

not used

Excerpts from "The Case For Manchoukuo"
by George Bronson Rea

The Law of Self-Preservation

Pages 252-257

In 1926, the Cantonese faction in league with Moscow, sent its armies north, conquered the Yangtze region and set up their capital at Hankow. General Chiang Kai-shek, who commanded the Nationalist army, broke away from his comrades and established an anti-Communist Government at Nanking. The Cantonese, the Left Wing leaders, the Reds and Moscow will never forget or forgive this betrayal, just when they had the Powers on the run and all China in their grasp. He won out and gained recognition by the Powers. Chiang must now fight the Communists or go under. The Left Wing and the Reds are pressing him to desert from his anti-Communist drives and turn his guns on Japan. A holy war against Japan was recently proclaimed by the Red leaders in China which clearly foreshadows what we may expect if and when they come into power.

We see Russia entrenched in Mongolia, with strategic railways encircling its western borders and Turkestan. Communism is almost supreme in the heart of China with the possibility that it will overthrow the régime at Nanking. In this event it will turn on Manchoukuo and Japan. The Powers can do nothing to save the situation without first denouncing the Nine Power Treaty, something which China or the American Government will never consent to. The treaty binds Japan to respect its provisions, while Soviet Russia and now Soviet China are permitted all the time necessary to prepare for her undoing. In effect, the treaty has worked out in practice as an alliance between seven great Powers to prohibit Japan from taking steps to defend herself against a menace to her existence that each day grows more alarming.

Russia Given Certes-Blanche

The signatories of the Nine Power Treaty bound themselves not to enter into any agreement, arrangement or understanding with any Power or Powers which would infringe or impair its objects. The treaty does not prohibit any of the contracting parties from entering into an agreement with some non-signatory Power who may have infringed its principles. But the fact that all the signatories have entered into relations with Soviet Russia after she had infringed and impaired this principle, strengthens the argument that Russia was given *certes-Blanche* to do as she pleased in China and that the other Powers will not protest or take concerted action to defend their threatened interests.

Had Russia not been checked in her designs; had she been permitted to carry through her Five and Ten Year Plans with her steel mills in the Altai and munitions plants scattered along the Trans-Siberian Railway, she would by now be in an impregnable position to dominate the whole of Eastern Asia. Faced with this formidable menace to her security, what could Japan do? Was she expected to wait until Russia was ready for the next forward move that would have carried her into Inner Mongolia and flanked her position in South Manchuria? Should Japan have appealed to the Powers for permission to defend herself?

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No nation will surrender its right of self-defense to the decision of another Power. It is the implied condition of every treaty that a state cannot be expected to sacrifice its very existence to uphold its treaty obligations. "A treaty therefore," says Hall, an authority on international law, becomes voidable as soon as it is dangerous to the life or incompatible with the independence of a state, provided that its injurious effects are not intended by the two contracting parties at the time of its conclusion. The rule is logically deducible from the general principle, itself deducible from the primary right of self-preservation, that a state cannot be presumed to have bargained away any part of its international personality unless it had done so in clear and unmistakable terms. Hence, it is an implied condition that the treaty must never, by any change of circumstances, have such an effect.

Any agreement (says Hyde) which purports to do violence to the underlying principles of international law, must to that extent be regarded by the family of nations as internationally invalid. This is none the less true even though the contracting parties are not disposed to make such a claim.

The right of self-preservation is held as a principle which underlies all law, based upon an instinct which is the first law of nature. So sacred is it that to preserve this right, a sovereign State may, in extreme cases of necessity, commit what would ordinarily be an infraction of the law of nations and violate the territorial sovereignty and international rights of another state. Says Rivier:

When a conflict arises between the right of self-preservation of a State and the duty of that State to respect the right of another, the right of self-preservation overrides the duty. *Primum vivere*. A man may be free to sacrifice himself. It is never permitted to a government to sacrifice the State of which the destinies are confided to it. The Government is then authorized, and even in certain circumstances, bound to violate the right of another country or the safety of its own. That is the excuse of necessity, an application of the reason of State. It is a legitimate excuse. . .

The Law of Nations declares that when performance of a treaty becomes self-destructive to the party, the law of self-preservation overrides its obligations, or as Oppenheim puts it:

When, for example, the existence or necessary development of a State stands in unavoidable conflict with such State's treaty obligations, the latter must give way, for self-preservation and development in accordance with the growth and the necessary requirements of the nation are the primary duties of every State.

