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Global Constitutionalism in the Early Modern Period: The Role of Empires, Treaties and Natural Law

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Introduction

Written treatises have become sacrosanct in modern international law. Printed volumes filled with agreements between sovereign rulers and/or states have rolled from the presses in Western Europe since the seventeenth century. Textbooks on international law inform us that it was the rise of positivism in the nineteenth century – a strong preference for treaties and international conventions as sources of law – which signalled the birth of modern international law. Indeed, the entire edifice of world courts that has come into existence in the twentieth and twenty-first centuries – the Permanent Court of Arbitration, the International Court of Justice, the International Criminal Court, etc. – rests on written agreements between states. The same applies, of course, to the establishment of the League of Nations (1920) and United Nations (1945) and their subsidiaries (Lesaffer 2012; Shaw 1995, pp. 21-100; for a very different account of the origins of modern international law see Anghie 2005; Koskenniemi 2001, 2012). No wonder, then, that when the UN adopted the Declaration on the Rights of Indigenous Peoples in 2007, it included a clause affirming the right of native peoples

to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements (United Nations Declaration on the Rights of Indigenous Peoples, 13 Sept. 2007, clause 37).

Indigenous activists and their white supporters pushed for the inclusion of this clause in the UN Declaration. They have long embraced intercultural dialogue and treaty-making as the way forward.

This chapter offers a critique of the recent fetishism of treaties, particularly the lazy and mistaken assumption that treaties are ironclad guarantees for indigenous rights. It explores the relationship between European expansion overseas, treaty making and natural law in the early modern period, focusing in particular on the Dutch jurist Hugo Grotius (1583-1645). The man hailed in the twentieth century as ‘father of international law’ was known in his own time for his steadfast support for the Dutch East India Company or VOC (*Verenigde Oostindische Compagnie*). His understanding of natural law, particularly the notion of *pacta sunt servanda* (‘treaties must be performed’), cannot be separated from his justification of Dutch empire-building in the East Indies. There was nothing equal about the VOC’s treaty relationship with the inhabitants of the Spice Islands (i.e. the present-day Maluku Islands in Indonesia). Grotius knew this. Indeed, he vigorously defended these unequal treaties in his *De Indiis/On the Indies* – written in 1604-08, but only published in the nineteenth century as *De Jure Praedae/On the Law of Prize and Booty* (Grotius, 2006) – and, of course, in his *De Jure Belli ac Pacis/On the Law of War and Peace*, first published in 1625 and reprinted many times afterwards (Grotius, 2005). The VOC and the native inhabitants of the Spice Islands were bound together in a protection/tribute exchange. The VOC’s role was to shield the islanders from foreign invasions, particularly attacks by the, allegedly, ‘tyrannical’ Spanish and Portuguese. In return, the islanders were obliged to sell all their produce to the VOC – in perpetuity and for a fixed price determined by the VOC. Crucially, it was up to the VOC

to monitor indigenous performance of the treaties. If it deemed the natives deficient in any way, it could punish them as transgressors of the natural law, waging a ‘just war’ against them. By these means, the VOC became, first, co-ruler in the Spice Islands, and, subsequently, a full-fledged sovereign. The history of treaty making, then, is closely connected with that of Western imperialism and colonialism. It is certainly no panacea for the protection of indigenous rights.

James Tully, who served on the Canadian Royal Commission on Aboriginal Peoples from 1991 until 1995, is far more positive about the role (to be) played by treaties in relations between the aboriginal and non-aboriginal peoples of Canada. In section I, we examine both Tully’s pronouncements on treaty making in his magisterial *Public Philosophy in a New Key* (2008) and recent contributions to the debate by historians. The role which written documents have played in European relations with native peoples since 1500 is the focus of two essay volumes edited by the historian Saliha Belmessous: *Native Claims: Indigenous Law against Empire, 1500-1920* (2012) and *Empire by Treaty: Negotiating European Expansion, 1600-1900* (2015). Not surprisingly, the contributors disagree about the question whether, and to what extent, aboriginal peoples were able to ‘negotiate’ or ‘resist’ empire. Section II provides a short overview of the eventful life and career of Hugo Grotius, while section III focuses on his justification of Dutch expansion overseas. There is a clear connection with his conceptualization of the Dutch Revolt against Philip II of Spain and Portugal. In cases of divided sovereignty, so Grotius argued, the entities acting as co-rulers – be they the States of Holland or the VOC – were entitled to punish transgressors of the natural law – be they Philip II of Spain and Portugal or the VOC’s native allies – and to wage a ‘just war’

