OFFICIAL

IN THE WAITANGI TRIBUNAL **WAI 1040**

IN THE MATTER OF **THE TREATY OF WAITANGI ACT 1975**

AND

IN THE MATTER OF **TE PAPARAHI O TE RAKI**
(NORTHLAND INQUIRY)

BRIEF OF EVIDENCE OF DR DONALD M LOVERIDGE

Dated 17 December 2009

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‘The Knot of a Thousand Difficulties’

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Britain and New Zealand, 1769-1840.

Dr. Donald M. Loveridge
Historical Consultant
December, 2009

A Report for the Crown Law Office

"Upon the whole, the affair is a complete mess. All this was long foretold by persons well-acquainted with the subject. The suggestions of the New Zealand Association of 1837, on which the instructions of Captain Hobson are founded, might have been suitable to the then state of things, but are wholly inapplicable now. Since Lord Howick's crotchetiness prevented the passing of a law for the regular colonization of New Zealand [in 1838], the mischiefs of irregular colonization have been proceeding apace. They are now all but incurable. The Colonial Office will not cure them except by retracing its steps and starting afresh from the safe point of *British sovereignty established by Cook in 1769, and formally asserted by the Crown of England in 1814*. This would cut the knot of a thousand difficulties. This too is the most legitimate mode of proceeding – the one least open, or rather the only one not at all open to question. Finally, this is the only way of averting fresh difficulties of a most serious kind *which are growing in Paris."*

from
"Colonization of New Zealand: Official Announcement"
Colonial Gazette (London), 2 Oct. 1839
[Emphasis in original]

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Notes and Abbreviations

Citations of Official Documents	Where possible, for ease of access, published versions of official correspondence and documents have been cited. Some of the archival versions cited may have been published, but in the absence of complete index of documents reproduced in the British Parliamentary Papers and New Zealand Company Annual Reports it has not always been possible to track them down. Many of the documents sent to and from New Zealand, of course, were not reproduced in either of these publications.
Colonial Minister	This title (often used by contemporaries) has been employed when referring to the "Secretary of State for War and the Colonies" in the British Cabinet.
New Zealand Company/ Association/ Land Company	The various organizations formed for the colonization of New Zealand in the 1830s were often referred to indiscriminately at the time as 'The New Zealand Company'. In this study they have referred to as the New Zealand Company (1825); the New Zealand Association (1837); the New Zealand Land Company (1839); and the New Zealand Company (1840) – the last being the organisation created by a Crown charter in November of 1840.

AIML	Auckland Institute and Museum Library
ATL	Alexander Turnbull Library, National Library, Wellington.
APL	Auckland Public Library. (Archival materials are housed in the New Zealand and Special Collections).
AUL	Auckland University Library
ANZ	Archives New Zealand, Wellington.
BDB	Busby Despatch Book (Turnbull Library qMS-0344). This contains James Busby's copies of the despatches which he sent to New South Wales. I have generally relied on this source in preference to the sets in CO 209 and SANSW. noting where entries vary in date and/or content from the versions actually sent off to Sydney. It should be noted that this source does not (with one exception) contain copies of the despatches which Busby sent straight to the Colonial Office.
BPD	British Parliamentary Debates (Hansard)
BPP	British Parliamentary Papers (Unless otherwise stated, all of the papers cited can be found in the Irish University Press reprint series, "Colonies – New Zealand" volumes).

CMS	Church Missionary Society
CMSMB	Church Missionary Society Committee Minutes (MC17-MC19; Turnbull Library Micro Collection 4/ Reel 9)
CO 209	Colonial Office records relating to New Zealand (on microfilm, held by the Archives New Zealand in Wellington).
CSNSW	Colonial Secretary of New South Wales
Dixson	Dixson Library, Sydney (records relating to New Zealand, on microfilm, are held by Archives New Zealand in Wellington).
DNZB	Dictionary of New Zealand Biography (references are to the website, www.dnzb.govt.nz/dnzb)
HRA	Commonwealth Parliament. *Historical Records of Australia. Series I: Governor's Despatches to and from England*. Sydney: Library Committee of the Commonwealth Parliament, 1923+.
HRNZ	Robert McNab, *Historical Records of New Zealand*. 2 Vols. Wellington: Government Printer, 1908 and 1914.
NZALB	Letterbook of the New Zealand Association (Mitchell Library C182; ATL Micro MS 459)
NZAMB	Minute Book of the New Zealand Association (Mitchell Library C182; ATL Micro MS 459).
SANSW	State Archives of New South Wales, Sydney (records relating to New Zealand, on microfilm, are held by Archives New Zealand in Wellington).
WMS	Wesleyan Missionary Society

Preface

P/1. My name is Donald M. Loveridge. I am a professional historian, and have worked as an historical researcher and consultant in Canada and New Zealand. I received B.A. and M.A. degrees in History from Brandon University and the University of Manitoba, respectively, during the 1970s, and a Doctorate in Canadian History from the University of Toronto in 1986. My specialist field was land legislation and European settlement in the Canadian West during the latter half of the Nineteenth century[1].

P/2. I was employed on contract as Senior Historian with the Treaty Issues and International Law Team of the Crown Law Office from January of 1988 until May of 1993. During this time I was involved in various ways with most of the Treaty of Waitangi matters dealt with by the Treaty Issues and International Law Team, but was principally concerned with the Ngai Tahu, Taranaki Raupatu, Muriwhenua (Land), and Geothermal inquiries. From May of 1993 until May of 1994 I was employed on contract as Chief Historian and Director of Research by the Crown Forestry Rental Trust, and have worked as an independent historical consultant since that time. During the period 1994-1998 my principal activities were the planning and supervision of historical research programs for various Maori claimant groups and the Crown Forestry Rental Trust, including (with Prof. Alan Ward) the "Maori Land Administration in the Twentieth Century" project[2], and the preparation of historical reports. Since 1996 I have submitted evidence to the Waitangi Tribunal for claimants in relation to the Ngati Pahauwera claim in Hawke's Bay, the Ngati Pikiao claim in the Rotorua Lakes area and the Te Ati Awa/ Ngati Awa claim in the South

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[1] "'The Garden of Manitoba': The Settlement and Agricultural Development of the Rock Lake District and the Municipality of Louise, 1878-1902". PhD thesis, University of Toronto (History), 1986.

[2] Reports produced included:
Part I. Maori Land Boards Project: *John L. Hutton,* "'A Ready and Quick Method': the alienation of Maori land by sales to the Crown and private individuals, 1905-30."; "Archival Material Relating to the Maori Land Boards: 1900-1952."; "The Operation of the Waikato-Maniapoto District Land Board.".
Rachel Willan. "Maori Land Sales, 1900-1930.".
Part II. Maori Land Development Project: *Ashley Gould,* "Maori Land Development 1929-1954: An Introductory Overview with Representative Case Studies." *Graham Owen*, "Tikitere: The Proverbial Image 1931-1972". *Dion Tuuta*, "Mahoenui Development Scheme: Synopsis of Activity 1929-1957"; "'Something Definite must be Done': The Ranana Development Scheme 1930-1962".
Part III. Native/Maori Trustee Project: *Kieran Schmidt (with Fiona Small).* "The Maori Trustee 1913-1953.".
Fiona Small. "Overview of Maori Reserve and Estate Administration Accounts, 1913-1954: Appendix to K. Schmidt, The Maori Trustee 1913-1953".
Revised editions of these reports were issued by the CFRT in Feb. 1998.

Island[3]. I also completed a history of Maori Land Councils and Boards for the Tribunal's *Rangahaua Whanui* programme in 1996[4].

P/3. More recently I have presented evidence to the Hauraki and Kaipara Tribunals on behalf of the Crown, including a study of the origins of the Native Land Acts and Native Land Court, and several reports on various aspects of the Ngati Whatua claims[5]. In 2004 I completed a report for the Wairarapa Tribunal on entitled "'An Object of the First Importance': Land Rights, Land Claims and Colonization in New Zealand, 1839-1852"[6], and another for the Central North Island inquiry entitled "The Development of Crown Policy on the Purchase of Maori Lands, 1865-1910: A Preliminary Survey"[7]. These were followed in 2006 by evidence for the National Park inquiry on "The Crown and the Opening of the King Country, 1882-1885"[8], and in 2007 by a report on "The Development and Introduction of Institutions for the Governance of Maori, 1852-1865" for the Whanganui inquiry[9]. I am at present contracted to the Crown Law Office for the provision of historical advice, research and analysis for the Treaty Issues and International Law Team and the Office of Treaty Settlements.

P/4. Early in 2009 I was asked by Crown Counsel to prepare a report for the Northland inquiry on the Crown's relationship with New Zealand during the pre-annexation period, paying particular attention to the origins of the Declaration of Independence of 1835 and the Treaty of Waitangi of 1840. Research which I had carried out previously in relation to the Declaration of Independence[10], the proclamation of British sovereignty in 1840[11], and to the Crown's land and settlement policies as they bore upon

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[3] "'When the Freshets reach the Sea': Ngati Pahauwera and their Lands,1851-1941" (Wellington: Dec. 1996); "'The Most Valuable of the Rotorua Lands': Alienation and Development in the Ngati Pikiao Blocks, 1881-1960" (Wellington: April 1998), and (with P. McBurney); "Ngati Pikiao Lands ca. 1881-1960: Block Histories" (Wellington: March 1998); "'Let the White Men Come Here': The Alienation of Ngati Awa Lands in Queen Charlotte Sound, 1839-1856" (Wellington: January 1999).

[4] "Maori Land Councils and Maori Land Boards: A Historical Overview, 1900 to 1952." (Wellington: Waitangi Tribunal, December 1996; Rangahaua Whanui National Theme Report 'K', "First Release").

[5] "The Origins of the Native Lands Acts and Native Land Court in New Zealand" (Wellington: October 2000); "Ngati Whatua and the Crown – The First Quarter-Century: An Appraisal of the Wyatt Report" (Wellington: April 2001); "Maori Lands and British Colonization 1840-1865 – A Preliminary Analysis" (Wellington: May 2001); "Issues Relating to the Otakanini Block 1904-1908" (Wellington: May 2001).

[6] Wellington: January, 2004 (A Report for the Crown Law Office).

[7] Wellington: October 2004 (A Report for the Crown Law Office).

[8] Wellington: Feb. 2006 (A Report for the Crown Law Office).

[9] Wellington: Sept. 2007 (A Report for the Crown Law Office).

[10] "The 'Declaration of the Independence of New Zealand' of 1835, and the Confederation of United Tribes,1835-1840" (Wellington: Crown law Office, June 1993. Revised version 1998).

[11] "'Many a Slip ...': The Proclamations of May 21, 1840". Appendix to "The New Zealand Land Claims Act of 1840". Wellington: Crown Law Office WAI-45 Doc. #I6; revised version 2002.

New Zealand during the late 1830s and early 1840s[12] (including the land claims policy adopted in 1839-40[13]), provided a starting point for this project. I sought to examine as much as possible of the documentary record generated by the Colonial Office and the government of New South Wales, including the reports made by the British Resident in New Zealand, in order to ascertain what the British Government thought it was doing (or, more commonly, not doing) where New Zealand was concerned, and why. The instructions issued to Captain Hobson in 1839 were subjected to particular scrutiny.

P/5. It was, of course, also necessary to go further afield to examine other sources of information and opinion which affected the decision-making process. I decided that it was necessary to pay particular attention to the debate over the colonization of New Zealand which took place in Britain in 1837-38, and also to that about New Zealand (not often considered in the historical literature on the Treaty) which took place after Captain Hobson left for the southern hemisphere in August of 1839, and before news of the May 1840 proclamations of British sovereignty reached Britain. The first of these debates strongly influenced the policies of the British Government, and the second casts light on some the pressures which it was under to find an answer for 'the New Zealand Question'. This report concludes with an examination of Hobson's activities in 1840, in light of what he had been ordered to do (and probably told, off the record, to do) by his superiors. This discussion focuses on what was said by and on behalf of the Crown at Waitangi, and on the proclamation of British sovereignty in May of 1840.

P/6. I would like to thank Brent Parker, Louise Sinclair and Ruth Robinson of the Crown Law Office Treaty Issues and International Law Team for their assistance with research, and my legal and historical associates at the Crown Law Office for their comments and criticisms, but any errors of commission or omission are entirely of my own making. The views expressed and conclusions drawn are also my own, and do not necessarily reflect those of the Crown Law Office or any other institution.

Wellington,

December, 2009.

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[12] "'An Object of the First Importance': Land Rights, Land Claims and Colonization in New Zealand, 1839-1852" (Wellington: January, 2004; A Report for the Crown Law Office).

[13] "The New Zealand Land Claims Act of 1840 (Wellington: Crown Law Office, 16 April 1993, WAI-45 Doc. #I 6; revised version 2002).

I

Introduction: Cession and Annexation in 1840

1. On 21 May 1840 the sovereign rights of Queen Victoria over the Islands of New Zealand were asserted by Captain William Hobson of the Royal Navy, her "Lieutenant-Governor in New-Zealand". Where the North Island was concerned, this claim was based on the cession of sovereignty made in the Treaty of Waitangi by

> the Chiefs of the Confederation of the United Tribes of New-Zealand, and the Separate and Independent Chiefs of New-Zealand, not Members of the Confederation ... further ratified and confirmed by the adherence of the Principal Chiefs of this Island of New-Zealand.

In the case of the South Island and Stewart Island, the claim was made "on the grounds of Discovery" (as a corrected version of the original proclamation explicitly put it), referring to rights deriving from the actions of Captain James Cook in 1769-70. Unaware of Captain Hobson's actions, another British official would in June 1840 proclaim the Crown's sovereign rights over Stewart Island, on the grounds of discovery, and over the South Island, on the grounds of cession by its "independent native chiefs" through the Treaty[14].

2. As far as the British Government and the Queen's subjects in general were concerned, Hobson's proclamations were the end of the matter[15]: New Zealand was now British, Maori were British subjects and New Zealand for the first time in its history came under a single central government. Some Maori welcomed these changes. When the May proclamations were issued, however, a good many chiefs and tribes had not been given an opportunity to sign the Treaty, or chose not to do so, or (in at least one case[16]) attempted to retract their signatures. In his report to his superiors Hobson claimed "the universal adherence of the native chiefs to the Treaty of Waitangi" in the North Island[17]. This statement was, obviously, an exaggeration. Although a substantial number of rangatira had accepted the Treaty, it was still unfinished business as of 21 May 1840. It would remain unfinished business thereafter where some Maori were concerned, in large measure because Hobson took no further initiatives to solicit signatures to the Treaty once his two

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[14] See Ch. VII, below. The Appendix ("'Many a Slip ...': The Proclamations of May 21, 1840") to D.M. Loveridge, "The New Zealand Land Claims Act of 1840." (1993) examines the history of the May proclamations themselves.

[15] Particularly after they were officially published in London on 2 Oct. 1840: *London Gazette*, Issue No.19900, pp. 2179-2180. "So far as sovereignty is concerned", Prof. Rutherford observed, the publication of the two proclamations on 2 October "is definitive and final": J. Rutherford, *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand, 1840* (1949), p. 28

[16] See C. Orange, The Treaty of Waitangi (1987), p. 66.

[17] Despatch #40/3 of 25 May 1840 from Hobson to Lord Russell: BPP 1841 (311) pp.15-17 No. 11.

proclamations had been published[18]. This is not to say that the Crown ever considered any part of the country to be 'left out' of the Treaty after this date[19], but in some cases Maori consent for inclusion was definitely in short supply.

3. It has been suggested that the British Crown in 1839-40 was determined to add these Islands to Queen Victoria's empire come what may, whether or not Maori chose to go along, and that the aforementioned proclamations on the grounds of 'discovery' provide clear evidence of such intentions. There is no doubt whatsoever that a good many British subjects thought that Maori consent to British acquisition was neither necessary nor particularly desirable: a major debate raged in Britain over this very question once the Government's intentions to negotiate for the cession of sovereignty became known. At the same time, however, it is quite clear that the British Government of the day did not share this opinion, and that a good many British subjects also considered Maori consent to be an essential precondition for any acquisition of sovereignty by the Crown. The main problem for those who supported negotiation, if the Crown did in fact decide to seek a voluntary cession of sovereignty over all or part of New Zealand from Maori, was how to ascertain what level and quality of consent would be required to justify a legitimate transfer of sovereign rights. The ideal would have been to consult every chief and every iwi, brief them thoroughly on the effects and implications of accepting the sovereignty of the British Crown, and gain their approval for the proposed cession. But even if this was possible, how could the Crown be certain, across the yawning gulfs of geography, language and culture which separated London offices from whares in the back-blocks of New Zealand, that Maori really understood what they were getting into? How much, in any case, did they need to understand in order to consent to a cession of sovereignty?

4. There were no easy answers to such questions, particularly when the British Government was coming under increasing pressure to do something about the worsening

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[18] No new copies of the Treaty were circulated after 21 May, and (not counting the South Island, where Major Bunbury was proceeding independently) few signatures were added to the existing Treaty sheets after this date. It is significant that before the end of the month ("on occasion of proclaiming the authority of Her Majesty over these Islands", as he put it) Hobson sent letters to both the CMS and WMS thanking the missionaries for their assistance with the Treaty: ANZ IA 4/305 pp.17-18 (CMS), and IA 4/1 pp. 29-30 (WMS). He evidently saw this stage of his mission as having ended.

[19] A good example of this involved Hobson himself. In 1841 the New Zealand Company wished to establish new colonies in the South Island, and suggested to the Governor that acquisition by 'discovery' meant that the Crown could dispose of land there as it wished. Hobson replied that "beyond its sovereign rights" the Crown had no control over territory in question – clearly implying that he considered the property guarantee in Article Two to apply regardless. See letters of 25 and 27 Sept. 1841: *Documents Appended to the Twelfth Report of the New Zealand Company* (1844), Appendix D pp. 61D-65D.

state of the Islands as the pace of unregulated European commerce and settlement steadily escalated during that late 1830s, and as ever-larger volumes of land were claimed by Europeans in circumstances where no code of laws "to regulate the possession of property, its descent, or its alienation" was in force[20]. The tipping-point came early in 1839 when a private company – the New Zealand Land Company – proposed to establish large colonies of British subjects in the Islands with or without the Government's sanction, and proceeded to actually do so. By this time most of the missionaries and humanitarians who had previously opposed the acquisition or imposition of British sovereignty over any part of New Zealand had altered their position, in the belief that this was now the only way Maori could receive any kind of effective protection from the harmful effects of colonization. In order to impose British control as quickly as possible – which seemed desirable for a number of reasons – the Government selected a strategy which in the event led to the acquisition of sovereignty over the whole of the country within the space of less than nine months after Hobson was despatched to New Zealand (four of which were taken up by the voyage south). It can be argued that this particular solution to the 'New Zealand question' itself gave rise to many of the problems which, from the perspective of the present day, seem to tarnish the process by which New Zealand was acquired by the Crown.

[20] As Lord Eliot's (rejected) draft Report for the 1840 Select Committee on New Zealand put it: BPP 1840 (582), Report p. vii.

II

Britain and New Zealand, from Cook to Busby

Explorers and Lawyers

5. One might as well begin with Captain Cook, who as far as we know was the first non-Maori to set foot on the New Zealand archipelago (Tasman having sailed past in 1642 without going ashore[21]). More to the point, Cook was certainly the first one to claim authority over the islands for a European state, at Mercury Bay on 15 Nov. 1769, and at Queen Charlotte's Sound on 31 Jan. 1770[22]. The explorer had come south in search of a large continent thought to occupy the southern part of the globe, carrying secret instructions authorising him to take possession of any new "Continent or Land of great extent" which he might find, and "with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain"[23]. One historian points out that

> there is little doubt that his acts of appropriation were State acts, performed in pursuance of the terms of his secret orders, and that he had been invested with general or specific authority formally to take possession of New Zealand. [24]

The Captain commented at some length in his Journals on the suitability of the country for European settlement, noting, among other things, that the indigenous people appeared to be "too much divided among themselves to unite in opposing [settlement]; by which means, and kind and gentle usage, the colonists would be able to form strong parties among them"[25].

6. A decade later, when the British Government was looking for a dumping-ground for convicts to replace the American Colonies, New Zealand was briefly considered as a possibility, but rejected in favour of Botany Bay[26]. The instructions given to the first Governor of New South Wales, however, were worded in such a way as potentially to include all of New Zealand north of Bank's Peninsula within the jurisdiction of that colony,

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[21] A.H. McLintock, *Crown Colony Government in New Zealand* (1958), p.6 "At no point did he [Tasman] set foot on the new land; nowhere did he take possession of the country in the name of his government or country, and nowhere did he attempt to secure the allegiance of the natives".

[22] A.H & A.W Reed, *Captain Cook in New Zealand: Extracts from the Journals of Captain James Cook* (Wellington: 1951), p. 67 and p. 108.

[23] See National Library of Australia MS2 "Secret Instructions for Lieutenant James Cook Appointed to Command His Majesty's Bark the Endeavour 30 July 1768", (reproduced at http://www.foundingdocs.gov.au). In the case of the Queen Charlotte Sound proclamation, the consent of local Maori was allegedly sought and obtained.

[24] J. Hight and H.D. Bamford, *The Constitutional History and Law of New Zealand* (1914), p. 21.

[25] Cited in Hight and Bamford, *Constitutional History and Law of New Zealand*, p. 22.

[26] See T.M. Hocken, *The Early History of New Zealand. Being a Series of Lectures Delivered Before the Otago Institute* (1914), p. 15. According to J.D. Lang, *New Zealand in 1839* (1839), p. 77, around 1800 the idea of making New Zealand a "a subordinate penal settlement and dependency of New South Wales" was under consideration.

for it was described as encompassing on its eastern side "all the Islands adjacent in the Pacific Ocean within the Latitudes aforesaid of 10º 37' South, and 43º 39' South, and of all Towns, Garrisons, Castles, Forts, and all other Fortifications, or other Military Works which may be hereafter erected upon ... any of the said Islands"[27]. Prof. Rutherford thinks that it required "a strained interpretation" of the instructions to see them as encompassing New Zealand, and points out that occupation did not immediately follow[28]. On the other hand, Rev. J.D. Lang observed in 1839,

> If it should be urged ... that this description could not be supposed to include islands so far to the eastward of New Holland as New Zealand, I beg to reply ... that it was not only supposed to do so, but that it really did include such islands; the island, called Norfolk Island, situated to the northward of New Zealand, on the same meridian, being actually colonized by Captain Phillip, in virtue of his commission ..., as a part of the territory of New South Wales and its dependencies. [29]

It would also appear that at one point in the 1790s the Lieutenant-Governor of New South Wales, in charge of Norfolk Island, suggested that a settlement be established in New Zealand for the purpose of exploiting flax (for the manufacture of ropes and sailcloth)[30]. One might well think that if the British had decided to claim and occupy all or part of the Islands during this period, Captain Phillips' instructions would have provided a convenient legal device.

7. This did not happen, but there was no shortage of British interest in New Zealand before the end of the 18th century. Benjamin Franklin, while still a loyal subject of King George III in 1771, proposed that a humanitarian expedition be sent to the Islands to introduce Maori to the necessities of civilized European life, including "fowls, hogs, goats, cattle, corn, iron &c". The purpose of the exercise, as Franklin put it, would be

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[27] Transcript of Governor Phillip's instructions of 25 April 1787, from http://www.foundingdocs.gov.au.
[28] Rutherford, *The Treaty of Waitangi*, p. 7. The same wording was used in all of the Governors' Commissions until modified in 1824 in recognition of the separation of Van Diemen's Land from New South Wales. This moved the southern boundary of the latter as it encompassed 'islands adjacent' north to about the middle of the North Island: E.J. Tapp, *Early New Zealand: A Dependency of New South Wales, 1788-1841* (1958), p. 73. I have not been able to ascertain whether the commission of the Governor of Van Diemen's Land thereafter included (or seemed to include) any part of New Zealand, although it seems probable that his authority over such islands simply replaced that of the Governor of New South Wales (who was also Governor-in-Chief over all the Australian colonies).
[29] Lang, *New Zealand in 1839*, p. 77.
[30] See R. McNab, *From Tasman to Marsden: A History of Northern New Zealand from 1642 to 1818* (1914), p. 83. Governor King visited New Zealand at this time to return two Maori men who had been taken by force to Norfolk Island.

> not to cheat them, not to rob them, not to seize their lands, or enslave their persons; but merely to do them good, and make them, as far as in our power lies, to live as comfortably as ourselves. [31]

Less philanthropic was a plan sent to the Colonial Office in 1792, which suggested that Britain could easily conquer New Zealand by turning tribe against tribe, training allies in "a discipline ... (without firearms) which would make them superior to their neighbours", and then occupying a township which would provide a base for trade and for the conquest of "the greater part of the South Sea Islands". All this, John Thomson thought, would lead to "peace, hence improvement and civilization, &c.", and could be accomplished in a few years[32]. More productive of substantial results than plans such as these was the growing interest in New Zealand's resources – flax, timber, whales and seals – and in trade with its inhabitants.

8. Whaling off the coast of New Zealand brought about a certain amount of contact with Maori, many of whom joined the crews of the ships involved. Such was the number of Maori sailors abandoned in New South Wales, that in May of 1805 its Governor considered it necessary to issue an Order regulating the use and treatment of such people by British whalers[33]. Trade continued to increase during this period, and, despite the destruction of the *Boyd* at Whangaroa in 1809, in 1810 a group of merchants in Port Jackson (Sydney's port) were making plans to establish a station, or settlement on the North Island to collect flax and manufacture ropes and canvas. A European who had previously lived in the Bay of Islands was contracted as their agent[34]. This effort failed, allegedly due to misconduct by the latter, but the entrepreneurs involved were not discouraged. In 1814 they drew up a Memorial outlining their new plan to form a company "to establish such settlements and factories at New Zealand" as might be required. Governor Macquarie was asked to provide a charter for this company, and give it a monopoly on trade between New Zealand and New South Wales. Maori, they took pains to point out, would be treated with kindness, which

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[31] This proposal is summarised by Hocken, *Early History*, p.14. The original paper, "A Plan for Benefiting Distant Unprovided Countries" of 29 Aug. 1771, "By Dr. Franklin and Mr. Dalrymple", can be found in J. Sparks, ed., *The Works of Benjamin Franklin Vol. II* (Boston: 1849), pp. 377-380.

[32] Letter of Nov. 1792, from Thomson the Colonial Minister (Henry Dundas): HRNZ I pp. 584-585. The marginal date is incorrect. Although the letter as transcribed refers to the establishment of a colony "in New Zealand or Nootka" (the latter a reference to what is now known as Vancouver Island), the letter is solely concerned with New Zealand. Like Cook, Thomson referred to Maori as "Indians".

[33] McNab, *From Tasman to Marsden*, p. 102 (26 May 1805).

[34] McNab, *From Tasman to Marsden*, pp. 138-142.

> may in time produce confidence and mutual friendship, making them first usefull [sic], and then leading them on to progressive civilization, by allowing and inviting such of them as may be so disposed to proceed to the establishment, where they may learn our tongue, and be taught to assist in the various processes attached to the arts before them, to facilitate which there will be a kind of dock yard, where blacksmiths, ship-wrights, carpenters, and sawyers will be employed

The Governor was also asked to make the person in charge of this "establishment" a Justice of the Peace[35].

9. The above comments about Maori were possibly prompted by, and certainly reflected the influence of an Order issued by Macquarie the previous year, which declared that the inhabitants of New Zealand and the islands of the South Pacific were "under His Majesty's protection"[36]. All ships leaving ports in New South Wales for these destinations were required to post a bond of good behaviour, and were specifically forbidden to take people away without their own, their chief's and their parents' consent[37]. Discharged crewmen had to be paid everything due to them, and warning was given that "all acts of rapine, plunder, piracy, murders, or other outrages against their persons or property will, upon conviction, be severely punished". Soon after receiving the aforementioned Memorial, on 9 Nov. 1814, and prompted by the Rev. Samuel Marsden (the leading Anglican clergyman in New South Wales), Macquarie issued another Order dealing specifically with New Zealand and the Bay of Islands[38]. This came about in response to information that visiting vessels had "been in the habit of offering gross insult and injury to the natives of those places" by abducting men and women, to the detriment of peaceful contact and trade. The Governor

> being equally solicitous to protect the natives of New Zealand and the Bay of Islands in all their just rights and privileges *as those of every other dependency of the territory of New South Wales*, hereby orders and directs that no master or seamen of any ship or vessel belonging to any British port, or to any of the colonies of Great Britain resorting to the said Islands of New Zealand shall in future remove or carry therefrom any of the natives without first obtaining the permission of the chief or chiefs of the districts in which the natives so to be embarked may happen to reside ... [emphasis added]

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[35] Memorial of 3 Oct. 1814: HRNZ I pp. 323-327.
[36] Order of 1 Dec. 1813: HRNZ I p. 429.
[37] To remove women also required the prior consent of the Governor.
[38] HRNZ I pp. 427-428.

Moreover, he required that this permission be "certified in writing, under the hand of Mr. Thomas Kendall, the Resident Magistrate in the Bay of Islands, or of the Magistrate for the time being in such districts", and three named chiefs were

> invested with power and authority for that purpose, and are to receive due obedience from all persons to whom these Orders have reference, so far as they relate to their obtaining permission to remove or carry away any of the natives of New Zealand or the adjacent isles, or to land or discharge any sailors or other persons thereon.

Offenders were threatened with rigorous prosecution. This document leaves no room for doubt that at least one of New South Wales' early Governors considered New Zealand to be within his jurisdiction.

10. This Order was of course related to the establishment of the Church Mission in New Zealand in 1814, Thomas Kendall being one of its leading members. Marsden (who played a prominent role in this development) informed the CMS Committee in London that Kendall had been appointed to act as a Magistrate in order to provide "a check upon some of the masters and owners of vessels and their crews, who visit New Zealand", and enclosed copies of the November Order. "The Governor", he noted, "has directed the colonial seal to be put to all the copies of these Orders, which I have to give to the chiefs, in order to shew more particularly what is the wish of the Executive authority in this colony"[39]. Marsden later reported that he had shown and explained the Order to the chiefs, and told them that in case of objectionable behaviour by British subjects "they might easily obtain redress from the Governor of New South Wales". He asked them "never to commit any act of violence upon Europeans in future, but refer their complaints to Governor Macquarie", at which "They seemed much pleased, and promised they would not injure the crews of ships that might touch there"[40].

11. This Order marked the beginning of 25-year-long struggle to match a desire to control the activities of British subjects in New Zealand, with the means – both legal and physical – to actually do so. Barely had the CMS mission planted itself ashore than its parent body in Britain was complaining about this problem. In 1817 a memorial was sent to the Colonial Minister, Lord Bathurst, by their Committee claiming that their efforts to convert and civilize the New Zealanders were being undermined by

[39] Letter of 18 Nov. 1814: HRNZ I pp. 330-331.
[40] Marsden's December 1814 report on his visit to New Zealand: HRNZ I p. 351.

> the atrocities committed by the European traders in the South Seas, by which not only the most grievous injuries are inflicted on the natives, but their minds are exasperated to acts of barbarous revenge, all tendency to a milder and more civilized character is repressed, confidence in the character and designs of the European settlers is weakened, and the lives of themselves [the missionaries] and their families are seriously endangered. [41]

Despite the efforts of the Governor of New South Wales, they stated, experience had shown

> that there is no competent jurisdiction in New South Wales for the cognizance and punishment of such offences as have been enumerated, nor any adequate means for their prevention; and that no remedy at present exists but sending persons charged with the perpetration of such enormities to be tried at the Admiralty Sessions in England.

They called upon the Minister

> to take the matters contained in this memorial into your earliest and most serious consideration, and to devise such measures for remedying the evils therein stated, and for preventing the recurrence of similar enormities as in Your Lordship's wisdom shall appear expedient.

12. The CMS's appeal led, within a short space of time, to action in Parliament. New Zealand was not the only place where such problems of jurisdiction had arisen, and the Imperial Act passed in 1817 applied to several parts of the world. Included were Honduras, as "a Settlement, for certain purposes, in the Possession, and under the Protection of His Majesty, but not within the Territory or Dominion of His Majesty", the Islands of New Zealand and Tahiti in the South Pacific Ocean "*and other Islands, Counties and Places not within His Majesty's Dominions*" [42]. The Act provided that the crews of British vessels who committed "Murders and Manslaughters" in these places "shall and may be tried" in courts in British possessions "in the same manner as if such Offence or Offences had been committed on the High Seas". One historian has observed that "it became clear, probably for the first time, that the British government had never intended its Governors to interpret their commissions as widely as King and Macquarie had done". Tapp also noted, however, that the latter "still continued to regard New Zealand as coming within his official cognizance", acting under his commission to have British offenders in New Zealand brought

[41] HRNZ I pp. 417-421 (attached documents are copied at pp. 421-430).
[42] Emphasis added. 57 Geo III (1817) c.53 "An Act for the more effectual Punishment of Murders and Manslaughters committed in Places not within His Majesty's Dominions". It did not apply to territories controlled by any European power or by the United States of America.

to New South Wales for trial, and appointing another Justice of the Peace there in 1819[43]. The person in question was a missionary, the Rev. John Butler, and his commission required him "to keep His Majesty's peace and for the preservation thereof and the quiet rule of Government of His Majesty's people within and throughout the British Settlements at New Zealand a dependency of the said Territory [New South Wales]"[44].

13. Commissioner John Bigge, a former Judge appointed in 1819 to inquire into the present state of New South Wales, was also instructed to consider "the best means of preventing the commission of outrage and violence on the persons of the New Zealand inhabitants of the islands of New Zealand by the crews of vessels navigating the Pacific"[45]. In his 1823 Report he observed that the protection provided by the 1817 Act was largely nullified by two factors. One was that the only offences committed in New Zealand which could be punished were murder or manslaughter; the other was that "it was declared in the preamble of this Act that New Zealand was a place not within the dominions of His Majesty". The latter, in particular, was a source of difficulty, for

> Altho', therefore, an Act of the British Legislature might be binding upon such of the subjects of His Majesty as committed offences upon the persons of the New Zealanders, yet it may be doubtful whether it would justify the punishment of foreigners for those offences. The protection of the Act must therefore be limited to cases of outrage or violence committed by the subjects of the King unless the preamble of the Act before mentioned is repealed or a positive declaration is made that New Zealand is included in and forms part of the British dominions.[46]

On what basis such a declaration might be made, Bigge did not know, for he considered the wording of the Commission of New South Wales' Governors "too vague to support the exercise of criminal authority in New Zealand, which is situated one thousand miles from it" (the same rationale, perhaps, which led the drafters of the 1817 Act to exclude New Zealand from King George's dominions). He concluded, rather limply, that the Governor should be given "an express authority" to appoint magistrates and constables "in the Islands of New

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[43] See Tapp, *Early New Zealand*, p. 70.

[44] Transcript of Commission of 19 July 1819, in R.J. Barton, ed., *Earliest New Zealand: The Journals and Correspondence of the Rev. John Butler* (1927), p. 28. Barton notes p. 30 that Butler "apprehended, and sent to Sydney, persons accused of disturbing the peace". In 1840 he was sent by the New Zealand Land Company to Port Nicholson to act as Magistrate, on the strength of his 1819 commission.

[45] The Report was requested in 1819, and is dated 27 Feb. 1823: HRNZ I pp. 587-596. For a useful outline of Bigge's career see http://www.eurekacouncil.com.au/Australia-History/History-Pages/1819commissioner_bigge.htm. Bigge's principal task was to consider the transportation of convicts and the general state of New South Wales, but he also, in effect, undertook the first major inquiry into Maori and New Zealand affairs by the Crown. Bigge and his Report perhaps deserves more attention that historians have given it to date.

[46] The HRNZ printed text says 'repeated', not 'repealed', but this clearly is incorrect.

Zealand", with the latter being paid officials, and that occasional visits should be made by British warships. He also recommended that a small detachment of troops be located in New Zealand to keep the peace between Maori and Europeans, noting that the cost could be offset by selling flax.

14. In 1823 an Imperial Act was passed "for the better administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof"[47]. Inspired in part by Commissioner Bigge's reports, it brought major changes to the government and legal system of the two colonies. Among many other things it set up Supreme Courts in both colonies and determined their jurisdictions. The Colonial Office evidently took the opportunity to deal with the problems of law and order outside of Australia on which Bigge had reported, for Sec. III enabled these new Courts to try all offences committed by the crews of British ships or by British subjects wherever the Admiralty had "Power, Authority or Jurisdiction" (that is, on the high seas), and also those which had been or would be committed "in the Islands of New Zealand, Otaheite [Tahiti] or any other Island, Country or Place situate in the Indian or Pacific Oceans, and not subject to His Majesty, or to any European State or Power"[48]. Those convicted would be liable to the same "Pains, Penalties and Forfeitures" as prevailed in England. In effect, the area encompassed, and powers provided by the 1817 Act were both extended in this one. It was a temporary measure, but in 1828 was replaced by a similar statute for the same purposes. Sec. IV of this new Act was an exact copy of Sec. III of the 1823 Act[49].

15. The New South Wales 'Charter of Justice' – the 1823 Act – was promulgated on 17 May 1824, at a ceremony at Government House in Sydney, and publically proclaimed "in the Market-place" that afternoon. The new Supreme Court of this colony was opened the same day, when the Charter was again read[50]. Governor Brisbane also issued a proclamation which focused attention on Section III. This provision had been passed by

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[47] 4 Geo IV (1823) c.96 s.3 "An Act ... for the better Administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof". This is known in New South Wales as its 'Third Charter of Justice'.

[48] Whether the change in wording – from "not within the Territory or Dominion of His Majesty" (1817), to "not subject to His Majesty" (1823) is significant is a question best left to experts in international law, but it does not sound quite as exclusive.

[49] See the discussion of the Bill in the *Sydney Gazette* of 14 Nov. 1827. The problems involved in exercising the jurisdiction of the Supreme Court were discussed at length in editorials in 1831: *Sydney Gazette* 14, 17 and 19 May 1831. Peter Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847* (1977), pp. 52-53 discusses aspects of this legislation.

[50] See *Sydney Gazette* 20 May 1824.

Parliament, he stated, because "misguided persons" had often committed "gross Outrages" which were injurious both to trade and to the native peoples of the Islands. The whole of Section III was set out in the proclamation. Brisbane declared it expedient that this "Enactment" be brought into effect immediately, and called upon all of His Majesty's subjects to assist in enforcing it – reminding them that it was all the more important to support the law in cases where circumstances "too often facilitate the Escape of Offenders"[51]. Most unusually, this proclamation was translated into Maori, and a bilingual version was printed – the first document of the British Government published in the Maori language[52]. Although no information seems to be available about the distribution of the translated proclamation, Governor Brisbane evidently considered it important to inform Maori of this development.

16. While legislators (slowly) acted, very little was done with respect to the actual application of British justice to New Zealand before 1830[53]. Writing to Bigge in 1819 the CMS missionaries complained that

> Generally speaking, we believe that the natives would be sufficiently protected were their cases brought before the Courts of New South Wales, but there is no means of carrying the provisions of the Act of Parliament into effect without an armed vessel.

The presence of such a vessel, they thought, would manifest "an earnest desire on the part of the British Government to protect the natives"[54]. The continuing absence of a Royal Navy vessel on permanent station in New Zealand would prove to be a grievance with the missionaries and other 'respectable' settlers for another two decades[55]. One colonial commentator writing in 1820 thought that, if barbarities such as the trade in preserved human heads could not be eradicated, British interests should be withdrawn from New Zealand for fear "the world should ... censure such an outrage on humanity, and apply to us

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[51] Proclamation of 17 May 1824: *Sydney Gazette* 20 May 1824 (first page).
[52] P. Parkinson and P. Griffith, Penny, eds., *Books in Maori* (2004), pp. 32-33 #6. The Turnbull Library has a photocopy of this imprint.
[53] As far as I have been able to determine, no one has yet assembled a record of all the legal cases relating to New Zealand which were tried in the courts of Britain and its possessions prior to 1840.
[54] Reply to Bigge of 8 Nov. 1819: HRNZ I pp. 441-445. Bigge had sent them a questionnaire to be filled out.
[55] From 1826 onwards the Commanders-in-Chief of the East Indies squadron were under instruction to send ships to New Zealand when requested to do so by the Governor of New South Wales. Governor Bourke observed in 1831 that "the annual Visit of a British Cruizer for a few days does not add in any perceptible degree to the Security of the Trade or the prevention of Crime" in New Zealand: Despatch #2 of 23 Dec. 1831, in HRA XVI pp. 482-484 Encl. No.1. As Tapp, *Early New Zealand*, p. 74 comments, "Since the stay of such vessels was so short, it was impossible for such visits to be of much use", and in any case they could not exercise any control over non- British people in New Zealand.

the imputation of being dealers in human flesh"[56]. Withdrawal from the Islands, however, was the last thing on most minds. The next decade saw rising interest in New Zealand, manifested in a number of proposals for commercial exploitation and colonization. It is important to understand, though, that this took place in a rather unreceptive atmosphere. British opinion at this point was largely opposed to colonies in general, and to the acquisition of new possessions by Britain in particular. One historian comments that "The general attitude of the British public towards colonies" during the 1820s "may be described as one of indifference tempered by uneasiness". This was fully reflected in the halls of government in London, particularly where any kind of government expenditure might be involved[57].

Trade and Settlement

17. An early example of such indifference related to a memorial sent to the Colonial Office in 1817 which proposed the establishment a major flax-processing facility in New Zealand. This was to involve the construction of machinery "that would employ a thousand of the natives" and supply "immense quantities of hemp to such vessels as may be appointed to call for it". Robert Williams of Sydney thought that these Maori would be happy to receive instruction in these industrial techniques, and to trade their raw flax for British goods, and predicted that all this would "soon improve their barbarous habits of life"[58]. More significant, perhaps, than the plan itself was Governor Macquarie's endorsement of it to Lord Bathurst. The scheme, he thought, might well succeed, but he believed that this would require the establishment of "a British settlement" with a small garrison of troops. "How far Your Lordship would deem this good policy it is not for me to say", Macquarie concluded,

> but I do not at present see that it would be attended with any bad consequences, except in regard to the expence of maintaining such a settlement, tho' I am inclined

[56] *Sydney Gazette* 8 Jan. 1820, letter to Editor n.d. by "Verax". See also the reply by "Candor" in *Sydney Gazette* 15 Jan. 1820.
[57] R.C. Mills, *The Colonization of Australia (1829-42): The Wakefield Experiment in Empire Building* (1915), p. 24. This attitude is discussed at length in his Ch. 1 "The British Colonies in 1830". In response to the first proposal in 1831 to found a new colony in South Australia, the Colonial Office replied that "the Secretary of State [for the Colonies] does not feel at liberty at the present moment to hold out any encouragement to schemes which have for their object the extension of the number of His Majesty's settlements abroad, and which, whether founded in the outset by individuals, or by the Government, are always liable to end in becoming in some way or other a source of expense to the revenue of this country" (pp. 219-220).
[58] Memorial of 1 April 1817: HRNZ I pp. 410-413.

> to think, if this manufacture proved successful, the advantages to be derived from it to the Mother Country would more than counterbalance any expence the establishment of a small British settlement in New Zealand would cost the Crown. [59]

(Bigge, it may be noted, would recommend in 1823 that a body of troops be sent to New South Wales "in case it should be deemed expedient to give encouragement to the colonisation of New Zealand"[60]). The Governor does not appear to have had any reservations about the propriety of sending British troops to a country soon afterwards defined as being "not within His Majesty's Dominions".

18. The Colonial Office offered no encouragement to Williams' proposal, or to the entrepreneurs who announced in 1821 that a colonizing expedition was about to leave England for New Zealand. Robert Sugden and his group saw a bright future for the country, pointing to its excellent natural resources and its proximity to New South Wales. They believed that their enterprise would also serve "the cause of humanity" in that

> provision would be made to a class of enlightened persons (now unoccupied from different causes), and the civilization of a fine race who are now sunk in utter ignorance would by such an event be rapidly accelerated, and eventually England would benefit by it in an eminent degree ....

As well, they were convinced that New Zealand "offers so many advantages, [that] if there is not speedily an English colony there will be one of some other nation"[61]. Lord Bathurst, the Colonial Minister at the time, was not moved by this patriotic appeal, but many others found such arguments quite persuasive.

19. The mid-1820s saw a post-war boom in Britain akin to that experienced a century later after the Great War. Speculative ventures of all kinds were the order of the day[62]. In this climate even New Zealand, half a world and half a year away, might be considered an attractive investment. The amount of information available about the Islands was also growing steadily, with the publication of several first-hand accounts of the country and the availability of other documents such as Bigge's report and those from the

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[59] Despatch of 1 April 1817 from Macquarie to Bathurst: HRNZ I pp. 409-410.
[60] Bigge Report of 27 Feb. 1823: HRNZ I pp. 587-596.
[61] Letter of 18 Jan. 1821 from Sugden to Lord Bathurst: HRNZ I p. 516.
[62] See in particular Ch. 4 of R. Wolfe, *A Society of Gentlemen* (2007).

Missionaries[63]. Several ambitious schemes for settlement and development were proposed. The first of these came from a Royal Marine officer, Lt.-Col. Edward Nicholls, in 1823.

Nicholls

20. Nicholls suggested that a colony made up of ex-military people (in abundant supply less than a decade after Waterloo) be established in New Zealand to provide a base for securing naval stores from that country – "objects of vital importance to the naval consequence and commercial interests of the British Empire" such as flax and spars[64]. He commented that

> A military establishment ... would also be best calculated to benefit the uncivilized natives of New Zealand. The furious struggles amongst the chiefs for the maintenance of their imagined rights, and the consequent destruction of human life, would be speedily terminated by the presence of such a force. Many of their leaders have expressed an ardent desire to retire from their predatory mode of life, but have at the same time lamented the utter impossibility of doing so whilst some of the more powerful and ambitious chiefs remain unsubdued or unawed by a regular military power, which in the event of its becoming necessary might compel their agreement to such pacific terms as should best serve the general interest.

He proposed that the British Government pay for the equipment required and for the passage of colonists to New Zealand, where it would provide each of them with a grant of land. This land was to be acquired from Maori in return for "iron tools or implements of husbandry ... by fair barter", and Nicholls claimed to be well aware of the need to adhere "to the strictest rules of equity" in all transactions with them[65]. In return for what was obviously going to involve a considerable expenditure (estimated at around £20,000), the Government would receive supplies of flax of such volume and value "as in a short period completely to liquidate the debt due". The colony, Nicholls concluded, would have a number of other advantages, not least in supplying a British destination for "Those useful and gallant emigrants from the northern counties of Ireland and Scotland who are daily flocking to the shores of the United States of America".

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[63] The first books included J. Savage, *Some Account of New Zealand* (1807), J.L. Nicolas, *Narrative of a Voyage to New Zealand* (1817), and R.A. Cruise, *A Journal of a Ten Months' Residence in New Zealand* (1823). Note the list of publications cited in an 1823 interview relating to the Nicholl plan (below): HRNZ I p. 614.

[64] Memorial of 8 Nov. 1823 from Nicholl to Lord Bathurst: HRNZ I pp. 598-606. It would appear that an early version of the same proposal was circulated before this memorial was sent to the Colonial Office.

[65] His remarks here were based on experience in dealing with the Native Americans of Florida during the War of 1812.

21. This scheme received the endorsement of the influential London company Enderby & Sons, which had extensive whaling and trading interests in the South Pacific[66]. They thought that a colony such as that proposed by Nicholls would assist the whaling trade, particularly in offering a ready source of supplies and a safe sanctuary where storm damage could be repaired, and that it would be relatively inexpensive to set up due to the proximity of New South Wales. While acknowledging that there was "some risk" in dealing with Maori, significant potential advantages were also identified. "If it is considered as good policy by our Government to attempt the colonizing New Zealand with the consent of the native chiefs", Enderby & Sons commented, they believed that Maori would prove a valuable source of ships' crews – and also pointed out that "If New Zealand falls into the hands of any other power with whom we should be at war the natives will be found a most powerful ally for our enemy and a bad neighbour to New Holland [Australia]". A businessman recently returned from New Zealand who was interviewed by the Colonial Office also considered the Nicholls plan to be feasible[67].

22. The Rev. Samuel Marsden, in New South Wales, was asked by the CMS for his opinion on the Nicholls scheme[68]. He was not familiar with all the details, but thought that "If a body of good men were to sit down as colonists, at the River Thames, or perhaps more to the southward, they would prove a great blessing to the island". Marsden, however, could not see how such a colony could prosper in the absence of any laws or government, European or Maori, to restrain the settlers, and considered that without these "much danger" would be involved. He considered the 1823 Act a step in the right direction, for "the natives would know that they would obtain protection from the Government here", and "If an effective Government can be established in New Zealand to punish crime, a colony may be established, and benefit the natives". But Marsden did not believe that an "effective" government could be established by Maori themselves. The good Reverend thought that

> The New Zealanders themselves are very sensible of the want of a protecting Government, and would rejoice if anything could be done to prevent the strong from crushing the weak. The New Zealanders want a head. I had many conversations with the chiefs on this subject when I was in the island last year. They told me no chief would be willing to give up his authority to another, and they could not agree amongst themself to nominate any one chief as king .... If the chiefs could be brought to act together, under some regular Government, much might be done.

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[66] Letter of 16 Sept. 1823 to Nicholl: HRNZ I pp. 608-609. One of the Enderbys later headed the abortive attempt to establish a colony in the Auckland Islands in 1849.
[67] "Note By Under Secretary Horton" 1823: HRNZ I pp. 612-614
[68] Letter of 4 June 1824 from Marsden to Rev. J. Pratt: HRNZ I pp. 627-629.

"They would sometimes say", he observed, that "if King George would send them a king they would attend to him".

De Thierry

23. But King George – or at least his Ministers – was in no mood at this juncture to intervene in New Zealand, be it to claim the Islands as a dependency or to promote Maori self-government. This was made abundantly clear to another entrepreneur interested in that country. The person in question was Baron Charles de Philippe de Thierry, a French *emigré* who had lived most of life in England, and had served briefly in the British Army[69]. In 1820 he had met the Rev. Thomas Kendall and two Maori chiefs (Hongi and Waikato) at Oxford. Kendall was of the leaders of the first CMS mission to New Zealand in 1814, and had returned to England to work on a written form of the Maori language. De Thierry commissioned Kendall to purchase land for him at the Hokianga, and provided trade goods for the purpose. De Thierry later wrote that

> Mr Kendall took out with him a well-drawn-up parchment deed with blanks, and declared before his departure that with the property entrusted to him he would purchase for me for the purpose of emigration, all that part of New Zealand from the narrow neck upon which Auckland now stands, to the North Cape.

Hongi, he claimed, was told that the purchase would include unoccupied lands only, and that substantial reserves would be made, over and above the lands actually occupied[70].

24. It seems most unlikely that Kendall would have agreed to such a far-reaching project, or that the chiefs would have consented to sell on such terms even those parts of the region to which they and their people had a claim. In any case, in 1822 Kendall went to the Hokianga with Captain James Herd, acting as interpreter for a commercial venture. While there, he took the opportunity to negotiate with local Maori for the purchase of a plot of land at the head of the harbour on behalf of De Thierry. According to the English-language deed signed on 7 Aug. 1822, and witnessed by Kendall and Herd, the plot encompassed some 40,000 acres for which 36 axes were paid[71]. De Thierry received this document from

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[69] See J.D. Raeside, *Sovereign Chief, A Biography of Baron de Thierry* (1977), Ch. 1.
[70] See Raeside, *Sovereign Chief*, pp. 23-24
[71] Deed in J. Binney, *The Legacy of Guilt: A Life of Thomas Kendall* (1968), p. 189.

Kendall sometime in 1823, along with an explanatory letter which indicated that its author did not intend to pursue any further purchases[72].

25. In December of 1823 the Baron wrote to the Colonial Office to inform Lord Bathurst that he had purchased "a considerable tract of land" in New Zealand "to which a number of persons are desirous to proceed for the purpose of colonization"[73]. He asked several very pertinent questions, including:

> 1. Will His Majesty's Government grant to British subjects in New Zealand the same protection as it grants to settlers in New South Wales, who have gone there of their own free will?
>
> 2. Will land purchased from the natives be considered the property of the purchaser in case the island is taken possession by the British Government; and in case such lands are again sold, will the sale of them be considered lawful and binding? ....
>
> 5. Should settlers in New Zealand have trading vessels, will they be allowed to carry the British flag, and receive the same protection as is extended to ships of other British colonies?

He received a rather rude reply a few days later, which dismissed his queries on the grounds that they were "founded upon the assumption that that island is considered as a possession of the Crown"[74]. As far as one can tell from the letter itself, De Thierry had not actually made such an assumption, but in any case he was never one to be put off by mere dismissal. The following month another letter was sent to the Colonial Office elaborating on his plans.

26. De Thierry informed the Colonial Minister on 16 Jan. 1824 that he had a 40,000-acre "estate" in New Zealand "with the means of adding considerably to its extent", and intended to send "a colony of a large number of useful persons who are anxious of going to settle there with their families"[75]. He understood that there was a large bounty for people settling in New South Wales, and wanted to know if the same applied to New Zealand, and also sought to touch up Lord Bathurst for a Government loan of £8,000 to £10,000, to be repaid in timber (offering his deed as security). "The immense advantages which the

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[72] Binney, *The Legacy of Guilt*, p. 189.
[73] Letter of 23 Dec. 1823 in HRNZ I pp. 614-615. Prof. Binney (citing this source) says that a copy of the deed was sent with this letter, but there is no reference to it there. Raeside, *Sovereign Chief*, p. 29 (no source given) says that copies were sent to the Foreign Office and to the Ministry of Foreign Affairs in Paris.
[74] Letter of 10 Dec. 1823 from Horton to De Thierry: HRNZ I pp. 615.
[75] HRNZ I pp. 617-618.

colonization of New Zealand by British subjects promises to the Mother-country", the Baron hoped, would persuade them to provide the assistance he required to reach "the desired objects". He had just finished outlining these objects in a pamphlet entitled "An Appeal to the People of England on the Colonization of New Zealand", which was printed sometime during 1824 along with a generous supply of forms for land grants[76]. The latter incorporated an acknowledgement by the recipient that they would

> conform to the Regulations and Orders issued by me, my Heirs, Successors and Representatives, for the benefit and safety of the Persons so receiving Grants of Land, and for the safety and Welfare of the Colony in general.

The grants of those who failed to "conform and be submissive" could be revoked, and it was specified that re-sales of land had to be made at a minimum price of £5 per acre[77].

27. It seems highly unlikely that De Thierry actually raised any funds for this colony or recruited any significant number of colonists during this period. He neglected to mention to the Colonial Office that he was at the time being vigorously pursued by creditors (and was indeed on bail from debtors' prison) – he would be declared bankrupt in October of 1824 – and there appears to be little if any reason to believe his own reminiscences on the subject[78]. The *Sydney Gazette* reported in April of 1825 that

> Recent information bids us report, that the idea of colonizing New Zealand is altogether abandoned. A needy adventurer or two attempted to effectuate certain schemes in London, but for want of resources sufficient, their arrangements were necessarily relinquished and the new colony ended in a bottle of smoke! [79]

The only thing which seems to have grown and prospered during this period was De Thierry's imagination: by 1825 the Baron was proposing to cede all of the area from Hokianga northwards to the French Government in return for being appointed its Governor for life, and was claiming that "The Chiefs (Arakes or kings)" had "offered me the sovereignty of the islands composing New Zealand"[80]. These claims were later investigated by the explorer Dumont D'Urville, and found to be lacking any substance whatsoever[81].

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[76] See Binney, *The Legacy of Guilt*, pp. 190-191. Prof. Binney suggests that this material was not actually circulated until 1826, although it appears that a copy may have been sent to the Colonial Office with his letter of 9 March 1824 (HRNZ I p. 624).
[77] Transcript of land grant form in Raeside, *Sovereign Chief*, p. 35.
[78] De Thierry's travails with his creditors are examined in detail in Raeside, *Sovereign Chief*, pp. 39-54 (especially p. 52). Raeside also discusses his approaches to the Dutch Government.
[79] *Sydney Gazette* 14 April 1825.
[80] Memorandum to Director of Colonies of April 1825: transcript in Raeside, *Sovereign Chief*, pp. 57-58.
[81] Raeside, *Sovereign Chief*, pp. 59-61.

The First New Zealand Company

28. The first New Zealand Company has long been overshadowed by its better-documented descendents, the New Zealand Association of 1837 and the New Zealand Land Company of 1839. This deficiency has been partly remedied by a recently-published history[82], but much work remains to be done on this subject. What we do know is that a group of London businessmen and investors came together in March of 1825 and launched a joint-stock company "to form commercial establishments in New Zealand, with the view of obtaining supplies of flax and timber, and other valuable products of that island" – as their *Times* advertisement put it[83]. The Chairman was John Lambton M.P. (later Lord Durham), and the Deputy Chairman was Lieut.-Col. Robert Torrens (uncle of Lt.-Col. Edward Nicholls, and a fellow Royal Marine[84]), while the Directors included several other MPs. The proposed capitalization was given as £1,000,000, although applications for shares would not "at present be received". Some £100,000 of this money was actually raised over the following year[85].

29. When the *Times* advertisement appeared, Lambton and one of the Directors had already met with Lord Bathurst to outline their scheme, emphasizing their "purely commercial" intentions[86]. They had also set in motion an application to the Board of Trade for a 31-year monopoly on "an exclusive Trade with New Zealand for the Native productions of those Islands"[87]. A monopoly, they argued, would be a reasonable inducement for capitalists to risk their money, noting that the programme which they proposed would require a heavy investment in labour, equipment, ships and settlements, not to mention the cost of "liberal presents" to secure "the favour and co-operation of the Chiefs". The outcome, if all went to plan, would be to free Britain from any need to rely on the Baltic countries for its naval supplies. "But should Government refuse", they warned,

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[82] Wolfe, *A Society of Gentlemen*.
[83] London *Times* 1 April 1825 p. 2 "New Zealand Company".
[84] Wolfe, *A Society of Gentlemen,* p. 39.
[85] Wolfe, *A Society of Gentlemen*, p. 68.
[86] See letter of 29 March 1825 from Bathurst to Littleton: HRNZ I p. 634. This was written to clarify a point about military assistance for the venture "in the event of the natives not allowing you peaceable possession". The Government stated that it would only act to protect settlers if they were forced to withdraw. Littleton accepted this, commenting in his 30 March reply that "we disclaim all projects of conquest in New Zealand, our intentions being purely commercial".
[87] See Turnbull MS-Papers-0140-12 "Memorial to William Huskisson" [President of the Board of Trade] ca 1825 (copied from Huskisson Papers in the British Library 38763 ff. 99-100). See Wolfe, *A Society of Gentlemen*, p. 53.

> or even delay, to give a British Company a privilege for opening a Commercial intercourse with these Islands, and of purchasing from the Natives the lands on which the Flax plant is produced, we know not how soon the French or Russians may charter a Company for these important objects; and by availing themselves of the harbours, the naval Stores, and the hardy Seamen of New Zealand, give a dangerous blow to our commercial prosperity and maritime power.

A modified version of this appeal, when considered by the Board of Trade a year later, was fairly well received[88]. Its Committee recommended that the petitioners be offered a Charter of Incorporation providing them with a 21-year monopoly on trade from New Zealand to Britain and the Australian colonies, although it specified that shareholders should be made liable for double the value of their shareholdings[89]. These recommendations were never implemented.

30. The Company's first expedition left for New Zealand in September of 1825 under its agent Captain James Herd, who had visited New Zealand a few years earlier[90]. Its two ships carried around 50 Scottish artisans and farmers and a good deal of agricultural and other equipment, including machinery for flax-processing – no expense seems to have been spared. The intention was to purchase land from Maori, and then establish a settlement which would provide a base for the future operations of the Company. Its ships first touched at Sydney, where Thomas Kendall (dismissed from the CMS mission in New Zealand in 1822) was brought aboard to serve as the expedition's guide and translator[91]. They proceeded to the South Island, and then went on to the Thames, where a "fort" was erected. According to one report of dubious accuracy, "in case of military assistance being required" the Government of New South Wales had agreed "to forward a sufficient number of troops for the defence of this other colony"[92]. After several months the party proceeded to the Manukau area, where four islands were purchased from Maori in September of 1826[93]. It

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[88] It appears that a modified petition, seeking a charter of incorporation, was submitted to the Board in October 1825: see Wolfe, *A Society of Gentlemen,* p. 56. Unfortunately the relevant report (UK National Archives PC 1/4303) is not accessible from New Zealand.

[89] Wolfe, *A Society of Gentlemen*, p. 56. One of the Directors mentioned in a letter to the Colonial Office in March of 1826 that "Our hope of obtaining from Gov[ernmen]t. a grant of an exclusive privilege" was "now destroyed by a refusal on the part of Huskisson": letter of 22 March 1826 from Littleton to Bathurst, in HRNZ I p. 658. Evidently Huskisson later changed his mind, or had been misunderstood.

[90] The following is taken from Wolfe, *A Society of Gentlemen*, Chs. 6 and 8, and R.A.A. Sherrin, *Early History of New Zealand: From Earliest Times to 1840* (1890), Ch. 28 pp. 287-291.

[91] None of the biographies of Kendall or the histories of the first Company that I have seen mention this, but Kendall was living in New South Wales in 1827 (NZDB website) and signed both of the Company's land-purchase deeds in 1827 as a witness (see below). As noted previously, Kendall had worked with Captain Herd during a visit to Hokianga in 1822.

[92] *Sydney Gazette* 3 June 1826.

[93] Text of deed of 23 Sept. 1826 in Wolfe, *A Society of Gentlemen*, p. 108. Sherrin, *Early History,* p. 290 says that land was also purchased "on the banks of the Thames", citing *The First Report of the Directors of the*

then went to the Bay of Islands, to find that the CMS missionaries were not particularly welcoming (the presence of Kendall may well have had something to do with this[94]), and soon moved on to the Hokianga. There Kendall arranged another purchase, of land at what was later known as Herd's Point, on 26 Jan. 1827[95]. A few of the emigrants remained at Hokianga, but most returned to New South Wales with the expedition shortly afterwards.

31. Soon after their arrival in Sydney Herd, "finding that the exports were not likely to meet the original views upon which the Company was established" announced that he had decided "to abandon the prosecution of further designs herein, as there was not the least probability of success". The cargo of his ships would be sold, and the expedition would return to England with any settlers who wished to go[96]. He did not explain to the *Sydney Gazette* how this pessimistic conclusion was reached, but the probable reason is not hard to find. This was a period of major unrest in New Zealand, at the height of the Musket Wars, and even the missionaries were very uneasy. While at the Hokianga, in fact, Herd had written to Henry Williams offering to remove all of the CMS personnel if the situation worsened[97], and the very same issue of the *Sydney Gazette* that announced his decision to cease operations carried news of the destruction of the WMS mission station at Whangaroa by Maori after it had been abandoned. One of the missionaries involved had made a verbal report on these events to the congregation of a Wesleyan Chapel in the city, "and for two hours the auditory [sic] were in tears, and petrified with horror". Their CMS colleagues at the Bay were said to be "in jeopardy every instant" and "were contemplating that flight ... would be their only refuge from an awful and bloody end"[98]. Such was the state of New Zealand that in 1827 the CMS missionaries were giving serious consideration to a scheme for creating a Maori colony in New South Wales, "in consequence of an application made by various Chiefs, who are anxious to avoid many of those evils which they cannot avoid in

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New-Zealand Company, presented to the First General Meeting of the Shareholders, on the 14th May, 1840 (London: May 1840). This is a very brief and vague reference in the 'Accounts' section.

[94] The immediate reason for Kendall's dismissal was his support for dealing in arms with Maori (DNZB website), and it may be significant that both of the land-purchases made by Herd and Kendall in 1827 were paid for with arms and gunpowder. One report has it that the ship *Rosanna* was carrying ten tons of gunpowder (Sherrin, *Early History,* p. 290).

[95] Text of deed of 26 Jan. 1827 in Wolfe, *A Society of Gentlemen*, pp. 114-115.

[96] *Sydney Gazette* 14 and 16 Feb. 1827.

[97] Wolfe, *A Society of Gentlemen*, pp. 116-117.

[98] *Sydney Gazette* 14 Feb. 1827 "The New Zealand Mission at Whangaroa". See also *Sydney Gazette* 28 April 1827 for further details, and 27 Aug. 1827 concerning their proposed return, which the editor considered ill-advised.

their own Country"[99]. This idea was considered by a missionary Committee, all of whom thought such a measure "desirable" for a number of reasons, and a lengthy Minute was prepared on the subject. The authors recommended that such a settlement be established "At not less that 100 miles from Port Jackson [Sydney]" to minimize contact with Europeans. (The project was eventually abandoned[100]).

32. Herd, in any case, decided to abandon the idea of founding a colony. Certainly the *Sydney Gazette* had no doubt that he had made the right decision. It considered that

> New Zealand might, at some future day, answer the purposes of a Colony, in the shape of annexation to the British Crown, but no private Company will ever succeed in bringing views to bear at all commensurate to the expense, and the certain hazard of human life, from such a myriad of cannibals. A British garrison would bring the savages to their senses. [101]

and later claimed that the Company's founders had been grossly misled about New Zealand

> by the misrepresentations of certain parties, who had interestedly given so fine a character of the savage land – the field of blood – the field of cannibalistic feasts – as to be induced to enter into speculations which could not but fail in their objects.

"Nothing less than a British force", it reiterated, "nothing short of the British flag – will be able to inspire respect and command obedience in such a horrible part of Creation"[102].

33. As it happened, the New Zealand Company in Britain decided to suspend operations not long after Herd had done so. The Sydney *Australian*, according to one historian, reported that Herd

> has happened to act in perfect accord with the views and intentions of the promoters. They had ... resolved to abandon their schemes and give up all idea of either claiming a portion of the island, or of attempting to derive benefit from the trade or

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[99] "Copy of a Minute of the Committee of the Missionaries attached to the Church Missionary settlement at New Zealand 1827", in CO 209/1 pp. 200b-202b. An undated version of this can be found in James Busby's *Authentic Information Relative to New South Wales and New Zealand* (1832), "A Brief Memoir Relative to the Islands of New Zealand" pp. 70-72. "Mr. Williams" is the only member named. Item I.7 says that "frequent application" for such a measure had been made by "various Chiefs".

[100] Marsden apparently did not take the idea very seriously, but nonetheless seems to have given some thought to the location of such a settlement: see his letters of 24 Feb. and 12 Nov. 1827 in HRNZ I pp. 668-669 and pp. 680-681.

[101] *Sydney Gazette* 14 Feb. 1827 "Captain Herd ...".

[102] *Sydney Gazette* 16 Feb. 1827 "The New Zealand Company".

> traffic, or the cultivation which they had originally proposed. The scheme was abandoned from motives distinct from the hostility of the natives. [103]

These particular 'motives' were linked to a financial crash in Britain in late 1825 and early 1826 which saw a rash of company failures, in which four-fifths of the joint stock companies formed in 1824-25 fell by the wayside. It appears, although details are lacking, that the Company closed its doors at around this time. The fact that nothing was done about the Board of Trade's recommendations may indicate that the first New Zealand Company was defunct before June of 1826. In 1827 it was being listed in one publication as an 'abandoned' joint stock company[104].

The 1826 Memorial

34. If the escalating violence in New Zealand discouraged some entrepreneurs, it led others to call for intervention by the British Government. On 24 April 1826 a group of "merchants, shipowners, and others interested in the South Sea fisheries, and in the trade of the South Pacific Ocean" sent a memorial to Lord Bathurst. Enderby & Son were the first on the list, and fourteen other companies and individuals gave their support to the appeal[105]. In some respects this looks like an attempt to revive the Nicholls scheme, which Enderby & Son had supported in 1823. After the usual glowing description of New Zealand's resources and strategic advantages, the memorialists came to the point: they "urged the great advantage and expediency of forming a settlement in New Zealand", and asked that "a military force may be stationed in those islands for the security of the various British interests which are springing up therein, and which must rapidly increase under its protection". Such a "British protecting force" ("which several of the most intelligent chiefs", they alleged, "have expressed a strong desire to obtain"[106]), would provide security for both settlers and Maori, and

> have a powerful tendency to check that barbarous warfare which the several independent tribes are perpetually waging against each other, and would thus prove the only effectual means of introducing amongst this interesting people the peaceful

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[103] Sherrin, *Early History,* p. 291, quoting from the Sydney *Australian*. The date of the issue containing the quoted report is not given.

[104] Wolfe, *A Society of Gentlemen*, p. 67, citing Henry English, *A Complete view of the Joint Stock Companies formed during the Years 1824 and 1825* .... (London: 1827). No representative of the Company collected the deeds from Herd when he returned to Britain. They were eventually collected from his widow by the New Zealand Association in 1837.

[105] HRNZ I pp. 663-666.

