

TREATY-MAKING IN THE PACIFIC IN THE NINETEENTH CENTURY AND THE TREATY OF WAITANGI

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This paper discusses the history of treaty-making between Pacific island nations and European powers during the nineteenth century in order to assess the validity of the Treaty of Waitangi at international law. The author also draws some brief comparisons with treaty-making in Africa. The particular focus of the paper is an assessment of how the colonial powers would have viewed a document such as the Treaty. The conclusion of the paper is that the signatories would have presumed that the Treaty would have serious effect, and would be binding in international law.

Editor's note: This paper was originally written in 1987 as part of the Administrative Law LLM course at Victoria University of Wellington. After it was recently cited with approval in Sir Kenneth Keith's article "Public Law in New Zealand" (2003) 1 New Zealand Journal of Public and International Law 3, it transpired that access to the paper was very limited. Despite its age, and the fact that much scholarship has been done in the intervening time, on the Treaty in particular, the material is still of considerable interest. Some changes have been made to the original text to cater for the passage of time.

I INTRODUCTION

The Court of Appeal decision in *New Zealand Maori Council v Attorney-General*¹ removed all doubts that the Treaty of Waitangi would be a central element in the public law of New Zealand for the remainder of the century and beyond. It may therefore seem unnecessary to examine again the vexed question of whether the Treaty of Waitangi is a valid treaty according to the customs and usages of international law. Much has already been written on this subject. The opinion of early commentators was that the Treaty clearly was not valid at international law.² Later twentieth century

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1 *New Zealand Maori Council v Attorney General* [1987] 1 NZLR 641 (CA).

2 See James Rutherford *The Treaty of Waitangi and the Acquisition of British Sovereignty in New Zealand 1840* (Auckland University College, Auckland, 1949); John Lochiel Robson *New Zealand: The Development of its Laws and Constitution* (Stevens, London, 1953); and Norman Arthur Foden

writers questioned this view.³ The issue remains important even now because it is part of a wider debate about the validity at international law of all treaty engagements of the colonial powers with "native" peoples.

International law writers of the nineteenth century proposed at least six distinct sources of this law:⁴

- (1) The opinions of writers of authority;
- (2) Treaties concluded between states;
- (3) The ordinances and laws of states;
- (4) The adjudications of tribunals;
- (5) The written opinions of legal advisors to their governments;
- (6) The general history of negotiations and transactions between states.

To determine if the Treaty of Waitangi is a document creating rights and obligations of a binding international character, and was regarded in this light when it was signed in 1840, it is necessary to see if it fulfilled the norms of international law arising from these sources.

This paper will begin by analysing the opinions of the writers of authority on international law to see how they regarded treaties made between European nations and "native" peoples. Then, rather than examining once again the events and writings relating directly to the signing of the Treaty, it will be viewed in the wider contemporary treaty-making context of the Pacific region. A central question to be considered is whether the theory of the law accorded with the practice.

After a brief discussion of the experience of the colonising powers in Africa, treaties and treaty-making practices in the Pacific in the nineteenth century will be examined to gain an understanding of how these agreements were regarded when they were concluded. The form of them will be looked at to see if they are similar to international treaties concluded in Europe and on the American

Constitutional Development of New Zealand in the First Decade 1839-1849 (LT Watkins, Wellington, 1938).

- 3 Kenneth J Keith "International Law and New Zealand Municipal Law" in John Frederick Northey and Arthur Geoffrey Davis (eds) *The AG Davis Essays in Law* (Butterworths, London, 1965) 130, 137; and Warren Arthur McKean "The Treaty of Waitangi Revisited" in Victoria University of Wellington Department of University Extension (ed) *The Treaty of Waitangi: its Origins and Significance* (series of papers presented at a seminar held at Victoria University of Wellington 19-20 February 1972, Victoria University of Wellington Department of University Extension, Wellington, 1972) 35, 35. See also, John David Sutton "The Treaty of Waitangi Today" (1981) 11 VUWLR 17.
- 4 Henry Wheaton *Elements of International Law* (8 ed, Boston, Little, Brown and Company, 1866) 23-27; literal reproduction of the 1866 edition (Clarendon Press, Oxford, 1936) 20-23 [*Elements of International Law* (1866)].

continent at the time. The manner of their signing will also be investigated. Did the non-colonial parties intend to be bound, and did they take actions to indicate that they considered the treaties to create obligations at international law? By answering these questions it will be possible to see where the Treaty of Waitangi fits into this treaty-making practice, and some brief conclusions will be drawn as to whether and in what ways the Treaty should be viewed as a valid treaty at international law.

II THE NINETEENTH CENTURY THEORY

According to international law theory, treaties are only valid if made between the subjects of international law, which are states. Therefore, when Prendergast J in *Wi Parata v The Bishop of Wellington*⁵ called the Treaty of Waitangi a "simple nullity" because "no body politic existed capable of making cession of sovereignty" he was expressing this basic proposition.

What is a state and how was it defined by the nineteenth century jurists? The existence of a state is a matter of fact and not of law, but the jurists laid down some criteria. Henry Wheaton in his *Elements of International Law* in 1866 wrote:⁶

The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied.

He also added that "an unsettled horde of wandering savages not yet formed into a civil society" could not be a state. He did not specify more exactly which territories should be regarded as states.

An English jurist, John Westlake, writing in 1895, did:⁷

The international society to which we belong, and of which what we know as international law is the body of rules comprises – First, all European states ... Secondly, all American states ... Thirdly, a few Christian states in other parts of the world ...

Lawrence Oppenheim in 1905 was also explicit. In order for a "State" to become a fully functioning member of the international community it must, inter alia, "be a civilised State which is in constant intercourse with members of the Family of Nations."⁸ In his 1929 edition of *Elements of International Law* Wheaton noted that "the gradual extension of relations among States has enlarged the field within which international law is applicable" and set down three conditions for the recognition of a state, the first being that it "have a form of civilization which renders it able to

5 *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) 72,78 (SC).

6 *Elements of International Law* (1866), above n 4, 26; 30.

7 John Westlake *Chapters on the Principles of International Law* (University Press, Cambridge (Mass), 1894) 81.

8 Gerrit W Gong *Standard of 'Civilisation' in International Society* (Clarendon Press, Oxford, 1984) 30.

apply the rules of that [international] law, and it must be in communications with the States already enjoying it."⁹

International law therefore, applied only between civilised nations. Historically, as Westlake, Oppenheim and others pointed out, these were initially the Christian states of Europe. In order to be a nation subject to the law and able to deal with these other nations a prospective "State" had to be tacitly or expressly "civilised" and then be accepted into the existing community. The standard of civilisation was obviously high. Westlake thought that "a government after the manner of the Asiatic empires ... would be sufficient".¹⁰

These later writers had gone beyond Wheaton's simple definition of a state. Until a state became civilised to the standard required for recognition by the European community, the European nations owed no duties at international law to it. Therefore any treaties made by European nations with, as yet, "uncivilised" peoples could not be enforced against these European nations as valid treaties at international law. Nor did the European nations owe any duties at international law under such treaties.

Obviously, by these criteria, Aotearoa¹¹ could not be recognised as a "civilised" state in 1840. Thus the treaty made with Maori chiefs could not have any validity at international law.

But that is not the end of the story. Some twentieth century writers, re-examining the development of legal thought in the last century, argued that the "civilised" or "uncivilised" distinction in international law was an exclusively nineteenth century development and part of a current of thought labelled "positivism" which ignored some of the arguments and assumptions of the early theorists, as well as state practice. There is also evidence of contemporary resistance to this thinking. Alexandrowicz describes the process in relation to the situation in Africa:¹²

9 Henry Wheaton *Elements of International Law* (6 ed, Stevens and Sons, London, 1929) vol 1, 30 [*Elements of International Law* (1929)].

10 Westlake, above n 7, 141.

11 The name "Aotearoa" will be used instead of "New Zealand" since a Maori name is more apt for the period this paper deals with.

12 Charles Henry Alexandrowicz *The European-African Confrontation. A Study in Treaty Making* (Sijthoff, Leiden (Netherlands), 1973) 6 [*The European-African Confrontation*]. See also Ram Prakash Anand "Role of the 'New' Asian-African Countries in the Present International Order" (1962) 56 AJIL 383; Daniel Patrick O'Connell "International Law and Boundary Disputes" [1960] *American Society of International Law: Proceedings* 77; Clarence Wilfred Jenks *The Common Law of Mankind* (Praeger, New York, 1958) 66-77; Taslim Olawale Elias *Africa and the Development of International Law* (Sijthoff, Leiden (Netherlands), 1972); A Kodwo Mensah-Brown (ed) *African International Legal History* (United Nations Institute for Training and Research, New York, 1975); Joop J G Sytaun *Some Newly Established Asian States and the Development of International Law* (M Nijhoff Publishers, The Hague, 1961); Charles Henry Alexandrowicz *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon Press, Oxford, 1967) [*An Introduction to the History of the Law of Nations in the East Indies*].

The Europeans arriving in Africa at first brought with them a law of nations based on the natural law ideology which started fading out in the nineteenth century, giving way to positivism. Positivism discarded some of the fundamental qualities of the classic law of nations, particularly the principle of universality of the Family of Nations irrespective of area, race, colour and continent ... International law shrank into a Euro-centric system which imposed on extra-European countries its own ideas ... It also discriminated against non-European civilisations and thus ran on parallel lines with colonialism as a political trend.

Undoubtedly the early "founders" of international law believed it to be a universal system of natural law "which native reason has established among all human beings, and which is equally observed by all mankind."¹³ So when exactly did this change in ideas occur?

It first seems to have been fully articulated in Wheaton's 1866 edition of *Elements of International Law*, where he asked:¹⁴

Is there a uniform law of nations? There certainly is not the same one for all the nations and States of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilised and Christian people of Europe or to those of Christian origin.

He then went on to say that early writers like Grotius, Bynkershoek, Leibnitz and Montesquieu had noted the difference between the "European law of nations" and "that of other races of mankind." Cornelius van Bynkershoek wrote "the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, *at least certainly among the greater part, and those the most civilized.*"¹⁵ Wheaton concluded:¹⁶

There is then, ... no universal law of nations, ... binding upon the whole human race – which all mankind in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan have recognized in theory or in practice, have professed to obey, or have in fact obeyed.

Wheaton here was at variance with earlier writers in asserting that there is no "natural" element to international law which is founded on inherent human reason. He went too far if he was suggesting that writers like Bynkershoek would have limited the "public law" to the "Christian people of Europe." Bynkershoek believed the law of nations applied to "if not all, at least certainly among the greater part" of the nations of the world. This clearly implies countries outside of Europe.

