “no believer in modern developments of international law.” See review by C. (most likely the initial of Sir Cecil Hurst) of the *Canons of International Law* by Thomas Baty in *British Year Book of International Law*, Vol. 12 (1931), p. 213. For a survey of mainstream considerations, specifically with regard to the Manchurian Incident, see Willoughby, *Sino-Japanese Controversy and the League of Nations*, 542-552.

⁴¹ Long, *Toward a New Liberal Internationalism*, 304.

⁴² *Ibid.*, 305.

national interest was tied to national feeling. He referred to such feeling as a vivid local patriotism, which he would call nationalism. And his answer in breaking free from national interests was quite close to what today is referred to as globalization, involving a variety of transnational actors and international organizations, which would transfer power from the nation to a new polity. His vision in 1909 was to recognize the foolishness of trying to bully the *patria* out of existence. He thought a direct collision with national feeling would only lead to calamity since no one was capable of two supreme passions. In his opinion, it was a gratuitous assumption to think, for example, that a Scotsman's feeling for Scotland could be perfectly compatible with a greater pride in the British Empire.

His strategy was to co-opt the practical interests of human security, of day-to-day life and encapsulate the public in a myriad of federations. In this way, the people's attention would be slowly drawn away from parochial matters and drawn to building bridges with new neighbors across national boundaries. In Baty's words, "the vital organism, based on good understanding, will eat away the dead timbers of the state machine."⁴³ On the nature of federation, he wrote:

...to secure common action within definite limits, common principles of right within wider limits, there must be federations, and federations of federations, each with functions of a known extent which is not seriously questioned or questionable without altering the whole mental attitude of the population concerned. That the world is ready to accept federations based on one or two such simple postulates, such as the permanent value of peace and territorial independence, is scarcely to be doubted. But there is a grave danger in the schemes which are now so actively propounded for World-Federation.⁴⁴

He held that it was imperative to avoid a world government solution in the form of a universal provider of legislation and police. He thought the idea quite dull, arising from the imitation of national sovereignties' peace preservation and justice administration functions within their borders. On such a basis, "the unthinking cry is raised for a world sovereignty of the same imperfect type." He considered it "unthinking" because thinking people should realize: "It is precisely this crude absolutism of the legislatures, of the aristocrats, of the bureaucratic cliques, of the chance majorities, that thinkers in every land are endeavoring to destroy."⁴⁵ In addition, he pondered the practicality of imposing legislation and codes on nations to preserve the peace. To him, codes and statutes had the same effect. Since both were not simple, both had to be interpreted and supplemented. Consequently, states would find ways to circumvent such limitations.⁴⁶ Moreover, in confronting the question of whether nations would accept such international counseling and direction from a universal provider, his answer would always remain: nations would

⁴³ Baty, Thomas *International Law* (New York: Longmans, Green and Co., 1909), 337.

⁴⁴ *Ibid.*, 334.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 9. Baty, "The Suppression of War," 178-179.

“regard the loss of their national character and perfect self-determination as a greater evil than war.”⁴⁷

In 1929, with his idea of federation far from a realization in global society, Baty focused instead on the inviolability of sovereignty in a manner that was in line with his principles of simplicity and certainty, which had continually shaped his thinking on international law. His prescription for the curse of war was not to penalize the warmonger through adjudication or sanctions, but to proclaim any nation that resorted to war as an outlaw. He believed the Kellogg-Briand Treaty to be epoch making because it represented a step in the direction of the effective renunciation of war by all nations. When realized internationally, effective renunciation would turn the united force of the world against the first nation that crosses the borders of another, “with the same energy as that with which neighbors rush to the scene of a conflagration.”⁴⁸

