Two years ago, Professor Yi Taejin prompted our discussions of the old treaties between Korea and Japan by arguing that, legally speaking, the annexation never came into being. The surrounding circumstances have dramatically changed since then. The outlook for ending the confrontation between South Korea and North Korea became much brighter after their summit conference took place in June 2000. Consequently, Japan resumed negotiations to open diplomatic relationships with North Korea, and its Prime Minister Mori expressed to the Diet his desire to “resolve historical issues.” (August 1, Upper House).

One of the most important issues of the past concerns the nullification of the annexation treaty of August 1910 and other prior treaties confirmed by Article II of the Korean-Japanese Treaty of 1965. Although it was not clearly expressed in the Article, the two countries disagreed on the timing of nullification. The Koreans maintained that the treaties had never been valid from the time of signing, by challenging the fundamental lawfulness of Japan’s colonial rule over Korea. The Japanese argued that they had been valid until August 15, 1948, when the
Republic of Korea was inaugurated, based on their view that the treaties were signed legally and effectively. If we are sincerely to address and resolve the historical issues that Mori mentioned, we have no choice but to tackle this issue. Our discussions must result in the Japanese government's reconsideration and alteration of its official views.

The two nations signed the Treaty of 1965 without resolving the issue of the legality of the Japanese colonial rule because of the Cold War circumstances at the time. The United States pressured both nations to narrow their differences in the face of the ongoing Vietnam War and expansion of Chinese influence in East Asia. The Korean military regime was willing to compromise because it hoped to utilize Japanese capital to stimulate its stagnant economy. The circumstances have changed since then. We wish to see the reunification of the two Koreas, whose division is the final Cold War confrontation in East Asia, and usher in a new age of peace and co-existence for all nations. We must resolve the past issues to move ahead with new and mature relationships in East Asia in the twenty-first century. I urge the Japanese government to reexamine its past views with courage and honesty and move beyond its past immature relations.

I would like to first discuss the background that led to the thirteen long years of negotiations before the Treaty of 1965 was signed. The primary difficulties between Japan and Korea lay in their perception of each other. The Korean negotiators felt that their Japanese counterparts maintained a superiority complex. On October 15, 1953, when Japan's chief negotiator, Mr. Kubota of the Foreign Ministry, was asked why the Cairo Declaration referred to the “Korean people's state of slavery,” he answered that this expression was used only because of the emotional upheaval during the war. The Korean delegation was naturally offended, and the negotiations broke off as a consequence.

The Allies clarified their objectives in the Cairo Declaration of November 1943. They recognized the cruelty of the Japanese
colonial rule by referring to the “slavery” of the Korean people, and expressed their determination to liberate them. Japan agreed to liberate Korea by referring to the Cairo Declaration in Article VIII of the Potsdam Declaration of 1945. Thus, Japan's acknowledgment of its harsh colonial rule and its acceptance of Korea as an independent nation were integral to its surrender to the Allies, and should have been the foundations for its postwar international relations. Nevertheless, its main negotiator denied this basic understanding in his 1953 statement. Postwar Japanese diplomats not only lacked a fundamental understanding of international law but retained residues of an imperialist mentality.

In 1965, the imperialistic attitude among Japan’s conservative politicians and elite bureaucrats led to their refusal to address and resolve their past colonial rule. In fact, the public also displayed an imperialistic consciousness and did not accept responsibility for the previous colonial rule. The Japanese colonialism had forced other peoples to assimilate into Japanese society in an effort to eliminate those who had a long history of their own. Its legacy still remains as an imperialistic mentality characterized by discrimination and elimination of those who used to be under their colonial rule. See Ian Nish, “Regaining Confidence: Japan after the Loss of Empire,” *Journal of Current History*, vol. 15 (1980), no. 1. This mentality still affects the views and behavior of the general Japanese public today. Even if the imperialistic mentality declined over the years, a superiority complex characterized by discrimination and elimination of foreigners still does exist, particularly toward Koreans and Chinese. This attitude is related to the recent reactionary attempts to recreate national identity with an emphasis on racial homogeneity and superiority toward neighboring nations.