13 Clarence Wilfred Jenks *The Common Law of Mankind* (Praeger, New York, 1958) 66-69 proves this point conclusively.

14 *Elements of International Law* (1866), above n 4, 17-18; 15.

15 As quoted in *Elements of International Law* (1866), above n 4, 18; 15-16 (emphasis in original).

16 *Elements of International Law* (1866), above n 4, 17-18; 16.

But Wheaton did not suggest here, as he and others later did, that the practice of the Christian European nations was the only possible source of international law. Quoting Savigny, he certainly observed that "the progress of civilisation, founded on Christianity" saw the European nations move to give "imperfect" international law a "solid base". But he went on to note:¹⁷

... [T]he more recent intercourse between the Christian nations in Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom.

This suggested only that the public law of Europe should be preferred to the "peculiar international usages" of the non-European states. It did not go so far as to suggest that those territories outside the European public law not being "civilised" had no law which would bind or affect the European states. It certainly did not support the conclusion that a treaty between a Christian and a non-Christian state could be regarded by the Christian state as a simple nullity. If the Christian state decided to accept the "peculiar international usages" of other nations, then supposedly it must abide by them.¹⁸ Nor did Wheaton here lay down rigid rules for entry to a European based community of nations. These seem to be developments of his thought during the later nineteenth century, along with authors like Westlake, Oppenheim and Hall and, still later, Holland.

Nor were these developing views the only ones in existence in the nineteenth century. Kent, for example, writing in 1866, highlighted the pre-eminence of the Christian nations in the area of international law, and yet maintained that a universal, natural law of nations remained:¹⁹

International law, so far as it is in accordance with principles of justice, truth and humanity, is equally binding in every age, and upon all mankind. But the Christian nations of Europe ... and their descendants across the Atlantic, by the vast superiority of their attainments in arts and science, and commerce, as well as in policy and government, and above all, by the brighter light, ... which

17 *Elements of International Law* (1866), above n 4, 22; 19.

18 This contention is supported by the fact that Henry Wheaton in *Elements of International Law* (1866), above n 4, 58; 49 quotes with approval Bynkershoek's observation that:

The Algerines, Tripolitans, Tunisians and those of Salee are not pirates, but regular organized societies who have a fixed territory and an established government ... and who, therefore, are entitled to the same rights as other independent States. The European sovereigns often enter into treaties with them ... All these things are to be found among the barbarians of Africa; for they pay the same regard to treaties ... that other nations do

Clearly both Bynkershoek and Wheaton (at this time at least) envisaged a wide scope for the international law.

19 John Thomas Abdy (ed) *Kent's Commentary on International Law* (2 ed, Stevens and Sons, London, 1878) 8.

Christianity has communicated to the ethical jurisprudence of the ancients, have established a system of law peculiar to themselves.

Halleck, an American jurist who first published in 1861, also maintained a belief in "a certain divine or natural law" underpinning the international law, even though he repeated Wheaton's assertion that no one law had been adhered to by all nations at any time.²⁰ He did not discuss any distinctions between "civilised" and "uncivilised" countries, merely noting the isolated case of the American Indians, with whom international treaties had been made but who were not treated as full members of the international community.²¹

Some writers disliked the implications of the "civilisation" distinction, which left it entirely in the hands of the European powers to determine what obligations they had by treaty with "civilised" states and which therefore had legal force, and those they had by treaty with "uncivilised" states, which did not. James Lorimer maintained that this left the European powers essentially in the position of being judges in their own cases and removed all certainty from the application of international law.²² Robert Philimore, who published in the 1850s, also disliked this idea:²³

... [I]nternational law is not confined in its application to the intercourse of Christian nations, still less, as it has been affirmed of European nations, but that it subsists between Christian and Heathen, and even between two Heathen nations, though in a vague manner and less perfect condition than between two Christian communities ... But if the precepts of Natural Law are obligatory upon Heathen States in their intercourse with each other, much more are they binding upon Christian Governments in their intercourse with Heathen States ... The great point, however, to be established is that the *principles* of international justice do govern, or *ought* to govern the dealings of the Christian with the Infidel Community ...

This suggests that a more rudimentary form of international law (but not quite natural law) operated as between Christian (that is, civilised, European) and Heathen (that is, uncivilised, non-European) states but to what degree Philimore left uncertain.

20 Sir G Sherston Baker (ed) *Halleck's International Law* (4 ed, Kegan Paul, London, 1908) 57.

21 Baker, above n 20, 81.

22 Quoted in Gong, above n 8, 61. O'Connell, above n 12, 77 and 81 wonders about the link between these ideas and the "Act of State" doctrine.

23 Robert Philimore *Commentaries upon International Law: Volume 1* (2 ed, London, Butterworths, 1871) 20 onwards.

A further commonly accepted view of the identity of a people with whom a treaty could be concluded was supplied by Lindley, in his study *The Acquisition and Government of Backward Territories at International Law* summed up state practice in a way which applies to the Pacific:²⁴

... [I]f territory is uninhabited, or is inhabited by a number of individuals who do not form a political society, then the acquisition may be made by Occupation. If the inhabitants exhibit collective political activity which, although of a crude and rudimentary form, possesses the elements of permanence, the acquisition can only be made by way of Cession or Conquest or Prescription.

Two main conclusions emerge from this analysis. First, there are, according to international law writers, rudimentary criteria, namely some form of leadership and permanent settlement, required of a body of people before they can claim to be a state. Secondly, from about 1836, there developed a split among jurists, with some beginning to maintain that the international law originated in Europe, and that only territories governed in a similar manner to the "civilised" European states and recognised by them could enjoy the full benefits of international law. These ideas developed slowly however and only became dominant from the late nineteenth century.²⁵ However they had serious implications for documents like the Treaty of Waitangi. Agreements signed with "native princes or chiefs of people not recognised as members of the community of nations" were not, according to a 1925 legal opinion "in the international law sense treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties ...".²⁶ The only practical legal effect they would have, if any, was to bolster the claim of European states to possession of territory as against other European states.

III THE NINETEENTH CENTURY PRACTICE

A The Colonial Powers in the Pacific

According to the theory of international law explained above, the Treaty of Waitangi might not have been seen as a valid treaty because it was made with "savages" who had not yet formed into a recognisable political body or "State". To test whether this is correct, it is useful to ask whether this same statement was seen as true of other peoples living in the Pacific territories. How did the colonial powers entering the region in the nineteenth century deal with them?

As indicated by Lindley, above, international law at the time recognised three main methods for claiming sovereignty over territories.²⁷ The first was by right of discovery, followed up by effective

24 Mark Frank Lindley *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (reprint of the 1926 ed, Negro Universities Press, New York, 1926) 44.

25 O'Connell, above n 12, 81 calls these ideas the inventions of English authors of "the late 19th century."

26 *Island of Palmas case* (1928) 2 RIAA 829, 858 Huber J.

27 There is one other method, "prescription", which need not be considered here.

occupation. This operated if the territory to be taken could be regarded as *terra nullius*, that is, it was uninhabited (or inhabited only by a few nomadic people) and unclaimed by any state. The second means was the taking of sovereignty by cession from the inhabitants. This presupposed that the existing inhabitants had the sovereignty of the territory to dispose of. The third major means was by conquest, forcibly taking the sovereignty from the existing holders.

If the Pacific peoples were indeed "savages" without any recognisable political organisations, who wandered over, but did not, and indeed could not, lay any claim to the sovereignty of these territories, it would be expected that the first means would be adopted by the colonising powers and they would regard the territories as *terra nullius*. Was this in fact the case?

On 22 August 1770 Captain James Cook took possession by discovery of the eastern coast of Australia in the name of George III. This was the first effective legal interest which the colonial powers took in the Pacific region. Earlier claims to possession by discovery had been made, for example by Britain and France to Tahiti in 1767 and 1768, but nothing came of these. A claim to Aotearoa by discovery by Cook himself in 1769 and later by Chevalier du Clesmeur for France in 1772 likewise failed to have any practical legal effect. Parry's *Consolidated Treaty Series* records the Treaty of Waitangi as the first British treaty, signed in the Pacific.²⁸ In fact, Britain had purported to take title to Hawaii by cession as early as 1794. When Cook made the first British landing there in 1778-1779 he found a complex society.²⁹ Between this date and the second landfall by Captain George Vancouver in 1792 the kingdoms which controlled the main island of Hawaii had consolidated under one king, Kamehameha I.

After a year of discussions, Vancouver took a cession of the island in 1794 by what appears to have been an oral agreement.³⁰ Thereafter Hawaii had close relations with Britain, with the succeeding king, Kamehameha II visiting Britain in 1823. In 1836 an agreement was signed setting out the rights of British subjects in the islands.³¹ Britain never enforced the cession however, and was content to maintain a position of equality with other powers like France and the United States who also had interests there.³² This situation was accepted by the three nations, although the

28 Treaty of Waitangi (5/6 Feb 1840) 89 CTS 473.

29 Ralph Simpson Kuykendall *The Hawaiian Kingdom (Volume 1: 1778-1854: Foundation and Transformation)* (University of Hawaii, Honolulu, 1938) 12-20.

30 George Vancouver *A Voyage of Discovery to the North Pacific Ocean and Round the World: Volume 5* (2 ed, Printed for John Stockdale, London, 1801) 27-28, 47-53, 80-81, the cession itself 88-97; Kuykendall, above n 29, 41-43.

31 Kuykendall, above n 29, 147-148.

32 Kuykendall, above n 29, 186.

arrangement nearly broke down when the islands were provisionally ceded to Britain in 1843.³³ London refused to ratify the action.

The Hawaiian Government, although under heavy American influence, retained its independence for most of the remainder of the century, with all four of the colonising powers concluding treaties with it. France made four treaties between 1837 and 1846, Britain six between 1843 and 1869,³⁴ and the United States made five treaties with the monarchy. In 1871 Hawaii made a treaty with Japan.³⁵ In 1886 the King even took tentative steps to form a federation with Samoa.³⁶ The monarchy was overthrown in 1891 by a group composed largely of American-born residents, who declared a republic and awaited annexation by the United States Government. This did not come until 1898.³⁷

John Manning Ward, in his book *British Policy in the South Pacific (1786-1893)*, notes another early and "unambiguous" recognition of island sovereignty by the British Government.³⁸ In 1827 the Foreign Office replied to a plea for protection from the chiefs of Tahiti in terms which implied that that country was viewed as a sovereign state under its Queen, Pomare. Samuel Wallis had claimed the islands for Britain in July 1767. Just nine months later the explorer Bouganville claimed them for France. Six years later the Spanish purported to take possession also. None of these actions had any practical legal effect. Tahiti remained independent of the colonising powers, even striking up a valuable pork trade with New South Wales from 1800.³⁹

In 1842, Queen Pomare, under pressure from France, invited the Government of that country to establish a protectorate over the islands. The British Government refused to recognise this action or the subsequent French annexation of the islands in 1843. On this last action France eventually backed down and Tahiti remained only a French protectorate till 1880 when its ruler unilaterally offered the full sovereignty of "Tahiti and dependencies" to France, retaining "all the guarantees of property and liberty" for Tahitians.⁴⁰ Despite the short period of complete independence, both

33 Jean Ingram Brookes *International Rivalry in the Pacific Islands 1800-1875* (University of California Press, Berkeley, 1941) 132-133.

