Treaty Documents – Materialising International Legal Agreement

Forthcoming in Luker and Biber (eds) Law's Documents: Materiality, Authority, Aesthetics.

Jessie Hohmann*

November 2020

Abstract:

According to international law, the essence of a treaty consists not in any record, document or other tangible form; rather, the treaty rests in the *agreement* between parties. In disputes over a treaty, argument will turn on what the parties intended. While words written on a treaty document will be mobilised to support a party's position, the document does not itself constitute the treaty. What, then, do the forms and materiality of treaty documents tell us, and why should we focus on them? These material objects – treaty documents – manifest and constitute law, and legal relations and intentions precede their creation, as well as infusing their forms. This chapter will reflect on the relationship between treaties and their documented form: from the scrawls of explorer-treaty makers like Stanley in the Congo, which according to King Leopold of Belgium's instructions, 'in a couple of articles must grant us everything'; to treaties recorded in Wampum, a communication and diplomatic technology of the Indigenous Peoples on the east coast of what is now called North America; to the modern multilateral treaty. In doing so, it will shine a light on how material forms embody and manifest legal agreement; the universal pretensions of international law; and the imprint of European colonial dominance which is etched into their material forms.

Introduction

* Jessie Hohmann is Associate Professor in the Faculty of Law, University of Technology Sydney. I and pay my respects to the Gadigal people of the Eora Nation, upon whose lands and waters I researched and wrote this work, and to their Elders both past, present, and emerging. I acknowledge them as the Owners of Country and the Holders of Knowledge for this place. I owe thanks to Megan Donaldson for initial conversations on the topic and to the editors of the volume for their enthusiastic engagement with the chapter.

In May 2019, the Vienna Convention on the Law of Treaties (the VCLT) was feted at a 50th birthday celebration at the United Nations in New York. Amid the speeches and other official proceedings, the treaty was exhibited in a glass cabinet: a thick stack of papers, loosely bound within a dark cover, four sets of holes punched at the left, with muted blue cord running through two of them. It was prominently and reverently displayed where the representatives of states, treaty law experts, and the pilgrims of international law could come to see the original text – typewritten in a font and format familiar to any reader of UN documents (the UN strictly controlling font use (UN Web Style Guide; United Nations Editorial Manual, 1983)).Attendees pronounced the treaty the guest of honour, and described 'folks literally lining up to get a photo taken with the VCLT.' (Hollis, 2019). The Vienna Convention codifies the international law on treaties, in a treaty. It thus occupies a special and preeminent place among the 70,000 or so treaties currently registered with the United Nations (UN Treaties https://treaties.un.org/.).

As the treaty on treaties, the VCLT carries layers of symbolism, as treaties themselves are already preeminent artefacts in international law, 'associated with history-changing moments', treaties epitomise 'progress, peace, history, prosperity, human dignity, order, unity, systematicity, and disciplinary identity.' (d'Aspremont 2020, 46; see also Hollis 2006, 3).

According to international law, however, the essence of a treaty consists not in any record, document or other tangible form; rather, the treaty rests in the *agreement* between parties. The celebrity of the VCLT as a material artefact sits oddly against this doctrine. Yet the attention lavished on the document signals the important role of the material in the law. These material objects – treaty documents – manifest and embody law, and legal relations and intentions precede their creation, as well as infusing their forms. They have not only legal but political functions, and their forms reflect struggles between the parties for hierarchy, control, and power at the time of their negotiation and conclusion. In addition, the material forms of treaties serve both symbolic and very practical functions – whether evidentiary or doctrinal – in ongoing disputes about rights, status and sovereignty for their signatories or those made subject to them.

This chapter reflects on the relationship between treaties and their documented form, across a range of their manifestations. After setting out some thoughts on the interplay of form and intention, I then turn to focus on three examples of treaty forms. First, colonial

treaties in the 'scramble for Africa', where European powers purported to 'carve up' Africa between them, with treaties as important proof of their claims. Second, treaties recorded in Wampum, the diplomatic technology of Indigenous Peoples on the east coast of North America. Third, the modern multilateral treaty. In doing so, the chapter shines a light on what these material forms of law show us within the frame of international law.

The interplay of form and intention

A treaty is an agreement between international entities that binds their conduct towards each other, governed by international law. Treaties have an important status: they are, 'the founding documents of most of the regimes and institutions which constitute the international legal order' and as such, as d'Aspremont notes, occupy a special space in that order, as well 'as in the consciousness and imagination of international lawyers.'(d'Aspremont 2020, 46). Their negotiation may stretch over years, and their final conclusion be marked by 'elaborate protocol and the heaviest symbolism' (Keene 2012, 475). For instance, in the negotiations leading to the signing of the Treaty of Versailles, which codified the terms of the peace between the winners and losers after World War I, the representatives of the defeated powers were not permitted to sit at the negotiating table. At the signing of the terms of the peace itself, the German Delegate caused affront by declining to rise to his feet during his speech. (Frazer 1919, 111). More recently, when the Paris Climate Agreement was concluded in 2015, the moment was marked by the banging of a small, green, climate-friendly and leaf-shaped gavel, emblazoned with the logo of the conference of the parties (Goldenberg et al 2015).

Despite d'Aspremont's reference to documents, however, according to international law the essence of a treaty consists not in any record, document or other tangible form; rather, the treaty rests in the *agreement* between parties. And agreement can be expressed in many ways, some of which are immaterial or ephemeral – for example, the spoken word, the handshake, the exchange of ritual gifts which are consumed or used up in the ceremony. (see further Calloway, 2013 Ch 3; see more generally Welch, 2017).

When a treaty is recorded in a written document, the question of whether or not the text encapsulates intention is the subject of much debate in international legal practice and scholarship (Fitzmaurice 2006, 198-204). In disputes over a treaty, the argument will turn on

what the parties intended (VCLT Art 31-33).[1] While words written on a treaty document will no doubt be mobilised to support a party's position, the document itself is not the treaty, since the treaty lies in the agreement, and the written words are only evidence of it. (Fitzmaurice 1958, 158; UN International Law Commission 1950, para 30).

