Chapter 5

The Boundaries of Peace-making: British Imperial Encounters, c. 1700–1900

Megan Donaldson[1]

1 The Boundaries of Peace-making

Many recent histories of peace settlements in international law have concentrated predominantly on the peace treaties of European powers *inter se*.[2] For the eighteenth and nineteenth centuries, this has meant an emphasis on the treaties emanating from Utrecht (1713), Vienna (1738), Aachen (1748), Paris (1763), and Vienna (1815), albeit with some consideration of relations with the Ottoman Empire, and the gradual adoption, by powers such as China and Japan, of 'European' modes of peace-making. To some extent, this focus on peace-making between European powers reflects the outlook of previous generations of jurists. The *droit public de l'Europe* emerged from a series of treaties between primarily European powers,[3] and jurists and diplomats contemplating future peace conferences reached back to these European instances for precedents.[4] Major

[1] I thank Mark Retter, Randall Lesaffer and Christoph Kampmann for insightful comments on earlier drafts.

[2] See e.g. Andreas Osiander, *The States System of Europe 1640–1990* (Oxford: Clarendon Press, 1994), 15 ('in order to keep the material manageable, all extra-European aspects of the peacemaking ventures that we will examine have had to be omitted'); Heinhard Steiger, 'Peace Treaties from Paris to Versailles', in Randall Lesaffer (ed.), *Peace Treaties and International Law in European History from the Late Middle Ages to World War One* (Cambridge: Cambridge University Press, 2004), 59; Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford: Oxford University Press, 2008) (dealing briefly with peaces of imperial expansion at 88–90); Stephen Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2008) 3 (acknowledging that the work does not say 'much about colonial warfare, which in many ways was quite distinct from conflict amongst developed [chiefly European] countries'); Randall Lesaffer, 'Peace Treaties and the Formation of International Law', in Bardo Fassbender and Anne Peters (eds.), *Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), 71. One exception is Jörg Fisch, *Krieg und Frieden im Friedensvertrag: Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedensschlusses* (Stuttgart: Klett-Cotta, 1979); see also Christophe Eick, *Indianervertraäge in Nouvelle-France: Ein Beitrage zur Völkerrechtsgeschichte* (Berlin: Duncker & Humblot, 1994).

[3] Abbé de Mably, *Le Droit public de l'Europe, fondé sur les traités*, 3rd éd. (Geneve: Compagnie des Libraires, 1764).

[4] See e.g. the succession evident in Mably; and Charles Webster's study of the Congress of Vienna, prepared in 1918 at the request of the British Foreign Office as part of its preparation for the peace-making following World War I: C.K. Webster, *The Congress of Vienna 1814–1815* (Oxford: Oxford University Press, 1918).

European peace treaties served – albeit often retrospectively – as indicia of changing legal norms, or moments to which new norms of the law of nations, and new reconfigurations of the European 'order', were traced.[5] In various ways, jurists distinguished the norms and practices prevailing between European powers, on one hand; from those prevailing among the diverse peoples and political formations they encountered beyond Europe, on the other.

This chapter looks deliberately towards the outer reaches of this picture, to the peaces made by European powers in the expansion of empire beyond Europe. To be clear: this does not purport to be a genuinely global history of peace-making. Such a project would have to explore the traditions of peace-making *among* peoples and polities of the various regions of the world, many of which had complex diplomatic systems of their own, long predating contact with Europeans. Rather, the chapter is animated by the sense that, even if we seek to understand *European* peace-making, we cannot bracket from analysis crucial aspects of the imperial endeavours which shaped both Europe and (European) international law. War and peace within Europe were shaped by rivalries beyond it, a relation implicit in the 'reason of state' writings of the early modern period, and made explicit, for example, in debates after the French Revolutionary Wars.[6] Major conflicts like the Seven Years War (1756–1763) and American Revolutionary War (1775–1783) involved a panoply of political entities on the Indian subcontinent, and American Indian nations in North America – as did the peace treaties which followed these conflicts. Most crucially, peace-making between European actors and indigenous peoples was central to many phases of European imperial expansion itself. The gradual establishment of trading posts and settlements entailed a large number of what contemporaries called 'wars', and this violence was punctuated by arrangements named by European contemporaries as 'peaces'.

This chapter is an effort to think anew about what counts as peace-making, beyond the iconic peace treaties we now take as exemplary of peace settlements. Peaces made on the fringes of empire – very often not by sovereigns and diplomats but by chartered companies, settlers, or imperial or

[5] See e.g. Cornelis van Vollenhoven, *The Law of Peace*, trans. W.H. Carter (London: Macmillan, 1936); and, more rigorously, Osiander, 'States System of Europe 1640–1990'. On retrospective construction of these founding moments, see Chapter 4 by Cristoph Kampmann in this volume.

[6] See e.g. the argument of the Comte d'Hauterive, a leading French diplomat, that the Westphalian settlement had not managed the emergent 'maritime and colonial system' forged by Britain; and that this failure threatened the 'political balance' within Europe: Alexandre D'Hauterive, *State of the French Republic at the End of the Year VIII*, trans. Lewis Goldsmith (London: J.S. Jordan, 1801), 25.

military officials – were, like the peaces between European sovereigns and the Ottoman Empire,[7] transactions between agents and communities which understood themselves precisely as *not* sharing some overarching worldview. The interlocutors did not have in common a dense corpus of prior norms or legal traditions, and did not partake in, for example, the vision of Christian *universitas* so central to peace-making in (especially continental) Europe – even if indigenous interlocutors were understood by Europeans to be bound by a universal natural law. These peaces on the margins of empire undoubtedly differed in both procedure and substance from contemporaneous peace treaties made between European powers. However, it is not clear that they can, on this basis alone, be excluded from the conceptual or juridical universe of 'European' peace-making. Indeed, attention to these peaces might be a promising way into some familiar arguments about the outer reaches of 'European' international law itself.

Section II of the chapter sets alongside the dominant histories of European peace treaties a brief, necessarily simplistic sketch of perspectives on law in empire opened by work in ethnohistory and imperial ordering. The point is not to reconcile these two (possibly irreconcilable) perspectives on peace-making, but to see what can be learnt by drawing them into relation. I argue that the juxtaposition opens up wide-ranging avenues for research: was 'peace', as used by contemporaries in different moments, necessarily contained within *juridical* discourse at all? And where and how would one locate a 'law' of peace – is 'law' confined to the treaty collections and treatises, or might it subsist in unwritten practices? Section III works at a more concrete level, to illustrate at least some of the fluidity and diversity of imperial peace-making. It focuses in on a loosely defined subset of peace settlements – those that are consciously understood by the parties as establishing new relations – and particularly on British practice in the eighteenth and nineteenth century. This is a canvas confined enough to have some commonalities, but large enough to show variation too. Section IV of the chapter reflects on what opening the geographical and conceptual bounds of our

[7] For a brief history of such peaces, see Karl-Heinz Ziegler, 'The Peace Treaties of the Ottoman Empire with European Christian Powers', in Lesaffer, 'Peace Treaties and International Law in European History', 338. On the ambiguous status of many of the texts in which Ottoman relations with European Christian powers took shape, and the effects of 'interpretational fluidity', see Umut Özsu, 'Ottoman Empire', in Fassbender and Peters (eds), 'Oxford Handbook of the History of International Law', 429, 432. There may be analytical and conceptual insights to be gained from seeing Ottoman/Christian relations and European/indigenous relations, typically studied separately, as part of a larger pattern of negotiation between disparate legal cultures, but this terrain cannot be explored further here.

histories of peace-making might offer for questions central to this volume, about the law of peace-making today.

2 Locating Peace in Law, and the Law on Peace

Peace as a juridical notion has long been connected conceptually to both war and sovereign status. Peace and war have been understood in relation to each other, and the making of war and peace without reference to another authority has been taken to be an important, if circular, mark of sovereignty. Within the European tradition, the juridical notion of peace has thus been shaped by evolutions in these other concepts. A 'just war' tradition cast peace between at least Christian sovereigns as part of a natural order, whereas the gradual emergence of a new understanding of 'formal' war entailed understanding peace as a 'constitutional' matter, a state of affairs deliberately constructed through diplomatic negotiation.[8] Recurrent etymological discussion captures an enduring ambivalence about what comes first, peace as a (natural) state, or the human artifice of agreement – as in Gentili's observation that:

> [t]he word peace (*pax*) is derived from the agreement (*pactio*) or conditions, if we may believe Festus and Ulpian; for Isidore on the contrary derives compact (*pactum*) from peace (*pax*), and interprets it as something made in consequence of peace, approved by law and custom.[9]

Intersecting with this fluidity concerning the relation between nature and human agency is a Roman tradition, deeply influential for the law of nations, in which 'peace' might embrace anything from outright subjugation to negotiated settlement; indeed the intertwining of 'peace' and imperial ideology rested on precisely the capaciousness of what peace-making might entail.[10]

Gentili treats peace, following Aristotle, as 'ordered harmony', an 'order or right distribution', but one may be '*brought about by the victor alone, or by both sides together*'.[11] His more detailed precepts, on matters such as vengeance, require the victor to act in pursuit of 'the true purpose of

[8] See Chapter 4 by Kampmann in this volume.
[9] Alberico Gentili, *De iure belli libri tres*, trans. John Carew Rolfe, 2 volumes (Oxford: Clarendon Press, 1933), Volume II, at 289, 290 [Book III, Chapter I].
[10] Myles Lavan, 'Peace and Empire. *Pacare*, *Pacatus*, and the Language of Roman Imperialism', in E.P. Moloney and Michael Stuart Williams (eds.), *Peace and Reconciliation in the Classical World* (Oxford: Routledge, 2017), 102; Clifford Ando, 'Pax Romana: Peace, Pacification and the Ethics of Empire', lecture given 4 April 2017, Centre for Ethics, University of Toronto; reproduced in 2017 Centre for Ethics Journal 1: https://c4ejournal.net/table-of-contents-3/ [last accessed 23 April 2019].
[11] Gentili, 'De iure belli libri tres', Volume II, 290 [Book III, Chapter I] (emphasis added).

