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Introduction

War and Peace. Two states of 'being' that are fundamentally polar opposite to one another. In today's world, the strife for the latter is particularly apparent, as the product of a heterogeneously conflict-ridden global society. In this society, the individual can take centre stage as victim and perpetrator of international crimes; international law and organisations have proliferated in the last century and are continuously trying to tackle global problems that are becoming more and more complex. With all these peace aims comes the question of how to convert the ideal into the real. And with all the damage caused by the complexities of war, one such ideal-to-real dilemma is reparation.

Whilst scholarship and practice has done its best to establish an individual's inherent right to reparation for war injury, they have up until now failed to do so. Developments in human rights and international criminal law[1] have in fact highlighted the ad-hoc nature of reparations, far from its clarification. The humanitarian law lacuna on reparations is therefore still far from filled. The private person is left unaware of how to, and often unable to, seek reparation. Neither is the private person a participant in the peacemaking process nor is there a general codified law on reparations for those most affected by the ravages of war.

The scholarship that does deal with reparations in international law also tends to focus on the development of general reparation after the First World War, as a reflection of the development of international law and contexts of twentieth and twenty-first-century transitional justice. However, there is very little information on how states and individuals – on how perpetrator and victim – dealt with the legal issue of reparation before the twentieth century. International legal history

[1] See later chapters for details on this.

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perspectives, mapping the long-term development of reparation, are remarkably non-existent.

One reason for this evident historical hole is the common misconception that individuals, before the development of a codified set of international laws, were not recognised as subjects with legal standing in the context of war and peace. The Westphalian state model 'represented a new diplomatic arrangement – an order created by States, for States'.[2] It largely ignored the private person and its grievances. Reparation, if it was paid at all, would go to the state, and only the state. Individual victims were irrelevant. It seems a sensible choice, then, not to delve into history. Why spend time digging into the past when we know what we will find? This book aims to correct this misconception and show history's ways and wonders in dealing with individual wartime damage.

Like the ancient Greek goddess Hecate, this book has three heads: an historical one, a legal one and a normative one. And intertwined, all these heads are fixed onto one body that has the sole purpose of assessing the war victim's right to reparation. The historical head will lay out the findings of selected case studies to show evidence of how and why reparations were provided in such instances. It will attempt to map out the historical causes of reparation and in many ways is an evolutionary history that shows why we have come to treat reparation in the way that we do. The historical investigation laid out in this book has ultimately revealed three basic methods for the compensation of victims of war. These were lump-sum settlements; mixed commissions for individual claims; and nationally based reparation methods. Later, in the wake of the Second World War, a fourth method was devised, that of civil actions by victims against states. As a result of specific contexts, various cocktail mechanisms amalgamating these basic methods also arose and continue to do so.

The history merges with the aims of the legal head that will highlight the law surrounding reparations within the selected wars' broader political, social and economic contexts. It is the shared interface between the law and society at relevant points in time that is important here. Finally, the normative head will attempt to justify the claim that reparations should be an essential part of peace building during and after war, but determine this using the analysis of the history and the law. It is the results of this aim that will hopefully contribute to how reparations can

[2] Kalevi J. Holsti, *Peace and War – Armed Conflicts and International Order, 1648–1989* (Cambridge University Press 1991) 25.

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be more consistently implemented within the international law framework today, particularly with its normative connection to the law on reparation as both retrospective and forward-looking.

1.1 A Point on Selection and Methodology

Whilst an accurate depiction of the historical practice of reparations was the ultimate goal, the author's ability to embark on a truly comprehensive study was always going to be hindered by the practical realities that one faces in an ever-increasing bureaucratic, capitalist society. And, as all authors will have experienced, knowing when to stop is like asking how long a piece of string is. The case studies were therefore selected as most representative, within that particular century, in order to achieve a good degree of homeostasis, at the very least.