It is clear, though, that for those concluding treaties, the material document is generally not an afterthought or merely a convenient way to record the agreement for posterity. Many treaties have a distinctive material manifestation. They appear made for presentation, with striking calligraphy, ribbons or tape, and colourful seals. In the past, thought was given to the quality of the paper or vellum, not only on which the treaty's articles were recorded, but also for letters of ratification. (Sowerby 2019, 204). Many are bound into large volumes, as the Vienna Convention on the Law of Treaties. Often, they are stored carefully in their own special boxes, like the 1918 peace Treaty of Brest-Litovsk, between the Bolshevik government of Russia and the Central Powers (the German Empire, Austria-Hungary, Bulgaria, and the Ottoman Empire), that ended Russia's participation in the First World War (see figure 1). While even recent treaties often look old-fashioned, given the sovereign paraphernalia attached, some treaty documents deliberately signal modernity in their forms. This is the case for the typewritten text of Western Treaty 8, concluded in 1899 between the Crown and the Indigenous Peoples of what is now Northern Alberta, British Columbia and Canada's Northwest Territories (Hohmann 2018). Similarly, the pre-printed treaties used by the British in the 'scramble for Africa': these were not just instruments to acquire and implement rights. The 'civilizing mission' was arguably 'accomplished on the face of these documents' which self-consciously embodied modernity and bureaucratic technology (Harris 2020, 3).

[1] Note that, according to Article 1(a) the VCLT governs only written treaties, although as its principles reflect customary international law for treaty interpretation they can apply also to disputes over unwritten treaties.

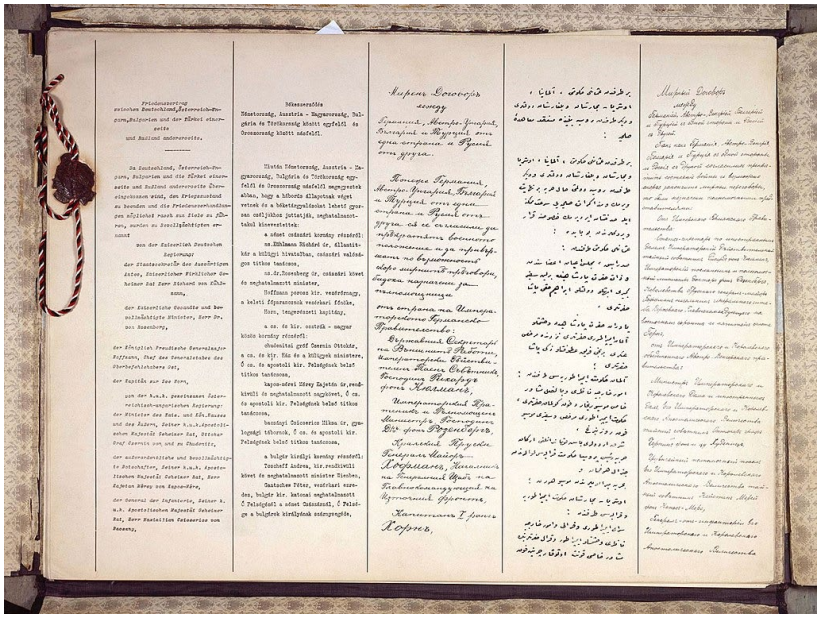

Figure 1- Treaty of Brest-Litovsk https://en.wikipedia.org/wiki/Treaty_of_Brest-Litovsk#/media/File:Traktat_brzeski_1918.jpg

Although lawyers seldom remark upon it, much care and attention is given to treaties' materiality. A treaty may, as a matter of law, *require* a material form. For example, when the United Kingdom ratifies a treaty, it must be 'signed by the Sovereign and sealed with the Great Seal' (Roberts 2019, 630): the seal must find a material surface on which to be embossed. Each country has a specific ratification practice, often highly dependent on documents of certain forms, deposited with certain agencies, in certain specific ways (see eg Republic of South Africa, nd detailing the process in South Africa). In modern practice, instruments of ratification that is, documents, must be lodged with the repository state or international organisation (UN Charter Art. 102; UN Treaty Handbook, 3). Moreover, treaties are important historical artefacts, and carry symbolic weight: at its 50th Anniversary celebrations, the VCLT was described as 'a cornerstone of multilateralism'; as 'an essential framework for international relations, and for the rules-based international order'; and as a symbol 'of the universality of international law.' (Espinosa Garces 2019). And indeed, much symbolism arguably rests in the material form which records the agreement. States have certainly felt this to be the case: writing in 1897, Francois Stewart Jones described the delicate matter of precedence of signatures on a treaty – that is, which state's signature should come first on the document, in recognition of the state's pre-eminence among European polities. This issue was 'a source of much contention, and sometimes even placed the adjustment of important

international matters in jeopardy.' (Stewart Jones, 1897, 424; see Welch 2017, 3 on precedence of states in early modern Europe more generally). To 'put an end to this element of discord' Stewart Jones tells us, 'the principle of the *alternat* was finally introduced.' (Stewart Jones, ibid.) The use of *alternat* was 'the right of each sovereign or head of a government to have his name appear first in the counterpart of the treaty which he is to retain, and to have the name of his plenipotentiary occupy the first place in the enumeration of the negotiators at the head of that document, as well as among the signatures at the end.' (ibid). Nevertheless, the actual application of *alternat* still left plenty of room for states to assert their supposed superiority. As Stewart Jones notes, within Europe, the Holy Roman Empire was long 'recognized as first in dignity' and signed even over the *French* princes, but Great Britain held out longest of all European states against the United States, finally acceding to the *alternat* in an 1815 treaty to regulate commerce and navigation (ibid, 425).

The value of treaties as historical documents is illustrated by the care taken to preserve them – and the originals are handled metaphorically – and sometimes literally - with gloves. While the Tartu Peace Treaty of 1920, through which the state of Estonia was birthed, is shown with the museum gloves with which it would be handled (Varrak 2017), the Canadian government jealously guards the fragile historical treaties with Canada's Indigenous Peoples, which form an important foundation for the Canadian state. Now only the digital documents can be studied, in order to preserve the brittle originals. Who can now touch the document, to feel the thin paper, or smell the last traces of ink? Digitisation may protect the historical record, and make these treaty documents accessible to all with an internet connection, but it also asserts the State's control over these artefacts, and thus over the still contested historical record of treaty making in Canada (see Hohmann 2018; Treaty 7 Elders et al 1996; see more generally Campos 2014).

