

## **PLEASE NOTE**

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### **Private Property in the Dutch-Spanish Peace Treaty of Münster (30 January 1648)**

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and

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#### Abstract

The rise of the dynastic State with its growing control over warfare led to a changing conception of war. Under the just war tradition of the Late Middle Ages, war was conceived of in terms of the vindication of justice and was, at least conceptually, limited in scope. It was perceived as a set of separate acts of war, not disrupting all relations between the belligerents and their subjects. While the just war tradition proved resilient during the Early-Modern Age, a second concept, that of legal war, emerged. A legal war disrupted normal peaceful relations almost wholly; it was thought of as a state of war. The laws of peace ruled the state of peace; the laws – and practices – of war and neutrality ruled the state of war. As war became a more encompassing state of affairs, peace treaties became more

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elaborate. Apart from setting the conditions for ending hostilities, they also had to regulate the return from the state of war to the state of peace.

By the 17<sup>th</sup> century, it had become customary for belligerents to seize and confiscate enemy property that came within their power. By consequence, many peace treaties included extensive stipulations on seized goods. The Dutch-Spanish Peace of Münster (1648), which ended the Eighty Years War (1567-1648), is an extremely interesting example thereof. As most early-modern peace treaties, the Münster Peace provided for the general restitution of all seized property, except for movables and lapsed incomes from reinstated property.

The analysis of the relevant clauses in the Peace Treaty and their confrontation with contemporary doctrine indicate that the practice of seizure and restitution shared in the same ambiguity which scholars such as Grotius had caught in distinguishing just and legal war. Seizures were part and parcel of the discourse of just war. Seized goods served as a security for the indemnification which the other side, the supposedly unjust belligerent, would have to pay. The restitution clauses, however, were dictated by the logic of legal war. They partook in the desire of the signatories to forget the past and not to attribute or concede any guilt for the war. This was given substance in the amnesty clauses that became standard in peace treaties.

## 1. *Introduction*

War is not a relation between men, but between States; in war, individuals are enemies wholly by chance, not as men, not even as citizens, but only as soldiers.<sup>2</sup>

In these well-known and much-quoted lines from *Du contrat social* (1762), Jean-Jacques Rousseau (1712-1778) associated the growing control of the State over war to its

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<sup>2</sup> *Jean-Jacques Rousseau, The Social Contract and Other Political Writings* (1762, transl. Victor Gourevitch, Cambridge Texts in the History of Political Thought), Cambridge 1997.

humanisation. Because war is the business of princes and governments, it should only concern the State's agents and not its citizens. While this was and remains a noble thought, it is hardly an accurate statement of reality for the *Ancien Régime*, or for any other period.

During the late 17<sup>th</sup> and the 18<sup>th</sup> centuries, the laws of war increasingly distinguished between combatants and noncombatants. This was consequential to the growing control of the sovereign princes of Europe over their armed forces. Between the early and late 17<sup>th</sup> century, the military entrepreneur had to make way at the head of the prince's armies for the officer, commissioned and paid for by the sovereign. In many countries, a vast bureaucracy was set up to organise, finance, provision, command and – most relevant for our subject – discipline the armed forces. All this contributed to the further professionalisation of war and set soldiers apart from civil society.<sup>3</sup> In this respect, the monopolisation of war by central governments was conducive to humanising war. But by no means was it a sufficient cause thereof. The association of State control and citizen's immunity might have some conceptual validity for the era of the dynastic State, once the nation-State emerged, the association worked the other way round. Now that the nation became the State, the State's war also became the nation's war. The total wars of the Revolutionary and Napoleonic Era and of the 20<sup>th</sup> century speak all too loudly for themselves.

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<sup>3</sup> On the bureaucratisation of the armed forces during the 17<sup>th</sup> century and its consequences: *David Parrott*, *Richelieu's Army: War, Government and Society in France, 1624-1642*, Cambridge 2001; *Guy Rowlands*, *The Dynastic State and the Army under Louis XIV: Royal Service and Private Interest, 1661-1701*, Cambridge 2002. On the growing distinction between combatants and noncombatants: *Randall Lesaffer*, *Siege Warfare in the Early Modern Age: A Study on the Customary Laws of War*, in: *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives*, eds. Amanda Perreau-Saussine/James Bernard Murphy, Cambridge 2007, 176-202, 183-90; *Geoffrey Parker*, *Early-Modern Europe*, in: *The Laws of War: Constraints on Warfare in the Western World*, eds. Michael Howard/George J. Andreopoulos/Mark R. Shulman, New Haven/London 1994, 40-58, 51-4.

But even for the era of the dynastic State, the bond between State control and the limitation of war holds only partially true. Growing State control did not only lead to less total war; in some respects it also led to more total war. Rousseau's words might, rather unwillingly as far as he was concerned, reflect reality in as much as they referred to the distinction between combatants and noncombatants, this by no means implied that citizens remained aloof from the sufferings of war. Although the laws and customs in some ways and circumstances aimed at protecting them from bodily harm, in the dynastic State the prince's war was also the war of his subjects. If they did not have to die in it, they surely had to pay for it – into their own, or the enemy's treasury. The mobilisation of their resources for war was one of the most crucial factors of success or failure for the princes and republics of early-modern Europe; during war, the capture or destruction of the enemy's resources was as much. The Military Revolutions of the Early-Modern Age were ever so many rounds in that vicious circle of the expanding machinery of State and rising costs of war, in every sense of the word. The Enlightenment did nothing to change that.<sup>4</sup>

The rise of the dynastic State and its emerging control over war changed the legal conception of war. Under the classical just war doctrine of the Late Middle Ages, war was basically an instrument of law enforcement, a kind of substitute for legal trial in the hands of a sovereign to enforce his just and rightful claims upon his enemy who had allegedly injured

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<sup>4</sup> On the Military Revolution and its impact on State formation in Early-Modern Europe: *Jeremy Black, A Military Revolution? Military Change and Society 1550-1800*, London 1991; *The Military Revolution and the State 1500-1800*, ed. Michael Duffy, Exeter 1980; *Geoffrey Parker, The Military Revolution, 1560-1660 – a Myth?*, in: *Journal of Modern History* 47 (1976) 195-214; *idem, The Military Revolution: Military Innovation and the Rise of the West 1500-1800*, Cambridge 1988; *David Parrott, Strategy and Tactics in the Thirty Years' War: The "Military Revolution"*, in: *Militärgeschichtliche Mitteilungen* 18 (1985) 7-25; *Michael Roberts, The Military Revolution, 1560-1660*, Belfast 1956; *The Military Revolution Debate: Readings on the Military Transformation of Early Modern Europe*, ed. Clifford J. Rogers, Boulder/Columbia/Oxford 1995.

these rights. In this sense, and regardless of the different types and scales of it, war was conceived of as somewhat limited in terms of its cause – the vindication of right and justice against the perpetrators of the injustice. It was legally perceived of as a set of separate acts of war which did not, at least not necessarily, disrupt all normal, legal relations between the belligerents and their vassals, adherents and subjects. Under the just war doctrine, the concept of war was discriminatory. On principle, only one side could have justice on its side and be fighting a just war. Consequentially, the benefits of war – the *iura belli*, as the right to conquer or plunder – only befell one side. Also, a just belligerent could only take from the enemy that to which he held a claim of restitution, compensation or vindication.

During the 16<sup>th</sup> and 17<sup>th</sup> centuries, the legal conception of war changed. Whereas the just war doctrine proved resilient in that belligerents continued to justify war in terms of its justice for the benefit of their and their enemy's allies and subjects – as well as their own conscience –,<sup>5</sup> a second conception of war emerged. It was the concept of legal war – which Hugo Grotius (1583-1645) labelled solemn war.<sup>6</sup> For a war to be legal, it had to be waged between sovereign powers and it had to be formally declared. This last condition indicated its *ratio existendi*. Whereas the justice of war was by and large a matter of religious morality as well as political propaganda, its legality had roots and ramifications in the practice of warfare. The declaration of war by a sovereign prince, having the authority to do so, indicated that from now on, a legal state of war reigned between the belligerents and their subjects. By consequence, the laws of peace – or at least, many of them – were superseded by the laws of war, and for third parties, of neutrality. Indeed, by the early 17<sup>th</sup> century, war was no longer perceived of as a set of different acts of hostility but as a condition, a state, highly different

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<sup>5</sup> *Randall Lesaffer*, *Defensive Warfare, Prevention and Hegemony: The Justifications for the Franco-Spanish War of 1635*, in: *Journal of the History of International Law* 8 (2006) 91-123 and 141-179, 111-23.

<sup>6</sup> *Hugo Grotius*, *De iure belli ac pacis libri tres* (Paris 1625, edn 1646, transl. Francis W. Kelsey, *The Classics of International Law*), 2 vols., Washington 1913, 1.3.4.1, 3.3.4-5 and 3.3.12-13.

from the state of peace, that suspended most if not all normal relations between the belligerents. The state of war was to be ruled by the laws of war and of neutrality, which were much more encompassing than the *iura belli* of the medieval *ius gentium*. Indeed, it allowed for more involvement of noncombatants as traditional medieval just doctrine would. In some sense, the growing distinction between combatants and noncombatants from the late 17<sup>th</sup> century onwards was a return to the days prior to the rise of the dynastic State.<sup>7</sup> Moreover, legal war was not discriminatory. The laws of war benefited all sides as the war could well be legal on all sides, as long as they were sovereign and the war had been declared. A legal war was, as Albericus Gentilis (1552-1608) held it, a ‘perfect’ war.<sup>8</sup>

Changing legal thought caught the changing reality of war. Between the Late Middle Ages and the 17<sup>th</sup> century, war became more encompassing. Gradually, war came to include trade prohibitions and general confiscations of enemy property, if not arrest of enemy subjects found within a belligerent’s borders. While this was not unheard of in the Middle Ages, these and other measures of war now became more general, more institutionalised, more standardised. Over the 16<sup>th</sup> and 17<sup>th</sup> centuries, it became customary to announce many of these measures and restrictions in the formal declaration of war, or in the war manifestos published by the belligerents to justify their actions towards their officials, their military commanders and their allies.<sup>9</sup>

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<sup>7</sup> Under the just war doctrine, whole categories of people were considered immune from warfare: *Maurice Keen*, *The Laws of War in the Late Middle Ages*, London 1965, 189-217; *Stephen Neff*, *War and the Law of Nations: A General History*, Cambridge 2005, 65; *Robert Stacey*, *The Age of Chivalry*, in: *The Laws of War: Constraints on Warfare in the Western World* (note 3), 27-39, 37.

<sup>8</sup> *Albericus Gentilis*, *De iure belli libri tres* (1588-1589, edn 1612, transl. John C. Rolfe, *The Classics of International Law*), 2 vols., Oxford/London 1933, 1.2.

