

## Chapter 2

# Reparation Politics: An Emerging Field

The norms that have now emerged concerning the virtue of reparation politics have their roots in the early post-war era. It was not only the codification of the Genocide Convention (1948) and the creation of reparation and restitution laws for Jewish victims of the Holocaust, but also the philosophical underpinning given to the movement, particularly by Theodor Adorno, Hannah Arendt, and Karl Jaspers. They argued for the recognition of the German state's responsibility for the Holocaust as well as arguing for the importance of a coming to terms with the past, or *Vergangenheitsbewältigung*.<sup>1</sup> These developments were a direct reaction to the atrocities committed in Germany during World War II, and contributed strongly to the emergence of new norms within international society, creating a foundation on which reparation politics has now solidly been built.

What is unique about this foundation is that reparation politics directly counters the idiom that history is written by the victors. Reparation politics is a story narrated by those who were victimized. An important segment of this field is the recognition and transmission of a historical narrative wherein the state acknowledges its unjust actions—leading to a history at least partially written by those who lost the battle, not those who won. In other words, we see an entirely new way of examining a nation's history and the victimization of groups. This chapter will discuss the development and emergence of this field, bringing together the various strands of the literature and move on to current theories that seek to explain the proliferation and success of reparation politics.

### 2.1 Emergence of Atrocity and Accountability Norms

The idea of basic human rights was set forth by the United Nations General Assembly in 1948 with the adoption of the Universal Declaration of Human Rights; however, the granting and protection of such rights can only be enforced by the state.

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<sup>1</sup> For early works which argue Germany's need to come to terms with the past see: Adorno (1986); Arendt (1997); and Jaspers (1961).

Andrew Schaap describes this relationship between legitimacy and states' treatment of their citizens as follows:

... the legitimacy of the state was established by divesting sovereignty from the monarch and investing it in 'the people'. On the other hand, it was understood to depend on the state's role in securing the private freedoms of individuals through the institution of rights. Yet, despite this achievement in principle, modern states have, in fact, been responsible for the most pervasive and systematic destruction of human life in history.<sup>2</sup>

The state has an obligation to its citizens as defined by the social contract. This contract, distinguishable by the rights it grants its citizens, the duties it demands, and the legal codes it enforces varies from one sovereign nation to the next, and has over time evolved, and in some instances temporarily devolved. Within the domestic sphere of a state's territories, the state is the absolute holder of the rule of law. Its police force exists to apprehend those in violation of said law and judicial systems enforce these laws and punish those who violate them. Michael Humphrey states that citizenship rights represent those rights that states grant as protection to its population. These same laws, however, have been and in some cases still are, manipulated to create policies of inclusion and exclusion within society. By defining who is, and who is not, protected the state can exclude segments of the populace, deny full formal citizenship rights, enshrine legal discrimination, and create segments of the populace who are subjected to state sanctioned violence.<sup>3</sup>

Within the international sphere, states are expected to both protect their own citizens and refrain from violating the rights of other sovereign states' representatives and citizens. This right and obligation to protect can be seen in international law, is enshrined in the concept of absolute sovereignty, and codified within international treaties and customs that have the force of international law. One such international custom is the inherent acceptance that diplomats have immunity from prosecution in countries where they are posted.<sup>4</sup> Further, this respect for the human rights of other states' citizens can be seen in the codification of international norms, as reflected by the Geneva and Hague Conventions, listed in Table 2.1.

Prior to World War II, states were neither required nor expected to provide legal or symbolic redress to its citizens. There was no historical precedent to do so, nor were there international or domestic norms which would encourage states to engage in reparation politics. The horrors of the Holocaust with its six million Jewish civilians dead, targeted solely for ideological and racial reasons, resulted in a shift in international thinking. This shift, I argue, created a strong impetus to mandate laws against genocide and crimes against humanity and to establish the foundations of accountability and redress norms. These atrocities and the subsequent normative shift within international law dictated restrictions on state behavior towards its own citizens, and introduced a human rights regime within international society.<sup>5</sup>

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<sup>2</sup> Schaap (2005, p. 10).

