ARTICLE 3 OF THE HAGUE CONVENTION (IV) RESPECTING THE LAWS AND CUSTOMS OF
WAR ON LAND, 1907, AND THE RIGHT OF INDIVIDUAL PERSONS TO CLAIM COMPENSATION
FOR THE ACTS OF MEMBERS OF ARMED FORCES

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On the request of counsel for plaintiffs, I write the present expert opinion in comment
on decisions rendered by Civil Divisions of the Tokyo District Court in cases concerning
Philippine former 'comfort women' (6 October 1998), former prisoners of war and
civilian detainees of the ex-Allied Powers (26 November 1998), and former prisoners of
war and civilian detainees of The Netherlands (30 November 1998). To that end,
relevant parts of the decisions, translated into English, were made available to me.

In writing this opinion, I shall not repeat what was included in my opinion of 5
February 1997, submitted to the aforementioned Divisions of the District Court. I
welcome this opportunity to clarify what may have been insufficiently clear in the earlier
opinion and to take up certain points made by the defendant or by the Divisions as
reflected in their decisions.

I may note at the outset that it appears to be common ground that the plaintiffs in
each of these cases have been the victims of wrongful acts committed by members of
the Japanese armed forces in the course of the Second World War. It is also common
ground that at the time of that war, Japan was a party to the Hague Convention (IV) of
1907 Respecting the Laws and Customs of War on Land (hereinafter: the Convention),
with the annexed Regulations Respecting the Laws and Customs of War on Land
(hereinafter: the Regulations). Japan was therefore bound by Article 3 of the Conven-
tion as a provision of treaty law.
The 1907 Convention and Regulations are in large part a reaffirmation of the provisions of the 1899 Hague Convention (II) and Regulations under the same title. Article 3 of the 1907 Convention was however a new addition to the treaty text. This means that the provisions of this Article acquired binding force as treaty obligations only with the ratification of the Convention by each State and as from the date of its ratification. For Japan, this date was 13 December 1911. Japan has remained bound by Article 3 as a treaty provision ever since.

Before 1907, the rule of Article 3 was not part of customary international law

The question has been raised whether the rule laid down in Article 3 did already belong to the body of customary international law prior to its adoption in 1907, or whether it acquired that character after that date. The answer to the first part of the question may be negative, given the lack of information evidencing that prior to 1907, States parties to armed conflicts considered themselves legally bound as a matter of international law to act in conformity with these rules. That they did occasionally follow the practice that subsequently became the rule of Article 3, may however safely be assumed, since the idea of immediate compensation for damage done is not all that far-fetched. An instance of the practice may be seen in an episode described in the book by Sakuyé Takahashi, *International Law Applied to the Russo-Japanese War*, American edition (1908). Discussing the question of private property of Chinese inhabitants of Port Arthur, the author relates the following (p. 264):

Some soldiers of the Twelfth Division one day accidentally burned down three dwelling houses. The authorities of the Japanese Army considered the damage thus sustained as a matter of course to be indemnified, and paid a reasonable sum in recompense to those who suffered from it.
This episode obviously provides just a single example and is far from being enough to establish 'a practice recognised as law.' It is, on the other hand, of interest because it demonstrates several aspects of relevance in the present context:

1. The destruction of the houses was an act committed by soldiers of the Japanese armed forces and, even though accidental, amounted to a violation of the rule on respect of private property, laid down in Article 46 of the Regulations of 1899 (reaffirmed in Article 46 of the Regulations of 1907).

2. The 'authorities of the Japanese Army' regarded it as quite natural ('a matter of course') that Japan should indemnify the individual victims for their losses.

3. Since the Japanese Army was an organ of the State, the payment of compensation by the Army authorities amounted to an indemnification by the Japanese State.

4. Payment was effected by these authorities without any need for the victims to submit their claims to any (Japanese or other) judicial body first.

5. As implicit already in the previous point, the settlement of the matter came about as-it-were on the domestic level, between the victims as members of the occupied population and the Japanese military authorities as representatives of the occupying State: the matter was never brought up to the international level as an affair between Japan and the State of which the victims were nationals, nor do the Japanese military authorities appear to have considered the possibility of making the payment in compensation to that State rather than to the victims.