34 Not counting the abortive cession of 1843.

35 Brookes, above n 33, 345.

36 Glen St John Barclay *A History of the Pacific from the Stone Age to the Present Day* (Sidgwick and Jackson, London, 1978) 120-121.

37 Barclay, above n 36, 123-124.

38 John Manning Ward *British Policy in the South Pacific (1786-1893)* (Australian Publishing Co, Sydney, 1948) 72-73.

39 New South Wales treated the islands as a dependency at this time however. See Barclay, above n 36, 64-65.

40 Colin Walter Newbury *Tahiti Nui: Change and Survival in French Polynesia 1767-1945* (University Press of Hawaii, Honolulu, 1980) 201-202 ["Tahiti Nui"].

France and the United States concluded treaties with Tahiti before 1843, and France took the protectorate in that year by a formal treaty also.

The first recorded treaty made with "the Government of the Samoan Islands" was by the United States in 1878.⁴¹ One year later treaties were concluded with Britain and Germany, although British influence in these islands had been ongoing since 1837-1838 when Captain Bethune of HMS Conway had organised two meetings of the principal chiefs and assisted them in drawing up port regulations.⁴² In 1877 the King of Samoa asked Britain to take the islands under its protection. The appeal was declined. A similar fate attended an earlier appeal in 1865 and an offer of sovereignty in 1859.⁴³

A similar situation developed here as in Hawaii, with no sovereign rights claimed by any one colonial power, but a strong foreign presence (this time British) in the local government. In 1844 the British and French Governments formally recognised Samoan independence. The next four decades saw this independence eroded by the extensive influence of the British, German and United States in the local administration, but always it was precariously retained. The resulting situation, as one critic described it, was that:⁴⁴

Apia had no regular wharf, no public school, no fire-control equipment, no proper footpath. But there were five different courts there in which a case of common assault might be heard.

The independence of Samoa was again noted in 1889 by the British, German and United States Treaty of Berlin, but after a civil war and the breakdown of local government in 1899, this and other declarations were simply left to one side and the islands carved up between German and American interests, with Britain taking German treaty rights in Tonga in exchange for its Samoan rights.⁴⁵

Full legal rights were not entered into with Fijian rulers until 1857 and 1858 when treaties were concluded with the United States and France respectively. These dealt with the protection of missionaries and equal trading rights.⁴⁶ In 1858 King Cakobau offered to cede the islands to Britain. After lengthy consideration of the offer the British Government refused it – mainly on practical rather than legal grounds.⁴⁷ In 1870 two appeals were made to Britain to establish a protectorate,

41 Treaty between Samoa and the United States (17 January 1878) 152 CTS 313.

42 Richard P Gilson *Samoa 1830 to 1900: The Politics of a Multi-Cultural Community* (Oxford University Press, Melbourne, 1970) 147.

43 Ward, above n 38, 155-156.

44 Gilson, above n 42, 404.

45 Convention between Germany, Great Britain and the United States (16 February 1900) 188 CTS 181.

46 Ronald Albert Derrick *A History of Fiji: Volume 1* (Government Printer, Fiji, 1946) 137.

47 Derrick, above n 46, 147-148.

and appeals were made in the same year also to the United States and Germany.⁴⁸ Clearly these powers were happy to recognise the existing government. Britain even extended de facto recognition to the Fiji administration in 1871.⁴⁹ Three years later however, Britain accepted a formal offer of cession, largely because of the continued inability of Cakobau and his supporters to balance Fijian and colonial interests in a manner satisfactory to the colonisers.

The first European missionaries to enter Tonga found there a very old kingdom in the midst of political upheaval. Rival power groups were fighting to gain overall control of the islands and unite them under a single ruler as had been the norm in the sixteenth and seventeenth centuries when the kingdom was more settled. By 1852 the reunification process was complete, but even before this, in 1839 and 1850, the emerging king, Taufaahua (whose English name was "King George") had promulgated written codes of law which dealt with criminal offences, the setting up of courts, sexual prohibitions, religious observances, the powers of local chiefs and the cultivation of lands.⁵⁰ In 1875 a constitution containing 132 articles was drawn up.⁵¹ It is not surprising, therefore, that the colonising powers regarded the islands as being an independent political entity. France concluded a treaty with the Tongan king in 1855, Germany followed with one in 1876, Britain concluded three after 1879 and the United States one in 1886. From 1890, Britain came to exercise a virtual protectorate power in the islands, but legally, the full sovereignty over them was never claimed by or granted to any colonising power.

These were then the major island groups with which the colonising powers had contact. They certainly were not regarded as *terra nullius*. This would appear to be because there was in each an authority readily recognisable to the colonists, such as a monarchy which had under its control considerable numbers of people. But what of the islands where this was not so; where the populations were small and scattered and where authority appeared to exist at a more localised, chiefly level? Their situation was, in some ways, more akin to that of Aotearoa, where no overall authority figure existed. The territory in question might therefore more readily be regarded as *terra nullius*, with no entity having the legal or political capacity to lay a claim to sovereignty over it.

Parry's collection only records one British treaty with an island group of this sort – with Savage Island (Niue) in 1900, which established a protectorate there.⁵² There were however many other

48 Ward, above n 38, 195.

49 Ward, above n 38, 211.

50 Sione Latukefu *The Tongan Constitution: A Brief History to Celebrate its Centenary* (Tongan Traditions Committee, Nukualofa (Tonga), 1975) 20-27.

51 Latukefu, above n 50, 41; 90-115.

52 Title of treaty (date of signature) 188 CTS 387. However, New Zealand annexed Niue shortly after this without further negotiation. See William Parker Morrell *Britain in the Pacific Islands* (Clarendon Press, Oxford, 1960) 297.

formal agreements with local Pacific rulers which indicate that even the most thinly inhabited and smallest of territories were not regarded by the British colonisers as *terra nullius*. In 1889 the High Commissioner for the Western Pacific, Sir John Thurston, asked for permission to "make a treaty or treaties with the respective Gilbert and Ellice Island (now Kiribati and Tuvalu) chiefs" providing for the regulation of trade and the presence of a British Resident there.⁵³ Up to this time, these islands were within the British "sphere of influence",⁵⁴ but no legal claims had been made with regard to them. In 1892 Britain took a protectorate over the Gilbert Islands. No formal treaties were concluded, but Morrell describes the following process:⁵⁵

On 22 April Captain EHM Davis of HMS Royalist was given his sailing orders. Landing on Abemama on 27 May, he explained his mission to the chief ... and his council in the maniaba or meeting house in the presence of three or four hundred islanders. No taxes would be levied without their consent; their laws and their customs in their relations with one another would not be interfered with. If they 'wished a white man to reside in the group for their better protection' they must contribute to his support. The queen would protect any of them who accepted any engagements within her realms but could not do so outside. Davis then read a proclamation declaring a protectorate and hoisted the Union Jack.

Davis repeated this process in the twelve other islands of the group. While no formal treaty was concluded there is evidence here of negotiation (albeit somewhat limited) by the British Government and an intention to gain the active consent of the local rulers. The territory does not appear to be *terra nullius*.

This method of "declaring a protectorate" appears to have been standard practice in the Pacific. The Ellice Island group became a British protectorate in exactly the same manner later that year.⁵⁶ Just one year later, in June 1893, a British naval captain called several meetings of the Solomon Island chiefs and explained to them that a protectorate was to be declared.⁵⁷ This looks to have been a more dubious undertaking than the Gilbert and Ellice affair as some chiefs rejected the proclamation of protectorate and in 1894,⁵⁸ Sir John Thurston, reporting on the practical possibility of enforcing this protectorate, noted that the situation was worse than in the Gilbert Islands – no treaties could be made because in his view no competent local authorities existed.⁵⁹ Thurston's

53 Morrell, above n 52.

54 This had been decided by an Anglo-German agreement in 1886.

55 Morrell, above n 52, 274.

56 Morrell, above n 52, 277. This process had parallels in the signing of standard form treaties in Africa: see Part III B The African Background.

57 Morrell, above n 52, 345.

58 Morrell, above n 52, 345.

59 Deryck Scarr *Fragments of Empire: A History of the Western Pacific High Commission 1877-1914* (Australian National University Press, Canberra, 1967) 259.

comment indicates though, that the British Government still desired to treat the chiefs as if they exercised some sovereign authority over their territories, if this were at all possible.

In New Guinea the situation was similar. On 4 April 1883 at Port Moresby, the Queensland Government claimed possession of these islands for the Queen. The local chiefs were merely told what was happening and handed £50 in goods.⁶⁰ More extensive negotiations were not undertaken because the power of the chiefs was felt to be too small and there were many of them. As one contemporary put it, "there is no native government that could be helped and strengthened to meet the case."⁶¹ Lord Chancellor Selbourne in England felt otherwise and made the interesting comment that the action was:⁶²

... [I]mpolitic in a very high degree and also morally unjustifiable; if it were done without demonstrable necessity and without that sort of invitation and concurrence, on the part of the principal native tribes or their rulers which we had in the case of Fiji.

The annexation was disavowed and a British protectorate instead declared in the same manner as in the other islands at separate meetings with local rulers.⁶³

France excelled over Britain in concluding a total of 14 official treaties with rulers with only small local powers. In New Caledonia, a large territory with no clear central authority over it, the French naval commandant La Ferriere concluded a treaty in 1844 with 13 kings and chiefs ("Rois et Chefs") there.⁶⁴ Despite this, the protectorate was abandoned in 1846 in order to smooth relations with other colonising powers. Then seven years later France took full possession of the island, it seems without further negotiation with the chiefs.⁶⁵ This seems to have been an oversight on the part of France, who probably assumed the 1844 consent sufficed, because the cession of the nearby Isle of Pines in the same month was not taken until the consent of the chief there was obtained.⁶⁶

From April to August in 1842 France signed a series of agreements in the Marquesas Islands by which the chiefs there recognised full French sovereignty.⁶⁷ A protectorate was also taken over

⁶⁰ Morrell, above n 52, 250.