<sup>3</sup> Humphrey (2002, p. 7).

<sup>4</sup> The concept of diplomatic immunity is a longstanding practice within international customary law.

<sup>5</sup> See Teitel (2011).

**Table 2.1** Major international conventions and treaties regulating armed conflict

Date	International conventions	Regulates
1864	First Geneva Convention for the amelioration of the condition of the wounded and sick in the armed forces in the field (last revision: 1949)	Protects wounded and sick soldiers during ground warfare Protects medical and religious personnel, medical units and medical transports Recognizes distinctive emblems Recognition of the Red Cross symbol as a means of identifying persons and equipment covered by the agreement
1899	Hague Convention of 1899	Settlement of international disputes Laws and customs of war on land Adaptation of maritime warfare principles from the Geneva Convention of 1864
1906	Second Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea	Protects wounded, sick, and shipwrecked military personnel at sea during war.
1907	Hague Convention of 1907	The opening of hostilities Laws and customs of ground warfare The rights and duties of neutral powers and persons Bombardment by naval forces during war Adaptation of the principles of the Geneva Convention Certain restrictions with regard to the exercise of the right of capture in naval war Rights and duties of neutral powers in naval war
1914–1918	World War I	
1928	Kellogg-Briand Pact	Multi-lateral treaty signed by the United States, Germany, and Japan among others stating that signatories Condemn war for the solution of international controversies Renounce war as an instrument of national policy
1929	Third Geneva Convention (last revision 1949)	Treatment of prisoners of war
1939–1945	World War II	
1949	Fourth Geneva Convention	Protection of civilians persons during war
1977	Protocol I Additional to the Geneva Conventions of August 12, 1949	Protection of victims of international armed conflicts
1977	Protocol II additional to the Geneva Conventions of August 12, 1949	Protection of victims of non-international armed conflict
2005	Protocol III additional to the Geneva Conventions of August 12, 1949	Adoption of an additional distinctive emblem

Sources: “International Humanitarian Law—Treaties and documents;” “Kellogg-Briand Pact 1928”

The concept of state-sponsored atrocity is not new. Tales of massacre, murder, and mayhem predate the foundation of the modern state system. One of the most well-known examples is written in the *History of the Peloponnesian War* (431 BC): the Melians were faced with the choice of paying tribute to Athens and surviving, or fighting the Athenian army and being destroyed. The Melians argued that they had the right to remain neutral in the conflict and their rights should be respected. The Athenians replied: “the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.”<sup>6</sup> The Melians did not surrender and, following the Athenian attack, all adult males were put to death and all women and children were enslaved. Redress and reparations for the deaths and enslavement would, during this time period, be unthinkable. The norms of the time legitimated the actions of the Athenian army.

It was not until 1859 in the Battle of Solferino<sup>7</sup> that international norms began to emerge concerning the treatment of individuals during war. The creation of such norms can be directly attributed to Henri Dunant, who was horrified by the treatment of wounded soldiers. His campaigning and lobbying eventually resulted in the passage of the Geneva Conventions and the founding of the International Red Cross.<sup>8</sup> Table 2.1 displays a brief summation of international conventions and treaties which regulate actions committed by soldiers and the state during war. The expectation of humane treatment of enemy soldiers and civilians demonstrates an evolution of norms within international society. This normative shift, however, only reflected proper treatment of soldiers and medics; it did not speak to treatment of the states’ own domestic populations until after World War II.