One component taken into account during this 'balancing act' was Britain's rise over the early-modern period into a dominant legal, political and economic power and major contributor to the laws of war and peace. Case studies were thus included based on the involvement of Great Britain. This was a natural course of action given that the country was historically one of the leading European powers, a frequent player in the game of war and peace and known consistently as a belligerent in the early modern period and beyond. This book therefore brings to light the role of Britain as a major contributor to the development of international law as a whole. Britain contributed directly to key developments on reparation, such as with commissions implemented at the end of war; with the influential and highly interesting nature of the English Court of Admiralty; Britain's interrelations (and frictions) with other powers, along with their approach to neutrals that led to endless neutral grievances. This placed Great Britain as a prime country of focus, acting as the spine that binds the case selection together.

In general, though, the strategy for selection was based on wars that were broadly relevant to the questions of how and why victim reparation was treated within history, with mindfulness on how theory development could be inferred from the case results. In this way, the cases had to be fertile in terms of individual involvement during peacemaking processes, as well as having the potential to maximise the analytical generalisability of the results. The reflection of cases to actual reparation practice was paramount. Whilst the study looks at rules such as *ius postliminium* and the laws of prize, how these conceptions were applied was crucial. It would have been futile to select case studies where the reliability,

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accessibility and feasibility of historical sources was minimal. Choosing a war that did not achieve a continuing legacy would have been equally futile, therefore enduring practices that in turn influenced further legal developments on reparation was borne in mind. In this way, how the results from each of the different wars and different contexts reverberated with each other within each century was also considered. The practical constraints that came with all these aims meant that there would always be a caveat to the limited breadth of this study.

Every legal historian will also be aware of the challenges and pitfalls of a legal history research project, especially if one is to use modern-day legal concepts to assess its history. The challenges are amplified when it is a rather broad study, spanning many centuries, with every legal development requiring an understanding both within the context of its own time and its future implications. This study has attempted to balance broad legal analysis with historical contextual techniques to outline the major trends and shifts that have taken place on reparation decisions, but doing so with the retention of a degree of historical context. It was especially important to not only understand if a right to reparation existed in history and how this was practically implemented, but also why states allowed for reparation to occur. This project is crucial in not only assessing the historical contexts, but also determining the validity and effectiveness of current day reparation mechanisms. It provides a good basis in which the broader legal analysis on continuities and discontinuities of war reparation can contribute to the world's future approach to a more systematic reparation framework and normatively, why there ought to be a right to reparation today. This could in turn also have a consequential effect on how relevant parties view war and therefore for the laws of war and peace as a whole.

1.2 Repairing a Definition

Reparation is at the heart of what this study is about, but a fruition of attempts to satisfy its legal character has meant a lack of agreement on what it is within international law. The Basic Principles are one such attempt and probably the most authoritative of definitions in recent years.[3] The results of the various case studies in this book, however, have

[3] Basic Principles 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', A/RES/60/147, 16 December 2005.

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brought to light a different kind of definition. Reparation has come to mean more than simply making amends for a harm done. It also goes far beyond a tangible product provided to repair an injury, such as restitution or compensation.

Reparation, through the hand of the law, is indeed a product of political context. However, whilst peace and justice is often argued as ostensibly owed to the balance of powers,[4] this book, in many ways, contends this. Reparation, more accurately, was a by-product of competing political interests and differing degrees of unilateral imperialism. This applied equally to the beneficiaries of reparations, as those construed as victims today.

In linking the normative aims of this book with the historical and legal results, I argue that no matter which period one looks at within the book's temporal scope, an overriding self-interest, reflected in political transformations, has moulded the peacemaking process, in turn explaining the type of legal response a state gives to the question of reparation. Reparation is the legal carrot dangled on a very political stick. This book shows that reparation within history was never formed through a sense of idealism. Whilst this book can be seen as a teleological approach to reparation – one cannot deny that it does encompass this – it also offers a new perspective on the law's position during and after war, as well as the normative connection to legally-orientated reparation processes for wartime injury.