Once again, the episode does not by a long way prove that payment of compensation for damage sustained by individual persons as a result of wrongful acts of war was recognised as required by existing customary international law. It does show, on the other hand, that the notion of payment of such compensation by the military authorities
directly to the victims was not totally strange at the time. The proposal introduced by the German delegate at the Second Hague Peace Conference of 1907, for inclusion of a provision dealing with this matter, may therefore not have seemed such a very odd suggestion. It should be emphasised that neither this delegate nor any of his colleagues ever suggested that the proposed provision qualified as a pre-existing rule of customary international law. What the German delegate did explain, and what was quite obvious to his colleagues, was that the proposed provision reflected a legal principle embedded since time immemorial in the systems of domestic law they were acquainted with.

Article 3 is a rule of treaty law, which has also come to be recognised as a rule of customary law.

The second half of the question asked above, whether Article 3 had perhaps acquired the status of customary international law sometime after its adoption in 1907, may be answered by noting that Article 3 forms part of the 1907 Convention and Regulations. This whole block of rules and principles has been recognised as customary law, first, by the post-World War Two International Military Tribunals of Nuremberg and Tokyo. A recent reaffirmation of this recognition is found in the report the Secretary-General of the United Nations submitted in 1994 to the Security Council about the establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (S/25704). In his comment on the proposed Article 3 (Violations of the laws and customs of war), the Secretary-General writes (par. 41):

The 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto comprise a second important area of conventional humanitarian international law which has become part of the body of international customary law.
Some might perhaps wish to query whether Article 3, taken by itself, could have collected sufficient practice and *opinio juris* to be regarded as a rule of customary law. While I shall discuss practice in the application of Article 3 of the Convention further down in this Opinion, I emphasise here that the question as posed here is largely irrelevant since the binding force of Article 3 does not depend on its being, in the terms of the Secretary-General, 'part of the body of international customary law' but rests on its being a provision of 'conventional humanitarian international law.' I shall therefore treat the rule of Article 3 as a treaty rule first and foremost.

For easy reading of the present opinion, I may repeat here the text of Article 3, in the original French and in its English translation:

La Partie belligérante qui violerait les dispositions du dit Règlement sera tenue à indemnité, s'il y a lieu. Elle sera responsable de tous actes commis par les personnes faisant partie de sa force armée.

A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

*Interpretation of Article 3 as a treaty provision*

Translated into modern terms, Article 3 provides, in the first sentence, that a State party to an international armed conflict is liable, 'if the case demands,' to pay compensation for violations of the Regulations. The second sentence adds that its responsibility extends over *all* acts committed by members of its armed forces – thus suggesting, as is indeed plausible, that the first sentence concerns the same category of acts committed by members of its armed forces.

While this may be clear, the problem is that the text of Article 3 does not specify in relation to whom compensation is due and responsibility arises. In my article, 'State
Responsibility for Warlike Acts of the Armed Forces," published in Vol. 40 of the *International and Comparative Law Quarterly* (1991), p. 827 et seq., I have argued on the basis of my enquiry into the drafting history of Article 3, that the purpose of its proponents was from the outset to enable individual persons, victims of acts in violation of the Regulations, to obtain compensation for the damage or losses they suffered as a result of the acts. If someone might doubt that the statements of the various delegates participating in the discussion of the proposal at the Conference of 1907 show this with sufficient clarity, it should suffice to recall that the initial German proposal suggested payment of compensation to neutral persons directly, during the armed conflict. Only in relation to persons of enemy nationality was it proposed to postpone the payment until after the war – a proposal that was straight away rejected by the Conference.

I simply fail to understand how one could explain this episode other than by recognising that the original idea was to provide for (direct or postponed) payment to individual persons; or, in other words, to make the State party to the conflict liable to pay compensation to those persons; or, again in other words, to give those persons a right to such compensation. And nothing suggests that this original idea was abandoned in the course of the proceedings.

All of this is however a matter of historical interpretation: of finding the original idea behind Article 3 and the meaning the drafters of 1907 embedded in the text. Historical interpretation is obviously only one method, mentioned in Article 32 of the Vienna Convention on the Law of Treaties (1969) as a ‘supplementary means of interpretation.’ Article 31, par. 1, of this Convention describes what is indicated as ‘general rule of interpretation:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
The circumstances under which recourse to the drafting history of a treaty text would be permitted are described in Article 32 as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

leaves the meaning ambiguous or obscure; or
leads to a result which is manifestly absurd or unreasonable.