With the exception of the Kellogg-Briand Pact of 1928, the above conventions and protocols are part of the international humanitarian laws of war, also commonly referred to as international humanitarian law, or the laws of war. International humanitarian law is the subset of international law that deals with the rules and regulations seeking to limit the effects of armed conflict.<sup>9</sup> This body of law regulates the actions of states, but only during periods of war or armed conflict. It does not limit state action during time of peace, nor, prior to 1949, did it consider the states’ treatment of individuals within their own territories. The only consideration that one’s domestic citizens had within international law was under the League of Nations (1919–1946) and its minority treaties which stated that racial, religious, and linguistic minorities within a country would have the same political and civil rights as the majority.<sup>10</sup> Although the minority treaties contributed to our understanding of international law, the failure of the League of Nations, the subsequent

<sup>6</sup> Thucydides (1954, p. 402).

<sup>7</sup> The June 24, 1859 Battle of Solferino was between the Austrian army and the allied French and Sardinian armies.

<sup>8</sup> For a detailed description of how the norm emerged, the creation of the first Geneva Convention, and Dunant’s role in this process, see Bennett (2006).

<sup>9</sup> Steiner et al. (2007, p. 70).

<sup>10</sup> Rosting (1923, p. 649).

outbreak of World War II, and the widespread injustices and atrocities directed at minority groups during the war, demonstrates that minority treaties did not contribute decisively to the emergence of an international norm. It took the shock and horror of the Holocaust with its estimated 6 million Jewish dead for the international community to mobilize, and norms concerning human rights and protections from the state to emerge.

The normative shift towards protection of individuals within conflict and the emergence of norms forbidding acts of atrocity is illustrated within international humanitarian law by the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War; The codification of international criminal law is illustrated by the International Military Tribunal at Nuremberg (1945–1946) and the Genocide Convention (1948). A final component of this shift is the emergence of international human rights law. This subset of international law protects individuals and groups within a sovereign state and are considered to have their source in the Universal Declaration of Human Rights (1948).<sup>11</sup> The emergence of these legal doctrines and subsequent norms is a direct result of World War II and the Holocaust. Chapter 5 will examine how these normative concepts developed into the trend of redress and reparations and its proliferation throughout international society.

## 2.2 Legal Concepts of Reparation

Some aspects of the redress and reparation movement (RRM) existed before World War II; however, the context was quite different. Prior to World War II, reparations, state apologies, and trials were the result of international politics and focused on the state not on the individual. This can be seen with the concept of reparation. Reparation had a distinct meaning within international society prior to World War II. Reparation, or compensation, was utilized exclusively in law to mean post-war fines. States on the losing side of a war were often required by treaty to make monetary payments to the victor for damages.<sup>12</sup> In a legal context reparation, often used interchangeably with compensation, can be defined as “compensation for an injury of wrong, esp. [sic] for wartime damages or breach of an international obligation.”<sup>13</sup> This definition has evolved from exclusive use in international or domestic law to also being used in the field of reparation politics—with reparations being some form of symbolic material compensation for that which could not be returned, such as human life, a flourishing culture, strong economy, and cultural identity.<sup>14</sup>

An early codification of the principle of reparations was the 1907 Hague Convention, which stated: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be

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<sup>11</sup> Teitel (2011, p. 5).

<sup>12</sup> Torpey (2006, p. 8).

<sup>13</sup> Black’s Law Dictionary, 8th ed., s.v. ‘reparation.’

<sup>14</sup> Barkan (2000, p. xix).

responsible for all acts committed by persons forming part of its armed forces.”<sup>15</sup> This convention, like the later Versailles Treaty, related only to international armed conflict. Under international law it entitled the state to compensation. There was no concept of reparation payments to individual citizens. Likewise, the Treaty of Versailles (June 28, 1919), which ended World War I, is perhaps the most well known example of what reparation meant prior to World War II.

Article 231 is the infamous “war guilt” clause of the Versailles Treaty:

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.<sup>16</sup>

The clause affirmed Germany’s moral responsibility for the consequences of the war, but did not acknowledge financial responsibility. Reparation obligations were then laid out in Art. 232:

The Allied and Associated Governments recognise that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present Treaty, to make complete reparation for all such loss and damage.

The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency...<sup>17</sup>

The language of the Versailles Treaty, and in particular Art. 232, seems to make a distinction between reparation and compensation.