victory, which is the blessing of peace', but even these cases are subject to rules for determining the *measure* of vengeance (as for punishment).[12] One sees in Gentili a relatively clear divide, in which peace brought about 'by both sides together', in a negotiated treaty which avoided attributing blame for the war to either party, captured practice between European sovereigns *inter se*, whereas peace 'brought about by the victor alone' captured practice in the Indies.[13]

By the time of Vattel, one sees a further distinction between a just war discourse, ruling the conscience or *foro interno*, and a notion of formal war, or legal right, predominant in the *foro externo*. A sovereign was obliged to end a war when a fair compromise was offered by the other party, though in the case of a perfidious enemy one could prolong the fighting in order to break their dangerous power. 'Barbarian nations' which did not adhere to the laws and customs of war – particularly, for Vattel, those like the Barbary states which lived by piracy and robbery – were exposed to particularly punitive treatment.[14] Vattel's concept of formal peace retained a concern for justice, even as it argued that negotiated peaces did not and could not hew to the *absolute* dictates of justice.[15] However, the situation of indigenous peoples ('savages') is somewhat marginal in Vattel's schema of nations, or states, engaged in the making of peace.[16]

Gentili and Vattel, though very different writers, both make present non-European, non-Christian polities in their treatment of peace-making, albeit largely in a subordinate or precarious position *vis-à-vis* European 'civilised' states. One might wonder, though, whether such treatises, taken as central to the law of nations, really capture the extent to which European imperial agents engaged in what they understood – even in a loose sense – as peace-making. Historians of international law are often heavily reliant on the writings of jurists, whether because of their relative accessibility, or because, as Pitts notes, these were privileged by *other* prominent writers, in a self-referential

[12] *Ibid.*, Volume II, 293, 295 [Book III, Chapter II].
[13] Randall Lesaffer, 'Alberico Gentili's Ius Post Bellum and Early Modern Peace Treaties', in Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010), 210, at 225–226.
[14] Walter Rech, *Enemies of Mankind: Vattel's Theory of Collective Security* (Leiden: Martinus Nijhoff, 2013), 125–127.
[15] Randall Lesaffer, 'A Master Abolishing His Homework? Vattel on Peacemaking and Peace Treaties', in Vincent Chétail and Peter Haggenmacher (eds.), *Vattel's International Law from a XXIst Century Perspective* (Leiden: Brill, 2011), 353.
[16] Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (London: Newbery, 1760), Book I, Chapter xviii. However, Vattel would later be cited in nineteenth-century legal battles in support of the treaty-making power of 'protected' Indian tribes: Inge Van Hulle, 'Grotius, Informal Empire and the Conclusion of Unequal Treaties' (2016) 37 *Grotiana* 43.

tradition.[17] These texts were not produced in isolation; many of the authors were, to varying degrees, responding to, or themselves participating in, contemporary diplomatic or juridical debates. However, treatises sometimes elided much of the complexity in broader political and legal discourse even between European states (as in Vattel's elision of the legal structure of empire in favour of understanding Europe as a collection of states,[18] and the gradual shift in treatises towards a notion of formal war while just war thinking continued to be central to pamphlet controversy and even peace-making negotiations).[19]

As one would expect, patterns of what was perceived by Europeans as 'peace-making' varied significantly with the material constraints, ideologies and political formations which characterised exploration, trade and settlement in different times and places. In the 'first' European empire, in the Americas (spanning 1492 to the nineteenth century), early military advances by the Spanish devastated native populations or decapitated native imperial structures, and Indians were simply claimed as subjects. Although indigenous populations persisted in political organisation and armed resistance, and were large relative to the small class of *conquistadors*, open rebellion was unusual. The Túpac Amaru rebellion (1780–1783) produced an armistice, later broken, but was ultimately suppressed through brutal exemplary executions rather than any political settlement. In struggles with Indian populations on the outer reaches of Spanish or Portuguese imperial control, however, settlers alternated between making war on recalcitrant Indians (in the Portuguese case, through a bureaucratic procedure for asserting the war in question was 'just'; and in the Spanish case, through a *de facto* 'just war' standard without the same bureaucratic control), and offering 'peace',

[17] Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century' (2012) 117 *American Historical Review* 92, at 100.

[18] Jennifer Pitts, *Boundaries of the International: Law and Empire* (Cambridge, MA: Harvard University Press, 2018). However, Vattel also discussed extensively the hierarchical relation of protection so central to the expansion of empire: Hulle, 'Grotius, Informal Empire and the Conclusion of Unequal Treaties'.

[19] See e.g. the ongoing centrality of just war conceptions in pamphlets and peace-making negotiations, even as treatises displayed a gradual shift of emphasis to the formal war model: Pärtel Piirimäe, 'Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War' (2002) 45 *Historical Journal* 499; Pärtel Piirimäe, 'The Westphalian Myth and the Idea of External Sovereignty', in Hent Kalmo and Quentin Skinner (eds.), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010), 64; see also Randall Lesaffer, 'Aggression before Versailles' (2018) 29 *European Journal of International Law* 773, at 790–797.

typically through gift-giving practices in which the Europeans, at least, imagined themselves the superior party.[20]

In North America, British and French chartered companies and colonists, if they had initially envisaged 'conquest', found themselves moving more tentatively, in a landscape that was much less populous than that of South America, but in which the decentralised, militarily proficient Indian tribes constituted enduring threats.[21] In Virginia, a series of conflicts with the Powhatan depleted tribal structures and culminated in a 'peace treaty' of 1646, providing that the 'King of the Indians' held his office from His Majesty, King of England, and was under the protection of the colony, in exchange for tributes to be paid annually.[22] In New England, some tribes entered into alliances with European colonies; the Europeans were both woven into inter-tribal conflicts and seeking to leverage these conflicts for their own ends. The 'Pequot Wars' (1636–1638) resulted in the virtual destruction of the Pequot; survivors were sold into slavery or bound under the headship of tribes allied with the Connecticut River colonists. 'King Philip's War', in the 1670s, also ended in defeat or enslavement for many of the tribes involved,[23] though intermittent violence continued in the north, as Indians united with New France against the English. In the 1670s, the New York colony began building relations of peace with the Iroquois – part of a long-term strategy to draw them into alliance against New France – with parties elaborating over time a 'covenant chain' system which the British would later try to transpose to other nations further south.[24]

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[20] See e.g. Tamar Herzog, 'Struggling over Indians', in Saliha Belmessous (ed.), *Empire by Treaty: Negotiating European Expansion, 1600–1900* (Oxford: Oxford University Press, 2014), 78.

[21] On the general differences between Spanish and British imperial endeavours in the Americas: Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France, c. 1500–c. 1800* (New Haven, CT: Yale University Press, 1995); J.H. Elliott, 'The Seizure of Overseas Territories by the European Powers' and 'Britain and Spain in America: Colonists and Colonised', in *Spain, Europe and the Wider World 1500–1800* (New Haven, CT: Yale University Press, 2009), Chapters VI, VIII.

[22] William Waller Hening (ed.), *The Statutes at Large; Being a Collection of All the Laws of Virginia from the First Session of the Legislature in the Year 1619* (New York, NY: Bartow, 1814), Volume I, at 323–326. For the earlier phases of warfare, and argument over conquest and occupation, see Andrew Fitzmaurice, 'Powhatan Legal Claims', in Saliha Belmessous (ed.), *Native Claims: Indigenous Law against Empire, 1500–1920* (Oxford, Oxford University Press, 2011), 85.

[23] On the enslavement of even those Indians which surrendered, often on promises of mercy: Linford D. Fisher, '"Why Shall Wee Have Peace to Bee Made Slaves": Indian Surrenderers During and After King Philip's War' (2017) 64 *Ethnohistory* 91.

[24] Eric Hinderaker, 'Diplomacy between Britons and Native Americans, c. 1600–1830', in H.V. Bowen *et al.* (eds.), *Britain's Oceanic Empire: Atlantic and Indian Ocean Worlds, c.1550–1850* (Cambridge: Cambridge University Press, 2012), 218, at 234. See also: John Philip Reid, *A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation during the Early Years of Contact* (University Park, PA: Penn State University Press, 1976); Daniel K. Richter,

On the subcontinent, the gradual accumulation by the East India Company of titles and possessions was a highly legalised endeavour. Although there were violent encounters, and major conflict between British, French and their respective Indian allies and clients during the Seven Years' War, further East India Company expansion after 1763 involved few major battles. There were exceptions – notably a series of wars with Mysore, the Marathas and Sikhs in the late eighteenth to early nineteenth centuries – but for the most part the gradual domination of remaining Indian princes to subordinate status though agreements was as much a matter of economic and bureaucratic force as it was military.

There was considerable variation not only between the imperial styles of European powers, but within them. For the British in the Pacific, the modest ambitions of the first settlement in Australia, together with early difficulties of communication with the indigenous,[25] and prevailing perceptions of indigenous peoples as dispersed and ill-suited for genuinely political interaction, suggested to colonists that there was little need for – or prospect of – a substantive relationship. Although the model of treaty relations was pursued in New Zealand, and raised in different Australian colonies on occasion as an alternative to persistent violence and a means of obtaining title,[26] the notion that Aboriginal peoples lacked the political structure requisite for sovereignty – alongside more prosaic objections – precluded this course from ever being pursued. Nevertheless, violence between indigenous and settlers, exacerbated by the expansion of settlements and agriculture, was occasionally cast by colonial authorities as warfare or something akin to it, and certainly understood by them as actuated by a coherent indigenous norm of retaliation; even if settler-colonial discourse saw only disordered marauding.[27] Attempts by colonial authorities to accommodate indigenous conceptions of this violence, and even avoid criminal prosecution for

'Native peoples of North America and the eighteenth-century British empire', in P. J. Marshall and Alaine Low (ed.), *The Oxford History of the British Empire: Volume II: The Eighteenth Century* (Oxford: Oxford University Press, 1998), 347.

[25] Inge Clendinnen, *Dancing with Strangers: The True History of the Meeting of the British First Fleet and the Aboriginal Australians, 1788* (Edinburgh: Canongate, 2005).

[26] Saliha Belmessous, 'The Tradition of Treaty Making in Australian History', in Belmessous, 'Empire by Treaty', 1; Bruce Buchan, *The Empire of Political Thought: Indigenous Australians and the Language of Colonial Government* (London: Pickering & Chatto, 2008), 97.