In the face of the significance of these treaties' material forms, the question of agreement and intention is very much alive. With respect to Western Treaty 8, the Indigenous signatories continue to resist the State's interpretation of the agreement, and the reduction of its terms to the documented, type-written, text (Hohmann 2018). The Tartu Peace Treaty, which is referred to as Estonia's 'birth certificate', is also mobilised to contest current legal and political developments, a symbolic as well as legal document that speaks to the founding of the nation, and can be used to question or bolster present governments' care of and commitment to the Estonian state (Varrak 2017; Medijainen at 202).

These examples serve to introduce the complex interplay of materiality and intention at play in the conclusion of treaties, in their subsequent political and legal lives, and in their symbolic status.

I turn now to concentrate more fully on the material forms of three particular treaty types. The first are colonial treaties concluded in the European 'scramble for Africa' which sought to gain control of land, resources or rights of access, often in the barest of articles, or using standard form templates. The second are treaties which are recorded in other material forms – forms that Eurocentric eyes would not easily recognise as documents (even if the present volume significantly complicates our understanding of documents): here I will concentrate on treaties recorded in Wampum – strings or belts of beads, which were an important diplomatic technology of the East Coast First Nations in what is now North America. Finally, I will turn to modern multilateral treaties, such as the VCLT discussed above. The chapter considers the often ignored interplay between intention and the material in treaty making, and foregrounds the way treaty forms embody and make law manifest.

Treaties and their Materiality – Three Examples

Colonial Treaties – standard forms and ad-hoc scrawls, which 'in a couple of articles must grant us everything'

During the late 1800s, European states engaged in a period of imperial expansion in Africa. This 'scramble for Africa', when European powers purported to claim and 'carve up' the continent amongst themselves, was accompanied by a notable spike in treaty making (Keene 2012, 481). Although it is clear that African peoples had long engaged in treaty making practices both with European states and amongst themselves, (Sahli and El Ouazzani 2012, 398-404; Smith 1973), treaties in the 'scramble for Africa' were different in that they purported to extinguish the sovereignty over territory of the African signatory. Sir Fredrick Lugard, British explorer, mercenary, treaty maker (and in later life, international legal figure),[2]

[2] Between 1922-36, Lugard was the British representative on the League of Nations' Permanent Mandates Commission. His publications on international law include *The Dual Mandate in British Tropical Africa* (Edinburgh and London, W. Blackwood & Sons, 1922).

described the treaties being 'produced in cartloads.' (Lugard, 1926, 15). Discussing these treaty making practices, Lugard wrote in the pages of the Geographical Journal that 'I have known a valuable concession purchased by the present of an old pair of boots' (Lugard 1893, 53).

The most well-known of the European treaty making parties adventuring in Africa at the time was headed by Henry Morton Stanley, who followed instructions to conclude treaties that must 'in a couple of articles … grant us everything' (Maurice 1957, 161). Stanley was in the employ of the infamous King Leopold II of Belgium, who's personal rule of the Congo Free State from 1884 to 1908 was an 'unprecedented system of wealth extraction and servitude' based on the forced labour of the population (Martineau 2018, 185 see also Ascherson 1999). Beheadings, floggings, and the severing of hands were widespread and applied so ruthlessly as to prompt other contemporary European powers to investigate and press for the removal of Leopold's personal control (Ascehson ibid; Casement 1904), though, as Martineau notes 'the colonizing enterprise of the Congo Basin was, in and of itself, never questioned. (Martineau 2018, 186).

The surge in treaty making in the scramble for Africa prompted quick, standard-form treaties: fill-in-the blank documents, with spaces left to write the names of the parties, the boundaries of the territories claimed, and the place of the treaty's conclusion; but with standard articles already drafted.[3] These were used by British Trading Companies, at times by Stanley, and by other European treaty parties (Surun 2014, 191). Standard form treaties suited situations where junior agents (who had neither experience nor the confidence of their foreign ministries to negotiate further) were sent far from colonial outposts, in haste and in potential competition with the agents of other European powers or trading companies, to claim territory (Harris 2020, 5). As Harris writes, 'the very act of using a pre-printed treaty meant that terms were unilaterally drafted by Europeans and presented by them to their counterparties in a physical form that spoke of pre-determination, regularity, and rationality' (Harris 2020, 3). These implications were understood at the time, and standard forms were spurned by some, such as Lugard, on the basis that they were inadequate to constitute an actual agreement (Surun 2014, 209). Accordingly, some treaties were simply ad-hoc

[3] see for e.g., the treaty between the 'Jakri' and the British in 1884, reproduced in Harris 2020, at page 13.

documents prepared on the spot, a few scrawled articles setting sweeping terms. (ibid; see also Aalberts 2018a, 454 figure 33.1.).

Whether or not these instruments constituted agreements in any sense – that is, whether the two parties could have had a shared understanding of what was transpiring, or have freely consented – continues to be debated, with some in favour (see Hebie 2015a 27-29; Mugambwa 1987). Others, however, reject the possibility of real consent to alienate land or sovereignty in the colonial treaty making process (see Watson, 2016, 155). The question of whether any such understanding could amount to a valid treaty under European understandings of international law also remains a live one, with continuing impacts including very real loss of Sovereign and territorial rights (see eg Hebie 2015; Mugambwa 1987; UN Commission on Human Rights, 1992, 1995, 1999).