This initial distinction, as we would understand the terms reparation and compensation is misleading as the focus was still state-centric. The Versailles Treaty clearly refers to damage done to civilian populations in Art. 232; however, the concept of the individual citizen within international law was fundamentally different than our understanding today. Compensation for property and economic damage was due only to the citizenry of Allied nations and was included in the peace treaty negotiations. Further, the citizen was, in essence, an extension of the state.<sup>18</sup> Oppenheim’s treatise *International Law* in 1912 stated: “...if individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right.”<sup>19</sup> Thus, reparation and compensation claims were not due to individuals who lost property or were damaged in some way. They were due to the state. Only the damages and fines that had been negotiated during the peace treaty were considered, and compensation was linked only to the victimized population of the victorious state.

<sup>15</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

<sup>16</sup> Baruch (1920, p. 127).

<sup>17</sup> Ibid. p. 128.

<sup>18</sup> Robertson (1999, p. xxi).

<sup>19</sup> quoted in Buergenthal (2006, p. 19).

Individuals harmed from the Central Powers or neutral countries were not directly compensated by the losing state, nor in actuality, were individuals from the Allied countries. Reparation monies would be paid to the victorious state, and they could distribute funds to civilians if so desired.

Moreover, according to Thomas Buergenthal, individuals prior to World War II had no independent rights under international law. They could not claim rights since they were not subject to international law. There were merely objects of international law, and the concept of the individual did not differ from a sovereign's territory or other possessions.<sup>20</sup> In this view citizens were merely possessions of a state, and thus, injury to a citizen was not deemed to be a human rights violation, but rather an injury to the state.<sup>21</sup> The process of reparation for individuals, then, would be as follows: during the peace treaty negotiations, it was agreed that Germany had to pay a set amount to France for damages, and it was then France's responsibility to determine damages to its civilians including any and all property damage claims, disability claims, and pensions. Reparations are seen in this 1919 definition as monies or territories given to the victor as compensation for damages that the losing state inflicted upon the victorious state. This definition and the process itself are distinctly different than compensation for that which cannot be returned,<sup>22</sup> the definition of reparations that one finds within the modern reparation politics.

The concept of individuals obtaining reparation and compensation for crimes committed against their property and person did not arise until after World War II. This shift in philosophy, and emphasis on the individual, is encapsulated by the negotiations between West Germany and Israel, which culminated in the 1952 Reparations Agreement between Israel and the Federal Republic of Germany, more commonly referred to as the Luxembourg Agreement. The Luxembourg Agreement resulted from negotiations between West Germany, Israel, and the Claims Conference. West Germany offered both Israel and the Claims Conference reparations, and agreed to establish domestic reparation laws to compensate individuals. This agreement created a shift in the conceptual understanding of reparations. The creation of these redress and reparations norms is further explored in Chap. 5.

## 2.3 Normative Shifts in International Law

The Versailles Treaty is a useful backdrop to describe the evolution of crimes against humanity and their treatment in international criminal law. Prior to World War II, international law addressed relations between states; the only exceptions were codified within international treaties and limited to the cases of those individuals apprehended in the act of piracy (from the 13th century) and individuals who were slavers (from the 19th century). These were, however, very specific exceptions. These crimes—as discussed below—often took place within international waters

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<sup>20</sup> Buergenthal (2006, p. 19).

<sup>21</sup> Ibid.