against them. By these means, co-rulers could acquire all the ‘marks of sovereignty,’ resulting in Dutch independence in Europe and the establishment of a colonial empire overseas. Section IV presents a case study: the role of treaties in the violent Dutch conquest of the Banda Islands between 1609 and 1621. I argue that, in the European encounter with ‘the other,’ treaty making should not be seen as an alternative to conquest and war, but as, in fact, integral to the process of ‘dispossessing the native.’

This has important implications for our understanding of modern-day global constitutionalism, which functions as an extension of international law and which relies upon textual guarantees in its support of the rule of law. Significantly, there has been little engagement with indigenous rights in the secondary literature on global constitutionalism – with the notable exception, that is, of a recent editorial in the eponymous journal. Critiquing the current state of the field of global law and governance, the editors of *Global Constitutionalism* point out that ‘indigenous peoples have been dispossessed of and removed from their life ways and ecosystems in which Homo sapiens co-evolved for 150,000 years in the name of development and progress,’ and argue for the alternative paradigm of ‘eco-social constitutionalisation,’ which includes ‘learning from and with indigenous peoples and their earth ways (Tully et al. 2016, p 9, 12). However well-intentioned, this conceptualization threatens to resurrect the hoary dichotomy of the Rousseau ‘noble savage’ living in harmony with nature versus the depraved, yet simultaneously ‘civilized’, city dweller (Pagden 1982, 1994). It is a well-known, and misleading, trope in Western culture, which tells us nothing about day-to-day interactions between indigenous communities and, for example, transnational corporations (TNCs), or about the various strategies adopted by TNCs to either persuade

or force these communities to comply with their demands. Nor is it unprecedented for TNCs to operate as ‘shadow sovereigns’ (Tully et al. 2016, p 7). In the days of Grotius, both the Dutch and English East India Companies operated as corporations alongside – and often in competition with – the two corporate bodies known as the Dutch and English states (Stern 2011; see also Pettigrew 2015). Paramount state sovereignty, either as a reality or as a norm in international law, is a rather recent phenomenon. Sadly, it has not worked for many native peoples in their power struggles with TNCs. We may want to find out why that is. Could it be that the written culture that is so crucial for the functioning of modern states and modern corporations puts native peoples at a disadvantage?

I. Indigenous Peoples and Treaty Making

In *Public Philosophy in a New Key*, James Tully boldly re-conceptualizes relations between the First Nations and other inhabitants of Canada on the basis of five fundamental principles: ‘mutual recognition, intercultural negotiation, mutual respect, sharing and mutual responsibility’ (Tully 2008, p. 229). He assigns an important role to treaty making in the process of reconciliation between the aboriginal and non-aboriginal peoples of Canada:

Specific types of relations are agreed to, written down as treaties, put into practice, reviewed and renewed. It is not a once-and-for-all agreement, as in social contract theories, nor an accord frozen in a constitutional document. It is a conversation between the members of Aboriginal and non-Aboriginal cultures in all walks of life over the time they live together and share the land (Tully 2008, p. 239).