[27] Buchan, 'Empire of Political Thought', 85–87.

what were essentially retributive acts of violence against settlers; lasted at least into the 1830s, before this violence began to be treated exclusively as a criminal act.[28]

In Africa, the establishment of trading posts on the western coast marked the start of treaty-making in 1788, and some of the considerable number of treaties made between this point and the mid-nineteenth century referred to war and peace as categories of conduct: for example, to African kings and peoples 'waging a cruel and unjust war' on British subjects,[29] to 'a state of war' existing (between Great Britain and the Ashanti, 1872–1874), and a subsequent 'Treaty of Peace'.[30] However, there were also major military engagements ending in outright defeat, rather than any form of negotiation (like the Zulu war of 1879).

Viewed with hindsight, these encounters reflected a general pattern of inexorable, if halting and uneven, European expansion, and accompanying devastation of indigenous polities and political independence. However, European contemporaries often felt their own presence to be precarious, and indigenous political formations to be pivotal to European fortunes. Peace-making as a deliberate relation, whether by treaty or in other ways, was thus an important strategy for survival and stability of European communities, as well as a means of building alliances and shoring up positions in rivalries between European powers.

Histories of international law have tried to grapple with the complexities of this picture. Alexandrowicz's canonical work of the 1960s and 70s posited a gradual evolution from a pluralist, and inclusive, law of nations in the eighteenth century, in which European practice conceded lawful and even nominally equal status to an array of political formations beyond Europe, to a more Eurocentric, exclusionary and hierarchical order in the (later) nineteenth century.[31] This offers some footing for taking seriously, as legal creations, the peaces between European agents and polities beyond Europe, particularly in the eighteenth century. However, Pitts is skeptical that the eighteenth-century law of nations was as inclusive as Alexandrowicz suggested. Though

[28] Consolidating a territorial conception of jurisdiction which further undermined acknowledgment of indigenous political ordering: Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge, MA: Harvard University Press, 2010).
[29] Edward Hertslet, *The Map of Africa by Treaty*, 2nd ed., 3 volumes (London: HMSO/Harrison & Sons, 1896), Volume I, at 372 (referring to Barra, regarding territory on the banks of the Gambia).
[30] *Ibid*., Volume I, at 390.
[31] See e.g. writings in David Armitage and Jennifer Pitts (eds.), C.H. Alexandrowicz, *The Law of Nations in Global History* (Oxford: Oxford University Press, 2017).

writers such as Wolff and Vattel were self-consciously universalist in their claims, she observes that 'there is remarkably little in their treatises to suggest that they seriously considered the place of treaty relations or legal practices beyond Europe as germane to the emerging doctrine of the law of nations.'[32]

One major indication of European attitudes to peace treaties with non-European powers has been the treatment of such instruments in the large-scale treaty collections of the seventeenth and eighteenth centuries. The *Grand recueil* (1700), compiled on the initiative of publishers and titled a 'Collection of treaties of peace, truce, neutrality [etc.] … made between the … powers of Europe and other parts of the world', contained – along with several treaties between European powers and rulers in the Ottoman empire and Barbary states – peaces 'accorded by' the Emperor of France to various of the Iroquois nations (1666, reprinted from Leonard's collection of treaties of France); a treaty between the Dutch East India Company and the 'King of Macassar' (1667, reprinted from a Dutch periodical); and 'Articles of peace between' Charles II of England and 'several kings and queens in the Indies' (actually made in the Virginia colony) (1677, reprinted from manuscript, though the source of the manuscript is unclear).[33] These elements are carried through into Dumont's *Corps diplomatique* (covering 315–1730), on which Pitts focuses.[34] Dumont reproduces for the period 1700–1730, not covered by the *Grand receuil*, various treaties with the Barbary states and other non-European polities, as well as a 'treaty of alliance and commerce' between Great Britain and the Cherokee (likely to have been selected because this treaty was made in London, and attracted significant public attention).[35] Martens' *Supplément*, covering *circa* 1731–1804, and intended to complement the *Corps diplomatique*, also assumed a European focus,[36] but

[32] Pitts, 'Empire and Legal Universalisms in the Eighteenth Century', 101.
[33] Jacques Bernard, *Recueil des traitez de paix, de trêve, de neutralité, de suspension d'armes, de confédération, d'alliance, de commerce, de garantie, et d'autres actes publics : comme contracts de mariage, testaments, manifestes, declarations de guerre, &c. faits entre les empereurs, rois, républiques, princes, & autres puissances de l'Europe, & des autres parties du monde, depuis la naissance de Jesus-Christ jusqu'à présent : servant à établir les droits des princes, et de fondement a l'histoire*, 4 volumes (Amsterdam: Henry & Boom / Moetjens, van Bulderen 1700), Volume IV, at 160, 162, 183, 234, 747.
[34] Pitts, 'Empire and Legal Universalisms in the Eighteenth Century', 104.
[35] Jean Dumont, *Corps universel diplomatique du droit des gens: contenant un recueil des traitez d'alliance, de paix, de trêve, de neutralité, de commerce, d'échange ... & autres contrats, qui ont été faits en Europe, depuis le regne de l'empereur Charlemagne jusques à présent; avec les capitulations imperiales et royales ...*, 8 volumes (Amsterdam: Brunel, 1726), Volume VIII, pt 2, at 162.
[36] Justifying inclusion of treaties entered into by the new United States of America on grounds that these states, though geographically remote, 'are so linked with the peoples of Europe, and …, by their mores, commerce and law of nations so assimilated to the European powers, that it has become as essential and interesting to know their political relations as it is to be informed of those of several states of Europe': G.F. de Martens, *Supplément au Recueil des principaux*

included treaties of European powers with Ceylon, Persia, Algiers and Morocco, as well as 'several treaties of England with the Indians' (Martens occasionally used 'Indiens' as a generic reference to the party for both treaties of Great Britain and the US with North American Indians, and predominantly treaties made by the East India Company with princely rulers in India).[37] However, he did observe that, were he starting again, he would have 'sent [*renvoyé*] to a separate volume all these treaties with the Indians which interest only a portion of readers'.[38]

These dynamics – the inclusion of select treaties with non-European polities, but also a sense that they might somehow be compartmentalised – are evident also in national collections. For Britain, a 1772 compilation of 'all the treaties of peace, alliance, and commerce, between Great-Britain and other powers, from the revolution in 1688 to the present time', included treaties with Morocco, the bey of Tunis, and the Cherokee (1730), but not the East India Company's dealings;[39] but a 1790 collection, aimed explicitly at presenting 'a commodious selection [of] those treaties which are most frequently perused', contained selected treaties of the East India Company with Indian rulers, but no treaties with North American Indian nations.[40] The numerous specialised collections of treaties, organised by imperial agents, or by regions (delineated also in accordance with the bureaucratic and geopolitical visions of the British),[41] on the other hand, offered a degree of comprehensiveness which was not required by generalist readers but essential for administration.[42]

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traités d'alliance, de paix, de trêve ... précédé de traités du XVIIIème siècle antérieurs à cette époque et qui ne se trouvent pas dans le Corps universel diplomatique de Mrs. Dumont et Rousset (Gottingue: H Dieterich, 1802), Volume VI, at vi.

[37] See tables in: *ibid*., V, at 99–101. In a later index, these treaties have been reorganised into one list under 'Amérique (peoples divers)' and 'Indiens' (for the subcontinent): *ibid*., Volume VII, unnumbered index at end.

[38] Martens, 'Supplément au Recueil des principaux traités d'alliance', VI, at v.

[39] *A Collection of All the Treaties of Peace, Alliance, and Commerce, between Great-Britain and Other Powers, from the Revolution in 1688, to the Present Time ...*, 2 volumes (London: Printed for J. Almon, 1772), Volume II, at 13. See also, for similar coverage: *A Collection of All the Treaties of Peace, Alliance, and Commerce, between Great-Britain and Other Powers, from the Treaty Signed at Munster in 1648, to the Treaties Signed at Paris in 1783*, 3 volumes (London: Printed for J. Debrett 1785) (hereinafter 'A Collection of Treaties of Peace, Alliance, and Commerce from 1648 to 1783').

[40] George Chalmers (ed.), *A Collection of Treaties between Great Britain and Other Powers*, 2 volumes (London: Printed for J. Stockdale, 1790) Volume I, at iii; Volume II, at 463ff.

[41] Having regard to the importance of maritime routes, for example, collections pertaining to India also included treaties with Arab sheikhs: East India Company, *Return to an Order of the Honourable the House of Commons, Dated 23 May 1856; - for, Copies 'of All Treaties, Conventions, and Arrangements with the Native States of India, Made since the 1st Day of May 1834'* (London: 1856).

[42] See e.g. R. Hughes Thomas, *Treaties, Agreements, and Engagements, between the Honorable East India Company and the Native Princes, Chiefs, and States, in Western India; the Red Sea; the Persian Gulf; &c., also between Her Britannic Majesty's Government, and Persia, Portugal, and Turkey* (Bombay: Bombay Education Society's Press,

On one view, the varying coverage of the treaty collections bears out Pitts' argument that treaties between European and non-European entities were seen as less central to, or generative of, the law of nations. Of course, different treaty collections were collated with diverse ends in mind (commercial gain, a sort of encyclopedic intellectual sensibility of the eighteenth century, the practical needs of negotiators and diplomats, companies and royal administrations …), and these different ends implied different incentives for comprehensiveness versus selectivity. But there is some evidence that, even where treaties with non-European polities were included in large-scale collections, they were less likely to be treated as holding any legal significance beyond the individual transaction – unlike many treaties between European powers, which came to be woven into a larger fabric of *droit public.*

On the other hand, it is not clear that it can be said that treaties with, for example, Asian rulers were thought to '*exist in a separate legal space* from that of the European treaties [which contemporary jurists] saw as the basis for a systematic law of nations'.[43] Indeed, to the extent that the other 'space' was also a legal one, forged with texts and phrases familiar from intra-European ordering, it arguably could not be entirely 'separate' from the law of nations, but rather part of a larger, if stratified and variegated, juridical universe. Evidence beyond the treaty collections reflects that, until well into the nineteenth century, extant treaty relations, if not the less tangible fabric of unwritten understandings, were taken seriously as reflecting an ongoing juridical relationship. The legal architecture of the early United States, for example, assumed that American Indians could make war, in some legally intelligible sense, and the Constitution assumed an enduring treaty power of 'Indian Tribes'.[44] Though Indian nations were recast jurisprudentially in 1832 as 'domestic, dependent tribes',[45] they were still considered juridically capable of entering into treaties, and 'Indian treaties' were subject to the same process of Senate approval prior to ratification as treaties with European powers. It was only in 1871 that the government ceased recognising tribes as independent nations with which the United States would deal by treaty.