[106] A letter sent to the Colonial Office in 1828, arguing along much the same lines the memorial, noted that many minor chiefs wished "to put themselves under the protection of Great Britain": letter of April 1828, in HRNZ I pp. 681-683.

> pursuits of industry and the blessings of civilization and of religious and moral instruction.

There was little here that had not been said before, but the final request raised the ante. "Above all", it stated, "your memorialists are exceedingly desirous that the important British interests connected with New Zealand should, as soon as may be found practicable, be placed under the formal protection of His Majesty's Government". Some form of annexation, in other words, was considered necessary to secure British control of trade and commerce with the Islands. Like some before, and many after, Enderby and his friends justified such a step by the alleged plans of the French to take over the country and so acquire "a complete ascendency in the eastern seas and South Pacific Ocean" which would enable them to menace the Australian colonies in time of war. British military forces, they concluded, were required in New Zealand "immediately".

Torrens

35. One reason for thinking that the aforementioned memorial was connected with an attempt to revive the Nicholls scheme was the subsequent involvement of Lt.-Col. Robert Torrens, late of the New Zealand Company. Two months after this memorial was submitted, he wrote to the Colonial Office to ask for the command of any forces sent to New Zealand in response to it[107]. He suggested that 200 Royal Marines would not only be sufficient to fulfill the expectations of the shipowners, but also

> would allow of ... [the Islands] being colonized on an extensive scale without entailing upon Government the heavy expenditure which new settlements have in most instances involved.

He later elaborated on this idea in a letter to Parliamentary Under Secretary R. Wilmot Horton, stating that he would like, before going to New Zealand, to suggest to the Colonial Office "regulations which, if it should hereafter be deemed expedient, might tend to promote an extensive colonization of New Zealand without entailing expence upon the Government". He would then give up his present command and head south,

> abundantly rewarded in having obtained an opportunity of giving practical application to principles of colonization long ardently cherished, and recently, by my intercourse with you, brought under my consideration in a state matured and extended far beyond any previous conception of my own.

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[107] Letter of 27 June 1826 to R.W. Horton: HRNZ I pp. 662-663. See also his letter of clarification of 4 July at pp. 661-662.

(Horton was an early advocate of the use of a form of 'systematic' colonization to resolve Britain's social and economic woes[108]). Presumably Torrens was contemplating some kind of colonization financed by the sale of lands in the Islands, but no further details have been located[109].

36. The Colonial Office showed no interest in 1826 in garrisoning New Zealand, but Torrens returned to the fray the following year with a more modest plan. He proposed that the shipment of emigrants to New South Wales be financed by routing their ships via New Zealand, where the passengers would be put to work collecting flax and kauri masts. The practical problems with such a scheme – how, for example, a ship loaded with 500-odd emigrants could also carry a cargo of masts – seemed self-evident to the Navy Board, who were also fearful that Maori, being "exceedingly apprehensive that their island will be taken possession of by the English", might react badly to the arrival of so many people at once[110]. Torrens agreed that the spars might be a problem, but stated that if the scheme was confined to the collection of flax, all "would be rendered perfectly easy and certain"[111]. The Navy Board did not agree: "the more I think of the plan", its Secretary wrote, "the more I am convinced that persons of a less sanguine disposition than the Colonel will at once see that our objections are reasonable and well founded, and, indeed, I should say unanswerable except as answered by Colonel Torrens"[112].

"A firm footing upon its soil"

37. While the Colonial Office fended off such advances in the 1820s, and British-based attempts at the colonization or commercial exploitation of New Zealand struggled, the merchants of the Australian colonies steadily expanded their contacts with the Islands, and the number of visits by foreign shipping steadily increased over the decade. Writing in 1831, James Busby would note that more than 100 ships left Sydney for New Zealand

[108] See Mills, *The Colonization of Australia,* Ch. II "Wilmot Horton and Pauper Location in Canada".
[109] Torrens later claimed that the first New Zealand Company were "the first propounders ... of a plan for applying to New Zealand the self-supporting principle which had been adopted under Lord Howick's regulations in Australia": Letter of 29 Nov, 1837 from Torrens to Lord Durham, in ATL Lambton Papers MS-P-140/1. It is difficult to see, however, where systematic colonization fitted into the Company's scheme as it was described in the 1820s.
[110] Letter of 6 June 1827 to Colonial Office: HRNZ I pp. 674-676. Torrens' original proposition seems not to have been preserved in the Colonial Office's records.
[111] Letter of 14 June 1827: HRNZ I pp. 676-678.
[112] Letter of 27 July 1827 from T.B. Martin to R.W. Hay: HRNZ I pp. 678-679.

during the previous year (including multiple trips by the same vessel) and a similar number arrived. "These voyages", he summarized

> were undertaken chiefly for the purpose of procuring New Zealand flax, but it has also been customary for vessels to leave parties on different parts of the coast, to prosecute the whale and seal fisheries, in the bays which are frequented at certain seasons of the year, by the black whale, and the seal.
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> Establishments have also been formed for the purpose of procuring spars for shipping, and timber for house building; the timber of New Zealand being softer and more easily, worked than that of New Holland. Two very handsome vessels, one of the burthen of 370 tons, and the other of the burthen of 140 tons, have also been built in one of the rivers by English mechanics; but in all their pursuits, the English are largely assisted by the natives. [113]

A similar level of shipping activity was reported for 1831, when exports from Sydney were valued at £30,760 and imports at £34,282[114]. Presumably in response to this burgeoning activity, several major trading firms at Sydney were reported to "have resolved to fix establishments at New Zealand"[115]. (A good portion of the exports, it should be noted, involved arms; a fact which led Samuel Marsden to comment in 1830 that "The avarice of the merchants are filling N[ew]. Zealand with muskets and powder"[116]).

38. Rumours of intervention by the British or French Governments – or both – were rife as the decade opened. In July of 1831, for example, the *Hobart Town Courier* claimed to have news that Governor Darling had made a "compact" with the chiefs of the South Island "for a considerable extent of the territory"[117]. The report was not correct, and in all probability was connected with a speculative article published in the *Sydney Gazette* a short time before, which argued that the British Government should take action with respect to the South Island. ("So long as we retain the confidence of the natives" in the North Island, the editor thought, no rival can displace us", but he saw the South Island as more exposed to foreign intervention because of its small Maori population.[118]) This article in turn was commenting on one published in *Hobart Town Courier* of 26 March 1831 which

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[113] Busby, *Authentic Information*, "A Brief Memoir Relative to the Islands of New Zealand", p. 59.
[114] *Sydney Gazette* 14 April 1832 "Original Correspondence – New Zealand". The Returns are copied in HRA XVI p. 485.
[115] *Sydney Gazette* 17 Sept. 1831 "New Zealand Trade". It was "confidently" reported to the newspaper "that a resident magistrate will be nominated for the protection of trade, supported by a military force from this country."
[116] Sic. Letter of 8 Feb. 1830 to D. Coates CMS: HRNZ I pp. 700-701.
[117] *Hobart Town Courier* 16 July 1831. This report was investigated, and dismissed as false, by the *Sydney Gazette* 4 Aug. 1831.
[118] *Sydney Gazette* 21 April 1831.

discussed a memorial being prepared "calling the attention of the Home Government to the present state of New Zealand, and pointing out the propriety of speedily forming a British settlement on that very desirable territory"[119]. If such a settlement were founded, the author argued, Maori

> would soon find it to their advantage to traffic and have intercourse with its [British] population, and the almost insurmountable barriers that now obstruct the charitable labours of our religious missionaries, would be as it were by the overwhelming influence of civilization disarmed and broken down.

The Australian colonies would also benefit,

> for independent of the immense commercial advantages that would accrue from the flax, wood and [whale] oil, with which New Zealand may be said to superabound, the addition of such an immense population [of Maori, estimated at "two millions"] ... would supply us with a mass of industrious labourers, who in their turn acquiring civilized wants and customs, would reciprocally barter and consume our mutual produce.

Warning that several foreign powers were casting a covetous eye towards the southwestern Pacific the author observed that

> Nothing in fact is more evident than that New Zealand must at no distant period form an integral and productive part of the immense Australian empire, of which we in these colonies are now the infant embryo, or if possessed by some rival power, will become the lasting bone of destructive contention.

"Nothing is more feasible than to establish a colony in this enviable spot on the most peaceful grounds", he stated, "if the undertaking were begun with the usual force and prudence which characterises the commencement of the majority of our national settlements".

39. The idea of peaceful annexation was very much in the air, the *Sydney Gazette* itself having asserted a few months earlier that "It is on many accounts desirable that New Zealand should be nominally taken possession of by the British Crown, and made a dependency of New South Wales"[120]. His Majesty's Government, the editor asserted, should "adopt these islands as her own children", and could do so with relative ease for

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[119] *Hobart Town Courier* 26 March 1831 editorial.

[120] Emphasis in original (here and below). *Sydney Gazette* 16 Sept. 1830 editorial. The editor supposed that the taking of possession by Britain "was at first omitted by oversight, for it is evident that in Governor Macquarie's administration (and we think also in Sir Thomas Brisbane's) that country was regarded as an appendage of his Government".

> Of New Zealand the British may in some sense be said to have *possession*, although not expressly recognised as her property. British missionaries and British merchants have got a firm footing upon its soil[121]. The natives are accustomed to their intercourse – have partially acquired a knowledge of their language – [and] have learnt the value of the instruction imparted by the one, and of the trade introduced by the other.

"A friendly alliance" between Britain and the chiefs, he argued, was all that was required:

> They must be left perfectly free and independent among themselves; no attempt, not the slightest, must be made to touch the authority of their chiefs, or to interfere with their own inclinations and habits; nor must they be allowed to feel, in any shape whatever, that they are under any authority but their own. Nor is it necessary that they should be in the smallest degree interfered with.

"Our object is not to govern them", the editor concluded, "but to prevent their being governed by *others* – not to get in ourselves, but to keep others out". One correspondent observed that "the manner you suggest of establishing our authority in the island is not only just, but from experience clearly shewn to be the best way it could possibly be effected". "A.Z." was convinced "that to use force would be the signal of destruction to every European on the island"[122].

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[121] The *Sydney Gazette* noted in a follow-up article that "If however ... it be a fact that Captain Cook planted the British flag there, as a King's officer employed on a voyage of discovery, there can be no doubt that the island is, according to the law of nations, already a British possession. Whether this ceremony gives it a permanent title, supposing it not be followed up, through the better part of a century, by actual occupancy, is a point which might perhaps be a good deal disputed: but in the present case this difficulty could hardly be started, for although the British Government has not formally recognised New Zealand as appertaining to the Crown, the country has for twenty or thirty years been inhabited by British subjects .... we cannot suppose that ...[the British Government] would be so insensible to the value of the island as to stand tamely by while [it was] being torn from their grasp": *Sydney Gazette* 18 Sept 1830 "New Zealand".

[122] *Sydney Gazette* 18 Sept 1830 "Original Correspondence – New Zealand", letter of 16 Sept. 1830 from "A.Z.". In its 15 March 1832 edition the *Gazette*'s editor commented "It has always been our impression, that the only safe policy for our Govern[ment] to pursue, would be that of *treaty*, the object being to establish a sort of *national alliance* .... Let Great Britain offer her *friendship*, her *alliance* [to Maori], pledging herself to respect their rights, to defend them from foreign oppression, and to carry on only the peaceful intercourse of commerce, and we are persuaded they would attach themselves to her by a lasting bond".

III

The British Residency and the Declaration of Independence, 1831-1837

The Need for a British Resident

40. Despite all of the appeals, suggestions and proposals made to it in the 1820s, the British Government sent few naval ships to New Zealand, and established no military garrisons there. Left to its own devices during this period, and in the absence of a real or perceived foreign threat, it might never have done anything about the Islands. The initiative which led to James Busby's appointment as Her Majesty's Resident in New Zealand came from the Legislative Council of New South Wales rather than from the Colonial Office or the Imperial Parliament in London. Early in 1831 the first detailed reports reached Sydney of an attack launched by Te Rauparaha and his supporters against a Ngai Tahu settlement on Banks Peninsula. It had been made possible by the connivance of Captain John Stewart of the British-registered *Elizabeth*, and prisoners had been taken back to Kapiti on his ship[123]. The involvement of a British ship in tribal warfare, and the gory details of the killings which came to light, caused an uproar in Sydney[124]. The *Elizabeth* was seized and Stewart was charged with murder (although the prosecution failed, for reasons which underlined the difficulties of imposing British law outside of its own possessions)[125].

41. Governor Darling acted quickly in hopes of preventing any repetition of such an incident, and preempting any retaliation by Maori against European settlers. The Governor reported to London in April of 1831 that he intended to send to New Zealand, immediately,

> a person in the character of Resident, which appears in accordance with the wishes of the Natives, so as to assure them of the desire of His Majesty's Government to afford them protection and to tranquillize the minds of the Settlers .... [emphasis in original]

The powers and responsibilities of such an official were not described in detail, although it was noted that he would require a vessel to get around the Islands. Darling commented that "Such an authority being once established in those Islands, a foundation will be laid which may hereafter, if desirable, be extended and improved to our advantage"[126]. Rev. Marsden

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[123] Darling first heard of the incident in February of 1831, but it was not until April that he had the full story: see Despatch #31/37 of 13 April 1831, in CO 209/1 pp. 28b-59b. These were brought to him in person by the son of one of the Ngai Tahu chiefs killed.
[124] See *Sydney Gazette* 2 April 1831.
[125] See online article "Incident of Brig Elizabeth", in *Encyclopedia of New Zealand* (1966) http://www.teara.govt.nz/en/1966/elizabeth-incident-of-brig/1.
[126] Despatch #31/37 of 13 April 1832: CO 209/1 pp. 28b-59b (also HRA XVI pp. 237-241).

chimed in in support of this proposal. Writing to the CMS in London he stated that, after discussions with Governor, and with two Maori chiefs then visiting Sydney, "I am of opinion that a resident should be stat[ion]ed in New Zealand, with proper authority to notice the misconduct of the Europeans, and to whom the natives can appeal for redress"[127]. Darling originally proposed that a Captain Barker be appointed to the post of British Resident, but after this official was killed by Aborigines suggested Charles Sturt, a well-known explorer then commanding the garrison at Norfolk Island[128].

42. At this juncture Darling received word that he was about to be replaced as Governor, and suspended the preparations for a Residency[129]. As soon as his replacement Sir Richard Bourke arrived in December, however, the project was resurrected – possibly because of a visit from Sydney merchants who asked that a Resident be appointed to watch over the growing trade between New Zealand and New South Wales[130]. Bourke first solicited an opinion from his Attorney-General as to how far such an official could be "legally authorised to suppress Aggression, or to apprehend Offenders or runaway convicts". John Kinchela did not think that the Governor had the power to appoint "any person to act in a Judicial or Magisterial Capacity in that Island, as it is not at present a Dependency of this Colony". But he also noted that under the 1828 Act, offenders in New Zealand could be brought to New South Wales for trial, and runaway convicts could be arrested[131]. Thus encouraged, Bourke raised the Residency issue with his Executive Council on 22 December 1831[132]. He described the role of a Resident ("with one of the Colonial [naval] Vessels under his orders") as being tasked "to conciliate the good will of the Chiefs"; to encourage the production of goods desired by colonial merchants, notably flax; to protect Maori from ill-treatment "by every possible means"; and to capture escaped convicts[133]. The Council were reportedly quite receptive, but were also convinced that nothing could be accomplished in New Zealand unless the Resident had troops at his disposal "for his protection and to give weight to his interference" (as Bourke put it). They considered that this could not be done

[127] Letter of 18 April 1831 to Coates: HRNZ I pp. 715-717. A few months earlier he had appealed to the Governor to have "a small armed King's vessel, with proper authority" based in New Zealand to control Europeans and, especially, to recapture convicts: letter of 2 Aug. 1830, in HRNZ I pp. 705-708.
[128] Despatch of 7 June 1831: CO 209/1 pp. 66b-69a.
[129] Despatch #31/71 of 7 Sept. 1831: HRA XVI pp. 345-346.
[130] Mentioned by him to the Executive Council: HRA XVI pp. 483-484 Encl. No.1.
[131] Letter of 12 Dec. 1831 to CSNSW: HRA XVI pp. 485-486.
[132] Extract from Proceedings in HRA XVI pp. 483-484 Encl. No.1.
[133] In his despatch to the Colonial Office Bourke said that he had shown the Council a draft of the instructions he proposed to give the Resident, but these do not appear to have been copied anywhere: Despatch #31/2 of 23 Dec. 1831, in HRA XVI pp. 482-486.

without approval from London, and recommended that the whole subject be referred to the Colonial Minister. Bourke did so.

43. The Council was also informed at this session of an appeal to King William IV recently received from "certain Chiefs" in New Zealand, and a copy of this document was attached to Bourke's despatch about the Residency[134]. As translated by the Rev. William Yate of the CMS, the thirteen chiefs assembled at Kerikeri said that they had heard the French were "coming to take away our land". They asked the British monarch "to become our friend and the guardian of these islands ... lest strangers should come and take away our land", and also to deal with British subjects who were "troublesome or vicious towards us". A month or so earlier rumours had begun circulating in New South Wales that the French had claimed sovereignty over New Zealand[135]. So concerned were officials that they made arrangements for a naval vessel to investigate the reports, its Captain being provided with a draft letter for any French officers involved in such a declaration informing them that "the Islands of New Zealand ... are considered as under the protection of the British Government"[136]. In New Zealand, Yate and his colleagues evidently urged the chiefs to make an appeal to the King for protection – using the situation as an excuse, more than one historian has speculated, to put pressure on the Government[137]. In any case, although the rumours soon proved to be completely unfounded, the chiefs' letter was nonetheless sent on to Sydney and London. The *Sydney Gazette* commented in December that

> We rejoice to hear of the application of the Chiefs for British protection. It will greatly facilitate that formal occupancy on the part of our nation, which we have so frequently and so strongly urged, and on which the future peace and welfare of these colonies will so materially depend.

The editor hoped that the Government would avail itself of "so excellent an opportunity for frustrating the sinister intentions of foreign interlopers"[138].

44. Governor Bourke was notified, by way of a private despatch sent out in January of 1832, that the Ministry intended to proceed with the Residency plan, but

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[134] Undated letter in BPP 1840 [238] p.7. The original is in CO 209/1 pp. 97b-98b. Yate's covering letter is dated 16 Nov. 1831. See also M.A. Henare, "The Changing Images of Nineteenth Century Maori Society: from Tribes to Nation" (PhD thesis, 2003), pp. 172-175 who expresses doubt that the chiefs were particularly alarmed by the French.
[135] See Despatch of 4 Nov. 1831, from Acting Governor Lindesay: HRA XVI pp. 442-443.
[136] See extract from Executive Council Minute #55 of 31 Oct. 1831, in Dixson DL N Ar/3 (ANZ Microfilm).
[137] Adams, *Fatal Necessity*, p. 76.
[138] *Sydney Gazette* 8 Dec. 1831 "New Zealand".

probably without troops being sent – at least "while the Military Force in the Australian Provinces is as low as at present"[139]. This was confirmed in a subsequent despatch from the Colonial Minister, which agreed with Darling that a person should be sent to New Zealand "in the character of Resident" – but without troops[140]. Lord Goderich preferred a civilian official rather than a military officer for the position, in any case, and told Bourke that

> After the Resident shall have conciliated the good will of the native Chiefs and in some measure restored that confidence between them and British Subjects, which the bad faith of the latter has so unhappily interrupted, you will be better able to judge in what manner it will be practicable to support the authority of the Resident without exciting the jealousy or illwill of the Natives.

This sounds suspiciously like a policy adopted in the absence of any real policy – an impression reinforced by Goderich's following comments on the legal situation with respect to New Zealand. The British authorities had no legal authority to seize wrongdoers, he acknowledged, so that actions of this nature taken by the Resident "cannot be strictly defended as legal". Some kind of protection or indemnification (not yet available) would have to be provided for him in such cases.

Busby's Appointment

45. James Busby, it appears, got wind of the Colonial Office's intention to proceed with Darling's plan, and approached it in an effort to obtain the position for himself. Busby and his family had emigrated to New South Wales from Scotland in the early 1820s, and he had briefly held posts as a tax collector and member of the colony's Land Board. His principal interests and expertise lay in viniculture, and he would later publish several books on the subject. Busby was in Britain in the early 1830s in pursuit of compensation for alleged improper dismissal from an earlier position[141]. His patron, the Earl of Haddington, supported his application to the Colonial Office, providing a memorandum which focused

[139] Despatch of 21 Jan. 1832 from Hay to Bourke: HRA XVI pp.505-506.
[140] Despatch #32/63 of 31 Jan. 1832, from Goderich to Bourke: HRA XVI pp. 510-513.
[141] See E. Ramsden, *Busby of Waitangi: H.M.'s Resident at New Zealand, 1833-40* (1942), Ch. 1 for details. Busby also gave evidence to a House of Commons Committee "on secondary punishments" of convicts: HRA XVI pp. 561-563 and p. 876 Note 163, and Ramsden, *Busby of Waitangi*, pp. 41-42. At a public meeting in Sydney in January of 1833, William Wentworth stated that Busby had "engratiated himself [in England] by calumniating the colony before committees of the House of Commons. [Hear, hear.] He did not, however, obtain the berth at which he had cast his eye – he was not made Protector of Convicts but he was made Resident at New Zealand, with £500 a year of our money [Hear, hear.]": *Sydney Gazette* 29 Jan. 1833 "Public Meeting". For a particularly poisonous appraisal of the reasons for Busby's appointment, and his character, see Sydney *Australian* 25 Nov. 1833.

on explaining why Busby should be preferred over Sturt[142]. He was offered the position late in March of 1832[143], and left for New South Wales in midyear.

46. Busby was not an obvious candidate for the job of Resident. He had no diplomatic or legal training or experience, and had never been to New Zealand[144]. He was, however, able to pull the right political strings, and apparently had the support of the missionaries[145]. It may also have helped that in 1831 Busby wrote "A Brief Memoir Relative to New Zealand" (an essay published in 1832 in his book *Authentic Information Relative to New South Wales and New Zealand* [146]). This was an up-to-date summary of the situation with respect to New Zealand up to early 1831, including the *Elizabeth* incident, and was obviously written with an eye to Governor Darling's plans for a Residency. Looking at the Maori[147], Busby concluded that, left on their own (under the guidance of the missionaries) they would eventually become Christian and civilized of their own accord "without the intervention of the British Government". "It would, however", he continued,

> be a cold and calculating policy which should not gladly embrace an opportunity for effecting these objects, when arising out of circumstances upon which it has become necessary to act from considerations of a more interested character.

In other words, British intervention to bring British subjects in New Zealand under control could serve both the empire's own interests and those of Maori, which would in turn foster trade and commerce with the Islands.

47. In Busby's opinion this goal could be achieved by the British Government "without taking a formal possession of these Islands, or forming expensive establishments upon them ... at little or no expense". The British missionaries, he noted, were highly

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[142] See Memorandum of 17 Feb. 1832 by the Earl of Haddington: CO 209/1 pp. 173b-175a.
[143] See letter of 31 March 1832 from Busby to Hay in CO 209/1 pp. 177b-178b. Lord Goderich, though, had already mentioned Bubsy's 'nomination' for the appointment in an 18 March 1832 despatch to Bourke: HRA XVI pp. 561-563 (Despatch #32/75).
[144] His father John, a Civil Engineer, had spent several months there in 1825 recovering a vessel which had foundered in Foveaux Straits, and visited the Bay of Islands on the way home: *Sydney Gazette* 3 March 1825 "Shipping Intelligence". John Busby's campaign to gain compensation for his efforts is documented in HRNZ 1 pp. 647-658. It appears that James was not involved with this exercise in any way, and did not visit New Zealand before 1833.
[145] He casually mentioned remarked to the Colonial Office that he had met with Dandeson Coates (Secretary of the CMS) while in London: Memorandum of 22 May 1832, in CO 209/1 pp. 181b-182a.
[146] The "Brief Memoir" dated June 1831 included in pp. 55-72 of this work is essentially the same as the MS version with the same title given to the Colonial Office in 1832: CO 209/1 pp. 183b-199b. All quotations here are from the published version. Oddly enough, the published version says that the Memoir was submitted to Goderich in July 1832, which seems rather late in process of Busby's appointment.
[147] Busby's footnotes reveal that he relied on the recently-published volume in the Library of Entertaining Knowledge series describing Maori: [Craik, George L.] *The New Zealanders* (London: Charles Knight, 1830).

respected by Maori, who also respected the wealth and power of the British empire. Busby thought that if the Government would send

> an authorized agent or resident ... invested with the authority of a magistrate over his own countrymen, he would be able to enter into a separate treaty with each chief, or a general treaty with the whole, having for its basis the reciprocal security of British subjects and the natives of New Zealand in their commercial intercourse. And the delivering up, by the latter, of all runaway convicts and persons not having authority from the British Government, to trade in the Islands.

He was certain that the Chiefs could understand such agreements, and would be able to fulfil their side of the bargain – "and also, that the whole number of chiefs could be made to guarantee their performance, by each separate individual". Land and "the property of the harbour" was to be purchased from Maori at the Bay of Islands and the Thames, and possibly at a location further south[148].

48. The whole exercise, he proposed, could be financed by small duties or fees levied on shipping in New Zealand and/or New South Wales. "Without assuming any authority over the natives", he concluded

> beyond what might be voluntarily conceded to his [the Resident's] character, or attempting any interference in their internal government, except by persuasion and advice, it is beyond a doubt that the influence of the resident would be sufficient to induce the New Zealanders to abandon the worst practices to which they are at present addicted, and which, even now, a respect for the opinions of Europeans, leads them to conceal and deny: and that, joined to the exertions of the Missionaries in their education, and the humanizing influence of commerce, and the domestic industry it would produce, their respect for the British character would lead them at length to abandon the ferocious character of the savage and the cannibal, for the principles of a milder religion, and the habits of a more civilized people.

The similarity of this plan to the one outlined in the *Sydney Gazette*'s editorial of 16 Sept. 1830 (see ¶.39 above) is fairly obvious. Busby no doubt thought that he was laying out a proposal which would receive fairly wide support in both Britain and New South Wales.

49. The new Resident suggested that it would be appropriate for him to carry the British Government's response to the chiefs' 1831 petition to the King, and if this was done he should first be presented to King William himself. "With their simple ideas of Majesty", he noted, "it would detract not a little from the respect in which ... [the chiefs] would hold

[148] Busby did not elaborate on this point, but it sounds as if he was thinking along very similar lines to the idea of setting up self-governing British enclaves – "factories" – which Captain Hobson raised in 1837 (see Ch. III, below).

me, if I had it not in my power to say that I had been in presence of the King"[149]. In June Busby was given a reply to the chiefs written by the Colonial Minister on behalf of the King[150]. This expressed the King's gratification (circuitously worded) that the French had not annexed New Zealand and his sorrow that Maori had suffered through the actions of British subjects, promising that he "will do all in His power" to stop such "outrages" and punish the guilty. The letter then introduced Busby as "His Majesty's Resident", sent out "to afford better protection to all classes, both Natives ... and British Subjects". Busby was "to investigate all complaints which may be made to him" and rid the Islands of escaped convicts. King William hoped that Maori would render the assistance required "to promote the object of his appointment, and to extend to your Country all the benefits which it is capable of receiving from its friendship and alliance with Great Britain". (I have not been able to discover if Busby was presented to the King before leaving Britain).

50. This letter was sent to Governor Bourke with the Colonial Minister's general instructions concerning the Residency, both being carried by Busby himself. Almost all of the latter were concerned with legal matters, for Goderich relied on the Governor to draw up Busby's general instructions (Bourke being "perfectly aware of the objects, which have led to this appointment in a commercial point of view")[151] – although the Colonial Minister did emphasize that the Resident must cooperate with the missionaries. Goderich forthrightly acknowledged that "the Law is at present inadequate to give full effect to such a mission" as this one. It appeared from experience, he admitted, that it was "almost nugatory" as far as bringing offenders to trial was concerned, for there was no authority in New Zealand to seize and detain them, and no power to compel the accused or witnesses to go to New South Wales for the trial. Nor was there any means of inflicting punishments on the spot. For that matter, there were many offences (such as "the fomenting of Wars between barbarous Tribes", and the sale of human heads) which although clearly criminal, were not actually covered by British law. To tackle these problems, the Government had drawn up a bill which would be submitted to Parliament in the near future.

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[149] "Memo. by Mr. James Busby" of 22 May 1832: HRA XVI pp. 665-666.
[150] Letter of 14 June to the Chiefs of New Zealand: HRA XVI p. 664.
[151] Despatch #32/103 of 14 June 1832: HRA XVI pp. 662-664.

The 'South Seas Bill'

51. This "Bill ... to make provision for the Prevention and Punishment of Crimes committed by His Majesty's Subjects in Islands situate in the Southern or Pacific Ocean, and not being within His Majesty's Dominion", would have enabled the Legislative Council of New South Wales to pass

> all such Laws and Ordinances as to them may seem meet for the prevention and punishment of Crimes and Offences committed by His Majesty's Subjects within the said Islands of New Zealand, or any other Islands within the Southern or Pacific Ocean, not being within His Majesty's Dominion; and ... any such Laws or Ordinances ... to make effectual provision for the seizure, detention, trial and punishment of any such Offenders, either within the said Colony of New South Wales, or within the Islands in which any such Offences may have been committed, or within any adjacent Islands

"Laws and ordinances" could also be passed to prevent the involvement of British subjects in tribal wars and punish offenders[152]. In many ways all this was a logical extension of the 1817-28 legislation. Lord Goderich noted that, if this Bill passed, the Legislative Council of New South Wales "will have the power of rendering Mr. Busby's Mission effectual to the purposes with which it has been undertaken"[153]. If not, though,

> his Mission will still not be unattended with important advantages, and His Majesty's Government will be acquitted of the reproach of an acquiescence in crime, which they will have done the utmost in their power to prevent.

Did the Colonial Minister think his "South Seas Bill" (as it was usually called) had a realistic chance of passing? If so, he was sadly mistaken. It made no progress in the House, and was rejected on the grounds that Parliament could not lawfully legislate for a foreign country[154].

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[152] "A Bill ... to make provision for the Prevention and Punishment of Crimes committed by His Majesty's Subjects in Islands situate in the Southern or Pacific Ocean, and not being within His Majesty's Dominion", dated 7 June 1832: CO 209/1 pp. 102b-104a. This was the version tabled in the House by Lord Howick on this date when he sought leave to bring it. Howick, in explaining why such legislation was needed, referred to the *Elizabeth* incident: BPD (Commons) 7 June 1832 col. 505-506.

[153] Its passage would also make all the difference where the ability of the Royal Navy to operate was concerned. Before Busby left Britain, Goderich had been informed by the Admiralty, with respect to New Zealand, that no authority could be given to any officer in command of a naval vessel "to interfere in a territory not belonging to His Majesty" save when such interference was for the purpose of protecting British subjects. See Letter of 24 March 1832 from Barrow to Hay, in HRA XVI p.573.

[154] Tapp, *Early New Zealand*, p. 95. When Lord Howick introduced the Bill Lord Howick several Members evidently had difficulty understanding its specific purpose. As one put it (Burge), "If these islands are within the King's dominions, the Governor [of New South Wales] can do what is necessary, without any law. If they

52. One suspects that the Colonial Office did not actually think that the Bill would be accepted. If this was indeed the case, what "important advantages" did Goderich anticipate from the Residency (other than a notional political advantage for his Government)? The creation of a point of contract between the chiefs and the Crown was perhaps of some use in itself. Indeed, in his 1833 instructions to Busby[155] Governor Bourke described the Resident's "principal and most important duty" as being

> to conciliate the good-will of the native chiefs, and establish upon a permanent basis that good understanding and confidence which it is important to the interests of Great Britain and this colony [New South Wales] to perpetuate. [156]

(Busby himself would later describe his principal role as that of "a political agent"[157]). Encouraging these chiefs to act together, and form some semblance of a government and legal system, was also a very desirable outcome. As matters stood, if legislation along the lines of the "South Seas Bill" proved to be unpassable, virtually the only *practical* way for the Crown to secure firm control of its subjects in New Zealand would be direct intervention in the form of a negotiated cession of sovereignty or annexation. The creation of a functioning Maori Government would change this, particularly if such an institution could provide mechanisms for the apprehension and extradition of British offenders to New South Wales for trial. This would put teeth into the 1828 Act.

53. In this light Busby's 1831 suggestions that the chiefs might be induced to act together to enter into a general treaty for "the delivering up" of British offenders, and that "the whole number of chiefs" might be able to pressure individual ones to cooperate, merited serious consideration. And the formation of a Maori government was evidently thought to be worth a try. Bourke noted in Busby's instructions that in the longer term

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are not, this House cannot legislate with respect to them". Howick explained that the immediate problem was apprehending offenders, but this does not seem to have helped. At least one Member (Croker) still "saw no necessity for the Bill". Leave to bring the Bill was given, but it went no further. BPD (Commons) 7 June 1832 col. 505.

[155] Letter of 13 April, 1833, from Bourke to Busby: BPP 1840 [238] pp. 4-6 Encl. No.1 in No.1.

[156] It may be worth noting here that in 1835, after the failure of the Residency to fulfil its initial promise became abundantly clear, Dandeson Coates of the CMS defended its continuation despite its flaws on the grounds that the Islands were of great "political importance ... [because] they constitute the Great Britain of the Southern Hemisphere", and were of "vast importance in reference to the commercial and political interests of this country". "Only let the present process be continued for a few years without interruption", he argued, "and the New Zealanders will be found occupying a distinguished place as an independent nation, fixed in its attachment to British interests, and a British connexion ....". (Letter of 29 Aug. 1835, in CO 209/1 pp. 361b-363b).

[157] In response to a question from Governor Gipps, before the Legislative Council in July 1840: "I was His Majesty's resident there: my duties were not well defined, but they were rather those of a political agent: I had no direct authority over British subjects" (*Sydney Herald* 6 July 1840 "Legislative Council").

> There is still another form in which the influence which it is hoped the British Resident may obtain over the New Zealand chiefs may be even more beneficially exhibited .... It is also possible, that at your suggestion, and by the aid of your counsels, some approach may be made by the natives towards a settled form of government, and that by the establishment of some system of jurisprudence among them their courts may be made to claim the cognizance of all crimes committed within their territory, and thus may the offending subjects, of whatever state, be brought to justice .... [158]

The Resident was expected to accomplish this

> by the skilful use of those powers which educated men possess over the wild or half-civilized savage, [through which] an influence may be gained by which the authority and strength of the New Zealand chiefs will be arrayed on the side of the Resident for the maintenance of tranquillity throughout the islands.

Busby would pursue these goals with considerable determination throughout most of his time as Resident.

54. In the best of all possible worlds James Busby would have been sent to New Zealand with an appointment as a magistrate, attended by a few junior officials such as constables, and supported by a small naval vessel and a company of soldiers. This would have been little enough for the tasks he was set, and if there was any consensus among the Britons familiar with the Islands at this time it was that a Resident would need both the legal authority and the means to enforce his decisions if the appointment was to have any practical benefit[159]. Although Busby lingered in New South Wales waiting for news that the South Seas Bill had been passed, Bourke finally sent him off to the Bay of Islands to do what he could with the 1828 Act, more or less on his own – freely admitting

> that this process, which is at best but a prolix and inconvenient operation, and may incur some considerable expense, will be totally useless unless you should have some well-founded expectation of securing the offender upon or after the arrival of the warrant [from Australia], and of being able to effect his conveyance here for trial, and that you have provided the necessary evidence to ensure his conviction.

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[158] Letter of 13 April, 1833, from Bourke to Busby: BPP 1840 [238] pp. 4-6 Encl. No.1 in No.1. This was written, it may be noted, *after* Busby had arrived in Sydney, and discussed his mission with the Governor. Glenelg would refer in October of 1835 to "the well framed and judicious Instructions, which you addressed to Mr. Busby [in 1833], which fully and clearly developed the views and wishes of His Majesty's Government"; HRA I Vol. XVIII pp. 170-174, Despatch #35/65 of 28 Oct. 1835, from Glenelg to Bourke.

[159] According to Busby he discussed this question with many people in Sydney early in 1833, and all of them "volunteered an opinion, that my proceeding to the Bay of Islands without a party of military, or a strong Civil force, would be attended with the most imminent personal danger": Letter of 19 March 1833 to CSNSW, in BDB pp. 23-25. At his first meeting with the Bay of Islands chiefs in May, when the King's message was read, "one or two" chiefs reportedly "observed that some of the New Zealanders were very wicked, and that I ought to have brought Soldiers for my protection": Despatch #5 of 17 May 1833, in BDB pp. 39-42.

According to Busby, the Governor told him in conversation that it would "be productive of little or no good" to send a Resident to New Zealand without the kind of powers embodied in the South Seas Bill, and to do so "would only tend to weaken my [Busby's] authority when it should arrive; as it would be very difficult for me to reestablish the same influence after my want of authority had once been discovered"[160]. Before his departure the Resident considered it prudent "to place upon record what means appear to me to be absolutely essential to the due fulfilment of the duties which the Home Govt. and the Public will expect from me", so that if such means were not (eventually) provided "it may not hereafter be imputed to me that I had originated, and embarked in an undertaking which had altogether failed to yield those advantages I had led H[is]. M[ajesty's]. Gov[ernmen]t to expect from it"[161].

55. It was and is sometimes claimed that Busby was accredited as Resident to the CMS missionaries, rather than to the Maori chiefs. This is not the case. He was indeed provided with "credentials" to the missionaries, but this term was obviously used by Bourke in the sense of letters of introduction[162]. On the other hand, the Resident was told that he was, at the first opportunity, to meet with the chiefs who had signed the 1831 petition to the King and present his reply. Busby was to announce

> your intention of remaining among them, and ... claim the protection and privileges which you will tell them are accorded in Europe and America to British subjects holding in foreign states situations similar to yours.

(He did exactly this in his first address to the chiefs of the Bay of Islands on 17 May 1833, in which he explained the role and status of a diplomatic representative[163]). Then

> If your proposal to reside, in an accredited character, in New Zealand, shall be received by the chiefs with ... satisfaction ... you will then confer with them as to the most convenient place for your residence, and will claim protection for the persons and property of yourself, family and servants.

For all practical purposes, the letter containing the King's reply to the chiefs was Busby's diplomatic credentials, which the chiefs were free to accept or reject. Anything more

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[160] Letter of 19 March 1833 to CSNSW: BDB pp. 23-25

[161] Letter of 27 March 1833 to CSNSW: BDB pp. 19-23. His attached "Remarks on the Force, either Military or Civil, that should be attached to him as Resident at New Zealand", can be found in Dixson DL N Ar/1.

[162] Letter of 13 April, 1833, from Bourke to Busby; BPP 1840 [238] pp. 4-6 Encl. No.1 in No.1. Busby noted in 1836 that he had "been specially accredited to the missionaries of the Church Missionary Society, and directed to consult with them" (Despatch #112 of 16 June 1837, in BPP 1840 [238] pp. 12-18 "C").

[163] Busby's address is reproduced in *Sydney Gazette* 2 July 1833 "New Zealand".

specific would have been considered inappropriate, given the absence of any formal organization among the chiefs, and it was doubtless considered impolitic to name or otherwise single out any individuals.

Busby in New Zealand

56. Busby arrived in New Zealand early in May of 1833. Even before his first meeting with the chiefs he began to speculate about the possibilities for creating a Maori government. "From all I have been able to learn", he wrote Governor Bourke in one of his first New Zealand despatches,

> it appears that there are in the Northern part of the Island from 25 to 30 Tribes of natives who are in every respect independent of each other and who exercise separately, and each without reference to the rest, all the functions of Sovereignty which their simple State of Society requires. [164]

Their leaders, he thought, had never even considered the possibility "of confederating for any national purpose", and it might well be very difficult to persuade any individual chief or tribe "to yield to the majority". Nonetheless, Busby had a plan to promote cooperation. Difficulties had recently arisen over the status of New Zealand-built ships trading with British possessions, one having been seized in Sydney in 1830 for entering a British port without a flag or Register (an official certificate detailing the origins, ownership and nationality of the vessel, required by British law). This posed a threat to trade, which could have serious implications for Maori as well as Europeans. A New Zealand flag recognised by the British Government would provide the basis for solving this problem.

57. Busby proposed that nothing be done about this issue until and unless the colonial Government received a request for a national flag from the chiefs as a group, thus establishing the principle they would only be acknowledged "in any transaction which might be considered of an international character *in their collective capacity only*" [emphasis added]. At the coming conference he intended to consult with "all the Chiefs who shall be acknowledged as Heads of Tribes", and would not provide certificates for New Zealand-built ships unless "two thirds of them shall have agreed upon a Flag and upon a petition to the King of England that their Flag shall be respected". He clearly considered the flag to be

[164] Despatch #3 of 13 May 1833, from Busby to CSNSW: BDB pp. 34-37. All of Busby's reports to the Governor were sent to the Colonial Secretary of New South Wales.

less important in itself than as "an opportunity of bringing the Chiefs to consent that they will henceforth act in a collective capacity in all future negotiations with me". The Resident saw many advantages "as likely to arise out of an established Government, of which *a Confederation of the Chiefs* may be considered the basis" [emphasis added].

58. Busby was well received by the twenty-two chiefs who assembled at Paihia on 17 May 1833. He read out the letter from the Colonial Minister containing the King's reply to the 1831 petition, and his own address, with Henry Williams translating[165]. Busby's proposals for a flag seem not to have been discussed with Maori at this meeting, but were approved by Bourke in November[166]. The flag design suggested by the Governor, though, was rejected by the missionaries (due to "the total absence of red, a color to which the New Zealanders are particularly partial and which they are accustomed to consider as a indicative of rank"), who provided three alternative patterns[167].

59. These were presented to the chiefs at a meeting held at Waitangi in March of 1834. "I have ... assembled the Chiefs", the Resident told them,

> that they may choose which Flag will be the Flag of New Zealand. The choice must be made by the principal Chiefs only. Some of them may desire one Flag. Some another Flag. Let every Chief judge for himself which is best, but the Flag which is chosen by the greatest Number will be the National Flag of New Zealand. No other than it will be acknowledged.

"Should it meet the King's approbation", he explained, "the ships which bear this Flag will not be seized, but will be received in to the Harbours of King William to trade"[168]. The chiefs then voted on the three designs, he reported, appearing "to have a perfect understanding of the nature of this proceeding". The flag "previously adopted by the Missionaries" for their ship won by a narrow margin, and this was "immediately hoisted on the Flagstaff ... [and] saluted with twenty one guns by the Ship of War" (HMS *Alligator*). It was his intention hereafter, Busby told the Governor, "to assemble the Chiefs periodically"[169]. He told the Colonial Office that

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[165] See *Sydney Gazette* 2 July 1833 "New Zealand", which copies both documents and describes the meeting. The letter and the Address were later translated into Maori, printed and circulated: see Parkinson & Griffith, *Books in Maori*, #20 p. 20.
[166] See Despatch of 9 Nov. 1833 from CSNSW to Busby: CO 209/1 pp. 223a-224a.
[167] Despatch #32 of 13 Jan. 1834 from Busby to Bourke: BDB pp. 85-87.
[168] Address by Busby, in CO 209/1 pp. 127b-128b.
[169] Despatch #38 of 22 March 1834: BDB p. 102-105. Until the approval of the King was received, Busby issued 'Temporary Certificates' to shipowners "without reference to the Chiefs": Despatch #45 of 8 Sept. 1834, in BDB p. 118.

> As this may be considered the first National Act of the New Zealand Chiefs it derives additional interest from that circumstance. I found it, as I had anticipated, a very happy occasion for treating with them in a collective capacity, and I trust it will prove the first step towards the formation of a permanent confederation of the Chiefs, which may prove the basis of civilized Institutions in this Country. [170]

He would later describe the approval given by the King for the flag as an acknowledgement by the Crown of "the Sovereignty of the Chiefs of New Zealand in their collective capacity"[171].

60. The Resident himself faced increasing difficulties during this period. An armed attack was made on his home by a number of Maori shortly after the flag was chosen, and he encountered many problems in fulfilling the role expected of him by the mercantile community. In May 1834 "His Britannic Majesty's Subjects in the Bay of Islands" drew up a petition stating that their "lives and property ... are not safe", and calling on the British Government to provide "the necessary protection for their lives and property". British investment, they claimed, was of such magnitude "as to require a British Force for its protection"[172]. The *Sydney Gazette* asserted at this time that the Resident had become "an absolute nullity on account of his incompetency to vindicate the interests or character of his nation from insult or degradation", and declared that "A strong military detachment must soon be stationed at the Bay of Islands, and fortifications be erected to provide against the probable chances that may result from the native wars", for:

> If the crown wishes New Zealand to continue [sic] as a part of the empire, where British industry and enterprise may flourish, it will secure the immunities and lives of its subjects; but if it cares not whether the country shall be abandoned, from despair of maintaining life and property safe, it will withhold that reasonable protection we have so often and earnestly recommended. [173]

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[170] Despatch of 3 April 1834 to Hay: Dixson DL N Ar/1 (Encl. in 18 April 1833 #39 to CSNSW).

[171] In his Address to British Subjects of 10 Oct. 1835, concerning De Thierry: CO 209/2 p. 94a. Approval for the flag was sent to Bourke in December of 1834: Despatch #34/3 of 31 Dec. 1834, in HRA XVII pp. 608-609.

[172] Petition of May 1834: CO 209/1 pp. 162b-163a. Busby's own opinion was essentially the same. See his letter to Capt. Lambert of 28 Oct. 1834: CO 209/1 pp. 251b-252b. In 1840 Governor Gipps put it to Busby that "The act of giving a flag [by Britain] would seem to be exercising an authority, not acknowledging an authority; did you ever hear of England giving a flag to any other country, and would not that be rather exercising a sovereignty than acknowledging a power[?]". Busby had to agree that it would, where "the nation reserved to itself a superiority as in the case of the [British protectorate] of the Ionian Islands", but thought that "The flag was saluted by a British man of war with twenty-one guns, which I believe is never done but to an independent flag, and which I look upon as a national act." (*Sydney Gazette* 6 July 1840 "Legislative Council").

[173] *Sydney Gazette* 21 Aug. 1834. Another commentator was of the opinion that "a sloop of war kept on the station, would be a much more effective magistrate than the present British resident, with his limited powers": *Hobart Town Courier* 19 Sept. 1834 "New Zealand". In September of 1834 HMS *Alligator* (a Royal Navy warship sent from Sydney by the Governor of New South Wales) successfully rescued several Europeans

Despite all his troubles, however, Busby remained confident that his efforts to organise the chiefs would eventually be successful, and would reap significant benefits for Britain.

61. In a long despatch written to Bourke in November 1834 (in relation to his efforts to secure restitution for the attack on his home[174]), Busby reminded the Governor that at present "there exists neither Government nor established order in any shape in New Zealand". Nonetheless, he stated:

> I can entertain no doubt whatever of being able eventually to obtain such an influence over the Chiefs as to secure to British Enterprise, both in the settlement of the Country & the prosecution of Trade, most of the advantages which would result from it being a direct dependency of the British Crown.

Maori were on "the very threshold of civilization" and he thought that "It is only necessary to acquire their confidence, in order to lead them to whatever changes in their social condition may best afford them the blessings of established Government, and impartial laws"[175]. Bourke was not confident that Busby could succeed in this undertaking, but neither did he recommend that he be replaced, or the Residency abolished[176]. Nor did Lord Glenelg (the new Colonial Minister) back in England. After reviewing the situation in October of 1835, Glenelg concluded that the fundamental reason that the Residency was not a success was its lack of judicial authority and military support – not any particular failing on Busby's part. He declined to order the dismissal of the incumbent Resident or the abolition of the Residency until another attempt was made to appeal to Parliament to provide the necessary powers, "the denial of which has in great measure served to render nugatory the appointment of Mr. Busby", and for the time being approved the expenditure of an additional £300 a year by the Resident "for the purpose of conciliating the Chiefs" [177].

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survivors held prisoner after their ship (the *Harriet*) was wrecked on the Taranaki coast, but in the process destroyed a pa by bombardment and killed a number of Maori. Although its Captain was later criticised by some for use of excessive force, this action was considered by others as proving that the presence of a British Resident in New Zealand was "a mere farce" unless he had an armed force at his disposal (*Sydney Gazette* 6 Dec. 1834).

[174] On the recommendation of Henry Williams, Busby persuaded the chiefs to approve of the confiscation of land from Rete, who had mounted the attack. This was in turn approved by the Executive Council of New South Wales on 27 Jan. 1835: CO 209/1 pp. 153b-157b.

[175] Despatch #48 of 28 Nov. 1834: BDB pp. 124-132.

[176] See Despatch #51 of 16 March 1835: BDB pp. 134-138. On the contrary, Bourke appointed Hokianga merchant Thomas McDonnell as "an additional British Resident at New Zealand" in 1834. Busby was not consulted, and was more than a little annoyed: see Despatch #61 of 7 Aug. 1835, in BDB pp. 168-174. He was particularly concerned that some of McDonnell's land claims would be disputed by Maori. McDonnell was nominally subordinate to the Resident, but in practice paid little attention to his orders and advice.

[177] Despatch #35/65 of 28 Oct. 1835 from Glenelg to Bourke: HRA XVIII pp. 170-174. Sir George Grey would comment in July of 1838 that Busby was retained in office "Probably from the consideration that it

62. Busby was well aware that his actions (and omissions) were under close scrutiny, and pressed on with his efforts to mould the chiefs into a functioning government. He was reluctant to take action, however, unless there was a clear prospect of success, for fear that failure would discourage all concerned. In September of 1835 the missionaries and settlers at the Bay of Islands were in agreement that the importation and sale of ardent spirits at the Bay should be banned, and wanted Busby's assistance in using local Maori to impose such a regime. They sought to devise some way to carry their proposed regulations into effect, Busby reported, and

> The means alluded to are of course the instrumentality of the natives Chiefs; and it was the evident wish of the deputation that I should agree at once to call upon them [Maori] to prevent by force the landing of spirits; and to seize and destroy any which might be found. Even the Rev. Mr. Williams seemed to think that this might be done without risking much either of violence or injustice to any one.

Busby thought that persuading the chiefs to ban the importation of spirits and to enforce such a prohibition would not be difficult, but nonetheless had declined to participate in such an exercise except on his own terms.

63. Maori, he suggested to Bourke, should not be allowed "to commence their first rude essays in the art of Gov[ernmen]t. in matters which have exclusive reference to British Subjects unless in direct cooperation in every case of a British authority", for

> Even in civilized countries, the Revenue or other Laws enacted for the prohibition or regulation of trade in particular commodities, require all the force of established order & immemorial usage as well as the most perfect discipline, and tried conduct in the functionaries employed to prevent their administration from being a frequent cause of evil and disorder; and it is to be feared that many years will elapse before so delicate a trust as the right to search or interfere with property can be safely conceded to the rival Chiefs of this Country, and their lawless followers.

If he was "invested with legal authority, and some means of enforcing it", as he "had expectations of being shortly", Busby promised the missionary deputation that he would take immediate steps against the liquor trade. For the time being, though, he had declined even to call a public meeting unless the Resolutions put to it had his approval in advance[178].

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would be impossible under present circumstances for any Officer to meet with success in that position.": Colonial Office Minute in CO 209/3 pp. 455b-456a.

[178] Despatch #65 of 10 Sept. 1835, from Busby to CSNSW: BDB pp. 178-183. He was criticised for this by many temperance advocates, including the editor of the *Hobart Town Courier* who commented, "What a glorious opportunity to distinguish himself as a man has he thrown away, and how will he be sunk in his

64. The next day the Resident sent an additional despatch to Bourke, this one marked "Private & Confidential"[179]. In it he pointed to "the proceedings referred in my Letter of yesterday's date", which illustrated

> the approaching necessity for placing the trade carried on by British Subjects at this place under such regulations, as the Native Chiefs themselves, are manifestly incompetent to enact or to maintain.

Busby considered that it would be "an undoubted assumption of authority" for the British Government "to frame and give effect to regulations for the conduct of trade in this Country", but justified such a proceeding as

> required by the necessity of the case, being even more necessary to protect the Native Chiefs from the consequences of a responsibility which in the present social and political condition it would be unjust to impose upon them; than to the well-being of the British Traders themselves.

It could also be done, he considered, "as much with the entire concurrence of the Natives, as for their real advantage".

65. What the Resident had in mind was a revised version of the plan which he proposed in 1831, of acquiring 'the property of the harbours' from Maori as a means of ensuring 'the reciprocal security of British subjects and the natives of New Zealand in their commercial intercourse'. He now suggested that the Crown

> purchase from the Native Chiefs, for a specific period a right and title to all dues or fees which are or might be exacted for the use of the Harbour for permission to water, or for any privileges or alleged privileges whatever. To be renewed by a similar purchase for a like period unless the natives should in the interim have established such a Gov[ernmen]t as could cause itself to be respected, and entitled to raise from this and other sources, the means of its support.

He thought that £500 would be sufficient for a 21-year lease of the Bay of Islands (plus Whangaroa and Maunganui), with similar sums being required for Hokianga and other ports. This treaty

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supineness, when the resolution is carried, as we doubt not it will be shortly, not only in New Zealand but in every other part of the rational and Christian world": *Hobart Town Courier* 5 Feb. 1836 "Sydney News – New Zealand". Busby was not pro-alcohol, by any means: in May of 1836 he told his brother Alex that "We have just established a temperance society here, of which of course I am President" (Letter of 9 May 1836 to Alex Busby, in AIML MS 46 F.1 pp. 51-54. See also *Sydney Gazette* 6 Aug. 1836 "New Zealand Temperance Society".

[179] Despatch #65/2 of 11 Sept. 1835 from Busby to CSNSW: BDB pp. 184-190.

> might include the exemption of British subjects settled here from all the exertions of power and authority on the part of the Natives unless exercised with the concurrence and under the direction of the British authority; and from the payment of any tax or impost of whatever nature during the period specified. It might also stipulate for the delivering up of all deserters from Ships, or escaped convicts – and for the active aid of the Chiefs in supporting the authority of the British Resident over British Subjects. It might provide for the security of the title to Land acquired by purchase from the natives after [illegible word] registration by the Resident on his being satisfied that the sale was effected by persons duly authorised.[180]

Busby was proposing that, as an interim measure before a proper Maori government was formed and in the continuing absence of a 'South Seas Bill', a treaty should be used as a mechanism to provide the British government with the ability to control its subjects and their trade. It was not a replacement for the development of a Maori government, but a temporary substitute for one – to be abandoned once the chiefs "established such a Gov[ernmen]t as could cause itself to be respected".

The Declaration of Independence, 1835

66. Busby was able to avert the imposition of an alcohol ban in the Bay of Islands (for the time being at least[181]), but was unable to influence events in the Hokianga. There, the 'Additional British Resident' Thomas McDonnell gave his support to a similar measure proposed by the missionaries and settlers. On 21 Sept. 1835 a public meeting involving Maori and settlers passed a set of resolutions banning "the importation and sale of ardent spirits in the River Hokianga", offenders being threatened with large fines. A "board" consisting of one chief and two settlers was appointed "to board and examine all vessels entering the Hokianga River, and to make their commanders acquainted with the Native Law against the importation of ardent spirits"[182]. The Hokianga settlers had thus done what Busby had stopped the Bay of Islands settlers from doing – employing "the instrumentality of the native Chiefs" for their own purposes. They had joined with the local chiefs, he told Bourke, to form "a Legislative authority competent to pass a Law interfering

[180] Managing all of this would require a larger establishment for the Resident, but the cost, Busby proposed, could easily be covered "by the levy of a small fee from each vessel clearing out from Sydney for New Zealand or entering thereupon".
[181] In October Busby received another request from the Bay settlers asking him to call a public meeting: Despatch #67 of 10 Oct. 1835, in BDB pp. 191-194.
[182] See *Sydney Herald* 19 Oct. 1835 "New Zealand".

with British property", and had taken steps to enforce it. This, he stated, was the exact opposite of his own proceedings in dealing with the alcohol question, which had been

> guided by the principle that no act should be recognised as of authority, on the part of the N.Z. Chiefs unless such should proceed from them in their collective capacity; and that in the execution of any Law which affected the persons or property of British Subjects, it is essential to relieve the Chiefs from a responsibility, the weight of which they are unqualified to judge of; and to limit their agency to the support which they may be called upon to give under the immediate direction and control of persons acting under British Legal authority; and responsible to the British Gov[ernmen]t. for its exercise. [183]

It was obvious which approach Busby considered to be the most advisable.

67. Governor Bourke would uphold McDonnell's actions rather than Busby's, and criticised the latter for (as the Resident put it) "inattention to my instructions in neglecting to lead the Chiefs step by step to a knowledge of the principles of Legislation and Gov[ernmen]t. by procuring them to enact Laws". The missionaries had also criticised him, he noted in his reply to Bourke in November, for "not having before this time established a Code of Native Laws, to repress the internal disorders which occasionally occur"[184]. Busby did not agree with either of them, and told the Governor so in no uncertain terms. The Hokianga law, and that proposed for the Bay, he claimed, simply would not work, and would cause more problems than they solved if the respect which Maori were gradually developing for "the sacredness of property" was undermined in the process.

68. "Until the Natives have acquired some knowledge of the nature and limits of Legal authority", Busby told Bourke,

> the enforcement by them of any law, which they may be induced to enact, will, in the majority of cases, be little better than authorised outrage, in which I humbly think it would be derogatory to a civilised nation to participate.

He considered this stance to be sound, and flatly refused to support the enactment of a law such as that passed in the Hokianga without "specified and detailed instructions" to do so[185]. "I see no way of keeping clear of these difficulties", the Resident told the Governor,

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[183] Despatch #67 of 10 Oct. 1835: BDB pp. 191-194.
[184] Despatch #73 of 30 Nov. 1835 from Busby to CSNSW: BDB pp. 211-219.
[185] Busby would later ask Bourke to send all of his correspondence relating to the alcohol issue and to McDonnell to the Colonial Minister: see Despatch of 30 Nov. 1835 #74 from Busby to CSNSW, in CO 209/2 pp. 121b-123a.

> but by a rigid adherence to the principles I have heretofore stated; and which I must over again maintain to be the only safe foundation upon which British interests in this Country can be established; or upon which the fabric of National laws and Institutions can be raised. These principles are, the recognition of only one authority, from which all Laws, and acts of Gov[ernmen]t must emanate in New Zealand. And the exemption of British subjects from the operation of all Native Laws except such as are enacted with the concurrence and exercised under the direction and control of the British Legal Authority.

In any case, Busby argued, simply enacting laws – as the Governor and missionaries urged him to do – would not serve any useful purpose in itself. "I cannot persuade myself", he wrote, "that Laws without authority to enforce them would be productive of any thing but contempt":

> If the mere drawing up, and promulgation of a code of Laws would have served the purposes of Legislation and Government I would have found little difficulty in this. The Age is fruitful in examples to have afforded me ample materials for choice; and the Chiefs are sufficiently docile to have joined in the promulgation of any Laws, or code of Laws which might be proposed to them.

"But the adaptation of Laws to the condition of the people is another affair", he concluded, "and it is still a more difficult problem to find the means of enforcing them".

69. It has been claimed that Busby engineered the passage of the Declaration of Independence in October of 1835 for the principal purpose of undercutting his rival Thomas McDonnell. There was much more to it than this. The Resident had been formulating his plans for a Maori government for several years, and had come to the conclusion that a single national authority was essential. The existence of *ad hoc* regional councils such as that implemented by McDonnell in the Hokianga and proposed for the Bay were likely to make it difficult to implement his scheme. The apparent threat posed by Baron De Thierry provided an opportunity to take action before such alternative governments could become entrenched, and "under circumstances well calculated to impress it upon the minds and hearts of the people". "The settlement of a foundation for future Legislation & Government", he explained to Bourke shortly afterwards, came "at an earlier period than I had intended", and he admitted that this new 'Confederation of United Chiefs' was a delicate instrument: "I cannot recommend any further experiments in legislation", he warned, "till they can be tried with better prospects of success"[186]. Nonetheless, as the

[186] Despatch #73 of 30 Nov. 1835 from Busby to CSNSW: BDB p. 211-219.

Governor was well aware, the Declaration and the Confederation were an experiment waiting to happen when De Thierry stepped once again onto the New Zealand scene.

70. We last encountered the Baron in the mid-1820s falling victim to creditors in London and offering to cede to France 'the sovereignty of the islands composing New Zealand" which supposedly had been offered to him by its chiefs. Since then he had been involved in a number of suspect ventures (including the proposed construction of a canal across the Panama Isthmus), but never lost sight of New Zealand. At one point he claimed to be "a Sovereign Chief" of the Islands by virtue of "the concession or grant of divers powers" in the early 1820s, and declared that

> a profound sentiment of friendship which exists between him and the powerful chiefs of New Zealand who visited England decided him [sic] to accede to their repeated requests that he should fulfill his promise of proceeding to that country to govern it as principal chief ... so that they might receive the blessings of civilisation and prosperity. [187]

By 1835 he had actually reached the south Pacific (declaring himself to be King of the island of Nuku Hiva in the Marquesas group along the way[188]). New Zealand was next on the Baron's agenda.

71. In September of 1835 he sent letters to Busby and the CMS missionaries, and issued an "Address to the White Residents of New Zealand"[189]. The most explicitly threatening of these documents was the letter sent to the missionaries, in which De Thierry declared that

> Invited by many native chiefs, Shungie [Hongi Hika] the foremost, and Sovereign Chief by purchase, I have declared the independence of New Zealand – that is, my own independence as Sovereign Chief, including all who may find it in their interest to benefit by it, and who may prefer wealth to poverty, honour to degradation, liberty to slavery, or happiness to misery. [190]

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[187] Undated pre-1835 document (originally in Spanish) by De Thierry, quoted in Raeside, *Sovereign Chief*, p.82.
[188] See Raeside, *Sovereign Chief*, pp. 93-95.
[189] For the letters see CO 209/6 pp. 344b-358a (to the Missionaries), and Dixson DL N Ar/1 #35/8737 enclosure (letter of 14 Sept. 1835 to Busby); and for the Address, H.H. Turton, *An Epitome of Official Documents relative to native affairs and land purchases in the North Island of New Zealand*, Vol. I (1883), pp 6-8.
[190] Letter of 14 Sept. 1835 from De Thierry to H. Williams, quoted in Raeside, *Sovereign Chief*, p. 111.

Governor Bourke pencilled in the margins of one of these letters, "This looks like insanity"[191], and reading them today is likely to generate a similar response. Mentally unbalanced or not, however, De Thierry definitely threatened to introduce a disruptive element into the unstable world of New Zealand tribal and settler politics. As has been noted, one of the principal fears entertained by the British Government over the preceding decade was that armed Europeans would take a hand in tribal wars, and place the British subjects in the Islands at risk. De Thierry explicitly claimed to have an armed entourage and armed ships at his disposal, and was proposing to set up a separate government and military force in New Zealand[192]. The people on the spot – Busby, McDonnell and the missionaries – did not think they could afford to ignore him. It is no wonder that the Resident was agitated, De Thierry's principal biographer has observed, for "It is only in hindsight that Busby has been made to look foolish"[193].

72. The Resident's immediate response was to issue his own Address to "His Britannic Majesty's Subjects who are residing or Trading in New Zealand"[194]. He commented on the aforementioned letters, referring to De Thierry's "alleged" purchases and his "alleged" invitation from certain chiefs, and warned British subjects "against turning a favourable ear to such insidious promises" as the Baron's offer of salaries to magistrates. King William, Busby believed, "after having acknowledged the Sovereignty of the Chiefs of New Zealand in their collective capacity, by the recognition of their Flag", would not permit "his Humble and Confiding Allies to be Deprived of their Independence upon such Pretensions". He called upon the King's subjects to make every possible effort to persuade Maori to resist De Thierry and his plan for "Usurping a Sovereignty over them", and declared that he himself would call the chiefs together "to Inform them of this proposed Attempt upon their Independence, and to advise them of what is Due to Themselves and to their Country".

73. In a despatch to Bourke written the same day, Busby informed the Governor that De Thierry planned to establish himself "as an Independent Sovereign in this

[191] Raeside, *Sovereign Chief*, p. 110.
[192] See Raeside, *Sovereign Chief*, p. 112. The letters both contained elaborate outlines of plans for governmental policies and practices. See also the fifteen "Articles of Agreement" attached to his Address (Turton, *An Epitome of Official Documents*, p. 8).
[193] Raeside, *Sovereign Chief*, p. 111.
[194] See CO 209/2 p. 94a for a printed copy of the Address of 10 Oct. 1835.

Country"[195]. While acknowledging that his first impression was that the Baron's letter "was the production of a madman", on reflection the Resident had concluded that "there appeared to be sufficient method in the madness ... to be productive of much mischief" if De Thierry managed to find the means to support his venture. Busby had therefore decided to call a meeting of chiefs as soon as possible

> in order that they may declare the Independence of their Country, and assert as a collective body their entire and exclusive right to its Sovereignty; and their determination to maintain that right in its integrity [sic]; and treat as a public enemy any person who professes to assume a right of Sovereignty within their Territories; and especially to warn ... [De Thierry] against approaching their shores, on pain of being treated as Independent States have a right to treat persons who attempt the usurpation of Sovereign rights within their borders. [196]

He also expected that the Chiefs would 'induce' him "to apply to H[is]. M[ajesty]. so far to take them under his protection, as to guarantee their Country against the intrusion of such adventurers". De Thierry would then be warned that, after all of this, any effort to assume the sovereignty of New Zealand would be "madness", and at best would only last "as long as it would be necessary for the British Gov[ernmen]t. to be apprised of his proceedings".

74. The proposed meeting took place at Waitangi (Busby's residence) on 28 Oct. 1835[197]. In attendance, he reported to the Governor, were "35 Chiefs and leading men who formed, in the opinion of the Revd. Mr. Williams, a fair representation of the population of the Country from the North Cape, Southward to the River Thames"[198]. Busby ascertained from the chiefs that De Thierry's claims "to the property and sovereignty of a large tract of land" at the Hokianga were rather dubious, and found that they "were perfectly unanimous in asserting their determination not to permit the landing of the Baron de Thierry or to submit to his Government". He then

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[195] Despatch #68 of 10 Oct. 1835, from Busby to CSNSW: BDB pp. 194-198.

[196] No. 5 of the "Articles of Agreement" attached to De Thierry's Address (Turton, , *An Epitome of Official Documents,* p. 8) stated that "No native tribe or government, or foreign State or Power, shall exercise jurisdiction within the limits of the Baron de Thierry's territory".

[197] Despatch #69 of 31 Oct. 1835, from Busby to the CSNSW: BDB pp. 198-206. Another copy can be seen in the Colonial Office records: CO 209/2 pp.95b-101a. Busby referred to the meeting here and elsewhere as having been held on the *29* th of October, which definitely was not the case.

[198] A note by Busby on the official English translation of the Declaration described the signatories as "35 Hereditary Chiefs and Heads of Tribes, which form a fair representation of the Tribes of New Zealand, from the North Cape to the Latitude of the River Thames": See enclosure in Despatch #69 of 31 October 1835, from Busby to CSNSW; Dixson DL N Ar/1 #36/81.

> addressed them on the great importance of laying aside their petty jealousies and contentions, which exposed them to the inroads of any adventurer who might make an attempt upon their Country, and exhorted them to unite as one man in its defence.

At this point the Resident introduced "a Declaration of the Independence of New Zealand, which I drew up for the Chiefs"[199].

75. This document was described by Busby it in a private letter as "the Magna Charta of New Zealand Independence"[200]. Both the Maori-language text and its 'official' English translation are copied in Appendix 1, below. In the latter, "the Hereditary Chiefs and Heads of the Tribes of the Northern parts of New Zealand" unanimously declared

> the Independence of our Country: which is hereby constituted and declared to be an Independent State, under the designation of "The United Tribes of New Zealand".

The second article declared that:

> All Sovereign power and Authority within the Territories of the United Tribes of New Zealand ... reside[s] entirely and exclusively, in the Hereditary Chiefs and Heads of Tribes in their Collective Capacity: who also declare that they will not permit any Legislative Authority separate from themselves in their Collective Capacity to exist, nor any function of Government to be exercised within the said Territories, unless by persons appointed by them and acting under the Authority of Laws regularly enacted by them in Congress assembled.