European states referred to these documents as treaties at the time of their conclusion, and treated them as having full legal effect (see e.g., Keene 2012, 484) particularly to found claims against other European powers (Hebie 2015, 27-28). African signatories at times strongly contested the treaties, including their individual terms, and prepared written translations of the texts in Arabic and local languages, which were duly signed by both parties (ibid; Shumway 2015; Touval 1966)). Nevertheless, it is generally conceded that in many cases, the primary audience for the document - those scraps of paper marked by the confident scrawls of Stanley and his ilk and the unpractised crosses of the African signatories - was not the African Peoples, but other European powers (Mugambwa 1987, 82-4). These treaties arguably operated not as records of agreement between the two parties, but as evidence of the control of territory, trade, and goods, to *other* European powers, to exclude their competing claims. 'From this perspective,' as Surun writes 'the treaties constitute so many performative utterances, whose accumulation established a kind of empire of paper' for the European signatories (Surun 2014 209).[4]

The proper paper form was insisted upon.[5] Harris, for example, notes an instance where the failure to use the standard form prompted the British Foreign Office to send instructions that the treaty must be redone (Harris 2020, 18). But these papers operated with hard effects on the ground. Harris writes that, meanwhile, 'the British claim to this territory was resolved (at least vis-à-vis the other European powers) by typically negotiated chancery-

[4] For further discussion of the signature see Trish Luker, this volume.
[5] For a further discussion of the form of documents, see Biber, this volume.

chancery treaties with the Germans and Leopold's Congo Free State. But in the meantime, Africans had been required to ratify what they had already agreed to in order to meet the requirements of the British legal machine.' (Harris 2020, 18).

Subsequently, the contemporary legal order has accepted even the most patently exploitative treaties, such as those where African Peoples exchanged their sovereignty for 20 bolts of cloth. Most of Africa was deemed under international law as *terra nullius* – no one's land – inhabited only by people so primitive that they did not count: they had no sovereignty to cede, no laws, no legal personality in international law, and could not be seen as having the capacity to enter into international treaties. The 'standard of civilisation' in 19th Century international law drew the boundary 'between European states as the Family of Nations on the one hand, and barbarian nations and savage entities, on the other [who] … lacked any status, rights, and duties within the international legal order.' (Aalberts 2018a 456). Even though international law has since recognised, at least in some instances, that Africa was not a *terra nullius,* it has nonetheless confirmed the legal validity of African treaties – notably in the still contested Western Sahara – as between the European signatories (Western Sahara Ad. Op ICJ Rep 80 [1975]).

Yet the material forms of these treaties trouble the confident dismissal of the African signatories, and the consequent attempt to erase African sovereignty. As Aalberts has argued, the treaties, and particularly the African 'signatures – or rather marks or crosses' appear at first sight to embody the standard of civilization, with the flamboyant European signature juxtaposed with the wobbly, unpractised cross. But they 'embody at the same time the condition of possibility of the nineteenth-century international legal order, and undermine its defining framework and thus constitute its condition of impossibility' (Aalberts 2018a, 455). As Aalberts contends:

> While the treaties provided proper legal title to the colonial enterprise, in line with legal positivist doctrine, they also implied a status of the chiefs that – according to the same doctrine – these savage rulers could not have. The very 'cross' by which they at once officially ceded their sovereignty to the colonial powers also implied they had the legal status as sovereigns to do so. After all, the right to enter into international treaties – including ones that restrict sovereign power – is an attribute of state sovereignty. (Ibid 459).

The signature, as Aalberts notes, showed the Indigenous party as a 'subject and an object through the same strike of the pen' (Aalberts 2018b, 878; see also Surun 2014, 190) thus both insider and outsider, always present at the foundational moment of the European claim, and always there materialised on the treaty document – to this day – to trouble the claims of European states, their role in colonisation, and international law's ongoing failures in meaningful decolonisation.

Treaties without Documents – Wampum and Indigenous Treaties in North America

With the essence of a treaty existing in the agreement between the parties, a treaty with no document is just as much a treaty as one recorded on the most sumptuous of vellums. Yet treaty records in forms other than words on paper (or similar media such as parchment) also inform our understanding of what a document is. This is notably the case for treaties recorded in Wampum, a communication technology of the First Nations in the Eastern parts of what are now Canada and the United States.

Wampum belts are a longstanding and important element of North American Indigenous peoples' diplomacy, both between Indigenous Peoples and western nations, and among Indigenous Peoples themselves (Two Row Wampum Renewal Campaign; Jacobs 1949; Jennings et al 1995). Wampum itself refers to small white and purple beads, fashioned laboriously from shell, which have been used by Indigenous Peoples on the east coast of Turtle Island (now North America) for over a thousand years (Haas 2007, 78; Jacobs 1949, 597). The beads are threaded onto skins, which are made into collars and girdles, as well as belts. The belts were used in ceremonies and to record important events, not only treaties but marriages, for example (Haas 2007, 78).

The exchange of wampum was an important, often essential, condition of any treaty agreement. Wampum signified the undertaking of obligation and the wampum belt formed the record of agreement (Borrows 2005, 161-2; Calloway 2013, 27).[6] The British Crown

[6] For further discussion of the Wampum and their use in Haudenosaunee diplomacy see Tidridge 2015; Borrows, 1997; Jennings, et al (1995). For further discussion of the materiality of treaties and their ability to

unquestionably understood wampum as treaty making: for example, the 1764 Treaty of Niagara, which brought the Crown within the already existing web of treaty relationships among the First Nations of Turtle Island, was not given written form, though it gave effect to the written text of the Royal Proclamation of 1763. It was solemnified with the giving and receiving of wampum on both sides but no written treaty text was concluded at the time (Hewitt, 2021; Coyle 2007, n14).[7] When asserting their treaty rights against the State, Indigenous Peoples who produced wampum belts often relied on them, presenting them to Crown or legal officials and explaining the terms as expressed in the belt (Renard Painter 2017; Hale 1897). Indeed, Indigenous Peoples continue to do so today (The Two Row Wampum Renewal Campaign). But how do the material records – the treaty objects – add to our understanding of the law they purport to create and govern? From the perspective of the European law of nations, the wampum belt is a non-legal artefact. No matter how important on the ground, and how central to treaty negotiations, once the treaty was concluded (where it was, at least, recognised that wampum was a necessary accoutrement of negotiations), the wampum belt ceased to have any objectivity in law. This is perhaps not surprising, given that the nations who had created the wampum belt were themselves to become mere objects of law, not regarded as sovereign subjects.