He makes a point of explicitly rejecting a world view which justified the colonial relationship in the nineteenth and twentieth centuries. The so-called ‘stages’ theory of history ranked Europeans at the top – as, supposedly, bearers of civilization – and

consigned aboriginal peoples to the most primitive stage, as, allegedly, living in a state of nature, totally devoid of government or territorial rights. This understanding of European-native relations has not survived the collapse of European empires after the Second World War. As Tully notes, aboriginal peoples around the world demand that the process of decolonialization be extended to them as well (Tully 2008, pp. 227-228).

Tully urges both the First Nations and other inhabitants of Canada to recognize each other as 'equal peoples who govern themselves and their lands by their own laws and cultures'. He claims to take his cue from early modern treaty making, a period of time when, allegedly, Europeans and natives were evenly matched and treated each other as equals. Of course, he realizes that the treaty system has suffered from constant abuse. He nevertheless values what he considers the original intentions behind early-modern treaty making, namely to settle differences 'by means of discussion and consent, without interfering in the internal government of either society' (Tully 2008, p. 226; see also *The Economist*, 2015).

Unfortunately, few historians of European overseas expansion will recognize Tully's reconstruction of events. Prior to 1800, European explorers, traders, settlers and colonial officials did not exactly embrace the principles of equality and non-interference, neither in their own societies, nor in their dealings with aboriginal peoples. It is a moot point whether Tully's belief in an idealized past will prove an aid or a hindrance to his efforts to improve the lot of the First Nations.

Historians have entered the debate about treaty-making past and present through the work of Saliha Belmessous, editor of *Native Claims: Indigenous Law against Empire, 1500-1920* and *Empire by Treaty: Negotiating European Expansion, 1600-1900*

(Belmessous 2012, 2015). The two essay volumes raise the important question whether treaties between Europeans and indigenous populations around the world can be read as alternatives to conquest and war, and, possibly, as the means by which indigenous peoples have sought to turn the tide of Western imperialism and colonialism. Belmessous notes in her introduction to *Empire by Treaty* that ‘today great expectations are placed on treaties for the resolution of conflicts over indigenous rights in postcolonial settler societies’ (Belmessous 2015, p. 15). In his concluding remarks, Paul Patton goes so far as to argue that the treaty relationship reflects a desire ‘on all sides’ to legitimize settler sovereignty ‘by reference to the consent, however belated or hypothetical, of ... indigenous peoples’ (Belmessous 2015, p. 268). Not all contributors to *Empire by Treaty* are so sanguine about the ability of native peoples to negotiate or resist empire. In her essay chapter on territorial conflict and alliance-making in pre-1800 South America, Tamar Herzog convincingly shows that treaties were ‘instruments of containment’ aimed at realizing ‘– to the degree that this was possible – the subjection of all things indigenous’ (Belmessous 2015, pp. 78-79). Dane Kennedy points out in his H-net review of *Empire by Treaty* that the history of treaty making raises serious concerns about the legitimacy of settler sovereignty, since ‘indigenous consent was often coerced’ (Kennedy 2015). The issue of meaningful consent is, indeed, a crucial one.

II. The Life and Times of Hugo Grotius

Before we turn to Grotius’ justification of Dutch expansion overseas and its relation to the importance of treaty making, a short overview of his eventful life and career is in order. The connections which Grotius made between the struggle for Dutch independence and the creation of a colonial empire overseas cannot be divorced from his own political career in Holland in the 1600s and 1610s.

Grotius was born into a prominent *regent* (i.e. patrician) family in Delft on Easter Day 1583. Just two years earlier, the Dutch States General had abjured Philip II of Spain and Portugal as the ruler of the Low Countries and created a new state, the Dutch Republic. Grotius started his professional life as a private solicitor, at the tender age of sixteen. In 1604, the VOC directors asked him to write a defense of the Company's privateering campaign in Asian waters, particularly its aggressive attacks on Portuguese ships and fortresses. Grotius was happy to oblige, and completed his *De Indiis* in 1607-08. This treatise of 163 folios remained in manuscript for another two-and-a-half centuries. At the Directors' request, Grotius did publish chapter twelve of *De Indiis* separately in 1609 as *Mare Liberum/The Free Sea* 'or ...the Right Which the Hollanders Ought to Have to the Indian Trade.' He continued to support the VOC in word and deed for the rest of his life, negotiating on the Company's behalf with the English East India Company (or EIC) in 1613 and 1615, for example (van Ittersum, 2006; Grotius 2004 and 2006; Nellen 2015, pp. 1-164).