(Article 2 meant, among other things, that the Hokianga council would have no authority to take any action against the liquor trade). These "Chiefs and Heads of Tribes" undertook to "meet in Congress" annually at Waitangi to make laws "for the dispensation of Justice, the preservation of peace and good order, and the regulation of Trade", and invited the southern tribes to join them. In the fourth and final article the chiefs also agreed to send the Declaration to King William IV, and entreated him "that he will continue to be the parent of their infant State, and that He will become its protector from all attempts upon its Independence". Busby later stated that both "The sentiment and the language" in the latter

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[199] Busby commented in March of 1836 that "The Declaration of Independence, was transmitted to the Revd. Henry Williams to be translated, with a request that he and his colleagues would offer any suggestions for its improvement which might occur to them, but no suggestion was offered, nor had I any reason to doubt that the declaration was entirely approved by all the Missionaries who had an opportunity of examining it": Despatch #91 of 16 March 1836, from Busby to the Colonial Secretary of New South Wales; CO 209/2 pp.210b-214a. This would appear to mean that the Declaration was drafted in English and translated into Maori before the meeting of 28 Oct. 1835.

[200] To his brother Alexander, on 10 Dec. 1835: AIML MS 46 f.1 (typescripts) pp. 48-50. Emphasis in original.

article of the Declaration came from the Chiefs themselves[201]. He had earlier predicted, of course, that they would ask him to apply to the King for protection on their behalf.

76. The Declaration, the Resident told Bourke, "was unanimously agreed to" by the 35 chiefs, "after a considerable time spent in explaining it, both by myself and the Missionaries". Although two other accounts of the meeting written by Busby are essentially similar to his contemporary report, both provide additional information about what was said at Waitangi in 1835. A year later, in a draft of letter to the Earl of Haddington[202], he related that in 1835

> I assembled the Chiefs[,] explained to them the nature of the attempt which was proposed to be made upon their country, and advised them to publish a declaration of their Independence. I drew up for them articles of Confederation constitution & declaring New Zealand to be an Independent State under the designation of the United Tribes of New Zealand and that the Sovereignty [was] to render entirely & exclusively in the Hereditary Chiefs & Heads of Tribes in their collective capacity .... The object of this was chiefly to prevent the establishment of any separate authority on legitimate grounds which could not fail if established by any person not a British subject to occasion great embarrassment and mischief. The Chiefs had, however sagacity enough to see that any resolutions they might agree to or laws they might enact would lend nothing to the establishment of order amongst them. They rightly observed that though eleven of their number should regulate their conduct by the law if the 12th. were disposed to break it, they had no resource left but to let crime go unpunished or to levy war Tribe against Tribe as at present.

In unpublished reminiscences about his time as Resident (probably written in the 1860s) Busby recalled that he sought to explain to the Chiefs[203]

> how the jealousies and rivalries existing amongst them exposed them to the inroads of any adventurer who might attempt to make their Country the theatre of his ambitious projects, and the importance of uniting for their external safety and internal government. The weakness of each tribe, while they continued separate, and the strength which would result from their union, were illustrated by the old Roman emblem of the fasces, which was provided for the occasion.

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[201] Despatch #112 of 16 June 1837 from J. Busby to CSNSW: BPP 1840 [238], Enclosure "C" p. 18. How this could have been the case if the Declaration was prepared before the meeting (see above) is not readily apparent. It would imply that a clause in Maori was drawn up or revised in the course of the meeting, and a translation of it added to the English version. None of the few accounts available suggest that such changes were made.

[202] Draft letter of 28 October, 1836, from Busby to the Earl of Haddington; AIML MS 46 (J. Busby Papers) Folder #4, "Official Letters to various people, 1833-1870" (typed transcripts), pp. 55-59.

[203] J. Busby, "The Occupation of New Zealand 1833-1843"; AIML MS 46 (J. Busby Papers) Folder #1, Undated Ms. (Typed transcript), pp. 24-25.

> After much discussion, and after many explanations had been required and given, Articles of Confederation and a declaration of Independence were unanimously agreed upon ....
>
> .... it was fully explained that each chief had relinquished his power, and that the congress of chiefs ... would review the conduct of each Chief against whom their might be grounds of complaint. There were not wanting, however, amongst the Chiefs, some who had sagacity enough to perceive that something more was necessary than the abstract assertion of the rights of a Government and the recognition of the parties in whom those rights vested. "It was very well" they said, "for such of them as were well disposed, – but how were those to be managed who were disposed to rebel? such persons would pay no attention to the laws enacted by the Chiefs and who was to compel them?"

The last was a very good question.

77. Governor Bourke, it later transpired, was quite happy with the Declaration of Independence, in most respects. In February of 1836 the Executive Council of New South Wales conveyed its approval of the Declaration as marking "an approach towards a regular form of Government in New Zealand", and congratulated Busby personally for having "availed yourself of excitement apparently created by the communications from the Baron de Thierry to obtain that Declaration"[204]. The Council did object, however, to the last half of the second article, which declared that the chiefs would permit no "Legislative Authority separate from themselves in their Collective Capacity" to exist "nor any function of Government to be exercised" without their permission, which seemed to the Council to have been "pointed to, and intended to subvert" McDonnell's anti-liquor law. This material, they stated, should have been submitted to the Executive Council for approval before being put to the chiefs[205].

78. Governor Bourke later told the Colonial Minister that

> I should have had no occasion to speak in other terms than those of commendation of the part Mr. Busby took in these transactions had he not unhappily mixed up with the Declaration of Independence a matter wholly unconnected with the protection of the Islands from foreign usurpation ... [206]

He went on to describe Busby's actions in terms which leave little doubt that he considered them to have been deliberately subversive. This, in my opinion, was not the case. Busby's

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[204] Despatch of 12 Feb. 1836 from CSNSW to Busby: CO 209/2 pp. 16b-19a.
[205] The Council also stated that the article was not shown in advance to the missionaries, although if Busby's claim that the Declaration was translated by Williams beforehand is correct this complaint was unfounded.
[206] Despatch of 16 March 1836 from Bourke to Colonial Minister: CO 209/2 pp. 10b-16a.

response to the charge was unequivocal. He stated flatly that the portion of the second article referred to was not intended "to subvert the Local law previously passed at Hokianga", but rather was aimed at De Thierry's stated intention to set up his own government within the territory he claimed, and clearly was in line with his own oft-stated intention of "acknowledging no authority in the Chiefs otherwise than in their collective capacity". As for McDonnell,

> I consider what has been dignified with the name of a Law, as a nullity from the commencement – the enactment of a Law necessarily implies the existence of a Legislature and a Gov[ernmen]t no approach to which did then exist, nor does now at Hokianga.

All of this rings quite true, as do most of the explanations which he gave in response to the Council's complaints[207].

A Protectorate?

79. Busby now had his Maori Government, on paper at least. The Declaration of Independence, he told Bourke,

> settles the basis of a Gov[ernmen]t for the Country upon the principle which I so strongly urged in my communication recommending that the Chiefs should be induced to adopt a National Flag – viz. that the power of a Gov[ernmen]t should be vested exclusively in the Chiefs of Tribes in their Collective capacity ... This I conceive to be the form of Gov[ernmen]t which naturally springs from the actual condition of the people. [208]

He also considered it to be the only alternative, other than a takeover of the country by a European power, "which ... is at all likely to promote the improvement of the people themselves; or to afford any degree of safety to British subjects". Busby believed that the actions which he had taken "were perfectly accordant with my instructions", and followed logically from those relating to the introduction of the flag in 1834. He was also fairly certain that the chiefs could

> be led to enact, and to aid by their influence & power, the enforcement of whatever Laws the British Gov[ernmen]t might determine to be most advantageous to the

[207] Despatch #91 of 16 March 1836 from Busby to CSNSW: CO 209/2 pp. 212b-214a. (The copy of this document in the BDB is incomplete).
[208] Despatch #69 of 31 Oct. 1835, from Busby to the CSNSW: BDB pp. 198-206.

> Country; were their execution supported by a Military Force just sufficient to enforce them against individuals.

The new Maori Government would be guided by British advice, in other words, and its authority would need to be underwritten by British troops. "The establishment of the Independence of the Country under the protection of the British Gov[ernmen]t.", Busby concluded, "would be the most effectual mode of making the Country a dependency of the British Empire in every thing but name".

80. The Resident was less prolix in his report to the Colonial Minister[209]. "The chiefs of the northern parts of New Zealand", he stated without elaboration, had declared the independence of their country and the uniting of their tribes into "one State, under the designation of 'The United Tribes of New Zealand'", and entreated the King to "continue to be the parent of their infant State, and ... become its protector from all attempts on its independence".

81. From the signing of the Declaration onwards, Busby's focus shifted onto the task of setting up a Protectorate in New Zealand – a government made up of Maori chiefs, guided by British example and advice. His first concern was the practical matter of accommodation for his Congress. Barely was the ink dry on his despatch to London that he was writing to Sydney to ask for funds for the construction of a "House of Assembly" to accommodate chiefs travelling to the Bay of Islands for meetings of the Congress, and to house the sessions themselves. The idea, said Busby, had been raised by Henry Williams before the Declaration meeting, and when proposing to the chiefs that the Congress should meet periodically Busby had promised that he would ask Bourke for financial assistance[210]. It may also have been around this time that he began to draft a constitution for the United Tribes.

82. In one of the earliest histories of New Zealand, published in 1859, Dr. A.S. Thomson provided a summary "Condensed from a parchment document in the Native Secretary's office, New Zealand" of a constitution said to have been adopted by the United

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[209] Despatch of 2 Nov. 1835 from Busby to Hay: Turton, *An Epitome of Official Documents*,Vol. I Part I pp. 8-9 No. 5. A copy of Busby's despatch to Bourke was sent by the Governor to the Colonial Office.
[210] Despatch #70 of 3 Nov. 1835 from Busby to CSNSW: BDB pp. 206-208

Tribes[211]. He stated that "The United Tribes of New Zealand in congress assembled approved of the following constitution":

- All sovereign power and authority within the New Zealand islands, was to reside in the hereditary chiefs and heads of tribes in their collective capacity.
- A provisional government was to be established, which was to be presided over by the British resident, and one half of the council were to be aboriginal inhabitants.
- Justice was to be administered by European and native judges, and English and native laws were to be amalgamated. An ecclesiastical establishment was to be supported from funds derived from the sale of lands. Financial arrangements were to be vested in congress, but a money advance was to be obtained from the British Government. A military force of Europeans and natives was to be maintained for protection and obedience.
- Lands not occupied by natives, or sold to Europeans, were to be declared, by a resolution of congress, public property.
- New Zealand was to be divided into districts, to be presided over by a chief and a European high sheriff. Towns with a thousand inhabitants were to have charters. The country was to be divided into counties with charters, to be managed by councils composed of Europeans and natives elected by the people.
- This provisional government was to continue in force twenty-one years; afterwards, each incorporated county and town was to send deputies to form a House of Assembly, to make laws for the future government of New Zealand. [212]

The original "parchment" has not been located, and in all probability no longer exists. In his letter of October 1836 to the Earl of Haddington, Busby made passing reference to having drawn up "articles of Confederation [and a] constitution" for the assembled chiefs[213]. He was probably referring here to the Declaration itself, however, and there is nothing to indicate that a 'constitution' was included in the documentation sent to New South Wales or

[211] A.S. Thomson, *The Story of New Zealand* Vol. 1 (1859), pp. 276-278. If this 'parchment document' bore a date, Thomson does not make reference to it. Sherrin, *Early History,* p. 462 gives a very similar description of the proposed provisional government, but this is probably a paraphrase of Thomson rather than an independent description of the same original document. See also Ch. IV, below, which comments on the similarities between this 'constitution' and a plan put forward by Robert Torrens in 1838.

[212] The original is a solid block of text, which I have reformatted for ease of reading and clarity.

[213] Quoted above, from Draft letter of 28 October, 1836, from J. Busby to Earl of Haddington; AIML MS 46 (J. Busby Papers) Folder #4, "Official Letters to various people, 1833-1870" (typed transcripts), pp. 55-59.

the Colonial Office in 1835-36 – and since the Confederation never actually met "in congress assembled", there was no opportunity for anything of this nature to be "approved" by this body. It seems fairly certain that what Thomson saw was actually a set of notes or a draft compiled by Busby, which was included among the official papers which he handed over to Hobson in 1840[214].

83. Thomson's summary of this material suggests that Busby intended to vest the actual operation of the United Tribes' government in an executive council. This was to be presided over by the Resident – who would have have become, for all practical purposes, the Lieutenant-Governor of the country, under the Governor of New South Wales – and half of its members were to be Europeans. Half of the judiciary was also to be European, as was the military and the local governments. The initial funding required to set up this 'provisional government' was to come from Britain. The reference to the nationalization of unoccupied Maori lands (a measure to which, one can be fairly certain, no Maori chief would ever have assented to) suggests that Busby intended to finance his government in the long term through revenue from the sale of lands for European settlement. The Resident himself, of course, had formerly been a member of the New South Wales Land Board – the body in charge of managing and selling the 'waste lands of the Crown' in that Colony – so this would have been an obvious model for him to adopt.

84. Busby went into greater detail concerning his ideas about a Protectorate in January of 1836[215]. A conflict over the sale of land to Europeans, which the Resident had been called upon to arbitrate, escalated into open warfare when one party (possibly incited by the Europeans involved) attacked the other at a meeting held at the Resident's house at Waitangi on 12 January, and several people were killed and wounded. The Resident was, he told Bourke, unwilling to mobilize "the confederated Chiefs" to punish the offenders; firstly, because "the duties which fall upon the confederated Chiefs, by their late act of union ... to them exist as yet only in theory", and secondly, because (in the absence of any armed force at the disposal of the United Tribes) those chiefs who supported him would be "exposed without protection to the violence of that party of their own Countrymen" (having given up "to the cause of religion and civilization, the defences of the Savage"). Europeans

[214] In February of 1840 Busby sent Hobson "an Inventory of the Official Documents and Books now in ,,, [his] Possession", but the Inventory itself is not extant: letter of 17 Feb, 1840 from G. Cooper to Busby, in ANZ IA 4/1 p. 2 No. 3. Busby handed the original Declaration of Independence to Hobson on 19 February 1840 (ANZ IA 4/1 p. 4 No.7).

[215] Despatch #84 of 18 Jan. 1836 from Busby to Bourke: BDB pp. 233-249.

settlers and families were also lacking any protection against the retaliation which might well result from "a war ... having its origin in British Interests and ... British interference".

85. Busby thought this incident would surely convince the Governor that

> some effectual interference on the part of the British Govt. for the protection of the well disposed Inhabitants of this Country, whether natives or British Subjects, can no longer be deferred.

He argued that "this insult upon the British Gov[ernmen]t."

> should be taken up as a National question;– that the Tribe from which it proceeded should be thoroughly humbled, and the persons who fired the Shots which took effect brought to that punishment which is authorised by the Laws of God and man for the crime of murder.

The necessity for intervention, he argued in a follow-up report, was "evident and inevitable", being "required not less by the National honour, and the National interests [of Britain]; than by justice and humanity" [216]. New Zealand could not be restored to "the same situation in which it would have stood had its shores still been unvisited by the missionary and the Traders", he pointed out, nor could the British Government retract the offers of protection it had made to the chiefs. The country, Busby argued,

> has become essentially British in all its interests and British Subjects have acquired an extensive property in its soil. The ruling influence throughout is British; and the question is nothing less than whether the Gov[ernmen]t will yield up the Country to the evil ascendancy of its own unprincipled subjects; or interpose the protection of Law and Gov[ernmen]t in favor of the peaceable and well disposed inhabitants whether Native or Europeans.

This required active intervention.

86. The leading chiefs in the north, the Resident thought, had confidence in the British Government and would willingly "yield up the Gov[ernmen]t. of their Country to those who are more fitted to conduct it", but outright annexation was neither necessary nor desirable:

> I submit for the consideration of H[is]. M[ajesty's]. Gov[ernmen]t whether the Islands of New Zealand might not be received under the protection of H[is]. M[ajesty] on the same principle as that upon which the Ionian Islands are constituted an Independent State in all things which pertain to the real advantage of the

[216] Despatch #85 of 26 Jan. 1836 from Busby to Bourke: BDB p. 249-258.

> Inhabitants, in giving them such a share in the Gov[ernmen]t of the Country as is consistent with its welfare; but reserving the ultimate authority for that power which affords that protection its weakness requires.

(He was referring here to the seven Ionian Islands, which lie along the western coasts of present-day Greece and Albania. These islands, captured and occupied by Britain during the Napoleonic wars, were by a treaty signed in 1815 between Britain, Russia and Turkey declared to be "a single, free, and independent state" named "the United States of the Ionian Islands". Under a Constitutional Charter drawn up in 1817 the British Crown was recognised as the republic's "Sovereign Protector". A resident Lord High Commissioner oversaw the government of the Islands, and Britain provided for its defence and controlled its trade and foreign policies[217]).

87. Busby reminded Bourke of his 1833 proposal that the Crown "establish in this Country a system of Gov[ernmen]t supported by Military Force", the system being based upon "the instrumentality of the Chiefs, and Heads of Tribes". He believed that one hundred British soldiers and a small warship "would effectually accomplish the desired object" without generating any significant opposition from dissident Maori[218]. The Resident would later suggest that anyone who opposed a British military intervention "be considered enemies of the King; and that their Lands would be confiscated to him as an indemnity for the expense of the expedition", and raised his estimate of the force required to include "two or three field pieces, and a few Congreve rockets" plus additional troops[219].

88. The Governor was anything but receptive to such suggestions. Busby deplored this attitude, and warned Bourke in March that

> Every day that passes and every event that occurs, makes me dread that an arrangement beneficial at once to the Natives, and to Great Britain may be rendered more difficult, if not altogether impracticable by the intervention of Foreign Interests.

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[217] R. Montgomery Martin's *History of the British Colonies. Vol. V Possessions in Europe* (1835), examines the history and government of the Ionian Protectorate in considerable detail. The author comments at p. 550 that "with reference to the Ionian Islands, it is a burlesque terming them a 'Republic' under the protection of Great Britain, when it is considered that the Lord High Commissioner, with his almost supreme power, is nominated by the Colonial Secretary". Busby may have thought that this would be a practical model for New Zealand, but it should be noted that the states which were united in the Ionian Islands Protectorate were not tribal entities, but functioning European-style polities with established systems for law and government.

[218] Despatch #85 of 26 Jan. 1836 from Busby to Bourke: BDB pp. 249-258.

[219] Despatch #86 of 20 Feb. 1836: BDB pp. 259-266. Congreve rockets, although notoriously inaccurate, were cutting-edge British military technology in the early 19th century, supplying the 'red glare' immortalized in the American national anthem in the course of a British attack on Washington in 1814. They would later be used in New Zealand during the wars of the 1840s, with limited effect.

He suggested as a stopgap that the Confederation should be extended, as a means of keeping out "all Foreign interference of a political character"[220]. For this purpose the Resident asked permission to undertake "an extensive journey to the Southward", preferably aboard a naval vessel:

> I might ... by her means visit in a short time almost every Tribe of influence on the Coast, and by obtaining their adherence to the Confederation make it impossible for any person to establish a political power in any part of the Island upon a Legislative basis. [221]

Permission to do so was given, but it did not reach New Zealand before winter weather made travel difficult[222].

89. Moreover, Busby had by then decided to take a different approach. Around the beginning of May he concluded that the best course, in light of what he (and many others) saw as the steadily-deteriorating situation in New Zealand, was to go to Britain himself. His intention, the Resident told the CMS Missionaries, was to point out to the Colonial Office "the inefficiency of my appointment as at present constituted", and the consequences of Bourke's failure "to propose or desire any change in my situation"[223]. They were more than happy to support his proposal "to lay before the Home Government the precarious state of this Country", being themselves in the process of preparing a petition along similar lines, and seeing no prospect whatsoever "of an improvement under the

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[220] Busby was criticised for treating the Declaration as if it applied to areas outside of those controlled by the signatory chiefs. This does not suggest that the Governor and Council read the Declaration itself very carefully. Busby commented that "It was certainly intended that the Confederation should be ultimately inclusive of every Tribe in the New Zealand Groupe ... but while all other Tribes are invited to join the Confederation of the United Tribes, the Confederated Chiefs do not assert any right of interference with any Tribe which has not actually become a member of the Union". See Despatch #89 of 12 March 1836 to CSNSW, in BDB pp. 269-273.

[221] Despatch #89 of 12 March 1836 to CSNSW, in BDB pp. 269-273. De Thierry had sent another letter to the missionaries, and Busby feared that in the present state of unrest and warfare he might be able to gain a foothold outside of the Hokianga: "There are other places also besides the Bay of Islands where not only territorial rights, but immense tracts of Country might be purchased for an amount of property so small as to be within almost any person[']s reach. And such political and territorial rights if possessed by any other than a subject of H[is] M[ajesty] could not fail to occasion great embarrassment when the settlement of affairs in this Country shall, as I am persuaded it must eventually take place, by the direct intervention of the British Gov[ernmen]t".

[222] Busby observed that "the Rivers and Swamps [have] become impassable": Despatch #97 of 18 June 1836, from Busby to CSNSW, in CO 209/2 pp. 248b-250a.

[223] "Memorandum for the Missionaries of the Church Missionary Society" of 11 May 1836: Dixson DL N Ar/1 #36/5584 (enclosure in Despatch #95 of 18 May 1835).

present system, on account of the inefficiency of the power possessed by the British Resident"[224].

90. Soon afterwards Busby asked Governor Bourke for permission to go to England in the near future, in order to "bring the state of this Country before H[is]. M[ajesty's]. Gov[ernmen]t."[225]. Recent events in New Zealand, he stated, had "filled me with alarm and apprehension":

> I have now for three years struggled with the difficulties of my situation consoling myself with the hope that the important matters which I was from time to time bringing under H[is] E[xcellency']s notice could not fail at length to force upon the Governor's mind the conviction that the time was come when it had ceased to be a question of expediency and had become a positive duty on the part of the British Government to extend its parental protection to this Country.

Both the growing interests of British subjects in the Islands and "the situation of the natives", he thought, made it obvious "that the time had long since arrived when the necessity for a change must have been obvious". Such were the magnitude of his problems, the Resident stated, that "I ... consider my office to be <u>in fact</u> in abeyance", and

> that altho the British Resident could not be withdrawn without extreme danger, if not of certain destruction to the mercantile Establishments here, that these reasons make it necessary & proper that the office should be considered & understood to be in abeyance until the final determination of H[is]. M[ajesty]. shall be ascertained.

Armed British intervention "for the maintenance of peace and good order"[226] and the creation of a Protectorate was the "arrangement" which he hoped to persuade the Government to adopt[227] –

> an arrangement originated, not by any desire for the aggrandisement of Great Britain, or the extension of its Territory, but by the higher claims of humanity and justice – An arrangement for preserving an infant nation in the full enjoyment of its natural rights, and protecting its simple members from the encroachments of men who exercise over them the powers of knowledge over ignorance ....

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[224] "Reply of the Missionaries of the Church Missionary Society ..." of 13 May 1836: Dixson DL N Ar/1 #36/5584 (enclosure in Despatch #95 of 18 May 1835). They proposed that a committee of missionaries stand in for Busby during his absence.
[224] "Reply of the Missionaries of the Church Missionary Society ..." of 13 May 1836: Dixson DL N Ar/1 (enclosure in 18 May 1835).
[225] Despatch #95 of 18 May 1836: BDB pp. 290-299.
[226] Busby stated that the missionaries were "prepared to bear evidence to the willingness of most of the Chiefs, and the earnest desire of many of them that a British Force should be employed for the maintenance of peace and good order".
[227] He referred here to his Despatch #85 of 26 Jan. 1836 (discussed above) in which he detailed his plans for "a system of Gov[ernmen]t supported by Military Force".

He suggested that his own brother, or a "Commission" of missionaries be placed in temporary charge of the Residency, and that his house remain occupied "to convince the natives that the British Resident is not withdrawn, but only absent for a time". Busby hoped that in Britain a Select Committee would be appointed by Parliament

> to consider what Measures ought to be adopted with regard to the Native Inhabitants of Countries where British Settlements are made, and to the neighbouring Tribes, in order to secure to them the due observance of Justice, and the protection of their Rights; to promote the spread of Civilization among them; and to lead them to the peaceful and voluntary reception of the Christian Religion.

91. The Governor ignored Busby's request, or at least decided not to respond to it. A month later the Resident prodded him again[228]. "I would most earnestly deprecate any hindrance to my proceeding to England", he wrote

> From whence should H[is] E[xcellency] be pleased to favor my views I would entertain little doubt of returning with full powers to negotiate such a treaty with the chiefs as would prove the basis of a Government capable of maintaining peace and good order, and of affording full protection both to H[is]. M[ajesty's] Subjects and to the Natives.

Nothing came of these pleas – Bourke continued to ignore them – but the Resident was for a time encouraged by news that the Colonial Office planned to submit a new South Seas Bill to Parliament, and by the appointment of a Select Committee to consider "the treatment of Aborigines of countries where the British have Settlements"[229]. "These affairs" he told his brother Alex in September 1836, "would give a new aspect to any question connected with New Zealand" – although Busby was not entirely confident that the Whig government would do "what is now necessary", or certain that an Act of Parliament such as that proposed would improve his own situation[230]. Petitions from British subjects in the Bay of Islands and the Hokianga point to a growing consensus that nothing short of direct intervention by Great Britain would serve any useful purpose[231]. When news arrived that

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[228] Despatch #97 of 18 June 1836: BDB pp. 304-307.
[229] Discussed below, Ch. IV.
[230] Letter of 9 Sept, 1836, from James to Alexander Busby: AIML MS 46 Folder #1 pp. 57-59. "Had I come down here at first with such a degree of authority as the former bill proposed to give me, we might have gone on for several years to come, But such a measure would be too late to be effectual now".
[231] See Petition of Oct 1836 in CO 209/2 pp. 324b-325a, and *Sydney Herald* 19 Jan. 1837 "New Zealand". See also Busby's Despatch #107 of 30 Jan. 1837 to Bourke: BDB pp. 315-324

efforts to put through a new South Seas Bill had been abandoned, the Resident actually "rejoiced to find this, for it would pave the way for my suggestions"[232].

92. On receipt of the English translation of the Declaration of Independence, the Colonial Minister told the Governor of New South Wales that

> With reference to the desire which the Chiefs have expressed on this occasion to maintain a good understanding with His Majesty's Subjects, it will be proper that they should be assured in His Majesty's name, that He will not fail to avail Himself of every opportunity of shewing His good will, and of affording to those Chiefs such support and protection as may be consistent with a due regard to the just rights of others and to the interests of His Majesty's subjects.

This message was passed on to Busby[233]. In January of 1836 he had reported that the Congress of the United Tribes could not be assembled for, due to intertribal disputes,

> it is probable that most of those who are disposed to peace would decline to attend; and that amongst those who should be present the agitation of the question for which they were brought together would lead to a repetition of the late outrage on a more extended scale. [234]

When the message concerning the Declaration arrived in 1837, the situation had not changed. Busby could only express his "extreme regret"

> that in the present disturbed state of the Country, it would be impossible to bring together even one half of the Chiefs for the purpose of communicating to them His Majesty's message, and that the best disposed of them and those whose friendship it is most essential to conciliate would be the most unwilling to assemble. [235]

He feared (as in 1836) that such an assembly would actually touch off further inter-tribal fighting, and therefore

> thought it necessary to defer making the nature of your communication known [to the Chiefs] until I shall have received further Instructions from His Excellency [the Governor] upon the subject.

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[232] Letter of 4 Nov. 1836 to Alexander Busby: AIML MS 46 Folder #1pp. 63-65. He received the news from his patron the Earl of Haddington. Lord Glenelg informed Bourke of the abandonment of the Bill – supposedly temporary – in his Despatch #36/198 of 26 Aug. 1836: HRA XVIII p. 506. The Colonial Minister hoped that a statute relating to the Cape of Good Hope recently passed would provide a precedent for similar legislation allowing the application of British law outside of British dominions in the South Seas (see 6-7 Wm IV Cap. LVII "An Act for the Prevention and Punishment of Offences committed by His Majesty's Subjects within Certain Territories adjacent to the Cape of Good Hope" of 13 Aug. 1836).

[233] By the Colonial Secretary of New South Wales, in a Despatch dated 19 Nov. 1836 which he received on 26 Jan. 1837.

[234] Despatch #85 of 26 Jan. 1836 from Busby to CSNSW: BDB pp. 249-258.

[235] Despatch #109 of 22 March 1837 from J. Busby to CSNSW; CO 209/2 pp. 311b-313a.

Busby had thought of circulating the King's message to the Chiefs "by means of a circular letter". On reflection, however, he

> considered it improper to have recourse to such a method of communicating with the Chiefs upon a subject of such importance without the previous sanction of ... the Governor

On the whole, the Resident considered it prudent that Bourke "defer the communication altogether for the present".

The 1837 Reports on New Zealand

93. The recommendations which Busby made in June of 1837 contained only two points which could be described as new, but due to their timing they probably had a greater impact than any other report he had penned. The stimulus for his despatch of 16 June 1837[236] came from the arrival of HMS *Rattlesnake* in the Bay of Islands under the command of Captain William Hobson, sent in response to the Resident's reports on the deteriorating situation in the Bay of Islands. Busby evidently discovered that the Captain had been asked by Bourke to report on the New Zealand situation, and suggest possible solutions, and decided to get his own views on record beforehand. After discussing both the immediate political circumstances and the impact of near-continuous tribal warfare on the Maori population ("In this way has the depopulation of the country been going on, till district after district has become void of its inhabitants"), he turned to other factors contributing to depopulation. Taken together, the Resident concluded, these threatened "at no very distant period, to leave the country destitute of a single aboriginal inhabitant". Busby did not agree with those who placed the onus for "the present miserable condition of the New Zealanders" solely on British subjects, but did conclude that Maori

> have at least some claim of justice upon the protection of the British Government; and certainly a very strong claim, not to be overlooked in those measures which are dictated by the present humane policy of the British Government towards the aboriginal inhabitants of countries where British settlements are established.

The Resident's emphasis on Maori depopulation was a new development in his official correspondence, and there is no reason to doubt that he was attempting to harness

[236] Busby Report of 16 June 1837: BPP 1840 [238] pp.12-18 "C". The following quotations are also from this report (until otherwise noted).

contemporary British concerns with the welfare of aboriginal populations in countries under British control to his own particular agenda.

94. The only way to stop Maori from destroying themselves, Busby once again concluded, was for the Islands to be taken under "the efficient protection of Great Britain", or some other foreign power. He drew the Governor's attention once again to his January 1836 plan for a Protectorate:

> It is founded upon the principle of a protecting state, administering in chief the affairs of another state in trust for the inhabitants, as sanctioned by the treaty of Paris, in the instance of Great Britain and the lonian Islands, and as applied, I believe, in various instances, on the borders of our Indian possessions.
>
> All my experience subsequent to the date of that suggestion has strengthened my belief that the principle is peculiarly applicable to this country; and that the details could be arranged with a degree both of efficiency and economy which at first sight might appear far from probable.

The signatories of the Declaration of Independence "together with those who have subsequently adhered to it"[237], he claimed, included almost all of the principal chiefs in the north, "and the adhesion of the remainder could at any time be procured". Given the powers and authority which these chiefs took upon themselves in the Declaration, he was certain that their Congress was

> competent to become a party to a treaty with a foreign power, and to avail itself of foreign assistance in reducing the country under its authority to order; and this principle being once admitted, all difficulty appears to me to vanish.

(The Resident did not explain how the Congress was to be assembled in the first place, to enter into a treaty, when this had so far proven impossible).

95. British troops could then be sent to support New Zealand's "native government",

> while, in return for this subsidiary force, it might be stipulated that the British settlers should be subject to the operation of no laws but such as should emanate from or be

[237] The Declaration itself bears a number of names added after the signing on 28 Oct. 1835, many with dates. See P.G. Parkinson, "'Our Infant State': the Maori language, the Mission Presses, the British Crown and the Maori, 1814-1838" (PhD Thesis, 2003), Vol. 3 Appendix III "The Identities of the Signatories to the Declaration of Independence, 1835-1836", pp. 497-506, for the most thorough examination of the signatories available. There is virtually no documentary evidence illuminating the circumstances in which these additional signatures were obtained, however. As far as I can see they were not mentioned (aside from this single reference)in any of Busby's reports to New South Wales or to London.

> consented to by their own Government and exercised under the control and directions of its officers; and that the revenues of the country should be made applicable, in the first instance, to the support of a civil government, to be established by the protecting power, and the maintenance of the quota of troops stipulated for by the treaty.

"In theory and ostensibly the government would be that of the confederated chiefs", he observed, "but in reality it must necessarily be that of the protecting power". In is opinion the chiefs were not at present fit to govern, but the Congress would function as "a school in which the chiefs would be instructed in the duties required of them, and the authority confided to them as conservators of the peace in their separate districts". The existence of a recognised "native government", Busby noted, removed any and all difficulties connected with the control and governance of British subjects, for "Whatever laws His Majesty's Government should consider suitable for the protection and control of the King's subjects would be proposed to, and, as [a matter] of course, become acts of the legislature of New Zealand", and "Whatever courts of judicature His Majesty might deem necessary would be established under the same sanction".

96. After elaborating at some length on the future role of the Missionaries (and his present, difficult relationship with them), on revenue and military requirements, and on the need for a "Commission" to examine "the titles of British subjects to land which they claim to have purchased from the natives", he observed that "if I am rightly informed"

> the whole coast line [north] from Cape Brett[238], including the noble harbour of the Bay of Islands, and extending as far as Wangaroa, forty miles to the northward of the bay, has, with trivial exceptions, passed from the possession of the natives into that of British subjects.

"Most of the valuable forests in the interior" had also changed hands, he believed, "and on the western coast an extensive territory is also claimed by British subjects". These facts alone, Busby thought, would probably lead the British Government to reconsider its policy of non-intervention, for

> the course of events has so altered the relation of this country to the rest of the world, as to demand the application of a different principle than that which, in an abstract view of its previous condition, may have been considered expedient and just.

[238] At the southern end of the Bay of Islands. The BPP version of the report refers to Cape "Bult", but the BDB text shows that Busby originally wrote "Brett".

The fact of British settlement, he suggested, meant that the possibility should also be considered of granting

> a charter of government to the colony of British subjects who are established in it, leaving the natives in the full possession of their abstract rights, so far as they have not conceded them to the colonists, and providing only against their suffering injustice at the hands of the latter.

This was the first time Busby had raised such a possibility, but he clearly did not consider such a step to be inconsistent with what he saw as the duty of the British Government to protect Maori from "all the injury and injustice which weakness and ignorance must suffer by being thrown into a competition of interests with knowledge and power" – a competition which was rapidly escalating in New Zealand and which Maori, the Resident was certain, were losing.

97. Hobson's report, submitted to Bourke in August of 1837[239], took a somewhat different view of both the situation in New Zealand, and of the manner in which the British Government could best deal with the problems which that country posed. He was markedly more optimistic than Busby, noting that hostilities in the Bay of Islands had ceased and that no Europeans had been harmed during the recent fighting, or expected to be harmed in future, and expressed the hope that the local European "abandoned ruffians" might be kept in check by application of "the 9th of George the Fourth"[240]. The situation was less promising elsewhere, but Europeans appeared to be safe from molestation. The efforts of the missionaries to promote peace, he commented, were "unremitting", and they "felt confident of eventual success". Hobson stated with respect to Maori that

> I cannot repress a feeling of deep regret that so fine and intelligent a race of human beings should, in the present state of general civilization, be found in barbarism; for there is not on earth a people more susceptible of high intellectual attainments, or more capable of becoming a useful and industrious race under a wise government.

He fully agreed with Busby as to the current the state of the Confederation:

> At present, notwithstanding their formal declaration of independence, they have not, in fact, any government whatsoever; nor could a meeting of the chiefs who profess to be the heads of the united tribes, take place at any time without danger of bloodshed. How, then, can it be expected that laws will be framed for the dispensation of justice,

[239] Report of 8 Aug. 1837 from Hobson to Bourke: BPP 1840 [238] pp. 9-11 "A".
[240] i.e. 9 Geo, IV c.83 (1828).

> or the preservation of peace and good order, even if native judgment were sufficiently matured, to enact such laws, or to carry them into execution.

Hobson also accepted that the growing numbers of Britons in New Zealand, and their claims to rapidly-increasing amounts of land, made it necessary for the British Government "to devise some practicable mode of protecting them from violence, and of restraining them from aggression". The "remedy" which he himself suggested for the "growing evil" in New Zealand, however, was not the creation of a puppet government run by Britain.

98. Rather, the Captain proposed a limited intervention which would suffice for the immediate requirements of the British subjects resident in and trading with the country. "It has occurred to me", Hobson wrote

> that if factories were established at the Bay of Islands, at Cloudy Bay and Hokianga, and in other places, as the occupation by British subjects proceeds, a sufficient restraint could be constitutionally imposed on the licentious whites, without exciting the jealousy of the New Zealanders, or of any other power.

This would involve the purchase of "sections of land" in such locations, which would be "inclosed and placed within the influence of British jurisdiction, as dependencies of this colony"[241].

99. In other words, limited portions of New Zealand would be acquired by the Crown and administered by New South Wales. A treaty should be concluded with the New Zealand chiefs for the recognition of these 'factories' as British possessions, and "for the protection of British subjects and property"[242] (with British subjects being required to register "themselves and their landed property" at the factories). The "chief factor" of the dependency would be a magistrate and "in addition, be accredited to the United Tribes of New Zealand as a political agent and consul". Other heads of factories would also be magistrates, reporting to the chief factor, and "the most respectable British residents" would be made justices of the peace, with prisons being erected within the factories. The cost would be defrayed through levies on trade and shipping, and fees for governmental services. All of this, Hobson noted, would require an Act of Parliament, along with a South Seas bill

[241] According to Bourke, this plan was inspired by "the factories of early trading companies resorting from Europe to India", and were to be principally "commercial establishments": Despatch of 9 Sept. 1837 from Bourke to Glenelg, BPP 1840 [238] pp. 8-9 Encl. 5 in No.1.

[242] Bourke specified in his 9 Sept. 1837 Despatch that the 'factories' scheme was based on the premise that "as an inflexible condition, ... nothing whatever [would] be established on the part of the British Government, which is not cheerfully conceded on terms of clear mutual interest by the natives", something Hobson did not emphasize.

to impose the jurisdiction of the Courts of New South Wales over offences committed by British subjects in New Zealand and to allow its Legislative Council "to enact such laws in respect thereof as the more complete local knowledge of the country might from time to time suggest". He commented in closing that such a scheme would have collateral benefits. Aside from the fact that the factories would provide a refuge for British subjects in time of war, "we may hope they will be the means of introducing amongst the natives a system of civil government which may hereafter be adopted and enlarged upon".

100. Hobson's instructions from Bourke had been that he was to produce a report on "the opinions which his observations whilst there might lead him to form upon the present state of New Zealand, and the means of securing, *with the least possible overt interference*, the common interests of the natives, and of the British settled amongst them"[243]. One wonders what the Captain might have recommended if not hampered by this requirement for minimal interference. A letter written to his wife at this time shows that Hobson's appraisal of the overall situation was not all that different from the Resident's[244]. That is, he agreed that New Zealand occupied a vital strategic position relative to the Australian colonies – "a position that affords it the power, in the hands of a civilised people, of exerting great influence, either beneficial or prejudicial, to those Colonies". Also, he accepted that Maori were "rapidly diminishing in numbers" while at the same time the British population grew and increasing amounts of land were being acquired by British subjects, who also dominated trade. "It is therefore just and politic", he concluded, for Great Britain to intervene in New Zealand for the purpose of "averting the danger to our Colonies of allowing a Hostile people to anticipate us in the acquisition of that Country, and of affording protection to our Fellow-Subjects". Since it was "not the policy of our Government", however, "to take formal Possession of New Zealand" Hobson had come up with the 'factories' plan. There is more than a hint here that the Captain would have been equally happy to support a Busby-style Protectorate or even full-blown annexation, had the Governor given him wider scope[245]. The position which Hobson adopted when the

[243] Emphasis added. Despatch of 9 Sept. 1837 from Bourke to Glenelg (covering the Busby and Hobson reports): BPP 1840 [238] pp. 8-9 Encl. 5 in No.1.
[244] Letter of 25 Aug. 1837: AUL Rutherford Papers MS A-42 Box 24 f.2 (typescript).
[245] Hobson was well aware, as he put it, that Maori "amongst themselves" did not have "any form of Government whatsoever" above the tribal level, and he quoted the Maori letter sent to Marsden to illustrate their lack of laws – an English translation of which is copied (from *The Missionary Register* of 1838) in J.R. Elder, ed., *The Letters and Journals of Samuel Marsden* (1932), pp. 532-533. It is difficult to see how he would have expected them to benefit from the example provided by one or two British factories, more so than from the previous 20 years of contact with British settlers in New Zealand.

'factories' plan was again placed on the table in 1839 reinforces this impression (see ¶167-168, below).

101. Bourke, in any case, was pleased with the Captain's report, which he described as containing "suggestions of great value". He saw it as offering a feasible method of dealing with the intractable problem of British settlement in and trade with New Zealand, and observed that

> Any plan ... by which intercourse may be sufficiently regulated, and usurpation, real or apparent, avoided,– providing at the same time for its support without drawing upon the revenues of this colony,– is well worthy of serious consideration.

The Governor himself could not suggest a better scheme. Busby's proposals, on the other hand, he (rather cryptically) dismissed as containing

> suggestions for the future proceeding of Great Britain towards New Zealand, which are not without value, but which would probably be found difficult to reconcile with some of the peculiar circumstances affecting the matter under consideration.

What these 'peculiar circumstances' might be, Bourke did not really explain[246], but his opinion of Busby's judgment was made quite clear.

102. The Resident was absolutely livid when he eventually saw this despatch, and complained vigorously about the "prominence" given by Bourke to Hobson's report – one, he declared, which contained

> scarcely a practicable suggestion which was not with others of much more importance urged upon Sir. R. Bourke's attention by me long before Capt. Hobson visited N.Z. without receiving any notice from him. [247]

Writing to his brother, he declared that the 'factories' plan itself was quite impracticable, and poured scorn on the notion that proposals made by "the Capt[ain] of a ship of war who had not been as many weeks in this country as I had been years" could or should be considered more credible than those from a person of his own station and experience[248]. These two reports would reach London in the middle of a vigorous debate over the future of New Zealand – or, rather, over the future shape of New Zealand's connections with Great

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[246] Busby later complained (not without justification) that Bourke's objections were "equally applicable to every human scheme or proposition": letter of 26 Nov. 1838 to Alex Busby, in AIML MS 46 Folder #1 (J to A Busby), pp. 84-87.
[247] Despatch #141 of 8 March 1839 from Busby to CSNSW: BDB pp. 394-395.
[248] Letter of 1 March 1839: AIML MS 46 Folder #1 pp.90-92.

Britain. It would appear that, because of the outcome of that debate between the supporters of the missionary societies, on the one hand, and the supporters of systematic colonization, on the other, the Busby and Hobson reports played an important role in shaping the British Government's decision in 1839 to pursue a course of action which led to the Treaty of Waitangi and the annexation of New Zealand in 1840.

IV

The Colonization Question, 1837-1838

Systematic Colonization

103. Until the early 1830s the principal British interest in New Zealand was commercial – the exploitation of whales, seals and other fauna, flax and timber. Trade with Maori grew up alongside these activities, and arose from them. Armaments, in particular, fuelled the development of commercial relationships between the Australian colonies and the Islands. The plans put forward by Col. Nicholls, the Baron de Thierry, the New Zealand Company and others all had as their principal objective the creation of secure bases for the exploitation of New Zealand resources and markets. Creating settlements of British subjects in New Zealand would (if any of these ventures had prospered) have been a consequence of commercial success rather than an objective in itself. The same can be said of the missionaries, who formed British settlements in New Zealand for the sole purpose of supporting their long term goals of converting and 'civilizing' Maori. Although the early 1830s saw a marked increase in the numbers of Europeans residing in New Zealand, and in claims to land purchased by them from Maori, this basic orientation did not change. As the decade wore on, however, New Zealand came under the scrutiny of people with different ideas about what Britons could and should do with that country.

104. Following the Napoleonic Wars, emigration from the British Isles increased at a prodigious rate. This exodus, one historian commented a century later, "considering the volume of people from which it was drawn", was "probably without parallel in the history of any civilised country"[249]. From the beginning, the greater part of these emigrants went to the United States and the Canadian colonies, a relatively short sea voyage away, although the Australian colonies attracted increasing numbers of free settlers as the century wore on. The sheer volume of emigrants, and concern about the skills and capital which they took away from Britain (and out of the Empire, in many cases), prompted interest in the theory and practice of colonization. One of the leaders in the study and application of this subject was Edward Gibbon Wakefield, whose talents in this direction first manifested themselves while he was in prison for certain offences committed while eloping with and marrying an underage woman. An interest in matters criminal led him to the question of the transportation of convicts to penal colonies, and from there to colonization in general. He proposed, in a series of publications, that British colonization could and should be conducted

[249] S.C. Johnson, *A History of Emigration from the United Kingdom to North America, 1763-1912* (1913), p. 14.

in a 'systematic' and scientific manner, to create self-funding agricultural colonies with a stable socio-economic makeup. This involved the termination of free grants of land by the Crown or companies, in favour of sale at high fixed prices, with the proceeds from the sale of land being dedicated to "the conveyance of British Labourers to the colony free of cost" – as he put it in his "Outline of a System of Colonization" in 1829[250].

105. In the early 1830s a 'Wakefield colony' was established in South Australia. Wakefield himself was actively involved in the early stages of this project, although he parted company with the promoters (including Robert Torrens) when they made what he considered to be too many compromises with the British Government to secure passage of the necessary legislation – and after people described by him as "ignorant and careless amateurs" were appointed to the governing Commission[251]. Despite these difficulties, Wakefield's reputation remained intact, and in 1836 he was the principal witness called to testify before a Select Committee on the disposal of lands in the British colonies and the virtues of 'systematic colonization'. As New Zealand was not a British colony, the Islands were not officially on the agenda of this Committee. One of the members, though, asked Wakefield whether there were "any parts of the world, subject to our dominion now, in which you imagine that new colonies might be founded advantageously under this proposed system?"[252]. Wakefield's reply was that

> Very near to Australia there is a country, which all testimony concurs in describing as the fittest country in the world for colonization; as the most beautiful country, with the finest climate, and the most productive soil; I mean New Zealand.

While acknowledging that New Zealand "does not belong to the British Crown", he stated that "Englishmen are beginning to colonize New Zealand", and

> We are, I think, going to colonize New Zealand, though we be doing so [sic] in a most slovenly, and scrambling, and disgraceful manner. That country appears to me to be open to colonization .... [253]

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[250] This was an appendix to his *A Letter from Sydney*, which discussed a range of issues relating to transportation and colonization. See M.F. Lloyd Pritchard, ed., *The Collected Works of Edward Gibbon Wakefield* (1968), pp. 178-185.

[251] Mills, *The Colonization of Australia*, p. 235 (and Ch. 8 pp. 218-258). His differed with the Commissioners over the minimum prices set for land, the mode of disposal, and the use of funds from land sales to underwrite the costs of local government. The colony proved to be an administrative shambles, and Captain George Grey would make his reputation as a colonial Governor by sorting out the mess.

[252] BPP 1836 [512] "Report from the Select Committee on the Disposal of Lands in the British Colonies; together with the Minutes of Evidence, and Appendix", p. 108.

[253] In 1833 in *England and America,* Wakefield had stated that New Zealand was "a country admirably fit for colonization", and included it in a list of countries providing "fields of colonization" for Great Britain: see *Collected Works of Edward Gibbon Wakefield*, p. 579 footnote.

Not exactly stirring stuff, one might think, but according to most accounts these observations led directly to the creation of the New Zealand Association in 1837. Wakefield's son later recorded that his father's suggestions "made a deep impression upon Mr. Francis Baring, a member of the Committee" and afterwards "upon the minds of several gentlemen out of doors" (i.e. in the wider community)[254].

The New Zealand Association

106. On 22 May 1837 a meeting was held in London to discuss the prospect of founding a Wakefield-style colony in New Zealand. Wakefield himself took the chair, and those present agreed to form a Society under the name of "The New Zealand Association". Its objects would be "those described in the printed paper entitled 'A Statement of the Objects of the New Zealand Association'"[255]. The meeting, in other words, was a formality, designed to set in motion a pre-existing plan. This statement (bearing the same date as this meeting) was published shortly afterwards[256]. It consisted of two sections – a brief "Statement &c., &c." of the objects of the Association, and a longer presentation of "Some Particulars concerning New Zealand". The Statement declared that the Association had been formed "for the purpose of promoting the settlement of British subjects in New Zealand", the Islands being "by their natural circumstances, peculiarly adapted for the habitation of British settlers". It observed that Britain did not appear to have any right to form settlements there without the consent of the native inhabitants ("whose national independence has been virtually, not to say formally acknowledged by the British Government ... By the appointment of a Resident at the Bay of Islands, and the recognition of a New Zealand flag"). It was therefore necessary to assume "that no right to form settlements in New Zealand can be acquired, except by treaty with the native inhabitants".

107. (It should be noted here that in discussions with the Government a month later, the Association would point out that their plan embraced "a deliberate and systematic

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[254] E.J. Wakefield, *The Hand-Book for New Zealand* (1848) pp. 58-59. Baring would become the chairman of the Association in 1837.
[255] Meeting of 22 May 1837: NZAMB pp. 9-10.
[256] [E.G. Wakefield]. *A Statement of the Objects of the New Zealand Association, with Some Particulars concerning the Position, Extent, Soil and Climate, Natural Productions, and Natives of New Zealand*. London: New Zealand Association (1837). This was available for distribution before the end of May.

endeavour to render the Colonization of New Zealand highly advantageous to the native inhabitants", and were of opinion that this could not be accomplished without proceeding on

> the principle of considering the natives as perfectly independent of the British Crown, so that they may exert a free and full consent to every cession of territory for the purpose of settlement by Englishmen.

Francis Baring went on to explain to the Prime Minister, however, that the adoption of such a principle was not thought to compromise

> any rights, as against other European nations which the Crown of England has established first by the acts of Captain Cook who took possession of the Country in the name of his Sovereign and secondly by the representative of the Crown in New South Wales, who as long ago as the year 1814 issued a proclamation by which New Zealand was declared to be a dependency of the British Crown.

In their view, in other words, New Zealand was already part of the British dominions – or, at least, a territory in which the Crown had priority over any other nation with respect to future acquisition – but as a matter of "actual justice" Maori should be treated as independent where matters of cession were concerned[257]. As far as we know, the Prime Minister did not object to this interpretation.)

108. The Association, in its "Statement", disclaimed any desire to lead "savage or semi-barbarous men" into "engagements which they do not perfectly comprehend", and expressed a belief that Maori would prove to possess

> a natural capacity for civilization – [so] that instead of being gradually exterminated by intercourse with civilized men, this people may be brought to adopt the language, usages, laws, religion, and social ties of a superior race.

It proposed that (as a fundamental principle of the Association) all cessions of unoccupied lands would require "the free, full, and, perfectly-understanding consent and approval of the native tribes", publicly given. The areas ceded would be declared "part of his Majesty's foreign possessions"[258]. It also proposed that Maori who remained on, or moved onto, ceded lands would be admitted to "the rights and privileges of British subjects", and afforded protection from "the aggression of white men" – observing that

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[257] Letter of 14 June 1837 from Baring to Lord Melbourne: NZALB pp. 3-8a. The word written in the letterbook is "compensate", not "compromise", but this makes no sense in the context of the paragraph, and would appear to be an error in transcription.

[258] At a meeting on 31 May 1837 the possibility of making land purchases from Maori before going to Parliament for approval of the Association was canvassed, but it was agreed "that an Act of Parliament was needed antecedently to the opening of such a treaty": Meeting of 22 May 1837: NZAMB pp. 9-10.

> The importance of this last object will appear further on, where evidence has been collected of grievous and growing evils suffered by the natives of New Zealand, in consequence of the residence amongst them of British subjects not under the restraint of any law or authority.

The colony itself was to be operated on the Wakefield system, in a manner similar to South Australia "with this difference only – that out of the fund received as the purchase-money of land, it would be necessary to deduct the amount paid for land to the native tribes". This had not been a consideration in Australia, where the Crown never recognised the customary claims of Aborigines to land[259].

109. There was in fact "Another ... more important difference" between the South Australian colony and the New Zealand settlements, which was that the latter were not to be lumbered with excessive (and expensive) measures for their governance. The idea was "to make provision for what is necessary at first ... and to avoid legislating for a state of things which cannot actually be foreseen", which meant "treat[ing] the contemplated settlements as such – not as provinces or colonies", with the work of forming and regulating them being confided "to a few persons of station and character selected from amongst the originators and most zealous patrons of the undertaking". Parliament would be asked to provide these persons with "a sufficient authority for accomplishing the object in view" for a specific period, at the end of which the arrangement would be reviewed. There was precedent for such a procedure, the author claimed, in cases where "authorized individual enterprise has augmented the dominions of the British Crown" (a reference to British colonization charters of the 17th and 18th centuries), and the Association had prepared a draft Bill for submission to the Crown. It was proposed that most of the funds required to establish the settlements be provided by the people who planned to emigrate there. The information available about New Zealand, the Statement concluded

> will shew ... that no part of the world presents a more eligible field for the exertion of British enterprize, or a more promising career of usefulness and satisfaction to those who love to labour in the cause of human improvement.

It was followed by a fairly glowing account of the Islands and their inhabitants.

110. A few of the points made in the "Particulars" worthy of note were:

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[259] Maori were described as a people "who have so far advanced beyond the savage state as to recognise property in land".

- that Maori were few in number "quite insignificant in proportion to the immense fertile territory they possess", and the amount of land under cultivation "a mere nothing" (p. 13);
- that Maori were prepared to sell their unoccupied and unused lands "at a price which, to us, would be nominal" (p. 18)[260];
- that Maori were a people with superior intellectual and physical properties "calculated, by intermarriage with Europeans, to form the basis of a great nation", and capable of great improvement (pp. 15-16, 18);
- that Maori would welcome British settlement in New Zealand "for they see the substantial benefits that would accrue to them from the establishment of our laws and the rest of our civilization" (p. 19).

111. The idea, then, was that the Association would form British colonies in New Zealand at no cost to the British Government. The lands required would be purchased from Maori (at nominal prices), and with their consent declared to be "part of his Majesty's foreign possessions". The Association would raise the funds initially required from its own settlers, and those needed to build up the settlements would be provided by the profits from sales of land. All the British Government was asked to do was to give its general approval to the Association's proceedings, and support the provision by Parliament of sufficient authority to a small number of leaders to enable law and order to be established within the areas under British sovereignty. Maori who elected to become members of these settlements were to have the same rights as British subjects, and would receive protection from the settlers. It was expected that Maori in general would welcome settlements of this kind, and would provide a useful supplement to their immigrant population. The ultimate purpose of the exercise was to establish large, permanent agricultural settlements of British subjects in New Zealand.

112. The next step was to negotiate with the British Government for approval. It appears that draft legislation was discussed with Prime Minister Melbourne and other Ministers early in June[261], and that the Bill submitted to him by Baring on 14 June 1837 already contained amendments made in response to their comments. Baring stated that the Association wanted to put this measure before the House of Lords, where the basic plan could be approved before submitting it to the Commons where organizational and financial

[260] Noting that "we must always religiously, that is, justly and generously, respect the primary and inalienable right of the aborigines to a subsistence out of the soil on which they were born. No plan of colonization ought to be encouraged, or even tolerated, that does not begin with the principle of upholding the rights and improving the rights of the aborigines" (pp. 18-19).

[261] See the minutes of the Association meeting on 9 June 1837: NZAMB p. 19. Wakefield himself had met with the Prime Minister by this point.

matters could be considered[262]. But then an unexpected complication arose: King William IV died on 20 June 1837, which automatically meant that Parliament would be dissolved and elections called. Baring urged the Government to deal with any of its objections to the Bill in Committee in the Lords, to avoid delay[263]. Melbourne had evidently given the Bill to Lord Howick (the Secretary of War) for comments.

113. An "Abstract of a Bill sent to Lord Howick, on the part of the New Zealand Association, June 1837" was later published in the Parliamentary Papers[264]. This actually appears to be a version which was revised in response to the comments which the Minister made later in June (compare the "Abstract" with Baring's précis of the changes which Howick proposed, most of which appear to have been made in this version[265]), but it gives a good view of the legislative provisions desired by the Association at this stage of proceedings. The Bill provided for the creation of a Board of Commissioners, made up of "founders of settlements in New Zealand" (that is, founding members of the Association). This Board would submit annual reports to the Colonial Minister, who would have a veto power on new appointments. The 'Founders' would

> have power to enter into treaties with natives and others, for the purchase of land and other property, and for a cession of all sovereign rights to Her Majesty, which shall thereupon become part of Her Majesty's foreign possessions; and the inhabitants enjoy all the same rights as in other foreign possessions; and they, as well as all persons trading thereto, shall be subject to the laws made and enacted by authority of the Act.

They would be "empowered and required to secure to chiefs and their families the permanent possession and enjoyment, as British territory, of a certain proportion of the land ceded by them" – to create Native Reserves with Crown titles, in other words. Laws were also to be passed "for the protection of natives", and for allowing "their evidence to be taken in certain cases, and certain degree of weight to be attached to it".

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[262] Letter of 14 June 1837, from Baring to Lord Melbourne: NZALB pp. 3-8a.
[263] Letter of 21 June 1837 from Baring to Lord Melbourne, in NZALB pp. 8b-9a.
[264] BPP 1840 (582) Appendix #18 pp. 163-164. Lord Howick was the Secretary of State for War in the Melbourne government (1835-39), but was very interested in matters relating to colonies and colonization. Later, as the 3rd Earl Grey, he became Secretary of State for War and the Colonies (1846-52), when he brought in two Constitutions for New Zealand (1846 and 1852).
[265] Letter of 28 June 1837 from Baring to Howick: NZALB pp. 9b-14. Note especially Baring's comments that the Association would not object to part of the Land Fund being earmarked for local public improvements "public improvements "provided the proportion were fixed" [emphasis in original]. The "Abstract" provided for 25% of the Fund "to be laid out on local improvements". The "Abstract" is probably the version submitted to the Colonial Office in November, which is described by Baring in this letter to Melbourne of 21 Nov. 1837 (NZALB pp. 41-43), and in the minutes of the Association meeting of the same date.

114. The Founders would also be empowered

> to make laws for the settlements, and create courts of law and justice, with civil and criminal jurisdiction, which laws are to be reported to the Principal Secretary of State for the Colonies, who shall have power to disallow the same .... Founders to have power to appoint an executive council for the colony, and to supply vacancies; to nominate judges and supply vacancies; subject to disapproval of the Secretary of State for the Colonies.

After a certain (unspecified) time had elapsed

> the Crown, with consent of the Privy Council, shall grant to the said settlement ... such legislative powers and constitution as shall seem advisable, making provision at same time for all obligations previously undertaken by founders and Executive Council.

The rest of the Bill related to the imposition of a Wakefieldian regime for land sales, and various related fiscal and financial measures including a requirement that three-quarters of the returns from land sales be devoted to emigration, and the balance to "local improvements". The Founders would be able to raise military and naval forces, which might include Maori soldiers and sailors, and convicts were banned from their settlements. Nothing whatever was to happen until £100,000 had been raised[266].

115. If the members of the Association thought it likely that an Act would be passed before Parliament prorogued, they were mistaken. It soon became apparent that nothing could be done until the next session, and on 10 July 1837 the members decided to direct their efforts in the immediate future towards strengthening the Association "by laying their views before the public, and adding to their numbers"[267]. This resolution would lead, among other things, to the publication four months later of *The British Colonization of New Zealand; being an account of the Principles, objects and plans of the New Zealand Association. Together with Particulars Concerning the Position, Extent, Soil and Climate, Natural Productions, and Native Inhabitants of New Zealand*[268] – a work which might best

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[266] "Founders not to convey settlers to New Zealand, or exercise the powers conferred by this Act, until 100,000£. be obtained for the purchase of land, or by loan in terms of this Act, and until the interest for three years be invested in Bank of England or on Government securities, excepting such powers as may be necessary for legalizing, regulating, and receiving such purchase-money of land and loan". According to Baring (14 June 1837) this was one of the additions to the original draft bill.

[267] Minutes of the Association meeting on 10 July 1837: NZAMB p. 22.

[268] London: John W. Parker, 1837. T.M. Hocken, *A Bibliography of the Literature relating to New Zealand* (1909) notes that the main body of this work was written by E.G. Wakefield and John Ward, while "The

be described as a 423-page version of *A Statement of the Objects of the New Zealand Association*.

'Systematic Colonization' Rejected

116. Opposition to the Association's scheme emerged as soon as the details were made public. It centered on the Missionary Societies, led by the Committee of the CMS in London, and its Secretary Dandeson Coates. Soon after it laid hands on *A Statement of the Objects of the New Zealand Association,* the CMS Committee met to discuss the Association. Four resolutions were passed, the last of which proposed that "all suitable means" be employed to prevent the plan "from being carried into execution"[269].

117. The first three resolutions objected to the Association's plan on various grounds. The first was that the Association proposed to have Parliament "sanction the disposal of portions of a foreign country, over which it has no claim of sovereignty or jurisdiction whatever". It is not really made clear why the Committee considered this to be "highly objectionable" in itself. Perhaps they did not understand (although it is explained quite clearly in the "Statement") that 'disposal' would not take place until the lands involved were, with the permission of Parliament, declared "part of his Majesty's foreign possessions" after voluntary cession by the owners. The second objection was that "Universal experience", the Committee believed, had shown that "uncivilized Tribes" such as the Maori inevitably suffered "the greatest wrongs and most severe injuries" when their countries were colonized by Europeans. The third objection was quite specific, in that the Committee feared that large-scale colonization of the kind proposed would

> from its unavoidable tendency ... interrupt, if not defeat, those measures for the Religious Improvement and Civilization of the Natives of New Zealand which are now in favourable progress through the labours of the Missionaries.

A month later, after it became apparent that the Association's Bill would not proceed, these resolutions were sent to the CMS missionaries in New Zealand for comment[270].

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appendix has an essay, with several romantic suggestions, on the proper conduct of Europeans towards the natives, written by the Rev. M.J. Hawtrey".

[269] Resolutions of 6 June 1837 copied in Dandeson Coates, *The Present State of the New-Zealand Question Considered, in a Letter to J.P. Plumptre, Esq., M.P.* (1 Feb 1838), pp. 3-4.

[270] See Coates, *The Present State of the New-Zealand Question Considered* pp. 15-16. It would be reported by a Kororareka correspondent in December of 1838 that the missionaries there "are at this moment plotting, and

118. Although the CMS Committee believed (or at least claimed to believe) that the plan's promoters had good intentions, it told its missionaries that it considered the scheme "to be founded on injustice; and calculated, if carried into execution, to hinder the progress of the Mission and to intercept its civilizing influence". The missionaries were asked to catalogue "the injurious effects which are to be anticipated from this, or any other scheme for the Colonization of New Zealand", and to outline how, in their opinion, British subjects in the Islands could best be controlled "without having recourse to colonization, and the consequent introduction of British Authority and Rule to Repress and control them". It would be best for the missionary effort, it was hinted, if Parliament confined itself to passing legislation which gave greater power to the British authorities to control the actions of British subjects (a new South Seas Bill, in other words), and based a naval vessel in New Zealand to enforce such a regime.

119. Those objecting to the Association's plans were given substantial support in June with the publication of the final "Report from the Select Committee on Aborigines (British Settlements)"[271]. Select Committees had been hearing evidence on this subject since 1833[272], and the last one (chaired, it should be noted, by Thomas Fowell Buxton, one of the leaders of the movement which had recently secured the abolition of slavery in the Empire) produced a blunt condemnation of European colonization as it affected indigenous peoples around the world. The 1837 Committee concluded that:

> It is not too much to say, that the intercourse of Europeans in general, without any exception in favour of the subjects of Great Britain, has been, unless when attended by missionary exertions, a source of many calamities to uncivilized nations.

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have been for some time, against the Association for Emigration formed in England for New Zealand, for they know that should such a thing take place they will have powerful competitors in buying the land, and that the poor natives will be no longer duped by them.": *Sydney Gazette* 11 Dec. 1838, letter of 17 Nov. 1838 from "R.W.L.".

[271] "Report from the Select Committee on Aborigines (British Settlements); with Minutes of Evidence, Appendix and Index": BPP 1837 (425). This is available in Vol. 3 of the Irish University Press's "Aborigines" series. An edition of the main Report (less the evidence and appendices) with comments interpolated was published by the new Aborigines Protection Society in 1837, and even before the final report was released the Church and Wesleyan Missionary Societies had published the text of their own evidence to the Committee: see *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements.) Reprinted, with Comments by the "Aborigines Protection Society"* (London: 1837), and *Christianity The Means of Civilization: Shown in the Evidence Given Before a Committee of the House of Commons, On Aborigines, By D. Coates, Esq., Rev, John Beecham, and Rev. William Ellis. Secretaries of the Church Missionary Society, the Wesleyan Missionary Society, and London Missionary Society* (London: 2 March 1837).

[272] See the Introduction to Coates *et al*, *Christianity The Means of Civilization* (1837), p. ii. There is some interesting commentary on the Aborigines Committees in S. Bannister, *British Colonization and Coloured Tribes* (London: 1838).

(The evidence to this effect given by Coates and by his WMS counterpart John Beecham was highlighted here[273]).

> Too often, their territory has been usurped; their property seized; their numbers diminished; their character debased; the spread of civilization impeded. European vices and diseases have been introduced amongst them, and they have been familiarized with the use of our most potent instruments for the subtle or the violent destruction of human life, viz. brandy and gunpowder. [274]

The Select Committee believed that these 'evils' had been allowed to blight British colonization by default, and that this was "a short-sighted and disastrous policy" which "has been a burthen on the empire" – this, because such oppression had "thrown impediments in the way of successful colonization" in the form of expensive wars and the banishment or extermination of people who might otherwise have become "profitable workmen, good customers, and good neighbours"[275].

120. Where the South Sea Islands, including New Zealand, were concerned, the Select Committee considered the existing legislation for the prosecution of crimes committed by British subjects to be toothless, so that criminals enjoyed a virtual immunity from prosecution. It suggested that "Consular Agents" be appointed

> with a judicial authority to arrest, commit for trial, and try all British subjects committing offences within the limits of the Consul's commission; that in aid of this jurisdiction, the island should be periodically visited by some of His Majesty's ships of war; ... [and also that the Agent] should be authorized to proceed to the immediate infliction of the punishment, and especially of the punishment of removal from the island .... [276]

Other than this, the Committee deprecated "any further interference with the internal affairs of the South Sea Islands". Noting that schemes for colonizing New Zealand and the Pacific Islands had been suggested in the past, and that a project for colonising New Zealand was at present "on foot", they recommended

> that the Executive Government should not countenance, still less engage in any of them, until an opportunity shall have been offered to both Houses of Parliament of laying before Her Majesty their humble advice as to the policy of such an enlargement of Her Majesty's dominions, or of such an extension of British

[273] See "Report on Aborigines 1837", Conclusions pp. 74-75.
[274] "Report on Aborigines 1837", p. 5.
[275] "Report on Aborigines 1837", Conclusion p. 75.
[276] "Report on Aborigines 1837", Suggestions pp. 85-86.

> settlements abroad, even though unaccompanied by any distinct and immediate assertion of sovereignty.

Since it had already been suggested by the Select Committee that "new territories" should not be acquired, "either in sovereignty or in property", without the prior approval of Parliament, and that treaties with 'uncivilized races' be avoided[277], and since the following section suggested that missionaries (held to be an exception to the rule that "The safety and welfare of an uncivilized race require that their relations with their more cultivated neighbours should be diminished rather than multiplied") be protected and assisted with their task by the Crown[278], on the face of it the New Zealand Association was unlikely to draw much comfort from this Report. Its impact was likely to be compounded, where the Association's interests were concerned, by the fact that many of the leading lights of the Colonial Office had strong ties with reformers such as Buxton and with the CMS[279].

Wakefield's *British Colonization*

121. During the latter half of 1837 the New Zealand Association adopted several measures designed to 'lay their views before the public, and add to their numbers'. One was the recruitment of Lord Durham, a leading reformist politician, to join the Association's ruling Committee and become its public face. Durham's interests in New Zealand went back to the New Zealand Company of 1825, of which (as John Lambton) he had been the Chairman[280], and it was hoped that he would afford the Association better access to the upper levels of British society and government. Among other things, E.G. Wakefield hoped that Durham could persuade the newly-crowned Queen to allow the forthcoming *British Colonization of New Zealand* to be dedicated to her – ideally with the popular young

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[277] "Report on Aborigines 1837", Suggestions pp. 78-80. "Compacts between parties negotiating on terms of such entire disparity", the Committee observed, "are rather the preparatives and the apology for disputes than securities for peace: as often as the resentment or the cupidity of the more powerful body may be excited, a ready pretext for complaint will be found in the ambiguity of the language in which their agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in interpreting, and in evading them" (p. 80).

[278] "Report on Aborigines 1837", Suggestions pp. 80-81.

