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Re-Excavation of Fault in Article 3 of the 1907 Hague Convention IV on War on Land

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I. Introductory Dissertation

Article 3 of the Convention concerning the Laws and Customs of War on Land (the 1907 Hague Convention IV on War on Land) provides that "A belligerent party which violates the provisions of the said Regulations [the Regulations respecting the Laws and Customs of War on Land] shall, if the case demands, be liable to make compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[1)]

With regard to the nature of responsibility of a belligerent party (State) in this provision, the following doctrinal discussions have developed in accordance with methods of interpreting the relationship between the first and second sentences within a contextual paradigm.[2)]

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1) A. Pearce Higgins, The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries 213 (Cambridge University Press 1909).

2) *See*, the general rule of interpretation provided in Article 31(1) of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 332.

Soon after the adoption of the 1907 Hague Convention IV on War on Land (the "Convention"), Oppenheim presented his case arguing that Article 3 of the Convention ("Art. 3") stipulated responsibilities with two distinct natures, positing a disjunctive relationship between the first and second sentences. More specifically, he interpreted the first sentence as providing for the self-responsibility of a belligerent State for compensation in the case of violating the Regulations respecting the Laws of War on Land (the "Regulations"), whereas the second sentence addresses the vicarious responsibility of a belligerent State as regards the illegal conduct by members of its armed forces who are not under its immediate command or specific authorization.[3)]

According to Oppenheim, internationally injurious acts committed in the exercise of official functions by military forces of a State without its specific command or authorization are not acts of the State itself. However, he also holds that the State bears a vicarious responsibility for such acts because its military forces are under its disciplinary control.[4)] Therefore, Oppenheim asserts that Art. 3 prescribes, first, compensation responsibility as a conventional state responsibility (self-responsibility) derived from actionable activities of State agents (members of its armed forces under its auspices) and, second, vicarious responsibility of a State with respect to malefactions committed by members of its armed forces who are not under its immediate command. Here the differentiation of the qualities of specific actions yields the dissimilarity of responsibility, notwithstanding the commonality of wrongdoers' affiliation.

However, in contrast with Oppenheim's theory of dissociation of the first and second sentences of Art. 3 (the "Dissociation Theory"), the interpretation defining these sentences as a cohesive concept is widely accepted in international legal studies. Freeman, who represents a contrary view to Oppenheim's, argues that Art. 3 embodies the unitary rule, which sets up the compensation responsibility of a belligerent State for all acts committed by members of its

3) 2 L. Oppenheim, International Law: A Treatise 320 (Longmans, Green and Co., 2d ed. 1912).

4) 1 L. Oppenheim, International Law: A Treatise 218 (Longmans, Green and Co., 2d ed. 1912).

armed forces, which are in violation of the Regulations.[5] In addition, Freeman unequivocally disavows conferring insurer status (i.e., vicarious responsibility) on a belligerent State, arguing that the first sentence evinces the compensation responsibility of a belligerent State for infringements of the Regulations, and that the second sentence, following from the first, prescribes the responsibility of a belligerent State for every act of its armed forces members that contravenes said Regulations.[6]

On the basis of this contextual interpretation, Freeman asserts that a State shall accept responsibility, as its collective responsibility,[7] for all the acts of its armed forces members that violate the Regulations without any distinction between acts committed within the exercise of military duties and those that are not.[8] Here, irrespective of the qualities of a malfeasant's act, an undifferentiated concept of responsibility is applied based on the commonality of affiliation (i.e., armed forces member status of offenders).

Meron, just like Freeman, recognizes more widely that Art. 3 enunciates a belligerent State that takes responsibility in a single, uniform way for all acts committed by members of its armed forces, regardless of whether they acted as state organs or private persons,[9] describes this as a strict or objective responsibility.[10] Hence, in determining State responsibility, he focuses on the status of perpetrators and the consequences of their actions (i.e., objective

5) Alwyn V. Freeman, Responsibility of States for Unlawful Acts of Their Armed Forces 75-76 (A. W. Sijthoff 1957) (text of lectures reprinted from the Recueil des Cours de l'Académie de Droit International de La Haye).

6) *Id*. at 73-74, 80.

7) *Id*. at 70. In a similar vein, Mérignhac sketches the configuration in applying Art. 3 that responsibility of individual perpetrators (the members of armed forces) is pursued as global responsibility ("responsabilite globale") of a State through its government. A. Mérignhac, *De la Sanction des Infractions au Droit Des Gens: Commises, au Cours de la Guerre Européenne, par les Empires du Center*, 24 Revue Générale de Droit International Public 5, 9 (1917).

8) *Supra* note 5, at 73, 79.

9) Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 161, 223. (Clarendon Press 1989).

