1. Interlocking Discussions: Historical and Legal “Dialogue”

1.1. The Historical Significance of the Dialogue

After his article in *Sekai*, Prof. Yi published an article titled “Only the Treaties for Invasion of Korea were Anomalous: A Reply...
to Prof. Sakamoto's Answer.”¹ Prof. Sakamoto had made an issue of the authenticity of Emperor Kojong’s secret documents that appealed to the nine heads of states for the nullification of the Japanese-Korean Convention. Prof. Yi answered that the emperor’s personal seal on these documents proved their authenticity. To Prof. Sakamoto’s argument that not all treaties and conventions required ratification, Prof. Yi replied that out of the fifty-six treaties and agreements the Japanese government had signed around the turn of the century only Korean-Japanese treaties and agreements lacked ratification. These exchanges constituted a genuine dialogue, by clarifying historical facts and backgrounds. However, Prof. Yi did not reply to Prof. Sakamoto’s main legalistic discussion regarding whether the Convention was signed under duress.

1.2. The Legal Issue in the Dialogue

Profs. Yi and Sakamoto’s discussions raised many legal issues. First, Prof. Sakamoto questioned whether international law of the time had been ready to make a clear distinction between duress to a state representative and duress to the state itself.² He added that those who thought they had been distinguished must provide evidence. He thus placed the burden of proof on Prof. Yi.

Second, the two scholars raised the question of the content of customary international law, particularly with regard to the way it handled treaties signed under duress.

Third, they discussed the so-called Harvard Law School draft’s reference to the Korean-Japanese Convention of 1905 as an example of an invalid treaty. The main question is how the International Law Commission of the United Nations handled this draft.

Fourth, the validity of the old treaties relates to the problem of how we must interpret Article 2 of the current Korean-Japanese treaty, particularly the phrase “already null and void.” The Japanese interpret it to mean the old treaties are invalid “by now” while the Koreans interpret it to mean they “had been invalid from the inception.” This demonstrates the current differences directly linked to differences over the past. In this brief paper, I will discuss mainly the second and third questions mentioned above.

2. How International Law Handled Treaties Signed Under Duress

2.1. The traditional theory of just war in Europe emphasized the significance of free will in signing treaties. However, free will was not required in a “just war,” and forced surrender and treaties were acknowledged in such cases. In an “unjust war,” forced treaties were nullified because free consent was required.\(^3\) This way of thinking was still retained in the second half of the nineteenth century. The following discussion will be based on my understanding of this tradition.

According to Prof. Sakamoto, at the time of the 1905 Korean-Japanese Convention, when war was not really an illegal measure, international law distinguished use of duress to a representative from use of duress to a state. The former was considered invalid while a treaty resulted from the latter valid. He further discussed the distinction between the two cases by referring to L. Oppenheim’s first edition.\(^4\) His main question was

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how international law drew a line between a strong state’s forcing its will upon a weaker state’s official organs, such as those of sovereign or minister, and forcing particular individuals to sign a treaty; a treaty by the former was considered valid while a treaty by the latter invalid. Then, what does “forcing one’s will upon another” or “official organs” mean? How do the two relate to one another?

A sovereign or minister, though they hold an official position, are none other than the very individuals who may be forced into signing treaties, and so forcing them may render treaties invalid. Incidentally, Oppenheim did not refer to “official organs such as a sovereign or minister.” It was W. E. Hall, a scholar of international law active before Oppenheim, who mentioned what was similar to Prof. Sakamoto’s reference. In his International Law, Hall writes, “In international law, force and intimidation are permitted means of obtaining redress for wrongs.”