<sup>9</sup> See on this evolution in legal thinking about war, *Peter Haggenmacher*, *Grotius et la doctrine de la guerre juste*, Paris 1983; *Stephen Neff*, *The Rights and Duties of Neutrals: A General History*, Manchester 2000; *idem*,

By the 17<sup>th</sup> century, war was well under way to be perceived as and become on the ground a clash between dynastic States and all they held and controlled. As the sovereign princes gained more control over their territories and subjects, they also sucked them into their disputes and wars. The later 17<sup>th</sup> and 18<sup>th</sup> centuries might bring a growing consideration for the distinctiveness of soldiers and citizens, this did not imply that the citizens were spared, or supposed to be spared, the hardships of war. Among the great writers of the law of nations of the Early-Modern Age, it was well established that all property and assets belonging to the enemy subjects were liable for taking during the war.<sup>10</sup>

In this, doctrine bore testimony to the practices of States. During the Early-Modern Age, the property of private persons fell victim to war in several ways. First, there was plundering and looting by invading armies and soldiers. Second, there was the widespread practice of reprisal and the granting of *lettres de marques*, which made enemy ships and their load the lawful prize of privateers. Third, there was the seizing of enemy property found within the borders of a belligerent's territories, at the beginning of the war or at any later stage. This was mostly done through an official act. These seizures were variably and inconsistently labelled seizures, confiscations or sequestrations. We will use seizure as the general term encompassing both sequestration – the taking possession of and placing under

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War and the Law of Nations (note 7), 96-119, and references there. For an example of declarations and manifests of war, see *Lesaffer*, *Defensive Warfare, Prevention and Hegemony* (note 5). On declarations of war, *Bernd Klessman*, *Bellum solemnne. Formen und Funktionen europäischer Kriegserklärungen des 17. Jahrhunderts* (Veröffentlichungen des Instituts für Europäische Geschichte Mainz 216), Mainz 2007; *Anuschka Tischer*, *Der Wandel politischer Kommunikation im Kriegsfall: Formen, Inhalte und Funktionen von Kriegs begründungen der Kaiser Maximilian I. und Karl V.*, in: *Militär und Gesellschaft in der Frühen Neuzeit* 9 (2005) 7-28.

<sup>10</sup> E.g. *Grotius*, *De iure belli ac pacis* (note 6), 3.5.1.1 and *Emer de Vattel*, *Le droit des gens ou principes de la loi naturelle* (1758, transl. Charles G. Fenwick, *The Classics of International Law*), 3 vols., Washington 1916, 3.5.69-76.

administrative control by the treasury – and confiscation – the taking possession of and the transfer of the title of ownership to the treasury or a private person.<sup>11</sup> These seizures, fourth, could also include measures against enemy property in territories conquered and occupied during the war. Fifth, it became customary to impose contributions and requisitions on enemy subjects in occupied territories, in fact a mitigated way of seizure and a substitute for plunder. Sixth, enemy as well as neutral goods were often confiscated because of infringements against trade restrictions. Seventh, as a logical complement to trade restrictions between belligerents, the payment of debts to enemy creditors was often suspended. Sometimes, the debtor had to pay his debts into his own treasury. This amounted up to a kind of sequestration or confiscation of the debt.<sup>12</sup>

As war became a practically and legally more encompassing state of affairs, peacemaking became more complex. The stipulations of early-modern peace treaties can be classified in three groups. First, there were the political concessions made and won by the signatories. These often, if not always, entailed a settlement of the claims and issues for which the war had been waged. The settlement exhausted the right to resort to war over these issues in the future. Second, the treaty regulated the return from the state of war to the state of peace. Particularly on this point, early-modern peace treaties became quite elaborate. The more divergent the state of war and the state of peace, the more there was to settle in the instrument

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<sup>11</sup> Title did not always mean ownership. In reality, many confiscated estates and lands were not allodial, but feudal. Ownership – *dominium* – was then divided between the vassal, who held the *dominium utile* and the liege lord, who held the *dominium eminens*. The title transferred through the confiscation to the detriment of the vassal was then that to *dominium utile*. *Thomas Glyn Watkin, An Historical Introduction to Modern Civil Law, Aldershot etc. 1999, 227-8.*

<sup>12</sup> *Hans Neufeld, The International Protection of Private Creditors from the Treaties of Westphalia to the Congress of Vienna (1648-1815), Leyden 1971, 118-33; Fritz Redlich, De praeda militari: Looting and Booty 1500-1815, Wiesbaden 1956.*

of peace. Third, measures were taken to ensure peaceful relations in the future and to prevent new war from breaking out. Under the second category fell all stipulations with regards to indemnification or the restoration of private persons' rights and property. Under the third category came stipulations concerning the future protection of private persons' rights and property.<sup>13</sup>

This article entails a study of the Dutch-Spanish Peace Treaty of 30 January 1648 in relation to private property. Only the articles from the second category will be analysed. The next section sheds some light on the significance of this peace treaty as well as on its genesis and the negotiation process. In the third section, the relevant clauses are inventoried and briefly explained. The fourth section goes deeper into the legal context and implications of the main principles underlying the treaty.

## 2. *The Treaty of Münster: Forty years in the making*

When scholars use the words 'Peace of Westphalia,' they first and foremost refer to the two peace treaties signed simultaneously at Münster and Osnabrück on 24 October 1648. These treaties ended the series of international, confessional and civil wars that had devastated Central Europe for three decades and are collectively known in history as the Thirty Years War (1618-1648). Signatories to these treaties were the Emperor, princes and estates of the Holy Roman Empire as well as the King of France and the Queen of Sweden. In that same

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<sup>13</sup> *Jörg Fisch*, *Krieg und Frieden im Friedensvertrag. Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedenschlusses*, Stuttgart, 1979, 92-123; *Randall Lesaffer*, *Peace treaties from Lodi to Westphalia*, in: *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One*, ed. Randall Lesaffer, Cambridge 2004, 9-44, see some relevant studies in *idem*, *The Law of Nations in Peace and Alliance Treaties (15<sup>th</sup>-18<sup>th</sup> centuries): Collected studies*, Leyden/Boston, forthcoming.

year 1648, another major peace treaty was concluded in Westphalia, the Peace Treaty of Münster of 30 January between Philip IV, King of Spain (1621-1665) and the Estates-General of the Republic of the United Provinces of the Northern Netherlands. This peace treaty ended the so-called Eighty Years War (1567/8-1648),<sup>14</sup> the rebellion and war of secession of the Northern Netherlands against their former sovereign prince, the King of Spain. In the treaty, Philip IV recognised the freedom of the eight northern provinces of the Netherlands and ceded all his claims on these provinces, as well as on their conquests in the loyal provinces of the Southern Netherlands (Article 1).<sup>15</sup>

The Dutch-Spanish Peace Treaty of Münster is a particularly apt treaty for studying the treatment of private rights and property in early-modern peace treaties. Not only is it one of the most important international peace treaties of the era, it is also very elaborate on this point. This is natural as it ended an extremely long war, that moreover, was a war of secession and had been – at least in its initial phases – a civil war before it turned into a more traditional war. All this assured that the involvement of private persons had been rather extensive. The treaty, by consequence, had much to settle.<sup>16</sup>

The actual negotiations leading up to the signing of the treaty by the Dutch and Spanish plenipotentiaries in January 1648 started just two years before when the eight Dutch negotiators arrived in Münster on 15 January 1646. At the town of Münster, French

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<sup>14</sup> In the terms of the treaty, the war had actually taken 81 years, having started in 1567, see Art. 56.

<sup>15</sup> For this paper, we used the edition of the Dutch, original version of the treaty by Simon Groenveld: *Vrede van Munster 1648-1998. Tractaat van 'een aengename, goede, en oprechte Vrede,'* The Hague 1998. The authentic instruments of the treaty were in Dutch and French.

<sup>16</sup> On the Eighty Years War, see *Jonathan Israel*, *The Dutch Republic and the Hispanic World 1606-1661*, Oxford 1982; *idem*, *Conflicts of Empire: Spain, the Low Countries and the Struggle for World Supremacy 1585-1713*, London/Rio Grande 1997; *Geoffrey Parker*, *The Dutch Revolt*, 2<sup>nd</sup> edn, London 1985; *idem*, *Spain and the Netherlands 1559-1659. Ten studies*, London 1979.

plenipotentiaries were present to negotiate a peace treaty with Spain.<sup>17</sup> But, in fact, the origins of the Treaty of Münster go back far beyond 1646, to 1607.

In that year, forty years after the inception of the Dutch Revolt, the belligerents were ready to start talking about peace.<sup>18</sup> On 12 April 1607, an eight-months armistice was signed.<sup>19</sup> During that time, a congress would convene to negotiate a lasting peace settlement between the Dutch Republic of the Northern Netherlands, the Archdukes Albert (1598-1621) and Isabelle (1598-1633), sovereign princes of the Southern Netherlands, and the Spanish King Philip III (1598-1621), who shouldered the main effort in the war against the Republic both within Europe and the Indies.<sup>20</sup> While the armistice was time and again extended, the

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<sup>17</sup> On the complex negotiations at Münster and Osnabrück, see *L'Europe des traités de Westphalie: Esprit de diplomatie et diplomatie de l'esprit*, ed. Lucien Bély, Paris 2000; 1648: *Krieg und Frieden in Europa*, eds. Klaus Bußmann/Heinz Schilling, 2 vols., Münster/Osnabrück 1998; *Derek Croxton, Peacemaking in Early Modern Europe: Cardinal Mazarin and the Congress of Westphalia, 1643-1648*; *Fritz Dickmann, Der Westfälische Frieden*, 7<sup>th</sup> edn, Münster 1998; *Der Westfälische Friede: Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte*, ed. Heinz Duchhardt, Munich 1998.

<sup>18</sup> In 1579, the belligerents had already held brief and unsuccessful peace negotiations at Cologne at the instigation of the Emperor, *Parker, Dutch Revolt* (note 16), 195-7.

<sup>19</sup> The text of the armistice mentioned 24 April, but it was actually signed twelve days earlier: *W.J.M. van Eysinga, De wording van het Twaalfjarig Bestand van 9 april 1609* (Verhandelingen der Koninklijke Nederlandse Akademie van Wetenschappen, afdeling Letterkunde N.S. 66, 3), Amsterdam 1959, 83. For the text of the armistice, see *Jean Dumont, Corps universel diplomatique du droit des gens*, The Hague 1726, vol. 5.2, 83-4.