His thinking on absolute inviolability dated back to 1909. Then, he wrote that the “absolute sacredness of a nation’s land is the vital nerve of our present system.”⁴⁹ Other institutes of the Law of Nations could be modified or changed without their demise, in his opinion, but any revision of the law of territorial independence would lead to its dissolution and the production of anarchy. He referred to the folly of “pacific violence” by which sovereignty is invaded under a name other than war. He explained: “the great securities against aggression are the certain risks and losses of war, and the odium which attaches to those who disturb the peace of the world. Once admit that a state can peaceably invade another, in confidence that it will prefer submission to war, and that security dissolves into thin air.”⁵⁰ In a 1908 book review concerning Gladstone’s foreign minister, the Earl of Granville, Baty hailed the resolve of the foreign minister to call a pacific violator an invader. Granville had not allowed an aggressor to obtain overseas access to facilities or materials for its armed forces or to secure employment of troops from other neutrals.⁵¹

However, Baty’s concept of territorial sovereignty was conditional. The grace of sovereignty was not extended to highly dysfunctional political communities such as Japan perceived in China in 1931. The concept was simple and certain, but it was not complete. When Baty posed the questions of when is a nation not a nation and consequently when is violence within external territories permissible, he came up with a loophole for extraneous war. Baty allowed such an exception because in his thinking, international law was the law of states, not communities. For a community to be recognized as a state, it had to live up to certain standards of order (which Baty failed to catalogue, however). This separation of nation and community is evident in the definition he applies to nation in his 1909 book, *International Law*. Baty explained the word nation designated “an organized community.” He explained that restricting the term to race would deprive the word “State” of its only synonym. State, in his thinking, connoted the idea of government

⁴⁷ Baty, “The Suppression of War,” 179.

⁴⁸ *Ibid.*, 182-183.

⁴⁹ Baty, *International Law*, 245.

⁵⁰ *Ibid.*, 249.

⁵¹ Baty Thomas, “The Earl of Granville,” *The Westminster Review*, Vol. 169 (Feb. 1908), 206.

rather than country and therefore, nation meant the country in its organized aspect. The term had little to do historically with the existence of a community of ethnic origins.⁵²

For Baty, who reified the nation-state in one-dimensional form as a viable unit of action, the question of what is a nation or how nationalism developed was superfluous. The important question pertained to when a nation was without a government and in this regard there was no plea allowed for historical traditions, ethnic sentiments, popular desires or financial convenience. A nation that lost its government ceased to be a state and other nations could do as they pleased with its territories provided they observed the dictates of humanity. When new governments appeared in the territories, they should be recognized as the sovereigns of new states. For Baty, even in 1909, no good could come from behaving as though a political vacuum was filled with a united state with rights to be respected and duties to be fulfilled.

In 1915, the year of his appointment as an adviser to Japan, Baty wrote in reference to the revolutionary situation in Mexico that the United States was under no legal obligation to recognize a government based on a coup d'état. His judgment was: "It is not the particular individuals who are within a particular territory at a given time that constitute the State; nor is it even the particular individuals who owe allegiance to it. The State is an idea: it is the organism, and not the population, which is 'recognized' by other Powers. If the organism is overthrown and discarded, it is a new State which claims the recognition of the world."⁵³

At the time, Baty could look to China to offer an example of injustice in terms of the failure of the U.S. to provide immediate recognition of the new Republican regime in 1911. Herein, China served as a positive example of Baty's law. It was not so much that Baty favored or was biased against a particular culture or people, but he was stringent in the application of principles of international law. With regard to his empathy for China's case vis-à-vis the U.S., he wrote: "China, as an organized entity, was already recognized, and a mere voluntary change in the form of Government could not deprive her of her recognized position." Once again, "organized" was what set the legal boundaries between open and sacred lands.⁵⁴

The primary fallacy of Baty's approach was an inflexibility of principle as well as a stress on the presence of an effective governing unit in a territory. Regarding the latter, the effectiveness principle had governed colonial expansion in the pre-World-War I period. In the post-war period, the new international law emphasized an international consensus in legal recognition of sovereignty concomitant with the aim of forestalling territorial aggression through the administration of the procedures established by the covenant of the League.⁵⁵

⁵² Baty, *International Law*, 247.