Thanks to the patronage of Johan van Oldenbarnevelt, *de facto* political leader of the Dutch Republic and a friend of Grotius' father, he was quickly appointed to a number of high-level political positions at the provincial and federal level. He became Advocate-Fiscal (i.e. public prosecutor) of Holland in December 1607 and Pensionary (i.e. chief legal adviser) of the town of Rotterdam in June 1613. In the latter capacity, Grotius joined the Rotterdam delegation in the States of Holland. In May 1617, he became a member of the Holland delegation in the Dutch States General, the federal government of the Dutch Republic. By all accounts, it was a meteoric political career. Grotius would undoubtedly have succeeded Oldenbarnevelt as political leader of the Dutch Republic,

had it not been for religious troubles that brought the rebel state to the brink of collapse during the Twelve Years Truce (1609–21). Orthodox Calvinists squared off against the so-called ‘Remonstrants,’ followers of the Leiden theologian Arminius. Although Arminius’ followers were a minority in the Dutch Reformed Church, they enjoyed the support of the States of Holland, in particular of Oldenbarnevelt and Grotius. The theological bickering developed into a major political crisis that endangered the existence of the Dutch Republic. Prince Maurice of Orange, commander-in-chief of the country’s naval and military forces and Stadtholder (i.e. governor) of six of its seven provinces, could not stand idly by. In August 1618, he sought to break the political deadlock by means of a regime change, which landed Grotius in prison for almost three years. In view of his close association with Oldenbarnevelt—executed in May 1619—he was lucky to escape with his life (Nellen 2015, pp. 165-293; Nellen and Trapman, 1996; den Tex, 1973).

Yet Grotius’ political career was far from over. In March 1621, he escaped from Loevestein Castle in a book trunk. He headed south to Paris, where he lived as an exile for many years and received a pension from the French Crown. As a *quid pro quo*, he dedicated *De Jure Belli ac Pacis* (1625) to Louis XIII of France. Cardinal De Richelieu was eager to tap Grotius’ in-depth knowledge of Dutch overseas expansion and commercial governance, and sought to involve him in the establishment of a French East India Company. Yet Grotius was unwilling to burn his bridges behind him. For a long time he believed that he would be reinstated as Pensionary of Rotterdam once Prince Maurice’s younger brother and heir, Prince Frederic Henry, had established himself in power. Grotius returned to Holland in October 1631 in order to force a breakthrough in

the negotiations about his possible rehabilitation. His ostentatious visits to Rotterdam and Amsterdam badly backfired, however. In April 1632, the States of Holland exiled him once more and put a price of 2,000 guilders on his head. The definitive breach with his homeland came after two unhappy years in Hamburg. Grotius accepted the offer of the Swedish chancellor Axel Oxenstierna to become the resident Swedish ambassador in Paris. In the context of the Thirty Years War, this was an important and sensitive position: after the death of King Gustavus Adolphus, the Swedish armies in Germany were essentially kept afloat with French subsidies. It was Grotius' job to maintain good relations with the French ally, particularly Cardinal de Richelieu. He discharged this task for nearly ten years, albeit with uneven success, due to French opposition to his appointment. He was finally recalled by the Swedish government in January 1645 and arrived in Stockholm five months later. He refused to become one of Queen Christina's privy councilors, however, and took the first ship back to France. After a storm-ridden voyage across the Baltic, his ship was wrecked off the Pomeranian coast in August 1645. Although Grotius safely reached the shore, he died at an inn in Rostock, aged 62. He was buried in the family crypt in the New Church in Delft (Nellen 2015, pp. 293-763; van Ittersum 2010).