In the 1990s, Miguel Alfonso Martínez, the then United Nations Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations, submitted a series of reports to the United Nations in which he noted that many agreements between European states and Indigenous polities should be considered valid treaties (UN Commission on Human Rights, 1992; 1995; 1999). He wrote, nevertheless, of the problem of 'the absence of an "indigenous version" of these instruments, or the fact that, if such a version exists, it is not deposited with the competent official agencies of the nation-State concerned in the appropriate historical archives, nor does it appear in the treaty series published by the non-indigenous academy.' (Ibid 1995 para 149) Identifying this problem illustrates the centrality that written forms have taken: such that they can be deposited in the 'appropriate' historical archives and published in the relevant books. Yet, as objects,

prompt new understandings and conversations about international law through art, law and object, see Buchanan and Hewitt (2018).

[7] Notably, the commitments undertaken in the treaty of Niagara were given domestic legal recognition in Chippewas of Sarnia Band v. Canada (A.G.) (2000), 51 O.R. (3d) 641 at paras. 19-21.

Figure 1- Wampum belts and strings preserved by the Six Nations in the 1870s (Library and Archives Canada MIKAN 3367331)

Wampum belts exist independently and continue to trouble the state's assertions to

sovereign control, and the smooth presentation of Euro-Canadian law's wholeness. In 1923, the Royal Canadian Mounted Police invaded and occupied the Six Nations' Grand River Reserve. The police forcibly removed the wampum belts cataloguing and recording the history of the Haudenosaunee confederation and its diplomatic relations were confiscated (Renard Painter 2017).[8] The authorities' unease with the existence of these Indigenous records of governance and diplomacy points to their latent animate power – their ability to recall and communicate their own history and to make claims on the future (Bruchac 69-70) – even as they were denied any relevance as legal or historical records, and reduced to art objects and anthropological curios (ibid; Hewitt 2021; Hale 1897). The anxiety evident in the police raids, and the wider outlawing of rituals and ceremonies such as, on the West Coast, the Potlatch, (Mathias and Yabsley, 1991) shows how such objects can undermine the state's legal foundations, at the same time as they can be used to support them, existing in uneasy relationship with state understandings – or assertions – of Treaty agreements.

Interestingly, where European historians have concentrated on the place of wampum belts in treaty negotiations, they have often equated First Nations' reliance on them to the reading of a text. For example, at a treaty council in 1753, Calloway writes, the Indigenous Nation explained a delay in beginning the proceedings because the Indigenous nation had mislaid some wampum strings. Calloway writes that it 'was almost as if the Indians had misplaced the notes for a speech.' (Calloway 2013, 27). Other accounts recall that a speaker would often turn to consult the wampum belt while giving a speech (ibid). In 1897, the anthropologist Horatio Hale, writing in the Journal of the Anthropological Institute of Great Britain and Ireland, characterised wampum as 'a literature of aboriginal diplomatic records' (Hale 1897, 247). At the same time, historians have noted that scribes recording the treaty negotiations in North America took little notice of the details of wampum belts exchanged, concentrating instead on the oratory between the parties, and in particular on the rhetorical skills of Indigenous negotiators (Muller 2007, 136). In doing so, they concentrated on and helped to create a picture of Indigenous Peoples as oral cultures in the European historical record.

[8] These forced confiscations can be contrasted with the designation (albeit problematic and subsequently abused), South of the Border, of the State of New York as the *Ho-sen-na-ge-tah* (official wampum keeper) by the Onondaga Chiefs, in order to prevent further thefts and losses of their diplomatic records. See New York State Indian Law § 27, NY L.1899, c. 150; amended L.1971, c. 960, eff. June 25, 1971; repealed 1992) and the discussion in Burchac.

Yet wampum is a sophisticated information communication technology, of 'economic, social, political, and ideational complexity' (Ceci 1982, 99). It is significant that Wampum can be understood as an information storage and retrieval technology similar to that undergirding the digitisation of information. Angela Haas has noted that the wampum belt is a hypertextual technology which, as such, has 'extended human memories of inherited knowledges through interconnected, nonlinear designs and associative storage and retrieval methods' (Haas 2007, 77). She argues that wampum approximates the binary technology used in computer programming, and is a no less sophisticated form of communication.

International and Euro-Canadian law has consistently excluded the relevance of any Wampum Belt to an interpretation of the Royal Proclamation, relying only on the European text of the Royal Proclamation to found legal authority.[9] Obviously, as Martinez noted in respect of Indigenous versions of treaties things not written down cannot be filed away in the states' archives or official record-keeping repositories (Martinez, 1995 para 149). Accordingly, these objects have been, quite literally, written out of the historical record. The paper records crowd the imagined and real spaces of the archive, leaving no space for the physical presence of other treaty forms. Yet it is significant that the digitisation of images of objects makes new space in these archives for objects, rendered into two dimensions, and new technologies can then also remake these objects into 3-D projections or 3D printed artefacts, on our personal computer screens or in our homes.

The binary language of the Wampum record opens up the role that the digital plays in troubling our understanding of (legal) documents more broadly. Wampum as hypertext – with its binaries of purple and white; the zeros and ones, and European (here specifically Canadian law's) difficulty with understanding it as legal text, prefigure the difficulty of rendering the concept of the document forward into the digital age.[10] Thus Wampum is a binary information technology, one that predates the current debates over the digitisation of documents, and what impact this has on their status as legal documents. But the failure of courts to be able to acknowledge wampum as a legal document might have lessons for broader struggles in the legal understanding of digitised documents.

[9] See St Catherines Milling and Lumber Co v the Queen (1888) 14 AC 46 (PC); R v Tennisco (1986).
[10] See Biber, this volume.

Modern multilateral Treaties – Symbols of a Rule-Based Multilateral International Order

Multilateral treaties are an ancient tool of international diplomacy, but it was only in 1815 that multilateral treaties as we now understand them – a single legal instrument that binds all parties under the same terms – emerged into international law (Reuter, Law of Treaties 5 (cited in Keene)). In fact, despite their centrality to post-1945 international law under the United Nations, multilateral treaties are still an exceptional way for states to make agreements, as opposed to the ordinary daily business of bilateral activity (Hollis 2006).