10) *Id*. at 224.

elements) rather than the question of attribution to a belligerent State based on the quality of such actions.[11] Likewise, Kalshoven, positing that the two sentences of Art. 3 must be read together as an individual whole, argues that Art. 3 encompasses all violations of the Regulations committed by members of armed forces, regardless of whether those violations are done in that capacity or otherwise.[12] Quoting Freeman's denial of an insurer status of a State, Sassòli defines the responsibility in Art. 3 as "absolute responsibility," grounding this definition in the much stricter control the state exercises over members of armed forces as compared to other agents of the state.[13] Greenwood, in turn, follows Freeman's tenet.[14]

Such a theory, which links the first and second sentences of Art. 3 (the "Connection Theory"), is adopted not only in academia, but also in international practice. For instance, the United Nations Secretariat interprets Art. 3 as establishing an absolute or strict responsibility as defined in the Connection Theory.[15] A judgment by the Administrative Court of Appeal of Münster, German Federal Republic, which presided over a case of personal injuries

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11) *Id*. at 161-162. Attention to damage as a result of acts committed by members of armed forces is referred to by Greenspan. Morris Greenspan, The Modern Law of Land Warfare 404 (University of California Press, 1959).

12) Frits Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond*, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano, eds., War and the Rights of Individuals: Renaissance of Individual Compensation 225, 215, 219 (Nippon Hyoron-sha Co., LTD. Publishers 1999).

13) Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 846 Revue Internationale de la Croix-Rouge 401, 406 (2002).

14) Christopher Greenwood, *Rights to Compensation of Former Prisoners of War and Civilian Internees under Article 3 of Hague Convention No. IV, 1907*, in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano, eds., War and the Rights of Individuals: Renaissance of Individual Compensation 238, 233 (Nippon Hyoron-sha Co., LTD. Publishers 1999).

15) United Nations Secretariat, *"Force majeure" and "fortuitous event" as circumstances precluding wrongfulness: survey of State practice, international judicial decisions and doctrine* (UN Doc. A/CN.4/315), reprinted in 2(1) Yearbook of the International Law Commission 1978 61, 92-93 (UN Doc. A/CN.4/SER.A 1978/Add.1 Part 1 1978).

caused by a motor vehicle of an occupying power, stated that it was "an undisputed principle of the doctrine of international law" that Art. 3 provided for absolute responsibility.[16] This judgment is cited in a ruling by the Tokyo District Court, Japan, concerning injuries suffered by former prisoners of war and civilian internees of the ex-Allied Powers of World War II.[17] These examples reflect subsequent practices in the application of Art. 3.[18]

The most significant feature of the Connection Theory is that it requires no fault on the part of a responsible belligerent State as an element of the compensation responsibility in Art. 3. In his illustration of absolute responsibility, Kelsen recognizes Art. 3 as a case where a State is responsible even though no fault on the part of its institutions occurred.[19] The United Nations Secretariat clearly states that the responsibility in Art. 3 arises without any requirement to prove that State entities are at fault or negligent.[20] The Administrative Court of Appeal of Münster also holds that fault on the part of the person who caused harm is not a prerequisite of responsibility because Art.3 provides for absolute responsibility.[21]

The Connection Theory, by which a belligerent State accepts strict or absolute responsibility[22] for every illegal act of members of its armed forces

16） *Personal Injuries* (*Occupied Germany*) *Case*, in Hersch Lauterpacht ed., 19 International Law Reports (year 1952) 632, 633 (Cambridge University Press 1957).

17） *Claims for Compensation from Japan Arising from Injuries Suffered by Former POWS and Civilian Internees of the Ex-Allied Powers*, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano, eds., War and the Rights of Individuals: Renaissance of Individual Compensation 193, 190 (Nippon Hyoron-sha Co., LTD. Publishers 1999).

18） Article 31(3) of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 332.

19） Hans Kelsen, Principles of International Law 123-124 (Rinehart & Company Inc. 2d ed. 1956).

20） *Supra* note 15, at 92-93.

21） *Supra* note 16, at 633.

22） Strict responsibility should not be confounded with absolute responsibility even in international law. Strict responsibility postulates immunity reasons and the shift of the burden of proof as its essence. On the other hand, absolute responsibility does not accept any mode of exculpation. Ian Brownlie, 1 System of the Law of Nations: State Responsibility 44 (Clarendon Press 1983).

irrespective of the quality of such acts, is open to criticism. One of the strongest critiques of the Connection Theory is that the principle of absolute responsibility is hardly consonant with the view that the proposition (current Art. 3) was extending the principle of employers' or masters' liability in private law to international law.[23] This argument was made in the report submitted in the preparatory work for drafting the Convention (i.e., the Second Hague Peace Conference of 1907), which can be invoked as a supplementary means of interpretation.[24] Employers' or masters' liability in private law (tort law) certainly has the nature of strict responsibility (no element of employers' or masters' fault), but such liability is commonly considered to be strict responsibility only in the sense of vicarious responsibility within the system of Civil and Common Law.[25]

In this sense, Oppenheim's Dissociation Theory, which adopts vicarious responsibility regarding Art. 3, is more attuned to the above report. Moreover, employers' or masters' liability in private law presupposes tortious acts by employees or subordinates,[26] and such acts require the elements of intent or negligence by the agents. In line with this argument, Ago holds that fault, as an element for responsibility, must be sought in the action of individuals who belong to the armed forces, and that Art. 3 does not intend to establish no-fault responsibility of the State itself.[27] Therefore, even if the rationale for Art. 3 is

23) 1 The Proceedings of the Hague Peace Conferences 101 (Oxford University Press 1920); 3 The Proceedings of the Hague Peace Conferences 26 (Oxford University Press 1921).

24) Article 32 of the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 332.