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Bismarck put it in these words:

All contracts between great states cease to be unconditionally binding as soon as they are tested by the struggle for existence. No great nation will ever be induced to sacrifice its existence on the altar of fidelity to contract when it is compelled to choose between the two. The maxim "ultra posse nemo obligatur" holds good in spite of all treaty formulas whatsoever, nor can any treaty guarantee the degree of zeal and the amount of force that will be devoted to the discharge of obligations when the private interest of those who lie under them no longer reinforces the text and its earliest interpretation.

Or again, as Lord Clarendon wrote in 1854, when there was grave danger to the Christian population of Constantinople as the result of Russia's invasion of the Danubian provinces of Turkey:

When it appears that the lives and properties of British subjects are exposed to serious danger and that the Turkish Government declares itself unable to avert that danger, it is clear that the treaty has no longer a binding force upon us, and that urgent necessity supersedes its provisions.

Captain Edwin F. Glenn, Acting Judge Advocate of the U.S. Army, in his "Handbook of International Law" says that:

When a government is not able to carry out, or will not carry out, its international obligations, and, as a result of this condition, the welfare of a neighboring state is threatened, either by actual attacks on the subjects or by stirring up revolutions or by threatening the neighboring state, the latter may take the necessary steps to preserve its safety, and in such case may resort to war, or such measures short of war as will insure the same result.

Florida and Manchoukuo

He cites in support of this, the action of the United States in regard to Amelia Island, situated in Spanish territory at the mouth of the St. Mary's River in Florida, which had been seized by a band of buccaneers who preyed indiscriminately upon the commerce of the United States and Spain. The Spanish Government not being willing or able to drive them off, and the nuisance being one requiring immediate action, President Monroe in January, 1818, sent a vessel of war to drive them out and destroy their vessels and works.

Instead of pirates, let us say bandits and apply the precedent to Manchoukuo where, only on a much larger scale, the same situation is reproduced. In Manchoukuo, the outlaw leader actually became the government, with huge mercenary armies at his beck and call while the recognized govern-

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ment of China at Nanking was either unable or unwilling to carry out its international obligations. Japan with her army did what the United States did with her navy and while the latter subsequently seized and held Florida pending negotiation for its purchase with Spain, Japan dispersed the bandit armies and made possible the establishment of a government that could preserve law and order and discharge its international obligations.

The parallel goes even further than this. When the American secretary of state, John Quincy Adams, interviewed the Spanish minister, Onis, and the latter asked what were our intentions relative to the occupation of Amelia Island, Mr. Adams replied that this was a mere measure of self-defense and asked what guarantee Onis could give that the freebooters would not again take possession to the annoyance of lawful commerce, if the American troops were removed. Onis said he could give none except a promise to write to the Governor of Havana for troops, but he admitted that, even if sufficient force could there be obtained, six or seven months might elapse before they could be sent to Amelia Island. A continuance of the occupation by the United States was thus rendered unavoidable.

In the same way, there was no guarantee if Japan should withdraw her troops within the railway zone that the bandit armies would cease their depredations and attacks on Japanese subjects and properties throughout Manchuria. There was no Chinese Government that could give such guarantees and there was no disciplined, dependable Chinese army that could have been dispatched from Nanking capable of restoring law and order. Japan had no option other than to continue to occupy the strategic centers pending some solution of the problem....

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滿洲國出現の合理性
ブロンソン・レー著
漢譯

第三編 第三十三章

一九二六年廣東派は「モスコ」に同盟し「北伐軍を起し揚子江地方を征服して漢口に首府を奠めたのである。然るに其の國民黨軍を指揮した蔣介石は戦友と手を分ち南京に反共産黨政府を建てたのである。列國を味方とし蔣に全支那を象徴せんとした際に蔣介石がかゝる裏切行爲に出でたことは廣東派も國民黨の左翼領袖も赤軍も「モスコ」も決して之を忘れず又許さないものである。然し蔣は勝を占め列強の承認を得たのである。故に(1)蔣は共産黨と戦ふか然らざれば自滅するのである。左翼派と赤軍とは蔣に迫つて共産黨討伐を断念し其の優先を日本に向けしめんとして居るのである。支那共産黨の指導者達は最近日本に對する態度を呼號しつつある。是れ明に若し共産黨が支那の天下を取つた場合に如何なる態度に出づるかを示すものである。