III. Hugo Grotius and Treaty Making

Grotius vigorously defended Dutch expansion overseas in several publications, including *De Jure Belli ac Pacis*, and in memoranda written for the VOC directors, the States of Holland and Dutch States General. His understanding of natural law, particularly the notion of *pacta sunt servanda* ('treaties must be performed'), was crucial in this respect. The VOC engaged in a protection/tribute exchange with its native allies,

thus inserting itself as a co-ruler in, for example, the Spice Islands (Grotius, 2005 and 2006; van Ittersum, 2006; Clulow, 2009; Benton and Clulow, 2015). Both Grotius and the Company directors presented this arrangement as a war of liberation, pitting the VOC and its native allies against the ‘tyrannical’ Spanish and Portuguese. As Grotius put it in *De Jure Praedae*:

The Dutch sailor knows that he is fighting in defence of the law of nations while his foes are fighting against the fellowship of mankind; he knows that they fight to establish despotism, but that he himself is defending his own liberty and the liberty of others (Ms. BPL 917, f. 159; Grotius, 2006, p. 483).

Under natural law, so Grotius argued, the VOC was allowed to act as judge and executioner in its own cause. This went beyond self-defense. Both on the high seas and in Asian territories, the VOC was entitled to punish any transgressor of the natural law. In the first instance, the VOC went after European competitors, particularly the subjects of the King of Spain and Portugal, who, allegedly, showed little respect for the freedom of trade and navigation mandated by natural law. Not coincidentally, the Dutch Republic was fighting a war of independence against the selfsame ruler. Yet natural law was equally applicable to the Company’s native allies –or so Grotius and the VOC directors thought. If native allies did not keep their side of the bargain –by sabotaging the Company’s efforts to monopolize the spice trade, for example-- they were liable to punishment by the VOC in a ‘just war.’ A case in point is the Company’s violent subjugation of the Banda Islands, a group of tiny islands west of New Guinea. On various occasions, the Bandanese sought to sell nutmeg and mace to Asian merchants and the English East India Company, in spite of treaties to the contrary concluded with the VOC. Grotius wholly endorsed the Company’s efforts to punish Bandanese ‘rebels’,

resulting in the archipelago's subjection to Dutch rule by 1621 (van Ittersum, 2006, pp. 359-483; Arthur Weststeijn, 2014).

It is important to realize that Grotius' understanding of the situation in the Banda Islands was not very different from the way he conceptualized the Dutch Revolt against Philip II of Spain and Portugal. For Grotius, divided sovereignty was the norm, both in Asia and Europe. He saw clear parallels between the way the VOC acted as co-ruler in the Banda Islands and the way the States of Holland became fully sovereign and independent as a result of its 'just war' against Philip II of Spain and Portugal.

Allegedly, the Habsburg ruler and his representatives in the Low Countries had exceeded their constitutional powers by imposing taxes without the consent of the Dutch States General and the various provincial assemblies. The States of Holland and other provincial assemblies were justified in their decision to take up arms against Philip II, acquiring all the marks of sovereignty in the process. In this train of thought, it was the States of Holland that, acting in its capacity as co-ruler, punished Philip II for his failure to respect the (unwritten) Dutch constitution and for breaking his contractual relationship with his Dutch subjects. Similarly, the VOC took up arms in the Banda Islands in order to ensure (what it considered to be) the proper performance of contracts, becoming the islands' sole ruler in the process (Borschberg, 1994 and 2011, pp. 78-105; Waszink, forthcoming; Van Ittersum, 2016).

IV. A Case Study of Treaty Making and Armed Conflict in the Banda Islands, 1609-1621¹

¹ For a fuller account, see van Ittersum, 2016.