This historical survey provides insight into the normative constructions connected with legal responses to victim reparation during times of conflict. Of course, each of the wars in this study does not display the exact same measure of normativity in terms of conflict-based legal responses. This variation in normativity relates to the political and contextual elements dictating – or besieging – the identification of the victim and justifications for reparation. War is home to political tension and momentum, which, contrary to the stability aims of peace, drives law into a state of fluidity producing reparation as one aspect that serves to meet its purpose.

The starting point of this investigation is in the post-1648 era following the Thirty Years War. This is in line with the traditional view that the sovereign state rose following the Peace of Westphalia in 1648 or, as Clive Parry stated, 'classically regarded as the date of the foundation of

[4] See A.J.P. Taylor, *The Struggle for Mastery in Europe* (Oxford University Press 1954) xix.

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the modern system of States'.[5] The Peace of Westphalia is not assessed as part of this research, nor is it claimed that the traditional view is historically correct; at the very least, it ended one of the last religious wars in Europe and facilitated its stability. In fact, many scholars have refuted Westphalia as the point in which the state system derived and have referred to it as a 'myth', an event merely used to provide a frame of reference.[6] The frame of reference is indeed the reason why this study starts in the mid-seventeenth century.

Each chapter of this book delves into different historical (and thus political) contexts to examine how legal responses to reparation have permitted the normative development on this issue, but unlike other studies seeks to use the history as a core basis of its approach. Chapter 2 first invites the reader to enter the world of admiralty courts. These were domestic maritime courts functioning transnationally to allow the resolution of civil disputes relating to wartime damage. The same chapter will highlight the importance of peace treaties and the general principles and reparation rights they imparted in early-modern and nineteenth-century history. The interrelation and role of admiralty courts and peace treaties forms one lens in which the proceeding chapters will be viewed through, as numerous wars will be presented, as in Chapter 3. This chapter sets sail on murky waters. It presents the Anglo-Dutch Wars of the seventeenth century that like other wars to come would show the dominance of merchants and neutrals as a victim group eligible for reparation at this time.

Chapter 4 considers the unashamed and heroically-viewed Frederick the Great in his strive for reparation for his Prussian subjects. The Silesian Loan Affair triggers questions on the evolution of the reprisal with the later part of the chapter delving into the Seven Years War and the consequences on maritime principles as a result of neutral reparation claims. Chapter 5 opens the door on a new kind of victim, the loyalist during the American War of Independence, along with new kinds of reparation claims, such as ones for pre-war debts. Coupled with this is

[5] Preface, Clive Parry (ed.), *The Consolidated Treaty Series, Volume 1* (Oceana Publications 1969).

[6] For a critical view on the Peace of Westphalia's place in the history of international law, see Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law' (2003) 73(1) *British Yearbook of International Law* 103–139; Stephane Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?' (2000) 2 *Journal of the History of International Law* 148–177.

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the prolific use of commissions, forgiving those that often subject the Jay Treaty to ahistorical pinpointing for the rise of arbitration.

Moving into the nineteenth century, the Anglo-Argentine Commission, implemented after the Latin American Wars of Independence, is the focus of Chapter 6. This chapter contends with the difficulties faced by this – innately political – commission in compensating British subjects. Chapter 7 homes in on a fascinating period for American history and an equally fascinating one for the practice of reparations: the American Civil War. Naturally, the chapter will seek to understand the Alabama Arbitration, as an example of how states began to mix together already-existing basic compensation methods to form this arbitration model. The chapter, however, will also shed light on a domestic commission that provided a platform for individuals to seek compensation after the War. The nineteenth century epitomises the wider and growing trend of the use of commissions by states.

