Some Questions of International Law Arising from the Russo-Japanese War, Pt. II

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

II.
The Hay Note and Chinese Neutrality.

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The most important questions which have thus far arisen out of the Russo-Japanese War have been connected with the great problem of maintaining the neutrality and the integrity or "administrative entity" of the Chinese Empire. In order to preserve the integrity and neutrality of China proper, as well as to restrict the area of hostilities as much as possible, Secretary Hay, acting, it is said, at the suggestion of Germany, sent the following instructions to our representatives at St. Petersburg, Tokio, and Peking on February tenth:

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

At the same time all the Powers interested in the fate of China were informed of this action on the part of our Government and invited to take similar action on their part.

The favorable replies which were received from all the Powers would seem to indicate that similar action was taken by them, and the principles embodied in the Hay Note were also accepted by China, Russia and Japan. China at once issued a proclamation of neutrality; but the acceptance of the belligerents, more especially of Russia, was made conditional upon the acceptance of certain provisos which may lead to troublesome complications in the future. In its reply of February nineteenth, the Russian Government signified its willingness to respect the neutrality of China on the following conditions: (1) That China herself "strictly observe all the duties of neutrality"; (2) that the Japanese Government "loyally observe" not only the "engagements entered into with the Powers," but also "the principles generally recognized by the law of nations"; and (3) that "neutralization be in no case extended to Manchuria." Japan on the other hand, in her reply of February thirteenth, merely stipulated that the "region occupied by Russia" be excluded from the neutral area, and that "Russia, making a similar engagement, fulfill in good faith the conditions and terms of such engagement."

It will thus be seen that both Russia and Japan have made their acceptance of the main principle of the Hay Note, viz., the maintenance of the neutrality of China proper, conditional upon its observance by the other belligerent. This is entirely reasonable and proper; but Russia has, in addition, stipulated for a strict observance of the duties of

1 The phrase "administrative entity" is said by some to be ambiguous. It is not really so, for it must mean the integrity of that portion of the Chinese Empire which is actually administered or governed by Chinese officials. It at least includes China proper, i.e., the 18 provinces south of the Great Wall and east of Thibet, and probably Mongolia. Manchuria and Korea are of course excluded.

2 For the texts of these replies, see World's Work for April, 1904.
neutrality on the part of China and of the law of nations on the part of Japan. Inasmuch as numerous disputes regarding neutral rights and obligations as between neutrals and belligerents, as also charges and countercharges of violations of the law of nations between the belligerents themselves, are bound to arise in every war, and inasmuch as each party is its own judge in these matters, it is not difficult to see that we have before us a task of no small magnitude and one which contains possibilities of endless complication and controversy. Pretexts in infinite number and variety will not be wanting, especially to Russia, if she desires to avoid the natural consequences of her engagement.\footnote{The Hay Note is also bound to give rise to important questions of policy and diplomacy; but this is not the place to consider them.} Not only must the conduct of both belligerents be closely scrutinized, but that of China must also be carefully watched.

The term “neutrality,” as applied to China by the Hay Note, appears to have a double meaning. In the first place it means that China is to be “neutralized” during the struggle, \textit{i. e.}, she is not to be permitted to become a party to the war. This might perhaps be called a \textit{temporary}, as opposed to the \textit{permanent} neutralization of Belgium and Switzerland. It is neutralization under a sort of international guarantee of the Powers, although less formal and perhaps less effective than that of Belgium and Switzerland, which was the result of great international treaties. It may, however, prove to be a step in the direction of permanent neutralization. If such guarantees are to prove wholly successful, the guarantors must, of course, be ready and willing to resort to other means than those of “moral suasion” or “pressure of public opinion” in case of necessity. Whether the Powers are prepared to resort to the use of force in case of such necessity in the present instance remains to be seen. The “temporary neutralization” of China might also be compared with other modern tendencies to restrict or “localize” hostilities as much as possible in the interest of the possible or actual belligerents or of neutral commerce, \textit{e. g.}, the practice of pacific blockade and other forms of reprisal, although here the difference is one of kind rather than of degree.

In the second place the maintenance of Chinese neutrality, as implied in the Hay Note, means that hostilities or hostile preparations must not be carried on within the territorial limits of China proper, \textit{i. e.}, in those parts of China administered by Chinese officials. This is, in a sense, merely a guarantee of a right already in existence, \textit{viz.}, of the undoubted right of China to remain neutral, if she so desires, and to have her territorial sovereignty respected during the struggle by both belligerents. The violation of this right by either belligerent would be a gross violation of International Law in itself which it might be the duty of China to resist by force of arms; and, in case China herself were incapable of such an effort, such an attack might be resisted by any State which chose to champion her cause, although such knight-errantry is rare among nations except where their national interests are involved. The right of the Powers to take such measures as may be necessary in order to prevent or to defeat an attack upon the neutrality of China is clear and unquestionable.