With respect to these provisions it deserves to be emphasised, first, that they are the outcome of a hard-fought compromise, with many participants at the negotiating table preferring the reverse order, giving precedence to the drafting history of a treaty; secondly, that a most authoritative body like the International Court of Justice never hesitates to delve into the history of a treaty provision whenever the need for interpretation arises.

In the case at issue, my curiosity has led me to look into the drafting history of Article 3 in the first place, and with what I consider to be fairly clear results. I shall now proceed to apply the method proposed in Article 31 of the Vienna Convention, which has also been followed in the Decisions under review. I emphasise however that in doing this I see no conceivable reason to disregard what history so clearly indicates. I shall therefore continue to discuss Article 3 with these historical facts in mind.

The 'ordinary meaning' of Article 3

Reading the text of Article 3 with an eye solely to the ordinary meaning of its words, one can conclude no more than what was set forth above: a State party to an international armed conflict is responsible, and, depending on the case, liable to pay compensation, for all acts of its armed forces that violate the Regulations. Taken by itself, the
text has nothing more to tell us. In particular, there is nothing in it that might permit the additional conclusions that only States have a right to submit claims for compensation or that individuals have no such right.

The 'context' of Article 3

The context of Article 3 is provided by the Convention with its annexed Regulations. These are treaty texts designed to be applied, for the most part, in time of international armed conflict. The events Article 3 is concerned with are acts, committed by members of the armed forces of a State party to the conflict, that are alleged to constitute violations of the Regulations, and for which compensation is claimed. Reading the Article in context it may be inferred that the claim for compensation arises from damage or injury incurred as a result of the acts.

While in some situations the direct victim of the acts may be an (enemy or neutral) State, we are concerned here with cases of damage or injury suffered by individual persons (who likewise may be of enemy or neutral nationality). For practical reasons, I shall indicate these cases as 'torts', and the State against which compensation is claimed, as the 'responsible State'. The question is whether the context of Article 3 leads to any firm conclusions about who is entitled to claim compensation for these torts. Given the silence of the Article, there are two possibilities to consider: the right may lie with the victim of the tort, or with the national State of the victim (hereafter: 'the national State').

It deserves to be emphasised here that in my view, the act of claiming compensation is a legal act, based on a legal right to do so. The claimant is the subject of the right, which arises out of the tort. If the national State is the subject of the right to claim compensation, the victim cannot be a claimant as well but is reduced to the position of a complainant, that is, a person who can merely address a complaint about the tort to the proper authorities of the national State.
The difficulties attending this construction with the national State as sole claimant are obvious. As a practical problem, the victim may often be unable to contact the proper authorities of his national State, perhaps for as long as the armed conflict lasts. Another, more fundamental obstacle confronting the victim in the role of 'complainant' is the total freedom of the national State whether to act on the complaint or not. It is under no obligation whatsoever to take up individual complaints, and its decision will hinge on considerations of international relations and other policy factors which are completely unrelated to the underlying cause of the complaint and the interests of the victim.

Yet another, rather absurd consequence of the above construction occurs when the victim might actually have been in a position to submit his case directly to the authorities of the responsible State, for instance, when soldiers of the occupation forces accidentally burned down his house. His lack of a right to claim compensation precludes him from doing this, and his only option remains to seek the first opportunity to send a complaint to the authorities of the national State.

Considering now the alternative possibility, with the individual victim as subject of the right to bring his own claim, the practical difficulties may again be considerable, whether the case is pursued during or after the armed conflict. The fundamental difference is however that this time, the victim is the master of his own fate and is not wholly dependent on policy decisions by authorities he has no influence on and to whom his interests are at best one minor factor among the many factors they have to take into account.

Another matter is that in this assumption, individual victims may voluntarily choose to pass their claims on to the national State, which then pursues the claims as mandatory. The initiative for this course of action may actually lie with the authorities of the national State, out of a desire to facilitate the treatment of a large number of
individual claims. The national State is moreover capable of pursuing the claims on a
different level than is available to the individual victims. It may seek a solution through
diplomatic channels or, indeed, through international arbitration or other non-violent
means of inter-State conflict resolution. It is worthy of note that acting in this manner,
the national State arguably exercises its right, inherent in Article 3 as a treaty provision,
to ensure that the Article is ‘respected’ and victims are duly compensated. This right of
the State exists independent of the right to claim of the individual victims.