⁵³ Baty, Thomas "The Mexican Question," *The Contemporary Review*, Vol. 105 (April, 1914), 470-471.

⁵⁴ *Ibid.*, 470.

⁵⁵ On pre-war effectiveness principle, see: Oppenheim L., ed., *The Collected Paper of John Westlake on Public International Law* (Cambridge:Cambridge University Press, 1914), 143; Kunz, "The Law of Nations, Static and Dynamic," 631-635; Wright, *Research in International Law Since the War*, 1-2. Also, see, Brierly, James *The Law of Nationals*, 1936

BATY AS COUNSEL FOR THE DEFENSE

Although Baty nurtured Japan's legal approach within his canons of international law, he was not a political counselor within the Ministry of Foreign Affairs. He had no access to the flow of secret information concerning military movements in Manchuria; he was not privy to strategic political decisions in Japan, or diplomatic exchanges. Such access would have been extremely problematic in any case since his Japanese language was minimal and he was unable to read or write Japanese. He was employed to present legal opinions and draft legal documents. His work was completed within the confines of his office. His job was to create a defense based on his international scholarship and the information at hand. His job was not included in the official regulations governing the structure and operation of the Ministry of Foreign Affairs and his office was not situated within any policy-making division. In fact, he worked in close proximity to the ministry library, facilitating easy access to its resources. His advisory capacity did not extend to meeting with representatives of the League or foreign governments in an official capacity.

Finally, his knowledge of China was superficial. He had no contact with officials in China. His travels in China were confined to port stops during his intermittent journeys to and from Europe on furlough. In all, there are very strong reasons to concur in Baty's own assessment of his official contribution to the Manchurian affair in which he saw himself as an instrument of policy and not a negotiator of developments. In describing his role as foreign legal adviser, he wrote in the 1940s that he had always been "a fly on the carriage wheel." He claimed that "I never was admitted to discussions of policy, or even of legal points: my functions were confined to drafting a document or giving a written opinion on a written case. I do not remember once having an interview on a legal question with the Minister for Foreign Affairs, nor with the Vice-Minister...nor even with a departmental head."⁵⁶

The nature of Baty's role as defense counsel surfaced before Japan found itself embroiled in a full-blown legal contest with the League of Nations. According to Ian Nish, Baty drafted the first two declarations presented before the League.⁵⁷ Uchiyama, also, attests to Baty's role in the drafting of initial declarations.⁵⁸

On September 18, 1931, an explosion three miles south of Mukden damaged some track along Japan's South Manchurian Railway. Japanese railway guards claimed Chinese soldiers were seen fleeing the incident. The Japanese army immediately seized key cities along the line and within three days had occupied Kirin province. China's appeal to the League to intervene to prevent further development of a situation which would endanger the peace of nations resulted in the Ministry of Foreign Affairs availing itself of Baty's written legal skills to fashion a formal reply. Japan's first official declaration to the League read: Japan had "no territorial designs on Manchuria. It only

ed. (Oxford:Clarendon Press, 1949), 122-123; Baty, *The Canons of International Law*, 204-210.

⁵⁶ Baty, *Alone in Japan*, 164.

⁵⁷ Nish, Ian *Japan's Struggle with Internationalism* (London:Kegan Paul, 1993), 69.