They carry heavy symbolism in a contemporary international law based, in theory, on the sovereign equality of states: they represent participation as equals in the rules of the international order. For instance, at its 50th anniversary celebrations, the VCLT was described as 'a cornerstone of multilateralism'; as 'an essential framework for international relations, and for the rules-based international order'; and as a symbol 'of the universality of international law.' (Espinosa Garces 2019).

The material forms of modern multilateral treaties bear the traits of this universality, as well as calling it into question by pointing to the dominance of European forms and processes. As a legal requirement under Article 102 of the United Nations Charter, a treaty must be registered, at least if the Parties will seek to invoke it before any organ of the UN (UN Charter Art 102(1) and (2)). This requirement has, alongside its aims of transparency in international relations (Donaldson 2017), pushed states further toward documenting treaties in written form. Donaldson notes that the *form* of agreements between governments has had an impact on their legal character, noting 'the ubiquity of legal forms' – where 'even where parties considered themselves to be making, at best, a "non-binding agreement," they drifted by habit and training into forms characteristic of a treaty' (Donaldson 2017, 616).

All treaties registered with the UN are collected into the UN Treaty Series – bound volumes strongly resembling court reports. An interested reader can now find the digitised version of certified true copies of each treaty registered under the UN, arranged by subject matter under 29 chapter headings – including 'Pacific Settlement of International Disputes' (Chapter II), 'Narcotic Drugs and Psychotropic Substances' (Chapter VI), 'Navigation' (Chapter XII) and 'Fiscal Matters' (Ch XXVIII) in the United Nations Treaty Collection (UN Treaties, nd). The documents are not completely standard in their online presentation. Some include a

cover page with a bar code and file name before the scanned treaty text. They must – in the case of multilateral treaties – include the treaty text in all official UN languages (Chinese, Spanish, English, Russian, Arabic, and French), and the depositing parties must supply both a hard copy and electronic version of the treaty (UN Handbook, 35). Some of the older records are inexpertly scanned in their digital lives – some slightly wonky, or with traces of characters having bled through from the other side of the original. A treaty will not be registered if it is not complete, thus parties must also provide 'a copy of all enclosures, such as protocols, exchanges of notes, authentic texts, annexes, etc.' (ibid). The treaty, the UN Handbook reminds us, may not be reproduced in any single document but made up of a collection of adhesions, accessions, letters of ratification or even unilateral declarations (ibid). If 'important "political" clauses would be in the principal text, and signed by more senior figures or with greater solemnity' as Donaldson writes, 'more trivial or detailed clauses could be relegated to an ancillary text, sometimes signed separately by lesser figures (without necessarily implying any lesser degree of legal force).' (Donaldson 2017, 580-1). The language of 'enclosures' and 'adhesions' also points to the materiality of the treaties, as well as to their existence as bounded entities: they are held together into one legal object, rather than existing as a dispersed set of objects that refer or gesture to each other. At the same time, the legal character of the relations undertaken in multilateral treaty making pulls against any coherent understanding of the treaty document as one thing. As states can enter reservations to a treaty (see VCLT Art 2, 19-21; Swaine 2020, 285), the actual obligations existing between them in fact may render the treaty a honeycomb of different obligations, rather than a solid mass of law. The parties' undertakings *vis a vis* each other will only be evident with reference to the specific reservations and interpretive statements made between them (ibid).

If no particular form determines the existence of a treaty, why do modern multilateral treaties look so alike? For there is a striking similarity to the treaties' presentation, from the black-bordered, UN-logoed title page, to the use of a standard font. The first, and most obvious, reason for this uniformity is that the UN Treaty Handbook itself provides standard forms – or model instruments – for treaty making. These fill-in-the-blank documents are included in Annexes to the Handbook for the convenience of any diplomat or treaty technocrat, and uncannily recall the standard form treaties concluded in the European 'scramble for Africa' discussed above. These forms must also be read in light of the UN's deeper obsessions with *form*, which encompass strict conventions and explicit rules

governing font, grammar, and use of italics; and use of the UN Logo (See Roele, 2015; UN nd; UN 1983).

But there are other factors at play: As Vaughan Lowe, a previous Chichele Chair of Public International Law at the University of Oxford, wrote, those who make treaties set about this activity 'according to a style so homogenous as to delight the drafter of a medieval book of court forms.' (Lowe 2007, 22). After all, he notes, they 'are trained in the lawyer's and diplomat's arts, often in one of a handful of universities in Europe or North America; dispatched to international conferences and organizations, where they meet others who have read the same books, the same law reports and treaties and are perhaps alumni of the same university.' (ibid). Despite the six official languages of the UN, and the principle of the sovereign equality of states, the form of multilateral treaties carries the echoes of European international law, in its dominance by western institutions, forms and education. The 'diplomatic craft of drafting' (Donaldson 2017, 580) bears the marks of its guild.

Conclusion

The relationship between a treaty and its record in a document is multifaceted and far from straightforward. Although no material form is required to constitute a treaty, the material forms of treaties are highly illuminating. They illustrate the importance of moments of agreement in international law; they symbolise multilateralism and the peaceful ordering of international relations. Yet at the same time they materialise struggles for power and pre-eminence amongst states. Tensions are revealed as treaties, and the law underpinning them, attempt to assimilate or knit-up international legal entities within the conventions and norms of European dominated international law. As the example of Wampum demonstrates, this is sometimes unsuccessful, with other treaty forms remaining to underpin other understandings of the treaty relationship, and to serve as material nodes of resistance. The material forms of treaties also illustrate the influence of European legal processes, ideas, and forms on international law – from the dominance of a small club of similarly educated and experienced statesmen (and now sometimes women) to the very fact of treaty documents as words on paper (or parchment and vellum). And yet other treaty forms – such as treaty

recorded in Wampum – point to the challenges, as well as the opportunities, that digital technologies bring for reimagining our understanding of the document itself.

Legal arguments will disavows the treaty document's status as law, but the material forms of treaties cannot be dismissed entirely: they are preeminent legal artefacts, potent symbols of power, and resistance, in the international order. International lawyers might dismiss the form of a treaty as irrelevant to legal argument. Yet we can still find them clustered around a glass box, displayed in a room at the United Nations. Like reverent pilgrims or excited fans, they come to see, to almost touch, to bask in the aura of the law made manifest before them.