25) Paula Giliker, *Vicarious Liability or Liability for the Acts of Others in Tort: A Comparative Perspective*, 2 Journal of European Tort Law 31, 31-34 (2011). Note that David refers to Belgium and French civil code when he makes mention of the principle of the responsibility of masters and agents which arises in civil law. *See*, Eric David, *The Direct Effect of Article 3 of the Fourth Hague Convention of 18th October 1907 Respecting the Laws and Customs of War on land*, in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano, eds., War and the Rights of Individuals: Renaissance of Individual Compensation 248, 246 (Nippon Hyoron-sha Co., LTD. Publishers 1999).

26) Giliker, *Vicarious Liability*, *supra* note 25, at 33.

cited from employers' or masters' liability in private tort law, it is difficult to provide an account of Art. 3 based on the Connection Theory, which requires no fault on the part of entities or individuals who inflict harm.

With regard to this animadversion, Freeman, the leading advocate of the Connection Theory, refutes the employers' or masters' liability explanation on the following bases: First, no other element than membership in the State's armed forces can be seen in Art. 3 and, second, the delegates did not take careful account of a master-servant relationship at the meetings of the Second Commission of the Peace Conference.[28] However, given that his argument regarding the Connection Theory mainly relies on the drafting process of the Convention,[29] it is disingenuous to ignore the unequivocal statements regarding employers' or masters' responsibility in the report submitted in the drafting process.

In view of the above doctrinal discussions, there is room for revisiting the responsibility principle of Art. 3 to find an interpretation that is more compatible with the drafting process and the two Theories. With respect to the first, the discussion to which the two Theories commonly attach special importance should be re-examined.

The present study reconsiders the drafting process of Art. 3 by virtue of two data analytical methods that have never been adopted in doctrines: (1) construction of concepts process, which involves application and modification of the grounded theory approach; (2) quantitative content analysis, which tests the outcome of (1). This approach will explore the concretization of the rules of state responsibility during an armed conflict and is expected to contribute to the advancement of the system of international responsibility, including the secondary rules.[30]

27） Roberto Ago, *Le Délit International*, 68 Recueil des Cours (1939 – II) 419, 493 (1939).

28） *Supra* note 5, at 69-70, 74.

29） For example, *Id*. at 74-76, 78.

II. Concepts Process in the Course of Drafting Art. 3

A. Research Objectives and Method

The proposition which was submitted in the drafting process of Art. 3 reads as follows:

> Article 1: A belligerent party which shall violate the provision of these Regulations to the prejudice of neutral persons shall be liable to indemnify those persons for the wrong done them. It shall be responsible for all acts committed by persons forming part of its armed forces.
>
> The estimation of the damage caused and the indemnity to be paid, unless immediate indemnification in cash has been provided, may be postponed, if the belligerent party considers that such estimate is incompatible, for the time being, with military operations.
>
> Article 2: In case of violation to the prejudice of persons of the hostile party, the question of indemnity will be settled at the conclusion of peace.[31)]

The first and second sentences of Article 1 of this proposition correspond perfectly to the first and second sentences of current Art. 3, which are cited at the beginning of this paper. Therefore, to analyze the responsibility principle of Art. 3, it is necessary to analyze the drafting process by which the agreement was proposed.

To conduct an objective analysis of data with respect to the drafting process of Art. 3, this study focuses on oral statements directly related to Art. 3 at the fourth meeting of the first sub-commission of the Second Commission on July 31; the second meeting of the Second Commission on August 14; and the

30) Omori maintains that it is ultimately desirable for the advancement of the system of international responsibility to concretely determine individual rules of responsibility in each area of international law, and which is in tandem with clarification of responsibility concepts by codification approach targeted at the secondary rules. *See*, Masahito Omori, Kokusaisekinin no Rikou ni okeru Baisho no Kenkyu [Study on Reparation in the Implementation of International Responsibility] 258 (Keio University Hogaku-kenkyu-kai 2018) (in Japanese).

31) 3 The Proceedings of the Hague Peace Conferences, *supra* note 23, at 139.

fourth meeting of the plenary conference on August 17 in the Second Hague Peace Conference of 1907. These statements were acquired from primary sources, rather than relying on secondary sources, to maintain objectivity about the drafting process. Hence, as regards text data, the present study deals only with the oral statements pertinent to Art. 3, which were recorded in the first (plenary meetings) and third (meetings of the second, third, and fourth commissions) volumes of The Proceedings of the Hague Peace Conferences, which are the official minute books of the Second Hague Peace Conference of 1907.

To construct the concepts process applied in drafting Art. 3, this paper uses the modified grounded theory approach.[32] First, the relevant oral text data are broken down into segments according to semantic content and then properties[33] and dimensions[34] (concepts with a low degree of abstraction) are extracted from each data segment. Second, categories[35] (concepts with high level of abstraction) are created by classifying the data segments based on reference to label names given to each data segment according to its properties and dimensions. Third, the categories are classified through the use of paradigms[36]

32） The grounded theory approach includes "the discovery of important categories and their properties, their conditions and consequences; the development of such categories at different levels of conceptualization; the formulation of hypotheses of varying scope and generality; and above all the integration of the total theoretical framework." Barney G. Glaser & Anselm L. Strauss, The Discovery of Grounded Theory: Strategies for Qualitative Research 168-169 (Routledge 3d. paperback ed. 2008). Also, the theory "involves taking data apart, conceptualizing it, developing concepts in terms of their properties and dimensions, and then integrating the concepts around a core category… Theorizing is the act of constructing an explanatory scheme that systematically relates concepts to each other around a core concept." Juliet Corbin & Anselm Strauss, Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory 81 (SAGE Publications 4th ed. 2015).