⁵⁸ Uchiyama, *Gendai nihon gaigoshiron*, 181-186.

expects that Japanese subjects shall be permitted to enjoy security to engage in their various peaceful pursuits and take part in the development of the land by their capital or labor.” The statement indicated Japan’s readiness to negotiate a settlement of the affair with China.⁵⁹

The second declaration of Oct. 26 was drafted in response to the League resolution calling upon Japan to unilaterally withdraw its troops before the next meeting of the League’s Council on November 16. This resolution put the burden of responsibility for the incident on Japan’s shoulders. Japan rejected the League’s request and detailed the fundamental principles under which it would accept settlement of the dispute. The five points specified were: (1) Mutual repudiation of an aggressive policy; (2) Respect for China’s territorial integrity; (3) End to all organized movement interfering with trade (economic boycotts) and inflaming anti-Japanese feeling; (4) Effective protection of Japanese subjects in Manchuria; and (5) Chinese respect for the treaty rights of Japan in Manchuria.⁶⁰

When Japan had failed to abide by the League’s injunction to withdraw, the League backtracked and concluded that before taking any further action, an inquiry committee should be sent to Asia to ascertain facts. The commission headed by Lord Victor Lytton, of Great Britain would pass four months amassing evidence in Japan, China and Manchuria. When the report was released in October 1932, its findings and recommendations dismissed the core of the Japanese defense set forth in February that China lacked a legitimate government and contradicted many of the subsidiary points made by Japan concerning the development of the situation in Manchuria.

Since Japan was not to be swayed from its insistence on the veracity of its position on the meaning of sovereignty, Baty was asked to provide an opinion and draft a detailed reply. Consequently, Baty’s logic, plus whole paragraphs and pages of Baty’s contribution were incorporated in the document: *The Manchurian Question: Japan’s Case in the Sino-Japanese Dispute as Presented before the League of Nations*.

Baty’s contribution to the formation of “Japan’s Case” consisted of a memorandum on the Lytton report and a “Draft of Observations on the Lytton Report,” (Oct. 12, 1932) plus a revised draft, which followed two days after the original to refine his writing and add some new content. The essence of Japan’s rebuttal would rest on the memorandum. In fact, the first paragraph of the memorandum offered up an unyielding sense of the correctness of Japan’s original argument. It read:

The [Lytton] Report is vitiated throughout by the clinging of its authors to the assumption...that Manchuria was ‘indisputably part of China’. This may be true if we take ‘China’ as a geographical expression. In that sense Great Britain may be said to be ‘indisputably part of Europe’. But the Commissioners make this convenient assumption without attempting to grapple seriously with the contention that ‘China’ in that sense is not an organized State, and that Manchuria never was in truth and in fact governed, whether through the Changs (the warlords Chang Tso-lin and his

⁵⁹ Nish, *Japan’s Struggle with Internationalism*, 69. *New York Times*, September 25, 1931.

⁶⁰ *New York Times*, October 26, 1931.

son and successor Chang Hsueh-liang) or directly, by the government ruling at Nankin.⁶¹

Baty's emphasis in the memorandum was on his axiom of "control" for defining government and its authority.

Although "Japan's Case" included material from the draft of observations written by Eugene Pepin, a relative newcomer of two years, who was Baty's counterpart for Continental Law within the ministry,⁶² the Pepin draft was selectively sourced by the ministry to provide weight for Baty's assault. The ministry took as much from the Pepin draft as it did from Baty's work, but the final product remained consistent with Baty's draft observations and drew heavily upon Baty's reasoning and organization.⁶³

The important first two sections of "Japan's Case" reproduced Baty's brief extensively, however. Chapter I, dealing with conditions in China, attested to the veracity of Japan's position on the failure of China to qualify as an organized state. Japan therefore contested the commission's assertion that Japan's current attitude was at variance with the one taken at the time of the Washington Conference in 1922.⁶⁴ Baty's Japan Case read: (1) "At that time, conditions were certainly not ideal. But there were then only three main rivals in the field. Now there is a whole kaleidoscope." (2) "At the time...it was possible to hope for an early restoration of unity and peace to China, but events have belied that hope. The disunion and anarchy of China have gone from bad to worse." (3) "...it is only unreasoning optimism, or a failure to acquaint oneself with conditions on the spot, which can prompt an observer to detect progress since 1922."