Although Hall approved of force and intimidation to rectify wrongs in this manner, he insisted on the invalidity of all treaties that resulted from force and intimidation applied against “the person of a sovereign, of a commander, or of any negotiator invested with power to bind his state.” Since the sovereign and negotiator mentioned here can be rephrased as state representatives, we should note that both he and Oppenheim (first edition) mention the representatives in relation to the use of force. If so, Prof. Sakamoto should have referred to the “official organs such as a sovereign and minister” in relation to the use of duress upon representatives. However, he mentioned the “sovereign and minister” when speaking of a strong state forcing its will upon a

5. Sakamoto, *Hogaku ronshu*, p. 342. The underline was not in the original text.
7. Ibid., p. 328.
weak one. Thus, we must investigate what he really meant in his phrase underlined above.

2.2. Oppenheim in his first edition mentioned “the menace of a strong State to a weak State,” just as Prof. Sakamoto spoke of a strong state’s forcing its will upon a weak one. According to Oppenheim:

a. As a treaty will lack binding force without real consent, absolute freedom of action on the part of the contracting parties is required.

b. It must, however, be understood that circumstances of urgent distress, such as either defeat in war or the menace of a strong State to a weak State, are, according to the rules of International Law, not regarded as excluding the freedom of action of a party consenting to the terms of a treaty.

c. The phrase “freedom of action” applies only to the representatives of the contracting States. It is their freedom of action in consenting to a treaty which must not have been interfered with and which must not have been excluded by other causes. A treaty concluded through intimidation exercised against the representatives of either party or concluded by intoxicated or insane representatives is not binding upon the party so represented.”

I have deliberately divided Oppenheim’s discussion into three parts. He focused on C (forcing state representatives) more than on B (forcing the state). Then, when the fourth edition (edited by McNair) of *International Law* came out, Part B was in parenthesis while A and C were left intact. Thus B was treated as an additional explanation instead of part of the main text.

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8. Oppenheim, 1905, p. 525 (italics in the original text).
The eighth edition (edited by Lauterpacht) of Oppenheim’s book summarized and combined Part A and C (section 499) while it restored Part B to the main text. Regarding Part B, it eliminated the phrase “the menace of a strong State to a weak State,” but it newly included the Charter of the United Nations (1945) and the General Treaty for the Renunciation of War (1928) that outlawed war and nullified its resultant treaties. It concurrently mentioned the traditional view that considered war as a justified means for enforcement.\(^\text{10}\)

Oppenheim’s latest edition (edited by Jennings) has two paragraphs regarding this same topic (section 641). The first paragraph discusses free will (A) and explains using force on state representatives by referring to Article 51 of the Treaty of Vienna of 1969 (C). The second paragraph, following the pattern of the Lauterpacht edition, explains the outlawing of war in recent years while it maintains that “military force” is a justified means of enforcement. The expression “the menace of a strong State's to a weak State” was excluded in the Jennings edition just as in the Lauterpacht edition.\(^\text{11}\)

We can see that some of section 499 from the first edition of Oppenheim changed somewhat over time. The change included that of post-World War II international law, which nullified treaties signed under duress to a state or its representatives, whereas previous international law had invalidated only those treaties concluded upon the application of duress to individual representatives.

It is imperative that we read Oppenheim’s first edition according to the pre-W.W.II understanding. We should not attempt to take the contents of the first edition according to our understanding of international law after W.W.II.

What did not change over time is the distinction between duress


to a state (B) and duress to its representatives (C). Representatives have been mentioned only in relation to forcing them, and not with regard to forcing a state (B). Therefore, we must conclude that Prof. Sakamoto’s discussion mistakenly linked the two different issues: “a strong state’s use of duress to force its will upon a weak state” and “official organs such as a sovereign and a minister.”

2.3. Oppenheim never clarified in the first edition what he meant by “the menace of a strong State to a weak State.” We must interpret this phrase by supplying contextual materials.

1) Hall’s discussion is useful in this case:

Treaties concluded through force and intimidation as permitted means of obtaining redress for wrongs are valid. However, violence and intimidation used against the person of a sovereign, of a commander, or of any negotiator invested with power to bind his state are illegal. Accordingly all contracts are void which are made under the influence of personal fear.\(^\text{12}\)

Therefore, although he acknowledged the tradition of validating treaties signed under force and intimidation, he restricted such forcefulness to a means of redressing wrongs.