33） Properties are defined as "characteristics or qualities of concepts that define, give specificity, and differentiate one concept from another," or "characteristics that define and describe concepts. Corbin & Strauss, *supra* note 32, at 57, 220.

34） Dimensions are defined as "the range over which a property can vary," or "variations within properties." *Id.*

35） Categories are defined as "higher-level concepts under which analysts group lower-level concepts." *Id.* at 220.

and connected to one another by properties and dimensions and then the relationship between a core category[37] and the other sub-categories is described in a category relationship diagram. Fourth, the concepts process in the data as a whole is captured through a textual description of the diagram utilizing the concepts, including properties, dimensions, labels, and categories.[38]

B. Analytical Findings

As a result of the data analysis using the grounded theory approach mentioned earlier, <introduction of reparation obligation as the consequences of infractions of the Regulations> is identified as the core concept (category) in the drafting process of Art. 3. As explicitly stated in the explanation by the delegation of Germany {the German proposition, which aims to complete the Regulations respecting the laws and customs of war on land by the addition of provisions dealing with the case of infraction of the Regulations},[39] the above concept is the objective of the proposition (current Art. 3) itself. Moreover, this concept is the starting point of many other categories and routes. Therefore, it is appropriate to define it as the pivotal concept.

The relevance between this core category and the eleven circumambient sub-categories together with the subsequent concepts process in the course of drafting Art. 3 are shown in Figure 1. In this figure, a rectangle is a condition; a

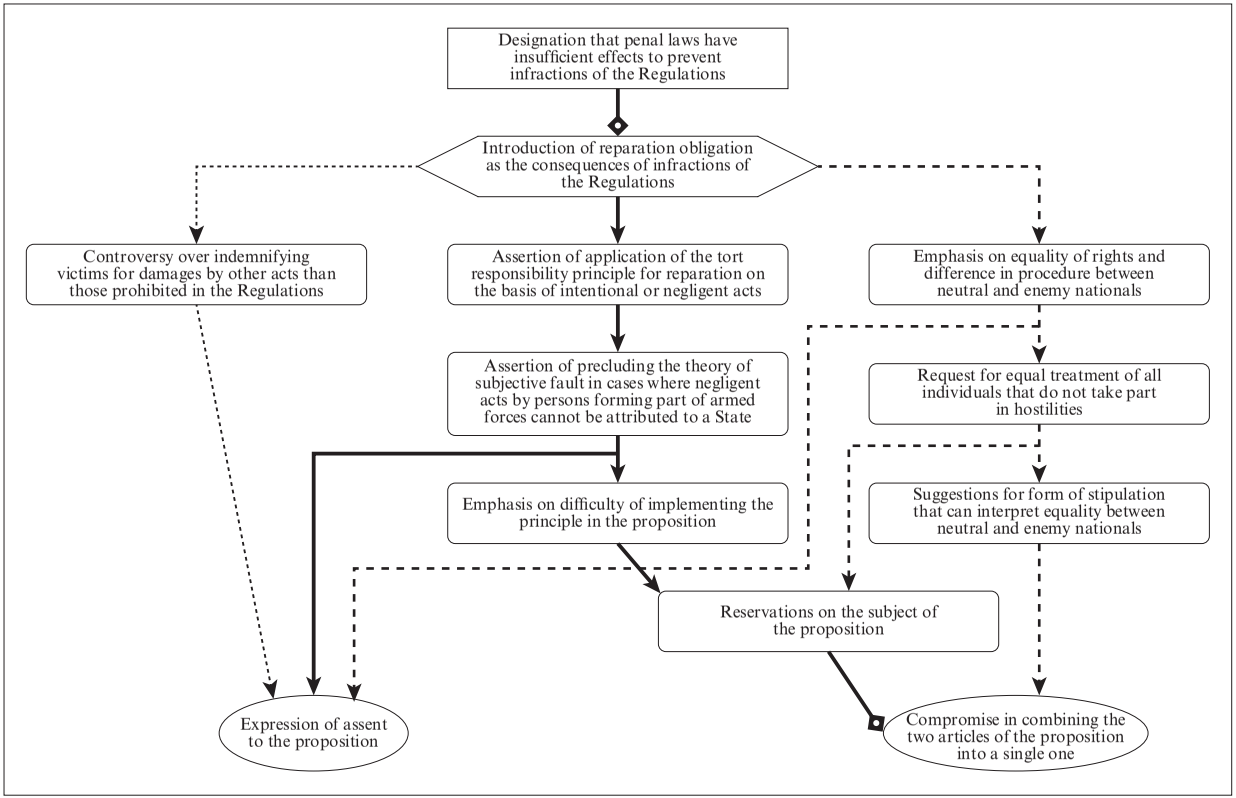
36) Structural demarcation consists of conditions, action-interaction and consequences. Paradigm is defined as "an analytic tool that helps analysts code around a category." Conditions "answer to the questions about why, when, and how come." Actions-interactions "are the actual responses people or groups make to the events or problematic situations." Consequences "are anticipated or actual outcomes of action and interaction." *Id.* at 153, 158-159.