1851); C. U. Aitchison (ed.), *A Collection of Treaties, Engagements, and Sunnuds, Relating to India and Neighbouring Countries* (Calcutta: Bengal Printing Company, 1862).

[43] Pitts, 'Empire and Legal Universalisms in the Eighteenth Century', 101, 104 (emphasis added).

[44] United States Constitution, Article I(8) granted Congress the power, *inter alia*, to 'provide for the Common Defence and General Welfare of the United States,' to 'regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes'.

[45] *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831).

However, reading treaty collections, and scrutinising the treatment of particular treaties in a wider apparatus of relations, remains within a particular construction of legal relations which clearly does not capture fully the spectrum of violence practiced in empire, the improvisational and contested ways in which this violence was framed, or the ways in which it was regulated or brought to an end. Indigenous violence was sometimes cast as 'war' and treated as such, as in North America; and sometimes cast ultimately as a violation of criminal law, as in Australia. As regards European violence, it is precisely 'reprisals' and punitive expeditions, the punctual interventions on asserted grounds of betrayal, benevolence or necessity, which most closely resembled patterns of violence in the expansion of empire, but are least theorised in the treatises, and may never have given rise to formal peace-making.[46]

Those working on imperial history have long been familiar with a disjuncture between formal accounts of the legal position of European agents, and the relations pursued by individuals in particular encounters and sites. Canonical work on the Iroquois/Haudenosaunee, for example, has noted the contrast between 'legal theories … that assumed the sovereignty of European monarchs over the Indians', and:

> the kings' agents in America [who] … understood very well that Indians were organized in communities with functioning governments that exercised real powers of control over trade, territory, and military activity. … [and] formally recogniz[ed] Indian chiefs as peers – 'brethren' – with power and responsibility to act on behalf of their nations and to fulfill contracts.[47]

These divergences between legal treatises or collations, and quotidian management of relations with peoples beyond Europe, call for closer scrutiny. We might, first, draw out the understandings of relations like 'peace', 'treaty', and 'alliance' operating across regional theatres, and question the extent to which 'peace' and the 'peace settlement' can be addressed exclusively as juridical phenomena.

Legal writings themselves make some concession to the fact that 'peace' might be a social and political relation not bounded by the (European) law of nations. A prefatory essay in the *Grand recueil* (1700), for example, catalogues the 'diverse ceremonies used by different nations in treaties

[46] See e.g. observations on the gulf between discussions in the treatises and governments' practice in: Neff, 'War and the Law of Nations', 120–124, 216, 227–231, 247.
[47] Francis Jennings *et al.* (eds.), *The History and Culture of Iroquois Diplomacy: An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse, NY: Syracuse University Press, 1985), xiv–xv.

of peace, alliance, etc'. This leans heavily on Biblical precedent, and Roman accounts of practices among foreigners, but notes too more contemporary accounts of the practices of Europeans in encounters with other peoples, mentioning Spanish participation in the Moluccas in a ritual involving the drawing of blood to seal an alliance.[48] This might be dismissed as antiquarianism or exoticism, but the very framing of the essay suggests the contemporaries' view that relations of 'peace' and 'alliance' *as such* might have a logic that extended beyond the particular legal forms of European powers, and be subject to negotiation with interlocutors from radically different traditions.

Other writings on relations between Europeans and particular peoples underline this sense of peace-making as a process transcending the law of nations. A Lieutenant Timberlake, for example, engaged in the drafting of a peace treaty between the English and Cherokee in 1761, describes the Cherokee as 'savage, and unacquainted with the laws of war or nations'.[49] They nevertheless make peace, and seek an English representative to carry the articles to other Cherokee and explain them. Timberlake records the ceremony of reading the articles and the [headman's] exhortation to the assembled Indians that the bloodied tomahawk must now be buried; and explains to English readers that 'their way of declaring war, is by smoaking a pipe as a bond among themselves, and lifting up a hatchet stained in blood … at declaring peace this hatchet is buried, and a pipe smoaked in reconciliation'.[50] What is significant here is not the accuracy or otherwise of the account of Cherokee practice and its meaning, but the assumption that the Indians share with the English basic notions of war and peace, while marking them differently.[51]

Importantly, this is not to posit that there was necessarily a *shared* concept of 'peace' between Europeans and the peoples with which they were in conflict. On the contrary, there is powerful

[48] Jacques Bernard, 'Dissertation sur les diverses cérémonies qu'ont employé les différentes Nations dans les Traitez de Paix, d'Alliance, &c.', in Jacques Bernard, 'Recueil des traitez de paix', Volume I, at xxxi, xxxiv.
[49] Henry Timberlake, *The Memoirs of Lieut. Henry Timberlake (Who Accompanied the Three Cherokee Indians to England in the Year 1762)* (London: Printed for Ridley/Nicoll/Henderson, 1765), 11. Repeated emphasis on ignorance of 'laws of war and humanity', e.g. in killing soldiers who have capitulated, or hostages (at 84).
[50] *Ibid*., 33. The memoirs detail several further rituals which discomfit Timberlake to varying degrees, but he clearly regards his own participation as essential to the finalisation of the peace.
[51] While he is in other respects dismissive of Cherokee mores, Timberlake repeatedly describes the Cherokee as pursuing relations of alliance with strategy and foresight, albeit noting the difficulty they have in gleaning accurate information as to English and French intentions: 'I shall be accused, perhaps, for mentioning policy among so barbarous a nation; but tho' I own their views are not so clear and refined as those of European statesmen, their alliance with the French seems equal, proportioning the lights of savages and Europeans, to our most masterly strokes of policy': *ibid*., 75.

evidence that abortive peace settlements were part of a 'dynamic of difference' in which peoples beyond Europe were punished for violating putatively universal norms they neither accepted nor perhaps understood.[52] But it suggests that we might have to read pervasive references to 'treaty', 'peace' and 'peace-making' in contemporary discourse (of jurists, officials, settlers and even indigenous interlocutors) as reflecting an expansive understanding of these relations across imperial fringes and metropolitan centres, encompassing but perhaps not reducible to the more technical meanings within the law of nations fixed in treatises.

In addition to questioning the extent to which 'peace' can be understood exclusively within the framework of a (European) law of nations, we might question our sense of where the 'law' on peace is located. Histories of imperial ordering have long been attentive to pluralism and the importance of practice and *habitus*, rather than texts, to legal ordering. There are rich studies of the 'political culture of diplomacy' in the emergence of the United States, for example, spanning traditional diplomatic and intellectual histories, and ethnohistory, but with an emphasis on ideas 'in service of' but also 'transformed by' action.[53] Lauren Benton has urged that we look for law beyond formal, written transactions entirely, to patterns of raiding and truce which, through repetition, become institutionalised. As she argues:

> [T]he logic of small wars [precisely the form of violence which predominated in many imperial contexts] did not reside … in a well-labeled and coherent political and legal framework. It was transmitted in the piecemeal descriptions of violence on the margins of war: in the interstices of truces, the fluctuation of alliances, the legal practices of settlement, and the subjective definitions of self-defense and betrayal.[54]

Such regularities might persist despite mutual incomprehension, as in the early interaction between Virginia and the Powhatan – 'an uneasy pattern of relations that swung between extremes of friendship and violence', and in which goods offered to Jamestown were considered by colonists to constitute the tribute due to them, but appear to have been regarded by the Powhatan as

[52] For 'dynamic of difference': Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2005), 4.
[53] Leonard J. Sadosky, *Revolutionary Negotiations: Indians, Empires, and Diplomats in the Founding of America* (Charlottesville, VA: University of Virginia Press, 2009), 5; see also, e.g., Colin G. Calloway, *Pen and Ink Witchcraft. Treaties and Treaty Making in American Indian History* (Oxford: Oxford University Press, 2013); Jeffrey Glover, *Paper Sovereigns: Anglo-Native Treaties and the Law of Nations 1604–1664* (Philadelphia, PA: University of Pennsylvania Press, 2014). For a broader range of indigenous engagements in legal argument with colonizers, see Belmessous (ed.), 'Native Claims'.
[54] Lauren Benton, 'The Legal Logic of Wars of Conquest: Truces and Betrayal in the Early Modern World' (2018) 28 *Duke Journal of Comparative and International Law* 24, at 445.

'intermittent gifts to keep their unpredictable and violent neighbours away'.[55] However, in instances of greater stability and mutual predictability, the precise sense of particular actions might not need to be the subject of agreement; indeed one might argue for a capacious understanding of lawful ordering – and thus a law of peace and peace-making – grounded not only in texts but in acts or omissions, crystallising over time into regionally and culturally variegated institutions.

Opening up our sense of where peace-making sits in relation to the (European) law of nations, and what 'law' might be, requires that we look beyond treatises and treaty collections, to more dispersed and fragmentary records that reflect the minutiae of peace-making. This might include more detail on the agents who engaged in it; the extent to which they were deploying templates from Europe or rather regional or tribal precedents; the keeping of records on matters of peace-making *not* contained in treaties; and the traces of local ordering and discipline which maintained less formalised practices of coexistence. This would have to be knitted in with what can be gleaned from ethnohistory or anthropology of the ways in which peace-making was understood and deployed or resisted by other peoples.