⁶¹ Morrell, above n 52, 251.

⁶² Morrell, above n 52, 251.

⁶³ Morrell, above n 52, 257-258.

⁶⁴ Treaty between France and New Caledonia (1 January 1844) 96 CTS 8.

⁶⁵ Morrell, above n 52, 103; Brookes, above n 34, 201.

⁶⁶ Morrell, above n 52, 103.

⁶⁷ Declaration between France and the Chiefs of the Island of Hivava (Pacific Ocean) (5 May 1842) 93 CTS 173; Agreements between France and Chiefs of the Island of Nukahiva, Mount Tuhiva and Hapou (Pacific Ocean) (31 May, 1 June, 12 June 1842) 212, 213, 214.

Wallis Island by treaty. France had had a treaty relationship with that small territory since 1842.⁶⁸ In the New Hebrides an unusual situation developed. France made a decision not to interfere with local affairs but was happy to promote a settlement by a French company, which then obtained several agreements from the chiefs between 1882 and 1884 for a French protectorate.⁶⁹ Subsequently, these islands became the testing ground of Anglo-French détente. A joint Anglo-French protectorate eventually came to manage them. The sovereignty of the local chiefs, while theoretically untouched by this arrangement, was gradually whittled away.⁷⁰ Nevertheless, there does appear to have been respect for it, if in name only.

Germany similarly, at a formal level, respected the independence of even the smallest of islands. In 1878 a detailed treaty concerning the freedom of trade and the position of German citizens in the Ellice Islands was concluded.⁷¹ Later that year the Marshall Islanders received recognition from the German Government in another trade treaty.⁷² They were to be recognised again when, in 1885, a treaty of protectorate was signed.⁷³

Enough has been said to show that the situation in Aotearoa was not unusual. It was common practice in the Pacific in the nineteenth century to obtain consent from "native" peoples before taking any legal claim over their territories. Sometimes there must have been a fine line between the obtaining of consent, in which case the colonial authority would take a derivative title from the rulers, and a simple proclamation, where it could be said that the colonial party was only informing the rulers of what had already occurred.⁷⁴

There were, inevitably perhaps, some situations where consent was not sought. Part of New Guinea looks to have been annexed to Germany without any consultation with the inhabitants.⁷⁵ Morrell also records that on Nauru Island the local chief was seized, so that the island was taken, in essence, by force.⁷⁶ But these exceptions serve to prove the rule. Thus any assertion that the Pacific

68 Treaty between France and the Wallis Islands (Pacific Ocean) (4 November 1842) 94 CTS 33; Treaty between France and Wallis (Pacific Ocean) (19 November 1886) 168 CTS 293.

69 Morrell, above n 52, 200.

70 Scarr, above n 59, 227-248. A court in the islands declared in 1914 the situation there to be akin to a conquered country: Scarr, above n 59, 242.

71 Treaty between Germany and Funafuti (Tuvalu) (12 November 1878) 154 CTS 17, 18.

72 Treaty between Germany and Jaluit and Ralick (Marshall Islands) (29 November 1878) 154 CTS 17, 20.

73 Morrell, above n 52, 268.

74 Morrell, above n 52, 285. A protectorate was declared in the Cook Islands in 1888. Here letters were simply sent to local chiefs informing them of what had happened: Morrell, above n 53, 285.

75 Morrell, above n 52, 257.

76 Morrell, above n 52, 267.

territories did not exhibit the basic qualities of states is contradicted by this consistent practice. The situation was summed up by the International Court of Justice in a 1975 opinion on colonial activity in North Africa.⁷⁷

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers ... such agreements with local rulers, whether or not considered as an actual 'cession' of the territory, were regarded as derivative routes of title, and not original titles obtained by occupation of *terrae nullius*.

B The African Background

It has been seen that the colonising powers in the Pacific treated with many of the peoples they found there as if they were independent states. According to one strand of nineteenth century theory, the treaties made were not valid at international law because they had been concluded with states not recognised as part of the European community of nations, from which international law came. If this was indeed how these territories were regarded or if there was doubt about their being states in the first place, it could be expected that these Pacific treaties in their form and manner of conclusion, and the actions of the colonial powers with regard to them, would indicate in some way that they were not regarded as being valid as international documents. To begin to see whether this was so, it is important to first look to the treaty arrangements of the European powers in Africa, which provide a useful background to the Pacific scene.

Britain alone made some 500 treaties with African tribes and polities in the course of the nineteenth century.⁷⁸ This does not include earlier British treaties made in northern parts of the African continent and the many treaties of France, Germany, Portugal, the Netherlands and Belgium made with African rulers.

The earliest European treaty-makers on the African continent were the Portugese. Alexandrowicz, who has made an extensive study of treaty-making in Africa,⁷⁹ records one as early as 1507 between Portugal and the King of Ormuz in the Persian Gulf.⁸⁰ The Portugese concluded further agreements with northern African rulers in the sixteenth and seventeenth centuries, with

⁷⁷ *Western Sahara Case* (1975) ICJ Rep 12, 39.

⁷⁸ As collected in Parry's CTS.

⁷⁹ *The European-African Confrontation*, above n 12.

⁸⁰ *The European-African Confrontation*, above n 12, 15. Charles Henry Alexandrowicz also records a commercial arrangement in 1157: *The European-African Confrontation*, above n 12, 18.

France and the Netherlands following suit from the seventeenth century.⁸¹ British interest began a century later.⁸² The pace of treaty-making picked up in the first half of the nineteenth century as the European colonists began competing with one another for territories in earnest. It was not until the 1880s that the "scramble" for Africa really began however. It was spurred on by the outcome of the Berlin Conference of 1884-1885. This decided, according to a contemporary commentator, "... that 'treaties' with the natives ... were to be accepted as valid titles to the acquisition of the African tropics by the European nations."⁸³

1 *The Form of the Treaties*

These treaties had the same form as those concluded between the European nations. The two parties were clearly identified and the rights and obligations of both sides carefully spelt out. Some of the agreements were complex and ran to many pages. They are concerned with matters of international significance, and many matters that were also dealt with in treaties concluded within the European community at the time. The variety of the treaties is immense. They provide for the cession of sovereignty over land and water, the regulation of trade, the abolition of slavery, religious freedom, ship-wreck and salvage rights, the cession of mineral rights, legal jurisdiction and the end of human sacrifices. Even "standard form" treaties such as those used by the Niger Company in the late nineteenth century, and which were signed in their hundreds, contain a mix of articles adapted for the particular parties with whom they were concluded.⁸⁴

2 *The African Parties*

The capacity of the African rulers to conclude these treaties is clearly spelt out in many of the documents. The first treaty made by Britain on the west coast of Africa in 1788, for example, is with the "Chief of Sierra Leone, by and with the consent of the other Kings, Princes, Chiefs and Potentates subscribing hereto ...".⁸⁵ Another made in 1840 provides "... and whereas all

81 *The European-African Confrontation*, above n 12, 14-17. For a survey of some of these early treaties in the East Indies see *An Introduction to the History of the Law of Nations in the East Indies*, above n 12.

82 Charles Henry Alexandrowicz records a British treaty with Morocco in 1791, *The European-African Confrontation*, above n 12, 27.

83 Sir Frederick John Dealtry Lugard *The Dual Mandate in British Tropical Africa* (Blackwood, Edinburgh, 1922) 14-15. This decision was not expressly arrived at, but it was clearly implied. Both Belgium and Britain had claims to the Congo and Lower Niger respectively by treaties with African chiefs. These were recognised by the Conference.

84 A return of 272 of these treaties in 1894 shows this. Checks were made to ensure that the chiefs had authority to make the treaties. All were referred to the Foreign Office for formal ratification: Colin Walter Newbury *British Policy Towards West Africa: Select Documents 1875-1914* (Clarendon Press, Oxford, 1971) 210-212 ["*British Policy Towards West Africa*"].

85 Treaty between Great Britain and the Chiefs of Sierra Leone (22 August 1788) 50 CTS 360, 361.

sovereignty of the ... territory is now vested in the said King Combo, and has descended to him from his ancestors, and the said King Combo having full power to dispose of the same ...".⁸⁶

Alexandrowicz has observed that many treaties state the capacity of the African ruler in a negative sense in that they declare the ruler to be independent of any other power. So a Senegalese treaty with France in 1880 declares "The Chief, notables and inhabitants of the country of Kito declare that they are independent of any foreign power."⁸⁷ Similar stipulations appear in German treaties.⁸⁸ Both French and British treaties also contain assertions that the African signatories have not earlier bound themselves by treaty to other colonising powers. Two Gold Coast treaties of 1879 typically declare that the African parties "formally deny having at any time ceded any sovereign rights to any power other than Her Majesty the Queen of Great Britain."⁸⁹ The chiefs of Dambo say in an 1883 treaty with France that "they had never signed or contracted any undertaking towards a foreign country ...".⁹⁰ An explicit recognition of treaty-making capacity arises in three agreements with Nigerian rulers in 1884: "... our people and country, are subject to the authority and jurisdiction of the Kings and Chiefs of Old Calabar; ... we cannot, therefore, make any treaty with a foreign power for ourselves."⁹¹

It was in the best interest of the colonial powers to ensure that they had made a treaty with the appropriate African authority, otherwise their rights over territory lay open to challenge. Alexandrowicz records a race between the French and British to conclude a treaty with a Nigerian ruler when it became known that an earlier treaty had been made with a party without the necessary capacity.⁹²

This consideration must also have influenced European attempts to ensure that treaties were understood by the African parties. The validity of some treaties on this score must be in doubt because they were so speedily negotiated and signed. The weight of evidence suggests, however, that this situation was exceptional. In the first place, African kingdoms had been in existence since at least 300 AD and had engaged in full diplomatic negotiations with one another, trading and

86 Convention of Cession between Great Britain and Combo (The Gambia) (13 July 1840) 90 CTS 283, 284.

87 *The European-African Confrontation*, above n 12, 34.

88 *The European-African Confrontation*, above n 12, 33.

89 Sir Edward Hertslet *The Map of Africa by Treaty: Volume 1* (3 ed, Cass, London, 1967) 68.

90 *The European-African Confrontation*, above n 12, 35.

91 Treaties between Great Britain and Tribes of West Africa (1884) Declaration (Accession of King and Chiefs of Efat) (8 September 1884) 163 CTS 157, 185.