<sup>20</sup> Just before he died in 1598, Philippe II (1558-1598) ceded the Netherlands, including the Franche-Comté, to his daughter Isabelle and her husband, the Archduke Albert of Austria. If they died without issue, their lands would return to Philip III and his descendants, a fact which transpired in 1621. See on the dependence of the Archdukes on Spain, *Joseph Lefèvre, La souveraineté d'Albert et d'Isabelle*, in: *Revue générale belge* 89 (1953) 967-83; *idem, L'intervention du duc de Lerne dans les affaires des Pays-Bas*, in: *Revue belge de philologie et*

peace negotiations at The Hague broke down by August 1608. Under pressure of the mediators, the English and French ambassadors to The Hague, negotiations were then resumed to make a truce for several years. These led up to the Twelve Years Truce, signed at Antwerp on 9 April 1609. During the final lap, the negotiation process had been taken into hand by the French mediators. The leading French diplomat was the jurist Pierre Jeannin (1542-1623), known as the 'president' because he held that function at the Parliament of Dijon, the high court of the French Duchy of Burgundy. Like the leading Dutch negotiator and the most active representative on the Southern delegation, Johan van Oldenbarnevelt (1547-1619) and Jean Richardot (1540-1609), Jeannin had been exposed to Roman law during his university days.<sup>21</sup> The Twelve Years Truce was supplemented by a treaty of interpretation concluded between the Republic and the Archdukes on 7 January 1610.<sup>22</sup>

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d'histoire 18 (1939) 463-85; *Geoffrey Parker*, The Decision-making Process in the Government of the Catholic Netherlands under the Archdukes, 1596-1621, in: *idem*, Spain and the Netherlands (note 16), 164-76.

<sup>21</sup> *Henri Ballande*, Rebelle et conseiller de trois souverains: Le Président Jeannin 1542-1623, Paris 1981; *J. den Tex*, Oldenbarneveldt, 2 vols., Cambridge 1973; *J.C.H. de Pater*, Maurits en Oldenbarnevelt in den strijd om het Twaalfjarig Bestand, Amsterdam 1940; *Marie-Paule Lauwers*, Jean Richardot, chef-president van de privé-raad (1597-1609), Leuven, unpublished thesis 1955; *Van Eysinga*, De wording van het Twaalfjarig Bestand (note 19); *Martina Julia van Ittersum*, Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615), Leyden/Boston 2006, 189-358. Also see, *Négociations diplomatiques et politiques du Président Jeannin (1598-1620)*, ed. J.-A.-C. Buchon, Paris 1875. For the text of the truce, see the official edition by *Jacobus Scheltus* from The Hague, 1609; also in *Dumont*, Corps universel (note 19), vol. 5.2, 99-102.

<sup>22</sup> For the text of this treaty, see the official edition by *Hillebrandt Jacobsz.* from The Hague 1610, also in *Dumont*, Corps universel (note 19), vol. 5.2, 119-20.

After the war resumed in 1621,<sup>23</sup> negotiations between the Dutch and Spain for a new truce or a peace treaty took place at several occasions and on several levels. But it was only after the general peace conference had been convened in Westphalia to end the many interconnected wars that devastated a large part of Europe, that the final negotiations between Spain and the Republic started.<sup>24</sup>

When the Dutch plenipotentiaries arrived at Münster in 1646, their brief was to conclude a new truce for at least twelve years on the basis of the text of 1609.<sup>25</sup> After the initial problems with the full powers of the Spanish negotiators which did not satisfy the Republic's demands in relation to the recognition of its sovereignty were sufficiently cleared, the Dutch diplomats submitted a draft of 71 Articles to their Spanish counterparts on 17 May 1646. The Spanish delegation accepted 60 of these articles with minor amendments.<sup>26</sup> The

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<sup>23</sup> On the reasons for the resumption of the war, *Peter Brightwell*, *The Spanish System and the Twelve Years' Truce*, in: *The English Historical Review* 89 (1974) 270-92; *John H. Elliott*, *The Count-Duke of Olivares: The Statesman in an Age of Decline*, New Haven/London 1986, 47-84; *Israel*, *Dutch Republic and the Hispanic World* (note 16), 66-95.

<sup>24</sup> On the negotiations between 1621 and the Congress of Westphalia, see *Alicia Esteban Estringana*, *La crise politique de 1629-1633 et le début de la prééminence institutionnelle de Pierre Roose dans le gouvernement général des Pays-Bas Catholiques*, in: *Revue belge de philologie et d'histoire* 76 (1998) 939-77; *Jonathan Israel*, *The Holland towns and the Dutch-Spanish conflict, 1621-1648*, in: *Bijdragen en Mededelingen betreffende de Geschiedenis der Nederlanden* 94 (1979) 41-69; *idem*, *Dutch Republic and the Hispanic World* (note 16); *Auguste Leman*, *Richelieu et Olivares. Leurs négociations secrètes de 1636 à 1642 pour le rétablissement de la paix*, Lille 1938; *Lieuwe van Aitzema*, *Verhael van de Nederlandsche Vreede Handeling*, The Hague 1650, vol. 1.

<sup>25</sup> See the instruction of the Estates-General to the eight Dutch plenipotentiaries from 28 October 1645 in *Aitzema*, *Vreede Handeling* (note 24), vol. 1, 570-607, esp. Arts. 4-6.

<sup>26</sup> *Aitzema*, *Vreede Handeling* (note 24), vol. 2, 54-78. The Spanish had, previously, on 13 May, submitted a brief of only four Articles, the first of which called for a new truce of 12 or 20 years on the basis of the text of 1609, *ibidem*, 52-3.

most contentious points regarded some territorial issues, the position of the Catholic religion in the countryside around 's-Hertogenbosch that was to be ceded to the Republic and the closure of the river Schelde. To the articles relating to private property, the Spanish made only minor remarks and amendments, many of which were later dropped. The Dutch draft was, as the instruction of the Estates-General, largely based on the Twelve Years Truce. Early July 1646, members of the two delegations initialled the Articles of the draft treaty on which consent had been reached.

In September 1646, the States of Holland proposed to convert the truce negotiations into peace negotiations. The motion was carried in the Estates-General and the Spanish were keen to accept this change. The draft treaty only had to undergo minor changes and adjustments, and only a few more articles were added to the text – which, in the end, would consist of 79 articles. The conversion was prepared by the Dutch delegation to Münster. By 27 December, the two delegations reached an agreement on the text. Whereas after that date, some more points – particularly in relation to territory and religion – arose and had to be cleared between the Dutch and the Spanish, it were not these that stalled the conclusion of the peace for another year. The Spanish from their side were more than keen to reach an agreement. Although they put up a fight over some issues, they were most willing to make concessions and did so on most contentious points. When the negotiation process leading up to the conference in Westphalia first started in the early 1640s – after the plans for a similar conference at Cologne from 1636 had failed –, Spain was fighting no less than four major wars: the Catalan and Portuguese rebellions (both since 1640) and the wars with the Dutch Republic (since 1621) and with France (since 1635). Moreover, as an auxiliary to the Emperor, Spain was also involved in the Thirty Years War in the Holy Roman Empire. In 1647, a rebellion against the Spanish broke out in Sicily and in Naples. By 1645, it was clear

to most in the Madrid government that any agreement that would knock the Republic out of the war was a victory in itself.<sup>27</sup>

That it took two years for peace to be achieved, was in the end less caused by any difficulty in the negotiations between the Dutch and the Spanish delegates at Münster, than by two other factors. In the first place, there was the reluctance of some Dutch provinces, particularly Zeeland, to make peace with Spain.<sup>28</sup> In the second place, the Dutch Republic was bound by treaty not to make a separate truce or peace without its main ally, France.<sup>29</sup> In fact, the Dutch delegation at Münster for many months tried to mediate and broker a truce or peace between the Spanish and the French.<sup>30</sup> Meanwhile, at The Hague, the French diplomats did everything in their power, aided by some of the provincial delegations to the Estates-General, to stall and hinder the Dutch-Spanish negotiations at Münster. A large part of the two years

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<sup>27</sup> *John H. Elliott*, *The Revolt of the Catalans: A Study in the Decline of Spain 1598-1640*, Cambridge 1963; *Richard A. Stradling*, *Europe and the Decline of Spain: A Study of the Spanish System, 1580-1720*, London, 1981, 85-142; *idem*, *Philip IV and the Government of Spain, 1621-1665*, Cambridge 1988, 172-245; *René Vermeir*, *In staat van oorlog: Filips IV en de Zuidelijke Nederlanden, 1629-1648*, Maastricht 2001.

<sup>28</sup> *J.H. Kluiver*, *De 'soevereine en independente' staat Zeeland. De politiek van de provincie Zeeland inzake de vredesonderhandelingen tijdens de Tachtigjarige Oorlog tegen de achtergrond van de positie van Zeeland in de Republiek*, Middelburg 1998.

<sup>29</sup> Already in the Treaty of Compiègne of 15 June 1624 by which France granted subsidies to the Republic, the latter promised not to make a truce or peace with Spain without the advice and intervention of the French King, Art. 3. *Dumont*, *Corps universel* (note 19), vol. 5-2, 461. Once France joined the war in 1635, this commitment became stricter and more relevant. E.g. Art. 3 of the Franco-Dutch Treaty of 1 March 1644 prevented the signatories of making a separate truce or peace without the consent of the other, *Aitzema*, *Vrede Handeling* (note 24), vol. 2, 473-5; also *Dumont*, *Corps universel* (note 19), vol. 6.1, 295.

<sup>30</sup> *Croxton*, *Peacemaking* (note 17), 196-255; *Michael Rohrschneider*, *Der gescheiterte Frieden von Münster: Spaniens Ringen mit Frankreich auf dem Westfälischen Friedenskongress (1643-1649)* (Schriftenreihe der Vereinigung zur Erforschung der Neueren Geschichte 30), Münster 2007.

which lapsed between January 1646 and the final conclusion of the peace on 30 January 1648, some of the most important Dutch diplomats spent at The Hague in order to defend their achievements from Münster and have them accepted. Only after many attempts to reach an agreement between Spain and France, could the States of Holland – the greatest promoters of peace – convince enough of the other provinces that France did not want peace and induce them to accept a separate treaty. Even on 16 January 1648, the French diplomats were once again successful in postponing the signing of the Dutch-Spanish treaty by another two weeks. It proved to be their final success. On 30 January, seven of the eight Dutch delegates underwrote the peace with Spain. By 15 May 1648, everything was ready for the ratifications to be exchanged at Münster. On 5 June, the treaty was published in all provinces of the Republic, including in Zeeland which had refused to ratify it but could not very well prevent its execution.<sup>31</sup>

### 3. *Private rights and property in the Peace Treaty of Münster*

The articles concerning the rights, assets and property of private citizens in the Peace Treaty of Münster were taken by and large, with minimal adjustments or additions, from the Twelve Years Truce of 1609 and the interpretative declaration of 1610. There seemed to be little enough change necessary to convert the truce into a peace treaty. This might seem surprising, but it can easily be explained from the circumstances of the case. The Twelve Years Truce

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<sup>31</sup> On the Dutch-Spanish negotiations and their ramifications in the Netherlands: 1648. De Vrede van Munster: Handelingen van het herdenkingscongres te Nijmegen en Kleef, 28-30 augustus 1996, eds. Hugo de Schepper/Christian L. Tümpel/Jan J.V.M. de Vet, Hilversum 1997; *Israel, Dutch Republic and the Hispanic World* (note 16), 347-74; *J.J. Poelhekke, De Vrede van Munster, The Hague 1948; Aitzema, Vreede Handeling* (note 24), vol.

was not only exceptionally long, it held many characteristics of a regular peace treaty – at least as far as the European theatre was concerned.<sup>32</sup> It was, in fact, not a drawn out armistice that only suspended the use of armed force and sustained the state of war. It restored the state of peace, albeit for a limited time. A large part of the explanation of this lays in the fact that most of the articles of the treaty had already been drafted before August 1608, when the negotiations were still aimed at peace. Indeed, when almost four decades later, the Dutch and Spanish negotiators decided to convert the negotiations for a truce into peace negotiations at Münster, there was little for them to amend.