In order to bring closure to these historical relationships, we must first overcome this imperialistic attitude. Otherwise, we cannot expect to see the friendship between the two Koreas and Japan grow and mature. As I mentioned, the negotiations before
the treaty of 1965 obfuscated the conflicting views, postponed legal evaluation of the colonial period, and allowed the Japanese imperialistic views to remain. Such a mistake cannot be repeated in our negotiations with North Korea in the future.

It has been pointed out that legality/illegality of Japan’s rule is closely linked to the issue of indemnity and compensation. If the colonial rule was not legitimate under international law, it was akin to a military occupation, which should require compensation, just like a war indemnity. Such compensation could require an enormous amount. Some members of Japan's Diet admitted that they maintain the legality of the old treaties because they were afraid of a huge compensation demand. Nevertheless, we must offer a sincere apology and an appropriate payment when we admit the injustice of the colonial rule. Calculation of the compensation must be based on the damage imposed. It is the role of politicians to make compromises in the area of payment. Economists may expect the “peace dividend” after the end of the Cold War. Some of them may view the recent prosperity of the U.S. economy as a result of the “peace dividend.”

Although I am aware that the materialistic and financial aspects of the negotiation will draw more attention, I would like to emphasize that our resolving of the past can contribute to Japan’s overcoming its imperialistic consciousness. In April 2000, Tokyo Mayor Ishihara Shintaro made a controversial remark on “the Third World countrymen” when he spoke about a Self Defense Force base. He referred to foreign residents in Japan as if they were potential criminals and requested mobilization of the Self Defense Force in case crimes were committed at times of natural catastrophes. In a later magazine interview, he referred to the massacre of Koreans at the time of the 1923 Tokyo earthquake and expressed his fear that massacre of Japanese by foreigners may take place in the future. He thus encouraged the Japanese public to fear Korean residents. (Ishihara tochiji: Sangokujin hatsugen no nani ga mondai ka, ed., Uchiumi Aiko, Takahashi

Even more disturbing than Ishihara's statements is the mood of the public that supported him. Behind this mood is the imperialistic consciousness, which has been reawakened by Ishihara's words. This consciousness has served as the foundation for the recent popularity of the right wing which promotes expansion of national homogeneity and self-centered nationalism.

We must seek to bring an appropriate closure to the divisions of the past, so that we can overcome the imperialism within ourselves. This closure requires more than the monetary payment that the Japanese government officials have been concerned about. It takes time to change popular attitudes and consciousness. Although previous negotiations did not bring about satisfactory solutions, a new negotiation between North Korea and Japan may force the latter to change quickly. It is my view that our discussion of the legality/illegality of the protectorate and annexation treaties must also take place in this context.

1. Japan’s Observance of International Law and Westernization

As already mentioned, a chief Japanese negotiator demonstrated his lack of understanding of international agreements by negating the intent of the Cairo Declaration. Japanese representatives also showed their general lack of responsibility toward the past colonial rule. Professor Akira Iriye pointed out that Meiji Japan’s leaders
dealt with the revision of treaties and other matters with no ideological background or moral restraint. The lack of philosophy in diplomacy has been a characteristic feature in modern Japan (*Nihon no gaiko: Meiji ishin kara gendai made*, Tokyo: Chuokoron, 1966). Thus, the chief negotiator's lack of moral consciousness in 1953 is a good example of the absence of ideological backing in Japanese diplomacy from the prewar period. Even today, Japan is criticized for not articulating its role in international society and its long-term diplomatic objectives.

Except for the period around the Pacific War, Japan simply sought increased territory, military strength and economic growth in changing international surroundings. This pragmatism is also seen in its acceptance and application of international law. International law was introduced to Japan at the end of the Tokugawa period. The most important aspect of international law to the Japanese government was the law of armed conflict, including the rules governing neutrality. Studies of international law in Japan were focused on the subject of war, particularly around the time of the Sino-Japanese War and the Russo-Japanese War. The national goal at this time was to revise the unequal treaties imposed on Japan by the Western nations. In order to achieve this goal, Japan needed first to demonstrate to them its exemplary observance of modern legal systems. Nagao Ariga, who served as a consultant to the armed forces in the Sino-Japanese War, published a book entitled *The Sino-Japanese War from the Viewpoint of International Law* in French (*La Guerre Sino-Japonaise au point de vue du droit international*). According to the preface of this book, later published in Japanese, its objective was to demonstrate to Western legal scholars that Japanese armed forces observed civilized war regulations despite the fact that its enemies did not. Professor Ariga sought to portray Japan as an exemplary follower of international law.