92 *The European-African Confrontation*, above n 12, 36.

concluding alliances. So it is unlikely that the concept of treaty negotiation was alien to the African rulers the colonial powers dealt with.⁹³

Evidence of African understanding comes from contemporary observers like Sir Frederick Lugard who had actually been involved in treaty negotiations. Lugard was dismissive of treaties made in the period of the "scramble", contending that the African rulers concerned would never have given away the rights they did had they known the true content of the documents they signed.⁹⁴ Yet his own testimony does not suggest this. Not only did he discover an African equivalent to the European concept of treaty-making ("blood brotherhood"),⁹⁵ he also insisted that in his negotiations there was a clear understanding shown by the Africans. In Uganda Lugard recorded that the rulers "thoroughly understood the nature of a written contract (treaty) and consider nothing definitely binding till it is written down."⁹⁶ Individual clauses were debated and altered, future implications of the provisions discussed and then the treaty was read "sentence by sentence" in the local language.⁹⁷

Another account from a contemporary actor describes the signing of a standard trade agreement with a Muslim ruler on the African west coast in 1881:⁹⁸

... [H]aving informed the Almany that I was deputed on behalf of Her Majesty to conclude a treaty of peace and commerce with him, I proceeded to read and explain, clause by clause, the provisions of the treaty that had been prepared for his acceptance and ratification. After everything had been fully explained, and the import and meaning of every clause had been made clear, I asked the King if he was willing to accept and abide by the terms and provisions of the treaty, and to signify his assent by affixing his signature to the instrument. His reply was that he was willing to conclude the treaty with me ... He went on to say that some Frenchmen went up to Timbo a few years ago, and tried to induce him to make a treaty with him, ... but ... he would have none of them ...

The Almany then signed the treaty, one copy of which he kept, printed in Arabic.⁹⁹

93 Elias, above n 12, 6-15; "... pre-European Africa was not all chaos and inter-tribal feud. Agreements were often entered into by one king or paramount chief with another as much to regulate their external relations as to promote territorial advancement. There were, of course, well established rules for securing a truce as for regulating the practice of warfare": Elias, above n 12, 44.

94 Lugard, above n 83, 15-17.

95 *The European-African Confrontation*, above n 12, 51.

96 *The European-African Confrontation*, above n 12, 52.

97 *The European-African Confrontation*, above n 12, 52.

98 *British Policy Towards West Africa*, above n 84, 22-23.

99 This was common practice for treaties made with Muslim rulers: *The European-African Confrontation*, above n 12, 54.

Even in the rush for titles in the 1880s the formalities of negotiation were not ignored; they could not be if a state was to obtain an unassailable right to the territory for which it had treated. The "standard form" treaties used by the British in Nigeria had attached a "Declaration by Interpreter" which attested to the understanding of the African party. One such declaration reads that:¹⁰⁰

I ... correctly interpreted to the native parties to this Treaty the several Articles thereof, and that they approved the same; that Article VI as printed was expunged because it was not agreed to by them, and that which now appears as Article VI was substituted.

Alexandrowicz notes a similar practice with French treaties.¹⁰¹ In addition, some African rulers could read and write, or at least had advisers who were able to do so.¹⁰²

A clear understanding of the treaties is evidenced by the fact that records show instances where African rulers insisted on their treaty rights. The Sultan of Sokoto, for example, regarded his treaty with the British Government abrogated when his stipend was not paid – and the British authorities, on legal advice, conceded that he was right.¹⁰³ The Brass chiefs of Nigeria in 1895 sought to enforce a "standard form" treaty signed with the Niger Company in 1886, which had guaranteed them, a trading nation, possession of their ancient markets. Their complaint was that the Company was now restricting access to those markets. Their detailed memorandum on the problem reads: "We humbly submit that we have a right confirmed by our Treaty, to go and trade freely in the places we have traded at for all these generations."¹⁰⁴ All of this accords with the conclusion of Alexandrowicz that every effort was made to ensure that the fundamental principle of "pacta sunt servanda" (roughly "treaties must be observed") was "firmly in the minds of the contracting parties."¹⁰⁵

There must be doubt however that the Africans understood precisely the meaning of terms like "sovereignty" which were alien to them. Alexandrowicz admits that the European and African understanding of such terms probably differed. This does not mean that their interpretations were too far apart. Practical considerations would not permit it. In 1884 HM Stanley, acting for the African International Association, made a treaty with five Congo chiefs which altered an earlier

100 Treaty between Great Britain and the King, Queen and Chiefs of Onitsha (Niger Left Bank, No 2) (9 October 1884) 163 CTS 157, 189.

101 *The European-African Confrontation*, above n 12, 49.

102 Alexandrowicz noted that the Ugandans could write, for example: *The European-African Confrontation*, above n 12, 52.

103 *British Policy Towards West Africa*, above n 84, 153.

104 *British Policy Towards West Africa*, above n 84, 144.

105 *The European-African Confrontation*, above n 12, 52. Elias records a treaty between five African chiefs in 1884 which provided at Article 5: "The confederated districts guarantee that the treaties made between them shall be respected": Elias, above n 12, 44.

treaty in which they ceded their entire rights to their territories to the Association. This was necessary because the chiefs had not intended to pass such rights and had misunderstood the import of the earlier treaty. Neither side, it seems, could operate on the basis of such a wide misunderstanding.¹⁰⁶

3 *The Colonial Powers*

What were the intentions of the colonial powers in concluding these treaties? Many, it must be admitted, were concluded with the primary purpose of excluding the claims of other colonial powers to the territories which they covered. For example between 1884 and 1892 Britain rushed to sign some 307 treaties in Nigeria with the aim of establishing a protectorate there.¹⁰⁷ Some of these were signed even while the Berlin Conference was in session. As has been noted, that Conference unofficially concluded that treaties were to be the means by which titles to the African interior were legitimised. This outcome simply sanctioned the existing practice. The practice was given further weight when the colonising powers sought to enforce these treaties against one another as legal documents. In 1870 and 1875 Britain was involved in international arbitrations in which it claimed that treaties made with African chiefs nullified Portuguese claims in Delagoa Bay and on the Island of Bulama.¹⁰⁸

But the colonising powers also took seriously the legal obligations these agreements created between themselves and the African parties. It must be remembered that treaties were concluded across the entire span of the nineteenth century, and not only during the period when the European nations were in competition. Therefore many of the early treaties primarily seek genuine understanding and cooperation with local rulers. With these early agreements this was a matter of practical necessity because the Europeans were often confronted by powerful African kingdoms, or they arrived as small settler groups without any physical means to enforce their demands. In this respect, it is interesting to note that while early treaties provided that criminal jurisdiction would be shared between European and African authorities, so that European residents might be tried according to African law, later treaties almost exclusively provided that foreign residents could be tried only by their own law.¹⁰⁹

106 Elias, above n 12, 44.

107 Sir Edward Hertslet lists them: Hertslet, above n 89, 154 onwards.

108 *The European-African Confrontation*, above n 12, 33-34. Britain claimed to have taken the sovereignty of lands around Delagoa Bay by treaties with local chiefs in 1823. The Portuguese Government had, however, earlier taken the sovereignty by treaty. Their claim was upheld. Britain also relied on treaties with chiefs in 1792 to claim the Island of Bulama. Britain lost again.

109 Charles Henry Alexandrowicz discusses this change in relation to French treaties: *The European-African Confrontation*, above n 12, 83-88. For British treaties see Treaty between Great Britain and the King of the Trazors (2 April 1814) 63 CTS 111 and Convention between Great Britain and the Timmances (Sierra Leone) (16 April 1836) 86 CTS 89.

Direct evidence of how the European nations regarded their responsibilities to the African rulers under these treaties is hard to find. Some is available however. It indicates that attempts were made to deal fairly with the Africans, and, more significantly, that strict legal form was always adhered to. In one case where an annual stipend paid to a Sierra Leone ruler was in dispute, the advice was given that:¹¹⁰

Having made the Treaty ... and agreed to pay the stipend I think it would be discreditable to our good faith and must lower us in the eyes of the natives who were evidently well aware of and displeased at our neglect not to fulfil our engagements

The similar case of the Sultan of Sokoto has already been mentioned. There the opinion of a judge was followed, even though this did not accord with Britain's wish to ignore the treaty. The important point to note is that the British authorities sought a legal opinion on this situation and, even though the advice went against them, they acted in accordance with it.¹¹¹

The attitude to treaty-making is perhaps best summed up in the following despatch sent to the British Consul in Lagos in 1861:¹¹²

Her Majesty's Government would be most unwilling that the establishment of British Sovereignty at Lagos should be attended with any injustice to Docemo, ... but they conceive that as his tenure of the island ... depends entirely on the continuance of protection ... no injustice will be inflicted upon him by changing this anomalous protectorate into an avowed occupation provided his material interests are secured ... it may well be that, previously to taking possession, you should obtain from the King Docemo and his headmen, a Treaty of Cession, duly signed and executed.

A treaty agreement was signed.

C The Pacific Treaties

It has already been shown that the colonising powers in the Pacific commonly turned to the international law practice of treaty-making as a means of dealing with the island rulers. Apart from the United States (which itself had the experience of dealings by treaty with Indian tribes)¹¹³ the major colonising powers in the Pacific – France, Britain and Germany – were involved extensively with treaty-making with tribal groups and polities in Africa. These African treaties were in form at least valid international law documents, they were understood by both parties to them, and their colonial signatories saw them as conferring legal rights of some nature and took their obligations

¹¹⁰ *British Policy Towards West Africa*, above n 84, 25.

¹¹¹ *British Policy Towards West Africa*, above n 84, 153.

¹¹² Hertslet, above n 89, 92.

¹¹³ As to this see Dorothy V Jones *License for Empire: Colonialism by Treaty in Early America* (University of Chicago Press, Chicago, 1982).

under them seriously, even when there was no obvious pressure from the other European powers to do so. They can be regarded, therefore, in all important respects as valid international law treaties. How far was this state of affairs true for the Pacific treaties?

1 The Form of the Treaties

As with the African documents, in their form the Pacific treaties look like valid agreements in nineteenth century international law. The two parties are clearly identified as entities of international standing, capable of entering into treaty obligations. The cession of Hawaii to Britain in 1794 was made with the "King of Owhyhee, in council with the principal chiefs of the island."¹¹⁴ The 1874 Fijian cession was signed by "the Fijian Chief Cakobau, styled Tui Viti [King of Fiji] and Vunivalu [paramount chief of Boui], and other native high chiefs."¹¹⁵ The 1879 Tongan treaty is signed with "His Majesty the King of Tonga", one knight of his court and two of his governors.¹¹⁶ A new element is added by the treaty of the same year with Samoa. It is concluded with the "King and Government of Samoa"¹¹⁷ and the treaty a year later is between "Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the King and Government of Samoa."¹¹⁸ The equality of the parties is clearly implied here.