<sup>22</sup> Barkan (2000, p. xix).

and thus carried a restricted understanding of universal jurisdiction and international criminals—individuals, regardless of where they were apprehended, could be tried by the state responsible for their capture.<sup>23</sup> Barring this highly limited notion of international responsibility, the rights of individuals were a factor only when one state violated the rights of another states' citizens. Thus, when the Versailles Treaty discussed compensation of individuals, it repeatedly referred to the "civilian population of the Allied countries." In general, the idea that international law could dictate a state's actions vis-à-vis its own citizens, or that an individual within the state could be held accountable for breaches of international law, especially in regard to the same state's citizens, was, at that time, unheard of.<sup>24</sup>

### 2.3.1 *Legal Status of Individuals Prior to 1945*

The first group of individuals to be considered criminals under international law were pirates. The concept of piracy *jure gentium*<sup>25</sup> is one of the oldest international offenses.<sup>26</sup> Since Hugo Grotius' 1631 text *On the Law of War and Peace*, pirates have been considered "no longer a national, but hostis humani generis," or enemy of mankind, "and as such he is justiciable by any State anywhere."<sup>27</sup> The evolution of pirates as enemies of mankind and the application of universal jurisdiction has more to do with the problematic issues of how and where to prosecute piracy, rather than with the concept of international criminal law.

Due to the nature of piracy and its practice in international waters, pirates tend to be outside the normal jurisdiction of domestic courts. It was generally accepted, however, that since there was a "common interest of all nations in protecting navigation against interference on the high seas outside the territory of any state, it was considered appropriate for the state apprehending a pirate to prosecute in its own courts."<sup>28</sup> This status meant that captured pirates were punished by various states, regardless of the individual nationality or the specific crime (murder, robbery, etc) for which they were apprehended. This application of limited universal jurisdiction shows us that although the language of the law was "pirates as the enemy of mankind," the laws that were enforced, and individuals prosecuted, were in actuality, the domestic laws of the nation-state. Likewise, until the adoption of

<sup>23</sup> Robertson (1999, pp. 223–225).

<sup>24</sup> The League of Nations attempted to safeguard the rights of national groups as equals under law and guarantee their right to exist as cultural, religious, and linguistic entities by a series of minority treaties and by issuing a vow that declared states not bound by the treaties should observe the same standards as those bound. However, the minority treaties are generally considered to have failed. Schechtman (1951, pp. 1–2).

<sup>25</sup> Latin: "law of nations".

<sup>26</sup> Bantekas and Nash (2003, p. 95).

<sup>27</sup> Qtd from "In Re a Reference under the Judicial Committee Act, 1833," (1935, pp. 141–142). Re Piracy *Jure Gentium* discusses the evolution of international law regarding piracy from the seventeenth century. See also White (1989, p. 141).

<sup>28</sup> Steiner et al. (2007, p. 115).



the 1958 Geneva Convention on the High Seas, even the definition of piracy rested within each country's domestic laws.

The second group of individuals who were assigned this status of *hostis humani generis* and were therefore subjected to universal jurisdiction were slavers. Like international piracy law, the evolution of international anti-slavery norms resulted in a compilation of domestic laws, international treaties, and international customary laws.<sup>29</sup> The Declaration of the Powers section of the Abolition of the Slave Trade document of February 8, 1815, declared the slave trade to be “repugnant to principles of humanity and universal morality.”<sup>30</sup> The 1926 Slavery Convention confirmed universal jurisdiction for the punishment of slavers, regardless of where they were apprehended.<sup>31</sup> The ban on slavery was later codified under international human rights law in Art. 4 of the Universal Declaration of Human Rights.

Slavers and pirates were considered the first international criminals. They could be captured anywhere and put on trial, regardless of their citizenship or the locality in which they were captured. The concept of international criminals is found in the application of crime and punishment for slavers and pirates, yet it does not translate into what today is considered to be international criminal law. Interestingly, these two categories of individuals foreshadowed the development of individual criminal law, yet were not ultimately included in that category. Piracy remained within the realm of international maritime law, whereas slavery was enveloped within international human rights law. One exception is enslavement when “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>32</sup> Additionally, crimes under international law were still encapsulated by the normative concept of state sovereign immunity and head-of-state immunity—which meant that in practice, the heads of state, senior military commanders, and officials acting under governmental orders were representatives of the state and therefore immune from international prosecution. State sovereign immunity governed the extent to which the state, as an entity, was free from the jurisdiction of foreign courts and reflected the premise that each sovereign state was independent and equal under international law, and thus, could not be put on trial without its consent.<sup>33</sup>

Another concept ingrained within international law was the defense of superior orders. The idea here was that one had to obey the orders of one's military commander, regardless of the nature of the order. Until the Nuremberg Trials, acting under superior orders was considered to be a legitimate defense and incorporated into

<sup>29</sup> Customary law is understood as practices that have been carried out over long periods of time; and although they are not laws, they have the force of law.