[279] H. Reynolds, *Law of the Land* (1987), p. 97. Another was Sir George Grey – not to be confused with Governor (later Sir) George Grey, or with Earl Grey (formerly Lord Howick, Colonial Secretary in the 1840s) – who was also a member of the 1837 Select Committee. See also Adams, *Fatal Necessity*, pp. 114-115, however, who suggests that CMS influence within the Colonial Office had distinct limits.

[280] Durham's involvement with the Association was accompanied by a revival of the 1825 Company, and marked the beginning of efforts to amalgamate the two bodies which culminated in 1839. I have not dealt with this aspect of the subject. According to Adams, *Fatal Necessity*, p. 99 an attempt had been made to revive the 1825 Company in 1834, but few details are available.

Victoria indicating her approval of the Association's plan[281]. He even composed a draft dedication to the Queen for Durham's approval, which linked Victoria with the first Elizabeth, "a zealous patron of the first English Colonizers", and prayed that the new Queen would "sanction and approve" the Association's plan

> for lawfully extending the religion, language, and social customs of England together with the dominions of Her Majesty's Crown to a barbarous and desert part of the earth, and for preserving a people of savage habits but fine capacity for improvement from the terrible evils that are inflicted upon them by the lawless British colonization. [282]

It is not known if this dedication was ever shown to Victoria, but in any case it did not appear in *British Colonization*[283].

122. The first proofs of the book came out in September. The Committee wished to have it published as soon as possible "in order to counteract before the meeting of Parliament certain misrepresentations of our views which are made by very jealous opponents of the measure". (The missionaries and their allies had not confined their criticisms to committee minutes). It was hoped that the final negotiations with the Government could be completed before the session began, Wakefield told Durham, and that the Bill "will go through before Xmas"[284]. In addition to the book, arrangements had been made for the artist Augustus Earle (a recent visitor to New Zealand) to produce a series of engravings of the Islands and their people, and for a Mr. Buford to prepare a large "Panorama of New Zealand" – of the Bay of Islands, in fact – for public display[285].

123. *British Colonization* was published in November – Wakefield expressed his gratification at being involved in "promoting a great national enterprise"[286]. As noted earlier, this was principally an enlargement of the May "Statement" and "Particulars", providing a good deal of additional information. But the benefits which the Association plan would allegedly reap for Maori received much more emphasis than before. Indeed,

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[281] See letter of 30 Sept. 1837 from Wakefield to Durham: NZALB pp. 30-33. Copies of the May pamphlet had been given to certain Royals, he noted, "and was I believe graciously received".
[282] Draft dedication in NZALB p. 33.
[283] The Association proposed to name the new colony 'the province of Victoria'. See the sarcastic comments of the London *Times* on this subject in its editorial of 3 Feb. 1838.
[284] Letter of 30 Sept. 1837 from Wakefield to Durham: NZALB pp. 30-33.
[285] See *Sydney Gazette* 28 April 1838 "Mr. Burford's New Panorama of New Zealand" for a detailed description of the display set up in Leicester Square. The preliminary work was evidently done in mid-1837, since Hobson's HMS *Rattlesnake* was shown at anchor in the harbour. The Panorama is mentioned in the minutes of the Association meeting of 21 Nov. 1837 as being scheduled for exhibition "by Christmas".
[286] Letter of 2 Nov. 1837 to Augustus Earle: NZALB pp. 40b-41.

they were presented as one of the main purposes of the exercise. This is especially apparent in Chapter II "Civilization of the New Zealanders", and Chapter IV "Mode of Establishing British Dominion in New Zealand". The first of these sought to secure the moral high ground for the Association. New Zealand had been selected by the Association for their endeavour, the authors claimed, because

> the Association have had an object which may be described as altogether new, – that of reclaiming and cultivating a moral wilderness, – that of civilizing a barbarous people by means of a deliberate plan and systematic efforts.

Success in this "experiment" (one "to improve a savage people, by means of colonization") would depend in large measure on the capacity of Maori to *be* civilized[287]. The Association considered this capacity to be quite high, and believed that the tribes in the north had already shown significant signs of improvement as a result of contact with "English missionaries". But Maori had also been mistreated by British settlers – who included a large number of runaway convicts – and by the crews of passing ships, who were subject to no laws: with a few honourable exceptions, the authors stated, "the British colonizers of New Zealand seem to vie with each other in counteracting the good which the natives have unquestionably derived from their intercourse with civilization". The Report of the Select Committee on Aborigines was quoted at length to demonstrate this point (pp. 32-40).

124. "Prompt and decided measures", the authors concluded, were required to suppress the evils arising from "the actual British colonization of New Zealand". Two "very different" plans for doing so had been proposed, they noted. One was that of the CMS missionaries, who had induced Maori in the north "to form some sort of *native* government for that part of the country", for the purpose of controlling British subjects and establishing a rule of law[288]:

> But it is admitted that the natives could not preserve, or even form such a government, except under the guidance of a higher degree of intelligence than they at present possess; and that they would want a physical force for accomplishing some of its most important ends .... In short, a self-relying native government, even for a small portion of the country, seems out of the question. [289]

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[287] [E.G. Wakefield and John Ward], *The British Colonization of New Zealand; being an account of the Principles, objects and plans of the New Zealand Association. Together with Particulars Concerning the Position, Extent, Soil and Climate, Natural Productions, and Native Inhabitants of New Zealand* (1837), pp. 27-28.

[288] *British Colonization*, p. 40. Emphasis in original. Why it was thought that the missionaries were the principal impetus behind the Declaration and the United Tribes is not clear.

[289] *British Colonization*, p. 41.

"A British authority", it was concluded, was necessary "to maintain any sort of government in New Zealand, either for natives or British subjects", and so to impose some description of law and order on the country. The Association claimed to have built its own plan upon this premise, but described it as one which differed materially "from all other projects for extending British dominion", in that this plan comprised

> a deliberate and methodical scheme for leading a savage people to embrace the religion, language, laws, and social habits of an advanced country, – for serving in the highest degree, instead of gradually exterminating, the aborigines of the country to be settled .... This ... is not a plan of mere colonization: it has for its object to civilize as well as to colonize: .... to preserve the New Zealand race from extermination.

This statement spoke directly to one of the principal conclusions of the 1837 Report, that the problem was not colonization *per se*, but rather that British colonization had not been specifically designed to minimise the damage inflicted upon the indigenous peoples affected, or to compensate them for the unavoidable negative effects of colonization[290]. The New Zealand Association claimed to have a plan for colonization which *had* been designed to accomplish these noble goals.

125. This was laid out in some detail in Chapter IV "Mode of Establishing British Dominion in New Zealand". The initial claim made by the authors was that Britain, by virtue of Cook *et al*, was the only state possessing any right to colonize New Zealand. Had the Crown desired to do so in the past, they observed (no doubt correctly), "the rights of the natives would have been wholly disregarded". However, "recent change of opinion" in Britain made "the invasion and confiscation of a territory" such as this impossible – and to pursue such a course now "would defeat a main object of the present undertaking":

> Wishing to civilize the New Zealanders by means of their amalgamation with our own race, it is indispensable that we treat them with exact justice .... we should eschew force, and deceit, and every sort of injustice, relying on persuasion only – on the kind of influence to which alone the successful missionaries have trusted. (p. 53)

Thus it was necessary to acknowledge the "national independence" of Maori, insofar as this had already been acknowledged by the Crown with the appointment of a Resident and the recognition of a flag[291]. This meant that no part of the Islands would be converted into

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[290] See especially "Report on Aborigines 1837", Suggestions VI p. 79.

[291] Not, conspicuously, the kind of "national independence" reflected in the Declaration of Independence, which was not mentioned. The reference here and below is to the 'independence' of individual *tribes*. The

British territory without the "full, free, and perfectly-understanding [sic] consent and approval" of the tribes concerned. Due to the absence of any "central native authority", it was thought, the imposition of British authority on New Zealand would necessarily be a piecemeal and gradual process.

126. The first step would be for the New Zealand Association to acquire lands from Maori who were "already disposed to part with their land and their sovereign rights" (presumably in the north, where much land had allegedly been sold to British subjects). These lands would be declared part of the British dominions, and "regular government" established on the usual British model. Any Maori who chose to remain within these ceded territories would become British subjects, and be the target of efforts to place them "as soon as possible, on terms of intellectual, moral, and social equality with the colonists", including the provisions of reserves "to be held in trust for their use and benefit". These would encompass an unspecified portion of the lands ceded[292]. It was believed that other Maori would also migrate to the British settlements, and that after the advantages of regular, British government had been demonstrated, the remaining tribes would want to become involved: "By degrees, then, and by the desire of the native inhabitants, British sovereignty and laws would be extended over the whole of New Zealand" (p. 57).

127. In the interim, the British government(s) of the settlement(s) would enter into a treaty or treaties with the independent tribes to recognise their authority over all British subjects in the country (to which, it was suggested, all tribes would readily agree). British dominion would thereby be confined to portions of the country ceded in sovereignty to the Crown, but effective British protection could be extended over the whole of the Islands. This, the authors claimed, was the only way that Maori could be delivered from the evils of

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"sovereign rights of the chiefs", and "the complete independence ... of the several tribes" are referred to further along.

[292] *British Colonization*, pp. 54-56. See also Appendix A p. 406, where the Rev. Hawtrey suggested that the leading chiefs receive amounts of land sufficient to place them "in as favourable position with regard to the possession of landed property as the principal English settlers". Coates later claimed not to understand how Maori were to be made into British subjects (see pp. 11-12 of *The Principles, Objects, and Plan of the New-Zealand Association Examined)*, but it seems to me that the Association made it quite clear from the beginning that the intention was to proceed only with Parliamentary approval to place lands under British sovereignty and to treat Maori who chose to stay on or move onto such land as British subjects. Coates surely was aware that on 26 July 1837 Lord Glenelg issued a ruling that the aboriginal inhabitants of countries under the Crown's sovereign authority were by definition British subjects: see BPP 1839 (526) "Return ... of Despatches relative to the Massacre of various Aborigines of Australia, in the Year 1838, and respecting the Trial of their Murderers" (IUP/BPP Colonies: Australia Vol. 5). See also Wakefield's comments on this point at p. 16 of *Mr. Dandeson Coates and the New Zealand Association (1837).*

unsystematic British colonization, and the British Government could be delivered from the "disgrace and crime" of having allowed such evils to happen in the first place[293].

128. In order to demonstrate that a modicum of thought had been given to the treatment of Maori within the Association's settlements, a discussion of "Exceptional Laws in Favour of the Natives of New Zealand" was included as an Appendix. Although no author was given, this was written by the Rev. Montague Hawtrey, of Trinity College, Cambridge. Hawtrey later recalled that

> I am one of those who worked with the New Zealand Association of 1836 [sic]. I promoted their views by my writings. My earnest aim was to strike out something which should avert from the natives the usual result of colonies – the demoralization and eventual destruction of the primitive race .... The main principle on which I went was this, – that it was necessary to step forward and meet the New Zealanders with institutions devised, expressly for the purpose of preserving them, not to leave them merely to general rules of justice; for I foresaw a thousand things which might come into operation to destroy them under a show of justice. [294]

In "Exceptional Laws" he argued that it was not enough to give people like Maori the rights of British subjects and the protection of British law. If they were to survive the impact of colonization, he argued, it was necessary to adapt British law to accommodate the fact that they needed special treatment. In the case of chiefs, Hawtrey suggested as an example,

> Every chief who disposes of his lands to the British crown, and consents to liberate his slaves, should have allotted to him, within the British settlement, such a tract of land ... as would place him in as favourable a position with regard to the possession of landed property as the principal English settlers. This land should be kept for him and his family, until by education and intercourse with civilized people he had learned to estimate its value.

Such measures would secure for the chiefs an elevated standing within colonial society, while at the same time preserving an element of traditional society. Hawtrey also thought that "social alliances" should be formed between the leading settler families and those of the chiefs, in which the former acted as mentors of the latter. He was sometimes ridiculed for his suggestion that the chiefs be given coats of arms based on those of their protectors, but

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[293] *British Colonization*, p. 58. The authors quoted from a dispatch by Lord Goderich here – not identified, but likely one of those related to the *Elizabeth* affair.

[294] In his letter of 21 Jan. 1861 to the Duke of Newcastle, prefacing his pamphlet on the Waitara War: *Justice to New Zealand, Honour to England* (London: 1861), pp. 5-6. In 1840 Hawtrey wrote *An Earnest Address to New Zealand Colonists, with Reference to their Intercourse with the Native Inhabitants* which discussed at some length how the New Zealand Land Company's colonization plan could best be applied to benefit Maori. His proposals on constitutional questions, including one that Maori chiefs be included in an Upper House, is particularly interesting. The *Colonial Gazette* of 23 Sept. 1840 (#96 pp. 635-636 "Justice to the Aborigines Practically Considered"), reviewed the *Earnest Address*.

his argument was not a frivolous one[295], and in the wider context of his discussion demonstrates, I would suggest, that he was better able 'to think outside the box' than most of his contemporaries.

Bill or Charter?

129. Negotiations with the Colonial Office resumed late in 1837. A revised Bill was drawn up by the Association[296], and immediate action was requested[297]. Wakefield reported that the Government appeared to be "favourable to the measure, & even wished that the Committee should apply without delay for the official sanction of the Cabinet"[298], which he did soon afterwards[299]. Approval was not forthcoming, and Wakefield became increasingly concerned that support was growing for those who wished "to prevent the colonization of New Zealand altogether"[300]. He was right to be alarmed, for the CMS and their allies had renewed their efforts towards this end. On 27 November 1837, for example, two letters were written to the Colonial Minister. One came from Dr. Thomas Hodgkin, a distinguished physician who had recently played a leading role in the foundation of the Aborigines' Protection Society[301].

130. Writing to one a prominent supporter of the New Zealand Association, Hodgkin stated that he had read *British Colonization*, and applauded the Association for its expressed desire

[295] *British Colonization*, pp. 411-413. See John Beecham's discussion of the Hawtrey Appendix in *Colonization: being Remarks on Colonization in General, with an Examination of the Proposals of the Association which has been Formed for Colonizing New Zealand* (1838), pp. 34-39.
[296] Probably, as noted above, the version of the Bill later published in BPP 1840 (582) Appendix #18 pp.163-164.
[297] See Baring's letter of 21 Nov. 1837 to Lord Melbourne: NZALB pp. 41-43. One particular reason for quick action, Baring noted, was that news of a plan for "the regular colonization of New Zealand" would lead to a flurry of "irregular settlements from New South Wales".
[298] Minutes of Association meeting of 21 Nov. 1837: NZAMB pp. 23-26.
[299] See letter of 24 Nov. 1837 from E.G. Wakefield to E.B. Hopper: Turnbull MS Papers 3124 (Hopper). "I have applied to L[or]d Melbourne for the official sanction of the Cabinet to the immediate introduction of our Bill. We have reason to believe that all is going well".
[300] As he put it in his 6 Dec. 1837 letter to Durham: Lambton Papers MS-P-140/1. Wakefield requested an immediate meeting to discuss this.
[301] For reference to his involvement see *The First Annual Report of the Aborigines Protection Society, presented at the Meeting in Exeter Hall, May 16th, 1838, with a List of Officers, Subscribers, and Benefactors* (1838). The stated purpose of the Society was "to assist in protecting the defenceless, and promoting the advancement of uncivilized Tribes" (p. 3).

> that the settlement which it is about to form, may become the means of rendering important services to the Aborigines of the country, and thus form a contrast with every instance of modern colonization now on record. [302]

Hodgkin then declared his "serious apprehension" that these measures would "fail to accomplish the benevolent object for which they are designed", and proceeded to critique the Association's plan. His main objections were:

- that experience had shown that "it is almost impossible perfectly to amalgamate widely different races", and that differences would inevitably arise which would lead to conflict, "ultimately terminating in the absolute subjugation or total extermination" of the "inferior" race;
- that "the complete equipment of your settlement as a transplanted British community" would not encourage settlers to "cultivate social intercourse" with Maori, and would attract more white settlers to New Zealand – considered in itself to be "injurious to the natives";
- that Maori would not be led by the example of a successful British settlement and government, but rather would become envious and jealous of the settlers, and "will shun your religion, your politics, and your social economy"; and
- that chiefs would not be prepared to surrender their authority in return for the material benefits offered, and rather would "employ all the means of authority and intimidation in their power, to avert what they will regard as fatal revolution and change".

Hodgkin suggested – anticipating Hobson – that the Association instead devote its efforts to the creation of a commercial centre or centres, striking alliances with surrounding tribes for protection. These, he thought, would provide a profitable base from which British subjects in New Zealand could be controlled, and Maori introduced to the blessing of 'civilization'. Such "modifications" to the Association's plan, as the author described them, would of course have meant the abandonment of the systematic colonization which it was formed to carry out.

131. The second letter of 27 Nov. 1837 (published and widely distributed as a pamphlet, and no doubt written for the purpose) came from the CMS Secretary, Dandeson Coates[303]. Addressed to Lord Glenelg and, this rather rambling discourse opened with a summary of the Select Committee's conclusions about the disastrous impact to date of European colonization on indigenous peoples (pp. 3-9). Tenor established, Coates turned to the Association's proposals as laid out in the May "Statement" and in *British Colonization*.

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[302] Letter of 27 Nov. 1837 to Benjamin Hawes M.P.: copied in Aborigines' Protection Society, *Extracts from the Papers and Proceedings of the Aborigines Protection Society* (1839), pp. 27-30.
[303] D. Coates, *The Principles, Objects, and Plan of the New-Zealand Association Examined, in a Letter to the Right Hon. Lord Glenelg, Secretary of State for the Colonies* (1837).

He accepted (or claimed to accept) "the purity of their motives and the benevolence of their intentions"[304]. Coates asserted, however, that every attempt at colonization by Europeans to date had ended in "calamity and misery to the Native Population involved". This being the case, he asked, why there was any reason to think that the impact of the Association's scheme would not be the same?:

> Are these Gentlemen prepared to put forward the pretension .... that they alone have the power or the wisdom to controul [sic] the course of future events in the execution of their design, so as to ensure to the Natives of New Zealand those beneficial results which they promise to the public [?].

If this was not the case, "how can they demand the public confidence for such a scheme, in the face of all past experience?".

132. Coates then turned to specifics. Leaving aside here his comments on the viability of Wakefieldian systematic colonization, and on the form of government proposed, he focused on the proposed cession of Maori sovereignty to the Crown by way of the Association. Coates castigated the Association for not being clear in its "Statement" as to how this was to accomplished, and asked if an organization with "PURPOSES OF THEIR OWN" (the capitalization is in the original) could or should be entrusted with such a mission, or with that of leading Maori to embrace all things British. "GAIN", he declared with evident horror, "is, in fact, the main-spring and ultimate end of the whole scheme", and

> It is too high wrought, too Utopian, to believe that a miscellaneous body of men will expatriate themselves, to a savage land at the antipodes, merely out of a benevolent regard to the civilization and moral improvement of the Natives. (p. 13)

The profit motive, he complained, was not clearly acknowledged by the Association at any point. The CMS's Secretary also questioned whether the Association would be able to persuade Maori to part with their land in large quantities (citing the difficulties of the missionaries in land purchase), let alone to cede their sovereignty[305]. If the latter was properly explained, so that Maori understood its full implications, he suggested, "a stop must inevitably be put, *in limine*, to this Utopian scheme"[306]. Coates did not, however,

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[304] After reading Coates' letter to Lord Glenelg, Henry Williams, in New Zealand, commented in a letter to the Secretary that "I am not quite so ready as you are to give to those gentlemen, connected with the plan, full credit for the purity of their motives, and the benevolence of their intentions. In my own mind, I have no doubt as to their intentions, which are benevolent to themselves alone": letter of 18 June 1838, quoted in Carleton, *Life of Henry Williams*, I p. 233.

[305] See Coates, *Principles, Objects, and Plan*, p. 16 and pp. 24-25.

[306] Coates, *Principles, Objects, and Plan*, p. 17; *in limine* = "at the threshold".

believe that Maori could be made "to fully comprehend the ultimate consequences to themselves of such an arrangement", due to "the very state of barbarism in which the Natives are found" and their "ignorance ... of the English Language, and the rudeness and poverty of their own". He also questioned whether the independent tribes outside of the British settlements would be willing to enter into any agreement to surrender British offenders against British laws (pp. 27-28).

133. Coates closed on the theme that, whatever remedies there were for the evils presently afflicting New Zealand, "Colonization is the very worst", in that "it could not cure: it could scarcely fail to aggravate them" (p. 27). It would also disrupt the work of the missionaries, in a number of ways, but particularly through the "collision and warfare" which would inevitably result from the proceedings of the Association (pp. 36-41). He pointed instead to the idea of "Consular Agents" put forward by the 1837 Select Committee (see above), and offered his own ideas concerning the application of such a scheme in New Zealand. The Crown, he suggested, should

- upgrade the status of the British representative to that of Consular Agent, giving the latter magisterial powers, and having the Colonial Minister make an appeal to the chiefs for their support for that official;
- form a Native Police, under the Consular Agent;
- maintain "a small ship of war", with a carefully selected Captain, permanently on station in New Zealand;
- empower selected British officials to "legally" try British subjects in New Zealand, at least for misdemeanors.

British authority, he emphasised, should never be exercised in New Zealand except "with the concurrence of the Native Authorities", whose "independence' should always be recognised[307]. (Coates was presumably referring to the chiefs here, for like Wakefield he made no reference to the existence or creation of a Maori national government). The letter closed as it had begun, with a long quotation from the Report of the Select Committee on Aborigines (pp. 4-46)

134. The Association evidently considered Coates' contribution to the debate to be of sufficient significance as to require a reply. E.G. Wakefield lost little time in turning one out. His own letter to Glenelg was sent on 12 Dec. 1837, and appeared in pamphlet

[307] Coates, *Principles, Objects, and Plan*, pp. 36-41. According to Wakefield, it was Coates who originally proposed the 'Consular Agent" plan to the Select Committee: see Turnbull qMS-1124 Durham Correspondence (typescripts), Item #46 "Mr. Wakefield's Comment" of Dec. 1837 on Lord Glenelg's "Objections", item #3).

form soon after as *Mr. Dandeson Coates and the New Zealand Association; In a Letter to The Right Hon. Lord Glenelg, by E.G. Wakefield, Esq.* The letter opened with the blunt accusation that Coates' pamphlet ("however unintentionally on his part") was "well calculated ... to mislead your lordship and the public as to the principles and objects of the Association". He had, Wakefield noted, while lamenting the impact of colonization on indigenous peoples, minimized the serious impact which unregulated European settlement was *already* having on New Zealand, particularly in terms of rapid depopulation. Coates, for example, failed to mention that the CMS missionaries themselves had proposed the removal of part of the Maori population from the Islands in order to get away from the evils attendant upon European commerce and settlement[308]. Wakefield observed that

> The British Colonization that is going on in New Zealand, is of the most disorderly, the most licentious kind. But is it, on that account, less injurious to the natives? On the contrary, it is more injurious. This appears to be the very worst of all systems, or rather sorts of colonization. (p. 5)

Coates had argued that "the Association plan must necessarily fail" because "all measures of colonization ... have been injurious to the natives". Wakefield's response was that

> the plan of the Association differs from all other plans, and especially from all measures without a plan. The argument of Mr. Coates, therefore, amounts to this – Because measures different from yours have failed, therefore will your measure fail.

"It would be difficult", he thought, "to arrive more unreasonably at a conclusion" (p. 5).

135. If Coates was right, and "it is beyond human wisdom to devise a plan of colonization not fatal to the aborigines", Wakefield observed, then Maori were "doomed to destruction", for British settlement in the Islands could not be halted. Yet the CMS Secretary had himself proposed a plan – the Consular Agent scheme – which was "to all intents and purposes, a plan of colonization". Wakefield pointed out that, if law and order was successfully imposed on New Zealand through such measures, the Islands would inevitably become even more attractive to British settlers:

> Before long there would be a numerous British colony in New Zealand. But as soon as a numerous British colony had been planted, it would be absolutely necessary to form a better government, than that of "a Consular Agent and the commander of a

[308] E.G. Wakefield, *Mr. Dandeson Coates and the New Zealand Association; In a Letter to The Right Hon. Lord Glenelg, by E.G. Wakefield, Esq.* (1837), pp. 3-4. This is a reference to the 1827 proposals which had been reproduced by Busby with his 1831 memorandum: see above ¶31, above.

> small ship of war," ... In the end – there cannot, I venture to say, be a doubt of it – New Zealand would be regularly colonized. (p. 10)

In other words, if the Coates plan succeeded "regular colonization would be its certain result", and Maori (by his reckoning) would be destroyed; if it failed, "lawless colonization" would produce the same outcome (p. 11).

136. This logic alone, Wakefield proposed, made the Association's plan "worthy of fuller and more candid examination than Mr. Coates has bestowed upon it", for "*Something must be done*. This will be admitted by everybody"[309]. The question was what. Coates' plan was described as deficient in all respects, whereas the Association's had been "most carefully matured by some of the wisest and best men in this country", for the express purpose "of showing, by a practical example, that there is a mode of colonization by which the savage peoples of a thinly-populated country" such as the Maori "may be preserved from the horrors of lawless colonization" (p. 12). He proceeded to attack a number of Coates' comments about the Association's plan, mainly by accusing him of "dishonest concealment" of material given in *British Colonization*.

137. Wakefield noted, for example, in response to Coates' allegation that the Association had concealed the profit motive behind its plans, that whole chapters of the book were devoted to discussions of the opportunities for profit and prosperity afforded by the Islands. The proceedings of the Association, he noted, had been widely publicized: there were no hidden agendas. There was more in this vein, including the correct observation that Coates had made no reference to either the chapter of *British Colonization* which outlined provisions for the religious instruction of Maori, or to Hawtrey's Appendix[310]. Wakefield could not resist the temptation to turn Coates' suggestion that Maori might not be willing to sell large quantities of land, as evidenced by the missionaries' own difficulties in acquiring "a sufficiency of land for their own objects", against him. The pamphlet reproduced a statement by a former member of the CMS mission which claimed that various missionaries had purchased very large quantities of Maori land "on private

[309] Wakefield, *Mr. Dandeson Coates,* p. 11. Emphasis in original.
[310] Beecham later made the rather feeble suggestion that Coates had probably considered the Hawtrey scheme to be "too extravagant to awaken any serious apprehension, and that it can never be really meant that its introduction shall be attempted", and so had "passed over it in silence": *Colonization*, p. 39.

account" (pp. 19-20) – a fact which was referred to repeatedly in New Zealand Association and New Zealand Company propaganda thereafter[311].

138. By December of 1837 the debate in Britain had largely boiled down to one over the degree of British intervention which would be necessary to save Maori from unsystematic British colonization. The missionaries and their supporters argued that minimal intervention by the Crown (a South Seas Act, a Consular Agent and a naval vessel) would suffice to bring the situation under control[312]. The New Zealand Association and its allies argued that the Crown needed to assert its sovereignty over all or parts the Islands in order to control British subjects, and should support large-scale systematic colonization as the best option for protecting and 'civilizing' the indigenous inhabitants. Few if any of the people involved in the debate seemed to think that British intervention of some kind could or should be avoided. Although the Government continued to talk to the Association, Lord Glenelg and his colleagues were at first leaning towards the missionary view. This was reflected in a memorandum which the Minister wrote for the Association on 15 December, outlining "the Difficulties which appear to him to impede the Adoption of that Scheme" (the scheme outlined in the draft Bill)[313].

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[311] And which, it should be emphasized, caused a good deal of concern within the CMS itself. Its 1839 pamphlet *Documents, Exhibiting the Views of the Committee of the Church Missionary Society on the New Zealand Question, and explanatory of the Present State of that Country (Confidential)* devoted a substantial section to a discussion of this issue ("Missionaries' Vindication of their Purchases of Land" pp. 17-40).

[312] For a useful statement of their anti-colonization position at the end of 1837, see the CMS's confidential pamphlet, *Notes for the Information of Those members of the Deputation to Lord Glenelg, respecting The New-Zealand Association, who have not attended the Meetings of the Committee on the Subject* (28 Dec. 1837). E.J. Wakefield later noted that although marked 'Confidential', this pamphlet "was privily but extensively circulated": *The Handbook for New Zealand* (1848), p. 60. It should be noted, though, that some of the people who opposed colonization in the North Island were less didactic where the southern islands were concerned. In his 1838 pamphlet *An Inquiry into the Equity, Practicability, and Expediency of the Proposal for Colonizing New Zealand* (1838), E.G. Marsh expressed strong doubts that Maori would benefit from colonization as the Association claimed, but added that "the remarks, made in this pamphlet, apply only to a plan for colonizing the northern island of New Zealand. In the southern island there are fewer people, and there is no Missionary establishment. Any experiment there might not be open to the same objections, if it were made on a spot, where the Natives are few, and ample space exists for the formation of an European establishment. At all events it would interrupt no measure of purely Christian philanthropy, actually in progress, and consequently would not be liable to objection on that score". In a similar vein the Rev. Thomas Chapman, writing from Rotorua in August of 1838, observed that "Relative to the S[outh] island, I am not prepared upon any well founded data to offer an opinion upon its being colonized. There are few inhabitants & therefore 'counties' must be lying quite desolate. How far objections applying to the northard island [sic] may be applicable to the southern one, when so very few reside, must be matter of opinion": letter of 6 Aug. 1838, in Turnbull qWU CHA Thos Chapman Vol. I.

[313] Printed Memorandum of 15 Dec. 1837: CO 209/2 pp. 409b-410b (the ms. draft is at pp. 411b-422b). This printed version was prepared in 1838 for submission to the Select Committee on New Zealand, but was not published with their Report.

139. The first category of "Difficulties" related to "whether it is right, wise, and practicable to execute this Plan". Here, Glenelg questioned whether Great Britain had any right to give anyone "an authority to establish such a Colony" without first ascertaining whether Maori would consent to one being established, and without "taking the most effectual Security" that such consent would be "freely and fairly made". In any case, the Colonial Minister noted, the 1837 Select Committee on Aborigines had advised against the colonization of New Zealand. He also questioned whether a plan "of such an Extent or of such a Nature' as the New Zealand Association's was really necessary to bring British subjects in New Zealand under control. Finally, Glenelg expressed concern that American citizens might resist the assertion of British Sovereignty (and their Government take advantage elsewhere in the Pacific of such a precedent), and that the colonization of New Zealand might detrimentally effect the expansion of settlement in the Australian colonies[314]. Even if all of these objections were satisfactorily answered, he concluded, there remained the question of whether the Association's plan would best be implemented by an Act of Parliament or by the granting of a Charter by the Queen using her prerogative powers. The Government preferred the latter solution[315].

140. E.G. Wakefield prepared a response to this memorandum[316], but in the event it was not needed. Less than a week later the Association met with Glenelg at the Colonial Office, and the Minister "announced the decision of Government, as favourable to the views of the Association, admitted the general principles, & suggested certain details of minor arrangements to be introduced to the Crown Charter to be granted to the Association instead of an Act of Parliament"[317]. On 29 Dec. 1837 the Colonial Minister wrote to Lord Durham

[314] The original draft contained another objection in the first Class: that "The Plan will be encountered by a violent opposition on the part of those Religious Societies, which employ Missionaries in New Zealand. With an organization embracing almost every Town in the Kingdom, those Bodies will have the power to provoke a very powerful opposition in Parl[iamen]t". True but impolitic, this observation was deleted in the final version.

[315] According to Adams, *Fatal Necessity*, p. 105, James Stephen had provided Howick with a paper which strongly urged that a Charter rather than an Act be used, in order to give the Crown greater control over the New ZealandAssociation.

[316] See Turnbull qMS-1124 Durham Correspondence (typescripts), Item #46. (The original document is in Turnbull Lambton Papers MS-P-140/2, but is much less readable). Not surprisingly, he dismissed all of Glenelg's objections of the first Class commenting, for example, that "Fraudulent treaties ... would be prevented by the act, which forbids anyone to treat [with Maori], except a responsible public functionary acting on behalf of the Crown". With respect to the Committee, he observed that their demand for a full inquiry by Parliament would be met by the debate over the Association's Bill.

[317] Minutes of meeting of 20 Dec. 1837: NZAMB pp. 29-30.

to summarize the topics discussed at this meeting[318]. Glenelg acknowledged, to begin with, that

> The intelligence which Her Majesty's Government has received from the most recent and authentic sources justifies the conclusion that it is an indispensable duty, in reference both to the natives and to British interests, to interpose, by some effective authority, to put a stop to the evils and dangers to which all those interests are exposed in consequence of the manner in which the intercourse of foreigners with those islands is now carried on.

The proposal made by the 1837 Aborigines Committee (the Consular Agents scheme) was considered by the Government to be "inadequate to meet the existing evil", and it was thought that

> the repression of practices of the most injurious tendency, to the natives of New Zealand can, as it would seem, be accomplished only by the establishment of some settled form of government within that territory, and in the neighbourhood of places resorted to by British settlers".

"Colonization", Glenelg accepted, "to no small extent is effected in these islands; the only question, therefore, is between a colonization desultory, without law, and fatal to the natives, and a colonization organized and salutary". The Government had decided to consider the proposal made by the Association for the establishment of a colony of the latter variety.

141. The 'intelligence' referred to by the Minister was the information contained in James Busby's report of 16 June 1837, the first copy of which was received at the Colonial Office on 18 Dec. 1837[319]. This report, with its emphasis on wars and escalating depopulation, and the inability of Maori to form any semblance of a government above the tribal level, seems to have made a deep impression on Glenelg, even though Busby's ideas about a Protectorate were dismissed or ignored by all concerned[320]. It also made an impression on Dandeson Coates, who requested a copy early in January because Glenelg

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[318] Letter of 29 Dec. 1837 from Glenelg to Durham: BPP 1840 (582) pp. 148-149 Appendix No. 8.

[319] This had been sent direct to London by Busby, with his despatch of 4 Aug. 1837 to the Colonial Office which enclosed copies of this despatches to Bourke since May (see CO 209/2 pp. 331b and pp. 333b-352a). The copy forwarded by Bourke with his Despatch #37/86 of 9 Sept. 1837 did not arrive in London until 1 Feb. 1838 (which means that Hobson's 'factory' plan and Bourke's critique of the two reports did not arrive until six weeks after Busby's report). The Bourke despatch and the two reports were presented to Parliament on 7 Feb. 1838, and published in BPP 1837-38 (122). Adams, *Fatal Necessity*, p. 106 was the first historian to clarify the times of arrival of the various despatches and the impact of Busby's report in December.

[320] Busby's passing reference to the idea of granting "a charter of government" to British settlers, on the other hand, was underlined in the copy of the reports which arrived at the Colonial Office in December, and mentioned by several commentators in the ensuing debate.

"seemed to attach considerable importance" to it "as illustrating the situation of New Zealand from the residence there of British subjects of immoral and desperate character"[321].

142. Although the CMS Secretary sought to downplay Busby's observations on war and depopulation in the commentary which he sent to Glenelg (also describing the Protectorate plan as "far too complicated to be practicable"), he acknowledged that the solution to the New Zealand question "is undoubtedly a matter of much difficulty"[322]. Coates then made a rather startling comment, that

> It must be admitted that the case of New Zealand is a peculiar and anomalous one. It is admitted too that it is not inconsistent with the essence of justice to deviate from acknowledged principles to meet an anomalous case. It may therefore be conceded that some departure from the strict letter of the law of nations is necessary to meet the New Zealand case. In other words, that the British Government may legitimately adopt proceedings in this case which, in the usual intercourse of independent states, would be an unjustifiable violation of the law of nations.

The proceedings which he suggested bore some resemblance to Hobson's 'factories' scheme, which had not yet reached the Colonial Office[323] – or perhaps the resemblance was to Hodgkin's scheme? (see ¶130, above) Coates proposed that, in order to facilitate the application of British law in New Zealand, "it will be requisite for the Government to obtain from the Native Chiefs by treaty the cession of a small portion of territory" – or, rather two 'portions', one at the Bay of Islands and the other somewhere in the south. These enclaves were to be under "the entire administration of the [British] Government", however, and he specified that both colonization and commerce should be excluded.

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[321] Letter of 1 Jan. 1838 from Coates to Glenelg: CO 209/3 pp. 125b-126a.
[322] Letter of 3 Jan. 1838 from Coates to Glenelg: CO 209/3 pp. 127b-131a. Parts of this letter were copied in Coates' *The Present State of the New Zealand Question Considered* (London: 1 Feb 1838).
[323] It is possible that Hobson had given a copy of his report to the CMS in New South Wales, which was sent on to Coates, but I have seen no evidence of this in the official and private correspondence I have examined.

The 'Provisional Government' Bill of 1838

143. This suggestion that Britain should acquire sovereignty over any part of New Zealand, however limited, was a significant departure from the previous policies of the missionary societies, but their opposition to large-scale colonization did not waver. On 30 Jan. 1838 Coates wrote to the Colonial Office expressing the "regret and disappointment" of the CMS Committee that a Charter was to be offered to the New Zealand Association, for in their opinion

> no conditions under which a Charter could be granted to that Association for the colonization of New Zealand could ... effectively guard against the evils to be apprehended both to the Society's Mission and to the Natives from such a proceeding if it should be adopted. [324]

The case against colonization was reiterated by Coates himself in a pamphlet published early in February[325], and by another published shortly afterwards by his ally John Beecham of the WMS. Beecham's *Colonization: being Remarks on Colonization in General, with an Examination of the Proposals of the Association which has been Formed for Colonizing New Zealand*[326], put the Association's plan under a microscope – paying particular attention to its stated plans for 'civilizing' Maori, and to Hawtrey's essay, and responding to Wakefield's criticisms of Coates. The results would not have surprised anyone familiar with the debate as it had unfolded to this point: the Association and its plans were found wanting in all respects.

144. In particular, Beecham concluded that they would impede the present missionary effort without making a significant contribution to "the work of Christianizing and civilizing the New Zealanders", and that the form of colonization proposed would inevitably lead to "collisions between the natives and Colonists ... respecting the transfer of lands" (p. 53). Nor, he prophesied, would colonization provide an effectual remedy to the problem of the immoral conduct and crimes of British subjects in the Islands (p. 56).

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[324] CO 209/3 pp. 153b-154a. See also Coates', *The Present State of the New Zealand Question Considered*, p. 6.

[325] Coates, *The Present State of the New-Zealand Question Considered*.

[326] London: 1838. Beecham sent a copy to Glenelg at the Colonial Office on 26 Jan. 1838: CO 209/3 pp. 205b-206a. He hoped that Glenelg would be able "to devise some other plan for the protection of the New Zealanders, rather than the very hazardous experiment of Colonization in its most improved form". A copy of the pamphlet itself can be found in CO 209/3 209b-242b.

Beecham's best point, perhaps, concerned the options open to the Crown. "It must be distinctly understood", he stated,

> that this plan is not proposed on the ground that all other probable means have been tried without success, and that Colonization is now forced upon the public attention as the *dernier* resort. Nothing, comparatively, has yet been attempted. The only step which has been taken, with a view to counteract the injurious influence exerted upon the natives by our immoral countrymen, has been the appointment of a British Resident at the Bay of Islands. But his circumstances there have been little different from those of a mere spectator.

"From doing next to nothing", Beecham pointed out, "it is now proposed to proceed at once from one extreme to another" (p. 57). It would be more logical, he suggested, to try an intermediate solution such as Coates' plan for Consular Agents, before resorting to one with such far-reaching consequences as large-scale colonization[327]. This was fair comment, although it assumed that an intermediate solution might be effective. The New Zealand Association, and many others, thought that the situation in New Zealand had been allowed to deteriorate beyond the point where this assumption was tenable.

145. The Rev. Mr. Beecham rushed back into print a few weeks later, following the official publication of the Busby and Hobson reports on 7 Feb. 1838. His pamphlet *Remarks upon the Latest Official Documents relating to New Zealand: (Ordered. by the House of Commons, to be Printed, February 7, 1838:) In a Letter to a Friend*[328] critiqued the Busby report (casting doubt on its accuracy), then surveyed and commented upon the various options put forward to date for dealing with New Zealand. These included large-scale Colonization, Busby's Protectorate, the Consular Agents scheme, and Hobson's 'factory' proposals. Not surprisingly, the Consular Agents proposal was considered the most, and colonization the least, promising among these. Beecham concluded that the Association's plan was utterly inadequate "to remedy the evils which afflict New Zealand", and that whatever was done, must be done under the direct control of the Crown:

> The complexity and difficulty of the question are such, and so much delicacy and care in the management of it are necessarily required; that it will be impossible for any private commercial company to deal with it effectually. The case of New Zealand can only be met by a Government measure, to be entrusted, as to its

[327] Beecham cited Glenelg's 1836 Cape of Good Hope legislation as a model of a mechanism which would provide sufficient teeth to make a 'Consular Agents' system workable.

[328] London: 1838. The letter is dated 26 Feb. 1838. A second edition of this pamphlet, with different pagination and appendices, was later published. As far as I can see the text of the letter itself, including the "Postscript" about Hinds) is the same in both.

> execution, to public officers whose sole business it shall be to carry it into full effect .... (p. 40)

Beecham was of course trying to put the Busby and Hobson reports to the best possible use for the supporters of the anti-colonization party. In a "Postscript" he announced having discovered, to his dismay, that the Association and their flunkies "were endeavouring to make these despatches subservient to their own purposes".

146. The reference was to the Rev. Samuel Hinds' *The Latest Official Documents relating to New Zealand; with Introductory Observations*[329]. This author did not in fact have much to say about the various despatches, but focused on the propriety of colonization, generally, and on the New Zealand Association's plan in particular. Hinds, however, had the temerity to criticise Beecham's *Colonization* (even though, the latter's author claimed, "I had no party-purpose to promote; but endeavoured ... honestly and impartially to examine the proposals of the Association"), and also to accuse him of "trifling with holy things" in some of his pronouncements (p. 22). Beecham responded more or less in kind. The debate was thus getting a little heated, and this appears to have been compounded by the contributions of the newspapers. The *Times*, for example, apparently picking up on Coates' observations about the evils of "GAIN", chimed in at this point with a swingeing attack on the Association and its plans – the first of a series during 1838. Its land-acquisition plans were a particular target on this occasion. "A considerable force of armed philanthropists", the editor cheerfully predicted, "will require to be kept up for the mere purpose of civilizing ... [Maori] habits, and of protecting their self-denying benefactors"[330].

147. Writing in early February, the *Times* seemed certain that a Royal Charter would be granted to the New Zealand Association. This did not eventuate. The Association and the Government were in agreement in most respects, but differed as to the way in which the venture should be funded and on the territorial extent of the colony. The Government wanted a joint-stock company, with investments made by the founding members, and did not want the colony to encompass the whole of the Islands, whereas the Association wanted it to be a public company with what amounted to a monopoly on their colonization. These differences were evident in the first exchange of letters on the subject of a Charter, and

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[329] London: 1838. Hinds is described on the title page as "Vicar of Yardley, Herts., and One of the Committee of the New-Zealand Association". The Busby, Hobson and Bourke despatches are copied, along with a "Petition to his Late Majesty from British Settlers in New Zealand" (pp. 43-46). This is the petition of 4 May 1837 from Bay of Islands settlers – including many missionaries – asking for protection.

[330] London *Times* 3 Feb. 1838.

could not be resolved[331]. Early in February of 1838 the Colonial Minister announced that no Charter would be awarded[332]. The Association then decided to place a Bill before Parliament, a measure which the Government announced that it would neither oppose nor encourage.

148. The New Zealand Association, it should be noted, was not without support outside of its own ranks. On 16 May 1838 the Aborigines Protection Society – founded the previous year "to assist in protecting the defenceless, and promoting the advancement of uncivilized Tribes" – published its first annual report[333]. It must have come as a considerable surprise to Coates and his allies that one of the principal planks in their platform was rejected by this humanitarian Society. The "New Zealand" section of the report stated that

> the question is not now whether any Colony at all shall be attempted there, for that question is settled by the fact of such large numbers of British subjects being already there, as to demand some legislative interference in the way of controul [sic]. It will not be friendship to the Aborigines to leave them a prey to the unprincipled and lawless, under the plea of the injustice that might be done them by the establishment of a British colony among them. The non-interference has now gone on too long, not to justify and demand immediate interference. (pp. 20-21)

What form this interference should take was not specified. The author observed that

> to afford protection to the natives while forming colonies among them, without compromising their independence, and involving their ultimate depression, poverty, and ruin, appears to your Committee a problem of vast difficulty yet to be solved. In no part of the world can it be expected that the Aborigines should be able to compete, in agriculture, trade, or commerce with their intelligent and enterprising visitors and settlers. (p. 21)

On the other hand, the Society could not find "any obviously essential defects" in the New Zealand Association's scheme, and considered those involved to be acting in good faith. "It is not the object of this Society", the authors observed, "to create difficulties in the way of

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[331] See letters of 29 and 30 Dec. 1837 from Glenelg to Durham, and Durham to Glenelg: BPP 1840 (582) Appendix No. 8. Adams, *Fatal Necessity*, pp. 116-117 discusses the pros and cons of these positions, concluding that "In a longer view of New Zealand's history it may be said that the colonization of the country would have been better in the hands of a non-profit-making organization [as originally proposed by the Association]; yet such a view can only be hypothetical", and that the Government acted properly by the financial standards of the day.

[332] See letter of 5 Feb. 1838 from Glenelg to Durham: BPP 1840 (582) p. 153 Appendix No. 11. See also London *Times* 9 Feb. 1838 "Parliamentary Intelligence", and 10 Feb. 1838 editorial. The latter attacked the New Zealand Association's "enchanting vision" for "a Radical Utopia in the Great Pacific". The Association did not entirely give up on its efforts to convert the Government to its views: see the May-June correspondence in CO 209/3 pp. 284b-285b, and Ch. V, below.

[333] Aborigines Protection Society, *The First Annual Report of the Aborigines Protection Society, presented at the Meeting in Exeter Hall, 16th May, 1838* (London: 1838).

emigration and colonization", and "the extension, on just and liberal principles, of Colonial Establishments, under the paternal sway of an enlightened British Government" would undoubtedly be good for the emigrants involved[334]. While expressing "deep anxiety" for the effects on Maori, the Report also commented in its conclusion that there was no reason to think that a "better scheme of colonization" could not be found which would be "compatible with the safety and improvement of the Aborigines":

> We cannot admit the doctrine that the establishment of a civilized community in the neighbourhood of uncivilized tribes, must be injurious to the latter, without supposing something extremely defective and improper in the regulations and principles of the former. Let these be corrected, and the evils must be diminished. (p. 26)

149. The New Zealand Association's Bill "for the Provisional Government of British Settlements in the Islands of New Zealand" would be tabled in Parliament on 1 June 1838[335]. It can best be described as a polished (and, of course, expanded) version of the 1837 "Abstract". A joint stock company, empowered to borrow money and sell land in the United Kingdom, was to be set up to establish and run the colony. It would be granted sufficient power to make "just and equitable Treaties ... with the native inhabitants" enabling the establishment of law and order, both to prevent the evils of uncontrolled colonization and also

> to the end that the native inhabitants may, for the future, be preserved from injury or wrong, may be instructed in the knowledge of religion, and the useful arts, and accustomed to the manners of social life, whereby, under the favour of Providence, colonization will be the means of diffusing amongst them the blessings of Christianity, and promoting their civilization and happiness .... [Preamble]

Sixteen Commissioners, including Lord Durham, were to be appointed, and sit as a Board. These men were required to take an oath of office promising to fulfil their duties to the best of their abilities, and stating that

> in particular, that in all dealings with the inhabitants of the native race in the Islands of New Zealand, I will cause law and justice to be observed according to the intent and meaning of this Act, and that I will at all times protect the said native inhabitants against any injury from all persons whatsoever, and will preserve to them all rights and privileges as by virtue of this Act shall justly appertain to them. [Sec. 9]

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[334] Aborigines Protection Society, *The First Annual Report (1838),* "New Zealand", p. 22.

[335] BPP 1839 (443). There is a copy in CO 209/4 pp. 731b-744a. It appears that the Bill, or one very like it, was in circulation well before this: see Baring's evidence to the Select Committee on 1 May 1838, at BPP 1837-38 (680) pp. 146-156.

The same clause was present in the oaths required from Members of the "Council of Government" in New Zealand, and from Judges (Secs. 18 and 18). A "Protector of Natives" was to be appointed whose task would be to protect the rights and privileges of Maori living within British territory, to attend Council meetings where questions relating to Maori were addressed, to represent them in Court proceedings without cost, and to witness all treaties and contracts made with Maori under the terms of the Act[336].

150. The Commissioners were to be empowered

> to make and enter into such treaties or contracts as they shall deem expedient with any chiefs or inhabitants of the native race, or other competent persons, in the said Islands of New Zealand, for the cession, to the Queen's Majesty, Her heirs and successors, or to the said Commissioners on behalf of Her said Majesty, Her heirs and successors, of any sovereign rights, territories, lands or hereditaments, within the said Islands, or any of them, or appurtenant thereto.

The lands involved would be proclaimed "to be British settlements, and ... shall be deemed and taken to be a part of Her Majesty's foreign possessions to all intents and purposes whatsoever". Anyone residing in these settlements would

> enjoy the same rights and privileges [for trade and navigation] ... as Her Majesty's free subjects in the most favoured British colony or possession, and shall be subject to and bound to obey the law of England, as far as the same can be applied within the said settlements, and subject to such modification as hereinafter mentioned .... Provided always, That nothing herein contained shall prejudice or affect the rights of any chiefs or others of the native race ... which shall not be freely and voluntarily ceded in pursuance of this Act. [337]

Treaties would also be made for the purpose of extending British legal jurisdiction over "parts of the said Islands of New Zealand whereof the sovereignty shall not have been ceded to Her Majesty", and for dealing with other matters. The Protector had to be present when such treaties were made, and all treaties had to be presented to Parliament. They could be declared void "if any force or intimidation, fraud, deceit or concealment, shall be used towards any person or persons of the native race in or about any such treaty or contract".

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[336] Sec. 25. The Protector was to be paid by the Commissioners, but could only be removed from office by the Crown. He was to report to the Colonial Minister, and could hire staff for his department.

[337] Sec. 10. The Commissioners were required to make it absolutely clear to Maori on making any treaty that all slaves in the territory ceded "shall thenceforth be free to all intents and purposes, in the same manner as if they had been born within the United Kingdom of Great Britain and Ireland".

151. Where land was ceded, the Commissioners were required to ensure that, for Maori remaining within the territory involved, a certain amount of land was reserved[338]. A "Commissioner for Native Titles" was to be appointed to "inquire into, examine, hear and determine" all claims to land based on alleged purchases from Maori prior to the passage of this Act[339]. The greater part of the Bill provided for the government of the Colony, and for setting up a Wakefieldian Land Fund system, special provisions being made for the fulfilment of the terms of treaties (Sec. 28), and for "providing for the inhabitants of the native race within such British settlements, [with] medical assistance and instruction in the useful arts, or other subjects for the exclusive benefit and improvement of the said inhabitants of the native race" (Sec. 40)[340].

152. Before this Bill was tabled the New Zealand question was raised in Parliament by the Earl of Devon. On 30 May 1838 he proposed in the House of Lords that a Select Committee be appointed "to inquire into the present state of the Islands of New Zealand". It was his intention, he explained, to introduce a Bill relating to New Zealand later in the session (evidently on behalf of the Association), and the Earl considered it advisable that information on this subject be gathered beforehand. In supporting this motion, Lord Glenelg requested that the work of the Committee be expedited, "as to enable the House to adopt some measure this Session", adding that

> It might be important to mention that, that the Government had intended to bring forward a measure in reference to New South Wales, in which certain clauses would have been contained, having reference to New Zealand.

This was evidently a reference to another variant of a South Seas Bill. Such a measure would have been presented already, the Colonial Minister stated, but had been held up by the "termination" of the Association's application for a Charter. Now it would be held up until the Committee had reported[341]. The Committee was duly appointed, and set about its work without delay.

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[338] Sec. 29. This was to be equal in value (at the minimum prices set for land in the settlements) to cost of importing the same number of persons as the native owners from Britain. Maori could presumably have used their treaty payments to buy additional land on the same terms as other purchasers.

[339] Sec. 34. Baring explained to the 1838 Select Committee that this clause was put in because such an investigation had been called for by the Committee on Aborigines. See BPP 1837-38 (680) p. 152.

[340] 5% of the Land Fund was earmarked for this Native Fund; 20% for local improvements; and 75% for a "Purchase Fund" and an "Emigration Fund". Presumably the "Purchase Fund" was intended to cover the actual costs of the terms of payment specified in the treaties.

[341] BPD (Lords) 30 March 1838, col. 152-152 "New Zealand". Glenelg told the CMS a month later "that it had been the intention of Her Majesty's Government to bring forward some measure respecting New Zealand, had the subject not been taken up by others; and that it was his wish that some suitable measure should be carried

153. The Government also set to work, reviewing the options open to it. Glenelg did not expect the Association's Bill to pass – it was "useless" for them to put it before the House of Commons, he told his fellow Lords[342]. It appears that his officials were given the task of making recommendations about the New Zealand question, for in May he received a note on this subject – unsigned, but probably written by James Stephen[343]. This outlined "Capt. Hobson's suggestions" for the acquisition of sovereignty over two or three districts already settled by Europeans. These would be declared dependencies of New South Wales and administered by Factors appointed by that colony, whose Legislative Council would be empowered to constitute "Courts having jurisdiction for the trial of all offences committed within New Zealand by any British Subject". Levies on tobacco and alcohol would pay all the necessary salaries. "This appears to be all that is essential for the present", the author commented: "For colonization it does not provide which would[?] seem an advantage, altho each Factory will of course be a nucleus round which hereafter a Colony will form itself". "If this be an evil", he concluded. "it is at least less so than the growth of the lawless population which is inflicting on that Country every evil of Colonization unattended by any of its advantages". Minimal intervention by the Crown was again the preferred course of action in the Colonial Office – when action was needed, that is. The Minister ordered that this note be placed on file for the time being.

154. "The Select Committee of the House of Lords, appointed to Inquire into the Present State of the Islands of New Zealand, and the Expediency of regulating the British Subjects therein"[344] cannot be faulted for lack of diligence. It heard more than twenty witnesses during April and May of 1838, many of whom had actually lived in or visited the Islands – hands-on experience being conspicuous by its absence from the colonization debate in Britain before this time. One witness, Nayti, was even a Maori, although neither the questions nor his answers seemed to add a great deal to the proceedings[345]. E.G. Wakefield would no doubt have been happy to testify, but he was away in the Canadas

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through Parliament during the present Session": CMSMB pp. 715-716 (3 April 1838).

[342] BPD (Lords) 30 March 1838, col. 154.

[343] Note of 4 May 1838: CO 209/3 pp. 374b-375a&b.

[344] The Report page noted that "the Petition of Merchants and Ship Owners of London, trading in the South Seas and to the Australian Colonies, praying for Protection of the Shipping Interest" was sent to the Committee. This apparently refers to "The Memorial of Merchants of London trading to the South Seas", of 16 Dec. 1837 (CO 209/2 pp. 445b-446b) which supported colonization as "the only sure means" of solving New Zealand's problems.

[345] See pp. 113-116. "Nayti" was what Te Whaiti of Ngati Toa was called during his visit to England: see P. Meredith, "Who was 'Nayti'", in *Te Matahauariki Newsletter* (#8 Sept. 2004), p. 2.

assisting Lord Durham with his inquiry into the state of affairs there[346]. More than 300 pages of testimony were collected. The impact of this material was limited, however, by the fact that the final 'report' produced in August comprised only a half-dozen lines. It can be reproduced in its entirety here:

> RESOLVED, – THAT it appears to this Committee, that the Extension of the Colonial Possessions of the Crown is a Question of public Policy which belongs to the Decision of Her Majesty's Government; but that it appears to this Committee, that Support, in whatever Way it may be deemed most expedient to afford it, of the Exertions which have already beneficially effected the rapid Advancement of the religious and social Condition of the Aborigines of New Zealand, affords the best present Hopes of their future Progress in Civilization. [347]

The *Times* was willing to read a good deal into this "laconic and vague" statement, arguing that the absence of comment entitled the newspaper "to infer that the divers colonization schemes, prospective profits, and Arcadian visions of 'The New Zealand Association' have found marvellously small favour in their Lordships eyes"[348]. This conclusion is more than a little questionable. The Committee was presented with a wide cross-section of opinion of the subject, which appears to have constituted a fairly good reflection of the New Zealand debate as it had developed over the previous year. Although many of the witnesses opposed colonization (notably Coates and Beecham), others supported it (notably the Rev. Samuel Hinds and G.S. Evans). It would seem that the Committee members were simply unable to reach agreement as to what could best be done about "the present state of the Islands of New Zealand", and sought refuge in a Report which did nothing but toss the proverbial ball back into the Government's court[349].

155. When the Select Committee Report appeared, the New Zealand Association's Bill had already suffered defeat in the Commons. Francis Baring, when he moved its introduction on 1 June 1838, was opposed by one MP on the grounds that Britain "had no right to establish a colony in a part of the world which was as independent of Great

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[346] He was largely responsible for the sections of Lord Durham's 1839 "Report on the Affairs of British North America" relating to Public Lands. Required reading for undergraduate students of Canadian 19th century history, the most useful version is C.P. Lucas's three-volume annotated edition, published in 1912 which copies all of the appendices. Durham was much criticized in some quarters for appointing a man with a criminal record to a government position. See London *Times* 18 Sept. 1838 "Lord Durham's Administration".

[347] Report of 8 Aug. 1838: BPP 1837-38 (680), p. iii.

[348] London *Times* 19 Oct. 1838, editorial. The author noted in passing that Durham took Wakefield to Canada with him "as a temporary *solatium* for the non-realization of their Polynesian hopes".

[349] The principal impact of the Report may have been in New Zealand rather than in Britain. Certainly it was later reported that its arrival in the southern hemisphere accelerated the rate and increased the scale of land-purchasing in the Islands: see letter of 17 July 1839 from a Bay of Islands resident, in *New Zealand Journal*, 8 Feb. 1840 p. 2 "New Zealand".

Britain as France or any of the nations of Europe", and by another on the grounds that establishing colonies was a prerogative of the Crown alone[350]. The CMS immediately joined in with a Petition against the Bill[351]. This gave a potted history of the Mission in New Zealand, and concluded that if the present course was maintained

> your Petitioners are persuaded that, at no distant period, the Chiefs and their people may be reasonably expected to assume the form of settled and well-regulated communities, enjoying at once the blessings of true Religion, and of a suitably-adapted civil polity, government, order, and the multiplied benefits which flow from these beneficent institutions.

The evils of colonization in general were then rehearsed, and a number of specific objections to the legislation outlined. The latter included *inter alia* an objection to the proposed treaties of cession and jurisdiction on the grounds that "the uncivilized state of the natives" rendered them "unavoidably ignorant of the full effect of such bargains", and predictions that Maori would sell all of their coastal lands and so lose their free access to the sea "for purposes of fishing and for commerce", and that the acquisition by the Association of "those parts of the Islands best adapted for commercial purpose" would hinder the "free intercourse" of the missionaries with Maori. The Petition asked the House not to pass the Bill, or any other measure "involving, as your Petitioners are persuaded the Bill in question does, a violation of the Rights and Liberties of the Natives of the Islands" or likely to hinder the operations of the missionaries. It also called upon the Crown to take upon itself (as an "office of international charity") the task of aiding "the Chiefs of New Zealand, as heads of an Independent Foreign State, in introducing law and government into their country".

156. On 20 June 1838 Baring moved the second reading of his Bill. Hansard provides only a brief outline of his speech, but a more complete text is available elsewhere[352]. Baring provided a brief history of the Association and its goals, and claimed that the promoters had been subjected to a clandestine attack by Coates "in which our motives were impugned, and the existence questioned of all those feeling by which honourable men should be influenced", and the accusation made "that we were an association of jobbers, whose only object was trading in land". The Secretary and his supporters would not listen to reason, he claimed, and

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[350] BPD (Commons) 1 June 1838 col. 542 "New Zealand".
[351] CO 209/3 pp. 161b-162b (printed copy).
[352] *New Zealand Gazette* 9 Sept. 1839 "Debate in the Commons on the New Zealand Bill" (mis-dated as 19 June 1838). This appears to have been copied from an article (presumably a June 1838 article) in the London *Spectator*. The official, abbreviated, account of the debate is in BPD (Commons) 20 June 1838 col. 871-883.

> when we found every overture rejected, we did begin to suspect the existence of some motives beyond those which Mr. Coates had thought expedient to avow .... [and] Upon a close and searching inquiry, we became convinced that it was less from a desire to expose our motives than to conceal their own; not so much a desire to protect the New Zealander from excess of power on our part, as to maintain the influence which, from motives which appear rather less than spiritual, they had been engaged in founding, that they had raised an opposition which in its tone and language is little in accordance, with those doctrines of justice and charity which, they so loudly profess.

Baring referred to the extensive land purchases made by people in or associated with the CMS mission, pointed to the Busby and Hobson reports as showing that the missionaries had been much less successful than they claimed in 'civilizing' Maori[353], and argued that "the time has come when their exertions can no longer singly avail". He described the New Zealand Association's plan as "the surest corrective of the evils against which, unaided ... [the missionaries] cannot struggle".

157. The MP asked what other viable options were available to the Crown (or rather, as he put it, to "this government of expedients")? Baring dismissed Maori self-government (and by implication Busby's Protectorate) from consideration:

> I can hardly think that the native congress, recommended by Mr Busby, with the adoption of collateral measures, such as the establishments of courts, &c – none of which can be admitted without assuming the sovereignty they affect to disclaim – can be in their contemplation. They must know that no number of Europeans are likely to submit to a legislative assembly at Waimate; and that by the time the missionaries have made the first step in their constitutional education, half the population will have disappeared, and the white invader will have increased twenty-fold.

As for Hobson's 'factories' scheme,

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[353] "But what is the state of society which has grown up under the mild government of the mission? Are not wars, murders, and every possible excess rife in all parts of the island? have they succeeded in putting an end to the system of slavery which everywhere exists; have they ventured to attempt it; are they in a position to counteract the gangrenous influences of the society of runaway sailors and escaped convicts, which is daily augmenting in a frightful proportion; can they oppose any barrier to the vicious example against which their precepts must struggle in vain, or set any bounds to the profligacy and excesses which are introducing disease and premature mortality into all the districts with which they are in contact?". A *Sydney Gazette* correspondent criticised the missionaries in December of 1838, asking "What are the Protestant Missionaries about? you may well ask. The fact is, and it is very much to be deplored, that they are so much engaged in purchasing large tracts of land – in attending to farming business – in superintending the erection of fine houses – in gossiping – in tea party chit chat – in supper feasting, that they have not sufficient time to spare from secular affairs to attend to the religious duties for which they are too well paid by the contributions of the rich and the poor of England": *Sydney Gazette* 11 Dec. 1838, letter of 17 Nov. 1838 from "R.W.L." of Kororareka.

> If they mean to plant factories, at the bottom of every bay where Europeans resort, I would ask them, to estimate the probable consequence of small communities: without commerce, without combined labour, arts, institutions, and religion, being grouped round twenty isolated points in the two islands.

He also dismissed the idea of the Government establishing a colony itself, asking "was the House prepared to vote 200,000£ for the expense?"[354]. In short, the MP presented the New Zealand Association's Bill as the only workable alternative open to Great Britain, and as one which could be implemented without cost to the Crown and the country.

158. Baring found some support for his arguments, notably from other members of the Association such as Benjamin Hawes, and John Ward – both of whom joined him in attacking the present Ministry[355]. But they met solid opposition from supporters of the Government who opposed the financial model in the Bill, from supporters of the missionaries (for obvious reasons), and from other MPs who simply agreed with W.E. Gladstone that

> whatever was done should be done under the strictest and most direct responsibility, by instruments under the immediate control of the executive and of Parliament, and not by any intermediate body, removed from their superintendence and control. (col. 874)

Or, as another Member put it, "that if they wished to colonize a country inhabited by a barbarous people, it should be undertaken by the Government" (col. 880). In the end, after a short debate, a second reading was denied by a solid majority, 92 MPs voting against it, while only 32 were in favour[356].

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[354] This remark is in BPD (Commons) 20 June 1838 col. 872.

[355] To which Lord Howick took great offence. He also continued to reject the idea of a company which relied on borrowed capital, rather than the resources of one using the funds of its founders: cols. 876-880.

[356] The *Colonial Gazette* later reported that "The opposition of the government to certain clauses of the bill introduced into parliament by the association, frustrated , for a time at least, what we do not hesitate to call a well devised and comprehensive scheme of colonization", and claimed that "all candid persons familiar with the principles of colonization, and the eligibility of New Zealand for a colony" had "pronounced strongly in favour of pursuing, in some way or other, the objects which the late association were, for a season, forced to abandon": *Colonial Gazette* 5 Jan. 1839. The disappointed editor of the *Sydney Gazette* commented when news of the defeat of the Bill reached Australia, that "any judicious measure having for its object the colonization of New Zealand, and the introduction of British settlers and British laws would confer an incalculable benefit on the New Zealander, the community of New South Wales, and the colonists themselves", later adding that "It is to be hoped that, in the ensuing session, some measure may be brought forward, more equitable in its principle, and therefore more likely to meet with the approbation of all classes of politicians; for the establishment of a British colony in New Zealand, under properly regulated principles, could not fail to prove a blessing to the New Zealanders, and a high benefit to the settlers there and in this colony": see *Sydney Gazette* 16 Oct. 1838, and 23 Oct. 1838 "New Zealand". The Sydney *Australian* commented sourly that "The combinations of government and other influences which were opposed to Mr. Baring's Bill, are such as justify suspicion, and demand investigation": Sydney *Australian* 24 Nov. 1838 "Colonization of New Zealand".

The Aftermath of the Bill

159. The New Zealand Association reacted to this "temporary failure of their application to Parliament" by resolving "to persevere in their efforts for assuring to the inhabitants of New Zealand the blessings of Christianity and civilization and to this country the advantages of a sell regulated system of colonization"[357]. It would appear that efforts by people connected with the Association (and/or the New Zealand Company of 1825) to obtain a charter from the Crown continued for at least six months[358]. The CMS Committee responded to the defeat of the Bill by supplying Glenelg with "suggestions, with a view to meeting the present circumstances of New Zealand", designed to control British subjects in New Zealand, to "favour and facilitate" the activities of the missionaries, and "To promote the introduction of a code of laws among the Chiefs, for the establishment and maintenance of an efficient Native Government". Their model was Coates' Consular Agent plan, and the measures which they considered "suitable to the case" included the provision of "An efficient Consul Agent, with such Assistants as may be found requisite" and "A ship of war, stationed on the coast of New Zealand", and the establishment of "The periodical mission of a Court of Assize, from Sydney to New Zealand". They again called on the Crown to assist with "The introduction of a Code of Laws among the Chiefs"[359].

160. The CMS Committee met with the Colonial Minister in August 1838 to push this familiar agenda[360]. It did them little good. An appraisal of their proposals for the Minister by a Colonial Office official observed that they included "little if anything which has not been already under the consideration of the Gov[ernmen]t."[361]. "What the missionaries really want", Gordon Gairdner observed with respect to proposals for a more-

[357] Meeting of 9 July 1838: NZAMB pp. 41-42.
[358] In August 1838 the possibility of an agreement concerning such a Charter was evidently rumoured, for Glenelg considered it necessary to promise the CMS "that no steps would be taken" before the 1839 session of Parliament "for chartering any company" to colonize New Zealand: CMS Committee Minutes for 14 Aug. 1838, CMSMB pp.191-192. According to the *Colonial Gazette* similar rumours were in circulation in December, leading the London *Times* to renew its attacks on the Association: *Colonial Gazette* 5 Jan 1839. Not long after this one group of colonists affiliated with the Association told Durham that they intended to go to New Zealand immediately, with or without Government approval or a Charter: Letter of 17 Jan. 1839 from G.S. Evans to Durham, in ATL Lambton Papers MS-P-140/3. See also ¶169-171, below, concerning the memorandum relating to this subject produced by James Stephen on 21 Jan. 1839.
[359] Letter of 23 July 1838 from Coates to Glenelg, copied in the CMS's *Documents, Exhibiting the Views of the Committee of the Church Missionary Society*, pp. 7-16.
[360] CMS Committee Minutes for 14 Aug. 1838: CMSMB pp. 191-192.
[361] Minute of 23 Aug. 1838 by G. Gairdner: CO 209/3 pp. 171b-173a.

powerful Consular Agent, "altho' they either did not perceive it themselves, or evade the admission of it, is that the agent should possess such power & authority as he can only derive from Parliament"[362]. A review of the remedies which had been suggested for the New Zealand situation led him to conclude that "of the plans I think Capt. Hobson's plan of factories & Courts of Justice infinitely preferable".