This is followed by Chapter 8, which uncovers previously untouched material on the Invasion Losses Enquiry Commission, amongst other compensatory mechanisms, during the Second Anglo-Boer War. This war in a way was symbolic of the gradual paradigm shift occurring at the turn of the twentieth century, providing a transitional context into the proliferation of international law as we know it today. The decisions made at the end of this war provide an insight, like no other, into differing rationale for reparation. Unique groups of victims were deemed eligible by Great Britain, including those unlawfully deported during the war, as well as British loyalists. The Treaty of Vereeniging signed at the end of the War is also remarkable for the study of reparation, as it is one of the only treaties in history that showed a victor state paying a substantial reparation sum to a vanquished side.

Chapter 9 will discuss a post-1945 world and provide a short historical survey on the international law developments that have brought us to the situation we are in today in terms of a lack of an implemented right for the war victim. Most importantly, however, the book ends with Chapter 10, which dives into the normativity of reparation as per the wars assessed. It will use Chapters 2–9 to demonstrate why an inherent right to reparation for victims of war should exist, particularly as we move into a world where war does not intend on dying down, and the laws of war and peace are seemingly spurned by those involved.

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Peace Treaties and Admiralty Courts

2.1 Amnesty Clauses

The nature of war was evolving in the sixteenth and seventeenth centuries. Whereas previously the idea of the just (or unjust) war, as embedded in eternal morality, prevailed, now war was, in the words of Stephen Neff, 'drifting steadily from Heaven down to Earth'.[1] More and more, the focus was on the rights and duties of states and no longer on the individual behaviour of princes, rulers or private persons. The evolution of the law of nations on more external state practice had consequences for approaches to war. The importance of the divine authority, as well as principles of conscience and good faith, within (just) wars had declined in favour of more formalistic 'voluntary' law. The just aspects of war, however, did not completely disappear, still remaining under the *ius ad bellum*. The belligerents of the early modern period still had recourse to war as a tool employed for justice and entered into war with the heavenly skies in mind. However, the legality of war was also now important, particularly with respect to dealing with damage done during war and, thereafter, its restitution.[2] The intertwinement of just war and legality is reflected in the peace treaties of wars from the late fifteenth century onwards. Quite important in the peace treaties is the way states utilised amnesty clauses to ensure a swift peace process on the one hand and restitution clauses to allow persons to reclaim their property on the other. These clauses demonstrated legal war and peace in action. This chapter will briefly outline the general conceptions and usages of amnesty and restitution clauses to emphasise their importance on historical peacemaking processes. This chapter will thus serve as a foundation

[1] Stephen Neff, *War and the Law of Nations* (Cambridge University Press 2012) 85.
[2] For the historical evolution of the laws of war and peace, see Neff, ibid. Also see Randall Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War' in Marc Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 35–55.

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for relevant reparation issues within specific wars in the following chapters of this book.

Etymologically speaking, the word 'amnesty' stems from the idea of forgetting.[3] The use of amnesty can be found in peace treaties created as far back as ancient Greece,[4] but most frequently is used from the late fifteenth century onwards. Amnesty clauses had a home in almost all peace treaties by the sixteenth century.[5] The origins of amnesty can also be derived from an example given by Grotius.[6] He describes the story of King Phillip V of Macedon who was unable to impose any form of punishment upon rebellious Macedonians during a period of territorial occupation by the Romans. Amnesty clauses here were a means of preventing prosecution of subjects who had cooperated with the enemy that had occupied territory belonging to their sovereign. Amnesty was also associated with attributes such as prudence and clemency, which were greatly discussed by neo-stoics. In addition, the economic benefits of not prolonging such matters and retaining a certain 'dignity for Leaguers who might otherwise hold back submission' also played a part, alongside Christian values.[7]