Located 2,000 kilometers east of Java, the Banda Islands – a group of seven small islands, including one volcano, the Gunung Api – are now a forgotten backwater in the Republic of Indonesia. It used to be very different. For centuries, the islands were part of an Asian trading network connecting the island of Java with the Philippines and the South China Sea. Merchants from ports on Java's north coast visited on a regular basis, exchanging rice from Java and textiles from the Indian subcontinent for nutmeg and mace. They brought Islam as well. Like elsewhere in Southeast Asia, state development was slow in the Banda Islands. Confederations of villages competed with each other, primarily *ulilima* (a group of five villages) and *ulisiva* (a group of nine villages). *Orangkayas* (aristocrats, generally with wealth from trade) met on the island of Nera in order to reduce conflict between villages and negotiate trade deals. Although the Bandanese successfully played off Javanese merchants against each other, they had become dependent on the spice trade for their livelihoods. Not much was left of the islands' original subsistence economy by the time the first Europeans arrived in the sixteenth century (Reid 1988, vol 1, pp. 11-13, 90-96, vol 2, pp. 1-61, 114-173; Gupta, 1987; Knaap, 2004).

Nutmeg, mace, and cloves had reached Europe via ports in the Middle East during the Middle Ages. One of the aims of European expansion into Asia was to cut out Muslim middlemen, and establish direct trade links with the Spice Islands. The Portuguese were the first to reach the Banda Islands. However, they were not able to establish a military presence there, in sharp contrast with the Moluccas and Ambon, where they built and garrisoned fortresses. Nor did the Portuguese obtain any special

trading privileges in the Banda Islands, but traded on the same footing as Javanese merchants (Villiers 1981; Vlekke 1944, pp. 68-90).

The situation in the Banda Islands changed completely when the VOC appeared on the scene. Swift Dutch penetration of Southeast Asia went hand-in-hand with naked aggression against both Portuguese and indigenous shipping. The voyage of Pieter Willemzoon Verhoef (1573-1609) – the VOC’s so-called Fourth Voyage (1607-1612) – was crucial in tipping the balance of power in the Banda Islands. For the first time, the Bandanese had to accept a European military presence in their country. Dutch fortresses were established on Nera in 1609, on Pulo Way in 1616 and on Great Banda (also known as Lonthor) in 1621. Yet indigenous inhabitants had no intention of surrendering without a fight, and took up arms against the VOC. A complex situation was complicated even further by the presence of merchants and mariners employed by the EIC, eager to secure their own trading interests (Locher-Scholten and Rietbergen, 2004; Knaap and Teitler, 2002; Milton, 1999; Loth, 1995; Keay, 1993; Masselman 1963; Chaudhuri, 1965; Foster, 1933).

By establishing fortresses in Asia, the VOC sought to tighten up the protection/tribute exchange with its native allies and strengthen its position as a co-ruler in these territories. The Bandanese saw things differently, of course. As Adam Clulow notes, the *orangkayas* ‘had long been accustomed to finding security by playing off foreign powers’ (Clulow, 2016 p. 30). Until Verhoef’s arrival in the archipelago, they had treated the VOC as simply one more merchant bidding for their produce. If and when the VOC failed to supply the trade goods they required, such as textiles and rice, they had been at liberty to sell their nutmeg and mace to somebody else, and frequently did.

Verhoef was determined to change that. His murder in May 1609 suggests that many Bandanese objected to a close military alliance with the VOC, and were desperate to avoid the construction of a Dutch fortress. Did they suspect that, ultimately, it would result in a complete loss of indigenous sovereignty (van Opstall 1972, pp. 94-105, 267-269; Purchas 1905-1907, vol II, pp. 534-539)?