In the following chapter on Manchuria, the Lytton Report's understanding that Manchuria had always been an integral part of China was contested. A published work in French in Baty's possession entitled *La Chine et le Droit International* [China and International Law] written by an adviser to the Nanking government was quoted without translation. The book's author was quoted as maintaining that the dynastic, personal bond tying Manchuria to China's Manchu Dynasty was not replaced by any other bond on the establishment of the Yuan Shih-kai regime in 1912. Included were Baty's remarks that the connection between Manchuria and China was, therefore, "loose and vague," but with the death of Yuan Shih-kai and the "break-up of all unity of government," the momentary ambiguity disappeared

⁶¹ See Baty's Lytton Report memorandum in Archives of the Japanese Ministry of Foreign Affairs [JMFA] 1868-1945 (Washington: Library of Congress Photoduplication Service, 1951), Reel 510. The records in the Library of Congress overlap with and reproduce the *Nihon gaiko bunsho* and the Diplomatic Record Office of the Ministry of Foreign Affairs files on the Manchurian Incident. The Library of Congress, however, contains flow charts for the distribution of information, administrative memos, letters and margin notations, as well as revisions which do not appear in the other sources and which are pertinent to a study of the function of the Office of the Foreign Adviser at the time of the Lytton Commission investigation.

⁶² Gaimusho, ed., *Nihon gaikoshi jiten* [Dictionary of Japanese Diplomacy] (Tokyo: Yamakawa Shupansha, 1992), 916.

⁶³ Uchiyama, *Gendai nihon gaigoshiron*, 192. See Pepin's draft in JMFA, Reel 510.

⁶⁴ See Baty's draft and revised draft in JMFA, Reel 510. Japanese Delegation to the League of Nations, *The Manchurian Question: Japan's Case in the Sino-Japanese Dispute as Presented before the League of Nations* (Geneva: League of Nations, 1933), 16.

to be replaced by the reality of the tyranny of warlord control in Manchuria. Japan's Case then replicated Baty's enumeration of passages in the text of the Lytton Report supporting its argument of the evolutionary linkage between an independent Manchuria and the new state of Manchukuo.⁶⁵

Although diluted by editing and additions, Japan's Case does bear the overall imprint of Baty's caustic style of argumentation. In reviewing Baty's scholarly writing on international law, one of his colleagues took note of Baty's personal idiosyncrasies. He wrote that Baty had a shrewd eye for finding the weak points in his opponent's case, but he allowed himself in the exhilaration of controversy to assume too often a tone of contemptuous arrogance.⁶⁶ It might be said that Baty set the "tone" for Japan's defense. Such an expressive style is also evident in a letter he drafted on his own initiative to be sent to the London *Times* to support Japan's Case. Baty wrote that the "perfervid advocates" of the League in the Manchurian affair should realize that the issue did not pertain to the viability of the peace pact or the covenant, but instead to "preconceived ideas" on the complex question of the constitutional relationship between Manchuria and Nanking. He continued: "Sir Austen Chamberlain's calm assumption that 'Japan is alone against the world' ignores the many skilled observers in England and elsewhere who recognize that Japan as a near neighbour with the experience of centuries is in a unique position for forming a correct judgment upon it."⁶⁷

Baty's drafts of observations, although top secret, were widely circulated among the higher officials of the ministry in view of the importance of the defense. Matsuoka Yosuke, the Chief Delegate at the League of Nations, was so impressed with the substance of Baty's presentation that he requested a translation of Baty's original draft to be used as reference for his final appeal.⁶⁸ In his closing argument, before the League rendered its ruling on February 24, 1933, Matsuoka focused on the lawlessness and disorder in China and declared in a very Baty-like way that it was pure fiction to deal with China as a sovereign state.⁶⁹

The contents, tone and circulation of the drafts raise the question of whether Baty was collaborating with the continental expansionists within the Ministry of Foreign Affairs. However, once again, Baty's description of "the fly on the carriage wheel" appears to be appropriate. The material upon which Baty based his Lytton Report drafts were resources primarily in the public domain. He possessed no understanding of the maneuverings and manipulations of the Kwantung army or its responsibility for the September 18 incident, for which he held China responsible. He was not familiar with current politics in Manchuria. The fact that his initial draft lacked details about the politics leading up to the establishment of Manchukuo prior to the publication of the Lytton Report or the current situation there indicates a lack

⁶⁵ See Baty's draft and revised draft in JMFA, Reel 510. Japanese Delegation to the League of Nations, *The Manchurian Question*, 25-27.