37) Core category is defined as "a concept that is sufficiently broad and abstract that summarizes in a few words the main ideas expressed in the study." *Id.* at 187.

38) Notice that theoretical sampling and theoretical saturation, which are peculiar to the grounded theory approach, are not conducted because the oral text data which are the object of analysis are immobilized as a historical record. About the details of theoretical sampling and theoretical saturation, *see*, *Id.* at 85, 106, 134, 135, 239; Glaser & Strauss, *supra* note 32, at 45, 61.

39) The statement by von Gündell. 3 The Proceedings of the Hague Peace Conferences, *supra* note 23, at 139.

Figure 1: Category Relationship Diagram



hexagon is the main action-interaction—i.e., the core concept (category); rounded rectangles are actions-interactions; and ellipses are consequences, respectively, under the paradigm. In the text of this paper, categories (or parts of them) are shown in angle brackets (< >) and parts of oral text data are presented in curly brackets ({ }).

It turns out that the concepts process in the course of drafting Art. 3 consists of three routes, which are represented as three types of arrowed lines: dotted, dashed, and solid arrows in Figure 1. In what follows, this concepts process is explicated by written text referring to the various concepts.

The relativity of the concepts in the route consisting dotted arrows is as follows. When the <designation that penal laws have insufficient effects to prevent infractions of the Regulations> is followed by the proposition's achieving <introduction of reparation obligation> into the Conventions, <controversy over indemnifying victims for damages by other acts than those prohibited in the Regulations> is presented. To be more precise, after a fear about non-prohibited actions is expressed {the danger of being interpreted *a contrario* in the sense that in the cases not provided for the violation of international rules would not imply any obligation to repair the damage done} (hereafter italics are in the original in quotations),[40] a solution that {a simple observation in the minutes can suffice to prevent any doubt or misunderstanding}[41] is offered to cope with the risk of such *argumentum e contrario*. Since the proposition gets adopted as Art. 3 without any dissenting opinion to this solution, it is reasonable to assert that <assent to the proposition> is implicitly expressed.

The second aspect of the diagram reflects the relatedness of the concepts illustrated by dashed arrows. When <introduction of reparation obligation> is proposed in the same way as the route with dotted arrows, <equality of rights between neutral and enemy nationals> is emphasized as a mere <difference in procedure> between them: {[t]he principle which it lays down is applicable to every individual injured, whether national of the enemy State or *ressortissant* of

40) The statement by Renault. *Id.* at 141.

41) The statement by Borel. *Id.* at 141-142.

the neutral State. The only distinction established between these two categories of victims and, consequently, legally entitled persons, relates to the settlement of the indemnity}[42] and {a difference between *neutral persons* and *persons of the hostile party* only as regards the method of paying indemnities}.[43] However, States, which do not express <assent to the proposition> and the above explanation, should submit a <request for equal treatment of all individuals that do not take part in hostilities> that is represented by the statement {measures taken for the protection of individuals should apply to all alike without any distinction between *neutral persons* and *persons of the hostile party*}.[44] Then, <reservations> not to express opinions are made by some States. After these discussions and exchange of ideas, <suggestions for form of stipulation that can interpret equality between neutral and enemy nationals> is provided: {it would be preferable that Article 1 should not relate exclusively to neutrals but also to persons of the hostile party, for it is the separation of the two stipulations that leads to misunderstanding by creating a seeming inequality}.[45] This suggestion conduces to <compromise in combining the two articles of the proposition into a single one>. Hence, the combined proposition (current Art. 3) is adopted.

The nature of responsibility in Art. 3, which is the central question of this study, has a direct bearing on the relevance of the concepts tracked in the route represented by the solid arrows. This is elaborated in the following paragraphs.

In submitting the proposition to the first sub-commission of the Second Commission, the delegation of Germany held that the <designation that penal laws ha[d] insufficient effects to prevent infractions of the Regulations> regarding the present circumstances, stating that {infraction [of the provisions contained in the Regulations] would come under the head of the penal laws which safeguard the discipline of the armies. However, we cannot pretend that this sanction is sufficient to prevent absolutely all individual transgression}.[46]

42） The statement by Borel. *Id.* at 142.
43） The statement by von Gündell. *Id.* at 143.
44） The statement by Renault. *Id.* at 141.
45） The statement by Nelidow. *Id.* at 143.
46） The statement by von Gündell. *Id.* at 140.