Thanks to the presence of William Keeling (1577/8-1620) in the Banda Islands in spring 1609, followed by visits of other EIC merchants and commanders, native opponents of the VOC were confident that they could play off the English against the Dutch and thus regain control of the situation. The Bandanese suffered from internal divisions, however. According to the Dutch Governor-General Laurens Reael (1583-1637), they governed themselves ‘entirely in a democratic fashion [*populariter*], like a republic’ (van Opstall, 1979 p. 197) – not exactly a compliment in the seventeenth century. It may explain why they dismissed Keeling’s suggestion to surrender their sovereignty to the King of England. Only in April 1616, when VOC commander Jan Dirckszoon Lam (d. 1626) was about to launch an all-out assault, did inhabitants of Pulo Way enact a ceremony formally acknowledging James I of England as their protector. It failed to stop Lam’s conquest of the island. But it did create a very useful precedent for the EIC. Eight months later, Nathaniel Courthope had little difficulty persuading inhabitants of Pulu Run – many of whom were refugees from Pulo Way – to repeat the ceremony and sign a treaty with him (Foster, 1933 pp. 261-267; Foster, 1905 pp. 328-329; Stapel, 1939, vol III, p. 99; Loth, 1995, pp. 713-714; van Goor, 2015, p. 281).

Meanwhile, VOC officials continued to sign contracts with the Bandanese as well, primarily with inhabitants of Rosengain and Great Banda. From the VOC

perspective, the conquests of Nera and Pulo Way in 1609 and 1616, respectively, had turned local populations into Company subjects. By concluding treaties with inhabitants of Rosengain and Great Banda, both Lam and Reael sought to obtain native recognition of the changed status of Nera and Pulo Way, secure a steady supply of nutmeg and mace for the VOC, and completely isolate Pulo Run and its inhabitants, who had sided with the English. Although Reael failed to launch a successful invasion of Pulo Run in the spring of 1617 and 1618, he used all other means at his disposal to make life difficult for Courthope and his indigenous allies. He forbade any contact between Bandanese allies of the VOC and inhabitants of Pulo Run, for example. The wavering loyalties of the Bandanese proved to be the Achilles' heel of his strategy. In summer 1618, Reael signed a truce treaty just with the '*orangkayas* and magistrates' of Selamon, not with any other villages on Great Banda. Those villages had effectively sided with the inhabitants of Pulo Run (Stapel, 1939, vol. III, pp. 102-104; Foster, 1933, pp. 261-270; Heeres and Stapel, 1907, pp. 66-69 (treaty with the Bandanese of 10 August 1609), 122-124 (treaty with the Bandanese of 3 May 1616), 127-130 (treaty with the Bandanese of 30 April 1617), 133-135 (treaty with the Bandanese of 25 June 1617), 160-161 (treaty with the Bandanese, March 1621?), 162-170 (treaty with the Bandanese of 9 May 1621).

From the Dutch perspective, the next logical step was to conquer and pacify Great Banda. More nutmeg trees grew on Great Banda than on all the other islands of the archipelago combined. The inhabitants of Pulo Run were crucially dependent for their survival on foodstuffs and water reaching them from Great Banda. In other words, a Dutch conquest of the island would make it impossible for the English to continue in actual possession of Pulo Run. And so it turned out to be. Inhabitants of Great Banda

repulsed Lam's expeditionary force in June 1618, but were soundly defeated by the Dutch Governor-General Jan Pieterzoon Coen (1587-1629) three years later. The Treaty of Defence, concluded by the VOC and EIC in London in June 1619, proved an unexpected benefit in pacifying the archipelago. Since the companies were now officially allied, neither the EIC merchants in Bantam and Jakarta, nor the few Englishmen left at Pulo Run, dared to interfere with Coen's invasion plans, or offer any support to the Bandanese (Van Goor, 2015, pp. 433-465; Loth, 1995, pp. 724-727).

Coen's brutal conquest of Great Banda is an inconvenient truth for many present-day global historians, eager to ascribe agency to indigenous peoples through various forms of 'negotiating' and 'resisting' empire. Yet the power differential between Europeans and certain native groups in Asia and the Americas is something that we ignore at our peril. At the time, many Bandanese clearly underestimated the VOC's determination to secure a monopoly of the spice trade and the enormous resources which it could marshal against a weak, isolated polity. Of course, there were plenty of areas in the pre-modern world where Europeans struggled to get a foot in the door. Yet the Banda Islands was not one of these (Clulow, 2013 and 2016; Meuwese, 2012).