2) Furthermore, Hall mentions that “[t]here is nonecessary correspondence between the amount of constraint thus put upon the individual and the degree to which one state lies at the mercy of the other.”\(^\text{13}\) Thus, he did not think that a strong state’s forcing a weak state’s representatives would inevitably lead to the former’s manipulation of the latter’s will. As an example, he referred to the Spanish king Ferdinand VII’s abdication in March 1808.

\(^{12}\) Hall, 1890, pp. 325-326.

\(^{13}\) Ibid., p. 326.
When Napoleon invaded Spain, King Carlos IV, who was initially conciliatory, declared that he would abdicate in favor of his son, Ferdinand VII, when he saw popular rebellions. Napoleon pressured Ferdinand with military power and threatened to bring him to trial for treason against his father. Ferdinand consequently decided to return the throne to his father. Then instead of Carlos, Napoleon attempted to install his brother Louis of Holland. Ferdinand was placed under house arrest for six years.¹⁴

Hall observed in connection with Napoleon’s acts that “concessions may be extorted which are wholly unjustified by the general relations between the two countries.”(p. 326). He thus seems to refer to this incident as an example of force and intimidation that could not be justified as being a means to redress wrongs, and invalid due to the physical force applied to a national representative.

3) Georg Grosch also considered Napoleon’s forcing abdication illegal.

(1) Referring to Hall’s discussion of Ferdinand, Grosch agreed with the tradition of nullifying the treaties when force was applied to state representatives. However, he discussed the relationship between a state and its representatives, not dealt with by Oppenheim or Hall. According to Grosch, a state acts through its organs, which are ultimately individuals. Then, is a state representative illegally threatened when he is told that his actions may bring about his nation’s demise? He did not consider this to be an example of forcing a representative, as he believed that use of military force was justifiable in the name of the protection of rights. He said, “International law justifies arrangements made under coercion as they restore the balance once destroyed.” In sum, Grosch, just as Hall, acknowledged the use of military force and intimidation as means to redress wrongs and safeguard rights.

(2) As seen in G. Jellinek, it was commonly accepted by the German school of international law in the nineteenth and twentieth centuries that a state is a legal entity whose will is determined by its organs. Thus, when Grosch said that force used toward a representative was applied to his state itself, his interpretation was nothing new. His reference to state representatives in his analysis of state coercion should not be taken as confusion on his part. He maintained the distinction of two kinds of force just as in Hall and Oppenheim’s first editions.

(3) Prof. Sakamoto questioned the distinction between duress to a representative and duress to the state itself. He referred to Taoka Ryoichi, who shared such questions and criticized conventional views. Yet, Prof. Taoka’s view is not the same as Prof. Sakamoto’s, but rather is similar to Grosch’s, as he simply pointed out that it was difficult to think of intimidation applied directly to a state, completely divorced from intimidation applied to individuals. He never said it was impossible to separate the two.

4) Returning to Oppenheim, his first edition considered defeat in war as well as intimidation by the strong to be justified uses of force. He did not mean any type of war, but rather a just war. Thus, his “menace of a strong State to a weak State” should probably be understood as force and intimidation to redress wrongs, as Hall mentioned. That is to say, in Grosch’s terms, force could be used to protect rights. It will make a fundamental difference whether we interpret the “menace of a strong State to a weak State” to simply mean enforcement as seen in Napoleon’s acts, or to mean a justified act to redress wrongs or secure rights. I suspect that in the second half of the nineteenth century the

15. Grosch, *Zwang im Volkerrecht* (Kokusaiho ni okeru kyosei), 1912, pp. 88-93.
tradition of justifying the strong’s forcing the weak was losing ground, as the view that emphasized the redress of wrongs and securing of rights gained ground. If so, Oppenheim’s “menace” should be understood in this context.