161. One other scheme, of several submitted to the Colonial Office during the latter half of 1838[363], is worth mentioning here. In November Robert Torrens (see Ch. II) sent "Outline of a Plan for establishing under the protection of the British Crown an Independent Native Government in the Islands of New Zealand"[364]. This was a rather ingenious combination of Busby's Protectorate with a chartered private company. Torrens proposed that a "New Zealand Society of Christian Civilization" be given a Royal Charter permitting it to enter into a contract with the United Tribes to set up a functional government in New Zealand. A "Resident Commissioner" would negotiate with the chiefs who had signed the Declaration of Independence for the purpose of "establishing and maintaining a regular form of Government". (The southern tribes would also be invited to participate). The chiefs would be called together at "Waitanger" (sic) to discuss "establishing a Provisional Council of Government; and ... considering and adopting the principles of a constitutional code for the future Government of the United Tribes of New Zealand", and if an agreement was reached, the Resident Commissioner would

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[362] The CMS missionaries in New Zealand were similarly dismissive. Their appraisal of Coates' 23 July 1838 plan was that it "seems to us inapplicable to the exigency of the case of the New Zealand Question. In the first place a Native Government cannot be formed by Natives. The Natives are without a revenue[?], divided by petty jealousies and family feuds, ignorant of the simplest forms of Government without a force of any kind to execute any laws .... and we fear that before any thing in the form of Native power could be made to bear upon Foreigners the Country is gone, at least its Sovereignty. Settlers are fast buying up the Country and every vessel is bringing New Settlers down": "Remarks of the Sub-Committee on the Coates Letter to Lord Glenelg July 23 1838", in CMSMB MC/18 p. 84, 3 July 1839. These "Remarks" appear to have been made early in 1839.

[363] One Captain Hanchett, for example, suggested that a surplus warship be fitted out as a floating civil-military-judicial base, complete with Courts, treadmills and prison cells, and be placed on permanent station in New Zealand. "A Chief of the Missionaries" was to be part of the package, to supervise their operations, and all executions would be carried out "in the most populous Bay of the Islands of New Zealand, as an Example", See CO 209/3 pp. 392b-394a. See also letter of 10 Nov. 1838 from Lt. Col. E.S. Angels to Glenelg: CO 209/5 pp. 168b-170a. Proposals for colonizing New Zealand reached the Colonial Office with sufficient frequency that in December of 1838 a somewhat exasperated James Stephen suggested that "(subject to the decision of the general question of Colonizing New Zealand) ... the various projectors of plans of that nature should be desired to meet together to ascertain the practicality of their all cooperating in some one scheme": CO 209/3 p. 322a, minute of 31 Dec. 1838.

[364] CO 209/3 pp. 299b-312b. Another "Outline" submitted in December appears to be identical to this one (CO 209/3 pp. 333b-346b).

> formally accept, on behalf of Her Majesty, the invitation contained in the fourth Article of the Declaration of Independence "to become the Parent and Protector of the Infant State of New Zealand".

(Note the implication that their invitation had not to date been accepted by the Crown).

162. The contract between the two parties was to last 21 years, during which time the country would be governed by the Provisional Council, with the Resident Commissioner at its head, among whose members would be chiefs elected by their peers. Courts, churches, schools and an army would be set up under the authority of the Council, and all unoccupied lands in New Zealand would be declared the property of the State. These would be available for sale under a complex set of rules, and State lands would be used to provide security for loans to pay for the establishment and operation of the Government. After the 21-year contract of the "Society of Christian Civilization" expired, a two-chamber representative government would be set up. The country's head of state would be an "Areekee" selected by the first Council of Administration, whose office would become an inherited one. Taken as a whole, the proposal was probably more viable than Busby's Protectorate, in several ways, but was ignored by a Government now focused on 'factories'[365].

[365] Torrens' plan in fact bears more resemblance to the 'constitution' for the United Tribes described by A.S. Thomson (see ¶82, above), than to Busby's 1837 Protectorate scheme, which may indicate that some kind of unrecorded cross-fertilization took place.

V

The Government's Plans for New Zealand, 1838-1839

The 'Factories' Plan

163. Early in December of 1838 the Colonial Office finally decided to take action on New Zealand, and after the customary delays and foot-dragging actually did so. It may be that it was pushed into motion by a private letter which Dandeson Coates sent to Lord Glenelg on 30 Nov. 1838, (or from private conversations which gave raise to this letter)[366]. Coates reported that recent correspondence received from the missionaries revealed that

> The state of things in New Zealand ... is ... so painful as to demand the adoption of energetic measures in order to remedy the disorder and evils which have grown up in the Island through the residence there of Whites, principally British subjects, of immoral and desperate character.

He called on the Government to

> apply without delay such remedies as the case may admit to secure the natives from the wrongs under which they now so severely suffer, and to avert still heavier calamities which, unless the British Government effectually interpose their friendly offices, seem likely to overwhelm them.

On 1 Dec. 1838 Glenelg wrote to Governor Sir George Gipps of New South Wales (Bourke's successor) to inform him that the Government intended "to appoint an officer who will be vested with the powers, and will assume the character of British Consul in New Zealand". Gipps would receive further information "very shortly", and was to inform James Busby of the Government's intentions[367].

164. Soon afterwards Lord Glenelg made a request that the Foreign Office consider "the expediency of appointing an officer, invested with the character and the powers of British Consul, at New Zealand"[368]. He discussed the situation in New Zealand,

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[366] Letter of 30 Nov. 1838 from Coates to Glenelg, "Private": CMS Home Letterbooks (Outwards) 1838-42 pp.133-134 (ATL Micro Collection 4/ Reel 66). The correspondence in question was a letter of 1 March 1838, from George Clarke (later Protector of Aborigines) which was published in *Documents, Exhibiting the Views of the Committee of the Church Missionary Society on the New Zealand Question*, pp. 41-45. Clarke emphasized the lawless state of the country, the growing volume and impact of land sales, and the inability of Maori to form a national government. He opposed the plans of the New Zealand Association, and called for the formation of a Maori government under a British Protectorate akin to that proposed by Busby. For reasons which are not clear, Coates later rejected a request from the Colonial Office to have the Clarke letter "recorded in the Office and considered as an official document": Private letter of 9 Jan. 1839 from Coates to Sir G. Grey (?), in CMS CH/L3 Home Letterbooks (Outwards) 1838-42 p. 138 (ATL Micro Collection 4/ Reel 66).

[367] Despatch #38/251 of 1 Dec. 1838: BPP 1840 [238] p. 19 No. 3.

[368] Letter of 12 Dec. 1838 from James Stephen to J. Backhouse (Foreign Office): BPP 1840 [238] pp. 3-4 No.1. Copies of Busby's 1832 instructions and of the Bourke, Hobson and Busby reports were attached. A 'Consul'

and the reasons for the appointment of a British Resident earlier in the decade. The Residency was a failure, he stated, although Maori had "evinced a strong disposition to place themselves under British protection". The Colonial Minister had decided that a British Consul would better serve the purposes of the Crown than a British Resident, and asked the Foreign Minister (Lord Palmerston) to look into the matter. "Until the state of society in New Zealand shall have become more settled", he suggested, "and until the relations with the chiefs shall have been placed on a more permanent footing", the Consul (although appointed by the Foreign Office) should report to the Colonial Office.

165. Captain William Hobson, who had returned from the Southern Hemisphere when his command of HMS *Rattlesnake* came to an end, was offered this position at the end of the month[369]. It was the wish of the Government, the letter from the Colonial Office stated

> to confer the appointment on some one who may possess some previous knowledge of the peculiar character of the Society in New Zealand: and from the report which you furnished to the Governor of N[ew]. S[outh]. Wales while commanding H.M.S. Rattlesnake on that Station Lord Glenelg is induced to inquire whether it would suit your views to accept the appointment.

The Minister hoped that "the interest you have already shewn in the well being of N[ew]. Zealand" would induce Hobson to accept the job[370]. Hobson replied on the first day of 1839, indicating that he was indeed interested. The Captain was no fool, however, and was quite familiar with the difficulties which Busby faced. Before committing himself further, he wanted to "satisfy myself that the Power and means with which I am supplied are adequate to the duties I shall be called upon to fulfill". He asked

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was the next step up the diplomatic ladder from a 'Resident'. The principal difference between the two appears to be that the Consul holds a commission from their head of state – the Queen in this case –and represents them, while the resident is simply an officer of the government represented.

[369] It may be noted that Hobson was not the only candidate for the job. The former Assistant British Resident Thomas McDonnell, now in England, had applied for the position earlier in 1838 (see his letters of 18 July and 21 Sept. 1838, in CO 209/3 pp. 447b- 454b, and pp. 494b-496a). Busby was not without supporters either, although they seem to have been rather thin on the ground in Britain. When news of Hobson's appointment reached the south the *Sydney Gazette* considered that the British Resident was hard done by. "Having gathered experience", the editor observed, Busby "is much better fitted for the office of British Consul at New Zealand than any stranger can possibly be". He observed that "No reason is assigned for passing over Mr. Busby, but we presume it is intended to attach a higher salary to the Consulate which will thus become too much of a *tidbit* of patronage to be dispensed with" by the Whig government. See *Sydney Gazette* 13 June 1839 "The Proceedings of Council".

[370] Draft letter of 28 Dec. 1838, in CO 209/3 pp. 395b-397a. Further correspondence concerning the terms and conditions of the appointment followed.

> to be informed if Her Majesty's Government contemplate any change in our present relations with the Natives of New Zealand? and what means will be afforded to the executive for the repression of crime, and the adjustment of differences, which are sure to occur amongst Men who are all in pursuit of the same object?

He was asked to come to London in order to "personally communicate" with the Minister on these and related subjects[371]. At their first meeting, Hobson later recorded, Lord Glenelg

> clearly explained to me the reluctance with which Her Majesty's Ministers interfered with the affairs of New Zealand, but that the force of circumstances had left them no alternative.
>
> The acquisition of vast tracts of Land in those Islands by British Subjects – and the settlement there of a considerable number of Persons, amongst whom were many of the most depraved character – and the still further emigration that was in progress from England, under a Society that had been founded for the promotion of that object, and for the purchase and resale of Land; had created a necessity for the interference of Government, to avert evils which must result both to the Aborigines and to the settlers, if unrestrained by necessary Laws and Institutions. [372]

(Note that the Colonial Office evidently did not think, at this point, that it had heard the last of the New Zealand Association).

166. It says something about the level of Colonial Office interest in New Zealand that little thought had been given to the practicalities of implementing a 'factories' scheme, even though it had been the Government's preferred option for almost a year[373]. Hobson discovered this when he turned up for his interviews early in the New Year. "I own I was a little surprised to find that no measure had been resolved upon", he told Sir Richard Bourke (with whom he obviously remained on friendly terms), "and that I was expected to furnish a plan for working out the details of the Factory System, which I had the honor to submit to you in [18]37"[374]. He requested "a brief outline of your ideas on the ... New Zealand affair" (and also prudently requested that when in London Bourke "not mention the observation I made about His Lordship being unprepared with a plan to proceed upon").

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[371] Private letter of 1 Jan. 1839, from Hobson to Glenelg: CO 209/4 pp. 83b-84a. The draft reply is on CO 209/4 pp. 85b-86a. It appears that Hobson was also lobbying for a naval position at this time, and according to Glenelg there was a possibility "of his being appointed to the Flag Ship of some Admiral": Minute of 12 Feb. 1839, in CO 209/4 pp. 191b-193a.

[372] Despatch #1 of 24 Dec. 1839 from Hobson to Gipps: ANZ G 36/1(a) pp. 1-7.

[373] Aside from the memorandum of 4 May 1838, discussed at ¶153 above (CO 209/3 pp. 374b-375a&b), which added little, if anything to what Hobson had suggested.

[374] Letter of 15 Jan. 1839: Mitchell Library, Sydney ML MSS 403/3 (Bourke Family Papers) pp. 197-200.

The 'Factories' Plan, Revisited

167. Hobson submitted a revised version of his 'Factory' system to Lord Glenelg on 21 Jan. 1839[375]. The Captain observed that the measure originally suggested had been "one of expediency, rather than of choice", in that it was based upon "an impression that Government had resolved to treat the States of New Zealand as an independent nation"[376]. He himself would have preferred something "preparatory to a permanent connection between Great Britain and New Zealand". Revisiting the scheme simply reinforced this opinion. Hobson still believed

> that the system of Factories is the only measure, *short of actual assumption of Sovereignty by Great Britain*, that is calculated to afford protection to our fellow subjects who settle in New Zealand. [emphasis added]

If this system was still to be pursued, he suggested

> that the extent of the Factories should not be limited, but that it should remain discretionary with her Majesty's Government to affix these boundaries and extend them as circumstances may require. In order to secure the means of carrying this proposal into full effect, considerable tracts of Land should be purchased by Government, beyond the contemplated limits of the Factories.

Townships should be created within each Factory, and harbour facilities provided. A Superintendent should be appointed "to whom should be confided the entire control of all the British Settlements in New Zealand", who would also "be appointed Consul General, and accredited as Political Agent to the united chiefs of New Zealand" and serve as Magistrate. (Junior officers would be Factors, Vice Consuls and Justices of the Peace). Hobson thought that legal authority within the Factories, and over British subjects elsewhere in the country, should be provided by an Act of Parliament. He went on to discuss possible arrangements for trials, military and naval requirements, and ideas for raising revenue, but had to confess that he was "unaccustomed to consider such cases in all their bearing, and to examine the possible effects of every proposal", and evidently thought that others might have better ideas than he about most of these subjects.

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[375] Letter of 21 Jan. 1839: CO 209/4 pp. 87b-93b.

[376] "From the first moment of my acquiring any knowledge of the actual condition of New Zealand it was clear and evident to my mind, that the tide of Emigration which had already begun to flow towards that country, would eventually oblige Her Majesty's Ministers to extend to it in some shape or other the protection of British Laws, and it was under the impression that Government had resolved to treat the States of New Zealand as an independent nation, I first suggested the plan of establishing Factories".

168. But in any case the Consul-elect did not think that a 'factories' system *should* be adopted, in either its original or revised form. Hobson concluded his memorandum by listing the drawbacks of his modified system:

> First. New Zealand will still, with the exception of the Factories, be open to the encroachment of all other Nations.
>
> Second. British Subjects and Natives will be liable to the aggressions of Foreigners, for whom it is not in the power of this Country to Legislate.
>
> Third. Vast tracts of land will be held by British Subjects without recognized title, and these will be devised and sold without any Legal record, creating confusion and strife, that I fear will at last baffle the Powers of the executive to control.

The only real "remedy", he thought, was for

> Her Majesty's Government [to] at once resolve to extend to that highly gifted Land the blessing of civilization and liberty, and the protection of British Law, by assuming the sovereignty of the whole Country, and by transplanting to its Shores, the Nucleus of a moral and industrious population. [377]

Annexation and large-scale colonization, in other words, were Hobson's preferred solutions to the New Zealand question as of January 1839[378].

The January Draft Instructions

169. While Hobson laboured over this memorandum, the Permanent Under Secretary of the Colonial Office also turned his attention to the New Zealand question. On 21 Jan. 1838 James Stephen produced a proposal for action by the Crown. It was an outline rather than a fully-detailed plan – "all unnecessary topics have been excluded", the author noted, "in order to disembarrass as far as possible, a question which will hardly bear any further delay" – but it is quite clear what he had in mind. Given Stephen's reputation as an opponent of colonization, the plan put forward here is more than a little surprising. His memorandum expressed regret that Europeans had ever visited New Zealand, but accepted that the damage done by them was "irreparable", and that the fact of the matter was that "an

[377] Hobson quoted this portion of his letter in its entirety to Governor Gipps in December of 1839: Despatch #1 of 24 Dec. 1839, in ANZ G 36/1(a) pp. 1-7.

[378] I have not been able to ascertain exactly when Hobson returned to the UK, although presumably he would have been called as a witness by the Select Committee if he had been on hand in April and May of 1838. It seems certain, however, that he would have paid close attention to the New Zealand debate when the opportunity presented itself, and certainly would have been aware of the controversy over the colonization of New Zealand.

unauthorized British Colony is rapidly rising into sufficient strength". He proposed to address these problems with what amounted to a revised version of the New Zealand Association's scheme, in which the Crown itself would provide governance from the beginning, and would allow systematic colonization. This alteration was designed to avoid perceived problems (with both the South Australian "experiment" and the New Zealand Association) relating to "the delegation of the essential powers of Government to Commissioners, or any other Body distinct from the Gov[ernmen]t. itself". Stephen observed "that the scheme while it maintains the ancient prerogative and the legitimate authority of the Crown, ... goes far to meet the wishes of the New Zealand [Association] projectors".

170. Stephen's idea was that a Crown Agent – "whether called Consul or however else designated", but bearing a Royal Commission as Governor for use when required – should be appointed, and authorised to acquire from Maori ("on fair terms") "the Sovereignty of such parts of New Zealand as may be best adapted for the proposed Colony". The Governor's Commission would authorise him "to establish Courts, Judges, Magistrates, and other Officers necessary for the Administration of Justice", and he would be supplied with instructions "having for their object, amongst other things, the protection of the Aborigines by every method which can be devised for that end". An Act of Parliament would set up a non-representative Crown Colony form of government "for a certain term of years", and would "prohibit any future acquisition of Land by British Subjects in New Zealand, except by a Title derived from, or through the Crown" – asserting, in other words, the Crown's pre-emptive right over customary lands claimed by Maori[379]. A "Charter of Incorporation" was to be granted to the New Zealand Association[380], in the name of "the New Zealand Company". This was to be a joint-stock company, which would be allowed to raise loans for certain purposes. It would act as the Crown's agent for the sale of Crown lands, receiving "a fair Brokerage or Commission". A Land Fund would provide for emigration, although it was to be specified "that any deficiency of the ordinary Revenue of the Colony" would be made up from that source. Stephen stressed that the New Zealand

[379] Stephen also noted that "large tracts of the most valuable Lands are obtained from the Chiefs and in proportion as the erection of a regular government shall be delayed, the possibility of any well regulated Land system being introduced, will be diminished. It would probably be necessary, whenever a Colony should be established, to impose a discriminatory Land Tax upon all Lands not held by a title derived through the Crown – a measure practicable now, but which will become more and more difficult with every fresh extension of such unauthorized acquisitions. Or it may be necessary to declare the invalidity of any title to Land, not acquired through the Crown – a declaration which might be safely made when the preponderating numerical interest is in favor of it, but not afterwards".

[380] The reference in the text is to "persons now applying for it".

colony would involve "no increase, or at least no immediate increase, to the national expenditure", hastening to add that "The question is ... not one of expense, but rather of humanity and justice towards the Aborigines, and of national policy".

171. This document is often described as the first of the series of draft instructions for Hobson which appeared in 1839. In my opinion this is not the case. It would appear that the Colonial Office was in touch with the New Zealand Association, or some element of it, during this period. Both the *Times* and the *Colonial Gazette* mentioned rumours that a new Bill or a Charter might be in the offing[381], while in the Colonial Office files lies a document labelled "Papers received from the New Zealand Deputation – Objects of the Joint Stock Company"[382]. Received on 22 Jan. 1839, this certainly seems to indicate that the Association was receptive to the kind of financial structure which Stephen called for in his 21 January memorandum. It seems more likely than not that the latter was written for the express purpose of facilitating these negotiations, rather than being intended as a practical plan which Hobson was to be called on to implement: unlike all of the other draft instructions of 1839, it should be noted, this one does not bear the heading "Captain Hobson". Further information about such negotiations is in short supply[383], but it may be that Sir George Grey's letter of 5 Feb. 1839 to George Lyall marks their termination. "Additional measures", Grey informed him, "are about to be adopted for the protection of British Subjects & for the establishment of regular forms of Government in New Zealand" and therefore the Government was not prepared to offer a Charter at this time[384]. The measures in question were those embodied in another memorandum written by James Stephen at this time.

172. Three days after his 21 January memorandum appeared, Stephen produced a set of draft instructions addressed to "Capt. Hobson RN"[385]. This was similar in many respects to the 21 January plan, but all reference to the acquisition of lands for the specific purpose of colonization, and to a Charter for a private company, were removed. Intervention by the British Government in New Zealand was said to be "indispensable":

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[381] See above, footnote #358.
[382] CO 209/4 pp. 287b-293b. There is another (also undated) copy, "Objects of the Joint Stock Company", in Lord Durham's papers: Lambton Papers MS-P-140/3.
[383] CO 209/4 also contains a letter of 31 Jan. 1839 from one John Bright to Glenelg concerning a Charter: pp. 298b-299b.
[384] Lambton Papers MS-P-140/3. See also Lyall's letter to Durham of 11 Feb 1839 in the same source.
[385] Draft Instructions of 24 Jan. 1839: CO 209/4 pp. 203b-221a.

> Whatever might be our views as to the wisdom of extending the Colonial Dominion of the British Crown in this direction, or as to the propriety of bringing the Civilized Natives of Europe into contact with the Aborigines of New Zealand, the course of events has reduced us to the necessity of choosing between an acquiescence in the growth of a British Settlement there without the restraints of Law, and the formation of a Colony in which lawful authority may be exercised for the protection of the Natives and the benefit of the Settlers themselves.

The Government now considered that "In order to the exercise [sic] of a lawful authority in those Islands, it is necessary that some parts of them should be brought under the Sovereignty of the Queen". Once Hobson had set himself up as Consul in New Zealand, therefore, he was to look over the country in order to ascertain

> what are those Ports and Districts within which it is most important that the British Sovereignty should be established for the good government of the existing Settlers, for the promotion of Trade, and for the protection of the Natives.

These were likely to include "the Bay of Islands, and at any other places to which British Shipping usually resorts, or where the Settlement of H[er] M[ajesty]'s Subjects have been actually formed".

173. Hobson was then to identify the chiefs in whom "according to the usages of the Country, the dominion over these Ports and places is vested", and persuade these chiefs to voluntarily cede said 'Ports and Districts' to the Queen. He would be authorised to offer them "an alliance offensive and defensive with the Crown of Great Britain"[386] and certain unspecified payments to be determined according to "the extent and value of the Ceded Territory". In these negotiations the Consul was to

> observe the utmost possible openness and sincerity. You will explain to the Chiefs the real motives by which Her Majesty is influenced, and will endeavour to convince them that of those motives the first and most important is to rescue themselves and their people from the outrages of lawless Bands of men, over whom the Queen can exercise no effective control, so long as New Zealand shall remain, as at present, an entirely Foreign Country. In dealing with these ignorant and helpless people it is as much our duty to avoid all approach to deception and fraud as [well as] any hostile use of our superior physical powers.

Once any territory was acquired in sovereignty, Hobson's Commission as Governor would take effect. For the most part, the following instructions relating to the legal institutions and

[386] Sir George Grey noted on the document that a promise of protection against external enemies might be unwise, for "It might compel us to resist by force any attempt at a settlement on any part of the unceded territory by the French or Americans" [Emphasis in original].

government of the Colony, and to the application of British law over British subjects in the unceded portion of the Islands, were much the same as those in the 21 January memorandum. One difference was that instructions were given concerning the disposal of Crown lands. It was specified that (as was the case in the other Australian colonies at this time), no Crown lands were to be alienated by way of free grants save for roads and similar purposes "in which the Colonists collectively are interested", and none were to be sold for less than the minimum upset prices fixed in London[387].

174. The situation overall, Stephen summarised, was that

> Within the British Territory in New Zealand you [Hobson] will possess the character & powers of a British Governor. Beyond that Territory you will be invested with the rights and privileges of a British Consul. The powers of either Class will be used for establishing and enforcing Law and Order amongst the British Inhabitants and for protecting the Natives from violence and injustice.

This was, more or less, Hobson's first 'factory' plan reconfigured as concrete instructions. As Glenelg put it two weeks later,

> The plan which I propose is not one for the encouragement of an extended system of Colonization, but for the establishment of a regular form of Government urgently demanded by existing circumstances.
>
> For this purpose it is proposed to obtain by negotiation and Cession from the Chiefs, the Sovereignty for the Queen of certain defined portion or portions of Land the portion or portions being those where the British are already settled. There the British authority would be established under proper Officers. [388]

A note by the Minister on the draft instructions stated that "the first step to be taken is to place it in the hands of Cap[tain] Hobson himself & to ask his opinion upon the instructions proposed to be given him". This was done[389], and by 12 Feb. 1839 Hobson was considering whether or not to accept the position.

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[387] Stephen noted in a letter to Labouchere on 15 March 1839 that in order to carry out this plan Glenelg's intention was that "A Bill was to be brought into Parl[iamen]t. enabling the Queen to nominate Five or Seven persons to make Laws as a Legislative Council for the Government of the purposed Colony. The Bill would have rendered answerable to the Tribunals of that Colony any British Subjects committing Crimes within any part of the Islands of New Zealand. The Bill would also have declared invalid any future acquisitions of Land by British Subjects within New Zealand from the Native Chiefs or people. This Constitution would of course have been provisional only, and of short continuance": CO 209/4 pp. 326b-331b.

[388] Minute by Glenelg of 12 Feb. 1839: CO 209/4 pp. 191b-193a.

[389] According to Stephen, "Lord Glenelg showed this Draft [of 24 Jan. 1839] to Captn. Hobson who generally approved it": Minute of 18 May 1839, in CO 209/4 pp. 243b-247b. It would appear from this that neither Stephen or Glenelg paid any attention to Hobson's memorandum of 21 January 1839, and that after the 24 January draft instructions appeared he himself did not continue to argue in favour of the changes outlined therein..

175. Included in the collection of 1839 draft instructions for New Zealand in the Colonial Office volume CO 209/4 is a set for Hobson which bears neither a date nor the usual Colonial Office stamp on which the circulation of a document was tracked[390]. A note at the top with James Stephen's initials reads, "I have not had time to read this since I dictated it. I w[oul]d therefore possibly file for now"[391]. The absence of a date on this document has inspired a great deal of speculation by historians as to when it was written and what it might signify. February, March, April and May of 1839 and possibly later have all been suggested[392], and one historian (evidently overlooking Stephen's note) argues that it was penned by Glenelg in February.

176. My own view is that this document was almost certainly written by James Stephen in December of 1838 or early January of 1839 as a rough compilation of ideas, after Hobson was selected for the position of Consul and before the Under Secretary wrote the 24 January draft instructions. One striking feature of the undated draft instructions which has received little or no comment is that – unlike all the others written in 1839[393] – they focused almost exclusively on the transfer of sovereignty from Maori to the Crown, including the reasons why this was both regrettable and necessary[394]. The nature of the colonial government and legal system to be created afterwards are only mentioned in passing – Hobson's comment on 15 Jan. 1839 that the Colonial Office did not have "a plan for working out the details of the Factory System" could well reflect his having seen this 'undated draft'. Although this document was obviously written in the context of an acceptance of Hobson's 'factories' plan, and his prospective appointment as Consul and Governor, it reads more like a first stab at articulating the rationale for and scope of British intervention than anything else, and can by no stretch of the imagination be described as a complete set of instructions. One might well ask why Stephen would have considered it

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[390] CO 209/4 pp. 221b-243a.

[391] CO 209/4 p. 221b. This is very faint on the microfilm copy available to me, but E.T. Williams, "James Stephen and British Intervention in New Zealand, 1838-40" *Journal of Modern History* 13#1 (March 1941), p. 28 n. 38 provides the text of the first sentence.

[392] Ably summarized by Sonia Cheyne, in "Act of Parliament or Royal Prerogative? James Stephen and the First New Zealand Constitution Bill", *New Zealand Journal of History* 24#2 (Oct. 1990), p. 185.

[393] The heading "Capt. Hobson RN" makes it unlikely that it was written earlier than 1839.

[394] One rather anachronistic feature is the possibility which Stephen raises of creating what amounted to a protectorate over the unceded areas: "Now however unfit the Chiefs may be to form a league for the purpose of establishing Laws and Institutions to which British Subjects would have to yield obedience, yet there may not be the same difficulty in entering into a Confederation with them of which the main objects would be to prevent any Settlement on the Islands without the express concurrence of the British Governor – to give all necessary facilities to British Commerce, and free admission and support to Christian Missionaries" (p. 237b-238b).

necessary to write something of this nature *after* his 24 Jan. 1839 instructions were completed, particularly in view of Glenelg's expressed opinion (12 Feb. 1839) that "abridgement" would be desirable[395]. (The undated draft was much longer and more rambling in its treatment of the cession of sovereignty than the sections of the 24 January draft dealing with this subject).

177. Stephen's draft instructions remained a work in progress in mid-February. Denied the command of an Admiral's flagship, Hobson accepted "the appointment to New Zealand" on 14 Feb. 1839, hoping that it would be accompanied by command of "a Ship of war" which would serve as a floating capital[396]. It appears that he expected to be sent away in the near future, but this did not come to pass. Lord Glenelg planned to raise the New Zealand question in Cabinet[397], but on 20 Feb. 1839 resigned his position as Colonial Minister. He had been forced out by his colleagues, mainly because of his handling of the Canadian crisis. Glenelg was replaced by the Marquis of Normanby, who had previously served as Governor of Jamaica and Lord Lieutenant of Ireland. A package of documents relating to New Zealand which included the 24 January draft instructions was placed before the new Minister in mid-March, but "Lord Normanby ... directed that this should be put by for his Lordships's future reference whenever this question should be ripe for decision, which at present it is not"[398].

178. It is instructive to note that in March James Stephen thought that "the best practicable course" open to the new Minister was a Charter scheme – basically that outlined in his memorandum of 21 Jan. 1839, although he referred instead to Glenelg's proposals to the New Zealand Association a year earlier[399]. Writing to Henry Labouchere, the new Parliamentary Under Secretary, in response to a new Bill concerning New Zealand then being proposed[400], Stephen stated that he knew of only "two modes of Colonizing New Zealand" short of full-blown annexation and the creation of a self-governing colony[401]. The

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[395] Minute by Glenelg of 12 Feb. 1839: CO 209/4 pp. 191b-193a.
[396] Letter of 14 Feb. 1839 from Hobson to Sir George Grey: CO 209/4 pp. 100b-104b. The acceptance occupies one line, while nautical details take up four pages. This idea, a good one on the face of it, was later abandoned. According to Hobson, the Admiralty "peremptorily refused" to consider the idea: Despatch #1 of 24 Dec. 1839 from Hobson to Gipps, in ANZ G 36/1(a) pp. 1-7.
[397] So Grey believed. See his letter of 21 Feb. 1839 to Stephen: CO 209/4 pp. 190b-191a. The much-annotated 24 January instructions were returned to the Colonial Office with this note.
[398] Minute of 14 March 1839 by Stephen, on Memorandum of 28 Feb. 1839: CO 209/4 p. 316b.
[399] Letter of 15 March 1839 from Stephen to Labouchere: CO 209/4 pp. 326b-331b.
[400] "A Bill to provide until the 31st day of December, 1844, for the government of British Settlements in the Islands of New Zealand" of March 1839: see ¶180-181, below.
[401] "Besides these two modes of Colonizing New Zealand, I know of none other except that of at once

first of the alternatives was Lord Gleneg's proposals to Durham

> that a Colony should be formed on the model of the old New England Constitution, that is, on a Body Corporate with a joint stock, the management of that Stock being the business of the Governing Body in England – the Settlement and Government of the Colony being the business of the Corporation abroad. To this were added various elaborate provisions for the defence of the Natives.

It would be necessary, he thought, to grant the Charter to a group of men other than those involved with the New Zealand Association, in order to "disarm the opposition of the Great Missionary Societies – an opposition which would be fatal to any project of Colonizing New Zealand". Stephen was uncertain whether it would be necessary to annex all or only parts of the Islands if the Charter scheme was adopted[402], but was certain that the pre-existing land claims of British subjects would prove to be a major headache.

179. "If that arrangement is impracticable", "Stephen continued, "then I hold that the next best course is that of executing Lord Glenelg's second, or substituted scheme" – Hobson's 'factory' plan. In the event that Cabinet was not prepared to sanction "the plan of a Colonial Corporation", he thought that there was "nothing to be done but to select the Consul and future Governor, and to prepare the Instructions and other Instruments under which he is to act".

The New Zealand Land Company

180. There the matter rested for two months. Questioned by the CMS Committee in April of 1839, Henry Labouchere admitted that the Government "had not been able fully to consider the New Zealand Question", and could only say that it "would in the course of the [northern] summer take up the matter, and ... adopt the measures which the case might

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establishing a Governor, Council, and Assembly. Notwithstanding all that is said of the danger of that system of Colonial Polity, all my information compels me to think that it is the best possible scheme for any Colonial Society of the Anglo Saxon Race who are exempt from the disaster of Caste. It is only because in New Zealand that calamity would prevail between the European and the Aboriginal Colonist that I should hesitate in at once convening an assembly, if I had any voice in such a decision".

[402] "Shall we acquire the Sovereignty of all the Islands and brave the discussion which must follow with the United States and with France with all the arduous responsibility of protecting the Inhabitants of so extensive a Dominion? Or shall we take the sovereignty of particular Districts only, and hazard the evils of a new unauthorized Colonization beyond our limits? Or, shall we attempt the middle course of obtaining from the Chiefs an agreement to place under British protection so much of the Islands as are not to be placed under British Dominion? The distinction may perhaps truly be said to be verbal rather than substantial; but in this, as in other Cases, an unsubstantial verbal distinction may be of very great practical use": pp. 330a- 330b.

require"[403]. Both Stephen's memorandum and the Committee's questions were prompted by William Hutt's draft "Bill to provide until the 31st day of December, 1844 for the Government of British Settlements in the Islands of New Zealand", a copy of which was sent to the Colonial Office on 12 March 1839[404]. Hutt had been a member of the New Zealand Association, and was involved with the group which at this time was forming the New Zealand Land Company. He proposed to submit this bill to the House of Commons, and told Labouchere

> I shall be very glad to modify it in any way you, or the Colonial Office, may desire – or, I shall be very glad, if you will allow me to withdraw my notice, on an understanding, that this important measure is to be, this Session, taken up by the Colonial Office. [Emphasis in original]

His Bill began with a declaration that "the Sovereignty of the Islands of New Zealand in the Southern Ocean is rightfully vested in the Queen's Majesty"[405]. Since many Britons had settled there, carrying out "considerable trade", and many more were "desirous of embarking for the said Islands", the preamble continued, it was necessary to provide for a temporary Civil government for them "and it is expedient to require the disposal of public lands therein upon an uniform System".

181. For these purposes, the Queen was to be authorised by Parliament to give authority to "any three or more persons" to make all the "Laws Institutions and Ordinances and to constitute such Courts and officers" required. These would be subject to the subsequent approval of Parliament. Two clauses then established a Land Fund system for the British Settlements. No public lands were to be disposed of "otherwise than by sale publicly, for ready money and at an uniform price", and all costs for the founding and operation of these settlements were to be paid for out of sales of public lands and through local taxes and duties: "no part of such expenses shall ever be charged upon or defrayed out of the public Revenues of the United Kingdom of Great Britain and Ireland, whether directly or indirectly on any account whatsoever". (A conspicuous omission from the Bill was any

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[403] CMS Committee minutes for 16 April 1839: CMSMB pp. 589-590. The Committee resolved that "That in the event of Her Majesty's Government taking upon themselves the devising and execution of suitable measures for remedying the evils in question, they be assured of the earnest desire of the Committee to co-operate to the utmost of their power in order to promote the salutary effect of such measures; so far as may be compatible with the peculiar object of the Society as a Missionary Institution and the character and obligation of the Missionaries as Christian Teachers".

[404] Letter of 12 March 1839 from Hutt to Labouchere: CO 209/4 pp. 531b-532a. A copy of this Bill can be found at CO 209/4 pp. 345b-349b.

[405] Cheyne, "Act of Parliament or Royal Prerogative?", p.186, in expressing surprise at this declaration, appears to be under the mistaken impression that this Bill was drawn up by the Government.

indication of where these "public lands" were to come from). Finally, no convicts were to be sent to New Zealand, and the Act was to expire after five years – when, presumably, a regular colonial government would be substituted.

182. Asked by Labouchere how he should respond to Hutt's Bill, James Stephen replied that a "short and Conclusive" answer was possible: "that the Queen cannot be advised to assent to the introduction into Parl[iamen]t. by any persons except the Minister of the Crown of a Bill for the enlargement of Her Majesty's Dominions". Appreciating that the MP might want to be a little more diplomatic, though, he suggested that Hutt be told "that whatever is necessary to be done will be undertaken by Lord Normanby and his Colleagues"[406]. As noted previously, Stephen went on to discuss the Crown's options, expressing his own preference for the establishment of a Chartered Company. It is not entirely clear what followed. On 22 March 1839 Hutt told the first meeting of the New Zealand Land Company

> that from conversations he had had with Mr. Labouchere he felt quite satisfied no Bill would be introduced this session [by the Government], as Mr. Labouchere told him that the great pressure of business on important questions such as Canada etc. would preclude the probability of their being able to give any attention to New Zealand until they were disposed of. [407]

A few weeks later, though, the MP would state in a letter to Labouchere that he had withdrawn his Bill "in consequence of Lord Normanby's assurance ... that his Lordship would undoubtedly introduce a measure ... [for regulating the Colonization of New Zealand] during the present session"[408].

183. It seems unlikely that such an assurance would have been given by any member of the Government at his time, and there is no indication in internal Colonial Office correspondence of preparations for such a measure before 18 May 1839. A great deal had changed between mid-March and the latter date. Hutt's comments to the first meeting of the New Zealand Land Company quoted above were followed by a statement that, when the

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[406] Letter of 15 March 1839 from Stephen to Labouchere: CO 209/4 pp. 326b-331b.
[407] Notes by E.B. Hopper on meeting of 20 March 1839: ATL MS-1034 EB Hopper Diary (Typescripts).
[408] Letter of 1 May 1839 from Hutt to Labouchere: ATL qMS-1124 Item #31 Durham Correspondence (typescripts). I have not been able to ascertain exactly what happened to the Bill, and when, which might clarify things. According to the minutes of CMS Committee for 26 March 1839, the Bill lapsed in the House before the Easter recess, but that Hutt announced his intention to re-introduce it: CMSMB p. 572. He did in fact issue a formal notice of his intention to revive the Bill after Easter: London *Times* 29 March 1839 "Parliamentary Notices".

Government finally introduced a New Zealand Bill, it was certain to include a pre-emption clause under which the Crown would not recognise the validity of private purchases of land from Maori. This meant that their proposed company

> would then have to pay the Government price [for land] instead of the Native's, which would in all probability amount to at least 500 per cent. more than what they can purchase for now.

Asked to comment on this, E.G. Wakefield gave his oft-quoted advice to "Send off your expedition immediately. Acquire all the land you can and then you will find that the Government will see the absolute necessity of doing something .... Possess yourselves of the soil and you are secure"[409]. By the end of April the new New Zealand Land Company was ready to send an exploratory land-buying expedition to New Zealand led by E.G. Wakefield's brother Col. William Wakefield. A ship (the *Tory*) was made ready, instructions were prepared[410].

The New South Wales Strategy, May 1839

184. The creation of a new land company with an avowed policy of establishing substantial settlements in New Zealand without Government permission lit a fire under the Colonial Minister and his Office[411]. Their immediate reaction was to revitalize the 'factories' plan. In a memorandum dated 18 May1839 James Stephen outlined what would be needed "If it be designed that Captn. Hobson should be sent to New Zealand". "There is much to be done", he stated, "which will necessarily occupy a considerable time, and which

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[409] Notes by E.B. Hopper on meeting of 20 March 1839: ATL MS-1034 EB Hopper Diary (Typescripts).

[410] See letter of 29 April 1839 from Hutt to Labouchere: BPP 1840 [238] p. 22 No.6. A printed copy of Col. William Wakefield's instructions were enclosed: CO 209/4 pp. 534b-545b

[411] It should be noted that, while the New Zealand Land Company was probably the most significant harbinger of imminent, large-scale British colonization at this juncture, it was by no means the only one. Interest in the Islands appears to have intensified as it became more and more likely that the British Government would take action, and would probably impose the Crown's authority over British settlements (at least). One example of this was the activities of "The Scots New Zealand Company", which began to organize itself in March of 1839 "for the purchase and resale of land in New Zealand, with the view of prompting emigration from Scotland to the company's land" (see *Sydney Gazette* 19 Oct. 1839 "Colonization of New Zealand"), and issued a prospectus in August which offered a different model for settlement than that promoted by the New Zealand Land Company, being aimed more at the middle and working classes (*Prospectus of the Scots New Zealand Company*, Edinburgh 1839). The chairman of the meeting at which the Prospectus was issued was one Patrick Matthew, who in November 1839 published *Emigration Fields. North America, The Cape, Australia. and New Zealand, Describing these Countries, and giving a Comparative View of the Advantages they Present to British Settlers* (Edinburgh & London: 1839). This elaborated on the Prospectus, paying particular attention to the humane treatment of Maori and their amalgamation into settler society. Every effort was to be made, Matthew stated, to bring Maori "to regard themselves as the subjects, not of a cannibal-petty-despot, but of the Queen of Britain—free subjects of the greatest empire of the world" (p. 163).

will therefore ill brook any further delay"[412]. To begin with, the plan had not yet been explained to Cabinet, and Stephen proposed that his draft instructions of 24 Jan. 1839 be sent to Ministers, along with "the remark upon it which ... Lord Glenelg himself made" (clearly referring to the ex-Minister's minute of 12 Feb. 1839), the latter on the grounds that "There is an advantage in retaining his own words (or at least the words which he adopted) in order to explain his meaning". It would also be necessary to obtain or draw up:

- a Commission for Hobson as Consul (from the Foreign Office);
- a Commission for Hobson as "Governor of the British Settlement at New Zealand" (from the Queen);
- approval from the Treasury for the expenses involved;
- instructions for Hobson, especially those relating to "Treaties to be made with the Natives", and the administration of justice; and
- despatches to the Governors of the Australian colonies "explanatory of the whole proceeding ... [and] instructing them to co-operate with Capt. Hobson".

Stephen saw the judicial provisions as posing the most difficulty. He commented that

> It is my own opinion that the best course would be to apply to Parl[iamen]t. on this subject in the present Session. I am aware of the difficulties which are made respecting Parl[iamen]ty Legislation for a Colony not actually in existence. But I cannot think there is much weight in this. In fact the Colony does exist altho' by mere usurpation on the rights of the New Zealanders. The Law would be made to meet a real and practical evil, and not to provide for a theoretical and speculative advantage.

Such legislation "would relieve the question of almost all its difficulties", for it would at one stroke "Create a Revenue, Courts of Justice, Police, and every other necessary Institution of Gov[ernmen]t". If it could not be obtained, Stephen gloomily observed,

> it will be necessary to consult the Crown Lawyers as to the course which he [Hobson] is in the first instance to pursue in creating by the mere Royal prerogative Courts either of Civil or Criminal Jurisdiction, and this consultation will occupy no short time.

Even if things went smoothly, he concluded, all of this was likely to take "some months", and he therefore urged his political masters to commence work immediately on "the first and most important [task] of all, that, namely, of obtaining the Concurrence of the Govt.

[412] Letter of 18 May 1839 from Stephen to Labouchere: CO 209/4 pp. 243b-247b.

collectively".

185. At some point between 18 May and 30 May 1839[413], a person (or persons) in or associated with the Colonial Office had an idea. It was quite a simple one, and in some ways an obvious option under the circumstances, but it had far-reaching implications for the future history of New Zealand. The New Zealand Land Company's announced plans promised to produce a large British settlement or settlements in the Islands in the near future. The Government had a plan of its own in hand – for the acquisition and administration of 'factories' under a British Governor – but it was not at all certain that Parliament could be persuaded to pass the necessary legislation in 1839. If it did not, the creation of a new colony by means of the Royal prerogative powers alone was likely to require a good deal of time. Delay in bringing British authority to New Zealand was particularly undesirable, however, because very large quantities of Maori land would undoubtedly be claimed by British settlers while legislators and officials pondered the problem of governance, and such private acquisitions would raise a barrier (or elevate the barrier which already existed) to the creation of a self-financing colony on the Land Fund model, which had become the standard for Australian possessions of the Crown.

186. The idea someone came up with was to make the new colony part and parcel of New South Wales from the beginning. Indeed, a notional New South Wales jurisdiction in the Islands was, in effect, to be created *in advance of any cession of sovereignty to the Crown by Maori*, meaning that any territories ceded (or already ceded) would instantly and by definition become part of New South Wales. And such a change to an existing colony lay within the scope of the Royal prerogative, which meant that Parliament would not have to be consulted in order to "Create a Revenue, Courts of Justice, Police, and every other necessary Institution of Gov[ernmen]t". Inclusion in New South Wales would automatically bring all of these things into effect in New Zealand, or at least would provide enough to go on with, until the opportunity for a review of the situation presented itself. (The saying

[413] In all probability before 25 May 1839, on which date Labouchere told Coates something "partially of a confidential nature", which led him to believe "that Government were about to adopt some decisive measures relative to New Zealand": CMS Committee minutes for 28 May 1839, in CMSMB MC/18 pp. 26-28. Information about the new plan would have been given in confidence because it had not yet been approved. Hobson was called to a meeting with Normanby and Labouchere on 25 May, and may have been briefed on the new plan: see his private letter of 30 May 1839 to Labouchere discussing land claims policy, in CO 209/4 pp.104b-108a. Hobson also visited Coates, on 27 May, "and informed him [Coates] that he had been appointed by Government to carry into execution their intended measures, with regard to New Zealand". Coates "formed a favourable opinion of the intended measures of Government and of the views of Capt. Hobson in carrying them into effect".

'close enough for Government work' springs to mind). Although the germ of this scheme can be discerned in Hobson's 'factories' plan, for it had always been the intention to treat ceded territories as 'dependencies' of New South Wales with a separate Governor, the May modification was major innovation in the long process of deciding what was to be done about New Zealand.

187. The new plan was outlined in duplicate letters sent on 30 May 1839 to the Attorney-General and the Solicitor General[414]. "Circumstances have recently occurred", Lord Normanby informed them,

> which impose on Her Majesty's Government the necessity of establishing some system for governing the numerous body of British subjects who have taken up their abode in the New Zealand Islands and who are still repairing thither.

The Government intended to obtain from the chiefs of New Zealand the cession of sovereignty to "the territories which have been, or which may be, acquired by Her Majesty's subjects by proprietary titles, derived from the grants of the different chiefs". This much was fairly familiar. But it was also proposed that the districts so obtained would be added to the colony of New South Wales "in the same manner as Norfolk Island"[415]. The Colonial Office assumed that it would be lawful to annex thereto any territory in New Zealand "of which the sovereignty may be acquired by the British Crown", and that

> the authority of the Legislative Council established under the statute 9. Geo. IV c. 83 [of 1828], would be extended to the settlements in New Zealand so soon as any such annexation should have been made.

The draft of a new Commission for the Governor of New South Wales enlarging the boundaries of the colony was attached[416]. The Colonial Minister asked for a joint opinion from the Attorney-General and the Solicitor General on these points. They answered all of his questions in the affirmative on 4 June[417], and on 15 June 1839 Letters Patent were signed

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[414] Letter of 30 May 1839 from Normanby to Attorney-General (same to Solicitor general); HRNZ I pp. 739-740 Encl. No.2 (in 14 Aug 1839 from Normanby to Hobson).

[415] That this was intended from the beginning as a short-term measure can be seen from the confidential briefing given to Dandeson Coates by Labouchere on 18 June 1839. The Government proposed "in the first instance" to put New Zealand under New South Wales, "but with the ultimate intention of making New Zealand a separate and independent Government": see CMSMB MC/18 pp. 26-28. In the event, preparations for making New Zealand a separate colony were set in motion as soon as news of the formal annexation of the whole country (by Hobson's 21 May 1840 proclamations) arrived in London. See Ch. 4, below.

[416] The first draft of this document in CO 380/122 pp. 5b-9b is dated 27 May 1839. The Letters Patent replaced those in Governor George Gipps' original commission of 5 Oct. 1837.

[417] HRNZ I, Encl. No.13 (in 14 Aug. 1839 from Normanby to Hobson), pp. 749-750. Solicitor General J. Campbell and Attorney General R.M. Rolfe concluded that "Her Majesty may lawfully annex to the Colony of

by the Queen. These altered the definition of the boundaries of New South Wales to include "any territory which is or may be acquired in sovereignty by Her Majesty ... within that group of Islands in the Pacific Ocean, commonly called New Zealand"[418].

188. The approval of the Law Officers cleared the way for the Colonial Office to approach Treasury about funding for the proposed colony. On 13 June 1839 Stephen wrote outlining the new plan[419]. Since the 'factories' scheme was put forward in December of 1838, he stated, "circumstances have transpired which have further tended to force upon Her Majesty's Government the adoption of measures for providing for the government of the Queen's subjects resident in or resorting to New Zealand". It was now intended that "certain parts" of the Islands would be added to New South Wales, and that Hobson would be appointed as both Consul and Lieutenant Governor. The Legislative Council of New South Wales would be asked to provide "all the necessary laws" to allow a revenue to be raised in New Zealand which would be adequate to support the Lieutenant Governor and a few "indispensable" officers – a new government "on the most moderate scale". Governor Gipps of New South Wales was to oversee this process, and any funds required before a revenue was raised in the Islands was to be advanced by that colony.

189. The Lords Commissioners of the Treasury responded on 22 June 1839, agreeing on the need to establish "some competent control over British subjects" in New Zealand, and accepting the financial arrangements proposed by the Colonial Office once "the contemplated cession in sovereignty to the British Crown of territories within those islands which have been, or may be, acquired by Her Majesty's subjects under grants from

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New South Wales any territory in New Zealand the sovereignty of which may be acquired by the British Crown". No restriction was placed on the means by which that sovereignty was acquired. With respect to 9 Geo IV (1828) c.83 they observed that "The object of the statute, as appears by the 20th section, was to create a legislative authority extending to the Colonies of New South Wales and Van Diemen's Land, and the dependencies thereof ; and although this, if construed independently of the context, might perhaps be confined to places constituting the dependencies at the time of the passing of the Act, yet as it is clear from the 3rd section that the Courts of justice were to have jurisdiction, not only over the then existing dependencies, but also over all islands and territories which might thereafter be dependent on the Government of New South Wales, we think the word dependencies, in the 20th section, must receive an extended construction so as to include future as well as then existing dependencies. It could hardly have been the intention of the Act to give a different extent of jurisdiction to the Courts of justice and the local Legislature".

[418] See Rutherford, *The Treaty of Waitangi*, p. 12. The Letters Patent replaced those in Governor George Gipps' original commission of 5 Oct. 1837. They are quoted in N.A. Foden, *The Constitutional Development of New Zealand in the First Decade (1839-1849)* (1938) , p. 11-12 (the final draft can be seen in CO 380/122 pp. 5b-9b). Technically speaking, as Foden explains, the Letters Patent altered and enlarged the territory comprised in Sir George Gipp's Commission as Governor and he was reappointed Captain-General and Governor-in-Chief in and over the reconstituted territory of New South Wales.

[419] Letter of 13 June 1839 from Stephen to A.Y. Spearman: BPP 1840 [238] pp. 32-33 No.10. This letter was outlined by Stephen in an internal Memorandum dated 8 June 1839: CO 209/4 pp. 113b-116a.

the different chiefs" had taken place. They emphasized that in their view a cession of sovereignty was necessary before any British authority could be exercised in New Zealand, and that this would have to be "obtained by amicable negociation with, and free concurrence of, the native chiefs"[420]. The Lords Commissioners' decision, with certain clarifications, would be embodied in a Minute dated 19 July 1839 which was laid before Parliament[421].

190. Once Treasury approval had been gained, the Colonial Office approached the Foreign Office. Henry Labouchere wrote to Lord Palmerston reminding him of the correspondence which had been exchanged in December of 1838. Normanby now recommended Captain Hobson as Consul to New Zealand and requested that he be supplied "with the usual commission as Consul, and with such instructions as may be necessary"[422]. The Commission and the instructions would be issued in mid-August, on the eve of Hobson's departure[423]. By this point Hobson had also received his Commission as Lieutenant Governor

> in and over that part of Our Territory so described as aforesaid in Our said last recited Letters Patent [of 15 June 1839] which is or may be acquired in Sovereignty by Us our Heirs or Successors within that group of Islands in the Pacific Ocean commonly called New Zealand ....

This document was signed by Lord Normanby on behalf of the Queen on 30 July 1839[424].

191. Dandeson Coates received a confidential briefing on the Government's plan from Henry Labouchere on 18 June. It had been decided, the latter informed him, that the

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[420] Letter of 22 June 1839 from G.L. Pennington to Stephen: BPP 1840 [238] pp. 33-34 No.11.

[421] Treasury Minute of 19 July 1839: BPP 1840 [238] pp. 34-35 No.13. It was placed before Parliament because the Lords Commissioners thought that, if "the anticipated cession of sovereignty" did not take place, funds would have been expended which would not have been covered in the estimates for the year. This appears to be the only reference in the official documentation to the possibility that Hobson's mission might fail.

[422] Letter of 3 July 1839: BPP 1840 [238] p. 34 No.12.

[423] See Palmerston's two letters to Hobson of 13 Aug. 1839: BPP 1840 [238] p. 36 Encl. 1 & 2 in No.15. Hobson was naturally concerned about the question of when his salary as Consul would cease, and when his salary as Lieutenant Governor would begin: see his letter of 13 Aug. 1839 in CO 209/4 pp. 169b-171b. "May I beg to be informed how my Salary is to be drawn when my consular duties cease, which I assume will terminate with the cession to Her Majesty of the Sovereignty of New Zealand". (Note the assumption here that the sovereignty over the whole country *would* be acquired the Crown at some point). I have not been able to locate any copy of Hobson's Commission as Consul, or any quotation from it, and so have not been able to ascertain who, exactly, he was accredited to. His letter of 16 Jan. 1840 to Gipps seems to indicate that he was accredited to the Confederation rather than to the chiefs in general, but this is not certain: see Despatch #40/4 of 16 Jan. 1840, from Hobson to Gipps: ANZ G36/1a pp. 10-12.

[424] The Commission is quoted in part in Rutherford, *The Treaty of Waitangi*, p.15. The original Commission of 30 July 1839 is held by Archives New Zealand (IA 9/3), and is on permanent display in its Constitution Room. It was given to Hobson in August, immediately prior to his departure for New Zealand: see CO 209/4 pp. 179b & 180b.

Government itself would "originate and administer" such measures relating to New Zealand "as they may deem advisable to meet the circumstances of the case"[425]. (In other words, the idea of leaving things to a chartered company had been abandoned[426]). It was proposed

> immediately to send out Capt. Hobson R.N., with authority to acquire the sovereignty of the whole or such portions of the Islands of New Zealand as might be practicable or expedient by cession from the several Chiefs.

Any "portions" over which the Queen's authority had been established would be attached to New South Wales – albeit "with the ultimate intention of making New Zealand a separate and independent Government". As soon as sovereignty had been acquired, Hobson was to issue a proclamation specifying "that no titles to land within the British sovereignty would be recognized which should appear fraudulent or excessive", and begin to establish law and order. It would be "the special object" of the Government, Labouchere took care to inform Coates, "to secure the interests of the Natives and to promote their social and moral improvement".

192. This briefing was no doubt intended to gain the support of the CMS for the Government plans, and it achieved this goal. On 17 July 1839 Coates would write to Hobson offering him

> information respecting the New Zealand Tribes and their country which may I think prove useful to you in prosecuting an object, to which I believe you attach much importance, the carrying into execution the interesting mission with which you are charged by Her Majesty's Government in the vigorous way conducive to the welfare of the Natives of that country. [427]

More importantly, on the same day the CMS Committee wrote to their missionaries in New Zealand urging them to give their full support to the Government's plan[428]. In the event, due to the vagaries of the wind-driven international postal service, this did not reach New Zealand before Hobson, but its absence was offset by a similar letter sent to the CMS

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[425] Minutes of meeting of 25 June 1839: CMSMB MC/18 pp. 71-72.
[426] Government approval of the proceedings of the New Zealand Land Company, he stated. had been "entirely withheld".
[427] Letter of 17 July 1839 from Coates to Hobson: CMS CH/L2 Home Letterbooks (Outwards) 1833-38 (ATL Micro Collection 4/ Reel 66). The information in question was contained in a copy of a letter from William Williams to the Committee. It would appear that Hobson was in regular contact with Coates during his time in England.
[428] Letter of 17 July 1838. I have not been able to locate the original, but it is quoted at length by Coates in a letter of 14 Aug. 1844: BPP 1844 (641) pp. 2-3.

missionaries by Bishop Broughton of New South Wales[429], and another sent to the WMS missionaries from their London Committee[430].

193. Another consequence of Labouchere's presentation was an agreement that Sir R.H. Inglis would ask a question about New Zealand in the House of Commons. The MP accordingly asked the Parliamentary Under Secretary on 25 June "what were the intentions of her Majesty's Government, relative to the colony of New Zealand generally, and also with respect to the New Zealand Company". Henry Labouchere replied

> that the Government had come to the determination of taking steps which would probably lead to the establishment of a colony in that country; but ... those measures were still under consideration .... A number of persons had gone out to New Zealand, and in order to protect the aborigines, and for the maintenance of good order among the inhabitants, it was thought fit that measures should be taken to establish law and peace.

As for the New Zealand Company, he declared that the Government had not given its approval for their actions, and warned

> that in any future step which the Government might take in reference to New Zealand, they would not consider themselves bound to recognise any title to land set up which might appear to be fraudulent or excessive.

This because

> in the case of land acquired from the aborigines – a class quite unable properly to protect their own interests – it was the duty of the Government to protect them, and to see that no title to land should be set up of the kind he had described. [431]

Labouchere's statement was one of the first public indications that British policy towards New Zealand had altered, and that direct intervention was in the wind[432]. It would be quoted

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[429] Letter of 10 Jan. 1840: AIML W72c pp. 15-25 [typescript from Hocken Library].
[430] Letter of 2 Sept. 1839 from Beecham to the Chairman of the New Zealand District, cited in J.M.R. Owens, "Missionaries and the Treaty of Waitangi", in *Wesley Historical Society (New Zealand) Journal '86*, p, 26.
[431] BPD (Commons) 25 June 1839 col. 828-829 "New Zealand". The CMS Committee noted that Labouchere's statement was "materially mis-stated" in some newspapers, and Coates asked for, and received assurance that the Government's policy was that stated at the 18 June 1839 meeting: Minutes of meeting of 2 July 1839, in CMSMB MC/18 p. 79.
[432] On the same day a debate took place in the House concerning "Waste Lands in the Colonies", dealing with a motion by Wakefield's fellow-author John Ward. Basically this was a discussion (largely in favour) of the merits of the Wakefield system. New Zealand was mentioned a number of times. Ward himself commented that "The settlers in New Zealand have introduced muskets, gunpowder, rum, spirits, lawless habits, and whatever it is most desirable to exclude. The worst evils of civilised society are thus engrafted upon the passions of the barbarians, and the seed thus sown is producing a plentiful crop of immorality and bloodshed. Against this I ask the friends of the aborigines to set the establishment of regular intercourse, under fixed and well-ascertained laws, and the gradual introduction of civilized habits, arts, industry, and trade, which must be

in full in November, in the "Statement of Committee of the Church Missionary Society relative to the New Zealand Mission". Coates and his colleagues observed that "The Committee, having long pressed on Government the obligation to take measures on behalf of the natives of New Zealand, feel strong satisfaction that this has at length been done"[433]. Its Secretary would later state that

> at the period when Captain Hobson was sent out the state of things in the island was so changed, that some more effectual interposition was absolutely necessary to reduce things to order; and when the Government, upon their own responsibility, sent out Captain Hobson to acquire the sovereignty for the Crown, we acquiesced in it, as the best course that at that time probably could have been adopted. [434]

The July Draft Instructions

194. The next major step along the paper trail leading to Waitangi was the preparation of instructions for Hobson as Lieutenant Governor of New Zealand[435]. The first draft in Colonial Office's records of what became his final instructions indicates that this document was completed by James Stephen on 9 July 1839, and than passed to Labouchere (10 July) and Normanby (11 July) for approval[436]. (The instructions would of course be issued in the name of Lord Normanby). Hobson – perhaps prompted by the questions in the House – asked to see his instructions on 28 June[437], and received a copy of the draft version

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the best preparation for Christianity itself. I cannot understand that false and mawkish sensibility as to the state of the aborigines which opposes a bar to colonization, when with proper precaution, it ought to be as beneficial to them as to ourselves" (cols. 841-919). See also *Colonial Gazette* 29 June 1839 #31, editorial. The author of this article observed that much was said about New Zealand in the debate, and that the Government has "positively decided on extending to these islands the protection and the privileges of a British settlement".

[433] Statement of 29 Nov. 1839: BPP 1840 (582) Appendix #21 p. 173.

[434] Evidence to the Select Committee on New Zealand, 20 July 1840: BPP 1840 (582) p. 82 ¶702.

[435] See Appendix 2, below, concerning the Rev. J.D. Lang's claims.

[436] CO 209/4 pp. 251b-283b. The text quoted here incorporates changes made to this draft. Quotations below are from this draft. The instructions in their final form, as issued on 14 Aug. 1839 in the form of Despatch #39/1, can be found at BPP 1840 [238] pp. 37-42 No.16.

[437] Letter of 28 June 1839 from Hobson to Stephen: CO 209/4 pp. 141b-142b. The letter was primarily concerned with finding good officials for the new colony, especially a Judge and a Legal Advisor. Hobson asked the Colonial Office to consider making these appointments in Britain, as he thought the selection would be better: "Here, may be found at the Bar, Men of Family & Character (not overburdened with employment) who, emulous of honorable distinction, & stimulated by the hope of advancement as the Colony progresses, or of promotion in other Colonies, will not hesitate to go out, if Government will ensure their appointment and probably relieve them from part of the expense by ordering them a free passage in any Convict Ship to Sydney". Unfortunately, his concerns about the quality of any candidates available in Sydney proved to be well founded.

before the end of July[438]. These began with a statement that British colonization was already underway in New Zealand, in that

> a very considerable Body of H[er]. M[ajesty.'s Subjects have already established their residence and effected Settlements there, and that many persons in this Kingdom have formed themselves into a Society having for it's [sic] object the acquisition of Land and the removal of Emigrants, to those Islands.

The potential value of New Zealand as a British colony (for all the reasons which commentators had been putting forward since the turn of the century) was acknowledged:

> We have not been insensible to the importance of New Zealand to the interests of Great Britain in Australia, nor unaware of the great natural resources by which that Country is distinguished or that it's [sic] geographical position must in seasons, either of peace or of war, enable it in the hands of Civilized men to exercise a paramount influence in that quarter of the Globe. There is probably no part of the earth in which Colonization could be effected with a greater or surer prospect of national advantage.

However, the Colonial Minister continued, "the Ministers of the Crown have been restrained by still higher motives from engaging in such an enterprise". The conclusions of the Select Committee on Aborigines were cited as evidence

> that the increase of national wealth and power promised by the acquisition of New Zealand, would be a most inadequate compensation for the injury which must be inflicted on this Kingdom itself, by embarking on a measure essentially unjust, and but too certainly fraught with calamity to a numerous and inoffensive people, whose title to the soil and to the Sovereignty of New Zealand is indisputable, and has been solemnly recognized by the British Gov[ernmen]t.

But "circumstances entirely beyond our Control" dictated that some kind of action by the Government was necessary.

195. These circumstances related to the rapid growth of settlement and land purchase by British subjects in New Zealand. It was feared that

> unless protected and restrained by necessary Laws and Institutions, they will repeat unchecked in that quarter of the Globe, the same process of War and spoilation, under which uncivilized Tribes have almost invariably disappeared as often as they have been brought into the immediate vicinity of Emigrants from the Nations of Christendom.

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[438] See his letter of 1 Aug. 1839 to Labouchere: BPP 1840 [238] pp. 42-44 No.17. The extant copies of the letter are simply dated "August", but other correspondence indicates that it was dated 1 August 1839. See letter of 21 Aug. 1839 #3 from Hobson to Stephen: CO 209/4 pp. 181b-182b.

It had now been decided to take steps to establish in New Zealand "a settled form of Civil Gov[ernmen]t." in order "To mitigate, and, if possible, to avert these disorders, and to rescue the Emigrants themselves from the evils of a lawless state of Society". This Government was to be British: the "principal object" of Hobson's mission was

> to treat with the Aborigines of New Zealand for the recognition of H[er] M[ajesty]'s Sovereign authority over the whole or any parts of those Islands which they may be willing to place under H[er] M[ajesty]'s Dominion.

Their "free and intelligent consent ... expressed according to their established usages" for this recognition was to be obtained. Such a course of action was justified on the grounds

> that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to Her Majesty of a right now so precarious and little more than nominal and persuaded, that the benefits of British protection, and of Laws administered by British Judges would far more than compensate for the sacrifice by the Natives of a national independence which they are no longer able to maintain

Normanby acknowledged that some Maori might be "unable to comprehend the exact meaning, or the probable results" of such a Treaty, and that many would "probably regard with distrust a proposal which may carry on the face of it the appearance of humiliation on their side, and of a formidable encroachment on ours". Hobson was given the (rather vague) advice to overcome such impediments "by the exercise on your part of mildness, justice, and perfect sincerity in your intercourse with them", and, more specifically, told that he was likely to find "powerful auxiliaries" amongst the missionaries "who have won and deserved their confidence, and amongst the older British Residents who have studied their character and acquired their language".

196. Many of the documents relating to Hobson's appointment in 1839 implied, in one way or another, that the only parts of New Zealand which would (or might) be acquired in sovereignty by the Crown were the areas already settled or purchased by British subjects. This possibility was also raised in the only major passage of the July draft instructions which was deleted from the final version. Stephen initially had a paragraph at this point stating that

> I am induced to believe that the New Zealanders neither understand, nor are able to appreciate, the distinction, so familiar to ourselves, between the rights of Sovereignty, and those of property; but that regarding them as identical they suppose that the Lands they have already ceded have passed from their own

> Dominion and that a general acknowledgement of the Sovereignty of the Queen would involve a Cession of the Lands which they still retain.

Should this prove to be the case, Hobson was "of course" to explain to the chiefs that a cession of sovereignty would not affect their property rights – pointing out that in fact these "will not be impaired but greatly strengthened by the abdication of their Sovereign authority". It was also suggested, however, that such a belief might assist Hobson, in that it could "abridge the difficulty of establishing a British Sovereignty coextensive with the British Possessions in the Island": he was in any case to insist on "the principle, that all Lands possessed by the Queen's Subjects in New Zealand, are within H[er] M[ajesty]'s Dominion". Henry Labouchere noted in the margin of the draft that "I w[oul]d omit the whole of this paragraph". No reason was given, but his advice was taken. It is probable that Hobson did not see this passage[439].

197. The next section of the instructions referred to land claims and land purchase. The chiefs were to be "induced, if possible, to contract with you, as representing Her Majesty, that henceforward no Lands shall be ceded either gratuitously or otherwise, except to the Crown of Great Britain". The purpose of this order – the origin of the second clause in Article Two of the Treaty of Waitangi – was to facilitate the implementation of a Land Fund system of settlement and development in the new colony. "Contemplating the future growth and extension of a British Colony in New Zealand", the instructions stated

> it is an object of the first importance, that the alienation of the unsettled Lands within its limits should be conducted from its commencement, upon that system of Sale, of which experience has proved the wisdom, and the disregard of which has been so fatal to the prosperity of other British Settlements. With a view to those interests, it is obviously the same thing, whether large tracts of land be acquired by the mere gift of the Gov[ernmen]t., or by purchases effected on nominal consideration from the aborigines. On either supposition the Land Revenue must be wasted; the introduction of Emigrants delayed or prevented, and the Country parcelled out amongst large Land holders, whose possessions must long remain an unprofitable or rather a pernicious waste.

As soon as he arrived in New Zealand, Hobson was to announce by a proclamation

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[439] That is, at the end of July Hobson would have been sent a 'clean' copy of the 9 July draft in CO 209/4, incorporating the alterations suggested by Stephen, Labouchere and Normanby. His personal copies of the draft and final versions of his instructions, unfortunately, are not extant. We know that during 1840 he frequently referred back to his instructions for guidance, and his marginal annotations (if any) would no doubt have been of great interest to historians.

> that Her Majesty will not acknowledge as valid any title to Land which either has been or shall hereafter be acquired[440] in that Country which is not either derived from, or confirmed by, a Grant to be made in Her Majesty's name and on Her behalf.

All claims to land allegedly acquired from Maori before the date of this proclamation would have to be investigated by a Crown-appointed Land Commission before any Crown titles could be issued. This body was to ascertain

> how far such grants [sic] were lawfully acquired, and ought to be respected, – and what may have been the price or other valuable considerations given for them. The Commissioners will make their Report to the Governor, and it will then be decided by him, how far the Claimants or any of them may be entitled to confirmatory Grants from the Crown; and on what conditions such confirmations ought to be made. [441]

In other words, the Crown alone would decide which European claims were valid, and on what conditions lands would be awarded under Crown titles. Maori could thus be protected from fraudulent and inequitable claims, and the future Colony from excessive ones (from "the acquisition of large tracts of Country by mere Land Jobbers") which might damage the successful operation of the Land Fund system.