Litigation from adjudicating lawsuits, concerning injuries incurred during the French Wars of Religion in the sixteenth century, also show the Chambre de l'Edit's efforts to administer a rule of *oubliance*. The Chamber of the Edict would consist of a combination of Catholic and Huguenot judges to ensure fair treatment to Huguenot plaintiffs. These lawsuits involved family members of people who had died in the war, usually widows, seeking some form of reparation for the lost lives or property. In 1598, Henri IV of France signed four documents known collectively as the Edict of Nantes. It was to be viewed as a settlement of grievances from both parties. The Edict of Nantes (1598), relied upon

[3] The late sixteenth century conception comes in Latin from the Greek word *amnestia*, which means 'forgetfulness'. See Oxford Dictionaries 'Amnesty' http://oxforddictionaries.com/definition/english/amnesty accessed on 24 June 2013.

[4] Coleman Phillipson, *Termination of War and Treaties of Peace* (The Law Exchange Ltd 2008) 243.

[5] Randall Lesaffer, 'Peace Treaties from Lodi to Westphalia' in Randall Lesaffer (ed.), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (Cambridge University Press 2004) 39 (hereafter Lesaffer, 'From Lodi to Westphalia').

[6] Hugo Grotius, *De Jure Belli Ac Pacis* (James Brown Scott, ed., Clarendon Press 1925) bk. 3, ch. 19, para. 570 (hereafter, 'Grotius, *De Jure Belli*').

[7] Michael Wolfe, 'Amnesty and *Oubliance* at the End of the French Wars of Religion' (1997) 16(2) *Cahiers d'histoire* 45, 48–49.

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during these litigious times, invoked amnesty to persons carrying out certain acts that, under normal circumstances, would lead to prosecution and punishment.[8] They were also put in place to prevent legal disputes and put an end to any bitter feuds that still existed. Other edicts went further to prohibit memorials in order to avoid the risk of reviving 'the memory of the troubles'.[9] It also provided for appropriate amounts of compensation, albeit related to the Church.[10] In 1599, the Edict of Fontainebleu was also issued, framed around the Edict of Nantes and seeking further to provide reparation and restore property and revenues seized from the Huguenots.[11]

Interestingly, in this case, a distinction was made on amnesty between the commission of acts 'according to the necessity, law, and order of war'[12] and acts committed during the Wars of Religion that were proven to be unrelated to the war itself. A balance was sought to forget most acts of war and allow only the prosecution of some that would suffice in the name of justice. They would however be sufficiently restricted in order to prevent the renewal of conflict.[13] This distinction is particularly relevant for, and in contrast to, the belief that in fact, for a long time, the attainment of justice for the private person was rare. An amnesty clause's inapplicability to acts not done in the name of war here gives an indication that an individual affected by such acts was not completely neglected, even in the sixteenth century, and both sides were accounted for in the peace.

Furthermore, these examples indicate that amnesty was a widely used tool in periods of civil strife and rebellion, seemingly separate from the amnesty clauses inserted into peace treaties in times of declared war. However, these situations were not entirely distinct from one another and the crossover on the use of amnesties pointed to a connection

[8] Diane Claire Margolf, *Religion and Royal Justice in Early Modern France: The Paris Chambre de l'Edit, 1598–1665* (Truman State University Press 2003) 76, 77. Also see Edict of Nantes [1598] Dumont Corps Universel Diplomatique, 5, Art. 1.

[9] Andre Stegmann (ed.), *Edits des Guerres de Religion* (Vrin 1979) 143; Philip Benedict, 'Shaping the Memory of the French Wars of Religion. The First Centuries' in Erika Kuijpers, Judith Pollman, Joannes Mueller and Jasper van der Steen (eds.), *Memory before Modernity: Practices of Memory in Early Modern Europe* (Brill 2013) 112.

[10] Vincent J. Pitts, *Henri IV of France: His Reign and Age* (The Johns Hopkins University Press 2009).

[11] Ibid.

[12] Edict of Nantes 1598, Art. 87.

[13] Diane Claire Margolf, *Religion and Royal Justice in Early Modern France* (Truman State University Press 2003) 78.

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