The single most important article on private rights and property from the Münster Treaty was Article 24. It stipulated the restitution of all goods that had been seized ('aengeslagen') or confiscated ('geconfisqueert') because of the war. The original owners, their heirs or successors in law, were granted the right to repossess them ('possessie vandien aennemen') on their own authority, meaning without having to refer to the courts. All official acts of seizure and all transactions to third persons which had followed seizure were thereby lifted. The repossessed owners ('proprietarissen') could dispose of their goods, including selling them, without having to ask for permission from the enemy's sovereign. As all measures taken during the war now lost their effect, the original owners did not only regain possession, but also their title. If the treasury had converted the seized property into an annuity, that would be transferred to the original owners or their successors in law.

Article 24 was almost wordily taken from Article 13 of the Twelve Years Truce. However, that Article had stipulated that the reinstated original owners could not sell nor mortgage their goods without consent of either the Archdukes or the Estates-General. This restriction indicated that the original owners only regained possession of their seized property

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<sup>32</sup> On the stipulations concerning the Indies, see *Van Eysinga*, *De wording van het Twaalfjarig Bestand* (note 19); *Van Ittersum*, *Profit and Principle* (note 21), 283-358.

for the duration of the truce, and that the title to the property remained in the balance. However, the Agreement of 7 January 1607 amended this. Article 6 of that Treaty lifted the prohibition to sell returned property, but sustained the prohibition for annuities. The draft treaty proposed by the Dutch on 17 May 1646 dropped all these restrictions (Article 23). The relaxation of the prohibition to sell returned property during the Truce was first and foremost a concession to the nobility and other important landowners who had estates in the territories controlled by the other side. It allowed them to sell off their property and thus escape new confiscations once the war would resume.<sup>33</sup>

The general restitution of Article 24 was severely amended by Article 54. This provision excluded the restitution of personal or movables and of all income gained on realty to be returned which had lapsed before the conclusion of the Peace Treaty on 30 January 1648. Restitution was, in other words, restricted to seized and confiscated realty. This clause, too, was taken from the Twelve Years Truce (Article 25).

The Peace Treaty of Münster of 1648 contained many more detailed stipulations about restitution. The Articles 31 and 32 provided for the case in which the treasury had sold confiscated goods. On principle, the original owners and their successors in law could not repossess them, but were compensated by an annuity of 1/16<sup>th</sup> of the price, to be paid by the wartime buyer. The first annuity would lapse one year after the ratification of the Peace Treaty. The treasury had to provide the original owners or their successors in law with the necessary papers to prove their case and vindicate their claim (Article 31). If, however, the sale of the property was ordered by the judiciary because of a debt owned by the original owner of the property, he or his successors in law had no right to an annuity. They had to satisfy themselves with the right to buy the property back from the current owner within a

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<sup>33</sup> *H.K.F. van Nierop*, *Van ridder tot regenten: De Hollandse adel in de zestiende en de eerste helft van de zeventiende eeuw*, Amsterdam 1990, 109 and 169-70.

year (Article 32). These two articles were almost wordily taken from the Twelve Years Truce and the Treaty of 1610 (Articles 15 and 16 of the Truce, Article 10 of the 1610 Treaty).

Article 33 exempted town houses, which had been sold to pay off the debt of the owner, from the application of Article 32. It was argued in the text of the Article that the compensation for the reparations and reconstruction works that had been done to these houses would be too complex. While this might be indeed a realistic concern, there was more to this exception. Article 33 prevented the heirs of the many burghers, among whom were many merchants and other entrepreneurs, who had fled their towns – often because of their religion – to regain their property in their ancestral town. This seemed quite deliberate. Allowing the opposite would have been disruptive for the economy and the political and religious stability of many of the Dutch, Flemish and Brabant towns. The interest of the land-owning nobility was better heeded in the treaty.

For the reparations and other works done to properties that were bought in application of Article 32, the wartime owners could claim compensation. The local judge would rule on this and would lay a mortgage on the property to secure the payment of the compensation (Article 34). Articles 33 and 34 also came from the Twelve Years Truce (Articles 17 and 18).

The next six articles of the Peace Treaty did not come from the Twelve Years Truce, but from the interpretative Treaty of 7 January 1610. Those enemy properties and rights that had escaped notice from the treasury during the war and had not been seized would remain with their owners (Article 35/Article 7). In Article 36 (Article 8 of the 1610 Treaty), it was stipulated that trees that had been felled before the conclusion of the Treaty but were still on the property on that day, would return to the reinstated owner of the property. The same went for trees that had been sold but were still standing. All fruits and incomes from properties that had to be returned under Article 24, would fall to the reinstated owners from the day of the conclusion of the Treaty onwards (Article 37/Article 9). Lease contracts on reinstated

property would expire at the end of 1648. The rent would fall to the reinstated owners from the day of the conclusion of the Treaty (Article 38/Article 11). Any sale of confiscated or sequestered property after the conclusion of the Peace of Münster was said to be null and void. The same went for some sales done during wartime that contravened specific agreements made between the belligerents (Article 39/Article 12). Article 40 guaranteed that reinstated owners would not be forced to take more soldiers into their homes than other inhabitants, a clause particular relevant for owners of houses in garrison towns. Nor would they have to pay more taxes than other locals (Article 14).

Article 42 stemmed from the Twelve Years Truce (Article 19). It provided for fortifications and other public works that had increased the value of returned property. The local judge would estimate the value and the reinstated owner would be held to compensate the treasury for it. He could, of course, also make an agreement with the treasury on that himself.

All ecclesiastical properties and benefices in the Republic which were dependent from Catholic ecclesiastical institutions from the Southern Netherlands, would be returned to these institutions, in as far as they had not been sold before the conclusion of the Treaty (Article 43). If the property had been sold during the war, the Catholic institution would be compensated by an annuity of  $1/16^{\text{th}}$  of the price. The ecclesiastical institutions would only regain usufruct of these goods, without, however, the right to dispose thereof. This clause, too, was taken from the Antwerp Truce of 1609 (Article 20). The date there had been 1 January 1607.

Article 46 exempted the owners of returned property from all payments for hypothecary debts resting on the property which had lapsed during the time they did not possess them. Those owners who had lost all their property to seizure during the war and who, by consequence, had not been able to pay their personal debts, were exempted from all

payments of debt. The first part of the article came from the Truce (Article 21); the second from the Treaty of 1610 (Article 16).

Article 47, which was identical to Article 22 of the Twelve Years Truce, provided for property that had been sold by the treasury because it needed to be diked in or rediked. To this, the original owners held no claims. They could only claim an annuity of 1/16<sup>th</sup> as compensation for their share in the (re)construction of the dike.

Article 55, identical to Article 26 of the Truce, was a logical complement to Article 54, which excluded all movables from restitution. It held that all claims for personal debt that had been acquitted by the public authorities during the war, would remain extinct.

The Peace Treaty of Münster, like the Twelve Years Truce, also held some clauses relating to the judiciary. Article 22 stipulated that any civil or criminal trial that had taken place during the war and that had involved an enemy subject who had not been able to defend his case, would not be executed. This Article also stemmed from the Twelve Years Truce (Article 10). In early-modern peace treaties, it was natural to void any such sentences. Here it was only provided that they would not be executed. This can only be explained by the fact that the article was taken from the Truce, and had not been suitably adapted. Article 48 (Article 23 of the Truce) was a logical complement to this. It entailed another exception to the general rule of restitution. It held that if a confiscation was based on the outcome of a trial in which the defendant had been allowed to defend his case, the confiscation would stand. As said above, Article 24 granted the original owners of confiscated property, or their heirs and successors, the right to repossess their goods without reference to the court. In case of trouble, they could, however, appeal to the local judge who would then order restitution. The judge could not postpone restitution because of any counterclaims regarding debts of the original owners made by the wartime possessor. This clause (Article 29) was taken from the 1610 Treaty (Article 15). The Münster Treaty also provided for a *Chambre mi-partie*, a kind of

arbitration court that would hold jurisdiction over all problems of implementation, execution and contravention of the Treaty. Local courts were bound to execute the decisions of the *Chambre* within six months. The Truce had not provided for such a solution. In reality, the *Chambre* would only develop a fairly limited activity. In the years after 1648, many particular problems were discussed and solved through the diplomatic channel. From 1649 onwards, Antoine Brun (1600-1654), who had been on the Spanish delegation in Münster, was the Spanish ambassador in The Hague. He became a central, if not always successful, linchpin in the ongoing negotiations between Madrid, Brussels and The Hague for the implementation of the Peace Treaty.<sup>34</sup>

Article 56 suspended all prescription during the war, which was considered to have run from 1567 to the beginning of the Twelve Years Truce and again from the resumption of the war to the conclusion of the Peace Treaty (compares Article 27 of the Truce). Article 61 annulled all disinheritances because of the war (Article 32 of the Truce).

A final group of provisions concerned the rights and property of the House of Orange. The head of that house, Frederick Henry, Stadholder, Captain- and Admiral-General of the Republic (1625-1647), and after his death on 14 March 1647, his son William II (1647-1650), were directly represented by their plenipotentiary, Johan de Knuyt (1587-1654, full powers of 12 June 1646), who was also the representative from Zeeland on the Dutch delegation at Münster. Frederick Henry and William II were the son and grandson of William the Silent (1533-1584), who had fled the Netherlands to the ancestral castle of Dillenburg in Germany in 1567 and had led the rebellion in its initial stages. His extensive properties throughout the Netherlands had been confiscated by the Spanish King Philip II (1558-1598) and his Governor-General in the Netherlands from 1567, Fernando Alvarez de Toledo, Duke of Alva (1507-1582). The incorporation of stipulations in treaties regarding important nobles had been

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<sup>34</sup> *Israel, Dutch Republic and the Hispanic World* (note 16), 385-98.

a normal occurrence during the Late Middle Ages and the 16<sup>th</sup> century. It had, however, become far less customary halfway through the 17<sup>th</sup> century.<sup>35</sup> The House of Orange constituted, however, a case on its own. As Stadholders of some of the main provinces of the Republic, including Holland and Zeeland, and as Captains- and Admirals-General of the Union, William the Silent, his sons Maurice of Nassau (Stadholder 1585-1625) and Frederick Henry and grandson William II held a distinct and to some extent autonomous position among the top tiers of the Republic's government. Within a Republic, with time they came to represent a kind of monarchical element. Moreover, as princes of Orange, they were princes of the Holy Roman Empire in their own right.<sup>36</sup> The Peace Treaty of Münster was, as the Twelve Years Truce,<sup>37</sup> generous to the House of Orange. The support of the Stadholder Frederick Henry and his wife, Amalia of Solms (1602-1675), to the treaty had been instrumental in building a majority in the Estates-General. William II's reluctance to make peace acted as an extra-incentive to satisfy the demands of the Oranges.<sup>38</sup>

On 27 December 1647 and 8 January 1648, De Knuyt had reached two separate agreements with the Spanish diplomats at Münster regarding the restitution of the estates and rights of the princes of Orange and their family. Article 45 of the Münster peace instrument

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<sup>35</sup> *Randall Lesaffer*, *Europa: een zoektocht naar vrede? (1453-1763/1945-1997)*, Leuven 1999, 255-6 and 472.