This is obviously a challenging task. But it is one that offers new insights on empire, peace and the bounds of (European) international law. It suggests a process of imperial expansion that was as dependent on peace-making as war-making: localised peaces, however benign in isolation, were interwoven – deliberately or not – with violence and encroachment that ultimately displaced non-European peoples, or unraveled their internal political organisation, altogether. This in turn allows an interrogation of the very notion of 'peace', calling into question the generally positive valence with which it is often imbued in contemporary European rhetoric and iconography. It opens up again for scrutiny the outer bounds of the (European) law of nations, but reframes the question from, in essence, where to draw the line – which polities were within and without this juridical order – to a much broader repertoire of inquiries: the relation between textual categories and more diffuse practices in empire; their mutual influence and interaction; and the political work done by any disjunctures.

[55] Hinderaker, 'Diplomacy between Britons and Native Americans', 223–224.

3 Peace-making and the Expansion of the British Empire, c. 1700–1900

The previous section sketched a large agenda for research on imperial peace-making, one well beyond the scope of this chapter. In what follows, I aim at something much more confined: giving a sense of the scale and diversity of peace-making in British imperial practice over the eighteenth and nineteenth centuries, and the ways in which this peace-making differed from modes prevailing between European powers. This task is complicated by the suggestion in the preceding section that a history of peace-making cannot take either the discussions of peace-making in legal treatises, nor the canonical peace treaties between European powers, as definitive of peace-making as a phenomenon in empire. Some new starting point is required, and this leaves the field very open. At one extreme, 'peace-making' might be understood in functional terms as the mere elimination of violent conflict: everything from coexistence between peoples without violence, to the 'peace' which ensues when one warring party has been physically devastated or displaced from the scene, or otherwise denied political agency. The latter is the idea reflected, for example, in Calgacus' accusation that the Romans, in translating a notional *imperium* 'without limits'[56] to the physical domination of territory, 'make a desert [*solitudinem*] and call it "peace"'[57] (*solitudinem* here capturing both the sense of devastation, and the fact that there is, at least in the eyes of the victor, only one figure present in the landscape). Alternatively, one could understand peace in the sense of an enduring *relation* of some kind between interlocutors recognised as having some distinct political status.[58] This would encompass a diverse repertoire of arrangements, from formal treaty-making (often embedded within a series of other ceremonies which might dwarf the treaty in political significance, and bound up on occasion with the negotiation of alliance and neutrality,

[56] Virgil, *Eclogues. Georgics. Aeneid I–VI*, trans. H. Rushton Fairclough and revised G.P. Goold (Cambridge, MA: Harvard University Press, 1999), 280–281 [Book I, line 279].
[57] Original text: '*ubi solitudinem faciunt, pacem appellant*'. Translation from: Tacitus, *Agricola and Germany*, trans. Anthony R. Birley (New York, NY: Oxford University Press, 1999), 22.
[58] In his *longue durée* study, Jörg Fisch took a similar approach, taking peace as the absence of war, and war as an 'armed use of force between political units of action' (defined broadly to include not only the modern state, but rebel factions and tribes), coupled with either concurrent or *ex post facto* stipulation that some at least minimally different law applied during the use of force, relative to other periods: Fisch, 'Krieg und Frieden im Friedensvertrag', 9. On this view, peace might be akin to the Roman concept of *amicitia* (as a sort of precondition for juridical relations, especially in the absence of some larger consensual order). On the historiographical debates over this concept, and its reappearance between the breakdown of the *respublica christiana* and the emergence of a *ius publicum Europaeum*, see Randall Lesaffer, '*Amicitia* in Renaissance Peace and Alliance Treaties (1450–1530)' (2002) 4 *Journal of the History of International Law* 77, at 78–81, 95–96.

trade and passage, cession of land and more) to discourses of 'friendship' or 'protection'; as well as practices of gift-giving, parley, or tacit coexistence.[59]

Without purporting to make any methodological claim about the preferable starting-point, my emphasis in this section is, loosely, on peaces-as-relations, though the demarcation of peace-as-relation from a larger universe of peace as the mere absence of violence may not be clear-cut. In particular, formalised understandings, to the extent they do exist, may be ambiguous as to whether they indicate an ongoing relation, or effective suppression of one party as an independent political interlocutor. In peace-making, as in other areas of the law of nations, one sees an evolution from the eighteenth to nineteenth century, manifest in a hardening of civilisational hierarchies, a closer focus on state practice as a ground of law, and a decreased tolerance for pluralism in local arrangements (reflected in and underpinned by developments in imperial bureaucracy).

3.1 Peace-making and Peace Settlements as an Encounter with other Cultures and Legal Worlds

If peace treaties between European powers emerged from, and helped constitute, an at least somewhat unitary legal tradition and sensibility, peace treaties on the fringes of empire typically had to span greater disjunctures in conceptual and cultural premises. The extent of accommodation of the parties' legal cultures seems to have varied, crudely, with the relative strength of the parties themselves. In North America, for example, it was in periods in which Indian peoples were at their strongest relative to colonists that they were able to impose modes of peace-making – large 'treaty conferences' – more responsive to their own cultural and legal traditions.[60] Yet even in situations in which Europeans had obvious material or practical advantage, some concessions were functionally indispensable: to make a formal peace, rather than relying on a more fragile and unarticulated *modus vivendi*, required interacting in a way that the other parties found minimally persuasive, and leaving space for their practices of consultation and deliberation to ensure that whichever figure offered consent did so in a way that had some local authority. Whether out of conviction or not, European actors learned to adopt and adapt the forms of their interlocutors, just as indigenous people came to incorporate a written and ratified treaty into their own protocols, including devising means of making their marks upon it. We might see in this something

[59] For an account of peace as enduring relations, from examining treaty making practices in the ancient Near East, see Chapter 2 by Larry May in this volume.
[60] Fisch, 'Krieg und Frieden im Friedensvertrag', 560.

functionally akin to what Lesaffer calls 'traditions or a *lore* of peace-making between particular sets of European powers'.[61]

This was not simply a process of interpolating different approaches and rituals (though that too might be useful on occasion). The meeting between disparate cultures and legal traditions sometimes produced a sort of hybrid institution novel to each side: what Richard White has called the creation of a mediated 'middle ground', or 'set of practices, rituals, offices, and beliefs that although comprised of elements of the group in contact is as a whole separate from the practices and beliefs of all those groups'.[62] One of the most elaborate arrangements for peace, for example, the 'Covenant Chain' of Iroquois tribes and Dutch and British colonies around New York, was 'as strange to Iroquois customary law as to British statutory law'.[63] This example of 'intercultural political accommodation', quite distinct from established categories of 'tribe and state and empire',[64] was not merely a single instance, but evolved into a larger metaphorical structure.[65] The British learnt from this example and sought, with varying degrees of success, to bring something of the kind into being with the Cherokees and the Creeks.

These efforts at transposition illustrate the extent to which novel, hybrid institutions could survive despite not being wholly authentic to either party; and serve as formal vehicles for political relations which nevertheless took different shape in practice. The 'Treaty of Whitehall' (1730), between a Cherokee delegation and King George, involved considerable pomp, and the treaty itself was arranged 'agreeable to the Indian stile', with references to chain of friendship, and gift-

[61] Chapter 3 by Randall Lesaffer in this volume, [editors to insert page number].
[62] Richard White, *The Middle Ground. Indians, Empires, and Republics in the Great Lakes Region, 1650–1815*, 20th anniversary ed. (Cambridge: Cambridge University Press, 2011), xiii. White's elaboration of the concept was based on the particular conditions prevailing in the upper country of French Canada in the seventeenth and eighteenth centuries, but the conditions he understood as prerequisite to a process of this kind ('a confrontation between imperial or state regimes and non-state forms of social organization, rough balance of power, a mutual need or desire for what the other possesses, and an inability of one side to commandeer enough force to compel the other to do what it desired': at xii) are also found elsewhere in the process of imperial expansion. For an alternative analytical framework aimed at more general application, see work on the 'transcultural' dimensions of imperial encounters: Christina Brauner and Antje Flüchter, 'Introduction: The Dimensions of Transcultural Statehood' (2014) 24 *Comparativ. Zeitschrift für Globalgeschichte und vergleichende Gesellschaftsforschung* 7, 11–13; Christina Brauner, 'Loss of a Middle Ground? Intercultural Diplomacy in Dahomey and the Discourse of Despotism' (2014) 24 *Comparativ* 99.
[63] Francis Jennings, *The Ambiguous Iroquois Empire: The Covenant Chain Confederation of Indian Tribes with English Colonies from Its Beginnings to the Lancaster Treaty of 1744* (New York, NY: W.W. Norton, 1984), 369.
[64] *Ibid*., 375.
[65] On the 'ubiquity' of this language of Iroquois diplomacy, e.g. in eighteenth-century British descriptions of, or projects for, relations with Indians in other regions: Sadosky, 'Revolutionary Negotiations', 35, 47.

giving.[66] However, the delegation itself was not genuinely representative of the Cherokee – the British had recognised as 'emperor' of the Cherokee the war leader of a town which rivalled the longstanding moral authority of the 'mother' town – and Cherokee did not accept his authority.[67] Nor was the notion of King George as protector or father taken literally; '[i]n practice the British officials continued to treat the Cherokees as a sovereign people', able to make war and peace, even if they envisioned various projects for their gradual reduction to tributaries.[68]

Peaces beyond Europe often had a somewhat distinct temporality. Widespread reference to 'perpetual' peace in treaties between European sovereigns was less a guarantee of duration than an assertion that certain matters had been definitively settled, at least in the sense that parties had renounced a right to war in relation to the disputes dealt with in the treaty; but European treaty practice was at least premised on the notion that a peace treaty, once made, might hold beyond the lifespan of the individuals concerned. Some treaties between European and indigenous interlocutors were also styled treaties of 'perpetual peace and friendship' or some equivalent formula, perhaps to distinguish them from truces which would expire at the end of a specified period (although some seem to have used 'perpetual' in a literal, temporal sense, perhaps reflecting a borrowing and misreading of European precedents). However, some non-European interlocutors often resisted the notion of definitive settlement, and operated on an assumption that treaties and alliances had to be renewed by periodic conference and contact.[69] This apparent gulf between practice outside and within Europe becomes less marked, though, when one notes that, despite the

[66] Minutes of meeting of HM Commissioners of Trade and Plantations, 19 August 1730, recording request to Sir William Keith, 'late Deputy Governor of Pennsylvania who has formerly had Conferences with the Indians' to prepare a draft in a style he thought necessary: National Archives (UK), CO 391/39, folio 213. The Commissioners wrote to the Duke of Newcastle that 'althô our Proposals and their Answer are in an uncommon Style, it is such as is best understood by them [the 'Indian Nations in America'], and is the same which is always made use of upon the like Occasion': CO 5/4, folio 46; see final 'Treaty of alliance and commerce', in 'A Collection of Treaties of Peace, Alliance, and Commerce from 1648 to 1783', Volume II, at 315, 318. This treaty articulated relations of friendship and subjection (on the part of the Cherokee); established obligations of the Cherokee to fight against any nation molesting or attacking the English, to keep violence from the roads traveled by the English, to trade exclusively with the English, and to help recover escaped slaves; and provided that any Englishman killing an Indian and any Indian killing an Englishman shall alike be subject to English law.