French and German treaties are similar. A treaty of peace and friendship was concluded by France in 1837 with "le Gouvernement des iles Sandwich" and the "Roi des iles Sandwich."¹¹⁹ A similar agreement was signed in 1838 with "le Gouvernement d'O'Taiti" and "la Reine des Iles d'O'Taiti".¹²⁰ An additional article further described the government and Queen as "La Reine Pomare et les grands chefs d'O'Taiti."¹²¹ In a series of unilateral declarations by rulers in the Marquesas Islands in 1842, "les chefs principaux" of these islands recognise the sovereignty of "SM Louis Philippe, Roi des Francais."¹²² Even a treaty with the tiny island of Wallis in the same year provides for perpetual peace and friendship between "SM le Roi des Francais et SM le Roi des Iles

¹¹⁴ This was the inscription written on a copper plaque placed in the King's residence, there being no written agreement: Vancouver, above n 30, 97.

¹¹⁵ The treaty is copied at Derrick, above n 46, Appendix I.

¹¹⁶ Treaty between Great Britain and Tonga (29 November 1879) 155 CTS 439.

¹¹⁷ Treaty between Great Britain and Samoa (28 August 1879) 155 CTS 193.

¹¹⁸ Convention between Great Britain and Samoa (2 September 1879) 155 CTS 205, 206.

¹¹⁹ Convention between France and the Sandwich Islands (24 July 1837) 87 CTS 27, 28.

¹²⁰ Convention between France and Tahiti (4 September 1838) 88 CTS 109, 110.

¹²¹ Convention between France and Tahiti (4 September 1838) 88 CTS 109, 110.

¹²² Declaration between France and the Chiefs of the Island of Hivava (Pacific Ocean) (5 May 1842) 93 CTS 173, 174; Agreements between France and the Chiefs of the Island of Nukahiva, Mount Tuhiva and Hapou (Pacific Ocean) (31 May, 1 June, 12 June 1842) 211, 212-214; Agreements between France and Roa-Huga and Fatuiva (Pacific Ocean) (3 August, 24 August 1842) 431, 432.

Wallis".¹²³ In 1858, "SM Napoleon III, l'Empereur des Francais" made a treaty with "Zacombao Tui Viti" (Cakobau, King of Fiji).¹²⁴ Germany's first treaty in the Pacific in 1876 with Tonga was between "His Majesty the German Emperor, King of Prussia ... and the King of Tonga."¹²⁵ The Hawaiian treaty of 1879 was between "His Majesty the German Emperor, King of Prussia, in the name of the German Empire" and "His Majesty the King of the Hawaiian Islands."¹²⁶

The United States likewise gave explicit recognition to the international position of the Pacific rulers. Its treaty with Tahiti in 1826 was made with "the King, Council and headmen", the King being "Pomare the III heir apparent to the Throne of Tahiti."¹²⁷ The Hawaiian agreement of the same year treated with "their Majesties, the Queen Regent, and Kaiukiaouli, King of the Sandwich Islands."¹²⁸ A treaty with Samoa in 1878 contained a very full declaration of the standing of the parties.¹²⁹

The Government of the United States of America and the Government of the Samoan Islands, being desirous of concluding a treaty of friendship and commerce, the President of the United States has for this purpose conferred full powers upon William M. Evartz, Secretary of State; and the Government of the Samoan Islands has conferred like powers upon Mk. Le Mamea, its Envoy Extraordinary to the United States. And the said Plenipotentiaries having exchanged their full powers, which were found to be in due form, have agreed upon the following articles

The treaties dealt with matters of international law and not private law. They ceded the sovereignty of territories, granted port privileges and navigation rights to states, gave protectorate powers and extra-territorial powers. They provided for the free flow of trade between states as well as arranging customs duties and even postal rules. They dealt with shipwreck and the freedom of religion. Many contained "most favoured nation" clauses which ensured that the Pacific parties did not give more rights to any other nation than the one with which they were dealing.

In their subject matter these treaties were similar to treaties concluded between the colonising powers at the time. The agreements made in the islands had parallels in Europe, particularly in matters of commerce and navigation.¹³⁰ Specific articles were also commonly copied, especially

123 Convention between France and Garroway (Senegal) (7 February 1842) 93 CTS 33, 34.

124 Convention between France and Fiji (7 July 1858) 119 CTS 233, 234.

125 Treaty between Germany and Tonga (1 November 1876) 151 CTS 118.

126 Treaty between Germany and Hawaii (19 September 1879) 155 CTS 235, 236.

127 Articles between the United States and Tahiti (6 September 1826) 76 CTS 398.

128 Articles between the United States and the Sandwich Islands (Hawaii) (23 December 1826) 77 CTS 34.

129 Treaty between Samoa and the United States (17 January 1878) 152 CTS 314.

130 A quick survey of treaties between 1839 and 1841 reveals treaties of commerce and navigation between: France and the Netherlands, (25 July 1840) 90 CTS 307; Portugal and the United States (26 August 1840)

general statements about "peace and amity" or "perpetual peace and friendship". "Most favoured nation" articles were standard features in European commercial treaties in the nineteenth century.¹³¹ The parties often referred to each other as "High Contracting Parties", a phrase similarly of European origin.¹³² The parallels were sometimes striking. The German treaty with Hawaii in 1879 provided at Article 25:¹³³

In the event of a vessel belonging to the Government or owned by a citizen of one of the two Contracting Parties being wrecked or cast on shore on the coast of the other, the local authorities shall inform the Consul-General, Consul, Vice-Consul or Consular Agent ...

Article one of a treaty signed between the British and the French Republic just three months earlier, in a completely different cultural and geographical context, provided:¹³⁴

If any ship belonging to the subjects of one of the two contracting States shall be wrecked or stranded upon the coasts of the other, the competent local authorities shall ... bring the fact to the knowledge of the Consul-General, Consul, Vice-Consul, or Consular Agent ...

90 CTS 343; Great Britain and Prussia, Convention between Great Britain and the Zollverein (2 March 1841) 91 CTS 283; and Belgium and Greece (13 (25) September 1840) 90 CTS 461. The text of these compares favourably with French treaties of friendship and commerce in Hawaii in 1837: Convention between France and the Sandwich Islands (24 July 1837) 87 CTS 27; and 1839; Treaties between France and the Sandwich Islands (12 July, 17 July 1839) 89 CTS 201, 202; with British treaties of commerce and navigation with Hawaii in 1844: Convention between Great Britain and the Sandwich Islands (12 February 1844) 96 CTS 135; and 1851: Treaty between Great Britain and the Sandwich Islands (Hawaii) (10 July 1851) 106 CTS 81; also a treaty of friendship and commerce with Samoa in 1879: Treaty between Great Britain and Samoa (28 August 1879) 155 CTS 193. See also the German treaty of commerce and navigation with the Marshall islands in 1878: Treaties between Germany and various Pacific Islands (Funafuti, Jaluit and Ralick, Makada, and Mioko) (12 November – 20 December 1878) 154 CTS 17; and treaty of friendship with Samoa in 1879: Treaty between Germany and Samoa (24 January 1879) 154 CTS 455.

131 For example, the treaty in 1840 between the United States and Portugal: Treaty of Commerce and Navigation between Portugal and the United States (26 August 1840) 90 CTS 343 provided in article 10: "The two Contracting Parties shall have the liberty of having, each in the Ports of the other, Consuls ... and Commissaries ... who shall enjoy the same privileges and powers as those of the most favoured nation." Article 5 of a treaty between the United States and Tonga in 1886, Treaty between Tonga and the United States (2 October 1886) 168 CTS 221, 222, typically provides: "No other or higher duties or charges ... shall be imposed in the dominion of the King of Tonga on vessels of the United States, or in the United States on Tongan vessels, than are imposed on vessels belonging to the most favoured nation."

132 See, for example, its use in Treaty between Germany and Tonga (1 November 1876) 151 CTS 118; Treaty between Germany and Hawaii (25 March/19 September 1879) 155 CTS 235, 236 and Treaty between Tonga and the United States (2 October 1886) 168 CTS 222.

133 Treaty between Germany and Hawaii (25 March/19 September 1879) 155 CTS 235, 255.

134 Declaration between France and Great Britain (16 June 1879) 155 CTS 139, 140.

2 *The Pacific Parties*

The 1794 Hawaiian cession was made by King Kamehameha, "in council with the principal chiefs of the island."¹³⁵ Vancouver records that one reason for the year-long delay in completing the agreement was because Kamehameha was insistent upon gaining the consent of all the chiefs under his authority.¹³⁶ This is good evidence that the King was aware of the limits of his authority when concluding such an agreement. In Tonga, a similarly well-defined division of powers existed and there is no doubt that kings like Tupou (who signed a number of treaties with western powers) had the full powers necessary to enter into treaties.¹³⁷

The situation was not so clear in some of the other island groups. The Pomares of Tahiti undoubtedly had control of the main island there, but had only nominal control over some outlying islands. This was not always well understood. Ward notes an incident in 1832 where a British ship was plundered near an island in the Tuamotu group. Responsibility was laid with the Tahitian Queen, but contemporary documents suggest she probably should not have been held to account as her authority did not extend to the group.¹³⁸

In Samoa and Fiji the situation was even more uncertain. Samoa was wracked by civil war, as two rival factions struggled for control, each setting up its own ruler. A compromise government was set up in 1871, and from 1875 the Samoan constitution provided that a single monarch should rule – even if at times the monarch was appointed by British and German decree, as Malietoa Laupepa was in 1880. Laupepa was driven from power by the German Government in 1884 and another King, Tamasese, was put in his place. He was unacceptable to the British and Americans, so in 1884 the three powers agreed to restore Laupepa. The internal strife continued. Most treaties with Samoa were concluded after 1879 and in the midst of this confusion.¹³⁹ Since they were signed with different rulers it is doubtful just what capacity the Samoan side had in each agreement.