It seems to be clearly understood on all sides that Manchuria, or that portion of the Chinese Empire which is administered, in accordance with treaty stipulations, by Russian officials for certain purposes and is actually occupied by Russian troops, shall be exempt from the application of the principles of the Hay Note. This appears to be a case of what has been called “double or ambigu-
ous sovereignty.” In such cases the territories or districts in question owe a nominal allegiance to one sovereign, but are really subject to the commands of another who is in actual possession. It is possible for such a place or region to possess a belligerent and a neutral character at the same time—belligerent in respect to the belligerents and neutrals, and neutral in respect to the nominal sovereign and his relations with other States. “The precise legal position of these territories, is very difficult, and perhaps impossible, to determine.”

One modern publicist, who has carefully examined the question, has come to the conclusion that “a juristic examination of these relations can only lead to negative results; it is a political provisional arrangement in which law and fact are in contradiction to each other.”

The law which should govern in all such anomalous cases is, however, reasonably clear. “The belligerency or neutrality of territory subject to a double sovereignty must be determined for external purposes, upon the analogy of territory under military occupation, by the belligerent or neutral character of the State de facto exercising permanent military control within it. When a place is militarily occupied by an enemy, the fact that it is under his control, and that he consequently can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil. In like manner, but with stronger reason, where sovereignty is double or ambiguous a belligerent must be permitted to fix his attention upon the crude fact of the exercise of power. He must be allowed to deal his enemy blows wherever he finds him in actual military possession, unless that possession has been given him for a specific purpose, such as that of securing internal tranquility, which does not carry with it a right to use the territory for his military objects. On the other hand, where a scintilla of sovereignty is possessed by a belligerent State over territory where it has no real control, an enemy of the State, still fixing his attention on facts, must respect the neutrality with which the territory is practically invested.”

In view of the anomalous position of China in respect to Manchuria, and also because of the vast interests involved and the great danger to the peace of the world which might result from any violation of Chinese neutrality (whether by either or both belligerents or by China herself), it is not surprising that the Press of all countries (and particularly of our own) has shown itself very sensitive to any charges of a violation of the neutrality of China (especially by Russia), and that much has been said by way of criticism and denunciation which is either unjust or impolitic.

Several weeks after the outbreak of the war, Admiral Alexieff issued a somewhat quaint and curious proclamation to the inhabitants of Manchuria, of which there has been much unfair criticism. This manifesto, which contained “six regulations which all must tremblingly obey” (after charging the Japanese with treachery in covertly attacking the Russian fleet while peaceful negotiations were in progress) lays especial stress upon the indissoluble unity of Russian and Chinese interests. He expresses the opinion that “on the principle of mutual connection between the cart-prop and the cart, the duty of China should be to join in attacking and destroying the invader wherever he is encountered;” but, “since China has announced her resolve to remain neutral and to look on with her hands in her sleeves,” Admiral Alex-
ieff contents himself with ordering "every (Chinese?) official in Manchuria" to render the Russian army every possible assistance in obtaining supplies, and in directing all the inhabitants of Manchuria to treat the Russian troops with confidence. He declares that he will hold "all virtuous citizens residing in the neighborhood of Manchurian railways or telegraph or telephone wires responsible for their protection," and that "the official headmen and village elders must unanimously devise means to prevent damage. Should attempts at destruction be made, not only will the offenders be severely punished, but the officials and people of the vicinity who witnessed such attempts will be held responsible." He also threatens severe punishment against any one privily harboring or concealing the Chunchuses or red-bearded brigands of Manchuria. He finally threatens that "if officials or people treat with enmity the Russian army, the Russian Government will assuredly exterminate these persons, showing no mercy."

While the language of this proclamation is certainly somewhat harsh and the penalties prescribed rather severe, they do not seem to go beyond the rights of an invader or a military occupant, nor do they constitute a violation of Chinese neutrality. As has been noted above, Manchuria is not included within the sphere of Chinese neutrality as far as the belligerents in their relations with each other and with neutrals are concerned. The position of Manchuria is one of double or ambiguous sovereignty which is closely analogous to that of a territory or district under military or belligerent occupation.