Coen's punitive expedition resulted in the near-total destruction of Bandanese society. Forty-eight *orangkayas* were captured, tried and executed at his order. Their relatives – approximately 789 old men, women and children – were shipped off to Batavia (modern-day Jakarta), the VOC headquarters in Asia, where they were put to work as slaves. In the end, there were only about 1,000 of an estimated 15,000 original inhabitants left in the Banda Islands. The arable land on Great Banda was divided into plots called *perken*, and distributed among European tenants. Many of these so-called

perkeniers were former VOC soldiers. Together with Company officials, they would form the upper crust of the new colonial society for centuries to come. In cultivating and harvesting the valuable spices, they could dispose of a large labor force of slaves, imported by the VOC from all parts of Asia. The Dutch conquest marked a fundamental break with the past (Van Goor, 2015, pp. 433-466; Winn, 2010, pp. 365-389; Loth, 1995, pp. 13-35; Niemeijer, 1994, pp. 2-24; Hanna, 1978).

Conclusion

So was there such a thing as empire by treaty? Our analysis of Grotius' justification of Dutch expansion overseas and our case study of Anglo-Dutch imperial competition the Banda Islands suggests that, yes, treaties played an important role in the rise of Western imperialism and colonialism. Written documents were no alternative to conflict and war, but an essential part of it. Europeans used treaties to make claims to trade and territories in early modern Asia, Africa and the Americas and to (violently) contest the claims of others, be they indigenous peoples or European competitors. Armed violence was the ever-present and none-too-subtle threat at the negotiating table, both in Europe and overseas. Grotius was well aware of this, twice negotiating face-to-face with EIC representatives about the Dutch and English claims to the Spice Islands. Indeed, his understanding of divided sovereignty and its implications, combined with the natural law notion of *pacta sunt servanda*, made it possible for him to justify the struggle for Dutch independence and the establishment of a VOC empire in Asia in very similar terms. Just like the States of Holland could punish Philip II of Spain and Portugal for transgressing the (unwritten) constitution of the Low Countries and become fully sovereign in the process, so the VOC could punish the inhabitants of the Banda Islands for their failure to

abide by the delivery contracts and conquer their territory in a 'just war.' The VOC directors and their personnel in the East showed themselves to be quick studies. It is also important to note that relations between human beings, whether as individuals or as groups, were ordered hierarchically in most pre-modern societies. The growth of capitalist economies and the substantial increases in literacy rates in north-western Europe in the period 1500-1800 ensured that both English and Dutch colonial officials, merchants and settlers would seek to preserve such hierarchical relations in writing. Of course, aboriginal peoples have sought to use legal procedures of various kinds, including the European courts, to contest the meaning of written documents and to offer their own readings (The Economist, 2016). Still, the decks were heavily stacked against them in the past, and remain so in the present.

Will a turn towards global constitutionalism remedy the situation? It depends on what this would mean in practice. Right now, aboriginal peoples seem to be on the receiving end of global constitutionalism. Unlike TNCs, most indigenous communities do not have the financial wherewithal to hire the best lawyers --those consummate masters of the text-- in order to overturn years, if not centuries, of jurisprudence favouring Western settlers and capitalist economics. In many areas of the world, aboriginal peoples are faced with TNCs acting as *de facto* sovereigns --think of the position of Royal Dutch Shell in the Niger Delta, for example (Obi and Rustad, 2011). National governments tend to treat indigenous communities as simply one more interest group clamouring for attention, and their complaints as actionable in domestic courts only. So far, no state has supported aboriginal peoples in appealing their cases to the international courts in The Hague. Indeed, these courts have yet to take a single case

brought by indigenous communities. There is no parity between states and aboriginal peoples in modern international law. Unless and until this changes, unequal treaties will remain the norm, even today.

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