In Fiji, Cakobau was the central figure in treaty negotiations. His offer of cession to Britain in 1858 was rejected in part because his claim to be Tui Viti or King of Fiji was dubious. According to one British opinion he was only the most prominent of a number of independent chiefs in these islands. He was therefore offering to cede the sovereignty of territories over which he had no effective control.¹⁴⁰ However, the cession of 1874 was made by him as King of Fiji. By this time

135 Vancouver, above n 30.

136 Vancouver, above n 30, 50.

137 Latukefu, above n 50, 2-13 describe, the indigenous political system.

138 Ward, above n 38, 63.

139 Sylvia Masterman *The Origins of International Rivalry in Samoa 1845-1884* (Allen and Unwin, London, 1934) 187-193.

140 Derrick, above n 46, 147.

there was no doubting his supreme authority in the island group. Even so, the cession was made by "the said Tui Viti and ... the several high chiefs ... for themselves and their respective tribes."¹⁴¹

The unilateral act of thirteen New Caledonian chiefs in 1842 which recognised the full and entire sovereignty of France in the island and placed it under French rule probably gave more than it should or could.¹⁴² This is not of great consequence, however, because – more seriously – France annexed the islands in 1853 without concluding any further agreement with the New Caledonians. France also concluded treaties with the rulers of very small islands, like those in the Marquesas group and with the Queen of tiny Wallis Island. In the African context, Alexandrowicz notes that some treaties were made with "petty village Chiefs" who were "viable entities neither in the African nor in the universal Family of Nations and were doomed to be absorbed by properly organised units."¹⁴³ Was this the case with these small islands? Larger political units in the Pacific did swallow smaller and less organised ones as occurred in Hawaii and Fiji. A special consideration in this region might be that local chiefs could more effectively assert their independence in island territories than could African chiefs with landward boundaries to protect.¹⁴⁴ In the case of Wallis Island the French Government recognised the monarchy there as being fully independent. Even when the island became a protectorate in 1886, the Queen was able to insist on the retention of some judicial powers, which the French finally honoured by another treaty in 1910.¹⁴⁵

Some of the nineteenth century writers on international law maintained, however, that treaties such as these show on their face that they are not valid because they are "unequal" – the Pacific party to them obviously not being able to bargain as a true state. Articles granting protectorate powers, or ceding sovereignty or allowing extensive extra-territorial powers or trading privileges indicate that the Pacific side is not an equal party to the agreement.¹⁴⁶

There is, of course, nothing wrong in one party to a treaty conceding more rights than the other. Otherwise treaties of peace in which the losing side concedes many rights would not often be valid. But the argument does not stand anyway if the content of the treaties is examined. All of those recorded by Parry in the Pacific involve the exchange of rights and obligations by both parties. Even

141 Derrick, above n 46, 157.

142 Treaty between France and the Kings and Chiefs of New Caledonia (1 January 1844) 96 CTS 7, 8.

143 *The European-African Confrontation*, above n 12, 50.

144 A prime example here is the New Hebrides, which no colonial power was willing to enter without protection because of the islanders' reputation for seeing off intruders.

145 See Treaty between France and Wallis (Pacific Ocean) (19 November 1886) 168 CTS 293; Treaty between France and Wallis Islands (19 May 1910) 211 CTS 128.

146 See Gong, above n 8, 8: "European extra-territoriality ... became a badge of inferiority for many non-European countries, a sign of their 'uncivilised' legal status."

the unilateral acts of chiefs recognising the sovereignty of a colonial power, as in the Marquesas Islands, request a reciprocal obligation on the part of the colonising party to provide protection.¹⁴⁷

Many of the treaties also provide for reciprocal rights to be taken by each party. The treaty of France with Hawaii in 1837 provides "The subjects of the King of the Sandwich Islands will be able equally to come to France; they will be received and protected like the most favoured foreigners."¹⁴⁸ The 1838 French treaty with Tahiti provides similar privileges for "the subjects of the Queen of Tahiti".¹⁴⁹ Like phrases are included in treaties with Tonga (1855)¹⁵⁰ and Fiji (1858).¹⁵¹

Other examples arise in British and United States treaties. One in 1882 provides "The subjects of Her Britannic Majesty shall always enjoy in Tonga, and Tongan subjects shall always enjoy in the territories of Her Britannic Majesty, whatever rights, privileges, and immunities they now possess."¹⁵² Another in 1843 not only allows British subjects to be tried by Hawaiian laws but unequivocally states "nothing herein shall deprive His Majesty [the King of Hawaii] of any inherent or acknowledged right vested in an independent sovereign."¹⁵³ Finally, a United States treaty in 1886 allows that "The citizens of the United States shall always enjoy, in the dominions of the King of Tonga, and Tongan subjects shall always enjoy in the United States, whatever rights ... are now accorded to citizens or subjects of the most favoured nation."¹⁵⁴

What understanding did the Pacific rulers have of these treaties which they signed? As with the African situation, the evidence is not straightforward. There is also less of it. Pacific treaties did not have the statement of the interpreter which some of the African ones did. Again, the beginning point is the Hawaiian cession of 1794.

Vancouver, summing up the speeches made by the Hawaiians immediately before the cession noted that:¹⁵⁵

147 See Agreements between France and the Chiefs of the Islands of Nukahiva, Mount Tuhiwa and Hapou (Pacific Ocean) (31 May, 1 June, 12 June 1842) 93 CTS 211-214. This was possibly not a bad bargain since the islands often suffered from the actions of unscrupulous sandalwood and labour traders.

148 Convention between France and the Sandwich Islands (24 July 1837) 87 CTS 28.

149 Convention between France and Tahiti (9 September 1838) 88 CTS 110.

150 Convention between France and Tonga (9 January 1855) 112 CTS 388.

151 Convention between France and Fiji (7 July 1858) 119 CTS 234.

152 Treaty between Great Britain and Tonga (29 November 1879) 155 CTS 439, 441.

153 Agreement between Great Britain and the Sandwich Islands (31 July 1843) 95 CTS 205, 206.

154 Treaty between Tonga and the United States (2 October 1886) 168 CTS 221, 222.

155 Vancouver, n 30, 94.

[I]n every one ... their religion, government, and domestic economy was noticed; and it was clearly understood, that no interference was to take place in either; that Tamaahmaah [Kamehameha], the chiefs and priests, were to continue as usual to officiate with the same authority as before...

Then he added an interesting note:

... [T]he whole party declared their consent by saying, that they were no longer Tanata no Owhyhee (i.e.) the people of Owhyhee; but Tanata no Britanee, (ie) the people of Britain.

Later commentators suggested that a protectorate only was intended.¹⁵⁶ The Hawaiians would have found it difficult to understand how they could retain intact their internal government and yet lose their sovereignty. Whatever the differences in understanding, the whole course of dealing suggests that the principle of "pacta sunt servanda" was foremost in the treaty-makers' minds. The evidence surrounding the 1836 agreements on port regulations and trading rights with Britain is less ambiguous. There the Hawaiian chiefs actually disagreed with parts of the British proposals, and retired to draw up their own draft. The final compromise agreement reflects the outcome of this bargaining process.¹⁵⁷

Up to the middle of the nineteenth century there remains some doubt about the understanding of the Pacific parties to the treaties, especially among smaller island groups. Debate still continues about what the Maori chiefs thought they were giving away in 1840. Some of the chiefs in the Marquesas Islands almost certainly did not understand that their agreements with France ceded sovereignty.¹⁵⁸ After 1850, however, the question of understanding is not really an issue. Among the large islands of Hawaii, Tonga, Samoa, Tahiti and Fiji, the colonising powers dealt with European style governments which often had prominent Europeans and Americans working within them. The most notorious example of this is the career of Reverend Shirley W Baker, an English missionary who became Premier of Tonga in 1881 and remained so until he was deported by the British authorities in 1890.¹⁵⁹

The sheer detail of the treaties made with these island groups also attests to the understanding of the Pacific parties involved.¹⁶⁰ The preamble to the America/Samoa treaty of 1878 has already been noted. This set out the exact powers of the parties and notes that the Hawaiian "Envoy Extraordinary

156 Kuykendall, above n 29, 41-42.

157 Kuykendall, above n 29, 148. For example, the consent of the King was required before foreigners could build on the island.

158 There was in fact fierce resistance to the cessions which was not crushed till 1880: Brookes, above n 33, 241.

159 Westlake, above n 7, 81 (an extreme "positivist") even includes Hawaii among the "few Christian States" he felt had fully reached the European standard of civilisation.

160 A German treaty with Hawaii in 1879 runs to 28 articles; see Treaty between Germany and Hawaii (25 March/19 September 1879) 155 CTS 236.

to the United States" would be negotiating for that nation.¹⁶¹ This is obviously some way from negotiating with "Native Chiefs and Tribes" in Aotearoa or "les chefs principaux" of the Marquesas group. French treaties with Tahiti and German ones with Samoa set out in precise detail the form of government that would exist in these territories. The local rulers were expected to establish these institutions and govern by them, so it is ridiculous to suggest that they had no clear understanding of what was required.

These Pacific rulers also made it clear when they did not like treaty stipulations. In Fiji in 1855, King Cakobau was visited by an American naval commander who insisted that the King sign a treaty agreeing to pay for some long standing debts to the American Government and people. Cakobau related that:¹⁶²

A paper was presented to me, and Mr Williams said 'sign that paper'. I refused to sign it, saying that I had not done anything for which I ought to be fined. Four times Captain Boutwell stood up, stamped on the ground in my presence, and said 'you must sign it, or I will take you away to America.' I was then afraid, and signed the document under fear.

Not surprisingly, after this incident, Cakobau protested that he had not signed the document of his own free will. He declared the treaty "unrighteous, tyrannical, unwarrantable and unworthy of the Government of the United States."¹⁶³ A similar incident occurred in Samoa in 1884 when the German Government forced a treaty to be signed putting virtual control of the country into German hands. King Malietoa Laupepa was deposed for informing the British Government of these facts stating that he had signed under duress and appealing for a treaty of protection with them.¹⁶⁴

3 *The Colonial Powers*

The form of the treaties has been examined and they are similar in all important respects to treaties made between European states. It is time now to consider the actions of the colonial governments in relation to the treaties, the legislation passed and the contemporary legal opinion, both within the courts and without, regarding them to see if they were considered as something less than "real" treaties at international law.

The available evidence shows that the colonising powers regarded their treaty arrangements as having legal consequences. First, once a treaty had been concluded with a Pacific state which witnessed to its independent status, that state continued to be treated fully in accordance with

161 Treaty between Samoa and the United States (17 January 1878) 152 CTS 313, 314.

162 Derrick, above n 46, 135.

163 Derrick, above n 46, 135-136.

164 Masterman, above n 139.

international law as independent and later relations with it continued to be on a treaty basis. This was so even though the independence recognised was in some cases fairly nominal.

So, for example, while the French Government practically could have taken complete control of Tahiti in 1843 by force, it did not do so. It had earlier made a treaty with that country as an independent state. The French naval commander Dupetit-Thouar's attempt to take the full sovereignty of Tahiti without the Queen's consent in 1844 was rejected by the French Government and the earlier treaty of protection adhered to.¹⁶⁵ When full sovereignty was finally taken in 1880 it was by a formal treaty arrangement.