In sum, interpretation of Article 3 as a treaty provision in the context of the other
provisions of the Convention and Regulations still leaves us with two different possibil-
ities. One construction accords the national State of the victim the exclusive right to
pursue claims for compensation based on violations of the Regulations. The
fundamental drawback of this system, apart from its considerable practical difficulties,
is that the decision whether or not to pursue a claim is bound to depend on
considerations wholly disconnected from the grounds underlying the complaint. The
absurd consequence may even be that a victim is precluded from claiming
compensation in a situation where he would have been perfectly capable to do so
himself.

Under the other construction, individual victims are themselves entitled to bring their
claims against the responsible State. This may be very difficult in practice. The
essential point is however that the protection of their legal interests remains their own
concern and is not made subject to considerations of foreign policy and similar factors.
The possibility remains for the victims to mandate the national State to pursue their
claims on the diplomatic level. Apart from acting as mandatary for the claimant, the
national State may be said to exercise its own right to ‘ensure respect’ for Article 3.

Thus, while interpretation of Article 3 in its context has elucidated certain features of
Article 3, it has not led to a clear answer to the question of who has the right to claim
compensation for the damage or injury resulting from acts in violation of the Regulations.

The 'object and purpose' of the Convention

It remains to examine whether interpretation of Article 3 in the light of the 'object and purpose' of the Convention may lead us out of the present predicament.

The direct 'object and purpose' of the Convention is doubtless to ensure that identical Regulations for the conduct of land warfare are in force in all the countries accepting the Convention and thus guarantee a common practice in the conduct of war. Yet, looking closer at the Convention, one paragraph of the preamble jumps to the eye that may shed some further light on the matter of its 'object and purpose.' It is the fifth paragraph, and it reads as follows:

According to the views of the High Contracting Parties, these provisions [adopted in 1899 by the First Peace Conference], the wording of which has been inspired by the desire to diminish the evils of war, as far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.

This text makes clear that the purpose of the Convention with its annexed Regulations is not confined to harmonising the practice of war, no matter how horrible the result. The guiding idea (the 'desire') is 'to diminish the evils of war, as far as military requirements permit.' Another striking feature is the emphasis on the relations of belligerents with the 'inhabitants': those present in the areas of warfare and particularly in occupied territory. One obvious 'evil of war' is the damage and injury incurred by individual persons as a result of acts violating the Regulations. While, as we now know, this 'evil of war' requires a variety of devices to either prevent its occurrence or redress its effects, thinking around the turn of the century centred in particular around financial compensation. The 1899 version of the Regulations, annexed to the Convention of that
year, already provides in a few cases (Articles 52 and 53) for payment of losses suffered as a result of acts of the occupying army. Apart from this, the Regulations of 1899 were silent on the matter of compensation for losses suffered by individual persons as a result of wrongful acts of war.

This defect in 1907 inspired the proposal for a provision on compensation. Originally meant for the Regulations, it was ultimately included as Article 3 in the Convention. This gives the provision an even wider scope than it would otherwise have had. It was definitely meant to contribute to the ‘object and purpose’ of diminishing the evils of war, in particular in relation to ‘the inhabitants’ and, in a wider sense, with individual persons.

This leads me to conclude that a reading of Article 3 with the national State as the only claimant and the victim in the role of a complainant falls short of this ‘object and purpose’: far from ‘diminishing the evils of war,’ it complicates and aggravates the problem of individual victims’ rightful compensation for the losses of war. The other reading, with the individual victim as a claimant in his own right and the national State in a subsidiary role as protector and facilitator, although far from free of difficulties either, results in a more just and flexible system of compensation. It thus plainly serves to ‘diminish the evils of war, as far as military requirements permit,’ in relation to ‘the inhabitants’ of occupied territory and, more generally, in relation to all persons who get caught in the turmoil of war.

The conclusion is that out of the two possible interpretations, the second is vastly to be preferred. To the extent that this still leaves room for doubt, I may refer once again to Article 32 of the Vienna Convention on the law of treaties. In the terms of that Article, the first interpretation, although theoretically possible, ‘leads to a result which is manifestly absurd or unreasonable’ and therefore must be rejected. This leaves us with a
single interpretation, which is moreover confirmed by 'the preparatory work of the treaty and the circumstances of its conclusion.'

*Individual persons can be the subjects of rights under international law*

The above conclusion hinges on one crucial assumption, viz., that individual persons have rights under Article 3. This assumption is rejected in the decisions of the District Court, *inter alia*, on the grounds that individuals cannot be the subjects of rights under international law.