Ariga worked as an international law expert for the General Staff Office during the Russo-Japanese War. In 1908, he published
another book, *The Russo-Japanese War from the Viewpoint of International Law*, again in French. A few things were added to the Japanese version of this book published later: “consultant to the General Staff Office” as Professor Arigas’s title, a preface by Army General Oku Yasukata, and Prince Kan’in’s calligraphy—“Bunmei senso” (civilization war). There were two international law scholars assigned to each battalion at that time. Six months into the Russo-Japanese War, the October 1904 issue of the newsletter of the Japanese Society of International Law (established in 1897) proudly announced that many members of the association applied their academic studies to the ongoing war, played certain diplomatic roles, or contributed to the war efforts by serving as international law commissioners, investigators of the prisoners of war and informants, etc. The field of international law earned a certain status in Japan through their contributions.

These examples illustrate how international law in Japan developed through dealings by the government, particularly of the military. Consequently, Japan observed international law as long as it needed to please the West by its exemplary “civilized” behavior in the world. On other occasions, however, Japan used international law only as a means to justify its behavior, as a disguise for its variable actions.

In the Sino-Japanese War, Japan’s official objective was to ensure Korea’s independence from China. In reality, it fought with China over dominion of Korea and at the same time demanded that the latter carry out modern reforms. Foreign Minister Mutsu was well aware of this contradiction and thought that the Western powers might interfere with Japan’s dealings with Korea if they found out. He also knew that Japan would be in an extremely difficult position if that happened. He sent a message to the Japanese Minister in Korea saying that Japanese personnel should never violate the confines of international law. He further instructed Japanese officials to refrain from impairing the appearance of Korean independence in order to avoid Western
intervention.

Mutsu’s behavior illustrates that Japan formally maintained Korea’s independence in order to avoid criticism or interference by the Western powers and that its observance of international law was only a tool in this process. Professor Tadashi Tanaka of Daitobunka University pointed out that Japanese leaders thought that they should observe international law in its formal relationship to Korea, but not toward the Korean people. It is true that Japan abided by international law when dealing with superior powers. Yet, it used the same law to conceal its unjustified dominion over less developed nations. Clearly, Japan considered international law not as an ethical code but as a tool (Tanaka Tadashi, “Waga kuni ni okeru sensoho no juyo to jissen” in Kokusaiho, Kokusairengo to Nihon, ed., Onuma Yasuaki, Tokyo: Kobundo, 1987).

By the time World War I broke out, Japan’s double standard was obvious. Although its application of international law toward the Western powers was exemplary, its actions in relation to Asian countries and peoples were opportunistic. This opportunism increased after World War I when it joined the ranks of great powers. The lack of ideology in Japanese diplomacy became apparent as Professor Iriye pointed out.


Japan became a colonizer after the Sino-Japanese War and an imperial power after signing the Anglo-Japanese alliance in 1902. It fulfilled its goal of revising the “unequal treaties.” Its new goal was to expand its sphere of influence with increasing strength. This is the time when Japanese scholars began discussing the status of a “protectorate,” reflecting national interests.
On February 23, 1904, soon after the outbreak of the Russo-Japanese War, Japan forced upon Korea the Protocol, which constituted the first step in Japan’s effort to reduce Korea into its “protectorate.” The Protocol was written to authorize Japan’s interference with Korea’s rights as a state, including its right to military use of strategic locations (Article IV) and its right to arrange agreements on Korea’s behalf with other countries (Article V). In the International Symposium held in Tokyo in July 1993, Professor Unno Fukuju of Meiji University stated that the Protocol’s format and signing procedure were inappropriately simple despite its significant content affecting both Korea and Japan. He said:

Japan handled the agreement as a regulation between the governments with no discussion in the Privy Council or even imperial approval. This is the reason why they called it a “protocol.” In fact, the Vice Chair and fifteen members of the Privy Council reported to the emperor that the foreign minister should be held responsible for acting against Japan’s national constitution.