Bibliography

Aalberts, T, (2018a) 'Sovereign Marks' in Hohmann J and Joyce D *International Law's Objects* Oxford, Oxford University Press 453-462.

Aalberts, T, (2018b) 'Misrecognition in legal practice: the aporia of the Family of Nations' 44(5) *Review of International Studies* 863-881.

Ascherson, Neal (1964) *The King incorporated: Leopold II in the Age of Trusts* Doubleday, Belgium.

Borrows, J (2005), 'Creating an Indigenous Legal Community: 5th Annual John Tait Memorial Lecture' 50 *McGill Law Journal*, 3.

Borrows, J (1997) 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government in Michael Asch (ed) *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (Vancouver, UBC Press).

Buchanan, R and Hewitt, J (2018) 'Treaty Canoe' in Hohmann J and Joyce D, eds, *International Law's Objects* Oxford, Oxford University Press 491-503.

Calloway, CG (2013), *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* New York, Oxford University Press.

Campos, LR (2014) *Archiving Memory: Explorer and Trader Accounts as Evidence in Aboriginal Rights and Title Litigation*, unpublished SJD Thesis, at https://tspace.library.utoronto.ca/bitstream/1807/68197/1/Campos_Luis_R_201411_SJD_thesis.pdf

Casement, R (1904) *Correspondence and Report from His Majesty's Consul at Boma Respecting the Administration of the Independent State of the Congo: Presented to both Houses of Parliament by Command of His Majesty, February 1904*, London, Harrison and Sons.

Ceci, L, 1982 'The Value of Wampum among the New York Iroquois: A Case Study in Artifact Analysis.' 38(1) *Journal of Anthropological Research* 97–107.

Charter of the United Nations, 1 UNTS XVI, opened for signature 26 June 1945, entered into force 24 October 1945, as amended.

Coyle, M 2007 'Respect for Treaty Rights in Ontario, The Law of the Land?' 39(2) *Ottawa Law Review* 405.

d'Aspremont (2020) 'Current Theorizations about the Treaty in International Law' in D. Hollis (ed) *The Oxford Guide to Treaties* (2nd ed) Oxford, Oxford University Press.

Donaldson, Megan (2017) 'The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order' 111(3) *The American Journal of International Law* 575-627.

Espinosa Garces, M F (2019), *Statement by H.E. Mrs. Maria Fernanda Espinosa Garces, President of the 73rd Session of the UN General Assembly* (23 May 2019) viewed 19 March 2020 <https://www.un.org/pga/73/2019/05/23/the-vienna-convention-on-the-law-of-treaties-at-fifty-an-anniversary-celebration/.

Fitzmaurice, M (2006) 'The Practical Working of the Law of Treaties' in M Evans (ed) *International Law* Oxford, Oxford University Press

Fitzmaurice, G (1958) *Some Problems Regarding the Formal Sources of International Law*, Symbolae Verzijl, Nijhoff 153-176.

Frazer, E (1919) 'The Signature' *The Saturday Evening Post* 30 August 1919, viewed 20 June 2020 at https://www.saturdayeveningpost.com/flipbooks/reprints/The_Signature/

Goldenberd, S, J Vidal, L Taylor, A Vaughan and F Harvey (2015) 'Paris Climate Deal: Nearly 200 Nations Sign in End of Fossil Fuel Era' The Guardian, 13 December, viewed 19 June 2020 https://www.theguardian.com/environment/2015/dec/12/paris-climate-deal-200-nations-sign-finish-fossil-fuel-era

Harris S M, (2020) 'Manufacturing International Law: Pre-printed Treaties in the 'Scramble for Africa' 22(1) *Journal of the History of International Law / Revue d'histoire du droit international* 1-27.

Haas, A M (2007) 'Wampum as Hypertext: An American Indian Intellectual Tradition of Multimedia Theory and Practice' 19(4) *Studies in American Indian Literatures* 77-100.

Hale, H, (1897) 'Four Huron Wampum Records: A Study of Aboriginal American History and Mnemonic Symbols' 26 *The Journal of the Anthropological Institute of Great Britain and Ireland* 221-247.

Hewitt, J, (2021) 'Certain (mis)Conceptions: Westphalian Origins, Portraiture and Wampum' in S Chalmers and S Pahuja (eds) *Routledge Handbook of International Law and the Humanities*, Abingdon: Routledge, xx.

Hohmann, J (2018) 'The Treaty 8 Typewriter: Tracing the Roles of Material Things in Imagining, Realising and Resisting Colonial Worlds' 5(3) *London Review of International Law* 371.

Hollis, D, (2006) 'Introduction' in Duncan B. Hollis Merritt R. Blakeslee & L. Benjamin Ederington *National treaty law and practice: Studies on the law of treaties* Vol 1, Netherlands: Martinus Nijhoff

Hollis, D. 2019 'The guest of honor. @UN with the original #VCLT 50 years on. Looking fwd to assessing its legacy & its future.', Twitter post, 24 May 2019, viewed 22 June 2020 at https://twitter.com/DuncanHollis/status/1131571145638121472

Hollis, D. 2019 'There were many birthday wishes but no singing. Still folks literally lining up to get a photo taken with the #VCLT' Twitter post, 24 May 2019, viewed 22 June 2020, at https://twitter.com/DuncanHollis/status/1131656208409141252

Hébié, M (2015) *The Role of the Agreements Concluded with Local Political Entities in the Course of French Colonial Expansion in West Africa* 85 (1) Brit. Y.B. Int'l L. 21–89.

Jacobs, W R, 'The Protocol of Indian Diplomacy' (1949) 6(4) *The William and Mary Quarterly* 596.

Jennings, F, Fenton, W N, Druke, M A, Miller, D R, (1995) (eds) *The History and Culture of Iroquois Diplomacy* Syracuse: Syracuse University Press.

Keene, E (2012) 'The Treaty-Making Revolution of the Nineteenth Century', 33(4) *The International History Review*, 475-500.

Lowe, V. (2007) *International Law* Oxford: Oxford/Clarendon.