[67] Sadosky, 'Revolutionary Negotiations', 20–29.

[68] John Oliphant, *Peace and War on the Anglo-Cherokee Frontier, 1756–63* (Basingstoke: Palgrave, 2001), 7, 9, 11–15. On Lytteltons's, and other settlers', later tendency to interpret at least some of the Cherokees' obligations under the 1730 treaty literally see: 64–73, 108–109, 177. On the 'ritual homage to the father/king and empire, in another context, as 'a form that all parties could adhere to and accept … a cultural middle ground that allowed negotiation to proceed': Sadosky, 'Revolutionary Negotiations', 53.

[69] William N. Fenton, 'Structure, Continuity, and Change in the Process of Iroquois Treaty Making', in Jennings *et al.*, 'History and Culture of Iroquois Diplomacy', 3, at 22.

textual gesture to definitive settlement at least of matters addressed in the treaty, provisions of treaties between European powers were entrenched over time by recursive drafting and cross-reference, being built into a repeatedly renewed fabric of commitments. It may be that in fact the distinction between intra- and extra-European practice was less about the demarcation of 'settled' matters and the expected duration of arrangements, and more about the differential reliance on text, rather than living memory.

3.2 Relation between Violence and Peace

Whereas European powers tended to understand 'peace' as encompassing truces and formal treaties following major conflict, peace-making on the fringes of empire, as suggested above, reflected greater variation in relations to actual violence. There were numerous instances of relatively intense or sustained conflict, called by European participants 'war', and often initiated by a formal declaration of war, which were then ended by 'peace'. In what would come to be called the 'Anglo-Cherokee' war, for example – a conflict fueled by settler encroachment, mismanaged recruiting for Anglo-French combat, and an escalating series of rapes and killings between Indians, settlers and soldiers – the governor of South Carolina had intended a formal declaration of war, and this had only been postponed, and then overtaken by events, as a result of differences with the colonial legislature over supplies.[70] Although some in the military command, and in the colonial legislatures, desired a highly punitive campaign, with the outright extirpation and destruction of the Cherokee towns ('just punishment of those barbarian Savages for their Inhuman acts of Cruelty'),[71] and many towns were indeed destroyed, one of the battalion commanders pressed for a peace which the Cherokees might be willing to accept, and the war was brought to an end by 1761 treaties of Long-Island-on-the-Holston (with Virginia) and Charlestown (with South Carolina), each of which were negotiated with the Cherokees and ratified by explanations and ceremonies in the Cherokee towns following the signing.[72] A similar progression, from conflict

[70] Oliphant, 'Peace and War on the Anglo-Cherokee Frontier', 101.
[71] Amherst (Commander-in-Chief of the British Army in North America) to Montgomery (regimental commander), 6 March 1760, in: *ibid*., 113.
[72] Correspondence reflects the ease with which colonial authorities spoke a language of peace-making shaped by the history of interactions: see e.g. instructions that an officer might assure 'Little Carpenter' 'that we are desirous of living upon Terms of Friendship [with] them, but that we cannot brighten the Chain of Friendship, and make peace to last for ever till the bloody Hatchet is entirely buried on all Sides': copy of letter Fauquier to Bullitt**,** 16 February 1761, WO 34/37, folio 58. For the Treaty of Long-Island-on-the-Holston, see WO 34/37 SR01751, reproduced in: Henry Timberlake, *The Memoirs of Lt. Henry Timberlake: The Story of a Soldier, Adventurer, and Emissary to the Cherokees, 1756-1765*, ed. by Duane H. King (Chapel Hill, NC: University of North Carolina Press, 2007), xxii–xxiii

self-consciously labeled ‘war’ by European parties, and ended by ‘peace’, is evident in the cluster of events known in English as the ‘Anglo-Mysore’ wars (1766–99), ‘Anglo-Maratha’ wars (1775–1818) and ‘Anglo-Sikh’ wars (1845–1849). These conflicts were punctuated with peaces, but culminated ultimately in either political subjection or annexation.

One can see in these dealings a rough relationship between the military and political strength of non-European polities, and the willingness to understand post-conflict relations in terms of ‘peace’ (rather than, say, subjecthood or simple military rout). This follows loosely the binary in juridical treatises between the *ius ad pacem* and the *ius victoriae*. However, it is noteworthy that in some instances in which indigenous resistance is definitively broken, the outcome is explicitly consecrated as ‘peace’: not as a peace treaty as such, but a unilateral ‘grant’ of peace. This is evident, for example, in a small punitive expedition led by the British against the ‘Witu sultanate’, on the East African coast. As later commentary attests, the British did not hold this polity in high regard, seeing it as ‘little more than a band of robbers collected by a Swahili outlaw, called Fumo Bakari, whom the Germans thought fit, for political reasons, to recognise as Sultan and place under their protection’.[73] In response to the murder of German planters and the looting of their property, the British sent various ultimata to the Sultan of Witu, demanding that he deliver up for trial those responsible, and return the property,[74] and ultimately a column to ‘inflict all possible adequate punishment’.[75] The town of Witu was ‘utterly destroyed and burned to the ground’.[76] Between seventy and eighty Witu were killed in the course of the expedition, but no British forces. This was, in military terms, a complete rout, but the Witu people were recorded as having ‘sued for peace and pardon from the great English Government for all the evil that they have done’.[77] The British undertook that ‘honourable treatment and subsistence will be accorded to [the Sultan] and his relatives’; ‘when this paper has been signed … all war and fighting shall cease.’ One here has the sense – as with some other treaties with African polities – that the invocation of ‘peace’ was

(and the account of peace-making in Timberlake’s memoirs). For the Treaty of Charlestown, see: Treaty of Peace and Friendship, 18 December 1761, image on file with author; and account of peace-making in: Oliphant, ‘Peace and War on the Anglo-Cherokee Frontier’, 140–190.

[73] Charles Eliot, *The East Africa Protectorate* (London: Edward Arnold, 1905), 45.

[74] Euan-Smith to Sultan of Witu, 15 Oct 1890, in Cmd 6213 (1890–91), at 14.

[75] Euan-Smith to Fremantle, 24 Oct 1890, in *ibid*., 20.

[76] Euan-Smith to the Marquis of Salisbury, 21 Nov 1890, in *ibid*., 16.

[77] ‘Terms of Peace … Submission of Witu People to British Government’ (Zanzibar), 25 January 1891, in Hertslet, ‘Map of Africa by Treaty’, Volume I, at 156. This peace is, however, referred to in subsequent treaties as a ‘peace … concluded between’ the people of Witu and the British Consul-General: Agreement between Imperial British East Africa Company and Witu, 18 March 1891: at 157.

less to do with the dignity of the indigenous interlocutor and more to do with the consecration as 'war' of what might otherwise have been seen, even by the standards of the time, as a trivial and brutal excursion.

Some 'peace' settlements were conceived as putting an end to more intermittent violence, or piracy, as in the sequence of arrangements culminating in the 'Treaty of Peace in Perpetuity between the Chiefs of the Arabian Coast' (1853).[78] The preamble asserted that 'having experienced for a series of years the benefits and advantages resulting from a maritime truce contracted amongst ourselves under the mediation of the [British] Resident in the Persian Gulf[79] … we … have determined … to conclude together a lasting and inviolable peace from this time forth in perpetuity'. The first article elaborated: from this date 'there shall be a complete cessation of hostilities at sea between our respective subjects and dependants, and a perfect maritime truce shall endure between ourselves and between our successors, respectively, for evermore'. In an early indication of the greater role to be played later by the British as protector, the treaty provided that 'the maintenance of the peace now concluded amongst us shall be watched over by the British Government, who will take steps to ensure at all times the due observance of the above Articles'.

Beyond Europe, political collectivities might be encountering each other for the first time, or with significant uncertainty regarding each other's intentions. Arrangements articulated as 'peaces' were sometimes made as a sort of pre-emptive device, albeit under threat of violence, to mark a sort of mutual recognition, or confirm relations after a period of wariness and uncertainty.

3.3 Layered and Hierarchical Relations

The simplest case of peace-making in empire involved peace between an agent of European power (whether government, chartered company, colony) and an indigenous political formation, often described with considerable fluidity (as 'nation', 'kingdom', 'tribe', or the subjects of a particular king or chieftain). Often, however, peaces implicated other 'friends and allies' or suchlike

[78] Treaty of Peace in Perpetuity between the Chiefs of the Arabian Coast, 4 May 1853, 110 CTS 269 (in this and following references to the CTS, treaty names are given as styled in the CTS. The frequent variation between the CTS title and the titles of the various texts and translations reproduced therein (which may themselves be appended later) reflects again the ways in which arrangements made in particular contexts might be recorded and collated differently by parties over time).