Concerning important treaties and agreements, the Emperor should seek advice from the Privy Council. The majority of the Council members were appalled by the fact that the Protocol did not go through this procedure. This expediency led to the extremely simple format of the agreement, and the term “protocol” was chosen for this reason. The Council protested against the clash between the contents and the format. The Council members were concerned about domestic procedures only, however, and were not concerned whether international procedures were ignored. The Protocol guaranteed the independence and territorial security of the Great Korean Empire (Article III) in order to please the Western powers. But, in fact, this article was contradicted by the other articles that established Korea’s protectorate status. Japanese scholars by this time no longer took pains to ensure observance of international law even superficially. Scholars were
preoccupied with discussing the status of a “protectorate,” with Korea in their mind, and they tended to discuss this status mostly on expediency and less on principles. This evolution reflected the change in Japan’s position from a nation under unequal treaties to an imperial power.

Imperialism was rampant then. Japanese scholars studied British and French protectorate treaties, not to understand the principles of international law, but to learn strategies for aggressive colonization. They were not particularly interested in whether Japan’s treaties complied with international regulations.

On August 22, 1904, Japan forced the Agreement on Korea in an attempt to place the Korean peninsula under its influence. This treaty marked a watershed in diplomatic relations because it required the Korean government to hire financial and diplomatic officials recommended by the Japanese government. It no longer guaranteed Korea’s independence or territorial security. When the content of the treaty was made public through the Foreign Ministry newsletter on September 5, 1904, the Japanese government published a statement saying that Japan had no choice but to send expert consultants to the Korean government because the Protocol mandated that the former be responsible for the latter’s diplomatic affairs. This was only an excuse (Unno, *Kankoku heigo*, Tokyo: Iwanami shinsho, 1995).

In October 1904, two scholars of international law discussed the status of a “protectorate” in *Kokusaiho zasshi* (Journal of international law). One was Professor Tomitsu Hiroto of Tokyo Imperial University, who compared Korea with Egypt, which was under British military occupation and was in fact ruled by British officials. According to him, Japan placed its officials in Korea following the example of Great Britain. He pointed out that Great Britain was so concerned about Turkey's historical suzerainty over Egypt that Britain’s actions had not transformed Egypt into its colony. He suggested that Japan should annex Korea because Japan would not face any serious challenge from the Western
powers in doing so. Although, at the time of the Sino-Japanese War, Japan did maintain Korea’s independence as a means to justify its actions and prevent interference by others, by the time of the Russo-Japanese War, Japan’s caution completely disappeared.

Another professor of international law at Tokyo Imperial University, Takahashi Sakue, wrote an article entitled, “British scholar’s view of Korea’s status,” in the same issue of Kokusaiho zasshi. He discussed the view by Dr. Lawrence of Cambridge and Greenwich Universities that Korea was clearly not independent because the Protocol of February 27, 1904 gave Japan protectorate rights over Korea. (War and Neutrality in the Far East). Takahashi criticized the cowardly hesitation of Japan’s elder statesmen to colonize Korea, arguing that they were restraining themselves from legally warranted actions. He considered Japan’s colonization of Korea as a legally justifiable act even though it infringed on Japan’s earlier promise of Korea’s independence and territorial security.

Professor Fujita Hisakazu of Kobe University pointed out that a positivist approach characterized Japanese scholarship of international law, represented by Ariga and Takahashi. Positivism, or legal positivism, was a mainstream legal theory in nineteenth-century Europe that valued national actions more than universal or natural laws. Japanese studies of international law developed under the influence of European positivism. Its legal positivism served to justify the nation’s military actions and other aspects of international relations.

3. Formal Treaty and Simplified Treaty

Ariga Nagao’s Hogokogu ron (Discussion of the protectorate,
Tokyo: Waseda shuppan) published in September 1906 summarized contemporaneous scholastic discussions of the Convention between Korea and Japan. He wrote this book to justify the Convention under international law. According to him, this treaty did not require ratification because it was signed in the form of a mutual notification by the Korean Foreign Minister and Japanese Minister in their routine responsibilities. He thus argued that it was not a formal treaty that would require signing by plenipotentiaries and ratification by sovereigns.