1 For the text of this curious and interesting proclamation, see the London Times (weekly ed.) for February 26, 1904.

2 It is neutral in respect to the relations between China and other States.

3 On the subject of Military or Belligerent Occupation, see especially Hall, Pt. III., c. 4; Lawrence, Pt. III., c. 4; Halleck, II., pp. 444ff; Bluntschli, Arts. 539-41; Calvo, §§ 2190-98.

such circumstances pillage or mere plunder is strictly forbidden and private property on land is not subject to capture and confiscation; but the invader or military occupant has an undoubted right to levy and collect fines, requisitions, and contributions for strictly military purposes, and he may, if he chooses, make the war support itself. These should, however, be as orderly and as light as possible, and they should not exceed the needs of the troop or the resources of the district in which they are levied. Above all, it should never be forgotten that the fundamental law of warfare is that of reasonable military necessity, and that only so much violence is permitted in war as is necessary for self-protection and the destruction of the enemy's power of resistance. The fact that the Russians expect the Chinese in Manchuria to treat them in a friendly or non-hostile manner, or even that they require them to furnish their army with supplies and carts for purposes of transportation, is no evidence of an intention or a desire to violate Chinese neutrality, as some of our newspapers seem to have regarded it, nor is it a breach of the laws of civilized warfare.

It is said that the Russian minister at Peking has made firm representations to the Chinese Government concerning the activity of the Chinese troops along the Manchurian frontier; that Russia has served notice on China that the latter must not send troops beyond the Great Wall; and that China has been informed that she must use her influence to restrain the Chinese bandits (who are spoken of as partially under the control of Chinese officials) from interfering with the railway and telegraph lines. It is also stated that Russia has notified China that a refusal to heed these warnings will be considered a breach of Chinese neutrality, and that China has received a pointed intimation of the defensive measures which Russia may in that
Some Questions of International Law.

The dispatch of Chinese troops to the Manchuria frontier is not necessarily a menace to Russia, inasmuch as it may have for its object the perfectly legitimate one of protecting the neutral rights of China against possible or probable encroachment. On the other hand the massing of such troops in this quarter in large numbers might, under certain circumstances, be regarded as menacing in its character. In no case could it be regarded as a direct violation of Chinese neutrality. The request that China use her influence to restrain the Chinese bandits in Manchuria as far as possible seems to be a perfectly proper one to make it itself, although, to be sure, it would be absurd for Russia to claim that China can be held responsible for any degree or amount of lawlessness and violence on the part of any portion of the population in Manchuria, or for the attacks of Chinese bandits in that region.

Dispatches from St. Petersburg further declare that Russia has demanded the dismissal of the Japanese military instructors with the Chinese army. Russia's protest on this head would seem to be eminently reasonable and proper and is said to have been tacitly approved by the United States Government.

It is also said that Russia believes or suspects that China has been giving secret aid to the Japanese fleets by allowing them to coal and re-victual in Chinese harbors. So far as our information extends, these charges have been very vague and nonspecific in their character and particular instances have not been cited. If China has permitted any of her ports to be used as a constant and regular base of supplies, whether of coal or of provisions, to the Japanese fleet, she would undoubtedly render herself liable in damages for any injury which might result to Russia. The neutrality regulations of most States, particularly of the United States, are very stringent and explicit with regard to coal. Our Proclamation of Neutrality, issued by President Roosevelt on February eleventh, provides that "No ship of war or privateer of either belligerent shall be permitted, while in any port, harbor, roadstead, or waters within the jurisdiction of the United States to take in any supplies except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel, if without any sail power, to the nearest port of her own country; or in case the vessel is rigged to go under sail, and may also be propelled by steam power, then with half the quantity of coal which she would be entitled to receive, if dependent upon steam alone, and no coal shall be again supplied to any such ship of war or privateer in the same or any other port, harbor, roadstead, or waters of the United States without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within the waters of the United States, unless such ship of war or privateer shall, since last thus supplied, have entered a port of the Government to which she belongs." But it should be borne in mind that the peculiar or particular stringency of our own municipal decrees or regulations regarding our neutral obligations are by no means to be taken as a necessary measure or standard of what is permitted or forbidden by International Law.