198. The same considerations applied after the colony was established. If Maori were able to sell large tracts of land to private buyers, the Land Fund system would be undermined, for it was founded upon the principle of charging settlers artificially high prices for their lands in order to subsidize immigration. No one would buy expensive land from the Crown if they could purchase it at lower prices elsewhere. It was thus politic to get Maori agreement for a Crown monopoly on land alienations right from the beginning[442]. Hobson was told that lands were to be purchased from Maori "by fair and equal contracts", wuth oversight of the colony's Protector of Aborigines, all dealings being "conducted on the same principles of sincerity, justice, and good faith, as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands". Furthermore, Maori were not to be allowed "to enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves", no land being purchased "the retention of

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[440] "which either ... acquired" was inserted here by Labouchere.

[441] On Labouchere's urging, a clause was inserted stating that when making his Proclamation, Hobson was to "take care to dispel any apprehensions which may be created in the minds of the Settlers that it is intended to dispossess the owners of any property which has been acquired on equitable conditions & which is not upon a scale which must be prejudicial to the later interests of the community".

[442] As I have noted elsewhere, the Crown after the Treaty interpreted the pre-emption clause as an acknowledgement by Maori that it possessed an *exclusive* right over all forms of alienation, including leases: see D.M. Loveridge, "'An Object of the First Importance': Land Rights, Land Claims and Colonization in New Zealand, 1839-1852" (2004), ¶I.2.10.

which by them would be essential, or highly conducive, to their own comfort, safety, or subsistence". Purchases were to be "confined to such Districts as the Natives can alienate without distress or serious inconvenience to themselves".

199. At the same time, however, it was assumed that the prices paid to Maori vendors by the Crown would be much less than those paid to the Crown by settlers. "Nor is there any injustice in this inequality", the instructions stated, for

> To the Natives or their Chiefs much of the land of the Country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value. Much of it must long remain useless even in the hands of the British Gov[ernmen]t. also, but its value in exchange will be first created, and then progressively increased, by the introduction of Capital and of Settlers from this Country. In the benefits of that increase the Natives themselves will gradually participate.

Maori were also to benefit from Government expenditures for "promoting their Civilization", made possible by the profits from land sales. These would involve support for religious instruction and other forms of education, and the defence of "the observance of their own Customs, so far as these are compatible with the universal maxims of humanity and morals".

200. The last half of Hobson's instructions were devoted to explaining how the government of the colony would be constituted. The New South Wales mechanism was outlined, with the Colonial Minister commenting that "there is no other practicable course which would not be opposed by difficulties still more considerable"[443]. Particular emphasis was given to the introduction of "The system at present established in New South Wales regarding Land" into New Zealand. It was specified that

> Separate accounts must be kept of the Land Revenue. Subject to the necessary deductions for the expense of surveys & management, and for the improvement by Roads & otherwise, of the unsold Territory, and subject to any deductions which may be required to meet the indispensable exigencies of the local Gov[ernmen]t.., the Surplus of this Revenue will be applicable, as in New South Wales, to the charge of removing Emigrants from this Kingdom to the New Colony.

It is clear here, as well, that the Colonial Office saw all of the measures for law and government in the new colony to be temporary steps, pending New Zealand's elevation to the status of a separate Colony within the near future. Accounts of revenue and expenditure

[443] Labouchere inserted here, "Although I trust that the time is not distant when it may be proper to establish in New Zealand itself a local legislative authority".

were to be kept separate from those of New South Wales, for example, "though corresponding with it as far as that correspondence can be maintained"[444]. Normanby's successor would later observe that the attachment of New Zealand to New South Wales was "merely a temporary provision"[445].

The August Addendum

201. As noted above, Hobson's primary mission would be to obtain from Maori the cession of their sovereignty over "the whole or any parts of those Islands which they may be willing to place under H[er] M[ajesty]'s Dominion". Implicit in this statement was the possibility that some part of the Islands might *not* be brought under the sovereign authority of the Crown. This possibility was. of course, stated explicitly in the Letters Patent of 15 June 1839, and it would appear that the initial expectation was that districts where a good deal of land was already owned and/or occupied by British subjects would be the first acquired in sovereignty by the Queen (with tribal areas under the influence of the missionaries following thereafter). Indeed, it would appear that the Crown's acquisition of such areas was considered to be virtually automatic[446]. Stephen's 24 January 1839 draft instructions had alluded to jurisdictional problems which might arise from a divided sovereignty in New Zealand. These ones did not, and certainly did not provide Hobson with directions for managing such problems[447]. Particularly noticeable is the absence of any directions relating to the evergreen problem of how British law was to be extended outside of areas under British dominion. This was not even mentioned, nor was the nature of the relationship to be established between the British administration and tribes outside of its jurisdiction.

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[444] Normanby also commented to Gipps in August that New Zealand would probably require "the introduction of a judicial System totally distinct from that which is administered at Sydney": letter of 29 Aug. 1839, in HRA XX pp. 298-301.

[445] Lord John Russell, in BPD (Commons) 7 July 1840 col. 536. Even before word of the formal annexation of the Islands had reached London, the requisite legislative provision for separation was made. An Act passed on 7 Aug. 1840 (3&4 Vic. c.62) provided for "certain dependencies" of New South Wales to be formed into separate colonies: See Adams, *Fatal Necessity*, p. 161.

[446] Normanby's comment to Gipps in August, for example, that Hobson was on his way "to assume the government of the British Settlements in progress in New Zealand", has a distinctly proprietary air: Despatch #39/118 of 15 Aug. 1839, in BPP 1840 [238] pp. 45-46 No.19.

[447] How, for example, were the boundaries between areas of Maori and British sovereignty to be defined, marked, and patrolled? There is not a word on this subject in the instructions, and neither Stephen, Labouchere or Normanby – or Hobson – commented on the absence of such provisions, let alone pointing out the need to finance such activities.

202. When criticising his own 1837 'factories' scheme in January of 1839 Hobson carefully outlined the drawbacks of a partial acquisition of sovereignty by Britain, and pointed out that these difficulties could be eliminated "by assuming the sovereignty of the whole Country". He himself expressed a preference for this option (along with large-scale colonization) as the best way for the British government "to extend to that highly gifted Land the blessing of civilization and liberty, and the protection of British Law". There are grounds for suggesting that by July of 1839 the Colonial Office was also looking in the same direction, and had decided that it would be desirable to acquire sovereign authority over the whole of the Islands for the Crown, rather than over a few scattered enclaves. The impetus for this may well have arisen from the decision made in May to adopt the New South Wales strategy, and the colonial Land Fund policy which came with it. If the new colony was to prosper, it became imperative to bring all of the lands in the Islands under the control of the Crown, for to leave large districts outside of the Land Fund system was almost certain to render the latter unworkable within areas under British control[448]. Based on the information received from the missionaries and Busby, the Colonial Office seems to have been fairly confident that many Maori would be willing to cede their sovereignty to the Crown. The question is, what did it intend to do about the remainder? The July draft instructions seem to imply – if more by omission than otherwise[449] – that Hobson would be expected to deal with any deficits in "free and intelligent consent" in other ways, in order to produce a colony encompassing the whole of the Islands.

203. Some indication of this came through in the supplementary instructions issued to Hobson in August. These July draft instructions formed the basis for the main instructions as Consul and Lieutenant Governor which were issued to Captain Hobson on 14

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[448] Some even thought that any failure to create a workable Land Fund system in New Zealand would have adverse effects on those in the Australian colonies. The *Colonial Gazette*, for example, observed in August of 1839 that "The extreme cheapness of sharked land in New Zealand must counteract the plan of *selling* waste land in New South Wales": *Colonial Gazette* 28 Aug.1839 #40 "Colonization, Generally and in New Zealand". This comment underlines the fact that it was considered essential to eliminate or minimize all forms of competition in order for a Land Fund system to work as intended.

[449] In the debate on the appointment of the 1840 Select Committee, Viscount Sandon observed that "he should like clearly to learn what was the understanding upon which Captain Hobson was to proceed: whether he was to negotiate for the sovereignty of the whole of New Zealand, or whether his negotiations were to be restricted to those parts of the islands where he found Englishmen located?". Lord Russell reply was not particularly illuminating. The Minister stated that Hobson's priority was "to endeavour to acquire the sovereignty of those lands to which any of her Majesty's subjects were located. If he should find, in the course of his negotiations with the chiefs, that were desirous of placing the whole sovereignty of their country in the hands of the Crown of England, he would be authorised to accept such a proposition. It was, however, a subject very much left to the discretion of Captain Hobson ....": BPD (Commons) 7 July 1840, cols. 544-545.

August of 1839[450]. There was not a great deal of difference between the two versions, in terms of text struck out, and nothing substantial was added to the July draft. This was in part because the Colonial Office decided not to alter the July draft in light of questions raised by Hobson, but rather to deal with these in an 'Addendum' (as it was sometimes referred to) in a separate letter. Hobson received the July draft before the end of the month, and "In order to avoid any misunderstanding of the views of Government in respect of the duties confided to me" addressed several questions to the Colonial Minister on 1 Aug. 1839[451].

204. The first of these had to do with "the acquisition of the Sovereign rights by the Queen over the Islands of New Zealand". Hobson noted

> that no distinction is made [in the draft instructions] between the northern and southern islands of New Zealand, although their relations with this country, and their respective advancement towards civilisation are essentially different.

He considered this to be a potential problem, noting that the Declaration of Independence of 1835

> was signed by the united chiefs of the northern island only (in fact, only of the northern part of that Island), and it was to them alone that His late Majesty's letter was addressed on the presentation of their flag [in 1834], and neither of these instruments had any application whatsoever to the southern islands.

"It may be of vast importance to keep this distinction in view", he suggested to the Colonial office, particularly where land claims were concerned. "My proceedings may be greatly facilitated by availing myself of this disparity", Hobson concluded

> For, with the wild savages in the southern islands, it appears scarcely possible to observe even the form of a Treaty, and there I might be permitted to plant the British flag in virtue of those rights of the Crown to which I have alluded. [452]

The 'rights of the Crown' alluded to were those "usually assumed by first discoverers".

205. In his reply of 15 Aug. 1839[453] Lord Normanby did not reprimand his subordinate for suggesting that "the free and intelligent consent of the natives" to British

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[450] BPP 1840 [238] pp. 37-42 No. 16.
[451] Letter of [1] Aug. 1839 from Hobson to Labouchere (for Normanby): BPP 1840 [238] pp. 42-44 No. 17.
[452] It is not clear how or why Hobson came to this particular conclusion, but it is no doubt relevant that in 1837 the southern islands were well outside the sphere of influence of the CMS missionaries. Coates admitted to the 1840 Select Committee that "Of the southern island we know nothing; we have no station there, nor has it ever been visited by any missionaries": BPP 1840 (582) p. 78 ¶671 (see also ¶741-742).

sovereignty could be dispensed with in some circumstances. On the contrary. Normanby stated that

> The remarks which I have made respecting the independence of the people of New Zealand relate, as you correctly suppose, to the tribes inhabiting the northern island only .... If the country is really, as you suppose, uninhabited, except by a very small number of persons in a savage state, incapable from their ignorance of entering intelligently into any treaties with the Crown, I agree with you that the ceremonial of making such engagements with them would be a mere illusion and pretence which ought to be avoided. The circumstances noticed in my instructions, may perhaps render the occupation of the southern island a matter of necessity, or of duty to the natives[454]. The only chance of an effective protection will probably be found in the establishment by treaty, if that be possible, or if not, then in the assertion, on the ground of discovery, of Her Majesty's sovereign rights over the Island. [455]

Hobson was thus empowered to use his own discretion where the acquisition of sovereignty over the southern islands were concerned, aided by advice from Governor Gipps. Absent from his other questions, which covered a wide range of subjects, was any request for instructions concerning relationships with areas not ceded to the Crown[456], nor did Normanby refer to such matters in his reply[457].

206. Hobson, it appears, had no further questions. He received all of the requisite instructions and commissions from the Colonial and Foreign Offices by 21 Aug. 1839[458], and left Britain for New South Wales three days later, aboard H.M.S. *Druid*[459]. Rather than issue a separate set of instructions to Gipps, the Colonial Office simply copied all of the documents relating to Hobson's appointment as Consul and Lieutenant Governor to the Governor, including the instructions of 14 and 15 August. Taken together, stated Normanby, these "leave nothing to add", save for a request that Gipps give Hobson "the full

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[453] Letter of 15 Aug. 1839 from Normanby to Hobson: BPP 1840 [238] pp. 44-45 No.18.
[454] The 'circumstances' in question were presumably the fears expressed in the 14 August instructions that Maori would be destroyed by "war and spoilation" if unregulated colonization by Europeans continued.
[455] McLintock, *Crown Colony*, p. 52 (who attributes the letter to James Stephen rather than the Minister) comments that this was "an extraordinary decision in view of the oft-repeated statements that the complete independence of New Zealand had been recognised by many official acts and parliamentary statutes".
[456] The only subject missing from the July draft instructions which Hobson considered to be significant concerned the lack of any allusion to the provision of troops, which he thought were needed to "check any disposition to revolt".
[457] Unless one counts his admonition that Maori practices "abhorrent from the first principles of morality" should be repressed "within any part of the Queen's dominions".
[458] See Despatch #1 of 21 Aug. 1839: CO 209/4 pp. 179b & 180b. While still in Britain, Hobson began a series of despatches to the Colonial Office in his capacity as Consul (of which this was the first). No further despatches seem to have been added to this series after his departure. Upon arrival in New South Wales, he started another series to Gipps, separately numbered, in his capacity as Lieutenant Governor of New Zealand, and in February started another series to the Colonial Minister, also as Lieutenant Governor.
[459] Despatch #4 of 24 Aug. 1839 from Hobson to Stephen: CO 209/4 p. 185b 24 Aug. 1839 #4.

benefit of all the knowledge and experience which you have gained during your long course of public service"[460]. Captain Hobson, it may be noted, was not the only one to depart from the Colonial Office at this time. At the end of August Lord Normanby switched places with the Home Secretary, Lord John Russell. The exchange was applauded by the *Colonial Gazette*, which claimed that

> As Colonial Minister, Lord Normanby has done nothing, suggested nothing, projected nothing. He has reaped no harvest ... and sown no seeds in the wide wilderness which he found open to improvement. He has exhibited neither genius, nor resolution, nor readiness, nor even common diligence. The multitudinous business of the Office was never more in arrear, never in a worse mess than at the present time. [461]

Chief among his failings, the editor noted, was that Normanby had done all he could "to prevent an important addition to the Colonial empire of England, which he might easily have had the honour of founding".

[460] Despatch #39/118 of 15 Aug. 1839 from Normanby to Gipps: BPP 1840 [238] pp. 45-46 No.19. It should be noted that HRNZ I pp.729-755 copies all of its numerous enclosures sent with this despatch.
[461] *Colonial Gazette* 4 Sept. 1839 #41 "The New Colonial Minister".

VI

The Sovereignty Debate in Britain, 1839-1840

Leaked Instructions

207. A few weeks after Captain Hobson left Britain for New Zealand in August of 1839, parts of his instructions from Lord Normandy were leaked to the press in London[462]. These sections dealt with land policy, and outlined (among other things) how the Crown intended to handle Europeans claiming to have purchased lands from Maori before the acquisition of sovereignty by the Crown (see ¶197, above). This policy received mixed reviews. One London newspaper, the *Globe*, praised the Government for taking "effectual measures" to offset the detrimental effects which the prior "irregular colonization" of New Zealand might otherwise have on the Land Fund system planned for the new colony[463]. If such a system was to succeed it was imperative, as the *Globe* put it, that all settlers be required "to contribute their due proportion towards a labour [i.e. emigration] fund". Where New Zealand was concerned, it was considered necessary to put in place a mechanism to limit the amount of land acquired by settlers prior to British intervention, and to bring those lands whose acquisition from Maori was recognized by the Crown under the aegis of the Land Fund system.

208. Another newspaper, the *Colonial Gazette*, was less impressed with these instructions. A firm supporter of the Wakefield line, it expressed approval of the Government's decision to adopt "the principles which Mr. Wakefield discovered some ten years ago" (the Land Fund system). The instructions given to Hobson to clear the way for their application in New Zealand, though, were considered to be impractical, and even likely to be harmful. The main difficulty, according to the *Gazette*, was that the process for dealing with land claims seemed to leave far too many loopholes open. The Crown's proposed reassurances to settlers about the security of small purchases made on equitable terms, for example, were paraphrased by this author as: "Be comforted, gentleman *land-sharks*; your property will not be disturbed, except in the case so vaguely described that ever to establish such a case will be next to impossible" [emphasis in original]. But this was not

[462] See *Colonial Gazette* 2 Oct.1839 #45 p. 711 "Instructions from the Colonial Office, to Captain Hobson, regarding Land in New Zealand". This material was first published in the *Globe* ("an acknowledged organ of the Government", according to the *Colonial Gazette*) on 1 October.

[463] *Colonial Gazette* 2 Oct.1839 #45 p. 706 "Colonization of New Zealand: Official Announcement". I quote here from the *Colonial Gazette*'s summary of the *Globe* article, which is not available to me. For some reason lost in the mists of time, my 1993 report on "The New Zealand Land Claims Act of 1840", footnote #15, gave the incorrect date '2 Nov. 1839' for this article.

the only problem. The execution of the Colonial Office's plan, the author noted, depended on Hobson first obtaining from Maori their "recognition of the sovereignty of the Queen". The author considered this to amount to "a direct encouragement to efforts on the part of settlers [in New Zealand] to prevent the native savages from acknowledging the Queen's sovereignty"[464].

209. "Upon the whole", he concluded, "the affair is in a complete mess": while the Colonial Office's plan of acquiring sovereignty from Maori by voluntary cession might have worked in 1837, when first proposed by the New Zealand Association, it was "wholly inapplicable now". The only viable solution open to the Government, the author asserted, was to retrace its steps, and start afresh "from the safe point of *British sovereignty established by Cook in 1769, and formally asserted by the Crown of England in 1814*"[465]. This would mean that "the mock sovereignty of the native savages" could be ignored[466], and the possibility of intrusion by foreign counties averted, so that Britain could proceed to impose its own schemes for colonization and for dealing with land claims: "the knot of a thousand difficulties" would be cut.

210. As we have seen, the *Colonial Gazette* was not the first commentator during this period to suggest that Britain had a right to exercise sovereign powers over New Zealand at any time it chose to do so. Nor would it be the last. Captain Cook's actions were usually cited as the source of such a right. This was a favourite theme of the New Zealand Association of 1837 and the New Zealand Land Company founded in 1839, and various

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[464] He referred here to the Treasury Minute of 19 June 1839, which authorized funding for Hobson's mission to New Zealand, describing it as requiring that Hobson only attempt to acquire sovereignty over lands already possessed by British subjects. The Minute, however, was only referring (rather inaccurately) to a particular Colonial Office document, which did not itself place any such limitation on Hobson's operations: see BPP 1840 [238] No. 13 pp. 34-35 for a copy of the Minute, and ¶189, above.

[465] Emphasis in original. '1814' refers to the proclamation issued by the Governor of New South Wales on 9 Nov. 1814 (see ¶9, above). The *Colonial Gazette* drew its historical information from an article published in the first issue of the New Zealand Land Company's *New Zealand Gazette* on 21 Aug. 1839 "Historical Sketch of the Colonization of New Zealand". This had recently been reviewed at length in the *Colonial Gazette*: 28 Aug.1839 #40 "Colonization, Generally and in New Zealand"

[466] The author says that Normanby in 1839 acknowledged as applying to the whole of New Zealand "the mock sovereignty of the native savages, which Lord Howick set up in 1831". This rather garbled reference becomes clearer when one consults its earlier article on New Zealand, "Colonization, Generally and in New Zealand" (*Colonial Gazette*: 28 Aug.1839 #40). This quotes a conclusion draw in the *New Zealand Gazette* article "Historical Sketch of the Colonization of New Zealand" (21 Aug. 1839) that "it seemed the fixed resolution of the Government [in the early 1830s], whatever inconvenience or suffering might be occasioned by it, to leave undisturbed the experiment of training up a native Levitical republic under Missionary control" in New Zealand. The *Colonial Gazette* commented that "This curious absurdity was, we believe, perpetrated in 1831, when Lord Howick was [Parliamentary] Under Secretary for the Colonies, and, having a will of his own, did what he pleased at the Colonial Office".

other organizations interested in the colonization of the country, but was no means confined to such agencies. The *Times* of London, for example, was an ardent opponent of the New Zealand Association's plans for large-scale colonization in 1837-38, yet after their Bill was defeated in Parliament it declared that the British Government should intervene in the Islands to control "unregulated colonization". The editor argued in December of 1838 that

> Of our right to take decisive measures for regulating this matter no reasonable doubt, we think, can be entertained. Properly speaking, the islands of New Zealand, especially considering the mere handful of barbarians who inhabit them, are as much the colonial property of the British Crown as any other colonies which we hold by dint of discovery and claim.

This meant that

> Any recognition of the sovereign independence of the native chiefs that may have been extended to them by our Government (and it is as vague as can well be imagined) is entirely an affair of pure grace on our part, which no other Government has anything to do with – a recognition which we may rightfully modify, withdraw, or regulate, according as enlarged views of the interests of liberty, humanity, and religion may seem to determine. Previously to the American revolution, no power in Europe would have presumed to question our undoubted right to colonize the New Zealand Islands, if such had been the inclination of the British Crown: nor has anything since arisen, either from our own forbearance, or from the rival claims of other states, to put that right in abeyance ....

The formal acquisition of New Zealand by Great Britain, he concluded, could be carried out whenever the Crown considered such a step to be desirable. There were numerous options open, but as of December of 1838 "the lesser evil placed within our choice" seemed to be to make New Zealand into "a colony, subject to Her Majesty's Crown"[467].

211. The press of New South Wales held similar views. A year later and half a world away, just as Hobson arrived in New Zealand, the *Sydney Gazette* pronounced in an editorial that

> England [sic] has a pre-emptive claim to New Zealand founded on the light of discovery. She has a collateral claim to it founded on occupancy of certain portions

[467] London *Times* 26 Dec. 1838, editorial. Annexation, it was argued, would enable the British Government to pursue a plan similar to one advocated by the Church Missionary Society after the New Zealand Association's Bill was defeated. It would be able to "overhaul and adjust all the pretended titles to landed property acquired by speculators such as Lord Durham and others", to send in the Navy to protect Maori and Europeans alike, and to "encourage and extend such educational and Christian privileges among the Islanders as may abolish barbarous usages and fit them for [a] civilized alliance".

> of it by British subjects. Thirdly she has a right to New Zealand from its proximity to her Australian Empire. [468]

A few weeks later, in response to news that the Treaty of Waitangi had been signed, the *Sydney Monitor* noted that although "the poor Bay of Islands Chiefs" had been persuaded to declare their acceptance of the Queen's authority,

> We opine, that our sovereignty will lie in two things founded on the law of nations – 1st The discovery of New Zealand by Captain Cook, and his planting there the British flag; and 2ndly subsequent occupation by British subjects, both mercantile and missionary.

The Sovereignty Memoranda

212. The *Colonial Gazette*'s arguments in October of 1839 drew upon a historical narrative published earlier in the *New Zealand Gazette*, a newspaper connected with the New Zealand Land Company which published two issues in England before being moved to Port Nicolson (Wellington)[469]. A similar line of argument featured in a letter sent by the Deputy-Governor of the Company, Joseph Somes, to Lord Palmerston, the Minister of Foreign Affairs in November of 1839, calling his attention "to the question of the sovereignty of Islands of New Zealand"[470]. The publication of the Treasury Minute of 19 July 1839, (which specified that a cession of sovereignty by Maori was needed before any part of New Zealand could be added to the British dominions[471]), and of the extract from Hobson's instructions from Lord Normanby, Somes claimed, had produced a good deal of "agitation" in France. They were taken to be a repudiation of British sovereignty over New Zealand through "an acknowledgement of the sovereignty of the native chiefs", which was seen as a tacit admission of

> the right of France either to obtain sovereign jurisdiction in New Zealand by the means which Captain Hobson is directed to employ, or ... to sustain the independent sovereignty of the natives.

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[468] *Sydney Gazette* 1 Feb. 1840 "Colonization of New Zealand". The *Gazette* was concerned lest some part of New Zealand fall into French or American Hands: the Islands, it declared "must either become an *exclusively* British Colony or nothing".

[469] Both issues are labelled "No. 1" with the second (of 6 Sept. 1839) is denominated a "second edition".

[470] Letter of 7 Nov. 1839: BPP 1840 [238] pp. 66-68 Encl. in No.36. This was sent on to the Colonial Office on 15 November, with Palmerston's request that it provide him "with information as to the statements made by Mr. Somes, with regard to the British right of sovereignty over the New Zealand Islands": BPP 1840 [238] No. 36 p. 65.

[471] BPP 1839 (469), published in July of 1839.

In short, the documents in question were "calculated to invite foreign pretensions, which otherwise would never have been imagined".

213. His Company's view was that

> The sovereignty of England [sic], in New Zealand, has been over and over again asserted and exercised. Whether it could be subsequently abandoned by such documents as the Treasury Minute and Instructions, is a question in constitutional and international law, on which your Lordship is, of course, far more competent to judge than we can pretend to be. But that there recently was a British sovereignty, either to maintain or to abandon, we have no sort of doubt.

Somes began with Cook and proceeded to work his way through various acts of Parliament and the Legislative Council of New South Wales, in order to conclude that from 1769

> The Islands ... continued in the state of a dependency [to the British Crown] until the year 1831, when a series of proceedings commenced, by which the sovereignty of Britain may perhaps have been forfeited.

These proceedings involved the presentation of "what was termed 'a National Flag'" to certain chiefs by British Resident James Busby in 1834, and the 'sanction' which Busby gave to the formation of a Confederation of United Tribes in 1835, with the Declaration of Independence.

214. According to Somes, either or both of these actions might easily be misinterpreted as "a transfer ... of the British Sovereignty" to the chiefs, but he argued that in the case of the flag Busby was accredited to the Missionaries not the chiefs (so that "By the latter act, the Sovereignty of the Islands might almost seem to have been transferred to these missionaries"[472]); and that in the case of the Confederation, Maori were simply incapable of either expressing or understanding the concept of 'sovereignty' and so could only have been the "unconscious instruments" of Busby and the Missionaries. "If, indeed, the sovereignty was delegated to the Missionaries [in 1834]", he concluded,

> they could, being British subjects, have held it but as trustees for the Crown. If the sovereignty of the natives was then acknowledged [in 1835], it extended only to the small part of one island, inhabited by the parties to the Declaration.

But the existence of Confederation, he claimed – "this mockery of an independent sovereign

[472] See ¶55, above, on this point.

nationality" – had had no effect whatsoever on the way in which "the jurisdiction of British law, and the armed authority of British ships of war" had been and were exercised in New Zealand since 1835.

215. Somes' letter purported to be a patriotic warning to the Government, but was in fact a shot across the bows of the Colonial Office, which he claimed was "extremely hostile to the objects for which the Company was formed"[473]. The Colonial Office at once produced an internal memorandum for its Minister, Lord Russell, on "the reasons why the 'New Zealand Company' think that New Zealand is already a British Dominion". Written by James Stephen, this rejected all of Somes' assertions[474]. The author(s) of the Somes letter, he observed, were either "ill informed as to the facts, or very ill-disposed to make a fair statement of them". Stephen proceeded to examine the flag issue in some detail, concluding that "After such proceedings ... it seems to me preposterous to maintain that New Zealand is a Possession of the British Crown". He also contested Somes' interpretation of several statutes, which led him to advise Lord Russell that

> If it be necessary to show in a letter to the Foreign Office that Great Britain has recognized New Zealand, as a Foreign and Independent State the proofs are, as it seems to me overwhelming and superabundant.

The Colonial Minister did consider it necessary to fully document "all that has been done since 1831" for Cabinet[475], and by 21 Nov. 1839 Stephen had produced an expanded version of his first memorandum[476]. This examined the flag issue in greater detail, and concluded that "After such proceedings it seems impossible to maintain that New Zealand is a Possession of the British Crown", then went on the look at various pieces of legislation.

216. Conspicuous by its absence from either of these Colonial Office memoranda was any reference to the Declaration of Independence of 1835 and/or the Confederation of United Tribes: evidently Stephen considered these to be surplus to requirements as far as sovereignty went. Nor was this omission rectified in a third version of his essay prepared in

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[473] It was certainly true that the Colonial Office was most unhappy with the way in which the Company had gone about its business since the previous May.

[474] Memorandum of 16 Nov. 1839: CO 209/5 pp. 51b-54a. This reproduced in full in E. Sweetman, *The Unsigned New Zealand Treaty: A Publication for the New Zealand Centenary 1840-1940* (1939), Appendix pp. 186-187.

[475] Minute of 17 Nov. 1839 by Russell, on the memorandum: CO 209/5 pp. 54a. Russell's reference to 1831 suggests that Somes had struck a sore point in suggesting that the Colonial Office had acted without proper authority.

[476] Memorandum of 15 Nov. 1839: CO 209/4 pp.332b-342a, and CO 209/5 pp.68b-73a (for the pages missing from the main text in CO 209/4).

March of 1840, when Lord Palmerston asked Lord Russell for a reply to his 15 November letter.[477] (This suggests that the sovereignty issue had not been placed before Cabinet in 1839). The resulting memorandum differed little from the November version[478]. Stephen stated as a preamble that any foreign power could challenge a British claim to sovereignty over New Zealand on two grounds:

> first, that the British Statute Book has, in the present century, in three distinct enactments, declared that New Zealand is not part of the British dominions; and, secondly, that King William IV, made the most public, solemn, and authentic declaration, which it was possible to make, that New Zealand was a substantive and independent State.

He then listed and discussed the three Statutes in question – although for all practical purposes there were only two[479] – and identified the 'declaration' by King William IV as being contained in a Despatch from the Colonial Minister of the day to Governor Bourke dated 21 Dec. 1834[480]. According to his own covering note, Stephens' relatively brief memorandum contained "all the information which it appears to Lord John Russell necessary or practicable to afford" in response to Somes[481].

A Widening Dispute

217. James Stephen's March memorandum made up part of the package of *Correspondence with the Secretary of State relative to New Zealand* which was submitted to the House of Commons on 14 April 1840[482]. Even before this Parliamentary Paper was released, the *Colonial Gazette* was reporting that it contained documents "which will

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[477] This was understandable, insofar as the Declaration was nominally an action taken by the chiefs themselves rather than by the British Government, but one would have thought that if Stephen saw the British recognition of the Declaration as carrying any weight, he would have mentioned it.

[478] See CO 209/5 pp. 64b-66b for the notes transforming the 21 November version into the printed Memorandum of March 1840: BPP 1840 [238] Encl. in No.38 pp. 68-69. The Memorandum itself is not dated, but it was sent to Palmerston under cover of a letter dated 18 March 1840.

[479] See ¶14, above. The description of the 1823 and 1828 Acts in Hight & Bamford, *Constitutional History and Law of New Zealand,* p. 44, is quite misleading in its implication that the 1828 Act differed from its predecessor where the provisions relating to New Zealand are concerned.

[480] CO 209/1 pp. 129b-130a. It seems to me open to question whether this can bear the weight which Stephen placed upon it. The despatch (from Lord Aberdeen, the Colonial Minister at the time) simply says that the King had been shown Bourke's report on the selection of flag, and signified "His gracious approbation of the course, which you have pursued in these respects". This was hardly a 'public' declaration, in the ordinary sense, and its solemnity and authenticity are somewhat diminished by it second-hand nature.

[481] Letter of 18 March 1840 from Stephen to Backhouse: BPP 1840 [238] No.38 p. 68.

[482] BPP 1840 [238]. This was tabled on 14 April 1840 (see *New Zealand Journal*, 18 April 1840, "Mr. Stephen and the Sovereignty of New Zealand"), in response to a address of 8 April 1840, and was issued before 18 April, when the *New Zealand Journal* commented on one of its documents.

disclose particulars seriously inculpating the Government, not less with regard to British subjects than to foreign pretension", for

> Lord Palmerston seems to have imagined that the sovereign right of England to these islands, which were discovered and taken possession of by Captain Cook in the name of George the Third, and have ever since been treated as a British dependency, has been forfeited by arrangements between the Crown and the natives similar to those by which the United States have often acknowledged the quasi independence of native tribes remaining wholly subject to their sovereign authority. This, at least, will probably be his excuse for having abandoned New Zealand to the French. [483]

When the Paper became publically available Stephen was vigorously attacked in the *New Zealand Journal* for his alleged efforts to prevent systematic colonization in New Zealand[484]. The country and its inhabitants, it was argued in an article on "Mr. Stephen and the Sovereignty of New Zealand", were suffering from the lawlessness produced by informal, unregulated colonization, yet "this is the species of colonization which Mr. James Stephen would fain perpetuate by his pernicious doctrine – that the Crown forfeits its ancient Sovereignty the instant it recognizes the rights of the native chiefs". This doctrine, the author declared, was "unsound", "utterly untenable" and without precedent. He had no difficulty with the pathway laid down in the Treasury Minute of 19 July 1839, of negotiating with Maori chiefs as a preliminary to British occupation ("let the principle of dealing with fairness towards the natives – the principle so successfully put in practice by the great Penn[485], be strictly adhered to") but demanded an immediate declaration "that Great Britain asserts a prior right of sovereignty, including a right of pre-emption, against all civilized powers". The Under Secretary's memorandum, he declared, should be treated "as so much waste paper – as a mere piece of official insolence, in no way affecting the question of the Sovereignty of New Zealand".

218. The *Spectator* reached similar conclusions a few days later[486]. Stephen's memorandum, it declared, "may be described as an earnest pleading for the right of any foreign power to colonize New Zealand". The case being put forward by the Government and the Colonial Office, the editor stated, was that

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[483] *Colonial Gazette* 8 April 1840 #72 p. 233 "Misconduct of the Government as to New Zealand".
[484] *New Zealand Journal* 18 April 1840, "Mr. Stephen and the Sovereignty of New Zealand". The editor believed that the documents in the Parliamentary Paper, taken together, revealed "a history of inconsistency, ignorance, and incapacity" on the part of Under Secretary Stephen in dealing with New Zealand over the previous decade.
[485] William Penn, the Quaker founder of the colony of Pennsylvania in North America.
[486] "Colonization of New Zealand", copied in *Colonial Gazette* 22 April 1840 #74 pp. 266-267.

> The Crown of England has over and over again repudiated all sovereign rights in New Zealand; and therefore the Government was not bound either to interfere with any design of France, or to provide against anarchy in settlements formed by emigrants from Britain; inasmuch as England had no sovereignty, we did well to assert none, but rather to try and obtain cession thereof from the natives: and let what may happen in the meanwhile, the fault will not be ours, but will be due to circumstances over which we had no control.

The author rejected Stephen's position that Britain had abandoned any sovereign rights which it might once have held over New Zealand, claiming that lawyers as good as the Under Secretary "deny that assumption *in toto*". Specifically, Stephen seemed to be

> entirely ignorant of the distinction between sovereignty as against foreign nations, and sovereignty modified with respect to savage tribes by various recognitions of their nationality. He dwells emphatically on acts of the British Crown and Parliament which have acknowledged a New Zealand nationality, but seems wholly unconscious of the numerous acts of the President and Congress of America, whereby they have acknowledged the nationality of several Indian tribes, as between those tribes and the United States, but without in any degree repudiating that general sovereign right, as against all foreign nations, which is founded on discovery.

This, it was argued, was "the very point on which this whole question turns". Furthermore, discrepancies could be detected between Stephen's assertions and the Colonial Office's actions.

219. The Parliamentary Paper containing Stephens' memorandum also included full texts of the various instructions issued in relation to New Zealand during 1839. Among them was the 'Addendum' sent to Captain Hobson by Normanby on 15 August, in response to questions concerning his main instructions[487], and another sent to Governor Gipps by Russell on 4 December[488]. In the first document, the author of the *Spectator* article noted, Hobson had been told that under certain circumstances he was allowed to assert "Her Majesty's Sovereign Rights" over the South Island "on the ground of discovery". In the second, Russell had stated that Gipps could send troops to New Zealand

> when you shall have received intelligence that Captain Hobson has obtained a grant or cession of territory from the New Zealand chiefs in the Northern Island, or that he has established the Queen's authority in the Southern Island.

Clearly, the author argued, the Colonial Minister was anticipating that Hobson was likely to

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[487] Letter of 15 Dec. 1839: BPP 1840 [238] No. 18 pp. 44-45. This was in response to a letter from Hobson (pp. 42-44) dated "August" – sent on 1 Aug. 1839.

[488] Despatch #39/53 of 4 Dec. 1839: BPP 1840 [238] p. 49 No.29 [extract] (there is a full copy in CO 209/4 pp. 609b-616b).

use the authority given him by his predecessor to proclaim British sovereignty in the south on the grounds of discovery, and had no objection to such a proceeding.

220. The *Spectator* article pointed out that Stephen's arguments "related without the shadow of a distinction to the whole of the islands called New Zealand", meaning that if the Government had repudiated British Sovereignty in one part "so have they in every other". Thus,

> If the elaborate argument with which Mr. Stephen winds up this "Correspondence" [sic] has any force, Lord Normanby and Lord John Russell have directed Captain Hobson to usurp a British sovereignty over the South Island in defiance of the law of nations. Mr. Stephen condemns two of his chiefs in succession. Or, if they are in the right and he is in the wrong on this subject as respects the South Island, then they are in the wrong as respects the North Island; he is in the wrong as to both islands; and his argument must be regarded as mere special-pleading for the purpose of excusing their folly as to the North Island ....

In a parting shot, the author pointed out that in dealing with the New Zealand Association in 1837-38, Lord Glenelg had apparently taken it as given that "the right of England to proceed on the discovery of Captain Cook, and other acts by which a general sovereignty had been established". The present Government, the *Spectator* concluded, had acted with "gross inconsistency" in their repudiation of any British sovereign authority over New Zealand.

The 1840 Select Committee on New Zealand

221. These exchanges were part of an upsurge of dissatisfaction with the British Government's New Zealand policy early in 1840. The tabling of the aforementioned documents, it was alleged in some quarters, represented an attempt by the Colonial Office to anticipate and undercut criticisms of its policies which were likely to be aired at a public meeting planned for the following day "to petition Parliament and the Crown in favour of the systematic colonization of New Zealand"[489]. The meeting in question was called by the Lord Mayor of London in response to a "requisition" signed by "upwards of 100 merchants" of the city[490]. These gentlemen wanted a petition to the Queen and Parliament drawn up asking them to adopt "prompt and efficient measures"

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[489] *New Zealand Journal* 18 April 1840, "The Great City Meeting", and the following article "Mr. Stephen and the Sovereignty of New Zealand".

[490] *New Zealand Journal* 18 April 1840, "The New Zealand Meeting at the Guildhall". A copy of the Petition produced at the meeting follows this description of the proceedings.

- "for preserving from invasion or abandonment the long-established sovereignty of the British Crown in the Islands of New Zealand, at present endangered by foreign pretensions, and by acts of the Executive Government";
- "for stopping the course of lawless emigration and settlement" in New Zealand, which had injured its native inhabitants and threatened to lead to "their speedy extermination"; and
- "for establishing the most beneficial system of colonization, and the protection and restraints of British law" in this "distant dependency of the territory of New South Wales", where "a state of anarchy" now prevailed.

222. People involved with the New Zealand Land Company, such as MPs Francis Baring and William Hawes played a prominent role at the meeting – although one speaker denied that there was a direct connection: "It had been called", G.F. Young stated, "to take the expression of public opinion on an important question". Be that as it may, the resolutions were discussed at some length, accompanied by much abuse of the Government, and a Petition was produced. This was to be made available for signing over the Easter holiday, and would be presented to Parliament at the earliest opportunity. In the event, the final "Petition of Merchants, Bankers, and Shipowners of London" was laid before the House of Commons, on 22 May 1840[491].

223. The Petition generally followed the lines laid down in the aforementioned "requisition". It opened with a lengthy account of the history of British-New Zealand relations, starting with Cook in 1769 and working through "the various acts" by which New Zealand had allegedly come "to form part of the British dominions in the Southern Pacific" by the early 19th century. Particular emphasis was placed on Captain Phillip's commission of 1787, which

> constitutes, as your petitioners believe, the sole and sufficient title of the British Crown, as against all foreign powers, except the natives, to the territories of New South Wales, and to the dependencies thereof, such as New Zealand and Norfolk Island, and Van Diemen's Land.

In 1835, it noted, an attempt was made to place New Zealand

[491] Copy in BPP 1840 (582), Appendix 1 pp. 135-137.

> under a kind of national government, by means of forming a confederation of chiefs residing at and near the Bay of Islands, to whom an officer of the British Crown (who had been appointed to reside there) presented a flag, intended to express New Zealand nationality.... [492]

This attempt, however, had "utterly failed, in consequence of the incapacity of the native chiefs to act either as a legislature or an executive", and British warships had since that time been "the only means by which order has been in any degree maintained in New Zealand".

224. The Petitioners deplored the failure of the Crown to provide "for the protection and restraint both of British subjects and of the native races inhabiting the country", and also the fact that settlers had been allowed to purchase land directly from Maori. This was, they stated,

> a practice which is forbidden by every other civilized government having relations with savages, and which is calculated not only to produce great uncertainty and endless litigation with respect to titles of land, but also to render impossible the adoption of any judicious system in the disposal of waste land by competent authority, for the purposes of colonization; and is also most injurious to the native inhabitants, by preventing [the creation of] any general and systematic reserves of land for their use, so that tribe after tribe is gradually deprived of its ordinary means of subsistence.

The idea that New Zealand did not at present lie within the dominions of the British Crown was firmly rejected, on the grounds that

> according to the principles hitherto recognised by colonizing states, and which, your petitioners believe, form a part of the established law of nations, Great Britain, as the discovering power, has, from the year 1769 downwards, possessed the sole right of acquiring territory from the natives of New Zealand as against all foreign powers whatever, and therefore neither the presentation of the national flag to a small number of chiefs in corner of one of the islands, nor the appointment of a consul, instructed to treat for cession of sovereignty, in any way resemble an abandonment or repudiation of the right of Great Britain to exercise dominion before all foreign powers, but are to be regarded simply as acts which the Crown has performed for regulating the political relations which it alone is entitled to hold with the native chiefs.

After a passing shot at possible French ambitions, the Petitioners requested that "immediate steps be taken to establish the complete administration of British law in New Zealand", for the benefit of both Maori and settlers; that further land-purchasing be stopped, and "decisive steps should be promptly taken" to repair the damage already caused by such activity; and

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[492] In fact, of course, the flag was presented to chiefs in the Bay of Islands a year before the Declaration of Independence.

that the government of New Zealand be separated from that of New South Wales.

225. As it happened, a few weeks after the Petition was presented to the House of Commons the first news was received about Hobson's actions in New Zealand. It came in the form of Sydney newspapers, one of which copied the proclamations issued at the Bay of Islands on 30 Jan. 1840[493]. (The newspapers arrived before Hobson's first despatches reached the Colonial Office[494]). Lord Eliot – one of the New Zealand Land Company's many supporters in Parliament[495] – had this material in hand on 7 July 1840, when he stood up in the House of Commons to draw attention to the London Petition. "The opinion of so large, so respectable, and so enlightened a body of men", he stated, "appeared to him to be deserving of the serious consideration of the House"[496], and he called for the formation of a Select Committee to deal with the questions raised.

226. Eliot praised the Wakefield system, referred to the evidence given to 1838 Select Committee on New Zealand which showed "the peculiar advantages which New Zealand offered ... to settlers from this country", and then launched an attack on the Government for is views on sovereignty. From the evidence available, he concluded

- that Cook's claims, made with "all the accustomed formalities", meant that Britain "had the same title to the possession of New Zealand as we had to a great part of our colonial empire, and more especially to our South Australian possessions"[497];
- that "down to 1829, there had been no doubt whatever on the part of the Colonial Secretary of State" as to the Crown's sovereign authority over New Zealand; and
- that none of the official documentation which he had seen from the period 1838-39 argued against or expressed doubt as to "the right of the British Crown to the sovereignty of New Zealand".

Eliot also pointed to instructions issued by Lord Russell on 14 Jan. 1840 to the new Colonial Land and Emigration Commission, which explicitly mentioned New Zealand as a British

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[493] See ¶240, below. The *Sydney Gazette* of 22 Feb. 1840 copied the two proclamations; and this material was first reproduced in London in the *Colonial Gazette* of 24 June 1840, along with other items relating to New Zealand.
[494] Copies of his initial despatches to Gipps did not arrive until around 9 July: see CO 209/6 pp. 46b.
[495] See E.J. Wakefield, *Adventures in New Zealand* (1845), Vol. 1 p. 420.
[496] BPD (Commons) 7 July 1840 cols. 523-545 "New Zealand".
[497] Meaning, he noted, that "if the Government thought fit to disclaim what he thought was a just claim to the Government [sic] of New Zealand, then they had in his opinion no right to retain the sovereignty of the other parts of the South Australian Islands [sic]" (col. 525).

colony containing "districts which it is not possible to exhaust by any rational scheme of colonization for a long course of years"[498]. This, he thought, clearly indicated that up to January of 1840 the Government had no doubts as to the right of the British Crown to the sovereignty of New Zealand.

227. Lord Eliot feared that Stephen's memorandum would lead to conflict between Britain and its ally France. It had been reported that "settlers were about to proceed from France to the southern island of New Zealand", and now the British Government had declared that it had no claim to that territory. This left the way open for France to establish a colony by itself negotiating a cession of sovereignty by Maori to the French Crown[499], and "the juxta-position of settlements from the two nations" would inevitably lead to "quarrels and collisions". Eliot castigated the Government for allowing this situation to develop; for alleged inconsistencies in its position on land claims in New Zealand[500]; for attaching New Zealand to New South Wales rather than creating an separate colony; for constituting a Land Claims Commission under the Governor of New South Wales without first acquiring permission from Parliament; and for setting the proposed upset price for Crown lands in New Zealand at 5s. per acre (much too low for a Wakefield purist). Lord Russell, he stated, had asked him "not to press this motion, because news was expected from New Zealand relating to the proceedings of Captain Hobson", but he had declined to cooperate with the Colonial Minister because the Government "was proceeding on vicious and erroneous principles", and a thorough inquiry was needed. He moved that a Select Committee be appointed to inquire into to the statements made in the Petition[501].

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[498] Instructions for the Colonial Land and Emigration Commissioners of 14 Jan. 1840: see *Colonial Gazette* 12 Feb.1840 #64 pp. 106-109. The *Gazette* had greeted this statement with delight, as amounting to "The recognition of New Zealand as a British colony".

[499] Unlike virtually all of the rumours circulated about the French and their alleged designs upon New Zealand during this period, this one proved to be true. Plans were afoot in France to do exactly this, although Stephen's memorandum seems to have had nothing to do with them. A French expedition arrived at the South Island in August of 1840, only to find that they had been pre-empted by Hobson and Busby. See Peter Tremewan, "The French Alternative to the Treaty of Waitangi" (*New Zealand Journal of History* 26 #1 April 1992, pp. 99-104. An extended treatment of this subject can be found in the same author's *French Akaroa: An Attempt to Colonise Southern New Zealand* (Christchurch: 1990).

[500] Pointing out, as Busby and Wentworth were doing in Sydney at virtually the same time, that if New Zealand was an independent state, that logically any land titles acquired there prior to British acquisition should be honoured by the Crown.

[501] The *Colonial Gazette* thought that Eliot had shown "that the most favourable issue of Captain Hobson's mission would leave unsettled every question except that of sovereignty, because the Colonial Office instructions to Captain Hobson were a tissue of inconsistencies and absurdities", and hoped that James Stephen would be required "to defend his strange doctrine" before the Committee: *Colonial Gazette* 8 July 1840 #85. Unfortunately for posterity, Stephen did not front up to explain what had happened in the Colonial Office in 1838-39. Presumably he was not called as a witness.

228. The Government was not particularly keen on a Parliamentary investigation of its handling of the New Zealand question. In reply to Eliot, Russell argued that he could not see how such a Committee could serve any practical purpose[502]. "All the noble Lord stated", as he saw it, "was, that if a committee were appointed, it might probably find some grounds upon which legislation might hereafter proceed". The Colonial Minister noted that the 1838 Lords Committee, "after a great deal if inquiry" into New Zealand matters, could only conclude that the subject of new colonies was one 'which properly belonged to the Crown", and he did not think that another Committee "could come to any other conclusion". With respect to rights of sovereignty based upon discovery, Russell observed that "it might be disputed whether the right of sovereignty remained, if the party making the discovery did not avail himself of it for a long series of years", and noted in the case of New Zealand that after 1769 a "solemn declaration" had been made "apparently relinquishing, [and] at all events, not confirming that right" (referring here to the 1817, 1824 and 1828 Acts). In such circumstances, the Colonial Minister thought, it "certainly was necessary that there should be some new title to the possession of any such sovereignty"[503].

229. Russell also attacked the New Zealand Association and the New Zealand Land Company for attempting to manipulate successive Governments in order to achieve their own ends – profit – and he defended the instructions given to Hobson (summarised as "Namely, if he could, to make an agreement with the natives to purchase their land and territory, and then establish the authority of this country there" [504]) as fully consistent with the law of nations. Eliot, he noted, "had not found fault with Captain Hobson being sent out with those instructions", and his objections to certain elements of them were dismissed as mere quibbles, where they were not ill-conceived or ill-advised. Russell thought that nothing useful could in any case be done until they knew what had taken place in New Zealand, "for whatever they might devise, might be completely overthrown by the arrival of a despatch the day after the committee made their report". Where the New Zealand Land Company was concerned, the Minister predicted that "immediately the authority of the Government in New Zealand was established, there would at once be an end to all disputes".

230. The ensuing debate was brief, and fairly predictable. At its end Eliot

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[502] Cols. 531-538.
[503] Russell made brief reference to the New Zealand flag here, but followed Stephen in avoiding any reference to the Declaration of Independence.
[504] Col. 534.

complained that the "contradictory statements" made upon this question to the House, and the bipartisan support which he had received, meant that he was not prepared to withdraw his motion. Russell decided not oppose it[505], and a Select Committee was appointed that same day to inquire into the Petition. Although no admirer of the Government, the *Times* was prepared to praise its stance in this instance. "The recent conduct of the Whigs in reference to New Zealand", the editor observed in an editorial in July, "unless they contemplate dishonest ends not hitherto apparent, has constituted by far the most faultless part of their colonial administration"[506]. Nonetheless, the Ministers were unable to have their way in Parliament. The Committee included Eliot, plus a mixture of Government and New Zealand Company supporters. During July the Committee heard a number of witnesses, including Beecham and Coates for the missionaries, Saxe Bannister and Hinds for the humanitarians, and Ward and Hutt for the New Zealand Company. The star witness, however, who spent a good deal more time on the stand than anyone else, was E.G. Wakefield.

231. The *Times* reported in July that the "New Zealand Confederacy" (that is, the Company and its supporters) had wrung from the Government "a packed colonization committee"[507], commenting later that it had expected a Report such as could have been written "without putting ... [the Committee members] to the trouble of a single sitting"[508]. Such a Report was in fact written by Lord Eliot, and appeared in the proceedings of the Committee for 30 July 1840[509]. But this was not adopted as the final Report of the Select Committee[510]. Rather, it was rejected by a vote of 7 to 4 on that date, and on 3 August the

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[505] Or as the *Times* put it, "it was only on perceiving the combination of heterogeneous elements which threatened to leave him in a minority, that his Lordship [Russell] was constrained to acquiesce to Lord Eliot's proposal, and to concede with ill-disguised reluctance what he felt his inability to withhold": London *Times* 27 July 1840, editorial.

[506] London *Times* 27 July 1840, editorial. The members are listed at BPP 1840 (582), p. ii.

[507] London *Times* 27 July 1840, editorial.

[508] London *Times* 4 Sept. 1840, editorial. On the other hand, the pro-Company press accused the Government representatives on the Committee of trying to obstruct its work: see *Colonial Gazette* 2 Sept. 1840 #93, and the *Spectator* article copied in *Colonial Gazette* 9 Sept. 1840 #94 "Lord Howick and the Officials in the Select Committee on New Zealand".

[509] BPP 1840 (582), pp. vi-x. According to one newspaper, Eliot himself later admitted that his report was largely written by E.G. Wakefield: *Devonport Independent* of 3 Nov. 1840, cited in A.J. Harrop, *England and New Zealand: From Tasman to the Taranaki War* (1926), p. 87. Harrop comments that "This was not the first nor the last occasion that Edward Gibbon Wakefield practically directed the operations of a Committee of the House".

[510] The London *Times* was the first of many to be deceived by the layout of the Parliamentary Paper into thinking that Eliot's draft was the Report of the Committee. In its 4 Sept. 1840 issue it published a summary of this labelled "Abstract of the Report of the Select Committee on New Zealand". The error was not corrected until its 16 Sept. 1840 issue: "as his Lordship's proposals are incorporated in the very front of the committee's collated documents, and clumsily headed with the word *Report* in large capitals, we naturally inferred ... that those proposals actually constituted the report itself".

Committee reported to the House that it had "considered the Matters to them referred, and have taken Evidence thereupon, which they have agreed to report to The House"[511]. In other words the proceedings of the Committee (including Eliots' draft Report), together with the Minutes of Evidence and the documents placed before it, were sent to the House. No conclusions were drawn. Once again a major Select Committee inquiry into New Zealand affairs had ended without the members being able to agree on a single set of conclusions. As in 1838 the only outcome was "a large body of evidence, *without note or comment*"[512].

232. Lord Eliot's draft Report is nonetheless worth examination, as an expression of the views of a significant body of British opinion on the eve of the publication of the annexation proclamations in Britain. It opened with the observation that recent reports from Hobson

> make it appear probable that sovereign rights over the whole of the islands will shortly be ceded by the natives to the Queen.[513] As the actual sovereignty of Her Majesty will thus be established, it is comparatively unimportant to know whether the *de jure* sovereignty was already vested in the Crown.

The Committee had therefore decided to direct its attention "to the present and to the future, rather than to the past" (p. vi). This was only true up to a point, however, for Eliot's draft Report proceeded to attack the Crown's policies towards New Zealand before 1840 under the guise of a critique of the land title situation in New Zealand. A great deal of land in New Zealand was claimed by Europeans, it stated, which posed a serious problem for the implementation of a successful Land Fund system. The responsibility for this was attributed entirely to the Crown's, for it would not have arisen

> if the British Government had, from the year 1769 downwards, never lost sight of the principle which was formerly acted upon by this country, and by all other European powers, with regard to their North American possessions, and had refused to recognise any titles to land founded on purchases made by private persons from savages.

This was the principle followed by the Americans

> and it has constantly guided their government in its dealings with the various Indian tribes inhabiting the North American Continent, and it has been solemnly declared

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[511] BPP 1840 (582), p. iii.
[512] As the London *Times* described the 1840 result: 16 Sept. 1840, editorial
[513] Documents published in an Appendix to the Report included Gipps' despatches of 9 and 19 Feb. 1840, to which Hobson's despatches to Gipps up to 6 February were attached. This necessarily means that this conclusion was drawn from his Waitangi reports alone.

> by the Supreme Court of Judicature in the United States to be a principle of international law. [514]

The principle in question was that

> the nation by whose subjects a new country is discovered, acquires thereby a title to its possession as against all foreign powers. That title, when completed by occupation, gives to the discovering nation the sole right to purchase the soil from the natives, to establish settlements within its territory, and to regulate its relation with foreign powers.

The consequences of the failure of the British Crown to follow up Cook's discovery of New Zealand with occupation (of some unspecified kind), to declare British sovereignty on the strength of this occupation, and to ban purchases of land from Maori from the outset, it was thought, could only be remedied by retrospective legislation.

233. The Eliot Report approved of the January 1840 land claims proclamations, but the plan for a Land Claims Commission outlined in Normanby's instructions to Hobson and Gipps was not considered to be fully workable. In particular, it was thought necessary that the Land Claims Commission be based on the authority of Parliament, rather than that of the Governor of New South Wales and New Zealand, and that the Commissioners appointed be people who had no previous connection with either territory. (And New Zealand, in any case, should be separated from New South Wales at the first opportunity). The Parliamentary Act creating the Commission, it was argued

> unless these islands are to continue a prey to speculators, ought to have the same effect with respect to private acquisitions, as the Crown would have [had] if its sovereignty had been enforced from the time of discovery .... since a good system of legislation may have the semblance in many cases of invading private rights to property, such legislation ought to be clothed with the highest and most solemn sanction that can be conferred upon it. (p. viii)

Land purchasers who had occupied and cultivated their lands should receive free grants, while "the holders of lands not in cultivation", where titles were "admitted" by Commission, should be required to pay 20s. per acre for possession – the latter being the price which should be set as the minimum price for Crown lands in the new colony.

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[514] It seems likely that evidence on this point given to the Commission led James Stephen to write his oft-quoted Memorandum of 28 July 1840 on native title (CO 209/4 pp.343b-344b: although dated 1839 this was written in 1840 for R. Vernon Smith who had replaced Henry Labouchere as Parliamentary Under Secretary). See Rutherford, *Treaty of Waitangi*, pp. 36-37.

234. The Eliot Report recommended "That the soil of New Zealand, or of any parts thereof, over which the sovereignty of the Crown shall have been established, should be vested solely in the Crown". Out of all lands sold or granted, however, "reserves [should] be made for the natives of a quantity equal to one-tenth of the lands so sold or otherwise disposed of", for it considered that

> a plan of reserve , similar to that adopted by the New Zealand Company, would be attended with the most beneficial effects to the native race in New Zealand, and affords the bets prospect of securing to them the benefits of civilization.

"The experiment of reserving lands for the native chiefs under proper regulations", the Report noted, "may justly be regarded as one of high importance to the interests of humanity, and one well deserving of the sanction of Parliament". It would appear that Eliot and his New Zealand Land Company supporters were quite prepared to discard the property guarantees in Article Two if these impeded the implementation of the latest version of the proposals for encouraging amalgamation which had originally been put forward by the New Zealand Association in 1837.

235. In a parting shot, Lord Eliot's draft Report attributed the evils of uncontrolled land purchasing in New Zealand to "the delay which has taken place in establishing the authority of British law in New Zealand", and hoped that legislation along the lines suggested would be laid before Parliament as soon as possible. Legislation relating to New Zealand would indeed be placed before Parliament before the end of 1840, but the Select Committee's proceedings had little to do with this development. Captain Hobson's proclamations of 21 May 1840, declaring the sovereignty of the British Crown over the whole of New Zealand, were received (and officially published) in London a month after the Committee finished its work. This news from New Zealand did not, as Lord Russell had hoped, bring "an end to all disputes", but it moved all existing controversies into a new and different context. As far as the British Government and British subjects were concerned, New Zealand had been brought into the empire, and all disputes would now revolve around the question of how the Islands and their people – Maori and European alike – were to be governed. The question of when or how British sovereignty was or should have been acquired could now be left to historians to argue over.

VII

"The Intelligent Consent of the Natives"

Hobson, Gipps and New Zealand's Sovereignty

236. Captain Hobson's first destination was Sydney, in New South Wales, where he arrived at the end of December in 1839. His superior, Governor Sir George Gipps, had to be consulted on a range of issues[515], and plans for New Zealand had to be finalised. One of the most important of these issues was land claims in the Islands. This was a hot topic in Sydney, and on 13 January Hobson was confronted by a deputation of colonists seeking to ascertain "the intentions of the British Government towards New Zealand"[516]. Various contradictory and garbled versions of what was said at their meeting subsequently appeared in the local press, and Hobson wrote to Gipps on the 16th to provide him with "a précis of what passed on that occasion"[517]. Of particular interest were his observations on the political state of New Zealand on the eve of his departure for the Bay of Islands.

237. Hobson told the Governor that he had been challenged by the deputation to explain why the British Government thought it had any right to interfere with alienations of land made when New Zealand was "a free and independent State". The response which Hobson made, as he recalled it for Gipps, was "to this effect":

> That it is true a formal declaration of Independence has been made by the New Zealand Chiefs; but that in fact the New Zealanders but little understood the nature of that proceeding, and that they never fulfilled its obligation. No confederation had ever been formed to enact Laws nor for any other useful purpose, it was an experiment wh[ich]. had failed – notwithstanding wh[ich]. their independence is still fully acknowledged by the British Gov[ernmen]t., as proof of which I am at this moment accredited to them [as Consul]. [518]

("A very universal misapprehension prevailed as to the boundary of the Independent State of New Zealand", he also told them, "wh[ich]. in reality only includes the northern part of the Northern Island"). When asked "if it was proposed to colonize the whole of New Zealand",

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[515] See in particular his Despatch #1 of 24 Dec. 1839 to Gipps, in which Hobson outlined the development of his mission in Britain and correctly observed that "I have an onerous and arduous task before me, with the smallest possible modicum of support that Government can possibly give": ANZ G 36/1(a) pp. 1-7. Among other things Gipps would sort out Hobson's finances and his transportation to New Zealand, and would find him several officials.

[516] See D.M. Loveridge, "The New Zealand Land Claims Act of 1840" (1993), Ch. I.3 for further discussion of the Sydney meetings.

[517] Despatch #40/4 of 16 Jan. 1840, from Hobson to Gipps: ANZ G36/1a pp. 10-12

[518] As noted previously I have not been able to ascertain who, exactly, Consul Hobson was accredited to in New Zealand, although this particular comment tends to suggest that it was the Confederation of United Tribes.

Hobson had replied that "this would be the subject of Negotiation; and that I would not answer for the result; but I said I hoped it might be accomplished".

238. It is apparent from this and other evidence that the Confederation was seen by the British Government and its officials in this period as a *potential* state rather than an *actual* sovereign entity – one whose constituent tribes were acknowledged to be independent (that is, independent of any foreign power), but whose status as a separate sovereign state was considered to be at best nominal[519]. This "Independent State of New Zealand", such as it was, was also seen as encompassing only a small part of the Islands[520]. These qualifications notwithstanding, however, the existence of the Confederation in any form was also seen as presenting a significant obstacle to the acquisition of sovereignty by the Crown in 1840. As well as being the only semblance of a Maori government above the tribal level in New Zealand, it had been recognised after a fashion by the Crown. Since neither the Declaration nor the Crown's recognition of it could be ignored, something had to be done about them. Although Hobson's written instructions were silent on the subject – perhaps suspiciously so – it is evident that he was given firm orders to remove the Confederation from play as the first step in the treaty process.

239. It can hardly have been a coincidence that one of his very first actions on reaching the Bay of Islands at the end of January 1840 was to ask all of the signatories of the Declaration – "all the chiefs of the Confederation of New Zealand" – to meet with him at Waitangi. A formal invitation, drawn up by former British Resident James Busby on 30

[519] Bishop Broughton, when writing to the CMS missionaries in New Zealand in January of 1840, put it in almost exactly these terms. "The actual sovereignty of New Zealand must be at present assumed to reside in the Chiefs, by whom it seems to be exercised within the limits of their respective territories", he observed: "These rights I have reason to suppose are so distinctly recognized by the British Government as to forbid the possibility of any design or attempt to set them aside, or to assume any powers for the Crown without the free consent of the Chiefs". He urged them to support Hobson's efforts to persuade the chiefs to surrender "their existing rights of Sovereignty" to the Crown, on the grounds that in doing so "we should be, I think, befriending the chiefs themselves and the natives generally in the most unquestionable manner; they being required only to surrender a precarious, and in their circumstances a fruitless independence, for the solid and substantial advantages of protection in persons and properties which will be afforded them by the British power and justice". See letter of 10 Jan. 1840 from Broughton to Henry Williams, AIML W72c pp. 15-25 (typescript of original from Hocken Library "V.53 Missionary Letters etc."). It should be noted that Broughton was a member of the Legislative Council of New South Wales, and parts of his letter suggest that he had seen Normanby's instructions to Hobson and Gipps. Certainly he had received a thorough briefing on the Government's plans and intentions.

[520] As noted previously, it appears that Busby did not notify his superiors at any point (save for a passing reference in his 1837 Report, of the additional signatures which were added to the Declaration of Independence after October of 1835.

January, was printed and distributed[521]. Chiefs who had not signed the Declaration may also have received personal invitations to the first meeting, but only as an afterthought[522]. Soon afterwards Hobson began drafting the Treaty. The first version extant is one written in the hand of his Chief Clerk, James S. Freeman[523], which includes a draft of a preamble and three articles. The article dealing with the cession of sovereignty (which later emerged in modified form as Article One of the final treaty) read:

> The United Chiefs of New Zealand cede to Her Majesty in full Sovereignty the whole Country contained between [*blank space*] and the North Cape with all the Islands adjoining thereto included between the [*blank space*] degree of Latitude and the [*blank space*] degree of Longitude, and the [*blank space*] degree of Latitude and the [*blank space*] degree of Longitude. [524]

It was only in later drafts that references to 'the Independent Chiefs' were written in – and even then a distinction between signatories and non-signatories was maintained. As the 'official' English text of Article One of the Treaty would put it,

> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof. [525]

The chiefs of the Confederation rather than "the separate and independent Chiefs" were the first to be invited to sign the Treaty on 6 February[526]. As we shall see, their signatures were also the ones which Hobson prized the most.

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[521] The invitation from Busby to the chiefs of the Confederation requested "that you come here to Waitangi, to my home here, to this gathering" on 5 February to meet the man who had come "from the Queen of England, to be a Governor for us". See T.L. Buick, *The Treaty of Waitangi: How New Zealand Became a British Colony* (1936), p. 101 (transcript) and p. 112 (original).

[522] See Orange, *Treaty of Waitangi*, p. 35.

[523] ANZ IA 9/10. This is reproduced in H.H. Turton, ed., *Facsimiles of the Declaration of Independence and the Treaty of Waitangi*. (1877).

[524] I have incorporated alterations and additions to produce a final text.

[525] From the 'official' English text, as signed at Waikato Heads in March or April, and at Manukau on April 26th; from Orange, *Treaty of Waitangi*, Appendix 1 pp. 258-259.

[526] See below. W. Colenso *The Authentic and Genuine History of the Signing of the Treaty of Waitangi, New Zealand, February 5 and 6, 1840: Being a Faithful and Circumstantial, though Brief, Narrative of Events which Happened on that Memorable Occasion; with copies of the Treaty in English and Maori, and of the three early Proclamations respecting the founding of the Colony* (1890), p. 32, records that Busby invited the chiefs forward "as they stood in his (private) list", but Colenso's original notes state that "Mr. B[usby]. proposed calling them by their names, as they were written in the List of Confederated Chiefs" (Colenso, "Memoranda of the arrival of Lieut.-Govr. Hobson in New Zealand..." (Turnbull Library MS Papers 1611 f.1).

The January Proclamations

240. The views of the British Government concerning New Zealand's anomalous political status were also reflected in the series of proclamations issued in Sydney and the Bay of Islands in January 1840. On 14 January Governor Gipps issued three[527]. The first declared the boundaries of New South Wales to be enlarged to include "any territory which is or may be acquired in sovereignty by Her Majesty ... within that group of Islands in the Pacific Ocean, commonly called New Zealand", as provided for in the Letters Patent issued in Britain on 15 June 1839[528]. The second declared that Governor Gipps had administered "the prescribed oaths" of a Lieutenant-Governor to Hobson on the strength of the Commission issued in Britain on 30 July 1839 which declared him to be Queen Victoria's Lieutenant-Governor

> over that part of Our Territory so described as aforesaid in Our said last recited Letters Patent which is or may be acquired in Sovereignty by Us our Heirs or Successors within that group of Islands in the Pacific Ocean commonly called New Zealand .... [529]

The third proclamation related to claims to land by Europeans in New Zealand. It declared that the Crown would recognise no purchases of land made from Maori after 14 January 1840, and would not accept the validity of any made before this date until they had been investigated and a Crown title issued[530]. The day after his arrival in the Bay of Islands – five days before the Waitangi meeting – on 30 January at Kororareka, Hobson declared himself to have "this day entered on the duties of my said office" as Lieutenant-Governor, citing the authority of Gipps' proclamation and his own Commission[531]. This proclamation, and another repeating Gipps' edict on land claims[532], were signed by Hobson as "Lieutenant-governor of the British Settlements in progress in New Zealand &c &c &c".

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[527] The three proclamations were dated 14 Jan. 1840 but were not actually issued until 18 January, after Hobson had left. See *Supplement to the New South Wales Government Gazette* of Wednesday, January 15, 1840 (No.4 January 18th, 1840, pp. 65-66) [Mitchell Library]. The Proclamations were reprinted in *Gazette* No. 5 of Jan. 22, 1840, pp. 67-68.