Based on the above <designation>, preparation of the proposition including <introduction of reparation obligation> is explained as an intention to address <the consequences of infractions of the Regulations>: {it is proper to anticipate the consequences of infractions which might be committed against the requirements of the Regulations}.[47)]

With respect to the elements to effectuate the above <reparation obligation>, <the tort responsibility principle for reparation on the basis of intentional or negligent acts> in private law purports to be applied to the proposition: {[a]ccording to a principle of private law, he who by an unlawful act, through intent or negligence, infringes the right of another, must make reparation to this other for the damage done. This principle is equally applicable in the domain of international law and especially in the cases in point}.[48)]

However, according to this principle of reparation responsibility, <in cases where negligent acts by persons forming part of armed forces cannot be attributed to a State> ({[t]he case most frequently occurring will be that in which no negligence is chargeable to the Government itself}[49)]), the only option available is to apply legal sanctions to members of armed forces based on their civil obligations or status. This makes it impossible to invoke state responsibility under international law, hence {persons injured as a consequence of violation of the Regulations could not demand reparation from the Government and were obliged to look to the officer or soldier at fault}.[50)] In these cases, <precluding the theory of subjective fault> is proposed by saying that {the responsibility for every unlawful act committed in violation of the Regulations by persons forming part of the armed force should rest with the Governments to which they belong}.[51)]

Some States express <assent to the proposition>: {[t]he considerations which inspired the two propositions are legitimate and just and, as such, should in our opinion be made the subject of an international agreement}[52)] and {the

47) The statement by von Gündell. *Id.*
48) The statement by von Gündell. *Id.*
49) The statement by von Gündell. *Id.*
50) The statement by von Gündell. *Id.*
51) The statement by von Gündell. *Id.*

Swiss delegation adheres without reservation to the project presented by the German delegation. The principle which this proposition tends to establish is so just that it might be said to fill a genuine gap in the Regulations of 1899}.[53] On the other hand, <emphasis on difficulty of implementing the principle in the proposition> is noted since {it is often very difficult to determine this violation and the extent of the damage done. To proclaim the principle is easy, but it is very difficult to apply it}.[54]

Given <reservations> of opinion by the delegations of the United Kingdom and Turkey, the delegation of Germany {accepts the wording decided on by the committee, which combines the two articles into a single one without establishing any difference in principle between neutral persons and others},[55] and so makes a <compromise>, with the result that the proposition gets adopted as Art. 3 in a definitive fashion.

The concepts relationship, consisting of three routes and written in sentences, enables us to track the concepts process in the course of drafting Art. 3. In the section which follows, the focus is on the relationship between the concepts in the route composed of the solid arrows, which is the core issue of the present study.

C. Discussion

Based on Figure 1 and the above text of concepts relevance in the route depicted by solid arrows, it is apparent that the context between <assertion of application of the tort responsibility principle for reparation on the basis of intentional or negligent acts> and <assertion of precluding the theory of subjective fault> is dissociated. Moreover, their respective range capabilities are totally different–that is to say, the former statement extends to the proposition as a whole, but the latter is limited to <cases where negligent acts by persons forming part of armed forces cannot be attributed to a State>. This

52） The statement by Tcharykow. *Id*. at 141.
53） The statement by Borel. *Id.*
54） The statement by Reay. *Id*. at 142.
55） The statement by von Gündell. *Id*. at 13.

interpretation regarding the ranges is compatible with a statement made by the delegation of Germany that {we cannot hold here to the theory of the subjective fault by which the State would be responsible only if a lack of care or surveillance were established against it. The case most frequently occurring will be that in which no negligence is chargeable to the Government itself}.[56)]

Because this statement regards the <subjective fault> as {a lack of care or surveillance}, the focus is exclusively on negligent acts by a State itself; concomitantly, negligent acts by members of armed forces postulate no possibility of attribution for such acts to a State. Furthermore, the statement underscores the practical barriers <in cases where negligent acts cannot be attributed to a State> immediately after the <assertion of precluding the theory of subjective fault>. This acknowledges the connection between such limited cases and the preclusion of subjective fault.

The above exegesis about the ranges of concepts leads to two conclusions. First, as long as <application of the tort responsibility principle for reparation> in private law is considered, specific acts by State agents (members of armed forces), whose actions are attributable to a State, essentially require intention or negligence as the element of obligation in the proposition. This accords with traditional fault responsibility principle introduced into international law by Grotius.[57)] Secondly, as a consequence of <precluding the theory of subjective fault>, by which a {State would be responsible only if a lack of care or surveillance were established}, <in cases where negligent acts by persons forming part of armed forces cannot be attributed to a State>, fault or negligence by a State with regard to care or surveillance is not required as a basis for reparation.

To summarize: (a) It is necessary for State's obligation of reparation to recognize a negligent act by a member of armed forces. When this negligent act by the person cannot be attributed to a State, this State shall be responsible for reparation even though it does not conduct any negligent acts on its own (i.e.,

56) The statement by von Gündell. *Id*. at 140.

57) H. Lauterpacht, Private Law Sources and Analogies of International Law 135-136 (Longmans, Green and Co. Ltd. 1927).

exhibit a lack of care or surveillance of the person). (b) The State's obligation of reparation is conferred with no regard for a negligent act of the State itself to care or surveil members of its armed forces; instead, the applicable premise is the existence of fault or negligence by the members of armed forces. This is because, unless the proposition was adopted, {persons injured as a consequence of violation of the Regulations could not demand reparation from the Government and were obliged to look to the officer or soldier at fault}.[58] Thus, private tort responsibility of members of armed forces to pay reparation was conceived.

Given this, both conclusions are typically assumed to require negligent acts by members of armed forces. With respect to the first conclusion, negligent acts by such members are treated as equivalent to as acts by the State; hence, the obligation of reparation is imposed on the State. As regards the second conclusion, even if the negligent acts by armed forces members are not attributable to a State, obligation of reparation for these acts is imposed on the State whether or not the State is at fault in caring or surveilling its agents (i.e., albeit no-fault).