吾人は盤西亞が蒙古に蟠居し而も盤西亞の戦略的鐵道が蒙古の國境及新疆

を取廻いて居るのを見るのである。共産主義は支那の心臓部に於て殆んど最優勢のものたらんとして居るのであつて南京政府を制し得る可能性があるのである。南京政府を制せば共産黨の餘弊は滿洲國と日本とに向ふのである。列強は先づ九國條約を廢棄するに非ざれば此の事態を救済する事は出来ないのである。而して九國條約を廢棄することは支那や米國政府の断して承諾しきうもないことである。九國條約は日本を拘束して其の規定を遵守せしめて居るに拘らず「ソヴキエト」露西亞や「ソヴキエト」化した支那は同條約の破壞をなすことを許されて居るのである。事實上九國條約は日本と支那とを除く外余の七ヶ國間に於て日本が自己の存立に關する脅威に對し自衛手段を執ることを禁止せんとする同意たるの作用をなすものである。

而も其の脅威たる日を送ふて行烈になりつゝ、あるのである。九國條約の訓印國は同條約の目的を害する協約、協定、了解は一切之を他國と結ぶことを得ないのである。然し同條約は締約國が他の非訓印國にして同條約の主義を害することあるべき同協約を結ぶことは之を禁止して

居ないのである。乍併九國條約調印國の全部は露西亞が九國條約の主張を破り之に違反した後に至つて始めて露西亞との口交を再開したものであつて此の事實は偶々露西亞は支那に於て其の欲するが儘に振舞ふ氣許を與へられ而も夫れが爲に支那を助けたいの列國は其の利益を擁護するが爲に抗議もしなければ一致の行動も取らないものであると云ふ説に根據を與ふるものである。

故に若し露西亞がその意圖する所に制約を受けず、又其の所謂五年乃至十年計畫を遂行して「アルタイ」山脈地方に鐵道所を設け西比利亞、道沿線に軍需工場を有するに至つて居れば今頃は最早東亞全部を制壓すべき不拔の地位を獲得して居るのである。日本は其の安全に對する此の怖るべき脅威に直視して何を爲し得るのであるか。日本は露西亞が第二の行動を起して内蒙古まで侵入し南滿洲の側面を突くに至るまで靜に待つて居らなければならぬか。將又日本は列強に提訴して自己防衛を爲す許可を求めなければならぬのであるか。

如何なる國家も自己防衛權を放棄して之を他國の決定に委ねる譯はない

國家は條約上の義務を守るが爲に自己の存立を犠牲にする事はざることは如何なる條約にも當然略に含まれて居る條件である。國際法の大家「ホル」は曰く

「條約は國家の生命に危険となり若くは國家の獨立と兩立し難きに至るや否や無効となるのである。但し其の有害なる結果が其の條約締結當時の當事者の豫定する所である場合は此の限でないのである。國家は明瞭にして誤解を生ぜざる條文を以てする場合の外其の國際的人格の一部たりとも之を賣却し得るものと推定し得ないことは一般原則から當然演繹し得る法規である。而して其の（後原）一則なるものは亦自存權なる第一的權利から演繹し得るものである。故に條約は如何に状況に變化があつてもかゝる結果を有つてはならないと云ふことが暗に含まれて居る條件である」

「ハイド」教授は曰く

「國際法の根本原則を破ることを目的とする協定は其の限度に於て國際的に無効であるを認められねばならないのである。假令其の協定の當事者が無効の主張を爲す意志なき場合と雖も眞理たるを失はないのである」

自存權は自然の大法たる本能を基礎とするものであつて一切の法律の根底に於ける原則と認められて居る。故に此の權利を擁護することは神聖なる事業であつて苟も主權國たるものは最緊急の場合には國際法の違反となり又他國の領土主權若くは國際上の權利の侵害になる行爲をも之を行ひ得るのである。

有名なる「リヴァキエ」教授曰く

「國家の自存權と其の國家が他國の權利を奪ふる義務とが衝突した場合には自存權が其義務に優先する個人は自己を犠牲にすることが出来たけれども國家の運命を託されて居る政府には其國家を犠牲にすることは許されないのである。故に政府は他國の權利を侵すことを許さるゝのみならず或場合には之を侵さざるを得ないことがあるのである。然らざれば自國の安全に係つて來るのである。是れ緊急状態に依る救済の場合であつて「國家」の理由」(Reason of State)なる法理の適用である。而して是れ合法的なる原質理由である」

國際法に依れば條約の履行が當事者を毀壞する場合には自存權の法則が其

の義務に優先することになるのである。

「オッペンハイム」教授は次の如く之を説明して居る。曰く

「例へば國家の存立若くは其の必要なる發展及其の國家の條約上の義務と如何にしても衝突を免れざる場合には後者が前歩せねばならないのである。何となれば國家の自存及生長に依る發展並に國家の必需品は各國の對一的義務であるからである」