<sup>30</sup> *The Parliamentary Debates from the Year 1803 to the Present Time*, (1816, p. 200).

<sup>31</sup> Robertson (1999, pp. 224–225). Revisions were made following the convention further defining slavery. This was followed by the United Nations 1956 Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions and Practices Similar to Slavery.

<sup>32</sup> United Nations (2002, Art. 7).

<sup>33</sup> Tunks (2002, p. 653, 655) As more states engaged in commercial behavior, state sovereign immunity began to shift to a ‘restricted’ understanding of state sovereign immunity where commercial activity could be regulated without violating core concepts of state independence and equality.

most military manuals including the British Manual of Military Law and the US Department of the Army Field Manual: The Law of Land Warfare.<sup>34</sup> The defense was considered a necessity of war, because no commander, regardless of nationality, would want soldiers who defy orders. Although “superior orders” can still be invoked (as it was in the trial of the East German border guards in 1991)<sup>35</sup> it is no longer considered to be a mitigating factor allowing one to escape culpability for his or her individual actions.<sup>36</sup> Regardless of the military justifications, utilizing the superior orders defense in conjunction with sovereign immunity meant that, with exception of individual violations of the Geneva Convention, criminal responsibility within international law was virtually non-existent.<sup>37</sup>

The norm of head-of-state sovereign immunity was debated at the Versailles Peace Conference. Although the debate failed to bring an indictment, Art. 227 of the Versailles Treaty stated: “The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties.”<sup>38</sup> The Treaty went on to describe the creation of a special tribunal constituted with 5 judges appointed by the Allied Powers (United States of America, the French Republic, the United Kingdom, and the Union of Soviet Socialist Republics). The challenge to the existent norms of sovereign immunity failed however, as the German Emperor had not committed any crime previously defined or considered punishable by then-existing international law. The indictment was regarded as political and lacked legal grounds for extradition. As a result, he never went to trial, an international tribunal was never established, and the former head of state resided in exile in the Netherlands until his death in 1941,<sup>39</sup> thus upholding sovereign immunity for the time being.<sup>40</sup> The challenge to the norm was significant in that it showed willingness for world leaders to consider abolishing sovereign immunity; however, they lacked political will at that time to carry out the international tribunal.<sup>41</sup>

The actions taken after World War II, however, are extremely significant as they **successfully** challenged sovereign immunity and broadened international law to

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<sup>34</sup> Maogoto (2003, p. 88).

<sup>35</sup> Kinzer (1992)

<sup>36</sup> Minow (1998, pp. 25–51).

<sup>37</sup> Ratner et al. (2009, p. 4).

<sup>38</sup> “The Versailles Treaty, 28 June 1919.”

<sup>39</sup> Robertson (1999, p. 226).

<sup>40</sup> Germany opposed Allied conducted trials and proposed that Germany conduct the trials of alleged war criminals themselves. The result was the Leipzig Trials. The original list of war criminals was 20,000, which the Allies pared down to 865 to be tried. Upon negotiation, the Allies agreed to reduce the number to be prosecuted and submitted 45 names. Of these 12 military officers were brought to trial, and 6 convicted with lenient punishments. For a review of these trials see Meron (2006, pp. 551–579) and Finch (1943, pp. 81–88).

<sup>41</sup> Although sovereign immunity was upheld after World War I, this does not imply a complete absence of trials. War crime trials were carried out in Germany following the end of the war for violations of military penal codes and customary international law. One of the more infamous of these was the Leipzig Trial. See Matthäus (2008).

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