<sup>36</sup> On the Dutch constitution, see *Robert Fruin*, *Staatsinstellingen in Nederland tot den val der Republiek*, 2<sup>nd</sup> edn, The Hague 1910; *Jonathan Israel*, *The Dutch Republic: Its Rise, Greatness, and Fall 1477-1806*, Oxford 1995, 300-6; *J.L. Price*, *Holland and the Dutch Republic in the Seventeenth Century: The Politics of Particularism*, Oxford 1994.

<sup>37</sup> From the very start of the negotiations of 1608-1609, some of the negotiators – particularly the French mediators – were very keen on achieving satisfaction for Maurice of Nassau and other members of the high nobility who had joined the rebellion, so as to help overcome their reluctance to make peace. E.g. 'Instruction particulière audit sieur de Preaux, faite par ledit sieur Jeannin,' in: *Négociations diplomatiques et politiques du Président Jeannin* (note 21), 17-8, also see Letter of Jeannin to King Henry IV (1589-1610), 1 May 1609, 669.

<sup>38</sup> *Poelhekke*, *Vrede van Munster* (note 31), esp. 406-20.

stated that these treaties were to be executed as if they were wordily inserted into the Treaty. In case the Münster Treaty contradicted clauses from these agreements, the latter would prevail. These agreements dealt with the compensation of the Prince of Orange for the property his ancestor William the Silent had held in the Southern Netherlands and that had been confiscated by Philip II. The general restitution clause was, apparently, not meant to apply to these goods, except where the Münster Treaty stated otherwise (see below).<sup>39</sup>

Moreover, the Münster Treaty contained seven specific articles on the House of Orange. Article 25 stipulated that Article 24 also applied to the heirs of William the Silent – though this was largely superseded by the two agreements.<sup>40</sup> More specifically, it provided for the return of the Oranges' rights on the saltpans at Salins-les-Bains in the Franche-Comté along with the woods that depended from these, inasmuch as these had not been bought and paid for by the Spanish King (Article 14 of the Truce). Article 26 extended this restitution to all other assets and rights of William the Silent in the Franche-Comté and the county of Charolles – a county in the Duchy of Burgundy in France which belonged to the Spanish Habsburgs – which had not been returned in contravention to the Twelve Years Truce and the Treaty of 1610 (especially Article 14 of the Truce). Article 27 voided the sentence of the Great Council of Malines, the highest court of the Southern Netherlands, which had attributed some of the goods of the House of Orange to the heirs of William the Silent's bother, Count Jan of Nassau (1535-1606), upon the resumption of the war in 1621.<sup>41</sup> These goods had now to be returned to the heirs of William the Silent. Finally, Article 28 provided for the immediate repossession of Châteaubelin in the Duchy of Luxemburg by the heirs of William

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<sup>39</sup> *Israel*, Dutch Republic and the Hispanic World (note 16), 387-8.

<sup>40</sup> As mentioned above, a general restitution was not to be. Only the properties and rights mentioned in Article 25 to 28 had to be returned; for the rest the separate agreements stipulated compensation.

<sup>41</sup> Count Jan VIII of Nassau-Siegen (1583-1638), William's brother's Jan VII second son, was a cavalry general in the Spanish Army in the Netherlands.

the Silent. Since the lifetime of William the Silent, a case on this fief had been hanging in court at the Great Council of Malines. In the Antwerp Truce, it had been agreed between the belligerents after lengthy negotiations that the Council would render an impartial judgment within the year. The Brussels government of the Archdukes has insisted on this solution, because they would not tolerate any infringement on the sovereign rights of their supreme court within their provinces. However, the Great Council had reached no verdict during the Twelve Years Truce and had not rendered justice to the House of Orange. During the negotiations between the Estates-General of the Republic and those of the Southern Netherlands in 1632-1633, the Spanish had insisted on some kind of solution that recognised the sovereign authority of the Great Council of Malines, but had gradually softened their stance. At the end of that round of negotiations, they had conceded that the case would be referred to the *Chambre mi-partie*, an arbitral body that would hold jurisdiction in all matters regarding the implementation of the future treaty. At Münster, the point was conceded by the Spanish without much trouble as they agreed to immediate restitution. In Article 28, the Spanish treasury ceded all its claims to the fief.<sup>42</sup> It was expressly stated that all fruits and incomes as well as taxes upon the property lapsed before the conclusion of the treaty would fall to the current possessors. This, of course, was in accordance with the general stipulation of Article 54.

In Article 44, it was agreed that the claims of William II of Orange on property now belonging to third persons would be settled later. The estates around Hulst, in the Dutch-occupied parts of the County of Flanders and elsewhere, which he had been granted by the Estates-General, would remain his and his heirs for the future. King Philip IV also ceded all

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<sup>42</sup> *Aitzema*, *Vreede Handeling* (note 24), vol.1, 219, 229 and 256, vol. 2, 80, 88. The Dutch instruction still stipulated that the Great Council would render a verdict within the year (Art. 39). The Dutch draft of 17 May 1646 (Art. 27) demanded immediate restitution.

claims and pretences on the town of Grave and the land of Cuyck in the Dutch-occupied part of the Duchy of Brabant, which had been granted by the Estates-General to Frederick Henry's older brother, Maurice of Nassau, in December 1611 (Article 49). The same went true for the King's pretences on the Town and County of Lingen and its dependencies, which belonged to the Princes of Orange (Article 50).

#### 4. *Seizure and restitution*

If most early-modern peace treaties were rather elaborate with regards to the restitution of confiscated property, the Peace Treaty of Münster between Spain and the United Provinces was exceedingly so. The many detailed stipulations were not so much necessitated by the occurrences during the second phase of the war, running from 1621 to 1648, but by the complexity of the situation before the Twelve Years Truce. At the start of the Münster negotiations, the Spanish and Dutch governments had departed from the text of the Antwerp Truce. Apart from the fact that, thus, they could stand on what had been common ground in the past, it had the additional advantage that they could draw on the experience of the past. After all, the Twelve Years Truce had proved a learning process. Whereas the Truce itself already entailed complex and detailed regulations about restitution, it quickly transpired that even more was needed. Within eight months after the Truce of Antwerp was signed, an extensive interpretative agreement was made.<sup>43</sup>

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<sup>43</sup> See for a glimpse on the many disputes about the execution of the Truce, including with regards restitution, brought before the Estates-General of the Republic, *Resolutiën der Staten-Generaal van 1576 tot 1609*, vol. 14, 1607-1609, ed. H.H.P. Rijperman (Rijks Geschiedkundige Publicatiën 131), The Hague 1970.

By the time the negotiations over the Twelve Years Truce took off, the conflict had long since, for all practical purposes, turned into a war between two foreign powers. But it had not started like that. When the so-called sea beggars as well as William the Silent took up arms against Philip II's new governor-general, the Duke of Alva, they were considered rebels. During the first years of the war, the Alva government issued many ordinances commanding the confiscation of all property belonging to the rebels and the people that fled to rebel territory.<sup>44</sup> Thousands were convicted and saw their property confiscated by the Council of Troubles, the special tribunal instituted by Alva to repress the rebellion. Among these were several members of the high nobility who had fled the Netherlands, like William the Silent.<sup>45</sup> After the failure of the pacification of 1576 and the consolidation of the rebel provinces into the Union of Utrecht (1579), the conflict took on the appearances of a regular war, even if the Madrid government continued to use the discourse of defending legitimate authority in the face of an illegal rebellion.<sup>46</sup> From then onwards, wartime measures such as confiscation of enemy property became more two-sided.<sup>47</sup> Confiscations were quite extensive because many nobles and other people held estates on both sides of the front line. This was particularly true

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<sup>44</sup> *Charles Terlinden*, *Liste chronologique provisoire des Edits et Ordonnances des Pays-Bas. Règne de Philippe II (1555-1598)*, Brussels 1912.

<sup>45</sup> *Parker*, *Dutch Revolt* (note 16), 108; *A.L.E. Verheyden*, *Le Conseil des Troubles. Liste des condamnés*, Brussels 1961.

<sup>46</sup> Regardless of this official position – which was strongly supported by Balthasar Ayala (1548-1584) in his treatise (cfr. *infra*, note 61) – the Spanish army increasingly, if not wholly, respected the laws of war as in a regular war as early as five years after the war's inception. *Parker*, *Early-Modern Europe* (note 3), 45-51; *Lesaffer*, *Siege Warfare* (note 3), 179-80.

<sup>47</sup> See the confiscation of enemy property by the Estates of Holland, 28 October 1579, in *Resolutiën van de Heeren Staaten van Holland en Westvriesland*, The Hague 1750.

for the greatest magnates, such as, again, the Princes of Orange.<sup>48</sup> Apart from general confiscations, many goods were also confiscated because of contraventions to trade restrictions.<sup>49</sup> After the war resumed in 1621, new seizures were commanded. As the war was drawn-out and went through several stages of intensity – both with regards to military action and economic warfare –, measures against trade and private property were repeatedly enhanced and relaxed. At the expiration of the Twelve Years Truce, King Philip IV ordered the confiscation of all Dutch shipping which had not left the Iberian ports by the end of April 1621 or entered after 14 April. Later, orders for confiscation were promulgated at different times for different parts of the Empire. In the Netherlands itself, an agreement was reached in June 1622 between the Brussels government and the Republic mutually to lift all confiscations. But in later years, new confiscations were ordered.<sup>50</sup>

The stipulations with regards to restitution from the Peace of Münster might be exceptionally detailed, the general principles which underlay them were very common for the Early-Modern Age. The underlying principles can be summarised as restitution of seized

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<sup>48</sup> For the all in all few nobles from Holland who were in that case, see *Van Nierop, Van ridders tot regenten* (note 33), 169-70.

<sup>49</sup> E.g. Placcard du Roi contenant pied et ordre que d'oresnavant sera tenu sur le fait du commerce et trafic sur les licences avec Hollande et Zélande et autres pays tenus par la partie contraire de S.M.H. from Brussels, 14 August 1598, in: *Recueil des ordonnances des Pays-Bas. Règne d'Albert et Isabelle 1597-1621*, ed. Victor Brants, Brussels 1909, vol.1, 20-6; Placcard sur la deffence et interdiction de toutes communications trafficques et commerces avec les pays de Hollande, Zelande et leurs adherens, from Antwerp, 9 February 1599, in: *ibidem*, vol. 1, 46-9; Ordonnance pour empêcher plus efficacement tout commerce avec les Provinces-Unies, from Brussels, 14 November 1610, in: *ibidem*, vol. 1, 115-6; see *J.H. Kernkamp, De handel op den vijand 1572-1609*, 2 vols., Utrecht 1931.