How could he argue that such an important agreement could take the form of a simplified notification instead of a formal treaty? The appendix of Nagao’s book lists protectorate treaties between France, on the one hand, and Tahiti (1847), Cambodia (1863 and 1884), Vietnam (1874, 1883, and 1884), Tunisia (1881), and Madagascar (1885), on the other. They all carry articles on ratification. We can see that it was customary for protectorate treaties to require ratification by the standard of international law of the day.

Most Japanese scholars supported this normal requirement of ratification at that time. Terao Toru wrote a short essay titled “questions and answers on treaty ratification” for the October 16, 1905 issue of Kokusaiho zasshi, a month before the Convention was signed. Terao was a professor of Tokyo Imperial University and the authority on international law at the time. He said ratification must follow signing of treaties because a treaty that could affect the nation’s existence, decline, fortune, or misfortune may be rejected in the ratification process. In other words, ratification was necessary as a mechanism for a nation to reject a treaty, which could jeopardize its existence or fundamental welfare. He went on to mention three types of treaties that required ratification: alliance treaties, security treaties, and protectorate treaties. It is only natural that he included protectorate treaties because falling into the status of protectorate is equivalent to a national decline.
Both the common practice and academic studies of international law mandated that significant treaties, such as protectorate treaties, needed to take the form of formal treaties with a ratification required. Nevertheless, Ariga maintained that a simplified treaty form with no ratification was good enough for the Convention to justify legally what had been already done. He commented that a formal treaty and a simplified treaty were both equally enforceable because they both were expressions of an agreement between two governments. According to him, the Convention was valid despite its format. The signatures of the Korean Foreign Minister and the Japanese counterpart provided enough evidence of governmental agreement.

The regulatory approach to international law gave way to opportunism by this time. Ariga raised the example of Egypt, which came under British control by military force with no treaties. He even argued that a protectorate could be established by a fait accompli with no written agreements. To him, the Japan-Korean agreement could be justified and explained as fait accompli.

4. The Issue of Ratification

When the Convention came into being in the fall of 1905, the issue of ratification was discussed passionately as both an academic and a political matter.

On September 5, 1905, the Russo-Japanese Treaty of Peace was signed. On July 29 of the same year, the United States and Japan signed the Taft-Katsura agreement, although it was kept secret until 1926. The second Anglo-Japanese treaty of alliance was made public on September 27, 1905. Of all of these treaties and agreements that documented Japan’s total dominion over Korea,
only the Russo-Japanese Treaty had a ratification clause.

The ratification of the Russo-Japanese Treaty developed into a political issue. On September 5, 1905, as soon as the Japanese public learned that the treaty had no provision for any territorial concession or indemnity, they organized a national rally and decided to block ratification of the treaty. Their decision was sent to the Privy Council as well as to the army stationed in Manchuria. A riot called the “Burning of Hibiya” took place in Tokyo from September 5 to 7. Six professors of international law, including Professors Tomizu Hiroto, Terao Toru, and Nakamura Shingo, submitted a report to the Imperial Household Agency. They demanded nonratification of the treaty by saying, “The right to refuse to ratify is obviously available according to international law. If a national sovereign is always obliged to ratify, there would be no need for a ratification clause. The clause is there to be utilized. (This incident led to the dismissal of Tomizu Hiroto and as well as that of the President of Tokyo Imperial University, which are beyond the scope of this paper.)

Terao Toru published the above-mentioned article in *Kokusaiho zasshi* in October 1905 against this political background. He criticized the government’s position and emphasized the view that a nation could refuse to ratify a treaty if unsatisfied with its terms. These same scholars, however, did not bring up the ratification of the Korean-Japanese Convention as an issue. This omission proves that their arguments based on the principles of international law were presented because of their desire to attack their government rather than because of a neutral analysis. The ratification debate was thus primarily political in nature just as international law as a whole was used to justify Japanese expansion into Korea. Tomizu Hiroto and other scholars, in fact, were known as expansionists, justifying Japan’s annexation of territories.

Scholars also were discussing the absence of a ratification clause in the second Anglo-Japanese treaty. Tachi Sakutaro was the first to deal with this problem in his article “Concerning the absence of
ratification in relation to the format of the new Anglo-Japanese Treaty” in the November 1905 issue of Kokka gakukai zasshi (Journal of study of nations, vol. 19, no. 11). He had just filled the position of professor of diplomatic history and international law in Tokyo Imperial University in the previous year.