There have also been complaints on the part of the Japanese of the sinking of a Japanese coasting steamer near Tain Chin Island, presumably in Chinese waters, and there is said to have been considerable irritation in Japan over the inability of the Chinese Government to compel a Russian gunboat...
to leave Shanghai, as also of their inability or unwillingness to drive the Russians from the region on the west side of the Liao river. 1 We are not sufficiently informed as to the facts in order to pass judgment upon all of these charges, but the sinking of a vessel in Chinese waters by either belligerent would be a gross violation of Chinese neutrality for which ample apology or reparation should at once have been made. The refusal of a Russian war vessel to leave a Chinese port at the request of the Chinese Government would be wholly unwarranted and would constitute a serious breach of Chinese neutrality. But these are questions which, even assuming the facts to be as reported, might easily be settled without a resort to arms. As to the inability of the Chinese to secure the evacuation by Russia of the region west of the Liao river, or to protect that region from a possible Japanese invasion, these are points which require a closer examination and a fuller discussion.

There has been a considerable newspaper controversy in respect to the neutrality of that portion of Manchuria which lies west of the Liao river, and of the treaty-port of Niu-Chwang, an important strategic point east of the Liao river and one of the termini of the Northern China Railway system. It is in this region that China's neutrality has been "subjected to the severest strain and to the closest scrutiny and criticism," as a recent writer in the _Contemporary Review_ predicted would be the case. This region, like the rest of Manchuria, was fully occupied by Russia in consequence of the Boxer uprising in 1900. 3 On April 8, 1902, Russia agreed to a gradual evacuation of Manchuria within eighteen months, and of this particular region within six months, although she reserved to herself the right to guard the Russian railways. According to this treaty, Russia agreed to the "re-establishment of Chinese authority in Manchuria," which was to remain "an integral part of the Chinese Empire," and also consented to "restore to China the right to exercise sovereign and administrative powers." 4 This arrangement, however, never seems to have been fully carried out, owing, as Count Cassini says, 5 to the "failure of China to furnishe the required guarantees." 6

China claims that this region is neutral and has included it in her declaration of neutrality. Russia has, however, declined to respect its neutrality, and has gone so far as to proclaim martial law at Niu-Chwang. She has re-occupied (?) this district and has forbidden China to station troops within its borders. Yet, on the other hand, she has shown a disposition to hold China responsible for the preservation of order in this territory and is said to have intimated that

1 The Russians on their side have suspected China of a willingness to aid the Japanese to land in this region.

2 See article on "The Neutrality of China" by D. C. Bouger in the _Contemporary Review_ for April, 1904.

3 This region had, however, been practically, though not definitely, under Russian control since

4 Art. I. of the treaty. See _Current History_ (XII., pp. 292ff) for June, 1902.

5 See article on "Russia in the Far East" by Count Cassini in _North American Review_ for May, 1904.

6 A portion of the Russian army seems, indeed, to have been withdrawn, but the remainder were simply stationed at important places along the Manchurian railways. The Northern Chinese railway to Niu-Chwang was restored to China. In September, 1903, Russia undertook to restore Niu-Chwang and to evacuate Mukden on Oct. 8, 1903, but this never seems to have been done: for, on Dec. 28, 1904, the Russian Minister at Peking informed the Chinese Foreign Office that "no further steps towards evacuation can be undertaken at present." See _Statesman's Year Book_ for 1904, p. 516.

7 The question mark indicates a doubt as to whether it had ever been really and wholly evacuated.
a landing of Japanese troops on its coast would constitute a violation of Chinese neutrality for which China would be held responsible.

A great outcry was raised by the American Press in consequence of the proclamation of martial law at Niu-Chwang on March twenty-seventh. This outcry was probably aggravated by the indiscreet action of the Russian police authorities in ordering some American (and British) flags on certain private buildings at Niu-Chwang to be hauled down. The Russian authorities seem to have been clearly within their rights in this matter, but they wisely apologized for this action and the flags were restored to their former places upon the representations of the American consul. It was also reported that the foreign consuls at Niu-Chwang were notified that they were no longer to exercise consular jurisdiction and consular functions, especially those of extra-territorial jurisdiction, but this report does not seem to have been confirmed. It seems that certain of their functions, especially those comprehended under the term "extra-territoriality" were merely suspended, and that the foreign consuls are still permitted to exercise such of their duties as are compatible with the execution of martial law. We do not recall that it has been customary to deprive consuls of their ordinary duties in time of war, but it could hardly be expected that they should be permitted to perform such service as would be inconsistent with the operation of military law.

In declaring martial law at Niu-Chwang, as also in occupying the region west of the Liao river with troops, Russia was clearly acting within her rights and was guilty of no violation of neutral rights or of the neutrality of China. This region forms a part of Manchuria which was at least impliedly excepted from the application of the Hay Note, and has been practically in the possession or under the control of Russia since 1900. When Russia chose to "re-occupy" this region with troops and to declare martial law in the early part of the present struggle, all doubts as to its neutrality vanished and it became a part of the field of possible military operations for Japan as well as for Russia; for it would be absurd for Russia to make belligerent use of this territory while claiming any part of it as neutral in respect to Japan.