<sup>50</sup> *Israel, Dutch Republic and the Hispanic World* (note 16), 92-3 and 142; *Charles Terlinden, Liste chronologique provisoire des Edits et Ordonnances des Pays-Bas. Règne de Philippe IV (1621-1665) et de Charles II (1665-1700)*, Brussels 1910.

property, with the exception of movables and lapsed income. In his study on the position of private creditors in the early-modern law of nations, Hans Neufeld indicated that the customary law of nations recognised two types of solutions to the problem of confiscated property: restoring the *status quo ante bellum*, or respecting the *status quo*, thus applying the *uti possidetis* rule from the praetorial edict.<sup>51</sup> The Münster solution was a combination of both. For realty, the rule implied the restoration of the *status quo ante bellum*, for personal and income from realty lapsed during the war, the rule of *uti possidetis* applied. The vast majority of early-modern peace treaties applied these principles in a similar fashion.<sup>52</sup>

Restitution clauses are typical for early-modern peace treaties. They first appeared in Western European peace treaty practice during the Hundred Years War between the French and English kings (1337-1453). The oldest important peace treaty to hold a general restitution clause is the Peace of Brétigny of 8 May 1360. The wordings of this and later clauses from the Hundred Years War indicate that these clauses for the ‘private’ restitution of property taken from vassals, adherents and subjects of the belligerent princes had grown out of the stipulations with regards to the ‘public’ restitution of towns, castles and lands that had been conquered and occupied during the war and were returned by one prince to the other.<sup>53</sup> It is no coincidence that it were the treaties from the Hundred Years War that first came to include regulations about the restitution of private property. The war was mostly fought on mainland France, often along the borderlines of the lands held as fiefs from the French crown by the English kings. Many nobles found that they had multiple allegiances and held property on

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<sup>51</sup> Neufeld, *International Protection of Private Creditors* (note 12), 135-6. See *Grotius*, *De iure belli ac pacis* (note 6), 3.20.11.2.

<sup>52</sup> Lesaffer, *Europa: een zoektocht naar vrede* (note 35), 253-7 and 472-3; *idem*, *Peace Treaties from Lodi to Westphalia* (note 13), 40; Neufeld, *International Protection of Private Creditors* (note 12), 8-90.

<sup>53</sup> Paragraph 26, *Dumont*, *Corps universel* (note 19), vol. 2.1, 14.

both sides; vassals often changed side. The capture and seizure of property belonging to enemy adherents thus became a common occurrence.<sup>54</sup>

Clauses about the restitution of private property only became common during the 16<sup>th</sup> century. An important earlier treaty that held them too was the Peace Treaty of Arras of 23 December 1482 between King Louis XI of France (1461-1483) and the future Emperor Maximilian I (1493-1519), then regent of the Burgundian Netherlands for his infant son Philip the Fair (1478/1494-1506). This Peace Treaty included several clauses relating to private rights and property that were elaborate and innovative and pre-configured clauses from the Twelve Years Truce and the Peace of Münster. In any case, the treaty already applied the double principle of restitution of realty and non-restitution of movables and income.<sup>55</sup> From there, the clauses have found their way into the Treaty of Senlis of 23 May 1493 between Maximilian and the French King Charles VIII (1483-1498)<sup>56</sup> and the great 16<sup>th</sup>-century peace treaties between the French Kings and the Habsburgs.<sup>57</sup> These treaties had, for these as for other clauses, a great impact on the development of general European peace treaty practice.<sup>58</sup> The negotiators of the Dutch-Spanish treaties of 1609 and 1648 tapped into this Franco-Spanish tradition. After all, historically speaking it was a French-Burgundian tradition. Thus,

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<sup>54</sup> *Theodor Meron*, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages*, Oxford 1993, 195.

<sup>55</sup> Arts. 47-8, *Dumont*, *Corps universel* (note 19), vol. 3.2, 104. See *Randall Lesaffer*, *The Concepts of War and Peace in the 15<sup>th</sup>-century Treaties of Arras*, in: *Arras et la diplomatie européenne XV<sup>e</sup>-XVI<sup>e</sup> siècles*, eds. Denis Clauzel/Charles Giry-Deloison/Christophe Leduc, Arras 1999, 165-82.

<sup>56</sup> Arts. 21, 25 and 26, *Dumont*, *Corps universel* (note 19), vol. 3-2, 305-6.

<sup>57</sup> Treaty of Madrid of 14 January 1526, Art. 29, *Tratados internacionales de España. Periodo de la preponderancia española*. Carlos V, ed. P. Mariño, Madrid 1986, vol. 3.3, 159-61; Treaty of Crépy of 18 September 1544, *Dumont*, *Corps universel* (note 19), vol. 4.2, 283; Treaty of Câteau-Cambrésis of 3 April 1559, Art. 5, *ibidem*, vol. 5.1, 35; Treaty of Vervins of 2 May 1598, Art. 7, *ibidem*, vol. 5-1, 561-2.

<sup>58</sup> *Fisch*, *Krieg und Frieden* (note 13), 536-7.

it belonged to the heritage of both the Spanish and the Dutch negotiators. But that was also the case for the main penholder of the Twelve Years Truce, the French diplomat and jurist Pierre Jeannin.

Why was the dual principle of restitution of realty and non-restitution of personal and lapsed income preferred? What were its implications? For both dimensions of the principle we will first have a look at the doctrinal context, and then search for the pragmatic reasons for which this dual principle was adopted.

The late 16<sup>th</sup> and early 17<sup>th</sup> centuries saw the emergence of an autonomous doctrine of the law of nations. Modern scholars often use historical scholarship as a kind of convenient shorthand for the law of nations as it was at a certain time. Certainly for the period studied here one should be careful with this. As the Cambridge international lawyer Thomas Alfred Walker had it, the great scholars who wrote treatises on the law of nations of the Early-Modern Age offered at best ‘second-hand’ information on the law of nations from their day and age.<sup>59</sup> Indeed, their purpose was rather to prescribe the law than to describe it. And although at times they had some impact, their success in prescribing the law should surely not be overstated. Still, it is useful to study these authors to gain insight into international legal practice. First, the authors of the late 16<sup>th</sup> and 17<sup>th</sup> centuries were certainly not positivists yet, but they did, increasingly so as humanism had its impact felt, make references to historical and, rather less so, current practices. In this, they were highly selective in order to corroborate their views. Their testimonies were indeed often ‘second-hand,’ but they were nevertheless testimonies. Even when trying to impose their views on the readership, authors had to make genuflections to reality. Second, and more significantly, they shared the same intellectual tradition and basic scholarship as the diplomat-jurists who negotiated the treaties. That was the great medieval tradition of the *ius commune* of canon and civil law, which was studied all

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<sup>59</sup> Thomas A. Walker, *A History of the Law of Nations*, Cambridge 1899, vol. 1, 21.

over Europe at the universities. Historically, the *ius gentium* was part and parcel of that tradition. The emergence of an autonomous doctrine of the law of nations was in fact a formal emancipation of the law of nations from the *ius commune*. But in that process, many concepts, rules and principles from the old *ius gentium* were taken aboard.<sup>60</sup>

Four authors are particularly relevant for our subject: Balthasar Ayala (1548-1584) was a military judge in the Spanish Army of the Duke of Alva. From the army camp, he wrote a treatise on the laws of war and military discipline.<sup>61</sup> Albericus Gentilis (1552-1608), an Italian protestant who had to flee his country, became Regius Professor of Civil Law at Oxford. There, in 1588-1589, he wrote his *De iure belli libri tres*. He, too, as a legal adviser, had some exposure to international legal practice. The same went for the great Dutch humanist, Hugo Grotius (1583-1645). In 1604, he wrote an extensive treatise on the right to booty, *De iure praedae*.<sup>62</sup> This was, however, not published during his lifetime, except for the chapter on the freedom of the sea, *Mare liberum*, which saw the light of day in 1609, just around the time the Twelve Years Truce was signed.<sup>63</sup> Grotius was indirectly involved in the

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<sup>60</sup> *Randall Lesaffer, An Early Treatise on Peace Treatise: Petrus Gudelinus between Roman Law and Modern Practice*, in: *Journal of Legal History* 23 (2002) 223-52, 224-5; *idem, International Law and its History: The Story of an Unrequited Love*, in: *Time, History and International Law*, eds. Matthew Craven/Malgosia Fitzmaurice/Maria Vogiatzi, Leyden/Boston 2007, 27-42, 36-7.

<sup>61</sup> *Balthasar de Ayala, De Jure et Officiis Bellicis et Disciplina Militari Libri tres* (transl. John Pawley Bate, *The Classics of International Law*), 2 vols., Washington 1912.

<sup>62</sup> *Hugo Grotius, De iure praedae commentarius* (1604, transl. Gwladys L. Williams, *The Classics of International Law*), 2 vols., Oxford/London 1950.

<sup>63</sup> Earlier, in the context of the negotiations of the 8-month armistice of April 1607, Grotius had entered the debate on the upcoming peace negotiations by writing a treatise which dealt, among others, with the question whether the Archdukes were competent to make peace with the Republic, *Observationes juridicae contra pacem cum archiduce Alberto in eundam (non autographae)*, printed in *W.J.M. van Eysinga, Eene onuitgegeven nota*

negotiations for the Twelve Years Truce as he had been invited to write a report for the Gentlemen XVII, the board of administrators of the Dutch East India Company, which certainly had its impact felt on Oldenbarnvelt and other members of the Dutch oligarchy. He was also invited to publish his views on the freedom of the seas by the same board.<sup>64</sup> Grotius, who was a protégé of Oldenbarnvelt, might well have had opportunity to advise the Dutch leading negotiator on some technical points relating to our subject. But even more than Grotius' early work, his *opus magnum* on the law of nations from 1625, *De jure belli ac pacis libri tres*, is relevant for our purposes because of its depth in relation to private property in war and peace. It is certainly possible that at least the Dutch negotiators of 1648 knew the treatise. However, as they copied the relevant articles in the Münster Peace Treaty almost all from the Twelve Years Truce and the 1610 Treaty, it cannot have had any direct impact. Finally, there is the treatise *De jure pacis commentarius* from the Leuven civil law professor Petrus Gudelinus (1550-1619), first published in 1620.<sup>65</sup> Like the others' works, and even more so, Gudelinus' treatise is imbedded in the tradition of the *ius commune*, and particularly, the *ius civile*. At Leuven, Gudelinus lectured on the *Novellae*, the collection of imperial constitutions issued by the Emperor Justinian (527-565) after the promulgation of the *Codex*. To the medieval text collection of these laws, the *Authenticum*, the *Libri feudorum*, a medieval collection of feudal law, had been added. By the end of the Middle Ages, alongside the *Libri feudorum*, the *Pax Constantiae* had found a fixed place in the *Authenticum*. The *Pax Constantiae* was the treaty the Emperor Frederic Barbarossa (1152-1190) had made with the

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van De Groot, in: Mededelingen der Koninklijke Nederlandse Akademie van Wetenschappen, Afdeling Letterkunde N.S. 18.10 (1955) 235-52. See *Van Ittersum*, Profit and Principle (note 21), 194-217.