[79] Earlier treaties included: General Treaty between the East India Company (Great Britain) and the Friendly Arabs (Trucial Sheikhdoms of Oman and Bahrein), 8 January 1820, 70 CTS 463; Terms of a Maritime Truce for Ten Years between Great Britain and the Chiefs of the Arabian Coast, 1 June 1843, 95 CTS 53.

categories.[80] In some cases, peaces had what were in effect external guarantors: for example, a treaty between the East India Company and the Peishwa Madhoo Row Pundit Purdan stated that it had been made through the 'mediation' of Madhoo Row Scindia, and an article recorded that both parties, 'having the fullest confidence' in this individual, 'have both requested the said Maharajah to be the mutual guarantee for the perpetual and invariable adherence of both parties to the conditions' of the treaty; 'If either of the parties shall deviate from the conditions of this Treaty, the said Maharajah will join the other party, and will, to the utmost of his power, endeavour to bring the aggressor to a proper understanding.'[81]

Both the implication of polities not themselves party to the peace, and the use of external parties as, in effect, guarantors, was seen also in treaties of European powers *inter se*.[82] France and Sweden had rights of intervention in the Holy Roman Empire under the Westphalian settlement, and indeed the Holy Roman Empire itself was a complex and porous political formation.[83] However, in the imperial context, where European agents were implicated in the keeping of peace *between* indigenous groups, or sought the intervention of one group to keep peace among others,[84] this peace-making could shade into *keeping the peace*.[85] That is, even where individual peaces preserved political independence, the implicit hierarchy consecrated in keeping the peace might help make a transition from relation to rule – as in British relations with the Gulf polities, mentioned above. We thus see in peace-making a dynamic similar to that traced in the shifting discourse of 'protection': what was at one point a rather open-ended relation, compatible with the continuing political agency of the protectee, hardened over time into the particular juridical

[80] See e.g. Treaty between the East India Co and Mysore, 11 March 1784, 49 CTS 25, Article 1 ('Peace and friendship shall immediately take place between the said Company and the Nawab Tippoo Sultan Bahadoor and their friends and allies …').
[81] Treaty between the East lndia Co. (Great Britain) and the Mahrattas, 17 March 1782, 48 CTS 61, Preamble, Article 16. The Maharajah marked the treaty 'Agreed to what is above written in Persian', and delivery of sealed copies of treaty to the Maharajah was stipulated as part of the ratification process: Article 17.
[82] Chapter 3 by Lesaffer in this volume, [editors to insert page numbers].
[83] Chapter 4 by Kampmann in this volume, [editors to insert page numbers].
[84] On British reliance on the Iroquois as peacemakers: Hinderaker, 'Diplomacy between Britons and Native Americans', 237–238.
[85] Although van Hulle's focus is on 'protection' rather than 'peace' as the central concept, a development of this kind is evident in her careful tracing of the evolution of relations between the British, Fante and Ashanti on the Gold Coast: Inge van Hulle, 'British Protection, Extraterritoriality and Protectorates in West Africa, 1807–80', in Lauren Benton *et al.* (eds.), *Protection and Empire: A Global History* (Cambridge: Cambridge University Press, 2018), 175.

institution of the colonial protectorate, with its effective nullification of any independent indigenous sovereignty.[86]

3.4 Terms of Peace: Legal Consequences of Conflict and Future Peaceful Relations

Peaces made on the fringes of empire tended to address broadly similar functional priorities to those within Europe: settlement of outstanding causes of conflict, arrangements for the aftermath of conflict (return of captives and property), and undertakings regulating further, peaceful interaction.[87] However, the thinness of the legal fabric holding together European and non-European parties meant that clauses dealing with the legal consequences of peace (matters such as amnesty, restitution, mutual retraction of prize/marque, prisoners) and future dealings (such as trade) sometimes had to be spelled out with considerable specificity. Where there was a gradual accretion of understanding, and consequent abbreviation of formal provisions,[88] this likely operated only on a regional or tribal scale.

Beyond Europe, 'peace-making' might not be entirely distinct from other modes of interaction. Whereas within Europe a sharp distinction might be made between determining a state of peace and war, and arranging matters of trade consequent upon this (often in a separate treaty of friendship, commerce and navigation),[89] dealings on the edge of empire sometimes reflected a different conceptual configuration. Peace might, in particular, be inextricably bound up with trade; the latter a sort of physical manifestation of the former, and this pattern being reflected in the way distinct 'genres' of treaty were mingled more freely in arrangements on the edges of empire.

The substance of peaceful ordering might also differ in the imperial context from norms within Europe. On the imperial frontiers, for example, the relation between peace and control of territory was not only a matter of delimiting and demarcating borders, as predominated in Europe (although it sometimes *did* involve the cession of territory). Rather, they often arranged for various rights of use and passage: movement and connection rather than division. The Treaty of Whitehall, for example, mentioned earlier, required the Cherokees to 'keep the way of commerce clean, and that there be no blood in the road where the English white men travel, even though they happen to be

[86] See *ibid*., and other essays in Benton *et al.*, 'Protection and Empire'.
[87] On dimensions within Europe, see Chapter 3 by Lesaffer in this volume.
[88] See Chapter 3 by Lesaffer in this volume.
[89] As in e.g. the repertoire of treaties at Utrecht (1713): see Chapter 3 by Lesaffer in this volume.

accompanied by any nation at war with the Cherrokees'.[90] This reference to 'no blood in the road' appears both literal, and highly resonant with metaphorical structures used by the Cherokees and others in which a 'path' of peace, cleared or opened, referred to dialogue or interaction between interlocutors.

As one would expect from the generally uneven terms on which polities were meeting, few treaties made between European agents and non-European interlocutors contained genuinely reciprocal terms.[91] Where there was provision for dispatch of an envoy or resident, it was often one-sided.[92] The provision of hostages as guarantees for compliance, overwhelmingly by non-European parties, persisted in imperial dealings long after it had ceased being used in Europe. In some cases the use of hostages was nakedly instrumental.[93] In others it might have a certain ambiguity: what a European interlocutor considered a hostage might be considered by others as a sort of adoptee: the deposit of a son or other relative in a European settlement could be a tangible commitment to familial or brotherly relations.

Whatever the tenor of the political ceremonial, many of the treaties essentially ascribed fault for the conflict to the non-European party, narrating affairs in a manner that tended to accelerate a slide from *peace-as-relation* to *peace-as- -rule.* In the Anglo-Sikh conflict, for example, a treaty between the British Government and the Sultan of Lahore noted in its preamble:

> Whereas the [previous] Treaty of Amity and Concord … was broken by the unprovoked aggression on the British provinces of the Sikh army in December last; and whereas on that occasion, by the Proclamation [of 13 December], the territories then in the occupation of the Maharajah of Lahore on the left or British bank of the River Sutlej were confiscated and annexed to the British provinces …[94]

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[90] *A Collection of All the Treaties of Peace, Alliance, and Commerce, between Great-Britain and Other Powers, from the Treaty Signed at Munster in 1648, to the Treaties Signed at Paris in 1783* (n 36) II, 315, 317.

[91] See, eg, Fisch, 'Krieg und Frieden im Friedensvertrag', 555–556.

[92] For an exception, see the Treaty of Peace, Friendship, and Commerce between Great Britain and Madagascar, 27 June 1865, providing in Article IV for the Queen of Madagascar to receive a British Agent at her capital, and Queen Victoria to receive an Agent of the Queen of Madagascar at Mauritius, or London: Hertslet, 'Map of Africa by Treaty', Volume II, at 796.

[93] See e.g. Definitive Treaty of Peace between the East India Co. (Great Britain) and Mysore, 18 March 1792 (Treaty of Seringapatam), 51 CTS 303. Article 2 reiterates stipulations from a preliminary treaty between the parties to the effect that 'two of the sons of … Tippoo Sultan shall be detained as hostages' pending fulfilment of the three key obligations: cession of half the country, payment of half the sum of money agreed, and release of prisoners. Note also the mention of hostages in treaties with African chiefs in 1832 (Barra): *ibid*., Volume I, at 372.

[94] Treaty and Articles of Agreement between the East India Company (Great Britain) and Lahore, 9 March 1846, 99 CTS 367, preamble; see also renunciation by the Maharajah of all these territories in Article II.

This is in sharp contrast to practice between European powers *inter se*, in which, as Lesaffer notes, it was vanishingly rare for treaties to determine the justice or injustice of the parties' causes, or ascribe blame for the war.[95] However, attention to the inequality of terms, and (often) the endpoint of political subjection, should not detract from the protean and constructive nature of imperial peace-making: the sheer variety of instances in which an idea of 'peace' was operating, and the range of what these interactions made possible.

4 *Lex Pacificatoria* Past and Present

It is clear that no direct, jurisgenerative relationship exists between the history of peace-making in empire, examined here, and the (implicitly global) practice of peace-making in the present, with which the remaining parts of this volume are concerned.[96] Efforts to discern legal norms shaping peace-making today focus, naturally, on more recent (and usually post-1945) practice. The current normative universe of peace-making – including a prohibition on inter-state recourse to force; internationalised constraints on intra-state violence; and at least nominal respect for self-determination and individual human rights – differs in fundamental ways from assumptions underpinning earlier imperial activity. Modes of imperial peace-making thus cannot give rise to legal or quasi-legal norms in the present, however central this peace-making might have been to the emergence of the current international legal order writ large. Nevertheless, the expanded history of peace settlements traced here serves as an intellectual provocation for current juridical thinking about peace-making.

Closer attention to imperial peace-making underlines questions about how peace relates to power, and to political authority. As contemporary practitioners and mediators well know, 'peace' may be shaped by relations of force, rather than constituting an escape from them. Peace can often only be secured when military operations produce a state of affairs conducive to bringing parties to negotiations, a truth acknowledged, obliquely, in the narrowness of provision for invalidity of treaties on the basis of coercion.[97] As peace agreements become more ambitious, they typically

[95] See e.g. Fisch, 'Krieg und Frieden im Friedensvertrag', 92–112; Lesaffer, 'A Master Abolishing His Homework?', 365, 373–374.
[96] Although in many cases treaties from this earlier period are still considered operative in some respects, and have been accommodated or incorporated into the public law of settlercolonial states.
[97] VCLT, Article 52; Olivier Corten, 'Article 52', in Olivier Corten and Pierre Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, 2 volumes (Oxford: Oxford University Press, 2011), Volume II, at 1201.

demand greater international support, training, funding and enforcement: peace within a state, and the re-articulation of domestic political authority, is fashioned through – hopefully transient – interventions from outside the state. Whether mediated through international organisations or not, such interventions raise critical questions about the locus of political authority.[98]

In this regard, the resonance of imperial history is explicit. Much internationally-underwritten peace-making occurs within territories initially subject to European imperialism, and which may still be shaped by governance regimes, borders and ethnic differentiation bequeathed by a colonial period. Moreover, as others have noted, the liberal peace model reproduces relations of power (particularly economic power) familiar from this earlier period.[99] This is not to say that the project of internationally-supported peace-keeping ought to be, or even could be, abandoned; but to draw attention to the fact that peace-making grounds political authority in particular ways, and draws polities into relations of hierarchy and vulnerability.