⁶⁶ See review by James Leslie Brierly, "International Law," *The Canons of International Law*, by Thomas Baty, *International Affairs*, Vol. 10 (1931), 403.

⁶⁷ See Baty's drafted letter to the Editor of the *Times*, January, 16, 1933, in JMFA, Reel 499.

⁶⁸ Uchiyama, *Gendai nihon gaigoshiron*, 192.

⁶⁹ Gaimusho, ed., *Nihon gaiko nenpyo narabini shuyo bunsho* [Principal and chronological Japanese diplomatic documents], Vol. 1 (Tokyo:Hara Shobo, 1978), 264-267. Willoughby, *Sino-Japanese Controversy and the League of Nations*, 486-489.

of a formal orientation from within the ministry prior to drafting his observations. It is only in the second draft of two days later that Baty obtained information that would be edited into his final draft and cut and pasted into Japan's Case. This material referred to the Chinese, not Japanese, generals who fostered the movement for the independence of the new state. It also provided background on the establishment of a "Self-Government Guiding Board" organized later to coordinate various independence initiatives, which was described by Baty as being a Manchurian undertaking rather than a tool of the Kwantung army.⁷⁰

CONCLUSION: BATY'S CONTRIBUTION TO DIPLOMACY

Baty's room within the ministry represented an office within an office, a barrister of law's office in the Foreign Office. Here, Baty drafted documents when the ministry had to file an international legal opinion. Since the Manchurian incident was caught up in the niceties of legal issues, the ministry adopted the defense formulated by its barrister. Although Baty's room was figuratively a law office, this does not mean to demean Baty's contribution. Baty's philosophy of peace, order and the unified state took center stage in 1932-1933 at a time when international law was moving on a different axis of recognition of sovereignty, one configured within the context of the appropriate behavior of astute nations rather than guided by canons of law. Baty provided Japan with a logical, legal discourse, but one that ran counter to world thinking on the recognition of sovereignty. Thus, the impression created was that Japan was "an outsider," not inclined to behave in conformity with current standards on the legal dynamics of peace. The expectation was that modern nations should treat the recognition of sovereignty as a progressive and evolutionary instrument of securing a non-divisive community of nations.

Baty was not active as a policymaker, but he was a contributor through his law and his drafts to the radicalization of Japan's policy. One can only speculate what would have been the outcome in the League if a mainstream international law specialist had assumed Baty's post. The legal case set forth would have had to come to terms with legal niceties of treaties and articles. The Japanese government would have been unable to cite Manchuria as a special case wherein such treaties and articles did not apply and less able to portray Japan as a victim of a miscarriage of Western justice.⁷¹ Japan might have found it more difficult or "dishonorable" to withdraw from the League. Whether Japan's withdrawal from the League changed the course of history and represented the first step to World War II has been argued over the years without resolve. In this respect, though, Baty's logic of sovereignty heightened the clear-cut, unclouded "just and necessary" idiom of Japan's

⁷⁰ See Baty's draft and revised draft in JMFA, Reel 510. Japanese Delegation to the League of Nations, *The Manchurian Question*, 50-51.

⁷¹ Young, Louise *Japan's Total Empire* (Berkeley:University of California Press, 1998), 152-155.

resolve in Manchuria and for that matter China. In 1936, in recognition of his contribution to Japanese diplomacy during the League controversy, Baty, who held the Imperial Order of the Sacred Treasure, 3rd grade since 1920 was upgraded to 2nd grade status.