<sup>64</sup> *Henk Nellen*, Hugo de Groot: Een leven in strijd om de vrede 1583-1645, Amsterdam 2007, 90-9; *Van Ittersum*, Profit and Principle (note 21), 217-358.

<sup>65</sup> *Petrus Gudelinus*, De jure pacis commentarius, in quo praecipuae de hoc jure quaestionis distinctis capitibus eleganter pertactantur, Leuven 1620.

cities of the Lombard League in 1183. At least two important medieval civil lawyers, Odofredus de Denariis († 1265) and Baldus de Ubaldis (1327-1400) had written commentaries on this peace treaty.<sup>66</sup> For Gudelinus, its presence in the *Corpus iuris civilis* offered the opportunity to teach on peace treaties and to write a treatise on the subject. While placing it in the tradition of the *ius commune*, he also clearly drew on existing practice. Therefore, his treatise is important to us for two reasons. It stands within the tradition of the learned *ius gentium* and thus reflects what the civil law trained jurist-diplomat might be supposed to have learned – as to some extent does Gentilis’ work. Furthermore, it reflects existing practice.<sup>67</sup> All of these authors had benefited from some exposure to civil law at the university – Grotius, who graduated in civil and canon law at Orléans at the age of 15 without having studied there, least of all.<sup>68</sup>

The treatises touched upon two questions which are relevant for our purpose. First, there was the discussion on *ius postliminii*. Under classical Roman law, *ius postliminii* restores a Roman who has been taken captive by the enemy to his freedom, his citizenship, his rights and property upon his return. By the time of Justinian, the *ius postliminii* had become restricted to prisoners of war.<sup>69</sup>

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<sup>66</sup> *Gero Dolezalek*, I commentari di Odofredo e Baldo alle pace di Costanza, in: La pace di Costanza 1183, Bologna 1984, 59-75; *Hermann Lange*, Römisches Recht im Mittelalter, vol. 1: Die Glossatoren, Munich 1997, 331-2; *Kenneth Pennington*, Baldus de Ubaldis, in: Rivista internazionale di diritto commune 8 (1997) 35-61.

<sup>67</sup> *Lesaffer*, Gudelinus (note 60), 226-8 and 244-6.

<sup>68</sup> *Nellen*, De Groot (note 64), 51-2.

<sup>69</sup> *Luigi Amirante*, Captivitas e postliminium, Naples 1969; *Jean Imbert*, Postliminium. Etudes sur la condition juridique du prisonnier de guerre, Paris 1944; *Alberto Maffi*, Recherche sul postliminium, Milan 1992; *Joseph Plescia*, The Roman Ius Belli, in: Bullettino dell’istituto di diritto romano Vittorio Scialoja 3rd series 31-2 (1989-90) 497-523, 520-1; *Karl-Heinz Ziegler*, Das Völkerrecht des römischen Republik, in: Aufstieg und Niedergang der römischen Welt: Geschichte und Kultur Roms im Spiegel der neueren Forschung, ed. Hildegard Temporini, Berlin/New York 1972, vol. 1, 68-114, 105-6.

The early-modern writers touched upon two relevant issues in relation to *postliminium*. *Primo*, there was the question whether the right also applied to property that had been taken and was later recovered, and to what kind of property. Ayala unequivocally accepted the rule from *Digest* 49.15.20.1 that land returned to the previous owner upon recapture during war. Ayala extended this to the usufruct of that land.<sup>70</sup> This rule implied that when the enemy had occupied a certain territory and taken, possibly by confiscation, somebody's land, it would automatically return to the original owner when the enemy was driven out. The rule also applied to large vessels and transports, such as ships, as well as some horses.<sup>71</sup> Gentilis was concurrent with Ayala to the effect that immovables fell under *postliminium*. He argued that one could never be reproached for having surrendered his lands to the enemy as they could not be taken to safety. *Postliminium* only covered losses suffered involuntarily during the war. Therefore, deserters did not benefit from *postliminium*.<sup>72</sup> Grotius agreed that lands were restored by *postliminium*, both under Roman and current law.<sup>73</sup> The same went for all rights annexed to the land.<sup>74</sup>

*Secundo*, there was the matter of *ius postliminii in pace*, whether *postliminium* also applied during peacetime. Pomponius, in *Digest* 49.15.5.2, had forwarded the opinion that *postliminium* also applied in time of peace. A Roman who had fallen into the hands of a foreign nation with which the Romans had made no treaty and was thus to be considered an enemy nation, also lost his citizenship and became a slave. Upon his return, he benefited from *postliminium*. In the context of the relations between the European States of the 16<sup>th</sup> and 17<sup>th</sup> centuries, this issue had become irrelevant. The early-modern writers interpreted the concept

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<sup>70</sup> Ayala, *De Jure et Officiis Bellicis* (note 61), 1.5.33. See D. 49.15.2 pr. and 1.

<sup>71</sup> Ayala, *De Jure et Officiis Bellicis* (note 61), 1.5.34.

<sup>72</sup> Gentilis, *De iure belli* (note 8), 3.17. See D. 49.15.2 pr. and 1.

<sup>73</sup> Grotius, *De iure praedae* (note 62), 10; *idem*, *De iure belli ac pacis* (note 6), 3.9.13.1.

<sup>74</sup> Grotius, *De iure belli ac pacis* (note 6), 3.9.13.2.

*ius postliminii in pace* in a very different way. In their view, the issue seemed to boil down, inasmuch as property was concerned, to the question whether a peace treaty automatically implied the restitution of all property – or at least property liable to *postliminium* – even without an express stipulation to that effect.

With the two authors who addressed that question, the answer was in the negative. Gentilis opened his chapter ‘De agris & postliminio’ with the words ‘that they [territories, places, and buildings] all remain in the power of the man who holds them at the time when peace is made, unless it has been otherwise provided by the treaty.’<sup>75</sup> For Gentilis, it was clear that *postliminium* pertained to the laws of war, and thus to the state of war. It was a right from which benefited people who had suffered losses because of the war, and which was won by acts of war – such as fighting or escaping the enemy.<sup>76</sup> Gudelinus, too, rejected automatic restitution on the basis of *postliminium in pace*, expressly attacking the opinion of Accursius to the opposite. For restitution to take place, it had to be expressly stipulated.<sup>77</sup>

Grotius did not address the question in terms of *postliminium in pace*, but his conclusion in terms of contemporary peace treaty practice was to the same effect. In relation to the position of property taken by the enemy during the war, he stated that there were two solutions: return to the old, pre-war situation or the application of *uti possidetis*. He was of the opinion that, if nothing was stipulated, the presumption was to the latter.<sup>78</sup>

In conclusion, we can say that there reigned a broad consent. They held to the opinion that, whereas land – and rights attached to it – fell under *postliminium*, there was no automatic

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<sup>75</sup> Gentilis, *De iure belli* (note 8), 3.17.

<sup>76</sup> With reference to D. 49.15.12 pr.

<sup>77</sup> Gudelinus, *De iure pacis* (note 65), 3.3-5; Lesaffer, Gudelinus (note 60), 234.

<sup>78</sup> Grotius, *De iure belli ac pacis* (note 6), 3.20.11.2 and 12.1.

restitution when peace was made. In order for restitution to take place, it had to be expressly stipulated. They all agreed, however, that peacemakers had a right to do so.<sup>79</sup>

A second relevant issue on which the authors shed their light concerned the right to take property from the enemy in general, and confiscation in particular. To begin with, there was widespread consent that according to the laws and customs of war, anything belonging to the enemy and his subjects could be taken during the war.<sup>80</sup> As this was a right which could be exercised in any ‘legal war’ – meaning a war waged by a sovereign and formally declared – it pertained to all belligerents, regardless of the justice of their cause.<sup>81</sup>

Among the authors studied here, Grotius was most explicit in distinguishing between the positive law of nature – which he labelled volitional – and the natural law of nations, the precepts of natural justice as applied to States.<sup>82</sup> But Ayala and Gentilis as well confronted elements of positive and natural law with one another. In relation to the laws of war, this meant that they all discussed both elements of just and of legal war.<sup>83</sup>

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<sup>79</sup> This also touched upon the question whether sovereigns had the right to dispose of their subjects property in a peace treaty. The answer was, with some qualification, to the affirmative. *Gudelinus*, *De iure pacis* (note 65), 6.3-5; Grotius, *De iure belli ac pacis* (note 6), 3.20.7.

<sup>80</sup> *Ayala*, *De Jure et Officiis Bellicis* (note 61), 1.5.1; *Gentilis*, *De iure belli* (note 8), 3.4 and 3.17; Grotius, *De iure praedae* (note 62), 4; *idem*, *De iure belli ac pacis* (note 6), 3.4.8, 3.5.1 and 3.6.1 and 2.1: ‘By the law of nations not merely he who wages war for a just cause, but in a public war (*bello solemn*) also any one at all becomes owner, without limit or restriction, of what he has taken from the enemy.’ (3.6.2.1).

<sup>81</sup> On the thought of Ayala, Gentilis and Grotius on just and legal war: *Lesaffer*, *Defensive Warfare, Prevention and Hegemony* (note 5), 115-123; *Neff*, *War and the Law of Nations* (note 7), 96-111; *Arthur Nußbaum*, *A Concise History of the Law of Nations*, New York 1947, 79; *Redlich*, *De praeda militari* (note 12), 20.

<sup>82</sup> One of the best expositions of Grotius’ thought in relation to the law(s) of nations from modern scholarship remains *Haggenmacher*, *Grotius et la doctrine de la guerre juste* (note 9).

<sup>83</sup> *Ayala*, *De Jure et Officiis Bellicis* (note 61), 1.2.34; *Gentilis*, *De iure belli* (note 8), 1.2-3, 1.5-7, 1.12; Grotius, *De iure belli ac pacis* (note 6), 1.3.4.1, 3.3.4-5 and 3.3.12-13

Whereas the positive laws of war made all enemy property liable to capture, the rules of natural justice mitigated this. The general view was that one could only take so much property of the enemy as was just.<sup>84</sup> For Grotius, there were three reasons that could make the destruction or capture of enemy property just: out of necessity, to settle a debt or the inflict – a proportional – punishment for injury.<sup>85</sup> Translated to the context of warfare, necessity meant that one could take from the enemy everything which weakened his ability to fight the war and thus furthered one's chances to victory.<sup>86</sup> As the necessity ended with the war, goods taken for this reason needed to be either restored in kind or, otherwise, compensated.<sup>87</sup> Whereas subjects could not be held liable for their prince's crimes, they were liable for his debts. To Grotius, this implied that their property could be captured by the enemy as a security for the enemy prince's debt. These were not limited for claims one had on the enemy prince before the war and which, possibly, formed the issue, or one of the issues, for which the war was fought. It also entailed claims to compensation for damages inflicted during the war. Compensation for war damages, of course, pertained to the sphere of the just war doctrine. It assumed that one of the belligerents had a right to wage the war and the other not. By consequence, all damages inflicted by the unjust side were considered to be the result of unjust actions. Therefore, the unjust side was liable to compensate them.<sup>88</sup>

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<sup>84</sup> *Gentilis*, *De iure belli* (note 8), 3.4: 'In our day it is not permitted to kill men, but the property of private individuals is usually carried off by way of punishment and is often bestowed upon these who have been sinned against.'