It is my contention that this argument is incorrect. It is since long common practice for individuals to bring cases based on rules of international law against foreign governments, whether before their own courts or before those of the foreign State. By way of example, and confining ourselves to cases before a foreign court, I may mention the treatment of foreigners under customary international law. In countless cases where foreigners had suffered damage or injury in a country as a result of acts of a government agency such as the police or the armed forces, they have successfully brought claims for compensation before the local courts of the State concerned, on the grounds that their treatment had violated the customary 'international minimum standard of treatment'.

The practice developed with regard to the 'international minimum standard of treatment' of foreigners may serve to demonstrate another important point. When in such a procedure the local courts up to and including the last resort failed to honour the claim, the foreigner found himself at an end of his possibilities: it was not open to him to pursue his claim against the State on an international level. It was at that stage of the affair that the national State of the foreigner, on his express request, could take up his claim ('espouse' it), by way of diplomatic protection, and lift it onto the international level as a claim of its own against the other State.
Thus, the example of the customary rule relating to the treatment of foreigners demonstrates not only that foreigners have rights under international law, but also that they lack the capability to bring their case up from the domestic to the international level: they lack 'standing' on that level. It appears to me that this point may not have been sufficiently clear in the procedures before the various Civil Divisions of the Tokyo District Court. There may indeed have been a confusion between, on the one hand, the capacity to have rights under international law and, on the other, the capacity to engage a State in a procedure aiming to enforce their rights on the international plane. To put it succinctly: individuals can have rights under international law, but they lack the standing necessary to pursue these rights on the international level.

The above confusion between 'entitlement' and 'standing' may also underlie an apparent misapprehension with respect to the notion of 'diplomatic protection'. The right for a State to set in motion, on behalf of its national, a procedure of diplomatic protection against another State does not come into being already at the time of the damage or injury suffered by its national. It arises only after the individual victim has exhausted all local remedies; and the action the State then undertakes (if it decides to do so) is based not on the wrongfulness of the act that caused damage or injury to the individual, but on the 'injury' suffered by the State as a consequence of the (alleged) miscarriage of justice by the judicial organs of the other State.

*Individual persons can have rights under Article 3 of the Convention*

While in the preceding section I dealt with the general question of whether individuals can be the subjects of rights under international law, I may notice next that individual rights exist in the law of war as well. Even the Regulations of 1907 already explicitly provide in a few instances for individual 'rights':

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14
— Article 3 states that members of the armed forces, in the case of capture by the enemy, 'have a right to be treated as prisoners of war';
— Article 13 provides that army followers 'are entitled to be treated as prisoners of war' provided they have the right papers;
— Article 32 provides that a parlementaire 'has a right to inviolability'.

While in these cases it would be very odd to disregard the express reference to 'right' or 'entitlement', in other instances the recognition of rights for the individuals concerned is implicit in a different phrasing:

— Article 6 provides that prisoners of war shall be paid for their work, and 'the balance shall be paid them on their release';
— Article 46, par. 2, lays down that 'Private property cannot be confiscated.';
— Article 52, par. 3, provides that 'Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.'

To have a right is one thing; to realise it, another. This may be especially difficult in times of war, when an individual wishes to claim compensation from a State Party to the conflict, for the damage or injury caused by an act, committed by a member of the armed forces of that State, which constitutes a violation of the Regulations. As noticed already in the foregoing, everything will depend here on the situation: where the event occurred (occupied or non-occupied territory, or territory of the State in question), and what is the relation between the State and the individual victim of the offence (enemy or neutral, free or detained). Admittedly, in many situations when compensation has not
immediately been paid, the individual simply will not be able to start a procedure as long as the conflict lasts.

Some points need to be emphasised here. First, individual rights are not always violated: they are, indeed, often respected precisely because they are seen as rights. This was as true in the past as it is today. Then, in cases where a violation of the Regulations (or, more generally, of rules of international humanitarian law) occurs, the individual victim does not always need to start a court case: he may receive compensation for his losses even without the need to ask for it, or a simple request to the local commander or the administrative authorities will suffice to bring about this result.

The last-mentioned point is of particular importance. The question has been asked whether there exists sufficient practice to support the assertion that Article 3 is a rule of customary law. I argued above that the question is immaterial, since Article 3 is part of the Convention of 1907, which together with the annexed Regulations has long ago been declared to belong to the body of customary international law. I now add that it is impossible to answer the question with any degree of accuracy. Instances of reliance on Article 3 when a State, or the United Nations, paid compensation to individual victims, were mentioned in the earlier proceedings of the present cases. It cannot be said however how often such compensation was paid without this being recorded: because there was no formal court procedure, or because the fact simply went unnoticed. It is a safe guess that this has happened in very many cases, once again, because the authorities in question were aware of the legal situation and of the right of the individual, and wanted to set matters right.