[528] BPP 1840 (582) pp. 138-139 Encl. in Appendix No.3

[529] BPP 1840 (582) p. 139 Encl. in Appendix No.3.

[530] BPP 1840 (582) pp. 139-140 Encl. on Appendix No.3.

[531] Proclamation #1 of 30 Jan. 1840: BPP 1840 (582) p. 144 Encl. in Encl. No. 2 in Appendix No.6. Some of the people in attendance at the meeting at Korarareka – forty Europeans and one Maori – signed a "Memoir" testifying that Hobson had indeed read out the Letters Patent and the Commission: BPP 1840 (582) pp. 143-144 Encl. in Encl. No.2 in Appendix No.6.

[532] BPP 1840 (582) p. 145 Encl. in Encl. No. 2 to Appendix No. 6. It was Gipps' Proclamation of 14 Jan. 1840, not Hobson's of 30 January, that was later used as marking the date after which no private land purchases in New Zealand would be recognised as valid by the Crown. This would seem to indicate that the

241. When he saw Hobson's land claims proclamation a short time later, CMS missionary Rev. A.N. Brown thought that, while "Good will doubtless arise from these measures", it had "a tone ... which sounds very much like the sovereign rights of New Zealand being vested in Queen Victoria"[533]. It did indeed amount to something very like the assertion of British authority over British subjects and their claims to land in New Zealand, as did the activation of Hobson's Commission as Lieutenant-Governor of "the British Settlements in progress in New Zealand". Normanby had of course instructed Hobson to issue a land claims proclamation of this nature "immediately" upon his arrival in New Zealand, so there is no question that he acted on his orders in this instance. Prof. Rutherford considered his elevation to the office of Lieutenant-Governor by Gipps to be a violation of the letter and spirit of the Colonial Minister's instructions, in that "Normanby's intention was that he [Hobson] should land in New Zealand as consul, treat with the native chiefs for the cession of sovereignty, and [only then] assume office as Lieutenant-Governor of such parts of New Zealand as were so ceded"[534]. This conclusion, however, is rather difficult to sustain. All Gipps did was activate Hobson's Commission *as an officer of the government of New South Wales*. It is difficult to see how this had any practical effect on Hobson's implementation of Normanby's instructions concerning negotiations with Maori for the cession of sovereignty. Nonetheless, one might suggest that the Colonial Office, let alone Gipps or Hobson, would not have proceeded in this manner if they thought they were dealing with a fully sovereign state which might take offence at what could have been perceived as an infringement of its authority.

242. Of greater import, perhaps, is the use of the phrase "Is or may be acquired in Sovereignty" in the Letters Patent and the various documents which followed from it. Did it mean that the British Crown thought, when the formula was first used in June of 1839, that some part of "that group of Islands" had already been so acquired?[535] There may be

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"British Settlements in progress in New Zealand" were considered to have come under the sovereign authority of the Crown from 14 Jan. 1840.

[533] Journal entry for 12 Feb. 1840 by A.N. Brown, in the Bay of Plenty: AUL AS A-179 Vol. 2 p. 29.

[534] Rutherford, *The Treaty of Waitangi*, p. 19. He quotes Sweetman's observation (*The Unsigned New Zealand Treaty* p. 58) that as of 30 Jan. 1840 "Hobson was a purely theoretical Lieutenant-Governor, over a non-existent part of the British Empire".

[535] Prof. Rutherford notes that there is some evidence suggesting that the Colonial Office, in June of 1839, had not quite made up its mind whether or not any part of New Zealand was held in sovereignty by the British Crown, and concludes that "the use of the present tense [i.e. "is"] may have been deliberately intended to permit an alternative line of policy": Rutherford, *The Treaty of Waitangi*,. He seems to be accepting Foden's suggestion (*Constitutional Development* p. 14) that when the Letters Patent were drafted, "the Home Authorities can be presumed to have been alive to the necessity of phrasing the Letters Patent of Extension in

something to this, which in turn may help to explain Gipps' willingness to activate Hobson's Commission. According to James Busby, writing in the 1860s,

> Captain Hobson's first idea was to read these proclamations [of 30 January] on the piece of ground which the native chiefs had confiscated and conferred upon the British Resident as an indemnification for the attack on his house ... [in] 1834 and which, at the instance of the Resident, had been conveyed by a parchment deed, not to himself but to King William the 4th, as he represented to the chiefs that the outrage was against the King in the person of his Resident. [536]

The 'parchment' referred to was "the Deed of Confiscation of the land of Riti [sic] to His late Majesty" which the Lieutenant-Governor later requested from Busby[537]. It referred to some 200 to 300 acres of land surrendered by the chief who had led the attack. The idea of reading the proclamations on that land, however, was abandoned when Busby pointed out that "it would have been impossible to obtain the attendance of the settlers at that place" on short notice[538]. If Busby's account is accurate, however, it would appear that Hobson thought that some land in New Zealand might indeed be under the sovereign control of the British Crown at this juncture. It may be relevant that in his second proclamation of 30 January Hobson would describe himself – misquoting his own Commission – as "Lieutenant-Governor in and over such Parts of New Zealand as *have been* or may be acquired in Sovereignty by Her Said Majesty"[539].

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terms wide enough to cover annexation to New South Wales based upon other possible grounds as alternative, or additional, to an annexation based upon cession. Cession was the course prescribed and preferred, but its certainty was not a foregone conclusion. A restrictively worded document might well have created difficulties had any other policy been rendered necessary to attain the object which the English Government ought to achieve by the least reproachable means available under the circumstances". Neither author mentions the paragraph on land sales and sovereignty deleted from the July draft of Hobson's Instructions (see ¶196, above).

[536] Busby, "The Occupation of New Zealand", p. 85. According to Ramsden, *Busby of Waitangi*, Bibliography pp. 377-378, this account was written in 1865. The Rete incident is described at length in Ramsden's Ch.4. See especially pp. 82-85.

[537] See letter of 20 Feb. 1840, from Cooper to Busby; ANZ IA 4/1 p. 4 No.7 (also in IA 4/277). He had also requested the Declaration of Independence.

[538] Busby, "Occupation", p. 85. He went on to criticize Hobson for assuming the office of Lieutenant-Governor before Maori had ceded any of their territory to the Crown, commenting that "the assumption of the office of Lieut. Governor, under such circumstances, was as little consistent with good faith, towards the natives, as with the professions of the British Government 'that any assumption of authority beyond that attaching to a British Consulate, should be strictly contingent upon the indispensable preliminary of the territorial cession having been obtained by amicable negotiation with and the free concurrence of the native chiefs'". The latter is a quotation from the Treasury Minute of 19 July, 1839; see BPP 1840 [238] pp. 34-35. By the time Busby wrote this, it should be noted, he had been campaigning for a quarter-century against the Crown's land claims policy, primarily on the grounds that the Crown had had no right to interfere with legitimate sales made before the Treaty by a people acknowledged to be sovereign.

[539] Emphasis added. See the original printed version of the proclamation in CO 209/7 p. 26b. (The other proclamation of that date used "is"). The "Memoir" of 30 January by the settlers affirming that Hobson had read his two Proclamations also uses the phrase "over such parts of the islands of New Zealand ... as either have been or shall be hereafter ceded to Her Majesty in Sovereignty": BPP 1840 (560) p. 7 Encl. No. 2 in No. 4 (original in ANZ IA 1 40/32). This may be attributed to simple repetition of the wording of the Second proclamation. Less easy to explain is the fact that the Preamble to Governor Gipps' "Unsigned Treaty" with

At Waitangi, 5 Feb. 1840

243. Late on the morning of Wednesday, the 5th of February, in 1840, a meeting was called to order at Waitangi in the Bay of Islands. Present were large numbers of Maori, missionaries and European settlers who had come to see and hear Captain Hobson[540]. As already noted, many of the chiefs, including all of those in the vicinity who had signed the Declaration of Independence of 1835, had received personal invitations to attend. According to the account of the proceedings later published by William Colenso, a member of the CMS mission[541], Hobson opened the assembly by addressing the Europeans present, saying

> that the meeting was convened for the purpose of informing the Native chiefs of Her Majesty's intentions towards them, and of gaining their public consent to a treaty now about to be proposed to them.

He then addressed the chiefs in English, with the Rev. Henry Williams (the head of the Church Mission in New Zealand) translating his words into Maori. Hobson told them that

> Her Majesty Victoria, Queen of Great Britain and Ireland, wishing to do good to the chiefs and people of New Zealand, and for the welfare of her subjects living among you, has sent me to this place as governor.
>
> But, as the law of England gives no civil powers to Her Majesty out of her dominions, her efforts to do you good will be futile unless you consent.
>
> Her Majesty has commanded me to explain these matters to you, that you

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the tribes of the South Island, drawn up in February 1840, also describes Hobson as "Her Majesty's Lieutenant Governor in and over such parts of New Zealand as *have been or may be* acquired in Sovereignty by Her said Majesty Her Heirs and successors" (emphasis added): see Dixson DL N Ar/3 text (first version).

[540] According to one witness present, "The assemblage of Chiefs was about three or four hundred, besides Europeans.": *Sydney Herald* 24 Feb. 1840 "New Zealand". The captain of a merchant ship likewise noted that there were "About 200 Natives with the Chiefs in front, and about 100 Europeans ... within the tent": *Sydney Herald* 21 Feb. 1840 "New Zealand". One settler, however, counted "nearly a thousand natives, amongst them several of the Chiefs from this neighbourhood" at the meeting (*Sydney Herald* 24 Feb. 1840 "New Zealand"), and another reported that "about 1,000 natives – men, women, and children – were present .... There were also about 300 or 400 Europeans" (*New Zealand Journal* 13 March 1841 pp.68-69 "Correspondence", letter dated 12 Oct. 1840). Hobson himself observed only that "a vast number of chiefs, with a multitude of followers, crowded in from every quarter": Despatch of 5/6 Feb, 1840 to Gipps, in BPP 1840 (582) pp. 145-146 Encl. No. 3 in Appendix No. 6.

[541] Colenso, *The Authentic and Genuine History*, p. 16. His original notes themselves are still extant, and show that the *The Authentic and Genuine History* is a fairly accurate transcript: see ATL MS Papers 1611 Folder 1 "Memoranda of the Arrival of Lieut. Govr. Hobson in New Zealand ...". The account is more or less the only one by an insider which describes the proceedings on the 5th and 6th of February from beginning to end, and as a result is widely used in historical descriptions of these events. It is fairly clear, however, that the notes are by no means comprehensive, and they should be used with caution. Just because Colenso does not mention something, does not mean it did not happen. A useful commentary on certain aspects of Colenso's account is Denis Walker's "The Ideology of Authenticity: William Colenso's Narrative of the Signing of the Treaty of Waitangi." (*Landfall* #175 44#3 Sept. 1990, pp. 327-336).

may understand them. [542]

244. After this opening statement, the Lieutenant-Governor proceeded to explain to Maori what it meant to cede authority to the Crown by treaty[543]. "The people of Great Britain are, thank God! free", he began,

> and, as long as they do not transgress the laws they can go where they please, and their sovereign has not power to restrain them. You have sold them lands here and encouraged them to come here. Her Majesty, always ready to protect her subjects, is also always ready to restrain them.
>
> Her Majesty the Queen asks you to sign this treaty, and to give her that power which shall enable her to restrain them.
>
> I ask you for this publicly: I do not go from one chief to another.

All of the relevant details were in the text of the treaty itself, Hobson told them:

> I will give you time to consider of the proposal I shall now offer you. What I wish you to do is expressly for your own good, as you will soon see by the treaty.
>
> You yourselves have often asked the King of England to extend his protection to you. Her Majesty now offers you that protection in this treaty.
>
> I think it is not necessary to say any more about it. I will therefore read the treaty.

Hobson then read out "the treaty in English", followed by the Rev. Henry Williams who read "the translation of the same, which had been prepared in the New Zealand language"[544].

245. This is all Colenso has to say about this portion of the meeting. According to Hobson's report to Gipps, however, which was written the same evening, while reading the Treaty he "dwelt on each article, and offered a few remarks explanatory of such passages as they might be supposed not to understand", while Henry Williams "did me the favour to

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[542] Colenso, *Authentic and Genuine History*, pp. 16-17.

[543] Capt. Robertson of the *Samuel Winter* commented that Hobson's address "was interpreted sentence by sentence" by Williams: *Sydney Herald* 21 Feb. 1840 "New Zealand".

[544] Hobson's text would have been the one dated "February 5th" which had been used by Henry and Edward Williams to prepare "the draft on paper" in Maori which was read out by Williams (Colenso, *Authentic and Genuine History*, p. 31). Several English copies of the Treaty bearing the date 5 February were later officially circulated, and Hobson himself tended to attribute this date to the first signing of the Treaty (notably in his proclamation of British sovereignty over the North Island of 21 May 1840 – see ¶281, below). The explanation for the existence of the several English copies of the Treaty dated '5 February' given by Parkinson is in my opinion very persuasive: Phil Parkinson, "'Preserved in the Archives of the Colony': The English Drafts of the Treaty of Waitangi" (2006).

interpret, and repeated in the native language, sentence by sentence, all I said"[545]. Two months later the Lieutenant-Governor stated that at the Waitangi meeting,

> I explained in the fullest manner the reason that Her Majesty had resolved with their consent to introduce civil institutions into this Land[,] that the unauthorized settlement of British Subjects here had rendered such a measure most essential for their Benefit, and I offered a Solemn pledge that the most perfect good Faith would be kept by Her Majesty's Government that their Property their Rights and Privileges should be most fully preserved. I then read the Treaty and explained such parts of it as might not be very intelligible to their untutored minds and I invited the Chiefs to offer any observations or remarks, or to ask explanation of any part they did not clearly understand. [546]

According to Henry Williams' own "Early Recollections", written some years later, the missionary did more than just read out the translation. "I told all to listen with care", the Williams recalled

> explaining clause by clause to the chiefs; giving them caution not to be in a hurry, but telling them that we, the Missionaries, fully approved of the treaty, that it was an act of love towards them on the part of the Queen, who desired to secure to them their property, rights, and privileges. That this treaty was as a fortress for them against any foreign power which might desire to take possession of their country, as the French had taken possession of Otiaiti [Tahiti]. [547]

It is not entirely clear from this whether two sets of explanations were given, or only one, but former British Resident James Busby's account (also written some years later) suggests the former. He relates that at the first meeting,

> Captain Hobson through Mr. Williams explained to the Chiefs, that it was not in the power of the Queen to prevent her subjects coming to New Zealand and settling there if they felt so disposed – nor was he able, as long as the Sovereignty belonged to the natives to control the excesses of Her subjects, or to regulate their conduct, that the only way in which this could be effected, was by their ceding their rights of Sovereignty to the Queen who would then be able to afford protection to them, as well as to her own subjects, and through him as her Lieut. Governor to put an end to

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[545] Despatch #40/8 of 5 & 6 Feb. 1840 from Hobson to Normanby: BPP 1841 (311) pp. 8-9 Encl. 3 in No.4. (I date this despatch as '5 & 6 February' because it contains two sections, one dated February 5th and one dated February 6th). For another version of Hobson's speech see Felton's Mathews' Journal, copied in J. Rutherford, ed., *The Founding of New Zealand; The Journals of Felton Mathew, First Surveyor-General of New Zealand, and his Wife 1840-47* (1940), p. 34.

[546] Letter of 25 April 1840 to Bunbury: ANZ IA 4/305 pp. 7-12.

[547] Williams' "Early Recollections", as quoted in H. Carleton, ed., *The Life of Henry Williams, Archdeacon of Waimate*, Vol. 2 (1877), p. 12. The French did not actually take possession of Tahiti until 1842. However, their 'aggressions' were already a matter of concern at this time: see, for example, the letter of 22 March 1839 from Richard Davis to Dandeson Coates (Hocken MS66/B) citing the case of Tahiti as a reason why "I think no step would be likely to answer so well for the Natives [of New Zealand] as the concession of the Sovereignty of their country to Great Britain – retaining for themselves the possession of their lands &c". See also the Appendix concerning the South Sea Islands in J.D. Lang, *New Zealand in 1839* (1839).

> the evils which had so long existed. The Missionaries present, both of the Church and Wesleyan Societies, as well as the late Resident [Busby], advised the Chiefs to accept the proposal and to execute the treaty. [548]

It is most unfortunate that no one seems to have taken detailed verbatim notes about what was actually said on behalf of the Crown when the Treaty was first presented to the chiefs[549]. This is one of the most important gaps in the evidence available to us relating to the signing of the Treaty of Waitangi.

246. The Treaty itself consisted of a Preamble, three Articles and a Postscript[550]. It had been written in English over the preceding week by Hobson and Busby, and their final draft was translated into Maori by Henry and Edward Williams on 4 February, in readiness for the meeting on the following day. The Preamble recorded the Queen's concerns about recent developments in the Islands and her decision

> to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those islands ... [in order] to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her subjects. [551]

Hobson was authorised "to invite the confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions".

247. In the English text on which the Maori text was based, the first article stated that these chiefs ceded to the Queen "absolutely and without reservation all the rights and powers of sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or possess over their respective Territories as the Sole Sovereigns thereof". In the second article the Queen confirmed and guaranteed to Maori "the full exclusive and undisturbed possession of their Lands and

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[548] Busby, "Occupation of New Zealand", p. 90.

[549] The fact that Colenso did not do so raises a number of questions about the accuracy and completeness of his *History*. It certainly needs to be treated with some care. See, for example, the comments by Buick at p. 116 of his *The Treaty of Waitangi* (1914), who notes that "There is ... a distinct difference of opinion and impression between Mr. Colenso and the above writers [Ironside, Baker] who were also present and heard what was said".

[550] While the Articles are numerically labelled (in various forms) in all "official" versions of the Treaty, neither the "Preamble" nor the "Postscript" has a label of this kind. I have adopted these terms in this analysis for the sake of clarity and consistency.

[551] Quoting here from the English text of the Treaty sent by Hobson to Gipps with his Despatch #40/8 of 5/6 Feb. 1840: Dixson DL N Ar/2 .

Estates, Forests, Fisheries and other properties, which they may collectively or individually possess", as long as they wished to retain these properties[552], but the chiefs in return agreed to yield to the Queen "the exclusive right of Pre-emption" over such lands as the "proprietors" chose to alienate. In the third article the Queen extended "Her Royal Protection" to Maori, and bestowed upon them "all the Rights and privileges of British Subjects"[553]. The postscript simply recorded that this agreement had been "Done in Waitangi" on 6 Feb. 1840 (in the final version).

248. Several scholars have observed that the contents and language of the Treaty of Waitangi are similar to those in treaties made in other parts of the Empire before 1840, particularly certain examples in West Africa[554]. Evidence that these treaties had any direct influence on New Zealand's, however, is in very short supply, and there is in fact no need to go beyond Normanby's instructions when seeking the origins of the English text. The Preamble, Article One, and both parts of Article Two all reflect directions made in those instructions, as re-stated by Hobson and Busby in "the treaty language of their day" (to borrow Prof. Sorrenson's useful description[555]). At first glance Article Three – guaranteeing Maori "the Rights and Privileges of British Subjects" – appears to be something of an anomaly, but this is not the case. Normanby neglected to give an explicit directive to the effect that Maori would become subjects of the Queen once their country became part of her dominions, but recent developments in New South Wales made this unnecessary. Since 1837 the Governors of New South Wales had been under instruction by the Colonial Office to treat all of the aboriginal inhabitants of "the continent of New Holland" (i.e. Australia) as subjects of the Queen[556], and a public announcement in 1838 (connected with the establishment of a Protectorate of Aborigines in New South Wales) stated that the "natives"

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[552] As I have noted elsewhere, in the context of the Proclamations by Gipps and Hobson relating to land claims, which asserted the Crown's right to ascertain the validity of all title to land in New Zealand, it could be argued that this guarantee "can best be understood as a promise that legitimate Maori claims to land (nature and extent undefined) would be respected by the Crown – meaning that lands in New Zealand could not be treated as Crown lands, and alienated by the government, unless and until such rights had been voluntarily surrendered": Loveridge, "An Object of the First Importance" ¶I.2.9 pp. 27-28.

[553] One contemporary commentator from the Bay of Islands, describing "the substance of the treaty" late in February of 1840, summarised articles One and Two, but for some reason omitted to mention Three. He noted, however, that one of the terms was "that the Native chiefs should retain such portion of the authority exercised by them over their tribes as might be considered proper or necessary by His Excellency the Governor". See undated letter in *Sydney Monitor* 20 March 1840 "Bay of Islands: New Zealand", by "C.B.".

[554] See, in particular, Prof. M.P.K. Sorrenson's "Treaties in British Colonial Policy: Precedents for Waitangi", In W. Renwick, ed., *Sovereignty & Indigenous Rights* (1991), pp. 15-29 & pp. 221-222.

[555] p. 29.

[556] See Despatch #353 26 July 1837, Glenelg to Bourke: BPP 1839 (526) No.1 p. 3 (extract) [IUP/BPP Col. Aus. 5]. It will be recalled that the New Zealand Association proposed in 1837 that all Maori who remained in or moved to areas ceded to the Crown should be considered British subjects (see ¶108, above).

of the colony "as subjects of the Queen, whose sovereignty extends over every part of New Holland ... have an acknowledged right to the protection of the government"[557]. (The application of this policy led, in December of 1838, to the execution of seven British settlers who murdered a group of Aborigines[558]). Since any district of New Zealand ceded to the Crown would automatically become a part of the colony of New South Wales, the presence of Article Three in the Treaty would have come as no surprise to anyone familiar with recent developments in that colony[559].

249. A number of serious questions arise, of course, concerning the relationship between the English and Maori texts of the Treaty – notably regarding the equation of "sovereignty' and "kawanatanga" in Article One, and the implications of "te tino rangatiratanga" in Article Two. I will not discuss these translation issues here, as they lie well outside my area of expertise. I would, however, note that the Crown did not have its own translators available (with the partial exception of James Busby) and relied on the services of the missionaries, and suggest that Hobson took something of a risk in signing a document which neither he nor his officials could read on the basis of advice from people who brought their own agendas to Waitangi[560]. Two related features of the Treaty as it stood on 5 February 1840, also need to be kept in mind when discussing it. The first is that the document was not presented to the chiefs as a basis for negotiation. Rather it was offered as a finished product, which they were at liberty to accept or reject. There appears to be no evidence that Hobson or Williams (or anyone else involved at Waitangi) asked Maori if they wanted to make any changes, or that any of the Maori involved requested changes to the document[561]. None were in fact made on the 5th or 6th of February[562].

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[557] Notice of 6 April, 1838: BPP 1839 (526) Encl. A.1 in No.4 pp. 25-26 [IUP/BPP Col. Aus. 5]. The creation of a Protectorate had been recommended in the 1837 Report of the 1837 Select Committee in Aborigines in British Settlements.

[558] At Myall Creek. See Despatch #200 of 19 Dec., 1838, from Gipps to Glenelg; BPP 1839 (526) No.8 pp. 34-36 [IUP/BPP Col. Aus. 5].

[559] It should be noted here that Governor Gipps' so-called "Unsigned Treaty" of February 1840 included an article specifying that "Her said Majesty does hereby engage to accept the said Native Chiefs and Tribes as Her Majesty's subjects and to grant Her Royal Protection to the said Native Chiefs their tribes and country in as full and ample a manner as Her Majesty is bound to afford protection to other [sic] Her Majesty's subjects and and [sic] dominions": quoting here from the first draft of this document in Dixson DL N Ar/3 "Miscellaneous New South Wales Archival Estrays relating to New Zealand, 1830-1845", "Memorandum of an agreement entered into between His Excellency Sir George Gipps ... etc.", pp. 79-84. See Loveridge, "The New Zealand Land Claims Act of 1840", Ch. III.10.

[560] One historian suggests, paraphrasing an observation made about Maori and the Treaty by Bishop Pompallier, that we should perhaps be asking whether "Captain Hobson failed to understand well what he did in signing": P. Low, "Pompallier and the Treaty" (*New Zealand Journal of History* 24#2 Oct. 1990), p. 199.

[561] The Rev. Montague Hawtrey later observed that the terms of the Treaty "were enunciated by ourselves, and the other party had not the knowledge requisite even to propose a modification of them": *Justice to New Zealand, Honour to England* (1861), p. 106.

250. The second point is that the draft treaty itself said very little about the form of government which would be put in place when and if sovereignty was ceded to the Crown, except insofar as Article Three bore upon that subject. This was the case even though Hobson had quite detailed instructions on this point from the Colonial Office: as a "dependency" or adjunct of New South Wales, New Zealand was to be governed in more or less exactly the same way as the older colony – the main exceptions being that it was not to be a penal colony, and claims to lands made by its aboriginal population under their own customary usages were to be respected by the Crown, not taken under the doctrine of *terra nullius*[563]. Like New South Wales, New Zealand would have a Protector of Aborigines, a Government official who in this case would also be responsible for the purchase of lands from Maori[564]. How much of this, if any, was explained to Maori at Waitangi, simply is not known.

251. The Treaty having been presented to the gathering, "liberty of speech was granted" (presumably by Hobson, in the chair) "to any one who felt inclined to speak on the subject, or to make any inquiry relative to the same"[565]. Former British Resident James Busby spoke briefly to the Maori present about land, stating that "the governor was not come to take away their land, but to secure them in the possession of what they had not sold". A number of chiefs then addressed the Governor and the meeting. These speeches constituted, to a large extent, a debate among these chiefs over one question – whether Hobson should stay, or whether he should go (although there was much reference to land issues in the process). It would appear, by the way, that the chiefs, like everyone else

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[562] The only exception being a minor change to the Maori text suggested by Busby on the 5th and incorporated in the final text prepared by Taylor. See Orange, *Treaty of Waitangi*, p. 44 and note 67 (p. 274). On Feb. 6th Bishop Pompallier requested that a clause protecting freedom of religion be inserted in the Treaty, but was fobbed off with a separate statement read aloud at the meeting (the so-called 'fourth article'): see below.

[563] Most of the questions which Hobson raised about his main instructions in his letter to Normanby of 1 Aug. 1839, it should be noted, related to the arrangements for government rather than the acquisition of sovereignty: Letter of 1 Aug. 1839 from Hobson to Labouchere (for Normanby): BPP 1840 [238] pp. 42-44 No. 17. The administrative history of New Zealand during the year spent under the governance of New South Wales has not, to my knowledge, been the subject of a specialist study, although such would probably be quite useful and interesting. The best reference available at present is probably McLintock's *Crown Colony Government in New Zealand* (1958), supported by G.H. Scholefield's biography of *Captain William Hobson; First Governor of New Zealand* (1934) and J.C. Beaglehole's *Captain Hobson and the New Zealand Company: A Study in Colonial Administration* (1928).

[564] A provision which had obvious problems, and which was abandoned in 1842: see Loveridge, "An Object of the First Importance", Ch. 5. These problems, incidentally, were largely anticipated in John Beecham's pamphlet *Colonization: being Remarks on Colonization in General, with an Examination of the Proposals of the Association which has been Formed for Colonizing New Zealand* (1838), p. 54.

[565] The following is from Colenso's *Authentic and Genuine History*,, unless otherwise stated. I have reproduced the names of chiefs, and their iwi affiliations, as Colenso gives them.

present, used the title 'Governor' when addressing or referring to Hobson[566].

252. The first speaker, Te Kemara of Ngatikawa, spoke against a treaty. He clearly understood the essential details of what a transfer of sovereign authority would involve – that chiefs would be placed in a position subordinate to the Governor, and would be subject to British criminal law. He commented that

> If thou stayest as Governor, then, perhaps, Te Kemara will be judged and condemned. Yes, indeed, and more than that – even hung by the neck. No, no, no; I shall never say 'Yes' to your staying. Were all to be on an equality, then, perhaps, Te Kemara would say, 'Yes;' but for the Governor to be up and Te Kemara down – Governor high up, up, up, and Te Kemara down low, small, a worm, a crawler – no, no, no. [567]

(If they took the latter as anything other than rhetoric, Hobson or Williams would certainly have rejected the idea that chiefs, or Maori in general, would be reduced to anything like the status of 'a worm or a crawler' under the Crown's governance). Te Kemara requested that it "be left to Busby and to Williams to arrange and to settle matters for us Natives as heretofore".

253. Rewa of Ngaitawake, the second speaker, also wanted the Governor to leave, on the grounds that the Maori people should not accept any authority other than that of their chiefs:

> What do Native men want of a Governor? We are not whites, nor foreigners. This country is ours, but the land is gone. Nevertheless we are the Governor – we, the chiefs of this our fathers' land. I will not say 'Yes' to the Governor's remaining. No, no, no; return. What! this land to become like Port Jackson and all other lands seen [or found] by the English. No, no. [568]

Or so Colenso recorded this speech[569]. According to Hobson, writing that evening, 'Revewah' said to the chiefs

> Send the man away; do not sign the paper; if you do, you will be reduced to the condition of slaves, and be obliged to break stones for the roads. Your land will be taken from you, and your dignity as chiefs will be destroyed. [570]

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[566] So Colenso's account would lead us to believe. I have not seen any evidence which suggest that they did not so refer to him, or that any of the chiefs contested his assumption of this title. One would assume that, from contact with the government and Governors of New South Wales (and, perhaps, Van Diemen's Land), that they would have been familiar with its implications to some degree.
[567] Colenso, *Authentic and Genuine History*, pp. 17-18.
[568] Colenso, *Authentic and Genuine History*, pp. 18-19,
[569] Colenso, *Authentic and Genuine History*, pp. 18-19.

It may be noted that this version accords better than Colenso's with comments made by another European observer about the Chiefs' speeches, that

> There appeared to be considerable opposition at first to the idea of having a Governor over them, but that a Governor might come and exercise authority over the Europeans. They had been told that if they signed the Treaty they would become slaves, hewers of wood and drawers of water, and be driven to break stones on the road .... their greatest apprehension was that they would be made slaves, and that soldiers would be sent among them. [571]

Busby also mentioned that several of the chiefs "brought up the old story" that if they became subjects of the Queen their fate would be "to break stones on the road"[572], and Williams commented in a letter written soon afterwards that

> The Popish Bishop has been endeavouring to poison the minds of the Natives but has not succeeded. Many of the Chiefs hung back for some time having been told that they would be sent to break stones as the convicts of Port Jackson & to labour as they do. [573]

(Writing in 1837, it may be noted, Dandeson Coates of the CMS mentioned that Maori were "fully aware of the effects of Colonization in New South Wales upon the Aborigines of that country; and point to that fact, as a justification of their own distrust and anxiety on this subject"[574]).

254. Tareha of Ngatirehia was also opposed to the Governor:

> No Governor for me – for us Native men. We, we only are the chiefs, rulers. We will not be ruled over. What! thou, a foreigner, up, and I down! Thou high, and I, Tareha, the great chief of the Ngapuhi tribes, low! No, no; never, never. I am jealous of thee; I am, and shall be, until thou and thy ship go away. Go back, go back; thou shalt not stay here. No, no; I will never say 'Yes.' Stay! Alas! what for? why? What is here for thee? Our lands are already all gone. Yes, it is so, but our names remain.

"Yes, I say we are the chiefs", he concluded:

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[570] Despatch #40/8 of 5 & 6 Feb. 1840 from Hobson to Normanby, in BPP 1841 (311) pp. 8-9 Encl. 3 in No.4. Presumably he was relying on a translation by Henry Williams.
[571] Journal of Capt. Robertson of the *Samuel Winter* on events in New Zealand, 30 Jan. to 8 Feb. 1840, in *Sydney Herald* 21 Feb. 1840 "New Zealand".
[572] Busby, "Occupation of New Zealand", pp. 90-91.
[573] Letter of 13 Feb. 1840 from H. Williams to Coates, in CMS Letters Received 1838-1840, CN/M11pp. 706-708 (ATL Micro Collection 4/ Reel 33). See also Felton Mathews' account: J. Rutherford, ed., *The Founding of New Zealand*, p.36-38.
[574] Coates, *Principles, Objects, and Plan*, p. 17.

> If all were to be alike, all equal in rank with thee – but thou, the Governor up high up, up, as this tall paddle (here he held up a common canoe paddle), and I down, under, beneath! No, no, no. I will never say, 'Yes, stay.' Go back, return; make haste away. Let me see you [all] go, thee and thy ship. Go, go; return, return. [575]

Several other chiefs took a similar line in their own speeches.

255. At around this point in the proceedings allegations were made that Williams's translations were unsatisfactory[576]. According to Colenso, after several of the chiefs had spoken

> a white man came forward, and addressing His Excellency, said that the Native speeches were not half interpreted by Mr. Williams, neither were His Excellency's remarks fully interpreted to the Natives. [577]

This person (not identified) proposed that a British settler named Johnson who was present at the meeting could do better. Hobson immediately asked the man to step up and replace Williams as his interpreter, for he was "anxious that the Natives should know what I say, and also that I should know what they say"[578]. Johnson, however, declined, stating that the missionaries "ought to be able to do it, and can do it very well. But he did request that Williams speak louder so that all could hear, and that he interpret "all that the Natives say", for "They say a great deal about land and missionaries, which Mr. Williams does not translate to you, Sir". (At this point in his *Authentic and Genuine History* Colenso inserted a footnote reading "This can only refer to their [the chiefs'] immense amount of repetition: otherwise Mr. Williams translated fairly what they said"[579]). Williams and Busby then stood up in turn, and defended their land purchases[580], after which the speeches by the chiefs

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[575] Colenso, *Authentic and Genuine History*, pp. 24-25. In a footnote he pointed out that Rewa and Tareha were both from Kororareka, and lived close to the Roman Catholic Bishop. The protestant Missionaries, and many other British settlers, believed that Bishop Pompallier was an agent of the French government, and that he made every effort to sabotage the Treaty and British annexation.

[576] Colenso, *Authentic and Genuine History*, pp. 19-21 places the interjection before Tamati Pukututu spoke. Robertson (*Sydney Herald* 21 Feb. 1840 "New Zealand") says that it took place "after ... several of the Chiefs addressed His Excellency".

[577] Colenso pp. 19-20.

[578] According to Robertson, "His Excellency then stated that if any one present thought he could interpret better than Mr. Williams, he would be glad to hear him, as it was a great object to ascertain the sentiments of the Chiefs as nearly as possible": *Sydney Herald* 21 Feb. 1840 "New Zealand".

[579] Robertson observed, relative to all of the speeches made by the chiefs, that "the figurative language of the Chiefs rendered it very difficult to translate, and the substance of the speeches could only be given": Robertson (*Sydney Herald* 21 Feb. 1840 "New Zealand"). It is not clear whether Captain Robertson himself had any knowledge of te reo, and if not, whose opinion this was.

[580] In Colenso's original notes (ATL MS Papers 1611 Folder 1 "Memoranda of the Arrival of Lieut. Govr. Hobson in New Zealand ...") these speeches are inserted as a separate page, with Busby given as speaking before Williams. The paraphrased description of them in Robertson's report, however, leaves little room for

continued. It would appear that Williams continued as the principal translator, and no further complaints about his performance are recorded.

256. Other chiefs spoke in favour of the Treaty and acceptance of the Governor, mainly on the grounds that the benefits would outweigh the disadvantages. Tamati Pukututu of Te Uri-o-te-hawato asked Hobson to become

> a Governor for us – for me, for all, that our lands may remain with us – that those fellows and creatures who sneak about, sticking to rocks and to the sides of brooks and gullies may not have it all. Sit, Governor, sit, for me, for us. Remain here, a father for us .... [581]

Matiu of Uri-o-ngongo also wanted the Governor to be "a father for us", so "that good may increase, may become large to us"[582], and Warerahi (George King) of Ngaitawake declared:

> Yes! What else? Stay, sit; if not, what? Sit; if not, how? Is it not good to be in peace? We will have this man as our Governor. What! turn him away! Say to this man of the Queen, Go back ! No, no. [583]

Others thought that there was no real alternative to accepting British authority.

257. "To raise up, or to bring down? to raise up, or to bring down?", Hoani Heke (Hone Heke) of Matarahurahu asked his fellow chiefs:

> Which? which? Who knows? Sit, Governor, sit. If thou shouldst return, we Natives are gone, utterly gone, nothinged [sic], extinct. What, then, shall we do? Who are we? Remain, Governor, a father for us. If thou goest away, what then? We do not know .... Thou to go away! No, no, no! For then the French people or the rum-sellers will have us Natives. Remain, remain; sit, sit here; you with the missionaries, all as one.

He endorsed the advice given by the British missionaries that Maori should accept the Treaty, on the grounds that

> we Natives are children – yes, mere children. Yes; it is not for us, but for you, our fathers – you missionaries – it is for you to say, to decide, what it shall be. It is for you to choose. For we are only Natives. Who and what are we? Children –

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doubt that Colenso's texts are fairly accurate. The *New Zealand Journal* of 1 Aug. 1840 p. 174 gave a muddled account of this exchange, describing it as "a public protest" by Maori "against the way in which the 'Church' Missionaries have 'managed matters hitherto without control' ....".

[581] Colenso, *Authentic and Genuine History*, pp. 21-22.

[582] Colenso, *Authentic and Genuine History*, pp. 21-22.

[583] Colenso, *Authentic and Genuine History*, p. 22.

> yes, children solely. We do not know: do you then choose for us. You, our fathers – you missionaries. Sit, I say, Governor, sit! a father, a Governor for us. [584]

All this, according to Colenso, was "Pronounced with remarkably strong and solemn emphasis, well supported both by gesture and manner"[585].

258. After Hone Heke came another prominent chief who endorsed Hobson. Tamati Waka Nene of Ngatihao first addressed his fellow chiefs, asking

> What do you say? The Governor to return? What, then, shall we do? Say here to me, O ye chiefs of the tribes of the northern part of New Zealand what we, how we?[586].... Is not the land already gone? is it not covered, all covered with men, with strangers, foreigners ... over whom we have no power? We, the chiefs and Natives of this land, are down low; they are up high, exalted.

To those who said that the Governor should go away, he responded that it was too late to turn back the tide of European intervention in New Zealand:

> Had you spoken thus in the old time, when the traders and grog-sellers came – had you turned them away, then you could well say to the Governor, 'Go back,' and it would have been correct, straight; and I would also have said with you, 'Go back;' – yes, we together as one man, one voice. But now, as things are, no, no, no.

He then said to Hobson

> I, Tamati Waka, say to thee, *sit*. Do not thou go away from us; remain for us – a father, a judge, a peacemaker. Yes, it is good, it is straight. Sit thou here; dwell in our midst. Remain; do not go away. Do not thou listen to what [the chiefs of] Ngapuhi say. Stay thou, our friend, our father, our Governor. [587]

259. Tamati Waka Nene was followed, and supported by his elder brother, Eruera Maehe Patuone, who told Hobson:

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[584] Colenso, *Authentic and Genuine History*, pp. 25-26.
[585] According to Hobson, 'Neni' "came forward and spoke with a degree of natural eloquence that surprised all the Europeans": "He first addressed himself to his own countrymen, desiring them to reflect on their own condition, to recollect how much the character of New Zealanders had been exalted by their intercourse with Europeans, and how impossible it was for them to govern themselves without frequent wars and bloodshed, and he concluded his harangue by strenuously advising them to receive us and to place confidence in our promises. He then turned to me and said, 'You must be our father! You must not allow us to become slaves! You must preserve our customs, and never permit our lands to be wrested from us!'". See Despatch #40/8 of 5 & 6 Feb. 1840 from Hobson to Normanby, in BPP 1841 (311) pp. 8-9 Encl. 3 in No.4.
[586] Colenso interjects here, "Meaning, how, in such a case, are we henceforward to act?".
[587] Colenso, *Authentic and Genuine History*, pp. 26-27.

> Sit, stay – thou, and the missionaries, and the Word of God. Remain here with us, to be a father for us, that the French have us not, that Pikopo [Bishop Pompallier], that bad man, have us not. Remain, Governor Sit, stay, our friend. [588]

After a few words by Te Kemara, who reiterated his opposition to the acceptance of British authority, the 5 February meeting ended with three cheers for the Governor "in which all lustily joined"[589]. Another account adds that a chief (unnamed) rose at the end of the speeches and asked Hobson for time to consider and discuss the matter, saying that "We will ask questions and then decide whether we will sign the Treaty"[590].

260. According to Williams, Hobson feared at this point that a majority of the chiefs were inclined not to sign. The missionary advised him to show no anxiety, but simply "to recommend it for their consideration" and meet with them again in two days, on 7 February[591]. Hobson admitted to no such misgivings in his report to Gipps, written immediately afterwards, but simply noted that the meeting was to be reconvened on the morning of the 7th, giving the chiefs "one clear day to reflect on my proposal"[592]. They evidently did a good deal of reflection that same evening. Williams recalled that

> There was considerable excitement amongst the people, greatly increased by the irritating language of ill-disposed Europeans, stating to the chiefs, in most insulting language, that their country was gone, and they were now only *taurekareka* [slaves]. [593]

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[588] Colenso, *Authentic and Genuine History*, p. 27.

[589] Colenso's account gives the distinct impression that the chiefs made their speeches one after the other, without receiving any responses from Hobson or Williams. This seems rather unlikely, and other accounts suggest that Hobson sought to counter some, at least, of the objections to the treaty. See, for example, the letter of 11 Feb. 1840 from James Kemp to the Secretary of the CMS, in which he reported that at Waitangi "The natives at first made some objections against their signing the Treaty, which objections had no doubt been instilled into their minds by wicked & designing men; but after these objections were explained by the Governor through Mr. Williams, the Chiefs took quite a different view of the matter, & all who were Chiefs of influence came forward with a good feeling & signed the Treaty": CMS Letters Received 1840-1842 CN/M12 pp. 101-104 (ATL Micro Collection 4/ Reel 33). Colenso reported no 'explanations' after the speeches, and (as noted below) there were no 'explanations' given on 6 February.

[590] Felton Mathew: J. Rutherford, ed., *The Founding of New Zealand*, p. 38.

[591] Williams' "Early Recollections", as quoted in Carleton, *The Life of Henry Williams*, p. 14. According to Busby, though, after Waka Nene had spoken "it became no longer doubtful whether a large majority would agree to the Treaty": Busby, "Occupation of New Zealand", p. 91.

[592] Despatch #40/8 of 5 & 6 Feb. 1840 from Hobson to Normanby: BPP 1841 (311) pp. 8-9 Encl. 3 in No.4.

[593] Williams' "Early Recollections", as quoted in Carleton, *Life of Henry Williams* Vol. 2 p. 14. The opposition of some European settlers to the Treaty (and to the Crown's land claims policy) is a subject which has not really been explored in any depth. Hobson commented to Gipps in May that "mischievous stories ... have been circulated by low, abandoned Europeans, who try to persuade the natives that we only wait until we are strong enough, to take possession of all the land, and sell it, irrespective of native claims": see Confidential Despatch from Hobson to Gipps of 5 May 1840, in BPP 1841 (311) pp. 57-58 (1) [extract].

Other contemporary accounts seem to bear this out, one Bay of Islands settler recording that "The Europeans generally are opposed to him [Hobson], and use their endeavors to convince the Chiefs that they will cut their [own] throats if they sign any papers"[594].

261. As a result of misgivings raised by such comments, Williams recorded, that evening

> Many [Maori] came to see us to speak upon this new state of affairs. We [the CMS Missionaries] gave them but one version, explaining [the proposed treaty] clause by clause, showing the advantage to them of being taken under the fostering care of the British Government, by which act they would become one people with the English, in the suppression of wars, and of every lawless act .... The people, on being dismissed, after many had spoken, to consider this grave question, were asked to reassemble on the third day [i.e. Friday the 7th] to declare their views, as the question was for their own benefit, to preserve them as a people. [595]

The Rev. Samuel Ironside, a CMS missionary at the Hokianga who was present at Waitangi, would almost certainly have taken part in this impromptu meeting. He commented in his diary that

> The Governor's proposal was to me very fair, & calculated to benefit the natives, so I gave it my sanction believing a regular colonization by government certainly much better than the irregular influx of convicts & runaway sailors, which infests the country at present. [596]

Several Catholic chiefs had approached Bishop Pompallier for advice before the Waitangi meeting. The Bishop later told a French naval officer that he had declined to take sides, but did tell them to ask themselves "whether it is preferable for you to recognise and obey a great European chief, rather than to live as you have lived until now", and "to give mature consideration before deciding, for the Europeans are strong". Pompallier added that "The chiefs did not want to hear talk of obedience; they supposed that Captain Hobson would be an additional great chief for the Europeans only, but not for them"[597]. Whether they would have thought the same after hearing the contents of the Treaty and the statements of Hobson and the Protestant missionaries at the first Treaty meeting, and what the Bishop would have advised to do, are good questions to which we have no answers[598].

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[594] *Sydney Herald* 24 Feb. 1840 "New Zealand" (letter from Bay of Islands dated 7 Feb. 1840).
[595] Williams' "Early Recollections", as quoted in Carleton, *Life of Henry Williams* Vol. 2 p. 14.
[596] Ironside Diary entry of 10 Feb. 1840, in ATL MS Papers 381 (Micro MS 474).
[597] Quoted by P. Low, in "Pompallier and the Treaty", p. 191.
[598] As Low clearly demonstrates, however, Pompallier's view of the Treaty was "generally a negative one" (p. 198).

262. Whether as a result of the explanations given at the public meeting, or those given afterwards by the Protestant missionaries, many chiefs wished to sign the treaty on 6 February rather than wait another day. According to one account Hobson was notified of this on the night of the 5th, and agreed to the change, but by some misunderstanding did not go ashore to Waitangi on Thursday until summoned late in the morning[599]. According to Henry Williams, he was asked by "the chiefs" (number and identity not specified) "why there need be any further delay, as their minds were made up, and they were desirous of concluding at once and returning to their respective places". The missionary notified Hobson of this development, and a meeting commenced at 11 a.m.[600]. The Lieutenant-Governor himself recorded being told

> that the chiefs, being impatient of further delay, and perfectly satisfied with the proposals I had made them, were desirous at once to sign the treaty, that they might return to their homes ...

Fearing that "to have refused this request would probably have rendered nugatory the whole proceeding, by the dispersion of the tribes before they had attested their consent by their signatures", he gathered up officials and missionaries and "proceeded to the tents" at Waitangi[601].

<u>At Waitangi, 6 Feb. 1840</u>

263. Colenso tells us that Captain Hobson arrived "in plain clothes, except his hat, and unattended by any of the officers of the *Herald*" – and evidently somewhat out of sorts, for he rather brusquely

> assured us he had not the least notion of a meeting to be held this day; but that, as it was, he would take the signatures of the Native chiefs who were present and desirous

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[599] The informant was the Rev. Richard Taylor. In his Journal Taylor notes that he approached Hobson because he thought that "nine tenths" of the chiefs would leave if the second meeting was delayed. Taylor recorded that he told Hobson this and was authorised to notify Maori accordingly, at which point "the rough copy of the treaty was sent to me to get copied .... I sat up late copying the treaty on parchment and I kept the original draft [on paper] for my pains" (referring here to the Maori text). See AIML Ms161 Taylor Journal, entry for 5 Feb. 1840 p. 298.

[600] Williams' "Early Recollections", as quoted in Carleton, *Life of Henry Williams* Vol. 2, p. 14. Colenso, *Authentic and Genuine History*, p. 29 suggests that there was a shortage of food.

[601] Despatch #40/8 of 5 & 6 Feb. 1840 from Hobson to Gipps: BPP 1841 (311) pp. 8-9 Encl. 3 in No.4. The Robertson account agrees that Hobson met with the chiefs on 6 February "at their request": *Sydney Herald* 21 Feb. 1840 "New Zealand".

> of signing the treaty: still, he must have a public meeting on the morrow (Friday), pursuant to the notice he had already given at the close of the meeting yesterday, &c.

When the meeting started, Colenso continued, Hobson immediately rose and told those in attendance that "I can only receive signatures this day. I cannot allow of any discussion, this not being a regular public meeting". He then asked Henry Williams to read out the Maori text of the treaty, which was done (apparently the English text was not read aloud on 6 February)[602]. According to Williams' later account Pompallier, the Roman Catholic Bishop, interrupted at this juncture and asked for confirmation that the British Government would protect all religions. After much jockeying between the various missionary factions this request was met by Hobson in the form of a statement read out to the meeting – the so-called 'Fourth Article' that

> The Governor wishes you to understand that all the Maories who shall join the Church of England, who shall join the Wesleyans, who shall join the Pikopo or Church of Rome, and those who retain their Maori practices, shall have the protection of the British Government.

This message, Williams states, "was received in silence. No observation was made upon it; the Maories, and others, being at a perfect loss to understand what it could mean"[603]. Then, "After some little discussion and trifling opposition", the signing of the treaty commenced. "No chief raised any objections that he did not understand the treaty", Williams concluded, "though some held back under the influence of the Romish Bishop and his priests".

264. This comment may have been Williams' way of dismissing an interjection made at this point by William Colenso. At least, Colenso states in his *Authentic History* that when called upon to come forward and sign the treaty, none of the chiefs "made any move nor seemed desirous of doing so". Busby, then suggested calling them up individually by name, from a list of chiefs of the Confederation[604]. Hone Heke was the first of those "who were this day present", but as the chief stepped up to sign Colenso says that he himself interjected, and addressed the Governor as follows:

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[602] Colenso, *Authentic and Genuine History*, pp. 30-31.

[603] See also Robertson's report: "The Catholic Bishop being present requested that it might be explained to the Natives, that all persuasions of religion were to be tolerated and protected, which was accordingly made known, and His Excellency expressed much gratification that the Bishop was present, as he wished all the proceedings to be as open and candid as possible": *Sydney Herald* 21 Feb. 1840 "New Zealand".

[604] Colenso records "as they stood in his (private) list" in the *Authentic and Genuine History*, p. 32, but Colenso's original notes state that "Mr. B[usby]. proposed calling them by their names, as they were written in the List of Confederated Chiefs" (Colenso, "Memoranda of the arrival of Lieut.-Govr. Hobson in New Zealand ...", Turnbull Library MS Papers 1611 f.1).

> *Mr. Colenso*: "Will your Excellency allow me to make a remark or two before that chief signs the treaty?"
>
> *The Governor*: "Certainly, sir."
>
> *Mr. Colenso*: "May I ask your Excellency whether it is your opinion that these Natives understand the articles of the treaty which they are now called upon to sign this morning."
>
> *The Governor*: "If the Native chiefs do not know the contents of this treaty it is no fault of mine. I wish them fully to understand it. I have done all that I could do to make them understand the same, and I really don't know how I shall be enabled to get them to do so. They have heard the treaty read by Mr. Williams."
>
> *Mr. Colenso*: "True, your Excellency; but the Natives are quite children in their ideas. It is no easy matter, I well know, to get them to understand – fully to comprehend a document of this kind; still, I think they ought to know somewhat of it to constitute its legality. I speak under correction, your Excellency. I have spoken to some chiefs concerning it, who had no idea whatever as to the purport of the treaty."

The author states that Busby again inserted himself into the proceedings and suggested that "The best answer that could be given to that observation" lay in the remark made by Hone Heke on the 5th, that "The Native mind could not comprehend these things: they must trust to the advice of their missionaries"[605]. The dialogue continued:

> *Mr. Colenso*: "Yes; and that is the very thing to which I was going to allude. The missionaries should do so; but at the same time the missionaries should explain the thing in all its bearings to the Natives, so that it should be their own very act and deed. Then, in case of a reaction taking place, the Natives could not turn round on the missionary and say, 'You advised me to sign that paper, but never told me what were the contents thereof.'"
>
> *The Governor*: "I am in hopes that no such reaction will take place. I think that the people under your care will be peaceable enough: I'm sure you will endeavour to make them so. And as to those that are without, why we must endeavour to do the best we can with them."

At this point Colenso claims that he backed down, and dropped the subject: "What I had to say arose from a conscientious feeling on the subject", he told Hobson, "Having said what I have I consider that I have discharged my duty".

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[605] This response is attributed to Richard Taylor in Colenso's original notes. Colenso's version of Heke's speech earlier in the *Authentic and Genuine History* (pp. 25-26), it should be noted, does not actually include this sentence. As noted above, Heke is recorded as saying that "we Natives are children – yes, mere children. Yes; it is not for us, but for you, our fathers – you missionaries – it is for you to say, to decide, what it shall be. It is for you to choose. For we are only Natives. Who and what are we? Children – yes, children solely. We do not know: do you then choose for us".

265. A number of questions are raised by this account. To the best of my knowledge no other eyewitness mentions such an exchange[606] (unless, as noted, William's comment can be so construed). On the other hand, we know that Colenso's notes were read by Busby and another CMS missionary shortly after the event without their contesting that something along these lines was said[607], and also that in a letter written on 13 February Colenso reported to the CMS Secretary in England that

> I believed, & do believe that the Natives did not fully understand what they signed; believing this & finding no other person would, I took upon me to address His Excellency at the Public Meeting, when the first person was called up to append his Name to the document I asked His Excellency whether His Excellency supposed that the Native Chiefs knew what they were about to do? &c &c His Excellency in reply stated, that he had done his best to enable them to understand the same &c &c.

One possible explanation is that the exchange took the form of quiet aside between Hobson, Colenso and Busby (or Taylor), but this is not how Colenso presents it. It is probably safe to conclude that none of the chiefs present 'raised any objections that he did not understand the treaty' before the signing began, but whether the degree of Maori understanding was discussed at any length by the Europeans present is not clear. It should be noted, though, that Colenso was not the only CMS missionary present who thought that the chiefs did not fully understand all of the implications of the British proposal. Richard Davis of the Waimate mission reported on 8 February that

> None of the Chiefs belonging to our Congregations withheld their signatures to the Treaty. They acknowledged they were not thoroughly acquainted with its nature, but at the same time having implicit confidence in our judgement on the subject they signed it at our recommendation .... [608]

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[606] The fairly-detailed account which Felton Mathew wrote does not mention it at all, and on the contrary states that at this point "one or two of the Chiefs rose up and said that yesterday they had not understood the matter, but that now they had made enquiry and duly considered it, and thought it was good, and they would sign it: J. Rutherford, ed., *The Founding of New Zealand*, p. 40. Nor do Bishop Pompallier's accounts of the Treaty meetings mention an interjection by Colenso, which is quite suggestive given his own stated opinion that "few [chiefs] understood well what they did in signing": letter of 14 May 1840, cited in P. Low, "Pompallier and the Treaty", pp. 190-191. It is difficult to believe that the Bishop would not have recorded such sentiments if they were in fact publicly stated by a member of the CMS mission. Low (p. 192 footnote 5) points out that there are a number of discrepancies between the Colenso and Pompallier accounts.

[607] See Colenso, *Authentic and Genuine History*, Preface pp. 8-9, and Colenso's "Memoranda of the arrival of Lieut.-Govr. Hobson in New Zealand..." (Turnbull Library MS Papers 1611 f.1).

[608] Letter 8 Feb. 40 R. Davis (Waimate) to the Secretary: CMS Letters Received 1838-1840 CN/M12 pp.15-18 (ATL Micro Collection 4/ Reel 33). "The few Chiefs who have professedly received Popery & who were living at Kororareka & in its vicinity", he added, "came prepared to reject the Governor & to vomit forth abuse against the Missionaries. That they were tutored by abler heads than their own was very evident, & which in the sequel proved to be true".

But this may tell us more about the relationship between certain chiefs and the CMS missionaries than it does about Hobson's efforts to provide explanations.

266. In Normanby's instructions, as we have seen, Hobson was told that the Queen disclaimed

> every pretension to seize on the Islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained.

He was also warned that it might be difficult to persuade them to accept a treaty with Great Britain, for

> The motives by which it is recommended are, of course, open to suspicion. The natives may, probably, regard with distrust a proposal which may carry on the face of it the appearance of humiliation on their side, and of a formidable encroachment on ours; and their ignorance even of the technical terms in which that proposal must be conveyed, may enhance their aversion to an arrangement of which they may be unable to comprehend the exact meaning, or the probable results.

The Captain was expected to overcome such reservations through "the exercise, on your part, of mildness, justice, and perfect sincerity in your intercourse with them", drawing upon the assistance of the missionaries and others[609]. The responses which he reportedly made to Colenso's queries thus ring true, for it is apparent that what the Colonial Office expected him to do was to make a sincere effort, within the context of 'their established usages', to explain the Treaty to Maori. It was anticipated that despite his best efforts, some might be 'unable to comprehend the exact meaning, or the probable result'. Their consent, then, was to be obtained without coercion and with as much understanding as possible in the circumstances prevailing.

267. Hobson commented in April 1840, in a semi-official letter, that due to "The Political Condition of the New Zealanders" it was impossible "to observe the usual formality of negociating a Treaty"[610]. This 'condition', in his view, amounted to

> a Species of wild Independence which acknowledged no control .... [in which] The Whole Community is split into innumerable petty Tribes and every free man enjoys equal rights, No Tribe exercising any control over another nor no person being vested with the power to command or direct the movements of the Tribe. [sic]

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[609] BPP 1840 [238] pp. 37-42 No.16.
[610] Letter of 25 April, 1840 from Hobson to Major T. Bunbury: ANZ IA 4/305 pp. 7-12. This letter was written to Bunbury as a supplement to his 'official' instructions of the same date.

Faced as he was with "a vast number of petty Democracies without any union of purpose or any acknowledged leader", he stated, his mode of proceeding at Waitangi

> was in accordance with the Native custom – to collect the Chiefs by a circular notice, and when assembled to address them on the subject I had to recommend for their consideration

After his initial address, he had read and explained the Treaty, then "invited the Chiefs to offer any observations or remarks, or to ask explanation of any part they did not clearly understand". "In this way", he concluded, "I satisfied myself that I had complied with the spirit of my Instructions".

268. The signing of the Treaty then began. The process was regulated by Busby's list of Confederation chiefs, and after each man wrote his signature or made his mark Hobson shook his hand and said to him "He iwi tahi tatou" ("We are [now] one people"). It appears that some of the chiefs who signed had arrived after the proceedings ended on 5 February[611], and many of those who had opposed the treaty on the 5th signed it the following day. Counts differ slightly, but either 45 or 46 chiefs signed on 6 February 1840. This meeting, like the first, ended with three cheers for the Governor. Despite the opening comments attributed to the Lieutenant-Governor by Colenso, no meeting was called for or held on 7 February. If Hobson actually said that another meeting would be called on 7 February, he may have believed by the end of the day on the 6th that all the chiefs present at the Bay who wished to sign had done so.

British Sovereignty in the North

269. Hobson read a great deal into the results of the second day of the Waitangi meeting. The "acquiescence of these chiefs", he informed Governor Gipps in a despatch written the same day, "26 of whom had signed the declaration of independence, must be deemed a full and clear recognition of the sovereign rights of Her Majesty over the northern parts of this island". A few days later he responded to a letter from the Baron De Thierry at Hokianga, reprimanding him for styling himself a "Sovereign Chief" on the basis of land ownership. "The only Sovereign Chief who can be acknowledged as such *from the Date of*

[611] According to Orange, *Treaty of Waitangi*, pp. 53-54.

the Treaty is Her Majesty Queen Victoria", he stated, "in Her name will every crime be punished committed within the limits ceded to Her"[612].

270. The Lieutenant-Governor intended to announce this with a 21-gun salute from HMS *Herald* on 7 February, but a deluge of summer rain led to a postponement[613]. Writing to the Captain of the frigate the following day Hobson stated that,

> a Treaty with the Native chiefs, by which a most important Territorial Cession has been made to Her Majesty in New Zealand, and it being a matter of great national importance that the Sovereign Rights of Her Majesty should be publicly manifested

he accordingly desired that a 21-gun salute be made "on the occasion of my assuming, in Her Majesty's name the Rights and Sovereignty thus acquired"[614]. It was fired at 1 p.m. on 8 Feb. 1840[615]. On the same day Hobson began the task of constructing his government. The Captain's protégé Lieutenant William Shortland was made Chief Magistrate of the Bay of Islands ("It being highly essential that a representative of Government should be stationed at this important and much frequented part of the island"), and Hobson recommended to Governor Gipps that prominent local merchants Gilbert Mair and James R. Clendon be appointed Magistrates[616].

271. Hobson's first despatches recording events up to this point, including the Waitangi signing, were received by the Colonial Office five months later. The news which

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[612] Letter #40/34 of 12 Feb. 1840 from Hobson to De Thierry: ANZ G36/1a pp. 21-22. Emphasis added.
[613] Despatch #40/8 of 5 & 6 Feb. 1840 from Hobson to Normanby: BPP 1841 (311) pp. 8-9 Encl. 3 in No.4. According to Colenso, *Authentic and Genuine History*, p. 35, the morning to the 7th "was ushered in with very heavy rain, which continued with hardly any intermission till towards evening".
[614] Letter of 8 Feb. 1840 from Hobson to Capt. J. Nias: ANZ IA 4/1 p. 1 No.1. When Hobson's despatches recording events up to this point were received in London five months later, the CMS Committee considered it safe to conclude that "the British Sovereignty is now established in the Northern Island of New Zealand": Minutes of meeting of 19 July 1840, in CMSMB MC/19 pp. 60-67. The Committee took this as a signal that they should begin planning a reorganization of their New Zealand Mission.
[615] Scholefield, *Captain William Hobson,* p.98 notes that *Herald*'s Master's Log records that a 21-gun salute was fired at 1 p.m. "to commemorate the cession to Her Majesty of the rights of sovereignty of New Zealand". Bishop Pompallier later claimed that "even before the natives or rather the chiefs were invited to sign the treaty presented by the governor, the English flag had been flown in the Bay of Islands and 21 cannons had been fired as a sign of the taking of possession [of New Zealand] ...": P. Low, "Pompallier and the Treaty" pp. 190-191, citing a letter dated 14 May 1840. As Low notes, this was not the case, although according to one source Hobson was saluted as Consul with 11 guns when he landed at Kororareka on 30 Jan. 1840: see *New Zealand Journal* 1 Aug. 1840 pp. 173-175, "Letter from New Zealand" of 3 Feb. 1840. Hobson had apparently asked for a 15-gun salute as Lieutenant-Governor, but Captain Nias of the *Herald* would not comply: Orange, *Treaty of Waitangi*, p. 34. Pompallier may have confused the 30 January salute with that on 8 February.
[616] See Despatches from Hobson to Gipps of 8 Feb. 1840, #s 40/10 and /11: ANZ G36/1a pp. 15-16. Shortland was appointed as Police Magistrate for "the Northern District of this Island" on 18 February: Letter of 18 Feb. 1840 from Hobson to Shortland, in ANZ IA 4/277. See also Despatch #40/14 of 18 Feb. 1840 from Hobson to Gipps: ANZ G36/1a pp. 28-30.

they contained was greeted with relief, as proving that the right course of action had been adopted. James Stephen passed the despatches along to his colleagues and superiors with the comment that

> It seems to me to prove, if proof were wanting, how much wiser was the course taken of negotiating for a Cession of the Sovereignty, than would have been the course of relying on the proceedings of Captain Cook, or the language of Vattel in opposition to our own Statute Book. [617]

In other words, those who argued that the time required for negotiations for cession would place British interests in the Islands in danger – the New Zealand Land Company and its supporters, among others – had been proven wrong[618].

Looking Southwards

272. Dame Claudia Orange, in her study *The Treaty of Waitangi*, suggests that

> After the Waitangi signing, certainly after the northern signings, it was inconsequential whether Maori signed the treaty or not. Hobson's intention, of which Maori were unaware, was to assume British sovereignty anyway. [619]

This conclusion overlooks one important point – that Hobson was not given permission by Lord Normanby to annex any part of the North Island on the grounds of 'discovery'. Nor, as far as we know, did he ever consider doing so. From the beginning of his mission, Hobson had planned to "circumnavigate the whole of the Islands, and touch at every Settlement", taking his treaty to Maori leaders around the country[620]. It appears that he intended to issue a series of proclamations as he went along, announcing that Maori had ceded sovereignty over particular districts. This incremental strategy was outlined to Gipps on 17 February, after further Treaty meetings had been held at Waimate and Hokianga.

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[617] Minute of 9 July 1840 in CO 209/6 p. 34a.

[618] Bishop Broughton, although he supported negotiations for the cession of sovereignty, considered it important to warn the CMS missionaries in New Zealand in his 10 Jan. 1840 letter that "Colonization is decided on: it is even now in rapid progress [in New Zealand]: some one European Nation must attain that supremacy which the natives can neither retain nor exercise: some form or other of law and government according to the practices of civilized nations must be established: and when the question is brought to this issue there can be no hesitation in deciding that, as there must be an introduction of laws and government, it will tend most to the advantage of the natives and to the general benefit of this quarter of the world that the British Laws and government, and none else, should be established in New Zealand, with the free consent of its present chiefs and people" (emphasis in original): letter of 10 Jan. 1840 from Broughton to Henry Williams, AIML W72c pp. 15-25 (typescript of original from Hocken Library "V.53 Missionary Letters etc.").

[619] Orange, *The Treaty of Waitangi,* p. 91.

[620] As he informed Felton Mathew in January, before HMS *Herald* reached New Zealand: J. Rutherford, ed., *The Founding of New Zealand*, pp. 21-22.

273. With the signing of the Treaty on 6 February, Hobson told his superior, he "considered ... the sovereignty of Her Majesty over the northern districts was complete", and could "only now add that the adherence of the Hokianga chiefs renders the question beyond dispute"[621]. The Confederation of United Tribes was no longer a factor which Hobson had to consider: the only Maori institution whose sovereign authority had in any sense been recognised by the Crown had ceded it to the Queen[622]. Nonetheless he did not consider that his mission was in any way finished. "I therefore propose", his despatch to Gipps continued,

> to issue a proclamation announcing that her Majesty's dominion in New Zealand extends from the North Cape to the 36th degree of latitude[623]. As I proceed southward and obtain the consent of the chiefs, I will extend these limits by proclamation; until I can include the whole of the islands. [624]

He did in fact draw up such a proclamation on the 18th, but then decided not to issue it "as the promulgation of such a notice might operate unfavorably on my negociations" – no explanation was given as to why he thought it might have a detrimental effect.

274. Hobson left this document with Shortland when HMS *Herald* sailed southwards from the Bay of Islands on 21 February, noting that "I desire you will not circulate it unless some circumstances arise that render its publication actually requisite"[625]. But the circumnavigation scheme had to be abandoned after the Lieutenant-Governor suffered a stroke early in March while visiting the area now occupied by Auckland. This created a dilemma for Hobson. The fact that he did not resolve it by a proclamation of British sovereignty over the whole of the Islands on the grounds of British rights derived from 'discovery' is significant. Rather he proceeded to delegate the duty of securing further signatures on the Treaty to various officials, missionaries and other Europeans (such, for example, as Captain W.C. Symonds who was visiting New Zealand at the time). It was not

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[621] Despatch #40/13 of 17 Feb. 1840, from Hobson to Gipps: BPP 1841 (311), pp. 10-12.
[622] Gipps later commented, in July 1840, that the only effect of the Declaration of Independence "would have been to prevent Captain Hobson from taking possession of the island in which it was made, by virtue of the right derived from the discovery of Captain Cook, and to make him have recourse to negotiations with the natives. And as this is the very course which Captain Hobson did pursue, and as Her Majesty's sovereignty has now been acknowledged by the very chiefs who signed the declaration of independence, it follows, that all things are now returned to the state in which they would have been if no declaration of independence had ever been made": Gipps' Speech on the Land Claims Bill of 9 July 1840: BPP 1841 (311) p. 75.
[623] That is, down to present-day Dargaville and Whangarei (approximately).
[624] Despatch #40/13 of 17 Feb. 1840, from Hobson to Gipps: BPP 1841 (311), pp. 10-12.
[625] Letter of 18 Feb. 1840 from Hobson to Shortland: ANZ IA 4/277. (The draft proclamation itself does not appear to be extant).

a particularly elegant solution – as Dame Claudia's account of the process amply demonstrates – but it does show that Hobson did not consider annexation on the grounds of 'discovery' to be a viable option where the North Island was concerned.

275. Nor, as far as we can tell, did Governor Gipps. The Governor placed a certain amount of pressure on Hobson to move things along, but at no point did he suggest that the presentation of the Treaty to North Island chiefs could or should be curtailed by a 'discovery'-based proclamation. During February he himself had attempted to persuade South Island chiefs present in Sydney to sign a treaty of his own devising[626], but was thwarted by speculators. By March Gipps was in the process of preparing legislation relating to New Zealand, including legislation providing for the investigation of land claims, but it would appear that he did not think that a formal declaration of British sovereignty over all or part of the country was necessary before the New Zealand bills could be introduced into his Legislative Council. Two were submitted on 28 May 1840, before news reached Sydney that any such proclamations had been made. One bill justified the application of New South Wales legislation to New Zealand on the grounds that "her Majesty hath lately acquired the Sovereignty of a great portion of the Islands of New Zealand", and the other justified the establishment of a Land Claims Commission on the grounds that "various parts of the Islands of New Zealand [are] comprehended within the limits of the Territory and Government of New South Wales"; neither explained how the state of affairs referred to had come about[627].