<sup>85</sup> *Grotius*, *De iure belli ac pacis* (note 6), 3.12.1.1.

<sup>86</sup> *Grotius*, *De iure belli ac pacis* (note 6), 3.12.1.2-3.

<sup>87</sup> *Grotius*, *De iure belli ac pacis* (note 6), 3.13.1.1.

<sup>88</sup> *Grotius*, *De iure belli ac pacis* (note 6), 3.2.2 and 3.13.2-3; also see *idem*, *De iure praedae* (note 62), 4.

According to Grotius, the just belligerent should, ideally, ‘obtain that for which he took up arms, and should likewise recover for damages and costs.’<sup>89</sup> But as it was not customary for a signatory party to a peace treaty ever to concede that he had waged an unjust war, this rule remained ineffective. Property was either kept under the rule of *uti possidetis*, or mutually returned.<sup>90</sup>

With these remarks, Grotius faithfully described the practice of his day and age and illuminated the doctrinal background for it. Restitution clauses in late-medieval and early-modern peace treaties were closely linked to another clause, that emerged around the same time and had become a standard clause of almost every peace treaty by the 17<sup>th</sup> century: the clause of amnesty and oblivion.<sup>91</sup> This clause implied that all acts committed during and because of the war were remitted and that no claims could be laid because of crimes or injuries committed because the war or of damages inflicted because of the war. These clauses were congenial to the silent acceptance, which was a fundamental feature of almost all late-medieval and early-modern peace treaties, that both parties had held a right to wage the war. In not a single peace treaty of the 16<sup>th</sup> to 18<sup>th</sup> centuries between European powers an attribution of guilt for the war or a judgment on the justice of this or the other side can be found.<sup>92</sup> As both sides were considered to have held the right to wage the war, their actions were covered by the legality of the war, or of its presumed justice.

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<sup>89</sup> Grotius, *De iure belli ac pacis* (note 6), 3.20.11.2.

<sup>90</sup> Grotius, *De iure belli ac pacis* (note 6), 3.20.12.1.

<sup>91</sup> Art. 4 of the Peace Treaty of Münster.

<sup>92</sup> Fisch, *Krieg und Frieden* (note 13), 92-112. The Swiss diplomat Emer de Vattel (1714-1767) stated that even if there was no express amnesty clause in the peace treaty, it was to be considered silently implied. Vattel, *Le droit des gens* (note 10), 4.2.20. In the peace treaties of the later 17<sup>th</sup> and 18<sup>th</sup> centuries, amnesty and restitution clauses became more and more standardised, with the restitution clause often directly following the amnesty clause. Lesaffer, *Europa: een zoektocht naar vrede* (note 35), 470-3.

But the overlap between Grotius' doctrine and practice did not end there. Early-modern State practice reflected the ambiguity which Grotius had caught in his distinction of just and solemn – or legal – war, of the natural and the volitional law of nations. Throughout most of the Early-Modern Age, princes and Republics in their declarations and manifestos of war, as well as in treaties of alliance, continued to use the discourse of just war in justifying their actions to their subjects, their allies, their enemies, and ultimately, their conscience. This implied that they, at least implicitly but mostly explicitly, took the stance that they had right on their side and were thus pardoned for resorting to war, while their enemy was not. This discriminatory conception of war also spilled into the measures taken against the enemy. Declarations of war served multiple purposes. They contained a justification for the war, but also served to inform State official and military commanders of the war and what it entailed. Many declarations or counterdeclarations of war announced at their end the measures taken against the enemy, including confiscations. The measures were thus associated to the discourse of justice.<sup>93</sup> But, as indicated above, in peace treaties none of this returned.

Seizures and confiscations of property thus shared in the ambiguity of just and legal war. Enemy property – whether found in one's own territory at the start of the war or seized later in conquered lands – was seized. Whereas the laws and customs of war condoned this, justice, too, sanctioned it, but only for the just belligerent. Princes and governments liked to cloak their actions in the mantle of justice. But once peace was made, these claims to justice

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<sup>93</sup> E.g. the counterdeclaration of the Cardinal-Infante, Don Fernando of Spain, Governor-General of the Spanish Netherlands (1634-1641), against the French King Louis XIII (1610-1643) of 24 June 1635: *Declaration de son Alteze touchant la guerre contre la couronne de France*, s.l. 1635; see *Lesaffer*, *Defensive Warfare, Prevention and Hegemony* (note 5), 153 and 161. The connection between the justice of the cause and the confiscation of enemy property was even stronger in the early years of the Eighty Years War as the Spanish King considered the Dutch as rebels and criminals who had forfeited all their property and rights through their illegal rebellion. See also *Klessman*, *Bellum solemnne* (note 9).

were abandoned. According to doctrine, as to logic, confiscations were made either to weaken the enemy, as a security for his debts or as punishment. By consequence, the peace treaty destroyed their very foundation. Ending the war meant that there was no further justification to weaken the enemy. The belligerent's claims that lay at the roots of the war were either settled in the treaty, or reserved for the future without them being adjudged. The absence of any attribution of guilt to any of the belligerents meant that they would not be punished for the war. And, finally and most importantly, the amnesty clause took away the foundation for confiscation as a security for the compensation of war damages.

The question now remains open why restitution did not extend to movables and income on realty lapsed before the conclusion of the peace treaty. For this, doctrine gives some clues. It is not the time and place here to delve deeply into the intricate arguments made by the historical writers on the capture of movables. Let us suffice with three general remarks.

First, under the civil law, the conditions for a possessor to become owner of a movable good are far less demanding than for realty.<sup>94</sup>

Second, this distinction from private law found its reflection into the laws of capture and plunder. The traditional view was that whereas movables became the property of the captor – at least once they had been safely brought within the lines –, land became public property. It was acknowledged that, historically as well as currently, princes and military commanders held the right to put these rules aside and impose their own rules.<sup>95</sup> Government control was a particular point of interest during the Early-Modern Age. As governments tried to enhance military discipline, they also tried to increase their control over the division of the

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<sup>94</sup> *Andrew Borkowski and Paul du Plessis*, Textbook on Roman Law, 3<sup>rd</sup> edn, Oxford 2005, 157-69; *Barry Nicholas*, An Introduction to Roman Law, Oxford 1962, 98-129; *Watkin*, Modern Civil Law (note 11), 230.

<sup>95</sup> *Ayala*, De Jure et Officiis Bellicis (note 61), 1.5.3-9 and 1.5.37; *Grotius*, De iure belli ac pacis (note 6), 3.6.3-4, 3.6.11.1 and 3.6.12-14 as well as 3.9.16-17.

spoils of war.<sup>96</sup> Moreover, whereas an owner lost his title to his movable property once it had been brought within enemy lines, for the title on realty to be lost, more needed to be done. Classical doctrine held that the land had to be fortified and protected by fortifications.<sup>97</sup> In reality, title was only taken from the original owners through the official act of confiscation.

Third, not all movables were considered to fall under *postliminium*. Classical Roman law only applied *postliminium* to some categories of movables. The early-modern writers studied here all supported the view that, with some exceptions for goods useful in war such as warships, transports and some horses, movables did not return to the original owner upon recapture from the enemy.<sup>98</sup> Grotius, however, held that under the current law all movables were exempted from *postliminium*.<sup>99</sup> While this discussion on *postliminium* was not directly relevant to restitution and confiscation, it allows for an analogy. As movables did not fall under *postliminium*, it stood to reason that they would also be exempted from restitution.

Though it offers up some indication, doctrine thus not provide a definitive argument for discriminating between realty on the one hand and movables and lapsed income on the other hand.<sup>100</sup> The true reason for the discrimination was one of expediency. First and

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<sup>96</sup> E.g. by ruling that a soldier could only gain ownership of his plunder by a decision of a military auditor, Ordinance of Philip II for the Netherlands of 1587, Art. 22, in Code militaire des Pays-Bas, contenant les edits, ordonnances, etc. ensemble un commentaire sur le placard du prince de Parme de 1587, ed. Pierre-Winand Clerin, Maastricht 1721, 127-9.

<sup>97</sup> Ayala, De Jure et Officiis Bellicis (note 61), 1.5.37; Gentilis, De iure belli (note 8), 3.17; Grotius, De iure belli ac pacis (note 6), 3.6.3-5.

<sup>98</sup> Ayala, De Jure et Officiis Bellicis (note 61), 1.5.36; Gentilis, De iure belli (note 8), 3.17; Grotius, De iure praedae (note 62), 10; *idem*, De iure belli ac pacis (note 6), 3.9.14. Weapons then again, of which it said it was shameful to lose, did not fall under *postliminium*, D. 49.15.2.2.

<sup>99</sup> Grotius, De iure praedae (note 62), 10; *idem*, De iure belli ac pacis (note 6), 3.9.15.

<sup>100</sup> Gudelinus, De jure pacis (note 65), 5.10-3 offers an explanation for the exemption of lapsed incomes on the basis of an *a contrario* reasoning from private law; Lesaffer, Gudelinus (note 60), 235-6.

foremost, restitution was connected to amnesty. The amnesty clause, which was part and parcel of the very foundations on which a peace treaty was vested, indicated the desire of the signatory parties to do away with the state of war and everything that had occurred during the war, and to restore the state of peace as quickly and as smoothly as possible. The way to achieve this was to forgive and forget. This dictated restitution of confiscated property, as confiscation was primarily a security for compensation of this enemy's wartime actions. But, paradoxically, and for reasons of expediency, this also dictated the exemption of movables and lapsed incomes. Whereas restitution of realty, particularly after a long war like the Eighty Years War, was a complex matter, it was far less complicated than it would be to restore movables. These were evidently harder to trace. It would be much harder to prove who the original owners were and who their successors were. Moreover, many movables would have been consumed or lost by the time of the peace. This would cause more troubles with regards to the assessment of their value and the required compensation. Restitution of movables, as of lapsed income, would thus force the treaty partners to delve into the past, and do so for a long time.

Excluding movables from restitution had another practical advantage. Restitution only applied to goods that had been seized, not to goods that had been taken as plunder. It neither applied to ships and shiploads that had been captured by privateers under *lettres de marque*. These had been attributed by the municipal admiralty and prize courts of the belligerents.<sup>101</sup> By not returning confiscated movables, they were treated in a similar way as all other captured movables. In this manner, disputes on how certain goods had changed hands were prevented.

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<sup>101</sup> *Louis Sicking*, *Neptune and the Netherlands: State, Economy, and War at Sea in the Renaissance*, Leyden/Boston 2004, and references there.