It is submitted that this was in effect precisely the type of situation the participants at the Hague Peace Conference of 1907 had in mind when they discussed and adopted Article 3. They were not worrying about formal prescriptions for the settlement of claims under the Article because they were convinced they could leave this, as so many other
aspects of the application in practice of the rules they were devising, to the common sense and good faith of the commanders and authorities who would be called upon to implement the rules.

No distinction between enemy and neutral persons or States

The Decisions of the District Court lay great store by the distinction, drawn in the original German proposal, between enemy and neutral persons. The argument appears to be that since the proposal was to defer compensation for individuals of enemy nationality until after the war, this must have meant that not the individuals but the State would be the rightful claimant.

Admittedly, the drafting history is not completely unambiguous on this point. The lack of clarity reflects an element of confusion in the debate. On the one hand, the desire was to make provision for cases where damage resulting from a violation of the rules of war risked remaining uncompensated because the victims could not expect immediate compensation from the actual perpetrators of the offence: hence the provision that in such cases, the State is responsible and is liable to pay compensation.

On the other hand, there was the distinction in the German proposal between two categories of victims: nationals of a neutral State, and nationals of the enemy State: the former were to be compensated immediately, and the latter only after the war. The desire to make this distinction was not something particular to the proposal on compensation: it was in line with a general feature of the attitude of the German negotiators at the Conference.

This attitude came to light with special clarity in the German proposals relative to the rights and duties of neutral States and their nationals, a topic under discussion in another commission of the Conference. In that discussion, the German delegation sought to achieve protection for neutrals in enemy territory in every respect, whereas the enemy population would have to undergo the hardships of war and occupation. These
German ideas met with strong resistance. In effect, a French proposal suggested the exact opposite: the neutrals would suffer the same hardships as the local population.

In the end, the issue remained unresolved and no compromise could be found. As a result, both the Regulations and the Hague Convention (V) of 1907 respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land are silent on the matter. Yet, the point to be emphasised is that in the meantime, the attempt to introduce the distinction in what ultimately became Article 3 of the Convention (IV) on Land Warfare had been decisively defeated: the text of that Article makes no distinction between persons of enemy and neutral nationality, and there is no ground whatsoever for reading such a distinction into it.

Concluding remarks

Two points remain to be mentioned briefly by way of conclusion. The first concerns the practice of lump-sum agreements. Over and above what was already mentioned about that practice in the earlier stages of the procedure, I may reiterate that it has nothing to do with our argument about the right of individuals for compensation under Article 3. Lump-sum agreements are inter-State agreements; they are concluded for political reasons and are not, or at most only very partially, based on the damage and injury suffered by individual persons of the nationality of the State that receives money under the agreement. Often, the individual damage and injury are unknown at the time of the conclusion of the agreement, and therefore simply cannot have been taken into account in ‘calculating’ the payment under the agreement.

In the same vein, lump-sum agreements have nothing to do with diplomatic protection. Diplomatic protection is the conscious decision by a government to ‘espouse’ the case of its national who has attempted, and failed, to get satisfaction from a foreign State in the course of a procedure in which he has exhausted all local remedies. Lump-sum agreements are generally concluded without even an attempt to
find out whether potential individual claimants have followed this road of exhaustion of local remedies. And, once again, individuals could only have done this if they had a right, and the opportunity, to bring claims against the other State before the courts of that State.

This brings me to my final comment on the Decisions under review. The Tokyo District Court has paid much attention to the question of whether there are precedents concerning the application of Article 3 on the international level, i.e., in the relations between States. The procedure before the Tokyo Court does not however belong on that level: it is a national or 'domestic' procedure. The claimants in the cases submitted to it equally are situated on that domestic level. To the extent the Court needs to find precedents for its interpretation and application of Article 3, the relevant 'practice of States' to be looked for is, therefore, that of official persons and organs that can be regarded as agents of States, including – but not limited to – domestic courts. Had the Japanese payment of compensation for damages suffered by Chinese individuals in the Russo-Japanese war been made after 1907, it would have been a perfect example of such practice.

Wassenaar, 18 November 1999

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