276. On receiving news of Hobson's incapacitation, Gipps immediately sent his Lieutenant-Governor a despatch in which he stated that

> my sense of the extreme urgency of the service in which you are engaged, and of the necessity for prompt and decided measures, forces me to express a hope that the progress of your negotiations with the Chiefs of New Zealand may not be thereby interrupted.

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[626] One so similar to the first ('Freeman') draft of that presented to Maori at Waitangi as to suggest that Gipps and Hobson had reached general agreement on the terms before Hobson left, and perhaps even had made a rough draft of such a document. See Loveridge "The New Zealand Land Claims Act of 1840", Ch. III.

[627] Preambles to "A Bill to declare and extend the Laws of New South Wales to Her Majesty's Dominions in the Islands of New Zealand ..." (*Sydney Gazette* 11 June 1840), and "A Bill to Empower the Governor of New South Wales to Appoint Commissioners to examine and report on Claims to Grants of Land in New Zealand" (*Sydney Gazette* 13 June 1840). This portion of the Preamble of the first Bill was altered before it was passed, becoming "Her Majesty hath been pleased to annex Her Majesty's dominions in the islands of New Zealand to the government of New South Wales" (Statutes of New South Wales 3 Vic. No.28). This part of the preamble of the Land Claims Bill remained unchanged.

Gipps suggested that Hobson send someone else to carry the Treaty around the country if he himself was unable to go[628], and offered the assistance of Major Thomas Bunbury[629]. But he evidently concluded, on reflection, that such advice was not enough, and that it might be necessary to invoke the permission which Normanby had given seven months earlier to deal differently with the southern islands if the need arose.

277. The very next day the Governor sent Hobson a confidential despatch in which he stated that

> in respect to the extension of the Queen's authority over the Central [i.e. South] Island prompt measures appear to me to be very urgently required, and indeed (though I leave this point entirely to your own decision) I am disposed to think that the assertion of the Queen's sovereignty by virtue of the right of discovery would perhaps be the most advisable course of proceeding with respect to that Island which could be adopted. [630]

Hobson clearly took the hint that his superior expected him to send Major Bunbury out with unambiguous instructions to claim the southern islands 'by virtue of the right of discovery' if necessary – if, that is, they could not be acquired by treaty within a short space of time[631].

The Bunbury Expedition

278. On arrival in New Zealand, Hobson later reported, Major Bunbury agreed "to undertake the execution of those parts of my instructions which relate to the acquisition

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[628] Despatch #40/13 of 2 April 1840, from Gipps to Hobson; SANSW 4/1651 p. 9. He had just written to Hobson expressing concern "that Her Majesty's sovereignty is as yet only established over a small portion of the Northern Island, and that the parts of the coast which are second only in importance to the Bay of Islands, viz. those in the neighbourhood of Port Nicholson and the straits which separate the northern from the central island, have not yet been visited by you": Despatch #40/11 of 31 March 1840, in SANSW 4/1651. This was in part due to difficulties which had arisen between Hobson and Captain Joseph Nias of HMS *Herald*.

[629] Gipps evidently feared that Hobson might break down altogether, and sent Bunbury to New Zealand because he was sufficiently senior to replace Hobson in case the Captain's illness proved to be serious enough to cause his death or require his resignation: see Thomas Bunbury, *Reminiscences of a Veteran. Being Personal and Military Adventures in Portugal, Spain, France, Malta, New South Wales, Norfolk Island, New Zealand, Andaman Islands, and India*. 3 Vols. (1861), Vol. III pp. 44-46. Gipps revoked a commission issued to Lt. Willoughby Shortland in January, designating him as Hobson's replacement, and issued a new one making the officer commanding British troops in the country (now Bunbury) his successor: see Despatch #40/12 of 1 April 1840 to Hobson, in SANSW 4/1651 p.9.

[630] Confidential Despatch of 3 April 1840, from Hobson to Gipps; CO 209/6 pp. 93b-96b.

[631] See Hobson's Confidential Despatch to Gipps of 5 May 1840, in which he reported that Bunbury had been offered, and had accepted, the task of carrying out "the unexecuted instructions of Government relative to the acquisition of the Sovereignty of these Islands". As published in BPP 1841 (311) pp. 57-58 (1), this despatch was heavily edited to exclude (among other things) comments on Hobson's problems with Captain Nias of the *Herald*. The full text can be found in ANZ G36/1a pp. 72-75.

of the sovereignty of these islands, and which ... still remain unexecuted". This would involve his travelling to "such parts of the Northern Island as may not already have been ceded to the Queen", and to the southern islands, in HMS *Herald*[632]. Since Bunbury had no previous involvement with the Treaty (unlike most of the other proxies Hobson used), the Lieutenant-Governor explained the background to the present situation at some length. "The treaty which forms the base of all my proceedings", he explained

> was signed at Waitangi on the 6th February 1840, by 52 chiefs 26 of whom were of the confederation, and formed a majority of those who signed the Declaration of Independence. This instrument I consider to be *de facto* the treaty, and all the signatures that are subsequently obtained are merely testimonials of adherence to the terms of that original document.

Bunbury was to continue the process of obtaining such 'adherence' in the Bay of Plenty and along the East Coast. His principal task, though, was described as "the establishment of the Queen's authority in the Middle and Southern Islands". The 'adherence' of as many local chiefs as possible was to be sought, but Bunbury's attention was drawn in the first instance to "the Supplementary instructions of the Secretary of State" of 15 August, and specifically to the passage in which Hobson had been given permission to proclaim British sovereignty on the grounds of discovery[633].

279. The Major proceeded to carry out his instructions to the letter. He arrived in New Zealand from Sydney near the end of April, and within a week was underway in the *Herald* for points south, taking Edward M. Williams (who together with his father had translated the English draft treaty into Maori) as his interpreter. After gathering a number of signatures at Mercury Bay, in the Bay of Plenty and along the East coast, he proceeded to Akaroa, where a few more were obtained. The expedition then moved on to Stewart Island. Its first stopover ("Zephyr Bay, Southern Port, Stewart's Island") was found to be unoccupied, "and on my return to the Herald", Bunbury reported, "in the probability of our not finding any natives, Captain Nias and myself deemed it advisable the same day to proclaim the Queen's authority over the island". This was done, "the usual forms" being complied with. The "Declaration of Sovereignty of the Queen of England over Stewart's

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[632] Letter of 25 April 1840 from Hobson to Bunbury: BPP 1841 (311) pp. 17-18 (#2). These are Bunbury's 'official' instructions. For Hobson's semi-private supplementary instructions of the same date see ANZ IA 4/305 pp. 7-12. See Bunbury's letter to his own military superior of 1 May 1840, in which he expressed his "great reluctance" to take up this task. He was persuaded to do so, he stated, by the need "for the immediate completion of the duties now imposed upon me and which, if not executed, might occasion much embarrassment to the Government": Bunbury, *Reminiscences* (1861), Vol. III pp. 58-59.

[633] BPP 1841 (311) pp. 17-18 (#2).

Island" of 5 June 1840 stated that Stewart's Island and "the islands lying off" were "taken possession of in the name and in the right (by the discovery of the late lamented Captain Cook) for Her most Excellent Majesty Victoria ....". It was signed by several officers from HMS *Herald*, and by "Thomas Bunbury, Major 30th Regiment (Charged with a Diplomatic Mission)"[634].

280. The expedition then proceeded north, along the eastern coast of the South Island, and was able to acquire a number of additional signature from various chiefs along the way, including nine at Cloudy Bay on 17 June 1840[635]. This was to be the *Herald*'s last stop on this Island, and Bunbury again consulted with Nias:

> we were both of opinion that it would be advisable at once to proclaim the Queen's authority also over the Middle Island, as the most effectual means of preventing further dissension amongst the natives and Europeans[636]. I accordingly, while the natives [who had just signed the Treaty] were on board, had our intention explained to them, and ... the marines were landed and the union jack hoisted on the Horikaka pa, under a salute of 21 guns ...

The proclamation read out when the flag was hoisted stated that the South (Middle) Island and "the islands lying off" had "been ceded in sovereignty by the several independent native chiefs to Her Most Gracious Majesty Victoria" on 17 June 1840. This document too was signed by several of the officers of HMS *Herald*, and by "Thomas Bunbury, Major 30th Regiment (Charged with a Diplomatic Mission)". Bunbury commented in his final report to Hobson that issuing such a proclamation "may appear like cutting the Gordian knot, where so many and such intricate interests are interwoven", but thought that "the further delaying [of] this step could only tend to create further difficulties"[637]. In a separate report he simply informed Gipps that at one port on Stewart Island, and at another on the Middle Island he and Nias

> judging it would be for the best interests of the natives as well as European settlers that further delay should not take place, ... proclaimed the Queen's authority with the usual ceremonies, at the former place on the 5th of June, where we did not meet with

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[634] Report of 5 June 1840 from Bunbury to Hobson, in BPP 1841 (311) pp. 105-112 (1). The proclamation is copied at p. 112 ("most" is not capitalized here).
[635] See C. Orange, *An Illustrated History of the Treaty of Waitangi* (1990), for reproductions of all the Treaty sheets and annotated lists of signatures.
[636] That is, over land. Bunbury reported that some Europeans were making "preposterous claims" in the South Island. His letter of 15 July 1840 to Hobson concerning land claims is also of interest: ANZ IA 1 #40/303. Bunbury's impression was "that a very small portion of any of the Land of the Islands of New Zealand of any Value remains which will not be claimed by Europeans.".
[637] Report of 5 June 1840 from Bunbury to Hobson, in BPP 1841 (311) pp. 105-112 (10). The proclamation is copied at p. 112.

> natives, by right of discovery, and at the latter on the 17th of June from the sovereignty having been ceded by the principal Native Chiefs. [638]

There is no doubt that Bunbury considered the avoidance of 'delay' to be sufficient justification for his actions, and that all of his superiors up the line to London agreed[639].

The May Proclamations of Sovereignty

281. In fact, events had partly overtaken Bunbury's mission. When made in June, his two proclamations had already been rendered redundant by two others issued on 21 May 1840 by Lieutenant-Governor Hobson. In the first of these "the full Sovereignty of the Northern Island of New-Zealand" was claimed for the Crown on the strength of

> a Treaty bearing Date the Fifth day of February [sic], in the Year of Our Lord, One Thousand Eight Hundred and Forty, made and executed by me William Hobson ... of the one part, and the Chiefs of the Confederation of the United Tribes of New-Zealand, and the Separate and Independent Chiefs of New-Zealand, not Members of the Confederation, of the other; and further ratified and confirmed by the adherence of the Principal Chiefs of this Island of New- Zealand, commonly called "The Northern Island". [640]

(In his covering despatch Hobson laid claim to the "universal adherence of the native chiefs to the Treaty of Waitangi"[641]).

282. This proclamation was immediately followed by a second, which asserted "the Sovereign Rights of Her Majesty" over both of

> the Southern Islands of New-Zealand, commonly called, "The Middle Island", and "Stewart's Island"; and, the Island, commonly called, "The Northern Island" [642]

The North Island was claimed on the strength of its "having been ceded in Sovereignty to Her Majesty" – a reference to the Treaty of Waitangi (and the first proclamation). As far as the southern islands were concerned, however, Hobson simply stated that

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[638] Letter of 4 July 1840 from Bunbury to Gipps: CO 209/6 pp. 226b-228a.
[639] In his reply to Hobson's voluminous report of 30 Oct. 1840 on the Treaty negotiations, Lord Russell specifically mentioned Bunbury in asking that those who had assisted the Lieutenant-Governor in this work: Despatch of 30 March 1841, copied in Bunbury, *Reminiscences*, Vol. III pp. 124-125.
[640] First Proclamation of 21 May 1840; CO 209/7 p. 61b (an original printed copy enclosed with Hobson's Despatch #40/3 to Lord Russell).
[641] Despatch #40/3 of 25 May 1840 from Hobson to Lord Russell: BPP 1841 (311) pp. 15-17 No. 11.
[642] Second Proclamation of 21 May 1840; CO 209/7 p. 62b (an original printed copy enclosed with Hobson's Despatch #40/3 to Lord Russell).

> I have it in Command from Her Majesty Queen Victoria, through Her principal Secretary of State for the Colonies, to assert the Sovereign Rights of Her Majesty over the Southern Islands of New-Zealand ....

No grounds for the assertion of such rights were given in the original proclamation, but in his covering despatch to the Secretary of State Hobson explained that

> Actuated by ... a perfect knowledge of the uncivilized state of the natives, and supported by the advice of Sir George Gipps, previously given, I also proclaimed the authority of Her Majesty over the Southern Islands, on the ground of discovery [i.e.. by Captain Cook]. [643]

These proclamations had been drawn up in haste, and contained no mention of "discovery" in their texts. In June Hobson had the second proclamation reprinted, with corrections. The passage in question was altered to read:

> Whereas I have it in Command from Her Majesty Queen Victoria, through Her principal Secretary of State for the Colonies, to assert, *on the grounds of Discovery*, the Sovereign Rights of Her Majesty over the Southern Islands of New-Zealand, commonly called, "The Middle Island", and "Stewart's Island"; and, the Island, commonly called, "The Northern Island", having been ceded in Sovereignty to Her Majesty .... [644] [Emphasis added]

283. Hobson was pushed into this action by the recognition of Maori sovereignty over a community of British subjects at Port Nicolson. The newly-arrived settlers of the New Zealand Land Company were responsible. The Lieutenant-Governor reported to Lord Russell that on 21 May 1840 that he had

> learned, not only from the [Port Nicholson] New Zealand Gazette, but from other authentic sources, that the settlers who had located there, under the New Zealand Association [sic], had formed themselves into a government, had elected a council, appointed Colonel [William] Wakefield president, and had proceeded to enact laws and to appoint magistrates.

"This Intelligence", he stated, "demanded my immediate attention" and preparations were at once made to send an expedition south "to dismantle the illegal government of the New Zealand Company settlers and impose the Crown's authority"[645]. Before doing anything else, however, he issued his proclamations of 21 May 1840, declaring Queen Victoria to be the sole sovereign authority in New Zealand. There is nothing to suggest that he had been

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[643] Despatch #40/3 of 25 May 1840 from Hobson to Russell; BPP 1841 (311) pp. 15-17.
[644] Second Proclamation of 21 May 1840; copy of revised, reprinted version in CO 209/6 p.158b.
[645] Despatch #40/3 of 25 May 1840; BPP 1841 (311) pp.15-17 No.11.

contemplating this step before the aforementioned news arrived from Wellington[646]. An examination of the relevant issues of the *New Zealand Gazette* shows what actually triggered this response.

284. As far as the Crown was concerned, the fact that the Company settlers had set up their own local government was of little moment in itself. In the same confidential letter in which Gipps had urged Hobson to expedite the acquisition of sovereignty, the Governor had observed that

> Whatever advantages the settlers at Port Nicholson may have gained by being left so long undisturbed in their negotiations with the Chiefs for the acquisition of land will I hope be overcome by the necessity which sooner or later they will be under of submitting to such terms as the Government may dictate. [647]

This appraisal was undoubtedly correct, and as Hobson would later discover (if he did not know it already[648]) the Port Nicolson settlers welcomed the imposition of the Crown's authority over the themselves, and the country as whole. What they had done to upset Hobson, one can only conclude, was to acknowledge the authority of "the Sovereign Chiefs of Port Nicolson"[649]. An "Address from the Committee of Colonists" in mid-April explained that this body had met "to consider the situation of the Colonists, in relation to the question of Sovereignty"[650]. It decided, from an examination of the proclamations issued by Gipps in January, that

> the English [sic] Government had formally disclaimed the existence of any right of Sovereignty in the Crown of England, and had in the amplest manner recognized the independent Sovereignty of the Native Chiefs of the Island .... [and] the Government of England has recognised every petty tribe in New Zealand as an independent foreign power.

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[646] So hurried was the preparation of these Proclamations that two significant mistakes were made in the second, requiring Hobson to issue a corrected version in June: see Loveridge, "The New Zealand Land Claims Act of 1840", Appendix 1 pp. 124-126.

[647] Confidential Despatch of 3 April 1840, from Hobson to Gipps; CO 209/6 pp.93b-96b.

[648] There was a certain amount of contact between Wellington and Auckland prior to May. Col. William Wakefield, for example, wrote to Hobson on 27 April 1840 offering his services to promote the Government's views (this was mentioned by Hobson in his 25 May 1840 despatch). According to Henry Williams, writing on 29 April 1840, a delegation of Port Nicolson settlers was about to proceed to the Bay of Islands to see Hobson: ANZ 9/11 (#40/156).

[649] He had not yet heard that a large number of chiefs from Port Nicolson had signed Henry Williams' copy of the Treaty on 29 April 1840. Williams' report is dated the same day, and presumably would have been sent with his despatch of 25 May (which enclosed his instructions to Williams and other Treaty-related documents) if it had reached the Bay of Islands by this time.

[650] Published in the *New Zealand Gazette* 18 April 1840. This issue (the first one of this newspaper published in New Zealand) also contained copies of the Constitution and the Ratification discussed below. All of this material was reproduced in the *Sydney Herald* on 8 May 1840.

The Committee thought that the Crown had "by implication asserted the right of the Chiefs to exercise authority over every person residing within their territories, according to the laws, or rather customs, of the tribe", so that

> Every act of Government ... within the Colony, whether legislative or executive, must derive its validity from the assent, expressed or implied, of the Principal Chiefs of the district. And every act of government thus sanctioned, must be recognised as valid by the Government of England, and every civilised Government.

A Provisional Constitution having been drawn up, the Committee of Settlers approached the local chiefs for their approval. A "Ratification and Extension" of the Constitution was issued, which stated that

> We, the Sovereign Chiefs of the district of Wanga nui atera, or Port Nicholson, ... do hereby ratify and confirm the within agreement, and do declare that the same shall have the force of law within our territories, and shall be binding upon all parties residing within the same ....

Under this Ratification the Maori of the district were to "possess a perfect equality of rights with the Colonists"[651].

285. How such far-reaching conclusions could be extracted from Gipps' three proclamations of 14 Jan. 1840 is difficult to work out[652]. If anything, these proclamations (like the documents on which they were based) were rather ambiguous about the state of Britain's claims to sovereign authority in or over New Zealand – scholars still puzzle over the meaning of "is or may be acquired in Sovereignty". The two proclamations which Hobson issued on 30 Jan. 1840, immediately after his arrival in the Bay of Islands, did not clarify matters a great deal. One declared that he had "this day entered on the duties of my said office" as Lieutenant-Governor, and the other simply repeated Gipps' pronouncements

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[651] These documents are not dated, but the agreement is mentioned in T.M. Partridge's letter of 18 March 1840 (*New Zealand Journal* 29 Aug. 1840 p. 209), and in Col William Wakefield's Despatch #12 of 22 March 1840 to the New Zealand Land Company (CO 208/99 pp. 301b-305b).

[652] The *Sydney Herald*, commenting on the constitutional developments at Port Nicholson, thought that the January Proclamations had "clearly established the fact, that British law prevails in New Zealand", presciently concluding that "we shall soon see who has jurisdiction over New Zealand; whether Queen Victoria and the Judges of her Court, or Colonel Wakefield and his mud headed associates": *Sydney Herald* 11 May 1840 "What Law is in Force in New Zealand?". The *Colonial Gazette* in London later defended the New Zealand Company colonists, arguing that they had acted "strictly in accordance with the declarations and measures of the British Government", which had invested each tribe "with the attributes of a foreign independent sovereign power". It more or less accused the Government of repudiating the Queen's sovereignty over New Zealand for sole purpose of putting the New Zealand Land Company and its settlers in the wrong. See *Colonial Gazette* 16 Sept. 1840 #95 "Mr. Mothercountry caught in his own Trap". It should be noted that a related dispute over the governmance of the Port Nicholsons settlement took place in Britain in 1839 between the Government and the New Zeland Land Company: see Loveridge, ""The New Zealand Land Claims Act of 1840"", Ch. IV.

concerning land claims. The Port Nicolson Committee had all of these proclamations before it when the 'Ratification' was drawn up[653], but evidently chose to ignore the fact that both were signed by the Captain as "Lieutenant- governor of the British Settlements in progress in New Zealand &c &c &c"[654]. If the Crown was claiming authority over such settlers and settlements, and over their titles to land, this hardly suggested that the British Government recognised "the right of the Chiefs to exercise authority over every person residing within their territories, according to the laws, or rather customs, of the tribe", if those persons were also British subjects. As Hobson himself later put it, "Her Majesty needs not permission from the native chiefs to demand the allegiance of British subjects, or to exercise sovereign rights over their possessions"[655].

286. There is nothing in Hobson's instructions to Bunbury or the other sources available – such as Bunbury's own memoirs – which indicates that the Lieutenant-Governor expected the Major to fail in his efforts to persuade the chiefs he contacted to sign the Treaty. That is, Bunbury apparently was expected to do as well as the other people co-opted to carry the Treaty around the Islands, and in the event he was reasonably successful[656]. Had Hobson not felt it necessary to issue his proclamations before the Major returned to the Bay of Islands in June, there is no real reason to doubt that the whole of New Zealand would ultimately have been claimed for the Crown at this time on the grounds of cession, and nothing else. Annexation of New Zealand on the sole basis of Maori adherence to the Treaty would have been quite satisfactory as far as the Colonial Office was concerned, and a June proclamation would not have caused few if any problems for Governor Gipps.

287. The May proclamations removed any questions – as far as British subjects were concerned – as to who was the sovereign power in New Zealand. The Lieutenant-Governor immediately dispatched a senior official to Port Nicholson, accompanied by troops, "for the purpose of arresting at once, a course of Proceeding as insulting to the

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[653] Colonial Secretary Willoughby Shortland sent copies to Port Nicholson in a letter dated 7 March 1840 (ATL Ms 535 E.B. Hopper Papers), and they are discussed in Col William Wakefield's Despatch #12 of 22 March 1840 (CO 208/99 pp. 301b-305b).

[654] Proclamation #1 of 30 Jan. 1840: BPP 1840 (582) p.144 Encl. in Encl. No.2 in Appendix No.6. Those in attendance at the meeting at Kororareka – forty Europeans and one Maori – signed a "Memoir" testifying that Hobson had indeed read out the Letters Patent and the Commission: BPP 1840 (582) pp.143-144 Encl. in Encl. No.2 in Appendix No.6.

[655] Despatch #40/3 of 25 May 1840; BPP 1841 (311) pp. 15-17 No. 11.

[656] Orange, *The Treaty of Waitangi,* p. 82 concludes that the 27 signatures which Bunbury acquired were "a modest figure in comparison with some other treaty sheets but representative of a wider geographical area than any other copy". One might suggest that it was better than 'modest' on a *per capita* basis, given the much smaller Maori population in the south.

Sovereign powers of the Queen as it is detrimental to the Interests of Her Majesty's Subjects in this Colony"[657]. Lieutenant Willoughby Shortland was provided with a proclamation calling on the residents of Port Nicholson (as "part of the dominions of Her Majesty") to submit to the proper authorities[658]. The targets of this assault immediately succumbed. Major Bunbury, arriving at Port Nicholson close behind Shortland, reported that all was "tranquil"[659]. It would remain so thereafter, although an impressive amount of ink would be spilled in the following years over the New Zealand Company's claims and the Crown's land policies.

288. In Sydney, Governor Gipps let the opponents of the Land Claims Bill make their cases, and only then, like a magician with the proverbial rabbit, produced the May proclamations out of thin air[660]. These opponents – among them James Busby and William Wentworth, a large-scale speculator who laid claim to much of the South Island – argued that because the Crown had acknowledged the sovereignty and independence of the New Zealand chiefs, it could not exercise a retroactive jurisdiction over the sales of land made by those chiefs. As one newspaper noted, there was parallel here with the Port Nicholson case, where

> The settlers ... have attempted to invest the Native Chiefs there with sovereignty, and to carry on the government of the settlement in their name, and in virtue of their sovereign power. Mr. Wentworth has been equally anxious to make *Sovereigns* of his Chiefs, and consistently replied, when tempted thereto by His Excellency, that all that had been done at Port Nicholson was lawful. [661]

The fact that the Queen's sovereignty had been proclaimed meant that the Legislative Council had no real option but to pass Gipps' Land Claims Bill in some form. As the *Sydney Gazette* commented,

> We conceive that the recent proclamation of Lieutenant Governor Hobson has set the question of titles derived from the aboriginal chiefs of New Zealand completely at rest. Able as were Mr. Wentworth's arguments in the Legislative Council of New

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[657] Instructions of 23 May 1840 to Lt. Shortland: ANZ IA 4/305 pp. 14-16.
[658] Proclamation of 23 May 1840: BPP 1841 (311) p. 19 (5). The Port Nicholson settlers responded to this on 1 July with an Address to Hobson declaring their loyalty to the Crown, and explained everything away as being due to "the peculiar circumstances in which we were placed": BPP 1841 (311) p. 80 (2).
[659] Letter of 4 July 1840 to Gipps: BPP 1841 (311) p. 59. Although, according to Edward Williams, at Shortland's request the *Herald* "sailed completely round the harbour" in a show of force": entry for 21 June 1840 in "The Journal of Edward March Williams" (AIML W72 typescript).
[660] He actually suppressed the news of their publication for the better part of a month in order to gain an advantage over his opponents. See Loveridge, "The New Zealand Land Claims Act of 1840", Appendix 1 pp. 126-130.
[661] *Sydney Monitor* 13 July , 1840.

> South Wales – those arguments can go for nothing. He has now to contend upon other ground.

"We cannot admit for a single instant", the editor concluded, that "the propriety of a few British subjects, to contend against the rights and prerogatives of the Sovereign, to whom they owe an unqualified allegiance"[662].

289. In the proclamations issued in January, the right of the Crown to be the source of all land titles in New Zealand had been formally asserted, and an unambiguous warning was given that the validity of claims to land sold by Maori to Europeans would not be recognised by the Crown unless and until they were properly investigated (on its own terms) and a report made to the Governor. The proclamation of sovereignty in May set aside any doubts that the Crown could and would exercise this right over the whole of New Zealand. "An Act to empower the Governor of New South Wales to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land in New Zealand" was passed on 4 August 1840[663].

290. When the May proclamations arrived in London at the end of September 1840 they were greeted with relief, as much as anything. The Colonial Office had faced mounting criticism of its New Zealand strategy for months, culminating in Lord Eliot's Select Committee inquiry, and took immediate steps to have them officially published[664]. As one observer put it, these proclamations "placed the colony on an entirely new footing .... All doubt as to whether New Zealand is, or is not a British colony, ... [have] been set to rest by these documents"[665]. As far as Lord Russell and his colleagues were concerned, the proclamations cleared the way for the Government to reach an accommodation with the New Zealand Land Company, and to separate the colony of New Zealand from New South Wales. Both of these goals were attained before the end of the year.

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[662] *Sydney Gazette* 7 July 1840 "New Zealand". As Gipps knew at this point, and Wentworth did not, the Company in Britain had already admitted to the Crown that its instructions to the settlers to set up an independent government for themselves were illegal. See Loveridge, "The New Zealand Land Claims Act of 1840", Ch. IV.

[663] 4 Vic. (1840) No.7 (New South Wales). See Loveridge, "The New Zealand Land Claims Act of 1840", for a examination of the history of this legislation.

[664] *London Gazette*, Issue No.19900, pp. 2179-2180. They were copied in the London *Times* on 3 Oct. 1840. The *Times*, as it happened, had already reproduced copies of the two proclamations in its 28 Sept. 1840 issue ("New Zealand") which had been sent to England with a private letter dated 25 May 1840. Rutherford, *The Treaty of Waitangi*, p. 28 comments that "so far as sovereignty is concerned" the official publication of the two proclamations in London on 2 October 1840 was "definitive and final".

[665] "British Colonization of New Zealand" in *Colonial Magazine* No. 3 Sept.-Dec. 1840. The authorship is attributed by Hocken (*Bibliography*, p. 77) to Francis Dillon Bell, later a prominent New Zealand politician.

291. "In the actual state of things," wrote the Secretary of the Church Missionary Society in London soon after the May proclamations appeared, "the assumption of the entire sovereignty of all the Islands by Capt. Hobson was a sensible and necessary measure" – one that was "seemingly unavoidable in order to escape from greater immediate dangers", even though it raised the spectre of a "disastrous consequence" for Maori in the longer term due to colonization[666]. Dandeson Coates elaborated on these conclusions in a letter sent to Lord Russell, the Colonial Minister, in October. The CMS's central Committee, he observed, had been convinced by the "state of things" which had arisen in New Zealand

> that the occupation of the Islands of New Zealand by the British Crown & the introduction of a legitimate Government & salutary laws were essential in order to escape a state of anarchy, & all the evils in which such a state must have involved all classes, Natives as well as Settlers. They have therefore regarded the mission of Captn. Hobson & the course pursued by him in New Zealand, as necessary measures, under the actual circumstances of the case, though deeply to be regretted on general grounds, and fraught, as the Committee conceive, with extreme peril to the very existence of the Native tribes. [667]

'Necessary measures under the actual circumstances'. This sentence, in my opinion, embodies the best explanation we are ever likely to have for the sequence of events surrounding the British annexation of New Zealand in 1840. It is easy, in hindsight, to criticise the way the Crown proceeded in order to attain this outcome. While this can be an informative and entertaining exercise, however, it takes us away from the central problem faced by the Crown "in the actual state of things", on the ground, in the 1830s.

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[666] Letter of 13 Oct. 1840 from Coates to Richard Davis (in New Zealand), in AIML MS 273 v.6 pp. 41-45.
[667] Letter of 22 Oct. 1840 from Coates to Russell, in CMS Home Letterbooks (Outwards) 1838-42, CH/L3 pp. 344-348. (ATL Micro Collection 4/ Reel 66).

VIII

Summary and Conclusions

292. It is worth bearing in mind that barely a quarter of a century – less than a generation – elapsed between the establishment of the first CMS mission in New Zealand and the signing of the Treaty of Waitangi. The missionaries arrived at the beginning of, and contributed to, a period of rapid and extensive change for Maori. European weapons and pathogens brought war and disease, and other European goods and technologies brought changes in lifestyles, while European ideas, notably to do with religion and government, posed major challenges to the traditional Maori world-view. The sheer pace and magnitude of European intrusion left little time for coming to terms with these new developments, a difficulty compounded by the turmoil which they generated. All the while the numbers of transient and resident non-Maori people in the country grew steadily, and the attention of foreign governments was drawn to New Zealand in step with the growth of commercial activity in the Islands and the settlement of their citizens there.

293. This was particularly the case with the British Government, since a majority of the traders and most of the settlers were British subjects. No sooner had the process of interaction begun than the more 'respectable' of these subjects (those, generally speaking, who were not escaped convicts) began to call upon the Crown to protect their persons and property, and also to protect Maori from criminal and abusive behaviour by Europeans. The British Government's interest in New Zealand was also aroused by its proximity to the Australian colonies, which raised significant strategic concerns for Great Britain in this age of intense rivalry between the imperial powers of Europe. It was never likely that the world's foremost naval and colonial power would allow France (or Russia, or the United States) to establish a foothold in New Zealand from which, in time of war, British interests in the southern Pacific could be threatened and attacked. A good many Britons at home and abroad were in any case convinced before 1840 that if New Zealand was not already a possession or dependency of the Crown in some sense, then Cook's 'discovery' of the Islands undoubtedly gave Britain precedence over any European power should that country be annexed and colonized.

294. The first appeals for protection met with a ready response. In 1814 Governor Macquarie, believing that the islands were a dependency of New South Wales, lost no time in appointing Magistrates to execute British law within New Zealand, and even empowered certain Maori chiefs to assist them. The Imperial Parliament, however, did not agree, and soon passed legislation specifically stating that they were not part of the King's dominions.

The 1817 and 1823 Acts provided for the prosecution of some criminal offences committed by British subjects in New Zealand, but this proved to be more or less ineffective due to the absence of viable mechanisms for the enforcement of British law within the Islands. That is, the apprehension of offenders was a risky business when none of the people in a position to do the apprehending were protected from prosecution for false arrest, and there were no facilities or resources available aside from passing naval vessels for detaining or transporting suspects (or witnesses). The solution was actually quite simple: pass legislation allowing the appointment of Judges or Magistrates in New Zealand empowered to do all of the things necessary for the prosecution of British subjects who broke British laws, and provide these officials with the resources required to police their jurisdiction. As the 'South Seas Bill' of 1832 succinctly put it, what was needed was to "make effectual provision for the seizure, detention, trial and punishment of any ... Offenders"[668]. But the Imperial Parliaments of the day never saw their way clear to do this. In New Zealand's case they consistently rejected the idea of legislating for a foreign country, and in general opposed increases in government expenditure on colonial matters.

295. Absent a 'South Seas Bill', if anything effectual was to be done with respect to New Zealand in the early 1830s the British Government was left with two options. One was to encourage Maori to form their own national government and create their own national legal system, which could provide the mechanisms required for the detention and extradition of British offenders. This would probably have been enough to make the 1823/1828 legislation workable. In the existing state of affairs it was likely that such developments would only have taken place under British management, be it covert or overt. Even if Maori considered them to be desirable, the chiefs had little or no experience with governmental institutions above the level of the iwi, and none at all with either written codes of law or their application. Any European-style government established during this period would necessarily have been an artificial construct.

296. The second option was the annexation of New Zealand by the Crown. The idea of taking possession of the Islands appears to have been a popular one in the Australian colonies at the beginning of the 1830s[669]. Such a step would have killed two birds with one

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[668] "A Bill ... to make provision for the Prevention and Punishment of Crimes committed by His Majesty's Subjects in Islands situate in the Southern or Pacific Ocean, and not being within His Majesty's Dominion", dated 7 June 1832: CO 209/1 pp. 102b-104a.
[669] *Sydney Gazette* 16 Sept. 1830 editorial.

stone, removing all obstacles to the imposition of law and order on British subjects and at the same time excluding rival powers. As articulated in the colonial press, this was actually seen as something more akin to the imposition of a protectorate than anything else, involving the creation of "A friendly alliance" between the Crown and Maori, in which (to begin with at least) the latter would be left to regulate their own tribal affairs under their own leaders while the British Government confined its attention to the control of British subjects and to the regulation of New Zealand's foreign relations. The British Government, incidentally, would later be criticised in the 1839-40 debates surrounding Hobson's mission for not having imposed its authority on New Zealand at this time, before the problems caused by European involvement reached unmanageable proportions[670]. This criticism, however, was based on the premise that the Islands were already a British dependency of some description, and that the Government of the day was neglecting its responsibilities in not intervening to smooth the way for the future development of New Zealand as a British colonial possession.

297. The initial planning for the creation of a British Residency in New Zealand in 1831-32 assumed that the Resident would be provided with judicial authority of some kind over British subjects, and with sufficient resources to make such authority effective. By the time James Busby was despatched from London, though, it appeared more likely than not that neither the authority nor the resources required would actually be made available to him. It seems reasonably clear that Colonial Minister Goderich and Governor Bourke decided to proceed with the appointment in hopes that Busby might be able to conjure up some kind of Maori national government, which could be used as a means of making the existing British legislation workable. There is no doubt that, as the likelihood of the passage of a 'South Seas Bill' faded, the Resident's efforts to create "a Confederation of the Chiefs" intensified, and became the focal point of his mission. These efforts led first to the presentation to and acceptance by an assembly of chiefs of a national flag in 1834, and culminated in October of 1835 in the production of "He Wakaputanga o te Rangatiratanga o Nu Tireni" – the "Declaration of the Independence of New Zealand"[671]. This document was signed by upwards of 35 chiefs, with more signatures being added over the following four years. Busby's actions subsequently received the approval of all his superiors in Sydney and in London.

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[670] See Ch. VI, above.
[671] See Appendix 1. 'Nu Tireni' is spelled with an 'e' in the Declaration of Independence of 1835, and with an 'a' in the Treaty of Waitangi in 1840.

298. It very quickly became apparent that the government of the "United Tribes" was not going to get off the ground under its own power in the foreseeable future. Persistent intertribal disputes meant that the chiefs involved did not formally meet in congress at Waitangi, or anywhere else, until a substantial number of them came together on 5 Feb. 1840 in response to Captain Hobson's invitations. Having created a notional Maori government, Busby thereafter spent most of his efforts trying to persuade his superiors to provide the resources to breathe life into it. He realised that nothing would be done until the British Government provided British troops and naval vessels to enforce the authority of the Congress, and increasingly pushed for the establishment of a formal British Protectorate over the Islands. This culminated in his Report of 16 June 1837, in which the Resident advanced the argument that the Congress of the United Tribes was at least competent to enter into a treaty with the Crown "to avail itself of foreign assistance in reducing the country under its authority to order", and that this offered Britain a loophole through which it could create a new regime under which British law and government could be applied to British subjects in New Zealand.

299. Busby's 1837 report painted a very bleak picture of the current situation in New Zealand, which was largely supported by accounts from missionaries and other observers then and later. It appeared that Maori might suffer irreparable damage unless something was done to check tribal wars and depopulation. In Britain, a Parliamentary Select Committee examining the state of the aboriginal peoples in British possessions concluded at this juncture (1837) that such developments were an inevitable consequence of the process of European colonization. Where New Zealand was concerned, it recommended that the British Government do something to shield New Zealanders from the effects of the informal British colonization then taking place. The measures called for were more or less the same as those under consideration at the time the British Residency was created, involving legislation allowing the appointment of Judges or Magistrates in New Zealand empowered to do all of the things necessary for the prosecution of British subjects who broke British laws, and the provision of the resources required by these officials to police their jurisdictions. The Committee stated its opposition to any other kind of interference in New Zealand affairs by the British Government, which was also called upon not to give its approval for the establishment of any new British settlements in New Zealand unless and

until Parliament had been consulted[672].

300. It was probably inevitable that, as the 19th century wore on, someone would propose large-scale British settlement for New Zealand. Their distance from Britain aside, the Islands offered a very attractive temperate-zone destination for Europeans farmers, and mere distance was becoming less and less tyrannical as the Industrial Age proceeded. As well, the new Wakefieldian model for "systematic colonization" appeared to offer a way to minimize the costs and risks of establishing settlements in the distant antipodes. The principal fly in the ointment was that New Zealand already belonged to someone else – to people who, by all accounts, were well able to defend themselves from interlopers when they chose to do so. On the other hand, Maori were not particularly numerous relative to the size of the country, meaning that a good deal of unused land seemed to be available for settlement, and by the early 1830s it appeared that they had taken the first steps towards becoming good Christians who appreciated the benefits of European trade and technology. From the beginning the New Zealand Association proposed to negotiate with Maori for both the purchase of specific districts and the cession of sovereignty over them to the Crown, and declared that any and all Maori who remained in or migrated to the Association's lands would enjoy "the rights and privileges of British subjects". Amalgamation was their ideal.

301. Many missionaries and humanitarians condemned the Association's plan as certain to accelerate the damage caused to Maori by Europeans, and to impede their conversion and 'civilization' by the Christian missions. It was argued that, because no previous scheme of colonization had succeeded in benefiting the aboriginal peoples concerned, the Association's must necessarily fail as well. All of these attacks were rejected by E.G. Wakefield and his colleagues, who claimed that they had in fact found a formula which *would* work. In search of additional public support, they also reconfigured their plan to emphasize the benefits which the indigenous inhabitants would allegedly reap from the sale and occupation of their lands by British settlers. Indeed, they argued that systematic colonization was the best, and perhaps only option available which would ensure that Maori were properly protected and provided with the means to become 'civilized'. British colonization, the New Zealand Association's supporters (and others) repeatedly pointed out, was already underway in the Islands, and the efforts of the missionaries to limit its impact had to date met with limited success. It was time, they contended, to try something new. By

[672] See ¶120, above.

this point all were agreed that something had to be done by the Government to save Maori from the impact of 'unsystematic' British colonization: the only question was, what kind of action would be necessary to achieve this end?

302. The British Government was initially quite receptive to the new Zealand Association's proposals, then had second thoughts as opponents made themselves heard. The death of King William IV also slowed things down, by making it impossible for the Association to gain approval from Parliament until 1838. It would appear, however, that James Busby's 1837 report, which arrived in London in December of that year, persuaded Colonial Minister Glenelg and his colleagues that they should offer the Association a charter of incorporation which would obviate the need for a statute. For a brief time it looked as if the Crown would give its approval for the piecemeal acquisition of sovereignty over New Zealand, and the establishment of a government authorised by the Crown in that country. But in the event Lord Melbourne's Government and the New Zealand Association could not agree on the form which the company should take. The Association chose to approach Parliament once again, but in the absence of Government support for their proposals, and under attack by the missionary societies and their allies, their Bill "for the Provisional Government of British Settlements in the Islands of New Zealand" was rejected in June of 1838. At the same time, a Parliamentary Select Committee held an inquiry into the state of New Zealand and what should be done, but its members were unable to reach a common conclusion. In the end, all they could agree upon was "that the Extension of the Colonial Possessions of the Crown is a Question of public Policy which belongs to the Decision of Her Majesty's Government", and that the continuing efforts of the missionaries on behalf of Maori afforded "the best present Hopes of their future Progress in Civilization"[673].

303. Lord Melbourne's Ministry, however, was most reluctant to decide anything at all. New Zealand was not at the top of its list of colonial priorities in mid-1838, and any action taken was likely to antagonise one or both of the parties embroiled in the great Colonization debate of 1837-38. Insofar as it had any firm position on New Zealand, the Colonial Office preferred Captain Hobson's 1837 plan for the acquisition in sovereignty by the Crown of 'factories' in the Islands – of a few small territorial enclaves from which control could be exercised over the activities of British subjects. There was nothing particularly imaginative about this solution, and similar schemes had occurred to others,

[673] Report of 8 Aug. 1838: BPP 1837-38 (680), p. iii.

including Dandeson Coates of the CMS, but it suited the Colonial Office's preference for one which required the least (and least expensive) amount of interference in New Zealand affairs while promising to produce the outcomes desired. (It would later become apparent that this preference was not based on a thorough scrutiny of the 'factories' plan, and that little or no thought was given to its implementation). The missionaries had long opposed any action by the Crown which involved a cession of sovereignty by Maori, but towards the end of 1838 became convinced that the situation in New Zealand had deteriorated to such an extent that any reasonable intervention by the British Government – the application, as Coates put it, of "such remedies as the case may admit" – would be justified[674]. Lord Glenelg immediately began preparations for the application of the 'factories' scheme, and indeed brought in its author to take the lead.

304. Captain Hobson's first task was to review his year-old proposal. His immediate reaction was that the 'factories' plan was fine, as far as it went, but did not go far enough. He explained that it was put forward in 1837 as "the only measure, short of actual assumption of Sovereignty by Great Britain" over the whole country that seemed to him likely to attain the desired outcomes, but that he himself thought then and now that a complete British takeover would be the best solution. Hobson's comments, however, were ignored. On 24 Jan. 1839 a set of draft instructions was drawn up by James Stephen for implementing the original 'factories' scheme, with Hobson designated as Lieutenant-Governor over any territories ceded in sovereignty to the Crown, and as Consul to those parts remaining under the authority of the chiefs. This was the Government's programme for New Zealand – albeit one which sat in a pigeonhole after the departure of Lord Glenelg in February – until the end of May 1839. It appears that the Government, or some part of it, was also contemplating the possibility of issuing a charter to a colonization company during this period. The idea was abandoned once the 'factories' scheme was set in motion[675], but in fact remained James Stephen's preferred alternative to the acquisition of the whole of the Islands as late as March of 1839[676]

305. The application of the 'factories' scheme was put on hold in February 1839 – underlining once again the inclination of the Colonial Office to do nothing whenever the

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[674] Letter of 30 Nov. 1838 from Coates to Glenelg, "Private": CMS Home Letterbooks (Outwards) 1838-42, CH/L3 pp. 133-134 (ATL Micro Collection 4/ Reel 66).
[675] See the discussion of Stephen's memorandum of 21 January 1839, at ¶169-171, above.
[676] See ¶178-179, above.

opportunity arose – but was brought back to life by the energetic operations of the new New Zealand Land Company (a clone of the 1837 New Zealand Association), and particularly by its declared intention to plant settlements the Islands with or without Government approval. It appears that the new Company adopted this strategy when it became aware that whatever the Government did about New Zealand, it would involve a policy of refusing to recognise the validity of private purchases of land from Maori without investigation, and (rather ironically) the adoption of a semi-Wakefieldian Land Fund system in which the Crown enjoyed a monopoly on the alienation of lands. In any case the New Zealand Land Company planned to purchase large areas of Maori land in New Zealand, and to set up its own government for the colonies established on that land.

306. The Colonial Office had little choice but to move, and did so. Another look at the 'factories' plan, however, revealed its manifest inadequacies to deal with the large-scale British settlement which appeared to be in the offing. Of particular concern was the perennial problem of legal jurisdiction – of ensuring that British subjects could be brought under control within areas which were not under British sovereignty. In May 1839, within a very short space of time, the Government moved from a 'factories' scheme to one based upon an extension of the boundaries of the colony of New South Wales to encompass any and all lands acquired in sovereignty by the Crown within New Zealand. This had a number of advantages, not least of which was that it could be implemented at once, using the Queen's prerogative powers, which meant that Parliamentary approval would not be required for the initial stage of operations. Any lands acquired in sovereignty by the Crown would automatically and immediately come under an established governmental and legal system, with the power and (in theory) the resources to do whatever was necessary. It was always the British Government's intention, under this 'New South Wales' strategy, to erect New Zealand as a separate colony at a later date, as soon as the process of acquisition had been completed, and this would be done before the end of 1840.

307. Although never officially stated, there is reason to believe that when this 'New South Wales' strategy was adopted the Colonial Office abandoned the idea of partial acquisition, and that from May of 1839 onwards it intended to acquire sovereignty over the whole of the Islands. This intention was particularly evident in the new instructions which were drawn up for Captain Hobson in July and August of 1839. Absent from these – unlike his January draft instructions – was any direction to the new Lieutenant-Governor as to the

nature and management of the relationship which would exist between the new British zones and any districts which remained under Maori authority. Hobson was given firm instructions to negotiate with Maori for the cession of their authority to the Queen, but was not told – in writing at least – what he should do if some of those negotiations failed. A partial exception to this was the southern islands, where an absence of information about the nature of Maori society and government (and perhaps a desire to provide him with the means to expedite the acquisition of sovereignty if necessary) led the Colonial Office to give Hobson permission for "the assertion, on the ground of discovery, of Her Majesty's sovereign rights" over the southern islands if circumstances warranted[677]. It must be emphasised, though, that this permission did *not* extend to the North Island: the Captain had no discretion to impose the Queen's authority north of Cook Strait on the grounds of 'discovery'.

308. As far as the North Island was concerned (and the southern islands, as far as possible), Hobson's mission was to obtain the "free and intelligent consent" of the chiefs "expressed according to their established usages" for "the recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's dominion"[678]. But in the same breath Normanby also described what Maori would be asked to surrender as "a right now ... precarious and little more than nominal", referred to their "national independence" as something "which they are no longer able to maintain", and expressed considerable misgivings as to whether all of these chiefs would actually be able "to comprehend the exact meaning, or the probable results" of the proposed cession. In the August 1839 instructions the difficulty was glossed over by telling the Captain to rely on his own powers of persuasion (supported "by the exercise on your part of mildness, justice, and perfect sincerity in your intercourse with them") and those of the missionaries. The question is, what oral instructions did Hobson receive from the Colonial Office concerning Maori sovereignty and its cession in the briefings which took place before his departure?

309. Judging by Hobson's actions in New Zealand it seems certain that he was told to concentrate his efforts on the Confederation of United Tribes. It was the only Maori entity which had been officially recognised, in any sense, as fully sovereign by the Crown,

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[677] Letter of 15 Aug. 1839 from Normanby to Hobson: BPP 1840 [238] pp. 44-45 No.18.
[678] All quotations in this paragraph are from Normanby's Instructions of 14 Aug. 1840: Despatch No. 39/1, in BPP 1840 [238] pp.37-42 No.16.

and a cession of that sovereign authority was probably seen in London as a fundamental requirement for the success of Hobson's mission. This was reflected in the latter's repeated assertion that any signatures added to the Treaty of Waitangi after a majority of the Confederation chiefs had signed the Treaty on 6 February were "merely testimonials of adherence to the terms of that original document"[679]. I think it is highly likely that if Hobson had been unable to persuade a clear majority of the chiefs of the Confederation to accept the Treaty in February, he would have suspended his efforts to obtain further signatures until this goal was achieved. If, ultimately, this proved impossible he might well have given up altogether and returned to Sydney, although the fallback plan may well have been to acquire the cession of a 'factory' somewhere outside the Bay of Islands, in order to establish a British foothold in New Zealand.

310. Had Hobson's efforts to acquire substantial 'adherence' to the Treaty after 8 February (when "the Sovereign Rights of Her Majesty" over Northland were celebrated with a 21-gun salute) or 18 February (when a proclamation to the same effect was drafted) [680] met with failure, it seems more likely than not that he would have suspended operations while awaiting further orders. Under such circumstances, though, Hobson would almost certainly have issued a proclamation of British sovereignty over Northland on the basis of the Treaty. It is conceivable that he would also have declared British sovereignty over the southern islands on the grounds of 'discovery' at the same time, but I would consider any such a step unlikely before the acquisition of the whole of the North Island had been completed. In the event, Hobson only played the 'discovery' card in order to provide Major Bunbury with options in dealing with the southern islands, and to facilitate an immediate response to the situation at Port Nicholson, at a time when he had no reason to think that the southern chiefs would reject the Treaty. In my opinion, had it not been for the public recognition of the sovereignty of the Port Nicholson chiefs by the Company settlers, Hobson would have waited until Captain Bunbury's return from the south before proclaiming British sovereignty over the whole of New Zealand in June, and the cession of sovereignty by the chiefs in the Treaty would have been the only grounds cited for this important step. The May proclamations were temporary expedients, and nothing more.

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[679] e.g. Letter of 25 April 1840 from Hobson to Bunbury: BPP 1841 (311) pp. 17-18 (#2).
[680] See ¶270 and ¶273, above.

311. It seems certain that Hobson was told by the Colonial Office to gain the 'adherence' to the Treaty of as many chiefs as possible before proclaiming British sovereignty over New Zealand. Was he also told how many chiefs, or what proportion of the chiefs, had to sign before he could do so? I think it is fair to speculate, based on his apparent certainty (on 6 February[681]) that the signatures of a majority of the chiefs of the Confederation were sufficient to eliminate that body from future consideration, that Hobson was told that he must obtain something resembling a majority of the chiefs in the North Island (or perhaps of a majority of those in each district) before the Crown could proclaim it to be part of the Queen's dominions[682]. By May of 1840 Hobson was aware that several hundred chiefs had signed[683], and his statement that he had obtained "universal adherence of the native chiefs" of the North Island to the Treaty is perhaps best interpreted in the context of such directions. It was also, of course, a proceeding which expedited the British annexation of the whole of the country, and there is to my knowledge no indication that the Crown explained to Maori or anyone else what its criteria were for identifying the threshold at which cessions of sovereignty by individual chiefs would be considered sufficient to justify the Crown proclaiming its sovereignty over the whole of the country.

312. The most difficult questions concerning the history of the Treaty of Waitangi revolve around the explanations given to Maori by the Crown in order to persuade them to sign that document. Were these explanations complete and comprehensive, and what did the chiefs take the explanations given to them to mean? I should say to begin with that, in my opinion, Hobson sincerely believed he did everything possible to explain to Maori what the Treaty meant. His record in New Zealand seems to me quite consistent: like a good officer, he did what he was told by his superiors, and seldom took initiatives which led him beyond the bounds of his instructions[684]. He was instructed to obtain the intelligent consent of the chiefs, as far as this was possible, and evidently thought that he had done as much as he could under the circumstances. And it must be remembered that the circumstances were

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[681] See ¶268-269, above.

[682] There is perhaps an echo of such verbal instructions in Major Bunbury's explanation to the prominent east coats chief Te Hapuku, late in June, that the Queen's authority had already been proclaimed over New Zealand "with the consent of the greatest number of influential chiefs": letter of 28 June 1840 from Bunbury to Hobson, in BPP 1841 (311) pp. 105-111 (10).

[683] See his summary of the progress of the Treaty in his Despatch #40/3 to Lord Russell of 25 May 1840: BPP 1841 (311) pp. 15-17 No.11.

[684] A trait which would get him into a good deal of trouble in 1841-42, when he passed new land claims legislation based upon a reading of his intructions for the Colonial Office which proved to be mistaken. The 1842 Land Claims Ordinance was subsequently disallowed in London. See Loveridge, "An Object of the First Importance", ¶II.6.10-16.

very difficult. Captain Hobson was dealing, through interpreters who were not neutral parties, with a people whose direct experience with the Crown and the British political system was quite limited. (Nor, for that matter, did Hobson have any training in the delicate art of conveying subtle meanings with precision, save in the kind of diplomacy delivered from the barrel of a cannon by the Royal Navy). His impression that the chiefs understood what was going on can only have come from the missionaries, who do in fact seem to have discussed the nature and implications of the Treaty with them at some length, both in and outside of the Treaty meetings. And here we run head-on into the principal obstacle to providing good answers to the aforementioned questions.

313. This obstacle is the lack of reliable, let alone complete records of what Hobson and the missionaries actually said to Maori at Waitangi on the 5th and 6th of February in 1840. It is in my opinion abundantly clear that Colenso's account of their statements, questions and answers is seriously inadequate in the extent of its coverage, and that some of the material given is not dependable. Comparison with other accounts, such as they are, make this clear, but these accounts do not remedy the deficiencies in Colenso's notes. To some extent they compound the problem, as in the case of Henry Williams' report that an informal meeting took place on the evening of the 5th at which the missionaries explained the proposed Treaty to a number of chiefs "clause by clause, showing the advantage to them of being taken under the fostering care of the British Government"[685], and Bishop Pompallier's reports that he had discussed with chiefs the idea of Maori recognising "a great European chief"[686]. We have no record whatsoever of these discussion other than these brief references. As far as Waitangi is concerned, we are left with little more than a very rough outline of what happened. I have not dealt in detail with the other northern meetings, at Waimate, the Hokianga and Kaitaia, but the European records in relation to these hui appear to be little better and often worse than those for Waitangi, and (as Dame Anne Salmond found when commissioned by the Muriwhenua Tribunal to investigate the question) there are no contemporary records in Maori or by Maori of these events[687].

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[685] Williams' "Early Recollections", as quoted in Carleton, *Life of Henry Williams* Vol. 2 p. 14.
[686] Quoted by P. Low, in "Pompallier and the Treaty", p. 191.
[687] A. Salmond, "Submission for the Waitangi Tribunal – Muriwhenua Land Claim" WAI-45 #F19, p. 2. She concluded that "Apart from some brief notes in Maori scrawled by William Colenso beside one section of his manuscript account of the Waitangi signing of the Treaty, and one short section of the Waitangi debates on February 6 1840, the only contemporaneous Maori language record which appears to have survived of the Treaty transactions at Waitangi, Mangungu and Kaitaia in 1840 is the parchment version of the Maori language text of the Treaty, signed by various chiefs and Europeans at Waitangi, Waimate, Mangungu, Kaitaia, Waitemata and Okiato".

314. As a result of these deficiencies, any appraisal of what was said, what was not said and what was understood by any of the parties during the Treaty-signing process needs to be treated with a good deal of caution. My own view is that the wider historical context of the process best explains what happened. The Crown's representative was sent to New Zealand with a very specific mission: Hobson was under instructions to obtain British sovereignty over the country with the least possible delay, subject to the caveat that the Maori chiefs must give their willing consent to this assumption of authority by the Crown. These instructions were issued for what the Colonial Office, and the missionary societies and humanitarian groups in London, considered to be very good reasons in light of the information available. Simply put, they feared that, unless the authority of the Crown was interposed as a buffer between the 'aborigines' of New Zealand and the juggernaut of European colonization, Maori society would be irreparably damaged within a short space of time. So strong was this fear that the missionary societies were prepared to accept the Crown version of 'systematic colonization' which came as part of the New South Wales package – a development which they had fought tooth and nail only a year or two before. They were still opposed to any assumption of authority by the Crown without informed Maori consent, but by 1839-40 were – like the British Government – firmly convinced that a cession of sovereignty was in the best interests of Maori. As far as we can tell their men on the ground in New Zealand made every effort to support acceptance of the Treaty, and it is most improbable that Hobson (as he himself freely acknowledged) would have met with any success at all without this assistance.

315. There can be no doubt that the missionaries sought to present the Treaty in the best possible light, and no doubt emphasized the protections which the Crown would afford Maori rather than the changes which would occur under the new regime which came with it – although it must be noted that the missionaries themselves would have had only a general idea of what shape that regime would ultimately take. During the period in which the Treaty-signing process was underway the specifics of the land claims process, the Crown land system and the judicial arrangements (for example) had yet to be decided, and no one – including Hobson himself – would have been able to answer Maori questions on such matters with any confidence. The supporters of the Treaty were also faced with considerable opposition from some Europeans in New Zealand, particularly those who

wished to undermine the proposed land-claims investigation process[688], and the efforts of the pro-Treaty factions to counter hostile propaganda of this nature may well have affected the way in which they described the Treaty and its probable consequences. This is not to say that their descriptions were inaccurate, but they probably focused on certain issues at the expense of others. The relatively short space of time available may also have been a factor here. In most cases only a few hours or days of discussion were available before the chiefs involved had to make their decision to sign or reject the Treaty. There is reason to think that many chiefs simply accepted the assurances of the missionaries that – to paraphrase Dandeson Coates – the Treaty was 'a necessary measure, under the actual circumstances of the case', and acted accordingly[689].

316. The Treaty of Waitangi and the May proclamations of sovereignty were the outcome of intense pressures placed on the British Government in 1838-39 to do something about what was seen by all concerned to be an increasingly dire situation in New Zealand – a situation involving a set of problems which had been present, and growing worse for the better part of a quarter-century. The Government decided to adopt the policy direction urged upon it by the missionaries and humanitarians instead of that favoured by an influential body of merchants and colonization companies, and accordingly set out to treat with Maori to obtain their voluntary acceptance of the Queen's authority rather than arbitrarily proclaiming British sovereignty over the Islands. (What might have happened had a different Ministry held power in Britain in 1839 is an interesting – and troubling – question, particularly where Maori property rights post-annexation are concerned). This decision having been made, it was considered necessary to proceed as quickly as possible, in hope that British authority could be put in place before British subjects began to settle there on a large scale. In the event Captain Hobson pushed the Treaty process through to a conclusion in barely four months. It might have been better if a more time had been taken, and more chiefs consulted, but one suspects the outcome would have been the same regardless. The terms of the Treaty were the best Britain was prepared to offer, and for the

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[688] With good reason, insofar as they feared that excessive and ill-founded claims would be at risk. As Prof. Ward has noted, the land claims policy proved to be a major success in this respect. By one estimate more than 56 million acres of New Zealandwere subject to claims. Less than two million acres were considered by the Crown (after Land Claims Commission investigations) to have been alienated, and less than 1.5 million acres were actually alienated. This amounted to less than 5% of New Zealand's area. By comparison, some 8.2% of Fiji, 20% of Samoa, 40% of Vanuatu and 85% of New Caledonia were deemed to have been alienated prior to their annexation. See Ward, *National Overview* (1997) Vol. 1 ¶2.16.2, pp. 64-65. Prof. Ward's reservations about the Land Claims process itself should not be overlooked.

[689] Letter of 22 Oct. 1840 from Coates to Lord Russell, in CMS Home Letterbooks (Outwards) 1838-42, CH/L3 pp. 344-348 (ATL Micro Collection 4/ Reel 66). See ¶291, above.

time they were remarkably liberal. But British sovereignty would probably have been declared sooner rather than later unless extensive opposition to the Treaty had emerged among the chiefs.

317. It was almost inevitable that New Zealand would come under European control of some kind during the 19th century – none of the other of the Pacific islands escaped this fate, and New Zealand's climate and resources offered many attractions. Due to its proximity to the Australian colonies Great Britain was always the imperial power most likely to take such a step. The Treaty which Maori got may not have been the perfect outcome, in hindsight, but the outcome could easily have been much worse had different choices been made in London, or had the British Government decided not to do anything at all at this time. If Britain had not been prepared to offer such a Treaty, or had that Treaty been rejected in whole or in part, it is difficult to see how Maori would have been benefitted in either the short or the long term.

Appendix 1: He Wakaputanga o te Rangatiratanga o Nu Tireni / Declaration of the Independence of New Zealand

A1.1 *He Wakaputanga o te Rangatiratanga o Nu Tireni*[690]

1. Ko matou, ko nga Tino Rangatira o nga iwi o Nu Tireni i raro mai o Hauraki kua oti nei te huihui i Waitangi i Tokerau i te ra 28 o Okatopu 1835, ka wakaputa i te Rangatiratanga o to matou wenua a ka meatia ka wakaputaia e matou he Wenua Rangatira, kia huaina, Ko te wakaminenga o nga Hapu o Nu Tireni.

2. Ko te Kingitanga ko te mana i te wenua o te wakaminenga o Nu Tireni ka meatia nei kei nga Tino Rangatira anake i to matou huihuinga, a ka mea hoki e kore e tukua e matou te wakarite ture ki te tahi hunga ke atu, me te tahi Kawanatanga hoki kia meatia i te wenua o te wakaminenga o Nu Tireni, ko nga tangata anake e meatia nei e matou e wakarite ana ki te ritenga o o matou ture e meatia nei e matou i to matou huihuinga.

3. Ko matou ko nga tino Rangatira ka mea nei kia huihui ki te runanga ki Waitangi a te Ngahuru i tenei tau i tenei tau ki te wakarite ture kia tika ai te wakawakanga, kia mau pu te rongo kia mutu te he kia tika te hokohoko, a ka mea hoki ki nga tauiwi o runga, kia wakarerea te wawai, kia mahara ai ki te wakaoranga o to matou wenua, a kia uru ratou ki te wakaminenga o Nu Tireni.

4. Ka mea matou kia tuhituhia he pukapuka ki te ritenga o tenei o to matou wakaputanga nei ki te Kingi o Ingarani hei kawe atu i to matou aroha nana hoki i wakaae ki te Kara mo matou. A no te mea ka atawai matou, ka tiaki i nga pakeha e noho nei i uta, e rere mai ana ki te hokohoko, koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei wakakahoretia to matou Rangatiratanga.

Kua wakaetia katoatia e matou i tenei ra i te 28 Okatopa, 1835, ki te aroaro o te Reireneti o te Kingi o Ingarani.

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690 Transcript from the copy of the original in H.H. Turton, H.H., ed., *Facsimiles of the Declaration of Independence and the Treaty of Waitangi* (Wellington: 1877). Signatures have not been reproduced. According to Busby, the Maori text was "in the hand writing of the son of a chief". See *Sydney Herald* 6 July 1840, "Legislative Council" (report of proceedings on 30 June 1840).

A1.2 *Declaration of the Independence of New Zealand*[691]

1. We the Hereditary Chiefs and Heads of the Tribes of the Northern parts of New Zealand, being assembled at Waitangi, in the Bay of Islands, on this 28th day of October 1835, declare the Independence of our Country: which is hereby constituted and declared to be an Independent State, under the designation of "The United Tribes of New Zealand".

2. All Sovereign power and Authority within the Territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively, in the Hereditary Chiefs and Heads of Tribes in their Collective Capacity: who also declare that they will not permit any Legislative Authority separate from themselves in their Collective Capacity to exist, nor any function of Government to be exercised within the said Territories, unless by persons appointed by them and acting under the Authority of Laws regularly enacted by them in Congress assembled.

3. The Hereditary Chiefs and Heads of Tribes agree to meet in Congress at Waitangi in the Autumn of each year, for the purpose of framing laws for the dispensation of Justice, the preservation of peace and good order, and the regulation of Trade, and they cordially invite the Southern Tribes to lay aside their private Animosities and to consult the Safety and Welfare of our Common Country by joining the Confederation of the United Tribes.

4. They also agree to send a Copy of this declaration to His Majesty the King of England to thank him for his acknowledgment of their Flag. And in return for the friendship and protection they have shewn, and are prepared to shew to such of His subjects as have settled in their Country or resorted to its shores for the purposes of Trade, they entreat that he will continue to be the parent of their infant State, and that He will become its protector from all attempts upon its Independence.

Agreed to unanimously on this 28th day of October 1835, in the presence of His Britannic Majesty's Resident.

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[691] Transcript from Busby's "Correct Copy" enclosed in Despatch #69 of 31 October 1835, from Busby to CSNSW: Dixson DL N Ar/1 #36/81. The references to signatures and witnesses have not been reproduced. This was the official English translation of the Declaration sent to New South Wales and Britain in 1835. It bore the following certification, signed by Busby: "I certify that the above is a Correct Copy of the Declaration of the Chiefs, according to the Translation of Missionaries who have resided ten years and upwards in the Country: And it is transmitted to His Most Gracious Majesty the King of England at the unanimous request of the Chiefs". It seems rather unlikely, however, that after Busby's English draft was translated into Maori the Maori version was then translated back into English. In all probability, the "translation" is in fact very similar (if not identical) to Busby's original English draft.

Appendix 2: J.D. Lang and Annexation

A2.1 The Rev. John Dunmore Lang, a Presbyterian minister from New South Wales, later claimed that the Government's plans for New Zealand were greatly influenced by his pamphlet *New Zealand in 1839: or Four Letters to the Right Hon. Earl Durham, Governor of the New Zealand Land Company, &c. &c. &c. On the Colonization of that Island, and on the present condition and prospects of its native inhabitants*[692], which according to its author was published in London on the 7th or 8th of July in 1839[693]. It must be said that the fourth letter in this collection, dated June 1839, "On the Principles on which a British Colony in New Zealand ought to be Established and Conducted", laid out a plan which is very similar in many details to that actually followed by Gipps and Hobson, particularly where pre-emption, land claims and land policy in general were concerned.

A2.2 The principle difference is that Lang (who strongly believed that British intervention was necessary to protect Maori) advocated the immediate assumption of sovereignty over the whole of New Zealand by the Crown. Such an action, he proposed, could be based upon Captain Phillip's Commission of 1787, and was in any case justified by "sheer necessity; a principle which ... is superior to law, or rather which creates a law for itself", in that "It is absolutely necessary, on the one hand, that a regular and energetic Government should be established forthwith in that island; but the native chiefs are utterly incapable, on the other, of forming such a Government for themselves". Writing in 1873 (in a second edition of the book published in Sydney) Lang claimed that to his knowledge Hobson obtained a copy of the pamphlet as soon as it was published in London, and "highly approved of it ... and considered the course it recommended ... as the only one that ought to have been adopted in the case"[694]. (As well he might, given that the Captain had recommended an immediate assumption of sovereignty in his 21 Jan. 1839 memorandum: see ¶167-168, above). Subsequently, Lang declared, "precisely the same course as I had recommended was virtually pursued" by the Government. By 'virtually' he meant that although the Government declared that the cession of sovereignty by Maori was necessary,

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[692] London: Smith, Elder and Co., 1839. Lang had stopped off in New Zealand for a time on a voyage from Sydney to Britain, which he had reached a month or so earlier.
[693] *New Zealand in 1839*, (Sydney: Republished, 1873), "Appendix for 1878", p. 87.
[694] "Appendix for 1878", p. 88.

> a Government was actually established and laws passed for New Zealand by the legislature of New South Wales from the very first. And can any person suppose that anything of the kind could have been done by the mere authority of a Secretary of State, if New Zealand had not been included in the original Commission of 1787, as a virtual Dependency of New South Wales? In that case the proceeding of the New South Wales Legislature was regular and appropriate, whereas it would otherwise have been a piece of monstrous usurpation. [695]

A2.3 There are at least two problems with Lang's claims. One is that as far as we know Hobson's August instructions were, subject to a few minor alterations, already in existence by 9 July. It seems quite unlikely that the pamphlet would have had such an immediate impact on James Stephen as to affect the instructions which he produced a day or two after it appeared, and Lang himself does not claim to have met with Colonial Office officials before its publication (or after, for that matter). Secondly, the Legislative Council of New South Wales passed no laws respecting New Zealand before it knew that some Maori had already ceded their sovereignty to the Crown through the Treaty of Waitangi[696]. It would appear that Lang and the officials at the Colonial Office had reached similar conclusions from different directions at approximately the same time, and that what Lang took to be influence was only coincidence.

[695] "Appendix for 1878", p. 88.

[696] The first such law, passed on 16 June 1840, was "An Act to Declare that the Laws of New South Wales extend to Her Majesty's Dominions in the Islands of New Zealand; and to apply the same so far as applicable, in the Administration of Justice therein and to Indemnify certain Officers for Acts already done" (New South Wales 3 Vic. No. 28).

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