Furthermore, given the second conclusion, it is possible to interpret this principle as vicarious responsibility of a State. This is because the State assumes private responsibility for damages, due to negligent acts by members of its armed forces, as reparation responsibility under international law. By this interpretation, the second conclusion is in sync with the view that the proposition (current Art. 3) was extending employers' or masters' liability (i.e., vicarious responsibility) in private law into the sphere of international law.

From the previous discussions, according to the construction of the concepts process based on the modified grounded theory approach, it becomes obvious that both responsibilities are fault responsibility and so commonly require negligence or fault in acts by members of armed forces. This finesses Oppenheim's Dissociation Theory in which compensation responsibility of a State itself is discrete from its vicarious responsibility. Hence, it can be argued

58） The statement by von Gündell. 3 The Proceedings of the Hague Peace Conferences, *supra* note 23, at 140.

that strict or absolute responsibility, which the prevailing Connection Theory advocates, runs counter to the concepts process applied in the course of drafting Art. 3, as well as hardly being consonant with the report as regards employers' or masters' liability submitted in the drafting process.

III. Validation by Quantitative Content Analysis

A. Research Object and Method

Even though the analysis based on the grounded theory approach is one of the objective assay methods, it is extremely difficult to completely eliminate the author's subjective interpretation. Thus, the aforementioned analytical findings await a guarantee of objectivity by performing the validation of them through a quantitative method.

As discussed in the previous section, the Dissociation Theory can be derived from the interpretation that the context between <assertion of application of the tort responsibility principle for reparation on the basis of intentional or negligent acts> and <assertion of precluding the theory of subjective fault> is dissociated and their respective ranges differ from each other. Conversely, taking as given the linkage between the two concepts along with commensurate ranges, both concepts would extend to the proposition (Art. 3) as a whole. Consequently, the subjective fault of a State would be excluded in all cases. On this premise, the Connection Theory, which considers the nature of responsibility in Art. 3 as strict or absolute responsibility, should be adopted. Therefore, it is possible to make an objective judgment about the plausibility of discussion in the preceding section by way of testing whether the two concepts are dissociated or not.

To validate analytical findings in the previous chapter by quantitative means, it is sufficient to be directed to the data segments which form the above concepts (categories). Accordingly, a quantitative analysis is conducted, treating "According to a principle of private law, … should rest with the Governments to which they belong" in the statement by von Gündell on page 140 in the third volumes of The Proceedings of the Hague Peace Conferences as the item to be tested.

Quantitative content analysis is applied as a validation methodology. This is a research technique for making replicable inferences from text data by giving objective, systematic, and quantitative descriptions of the content or context of communication in the data.[59] In conducting the quantitative content analysis, computer software was used to quantify the degree of co-occurrence (association) between words (this approach was used to exclude analyst's coding).[60] A word network diagram[61] was constructed to present a visual representation of co-occurrence between words.

B. Analytical Findings and Discussion

Quantitative content analysis gives the word network diagram in Figure 2. In this graphic, the high-low frequency of words is represented by the size of the circle, with words having a high degree of co-occurrence (association) joined by lines and automatically grouped.

Taking the statement data as an objective explanation with regard to the

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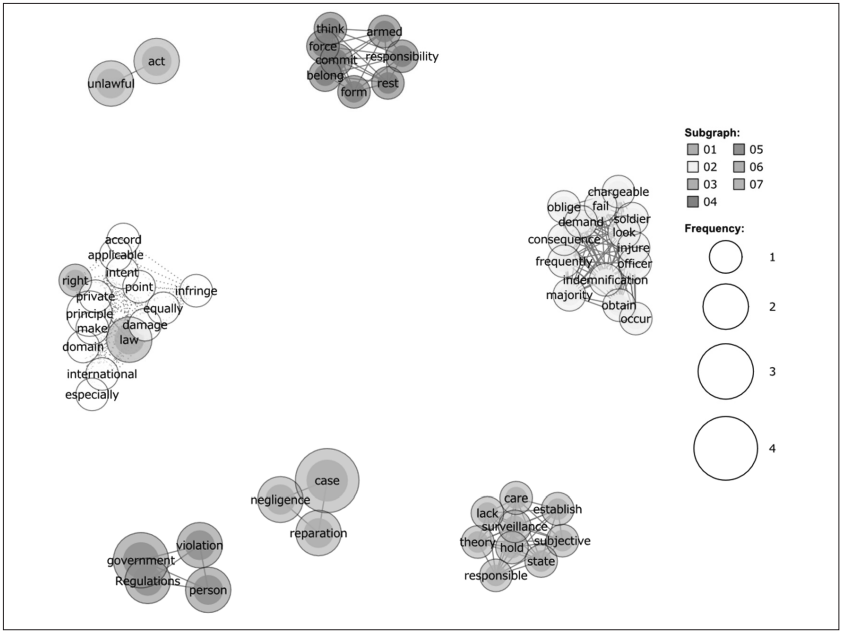
59） Bernard Berelson, Content Analysis in Communication Research 18 (Hafner Press 1952); Philip J. Stone, Dexter C. Dunphy, Marshall S. Smith, and Daniel M. Ogilvie, et al., The General Inquirer: A Computer Approach to Content Analysis 5 (The M.I.T. Press 1966); Klaus Krippendorff, Content Analysis: An Introduction to Its Methodology 24 (SAGE Publications 4th ed. 2019); Daniel Riffe, Stephen Lacy, Brendan R. Watson, and Frederick Fico, Analyzing Media Messages: Using Quantitative Content Analysis in Research 23 (Routledge 4th ed. 2019).