2.4. I have examined the issue of “a sovereign and ministers as official organs” and that of “the strong forcing its will upon the weak.” In sum, the linkage of these two issues, as in Prof. Sakamoto’s article, did not exist at the time the first edition of Oppenheim’s book appeared.

3. Questions surrounding the Harvard Draft

3.1. The “Harvard Draft” refers to a series of draft conventions and comments made by a 1935 Harvard University study group for international law. The draft referred to the Korean-Japanese Convention of 1905 as an example of a treaty considered invalid due to the use of force and duress. Prof. Yi maintained in his article that after the Harvard Draft, in 1963 the United Nations General Assembly recognized the invalidity of the Korean-Japanese Convention. Prof. Sakamoto, however, replied that the final commentary by the International Law Commission of the U.N. regarding use of force to state representatives did not include such contents.

3.2. Article 32, Section 1 in the Harvard Draft states, “[D]uress

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involves the employment of coercion directed against the persons signing a treaty on behalf of a State or against the persons engaged in ratifying or acceding to a treaty on behalf of a State.”

It added in the same section that a treaty, initially signed due to pressure of force, is not to be considered as having been entered into in consequence of duress if it was ratified without use of force. This leads to an interpretation that a treaty may be nullified if a party involved revealed that they signed out of duress. Thus the draft shows a view similar to that of the first and fourth (McNair) editions of Oppenheim and that of Hall. It is also true, as Prof. Sakamoto pointed out, that it introduced the view that treaties forcibly signed by a state under coercion, such as a defeat in war or duress, were void and invalid. This view was clearly a minority view. In sum, the Harvard Draft mentioned the Korean-Japanese Convention as an example of a treaty nullified because of the duress toward [Korean] representatives. The signing of a treaty under duress to the state itself was treated as a separate issue.

3.3. In 1963, the U.N.’s International Law Commission discussed the law of treaties. The “second report on the law of treaties” submitted by the Special Rapporteur Waldock included all the examples raised by the Harvard Draft: the siege of the Polish parliament in 1773; the Korean-Japanese Convention of 1905; the U.S. siege of the Haitian parliament in 1915; and Hitler’s forcing the Czechoslovakian president and foreign minister to sign a treaty reducing Bohemia and Moravia into German protectorates. The report pointed out that Hitler’s duress was a mixture of physical pressure on individuals and threat to the people. He then added that pressure on a state and pressure on its representatives are

fundamentally different although the two were not always easy to distinguish. He treated the two issues in separate articles (Articles 11 and 12).

3.4. Let us take a look at the discussion by the Commission.

1) Because many members noted that pressure on a state and on its representatives are usually combined, the Commission discussed the relationship between the two. Although Verdross voiced that the two could not be theoretically distinguished, for practical reasons the Commission decided to keep the two in separate articles. It then resolved to prohibit both of them, following Waldock’s second report.

2) What examples did the Commission present? Only that of Hitler, but not others raised by the Harvard Draft, such as the Korean-Japanese Convention. Does this indicate that the Commission considered only Hitler’s case as illegal and not other instances of duress applied to representatives, or the illegal combination of duress to individuals and to the people?

No member of the Commission questioned the other cases, and they all accepted the draft by Waldock. Thus, we can naturally assume that the Commission accepted these cases, as well as the case of Hitler, as examples of duress applied toward state representatives. It would be inappropriate to assume that they accepted only Hitler’s case as a viable example.

Accordingly, we cannot accept Prof. Sakamoto’s argument that the International Law Commission of 1966 could not raise appropriate examples of treaties signed under duress save for the case of Hitler. Also unreasonable was the comment made in Japan’s national parliament by Mr. Tanba, the head of the Treaty Department of the Foreign Ministry, that he did not believe international society considered the Korean-Japanese Convention of 1905 to be invalid.