Tachi Sakutaro acknowledged that all international treaties must generally be ratified to take effect, even if the treaty contains no formal clause on ratification. Thus, he agreed with the majority view of that time that treaties took effect when ratification was exchanged. The Anglo-Japanese treaty stated without any reservation, however, that it would take effect as soon as the signatures representing the two governments were affixed. If one strictly followed the principle requiring formal ratification, one would have to say that the Anglo-Japanese treaty had not taken effect, despite the signatures and seals by plenipotentiaries. Tachi thought this conclusion was preposterous.

The Anglo-Japanese alliance is a good example of the separation between academic theories and political practices. The difficult task that the Japanese scholars had to tackle with was how to provide an academic justification for the actions of the Foreign Ministry. Some of them came up with the theory of “silent ratification” to fulfill this objective. They argued that the national sovereign’s carrying out of the contents of a treaty was equivalent to ratification, even if no formal ratification procedure took place. Tachi rejected this convenient theory, however, saying that ratification of treaties in international law must always be a clear and distinct act, including the sending of documents signed by national sovereigns.

The first Anglo-Japanese Treaty of 1902 had been signed as a simple agreement without a ratification clause or full powers. Because the background of this treaty is outside the scope of this paper, I simply mention that it was not an ordinary treaty because of the political circumstances of that time. It may be possible to explain the lack of a ratification procedure in the second
Anglo-Japanese Treaty by elaborating on the political circumstances. The important point for our purposes is, however, that the attempt to devise a tortuous theory of “silent ratification” implied certain qualms about dispensing with ratification in concluding such an important treaty.

Tachi Sakutaro expressed his skepticism about the view that treaties were invalid until ratified without discussing this topic any further. Japan became part of the Triple Alliance and prepared for its participation in World War I by signing both the Russo-Japanese Alliance and the French-Japanese Alliance in 1907. These treaties also did not have a ratification clause. By the end of the war in 1918, Tachi changed his attitude and argued that certain treaties could take effect immediately without ratification, as seen in the cases of the Anglo-Japanese alliance, the Russo-Japanese alliance, and the French-Japanese alliance. Further, in 1932, he stated that a treaty without a ratification clause did not need to be ratified to enter into force. He was well aware that many scholars were still convinced of the necessity of ratification even if there was no such mention in the treaties. This change in his writings clearly illustrates that his scholarship developed in close connection with Japan’s political reality. Did he forget the original function of international law to limit and regulate national acts in the international area?

Tachi Sakutaro wrote an article entitled "The Korean-Japanese Convention and the Right to Conclude Treaties." Although he did not discuss the format of the treaty in detail, he wrote the following sentences:

A protectorate is in a transitional state because it will either become independent or become part of the state that made it into a protectorate. In this transitional process, we naturally see many exceptional instances that could not be regulated by legal theories... Although this article is confined by legal theories, political discussions are not.
He placed irregularities concerning a protectorate outside the realm of international law, saying that they were political matters. Irregularities in the Korean-Japanese Convention could not be legally explained, but should be politically handled.

According to Tachi, the Annexation Treaty of 1910 took effect when it was signed by plenipotentiaries because the imperial sanction before signing the treaty signified the intent not to require ratification. He could not legally explain, however, the reason why the treaty avoided ratification procedures and instead mentioned imperial sanctions. He simply mentioned that this structure originated from the political necessities of the time. The reason why he chose not to discuss these aspects of the Convention and the Annexation Treaty may be manifold. It may be that the acts of the Japanese government were so unorthodox that even a Japanese positivist scholar could not defend them. Or, he may have attributed the treaties to political forces because they concerned Korea, not the Western powers that Japan had to deal with legally. After all, Japan treated Asia very differently from the West. In any case, Professor Tachi’s treatment of the treaties amply portray prewar Japan’s practice of international law.

5. Conclusion

We can see in Tachi Sakutaro’s writing examples of Japanese scholarship on international law since the Meiji Restoration. They were characterized by the Japanese-style positivism, and by distinctly different dealings with the West from the dealings with Asia. Tachi’s relationship with the Foreign Ministry began at the time of the Sino-Japanese War when he was a college graduate and it lasted throughout his life. Although his official title at the Ministry was only that of a part-time consultant, he in fact served
as an important expert in international law. His office there had a large sign that read “Dr. Tachi.” His work as a scholar ran from the time of the Russo-Japanese War through the duration of World War II.