Lugard, F D (1926) *The Dual Mandate in British Tropical Africa* Edinburgh/London: William Blackwood & Son.

Lugard, F D (1893) 'Treaty-Making in Africa' 1(1) *The Geographical Journal*, Vol. 1, No. 1 , pp. 53-55.

Martineau, A-C, (2018) 'Chicotte' in J Hohmann & D Joyce (eds) *International Law's Objects* Oxford, Oxford University Press 182-190.

Mathias, Chief Jo E, and Yabsley, Gary R, 1991, 'Conspiracy of Legislation: The Suppression of Indian Rights in Canada' 89 (Spring) *BC Studies*, 34-47.

Maurice, A (1957) *H.M. Stanley Unpublished Letters*. London W.& R. Chambers.

Medijainen, E (2010) 'Article 5: Permanent Neutrality in The Tartu Peace Treaty, 1920' 41(2) *Journal of Baltic Studies*, 201-214.

Mugambwa, J (1987) 'Treaties or scraps of paper? A second look at the legal character of the nineteenth century British/African colonial agreements' 20(1) *The Comparative and International Law Journal of Southern Africa* 79-93.

Muller, Kathryn V, 2007, 'The Two "Mystery Belts" of Grand River: A Biography of the Two Row Wampum and the Friendship Belt' 31(1) *The American Indian Quarterly* pp. 129-164

Renard Painter, G, (2017) 'A Letter from the Huadenosaunee Confederacy to King George V: writing and reading jurisdictions in international legal history' 5(1) *London Review of International Law* 7-48.

Republic of South Africa (nd), Department of International Relations and Cooperation, Office of the Chief State Law Advisor: *Ratification/Accession Procedure*, visited 19 June 2020 at http://www.dirco.gov.za/chiefstatelawadvicer/ratification.html

Reuter, P, (1995), *Introduction to the Law of Treaties*, trans. J. Mico and P. Haggenmacher (2nd ed) London, Kegan Paul.

Roberts, I 2019, (ed) *Satow's diplomatic practice* (7th ed) Oxford, Oxford University Press.

Roele, I 2015 'Reading UN Security Council Resolutions through Valverde's Chronotopes' 23 *Feminist Legal Studies* 369-374.

Sahli, O and El Ouazzani, A, (2012) 'Africa North of the Sahara and Arab Countries' in Fassbender B and Peters A (eds) *The Oxford Handbook of the History of International Law* Oxford, Oxford University Press.

Shumway, R (2015) 'Palavers and Treaty Making in the British Acquisition of the Gold Coast Colony (West Africa)' in Belmessous S (ed) *Empire by Treaty: Negotiating European Expansion, 1600-1900* Oxford, Oxford University Press.

Smith, R 1973 'Peace and Palaver: International Relations in Pre-Colonial West-Africa' 14(4) *Journal of African History* 599-621.

Sowerby, TA, (2019) 'Negotiating with Material Text: Royal Correspondence Between England and the Wider World' in Sowerby and Craigwood (eds) *Cultures of Diplomacy and Literary Writing in the Early Modern World* Oxford, Oxford University Press.

Stewart Jones, F (1897) 'Treaties and Treaty-Making' 12 (3) *Political Science Quarterly* 420-49.

Surun, I 2014, 'Writing Sovereignty in Invisible Ink? Autochthonous Sovereignty and Territorial Appropriations in Nineteenth-Century Franco-African Treaties' (trans. Arby Gharibian) (2014) 69(2) *Annales* 313-348.

Swaine, T (2020) 'Reservations to Treaties' in Hollis (ed) The Oxford Handbook of Treaties, Oxford, Oxford University Press, 285

Tidridge, N (2015) *The Queen at the Council Fire: The Treaty of Niagara, Reconcilliation and the Dignified Crown in Canada* (Dundurn, Toronto)

Touval, S 1966 'Treaties, Borders, and the Partition of Africa' 7(2) *Journal of African History*, 279–93.

Treaty 7 Elders and Tribal Council, Hildebrant W, First Rider, D, Carter S, 1996 *The True Spirit and Original Intent of Treaty 7* McGill Queen's University Press.

Two Row Wampum Renewal Campaign (nd) visited June 22 2020 https://honorthetworow.org/

United Nations, Commission on Human Rights (1999) *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Final Report by Miguel Alfonso Martinez, Special Rapporteur*, UN Doc E/CN.4/Sub.2/1999/20.

United Nations, Commission on Human Rights (1995) *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: Second Progress Report by Miguel Alfonso Martinez, Special Rapporteur,* UN Doc E/CN.4/Sub.2/1995/27.

United Nations, Commission on Human Rights (1992) *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: First Progress Report by Miguel Alfonso Martinez, Special Rapporteur*, UN Doc E/CN.4/Sub.2/1992/32.

United Nations International Law Commission (1951) *Yearbook of the International Law Commission, 1951 Volume 2: Documents of the third session including the report of the Committee to the General Assembly, Report by Mr. J.L. Brierly, Special Rapporteur*, UNDOC A/CN.4/32, 1-16.

United Nations (2012) *Treaty Handbook* (revised ed) visited 22 June 2020 at https://treaties.un.org/doc/source/publications/THB/English.pdf

United Nations, *United Nations Web Style Guide* viewed 20 June 2020 <https://www.un.org/styleguide/>.

United Nations 1983, *United Nations Editorial Manual* United Nations, New York.

United Nations, *Treaties*, viewed 20 June 2020 <https://treaties.un.org/>.

Varrak, T, (2017) The Tartu Peace Treaty, The New Border Treaty and Relations with Russia *Diplomatica* 161/162, 10 February 2017 viewed 22 June 2020 <https://icds.ee/the-tartu-peace-treaty-the-new-border-treaty-and-relations-with-russia/>

Vienna Convention on the Law of Treaties 1969 UNTS, vol. 1155, p. 331, opened for signature 23 May 1969, entered into force 27 January 1980.

Watson, I, (2014) *Aboriginal Peoples, Colonialism and International Law: Raw Law*, Routledge.

Welch, Ellen R., 2017 *Theatre of Diplomacy: International Relations and the Performing Arts in Early Modern France*, Pennsylvania, University of Pennsylvania Press.