60） Howard P. Iker and Norman I. Harway, *A Computer Systems Approach toward the Recognition and Analysis of Content*, in George Gerbner, Ole R. Holsti et al., eds., The Analysis of Communication Content: Developments in Scientific Theories and Computer Techniques 381, 381-382, 384-386 (John Wiley & Sons, Inc. 1969). As a software for the quantitative content analysis, this study adopts KH Coder which is developed a quantitative analysis of qualitative data in the field of social sciences and humanities. Programs such as R for statistical analysis and MySQL for organization of data are built into the KH Coder. Koichi Higuchi, *A Two-Step Approach to Quantitative Content Analysis: KH Coder Tutorial using Anne of Green Gables (Part I)*, 52(3) Ritsumeikan Social Sciences Review 77, 77-78 (2016).

61） James A. Danowski, *Network Analysis of Message Content*, in William D. Richards, jr. and George A. Barnett, eds., 12 Progress in Communication Sciences 197, 198, 202, 203-212, 219 (Ablex Publishing Corporation 1993).

Figure 2: Word Network Diagram



proposition (Art. 3) the following inferences are elicited from each word group in Figure 2: (a) Acts in question are unlawful (the word group at the upper left). (b) Acts committed by armed forces confer responsibility (the word group at the upper middle). (c) The principle of damages in private law is equally applicable to the domain of international law (the word group at the middle left). (d) Indemnification for major consequences that are not chargeable is addressed (the word group at the middle right). (e) Government and persons can respectively violate Regulations (the word group at the lower left). (f) Negligence is associated with reparation (the word group at the lower middle). (g) A State is responsible because of a lack of subjective care or surveillance of its agents (the word group at the lower right).

These seven word groups do not display co-occurrence (association). Therefore, apparent demarcation between the groups at the middle left and right of Figure 2 reveals the difficulty of connecting the two concepts (categories) by

one underlying principle: <assertion of application of the tort responsibility principle for reparation on the basis of intentional or negligent acts>; <assertion of precluding the theory of subjective fault in cases where negligent acts by persons forming part of armed forces cannot be attributed to a State>.

Moreover, the three word groups at the lower part of Figure 2 imply adoption of the following principles: a government shoulders tort responsibility of members of armed forces through subrogation, making infractions of the Regulations subject to a government (State responsibility under international law) or members of its armed forces (tort responsibility under private law); a negligent act is a valid legal basis for reparation; and, even when acts of the members are not attributable, lack of due care or surveillance by itself constitutes responsibility of a government (State).

In this vein, the above quantitative content analysis succeeds in testing the validity of the discussion in the previous chapter which applies Dissociation Theory to Art. 3, asserting that State compensation responsibility and vicarious responsibility are both fault responsibility that require fault or negligence by members of armed forces as a basis for reparation.

IV. Conclusion

Using novel assay methods, this study has reconsidered interpretations more consonant with the drafting process in which the legal nature of responsibility in Art. 3 of the Convention was a key point of debate. First, application of the modified grounded theory approach provides the construction of the concepts process in the drafting of Art. 3, with <introduction of reparation obligation as the consequences of infractions of the Regulations> as the core concept. This leads to the finding of the two categories where context is dissociated: <assertion of application of the tort responsibility principle for reparation on the basis of intentional or negligent acts>; <assertion of precluding the theory of subjective fault in cases where negligent acts by persons forming part of armed forces cannot be attributed to a State>. Concomitantly, it becomes obvious that the principle of responsibility in Art. 3 is based on State's compensation responsibility and on vicarious responsibility, as well as

the principle that these two responsibilities typically require fault or negligence by members of armed forces.

Second, using the quantitative content analysis, this study tests the appropriateness of these findings. By depicting the degree of co-occurrence (association) between words in statement data, the existence of the two disconnected categories is implied; hence, the plausibility of findings is validated.

By treating the responsibility in Art. 3 as fault responsibility, the discussions in this study offer a critique of the reigning theory invoked in many international practices. This study is in concord with Ago, who rejects no-fault responsibility as applicable to Art. 3, proposing instead that fault or negligence by members of armed forces should be required as an element of responsibility.[62)]

Nonetheless, this study has specific limitations. Because this study relies only on the drafting process of Art. 3 as a supplementary means of interpretation, there is a possibility that the discussions are not sufficiently cogent to override the prevailing theory whereby international practices define interpretation of Art. 3. However, the transformation of international practices and the development of the system of state responsibility continue to be widely practiced to this day. When fault responsibility is invoked in a practice regarding Art. 3, the fault or negligence arguments which this study re-excavates from the drafting process will see the light of day. It is expected that this will help reify interpretation of the rules of state responsibility during armed conflicts. Moreover, it is predicted that this reification will impact Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts which bears a passing resemblance to Art. 3.

Acknowledgment

I wish to express my utmost gratitude to Professor Masahito OMORI for enlightenment and edification based on his consummate sagacity.

62) *Supra* note 27, at 493.