The close link between Tachi’s studies and the Foreign Ministry can be seen in the following instances. He argued that the Manchurian Incident was not illegal, despite the existence of the 1928 Kellogg-Briand Pact that prohibited resort to war in international relations, because of the right to self-defense. He also considered Japan’s attack of Pearl Harbor as an act required for self-defense. As for Japan’s bombing of Nanking in 1937, which was denounced by the League of Nations, he said that entire cities, such as Nanking, could rightfully be a target of bombing. In the meantime, the world’s view of international law had been changing since World War I. Moral consciousness returned with the Treaty of Versailles (1919), which called the nations to account for the war and introduced the concept of self-determination. The Kellogg-Briand Anti-War Pact of 1928 declared war to be illegal. The Japanese Foreign Ministry and its associate Tachi continued to insist on old-fashioned positivism, however, rejecting the anti-war view, and justifying Japan’s acts of aggression. In this context, we can hold the Foreign Ministry and scholars of international law accountable for Japan’s invasions and colonial rule.

Although such accountabilities have been mentioned in the field of international law, no criticism has been cast on the Foreign Ministry except on a few pro-German diplomats. Japanese-style positivism seems to influence Japan’s acts in the international arena even today. Japan’s lack of morality among diplomats and the lack of philosophical background in postwar diplomacy, mentioned by Iriye, should be understood in this light. The “international law of the day” is the key phrase in the discussion surrounding Japan’s annexation of Korea. It seems that we have been discussing the issues according to the pre-WWI international
law that was often linked to national interests based on positivism, instead of the post-WWI international law that demonstrated new trends. There is a problem in this approach, however.

International law in the nineteenth century was often centered around positivism that emphasized national necessity rather than universal norms. Yet, a new movement to seek legal norms in international law began to emerge among the Western nations around the turn of the century. The Peace Conferences held in Hague in 1899 and 1907 codified customary laws on land warfare and military acts. The Russian scholar Fyodor F. Martens stated in his preamble to the agreements that even though some areas of war were not covered by these agreements, because of the immature state of international law, all acts by nations and peoples still should be controlled and protected by basic principles of international law stemming from morality and customs existent among civilized nations. He added that this concept must be applied not only in war time but also in peace time. In 1907, the representative of the Korean emperor Kojong sought to appeal to the nations that had gathered in Hague about the illegality of the Protectorate Treaty (the Agreement of 1905). He expected the civilized nations to regulate Japan’s acts based on these same basic principles of morality and custom.

The Nuremberg trial that judged the Nazi criminals after WWII established the categories of “crimes against peace” and “crime against humanity” in addition to the existing war crimes. The defendants opposed the creation of new legal principles to judge old occurrences. The judges rejected this opposition because these new categories simply clarified general standards to be applied to the cases not covered by particular regulations of war, but did not create new crimes. The Martens Clause was cited at that time. Sir Quincy Wright, in his report of the war crime trials as a representative of the Allied War Crime Commission, commented that Fyodor Martens had summarized the essential principle governing the conduct of war, and emphasized its universal
applicability to international law.

The ethical element emerging in international law of the early twentieth century continued to develop through the two world wars. When we discuss the “contemporaneous international law,” we must pay attention to this developmental aspect instead of focusing on the Japanese positivism that justified the nation’s acts.

History is a critical study of the past from the viewpoint of today that develops into the future. If the international law of the past still casts a shadow on the actions of the Japanese government today, it is not appropriate to discuss the legality of that previous international law by separating it from the historical and political context of that time. Of course, the issue of legality constitutes the core of our ongoing discussions for resolving the past. This, in fact, is a very legalistic matter because it is central to the problem of the interpretation of Article II of the Treaty of 1965. It could be resolved by an international tribunal if the two countries agree. But, if the issue must be handled as a historical problem, Japan must first acknowledge the illegality and inappropriateness of its past colonial rule and then consider practical responses, such as apologies and indemnities. We should also overcome the imperialistic consciousness of the past by learning from the failures in the previous reconciliation efforts as soon as records become accessible from the negotiations of 1965.