Opening up the implicit geographical and conceptual boundaries separating practice between European states *inter se* and practice with a larger world also yields a more accurate framing of current challenges in peace-making. Lawyers, in particular, tend to see 'peace-making' today as occurring in the wake of a transition from formal inter-state war and peace to a messier and less analytically tractable landscape. In reality, that messiness has been there from the beginning. The 'drawn-out and multilayered process' of peace-making today, with its panoply of actors,[100] questionable roles of witnesses and guarantors,[101] and uncertainty about how agreements operate in various legal orders,[102] is reminiscent of complex, multilayered, ambiguous peaces on the margins of empire. The emphasis today on the interrelation between peace-keeping, keeping the peace, and managing law and order, also echoes earlier imperial dynamics. In other words, we are not today grappling with a wholly novel ambiguity and incoherence. It may in fact be the formal, inter-state peace treaties taken as paradigmatic instances of peace-making that are outliers over the *longue durée*.

[98] See e.g. the dilemmas which arose for the UN in the course of peacekeeping in the Congo: Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).
[99] See e.g. Chapter 21 by Achimm Wennmann and Andrew Ladley in this volume.
[100] See Chapter 9 by Philipp Kastner and Chapter 10 by Daragh Murray in this volume.
[101] See Chapter 12 by Andrea Varga in this volume.
[102] See Chapter 7 by Jonathon Worboys and Laura Edwards and Chapter 9 by Kastner in this volume.

That said, the messiness of formal peace-making occurs today within a much denser and more prescriptive corpus of international law, and one that is ostensibly more universal than the law of nations of the eighteenth and nineteenth centuries. Moreover, peace settlements made today are far more likely to be subject to formal adjudication, whether in national, regional or international courts and tribunals, than their predecessors.[103] This means that, while there may be continuities in the existence of ambiguity – about the nature and status of parties involved, and the meaning of the obligations – the *effects* of that ambiguity may be different. Ambiguity is today more likely to be forced into resolution, albeit not always in ways the parties themselves find fruitful.

Attention to imperial peace-making highlights the potential cultural and legal pluralism manifest in peace-making processes. Whatever the theoretical universalism of the law of nations, it was clear to participants that peace-making beyond Europe involved an encounter between radically different cultural and legal traditions. Parties to peace-making today fall under the umbrella of a single international legal order – perhaps more clearly so than at any earlier point in time – and an ostensibly growing consensus about the basic contours of legitimate rule (democratic principles, human rights). Yet there is resistance to this notional consensus. Conflicts often have powerful symbolic dimensions which are not addressed either from within the normative universe of international law, or by assuming a universally applicable 'rational actor' model in which persistence of conflict is driven by parties' efforts to extract rents and resources from ongoing violence.[104] Parties sometimes seek substantive outcomes grounded in ethnic or religious particularism which are impossible to reconcile with international law.[105] The growing pressure for peace agreements and peace-making to incorporate local traditions of deliberation, or understandings of justice, might, in theory, be accommodated within international law in various ways, but we might also, drawing on imperial examples, see peace-making as an intrinsically pluralist exercise, bringing into relation cultural specificities which might not be fully assimilable in international law.

[103] On the now-extensive consideration of peace agreements by international courts and tribunals, see Cindy Wittke, *Law in the Twilight: International Courts and Tribunals, the Security Council and the Internationalisation of Peace Agreements between State and Non-State Parties* (Cambridge: Cambridge University Press, 2018), 83–163.
[104] As in Christine Chinkin and Mary Kaldor, *International Law and New Wars* (Cambridge: Cambridge University Press, 2017).
[105] One flashpoint has been the translation of ethnic claims into consociational models for post-conflict states: see e.g. Christopher McCrudden and Brendan O'Leary, *Courts and Consociations: Human Rights versus Power-Sharing* (Oxford: Oxford University Press, 2013).

Finally, attention to a more complex history of peace-making brings to the fore some recurring questions about the boundaries of the 'peace settlement'. There is, first, a question about what constitutes the peace settlement, in law, in a particular instance. Here, the example of imperial peace-making prompts us to think about the relationship between peace treaties and a larger universe of peace-making; the final text and the full sequence of the parties' acts and practices. Imperial records have tended to focus closely on the terms of treaty texts, often drafted by, and in the control of, European agents. But it is very clear, even from *other* contemporaneous European records, that the texts were themselves often incidental to what participants considered the truly salient political gestures (everything from the razing of villages, or the death or surrender of a chieftain, to, in more equal transactions, a series of negotiations and ceremonies marking the inauguration of peaceful relations). Written terms were often understood by contemporaries as embedded within a whole set of surrounding understandings (this is of course also true of treaties between European powers, but the greater cultural homogeneity in such transactions likely meant that such understandings were less in need of clear articulation). This embeddedness has implications for interpretation of treaties. Indeed, in some settler-colonial states, jurisprudence has accepted the need to interpret such treaties in light of the fact that historic treaties were often not translated into indigenous languages, and may have recorded imperfectly a wider set of exchanges.[106]

Today, interlocutors may have greater equality in their ability to have their specific understandings reflected in final texts. Moreover, collections like the UN Peacemaker resource are not merely the new Dumont or Martens collections for peace agreements. They are more comprehensive; somewhat more egalitarian in access, insofar as they often include several translations; and more interactive, inviting peace-makers to engage proactively in the identification and selection of appropriate precedents for particular clauses. But one might still wonder if a close focus on texts alone can capture the terms on which particular conflicts were settled. In individual cases this concern is likely to surface in quite narrow, technical terms: what rules of interpretation are

[106] See e.g. for US: Nell Jessup Newton *et al.*, *Cohen's Handbook of Federal Indian Law* (San Francisco, CA: LexisNexis, 2012), Section 2.02; for Canada: Thomas Isaac, *Aboriginal Law*, 5th ed. (Toronto: Thomson Reuters, 2016), 112–117; for New Zealand, discussion of the Waitangi Tribunal in: 'Report of The Waitangi Tribunal on The Orakei Claim (Wai-9)', November 1987, at 180–182.

applicable to the text and, in particular, how is the negotiating history to be treated?[107] But the potential disjuncture between the text of a peace agreement and the larger peace settlement of which it is a part also has a more systemic significance for the development of the law. For peace agreement practice to be jurisgenerative (on an argument from customary international law), or to have some normative weight, one would need to have some sense of *why* particular provisions were included in successive agreements. This may not be obvious from the texts themselves.

There are intriguing resonances between past and present on a larger scale, too, regarding the outer bounds of a law of peace-making more generally. This chapter has suggested that the historiography of peace settlements might be revisited: that current understandings of this history may have been influenced by a nineteenth-century narrowing of the perceived reach of the law of nations; and, more controversially, that we cannot take even some jurists' or governments' writings of earlier periods as definitive of the law concerning peace-making. Rather, to the extent we can speak of peace as a creation of law – or of a 'law' of peace – we need to look again at the ways in which this 'law' subsisted in and emerged from complex, regionally- or nationally-specific interactions not fully captured by formal texts and treatises. There are parallels between this historiographical argument and the suggestion of Christine Bell that lawyers today should look beyond established doctrine and engage with a '*lex pacificatoria*' (by which I take Bell to designate not a thematically-distinct body of law, but a particular *quality* of the law shaping peace settlements, namely a dependence on decentralized, practice-generated norms). Leaving aside the question of whether Bell's analogy to the old *lex mercatoria* is exact, Bell's work highlights the importance today of different vectors of peace-making expertise (advisers, mediators, consultants; and their professional milieu); the proliferation of different actors involved; and the dissonance between the various bodies of law nominally applicable, and the felt demands of peace-making in particular contexts..[108]

Bell's notion of *lex pacificatoria* has been criticised on the basis, *inter alia*, that blurring a distinction between what is legally required and what falls short of this threshold may run counter

[107] The answers may well vary, depending on whether the texts are considered to be most analogous to treaties, to constitutions or other public documents, or to contracts: see Chapter 7 by Worboys and Edwards in this volume.
[108] Bell, 'On the Law of Peace'; Christine Bell, 'Of Jus Post Bellum and Lex Pacificatoria: What's in a Name?', in Carsten Stahn *et al.* (eds.), *Jus post Bellum: Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014), 181. On Bell's approach to law, see also Chapter 25 by Mark Retter in this volume, [editors to insert page number].

to the demands of both analytical and normative clarity. The distinction between what is legally required and not might make a critical difference to what can be included in a peace agreement, and thus in some cases, especially on issues of amnesty, determine whether agreement is possible at all. Focusing on the *lex pacificatoria*, as a diffuse body of normative expectations, may give undue weight to choices shaped by norms which, strictly speaking, bind only particular actors and institutions (such as rules about what that institution's personnel, and funded projects, can support), or are not informed by a sense of legal obligation at all but, for example, a *quid pro quo* logic implicit in conditions for aid.[109]

Yet the question of what is legally required is undeniably a complex one, even today. The distinctions often made in legal scholarship between hard and soft law, *lex lata* and *lex ferenda*, are merely restatements of the central problem. Although criteria for establishing the customary international law status of particular norms offer some means of demarcating between what is legally binding and not, there is a familiar paradox about the formation of customary international law, insofar as its crystallisation depends on practice which will itself not have been undertaken out of any firm belief in its obligatory character. If one accepts a basically Hartian, 'internal' perspective (asking, roughly, what is the applicable law governing a given issue, according to the generally accepted rule of recognition), this question cannot be answered without attention to the larger landscape which Bell's work captures, and which emerges also from the historical perspective: the variety of agents involved in peace-making; the diverse bodies of law with which they are either required to, or aspiring to, comply; and the awareness in practice of the need for peace settlements to accommodate other forms of normativity.

[109] Chapter 25 by Mark Retter in this volume, [editors to insert page number].