「ピスマルク」も次の如き言葉を以て此の理を説明して居る。曰く

「大國間の契約は是等の契約が國家存立の因争に試練される、に至るや否や悉く無條件に其の拘束力を失ふものである。如何なる大國も兩者の孰れかの選擇を余儀なくされた場合自國の存立を犠牲にして契約に對する誠實性を示すものはないのである *Nulla in esse tenio obligatur* の格言は契約の形式如何に拘らず一切の條約に有效に行はるゝのである。將又如何なる條約も其の義務の根底を爲す私の利益が侵早其の無文及急速の解釋を援助しなくなつた場合其の義務の履行に對する熱心の程度及勢力の分量を保障することは出来ないのである。」

更に英國外相「クラレンドン」は一八五四年露西亞が土耳其領「ダニユール」地方に侵入し君府に於ける基督教徒に重大なる危険が迫つた際に次の如き訓令を與へて居るのである。曰く「英國臣民の生命財産が重大なる危険に類し而も土耳其政府が其の危険を排除する力なきことを證明せる以上條約は最早其の拘束力を失ひ緊急の必要は條約規定に超越するに至ること明白である」。

米國陸軍の法務官「エドウキン・グレン」大尉 (Captain Edwin E. Glenn)

は其の著「國際法提要」(Handbook of International Law)の中に曰く

(7)

「或政府が國際上の義務を實行し能はざるが若しくは實行することを欲せざる結果として隣國の福祉が其の臣民に對する現實の攻撃、革命の煽動若しくは國家に對する脅威に由つて脅かされた場合其の隣國は自己の安全を擁護するが爲に必要な措置を執ることが出来る而して戰爭に訴へ若しくは戰爭に至らざる手段に依つて同一結果を確保し得るのである」。

而して「グレン」大尉は右の所論を支持する爲「フロリダ」州の「セントメリー」河の河口に在る西班牙領「アメリカ」島に對する米國政府の態度

を援用して居るのである。即ち同島が海賊に占領されその海賊が米西兩國の通商に對して無差別に掠奪を行ふに拘らず西班牙政府は是等不逞の徒を放逐する意思もなければ能力もなかつたのみならず而も其の不法行為は急速の處置を要するものであつたが爲に米國大統領「モンロー」は一八一八年一月軍艦一隻を派遣して之を放逐し彼等海賊の船隻及工作物を破壊したのである。

海賊なる語に代ふるに匪賊なる語を以てし而して後此の先例を滿洲國に適用せよ。然らば同一の状態が唯規模を大にして行はれて居るのみを知るのである。否滿洲國では其の不逞の徒自身が政府を構て巨大なる傭兵軍隊を擁し而も南京に於ける列國の承認した政府は國際上の義務を履行する能力もなければ意思もないのである。米國が海軍を以て遣つたことを日本は陸軍を以て遣つた丈けのことである。其の後米國は「フロリダ」を西班牙から買取る談判中之を占領、保有したのであるけれども日本は匪賊的軍隊を追放し法律と秩序とを維持し國際上の義務を履行するに足る政府の建設を可成ならしめたのである。

洲國と「フロリダ」この比較は更に一步を進め待るのである。米國國
 務卿「ジョン・キンシー・アダムス」が西班牙公使「オニス」と會談の
 際「オニス」公使から「アメリヤ」島の占領に關する米國政府の意向を
 尋ねた所「アダムス」國務卿は之に對し右は單なる自衛手段に過ぎずと
 答ふると同時に逆に「オニス」公使に對し若し米國軍隊が撤退する時合
 再び不逞の徒が同島を占領して通商の妨害を爲さざるよう如何なる保障
 を與へ得るかと尋ねたのである。
 是に對し「オニス」公使は「ハバナ」の總督に書面を送つて軍隊の派遣
 を乞ふ以外の約束は出來ないのみならず假令十分なる軍隊を派遣し得る
 としても「アメリヤ」島に到着するまでは六、七ヶ月を要すと答へた
 のである。仍て米國が同島の占領を繼續する事は避くべからざること、
 なつたのである。

右と同様に假令日本軍隊が鐵道附屬地内に撤退しても匪賊的軍隊が滿洲
 各地に在住する日本人の生命及財産に對する掠奪及攻撃を息めると云ふ
 保障はないのである。かゝる保障を與へ得る支那政府も存在せず又南京

から派遣して滿洲の治安を回復し得る訓練と信頼とを有する支那軍隊もないのである。故に日本としては問題が何等かの形勢が付くまで戰略的中心點を引續き占領するの外途ぶべき途はないのである。