In conclusion, it may said that at the present date of writing, there have been no serious or well-authenticated cases of the violation of Chinese neutrality, whether on the part of either belligerent or of China herself, which would necessitate the intervention of the Powers or would justify either belligerent in attacking China. Even if such violations have occurred or should occur on the part of China, they ought to be treated with great leniency, especially by Russia, on account of the serious difficulties of China's position and because of her military and administrative weakness. For this weakness and these difficulties Russia is in large measure responsible. Any violation of Chinese neutrality on the part of either belligerent, short of actual invasion of Chinese territory, should be settled by diplomacy or arbitration.

Russia seems to have made such claims in respect to the sea-coast.

Since the above was written Niu-Chwang appears to have been practically abandoned by the Russians, although it does not, at the present date of writing (May 20, 1904), seem as yet to have been occupied by Japanese troops. It will be interesting to notice the policy which the Japanese shall adopt in respect to the neutrality of Niu-Chwang and the region west of the Liao river.

A curious and interesting story has come via London from Peking to the effect that the Russian ministers at Seoul and Peking have been trying to induce China to "take over" Niu-Chwang.

There seems to have been no protest at Washington. Of course if the flag had been removed from the official residence of the consul, the case would have been different. A prompt and ample apology would have been necessary.
The Green Bag.

The purpose of such a proposal on the part of Russia (and we are inclined to credit the story because such methods are highly characteristic of Russian diplomacy), is, of course, obvious. It is intended to embarrass Japan in her future relations with China and the Powers. But, apart from any question as to the ultimate disposition of this territory, Japan could not thus be deprived of her right to the use of this region for military purposes. See editorial in N. Y. Times for May 15th.

There has also been a report, emanating from St. Petersburg, to the effect that the Chinese have tacitly agreed to cooperate with the operations of the Japanese against Russia. The Japanese propose, it is said, to drive General Kuropatkin's forces into Mongolia. This, it is urged, would place the Russians in the position of invaders of Chinese or neutral territory, and would enable General Ma's army to make reprisals, thus cleverly avoiding the infringement of Chinese neutrality by Japan or China. See N. Y. Times for May 16th.

If Russian troops should be driven into Chinese territory, a well-known and indisputable rule of International Law requires that they be interned and kept there at Russia's expense until the close of the war or until exchanged. China has again recently given repeated assurances of her intention to observe all her neutral obligations toward both belligerents. For the recent attacks of Chinese bandits in Manchuria on Russian outposts and coal mines, China can in no wise be held responsible unless they have been inspired or encouraged by the Chinese government.

WON THE JURY.

By Guy H. Holliday,
Of the Boston Bar.

It was in the early days of the Southwest where the juries were apt to be more familiar with Spanish than with English. The case against the prisoner was strong. There was upon the evidence, offered by the district attorney, not a shadow of a doubt that the defendant had stolen the horse, and the cross-examination by his counsel had not helped matters in the least. In spite of all this, however, and the fact that horse-stealing in that region was more serious than murder or robbery, the defendant's counsel, who was something of a student of human nature, as well as learned in the law, managed to win his case. As soon as he had learned from his client the weakness of the defense, he had sought out a Spanish speaking friend and had learned from him four words of Spanish,—"Gentlemen of the jury." He had practised on these until his accent was irreproachable. Then, when the time came for the argument, he arose deliberately and turning to the jury spoke those four words; all the Spanish he knew.

In an instant, the district attorney was on his feet, objecting to the use of Spanish in the argument, that English was the official language of this country, that such an innovation was without precedent, and a great deal more to the same effect. But the defendant's counsel waxed indignant also, and in the most urgent manner showed to the court that this case was of vital importance to the prisoner, that an argument to the jury lost half its force when filtered through an interpreter. Again and again, he shouted that it was the right, not only of the accused, but of the jury to have the argument made in a language that they could understand.

Finally, as he had expected, the court decided against him, and the argument was finished in English. As he had also expected, however, the jury, though unable to understand English well, had got the idea into their heads that he had wanted to address them in Spanish and had not been allowed to do so, and also got the notion that they themselves had in this way suffered a slight, and accordingly, with a fine disregard for the evidence, promptly gave their verdict in favor of the prisoner.