Based on the above explanation of the procedures of the International Law Commission, it is difficult to prove that the
1969 Vienna Convention on the Law of Treaties dismissed all events, other than Hitler’s case, as examples of duress to state representatives. In other words, the Treaty inherited the examples raised by the Commission including the Korean-Japanese Convention. We, therefore, cannot dismiss Prof. Yi’s argument.

3.5. Oppenheim’s description of duress in its eighth (Lauterpacht) and ninth (Jennings) editions reflected the discussions of the International Law Commission. However, it simply separated duress to state representatives from duress to a state and did not reflect upon the Commission’s understanding that the two could not always be separated.

We now know that Prof. Sakamoto’s view that the two are not always separable stems from discussions after W.W.II. He in fact applied recent issues of international law retroactively to the 1905 Convention. For this reason, his pointing out the problem of separating the two to Prof. Yi is unreasonable.

4. Conclusion

4.1. Although Prof. Yi succeeded in his historical examination to a great degree, he did not succeed in engaging in a legalistic dialogue. Then, how successful was Prof. Sakamoto in his legal dialogue?

Because the latter asked for a clarification of the distinction between duress to a representative and duress to a state, I examined the textbooks of international law and history regarding interpretations of this issue. As Prof. Sakamoto once pointed out, we must judge the Convention by the contemporaneous standards of international law, instead of by today’s standards. The following is a summary of my findings:
1) There were two kinds of duress in relation to treaties: duress to a state and duress to its representatives. Each required different circumstances for the treaty to be justified or nullified. In the latter case, the presence of violence or duress to a state representative would nullify the treaty. In the former case, the treaty would be justified if military force and threat to a state was utilized to redress wrongs or to secure rights.

2) Views to link the two did not appear in pre-W.W.II textbooks, although the German studies of international law came close. The relationship between the two was discussed in the International Law Commission following W.W.II.

3) When discussing the Korean-Japanese Convention of 1905, the important issue is not to distinguish the two kinds of duress but to examine the historical facts to see whether either kind of duress existed.

4.2. We now look at the historical facts based on the above.

1) As for duress to representatives, we need to examine the actions and words by Ito Hirobumi and Hayashi Gonsuke toward Emperor Kojong and his ministers as well as the whereabouts of the Japanese military forces to see if violence or duress was present according to Korean and Japanese laws. Ito’s coercion of Kojong into signing the treaty is problematic.\(^{24}\) Also, the Japanese placed Korean ministers under the surveillance of Japanese military police to prevent their escape.\(^{25}\) Ito and General Hasegawa, commander of the Japanese army in Korea, sequestered the Korean ministers in a room for many hours, then stood before them sternly and asked for their opinions one by one.\(^{26}\)

Minister Han wailed aloud, they took him to another room. Ito then whispered, looking at the others, that Han may be killed if he remained stubborn. These well-known episodes adequately illustrate the intense atmosphere present and the way in which the Korean ministers were pressured, obviously with no freedom of action.

2) The next issue is whether Japan was trying to redress wrongs or protect its rights against Korea. If it was, its duress and the resultant treaty may be justified. However, we all know that this was not the case. A comparison of the case of the 1905 Convention to Napoleon’s threat, as described by Hall, is suggestive. In fact, it was Kojong who had to seek the redress of wrongs and the protection of his rights. Meeting with Ito, Kojong criticized the Japanese acts, by referring to the murder of Queen Min, control of the national budget, monopoly of the communication system, and cruelty to the military.

In sum, it is not appropriate to bring up the issue of duress to a state when discussing the validity of the Korean-Japanese Convention. Besides, the old tradition of justifying duress applied by a strong state to a weak state was already phasing out when the Convention was signed.

4.3. When one argues for the validity of the Korean-Japanese Convention of 1905, many unresolved problems begin to surface. Joint studies by Korean and Japanese scholars may generate more fruitful dialogue in the future.

As Prof. Yi suggested, we need to maintain a sincere attitude in examining the past; monetary compensation should not be our primary concern. We must base our studies upon our common desire to uphold truth and correct wrongs.

July 1965, p. 33.