The same principles apply to British actions in Tonga. While exercising a virtual protectorate there from 1890, legally the British position remained consistent in its recognition of Tonga as an independent state with which it had a treaty accord. Even in the Wallis Islands France maintained the form of legal relations. The Queen of Wallis ceded the sovereignty there in 1886, but retained some elements of local jurisdiction. Practically the islands then became French territory, but the French Government still used the medium of a treaty in 1910 to remove these final impediments to full sovereignty.

The cases of New Caledonia and Samoa would seem to be the major exceptions to this rule. In 1843 France had taken a cession of New Caledonia by the unilateral act of fourteen chiefs who had recognised "la souveraineté pleine et entière" ("the full and entire sovereignty") of France over the islands. This action was taken without the knowledge of the French Government and it did not act on it. In 1853 France took full possession of the islands (the earlier agreement gave protectorate powers only), and occupied them. No further formal agreement was signed with the local chiefs. However, it is interesting to note that the French commander leading this later mission took the step of negotiating with the local chief on the nearby Isle of Pines before annexing that also. Perhaps it was felt in the case of New Caledonia that a formal cession was not needed, given the 1843 cession. It is significant that the French claim to the main island was not disputed, unlike the Tahitian annexation in 1844.

The confusion of the Samoan situation and the agreement of the colonising powers which ended that country's independence has already been noted. The best explanation there is that the civil war effectively extinguished any sovereignty in the islands before the Anglo-German-American agreement.

A second factor which demonstrates the seriousness with which the colonising powers viewed these treaties is that, unquestionably, they were intended to be enforceable amongst themselves, as

165 Ward, above n 38, 135.

was the case in Africa. Vancouver expresses this in the 1801 edition of the book of his travels when he gives his reasons for taking the Hawaiian cession:¹⁶⁶

The long continued practice of all civilised nations of claiming the Sovereignty and territorial right of newly discovered countries, had heretofore been assumed in consequence only of priority of seeing, or of visiting such parts of the earth as were unknown before; ... Notwithstanding that on the principles of the usage above stated, no dispute could have arisen as to the priority of claim that England has to the Sandwich Islands; yet I considered, that the voluntary resignation of these territories, by the formal surrender of the King and the people to the power and authority of Great Britain, might probably be the means of establishing an incontrovertible right, and of preventing any altercation with States hereafter.

After the death of the Hawaiian King during a visit to England in 1823, Lord Byron was sent to the island with the body and instructions which confirmed Vancouver's assessment and noted that "if any Foreign Power or its Agents should attempt ... to establish any Sovereignty or possession ... you are then to assert the prior rights of His Majesty."¹⁶⁷ But interestingly the cession was not to be enforced against the Hawaiian people themselves, although the instructions leave no doubt that the British Government believed it had the sovereignty.

In the entire course of the nineteenth century dealings between the colonial powers in the Pacific, there appears to be no instance of one power successfully challenging another's right to any territory once title to it had been secured by treaty. Brookes' *International Rivalry in the Pacific Islands* notes that the cession of the Isles of Pines involved a race between Britain and France. The British party withdrew as soon as it learned that the French had successfully negotiated a cession of sovereignty from the local chiefs.¹⁶⁸

Thirdly, the question of the legal validity of these treaty engagements also arose with regard to the jurisdiction of the European powers over their own subjects who resided in colonial territories. Commonly, the treaties made with Pacific states provided that Europeans living in them should only be subject to their own country's legal process – and reciprocal arrangements were provided for Pacific islanders who might visit European countries. But some Europeans lived in areas not covered by these treaty arrangements. The legislation passed by Britain to provide for such situations gives valuable proof that the Pacific treaties were regarded as having validity at international law.

In 1875 a Pacific Islanders Protection Act was passed which provided at section 6:

¹⁶⁶ Vancouver, above n 30, 50-51.

¹⁶⁷ Kuykendall, above n 29, 81.

¹⁶⁸ Brookes, above n 33, 56.

It shall be lawful for Her Majesty to exercise power and jurisdiction over her subjects within any islands and places in the Pacific Ocean not being within Her Majesty's Dominions, nor within the jurisdiction of any civilised Power.

By an Order in Council of 1877 the Act was applied to the Friendly Islands (Tonga) and the Navigators (Samoa) as well as "all other islands in the Western Pacific Ocean not being within the jurisdiction of any civilised Power."

This raised a problem for the Colonial Office. Since other nations had already concluded treaties with Samoa and Tonga, and the British Government was shortly proposing to, were these not "civilised Powers" and therefore outside the operation of the 1875 Act and its accompanying Order in Council? An opinion on that matter was sought from the Law Officers. It concluded that, if treaties were signed with these two states, a new Order in Council would be required to extend jurisdiction to them.¹⁶⁹ In other words, these states were "civilised Powers", and treaties signed with them operated in the normal legal manner – an Order in Council was needed to bring them into operation.

Since the Samoan Government was at that time in too confused a condition for a treaty to be signed with it, the Foreign Jurisdiction Act of 1843 was amended in 1878 to provide that "where a foreign country is not subject to any government from whom Her Majesty the Queen might obtain jurisdiction", then the Act gave her such jurisdiction. The Tongan Government was not in such a position, so the unamended 1843 Act applied which stated that where a treaty had been concluded within it, the rights of jurisdiction under the agreement were to be applied in as full a manner as if they had been obtained by cession or conquest. In 1879 the United States Government concluded a treaty with Samoa, which meant that the unamended 1843 Act applied there also.

Finally in this context section 7 of the Pacific Islanders Protection Act should be noted. It expressly recognised that independent sovereign states could exist in the Pacific when it provided:

Nothing herein ... contained shall extend or be construed to extent to invest Her Majesty ... with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid, or to derogate from the rights of the tribes or people inhabiting such islands, or of the Chiefs or Rulers thereof, to such sovereignty or dominion.

As has been seen, legislation passed by the English Parliament with regard to foreign jurisdiction recognised the sovereign independence of the Pacific states and the legal validity of treaties made with them. Cases before the Privy Council concerning treaties granting extraterritorial powers confirm this view. These cases cover both African and Pacific treaties and they are dealt with in a similar manner as if they had been treaties made between the European states.

¹⁶⁹ Ward, above n 38, 270.

In *McArthur v Cornwall* the dispute was over land in Samoa and whether the High Commissioner's Court there had jurisdiction in the dispute.¹⁷⁰ The Privy Council concluded:¹⁷¹

It is true that the Pacific Islanders Protection Act does not and could not give jurisdiction to Her Majesty over land in Samoa. But the Order in Council is clearly framed to give jurisdiction over British subjects in questions affecting land to the High Commissioner's Court, and it must be held to do so in all those places in which Her Majesty has been enabled to give it by the assent of the ruling power. So far as regards Samoa the matter is provided for by a treaty dated 28 of August, 1879, between Her Majesty and the King and Government of Samoa. In that treaty art. 3 ... creates a special tribunal for deciding disputes respecting purchases of land from Samoans ... this treaty applies itself to the Order in Council of 1877, and it appears to their Lordships to be sufficient ... to confer on the High Commissioner jurisdiction over such a suit as this.

Jurisdiction in a compensation case for land taken in the island of Mombasa was again the issue in *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co.*¹⁷² Should the court set up in Mombasa have to take account of Mahomedan law? The Privy Council noted first that a treaty with the Sultan of Zanzibar in 1886 set out the Queen's jurisdiction in the island and thereby gave effect to an earlier Order in Council as in the above case. The judgment went on:¹⁷³

The root of the jurisdiction is the treaty grant or other matter by which the Queen has power and jurisdiction in Zanzibar. She thereby becomes an authority in the foreign territory of Zanzibar though exercising her powers quite independently of the will of the Sultan ... throughout the matter Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired, which is within its limits a sovereign power. It results that a judge acting within those limits is a Zanzibar judge

In *Carr v Fracis Times & Co* there was the clearest indication that African treaties had as much weight as any others.¹⁷⁴ The Sultan of Muscat had issued a proclamation to the effect that British Navy ships could seize certain ships passing through his territorial waters. A British owned ship carrying ammunition was seized. The argument of the ship's owner was "the Sultan had no authority to interfere with any rights of two British subjects inter se. A jurisdiction of this character is not recognised by civilised nations."¹⁷⁵ The unanimous judgment of the Privy Council expressed surprise that the matter had come before it at all. Lord Halsbury summed up the matter shortly: " ...

¹⁷⁰ *McArthur v Cornwall* [1892] AC 75 (DC).

¹⁷¹ *McArthur v Cornwall*, above n 170, 85.

¹⁷² *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co* [1901] AC 373.

¹⁷³ *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co*, above n 172, 385.

¹⁷⁴ *Carr v Fracis Times & Co* [1902] AC 176.

¹⁷⁵ *Carr v Fracis Times & Co*, above n 174, 177.

the Act done is an act which is done with complete authority and cannot be made the subject of an action here."¹⁷⁶ The Sultan had complete authority to make the law which he did and the case could not be tried before an English court. This was the line of argument which the Crown presented, upholding the validity of its treaties in Africa.

One case which appears to run contrary to this sort of authority is a New Zealand Court of Appeal decision, *Hunt v Gordon*.¹⁷⁷ It arose in a slightly different context as no legal treaty was involved. The British Government claimed legal authority over an English-born Samoan resident. The resident claimed that under an English Act of Parliament, where a British subject voluntarily adopted the nationality of a foreign state he could not be subject to British authority. The question for the Court to answer was this: was Samoa a "state" at the relevant time? The resident argued that the British Government could not deny the existence of a Samoan state when it had concluded treaties and other formal agreements with it. Johnson J thought otherwise:¹⁷⁸

Now it seems clear to me that as the evident object of those negotiations and documents was to assist the people of the Islands in establishing peace and good government among themselves, to reconcile rival factions and interests, and to further the adoption of a Constitution which ... would in time give them the status of an independent and sovereign Power, it would be clearly inconsistent with that object to consider them as a final recognition of an already complete and independent sovereign State.

The use of mere words like "State", "sovereignty" or "nation" would not be sufficient to confer these characteristics to a country "where all the substantial requisites of sovereignty are wanting."¹⁷⁹

To some degree this case can be distinguished on its facts. The confused Samoan situation meant that there was an exception to the general rule that states with which treaties had been concluded were thereafter dealt with as sovereign states. The other island groups with whom treaty relations were established did have the "substantial requisites of sovereignty". But the decision is also open to some criticism. In determining what a "State" is, the Court looked to standard international law texts, including Wheaton's *Elements*. The resulting definition is a mixture of the basic requirements the early writers might have insisted on and the evolving new requirements:¹⁸⁰

... [A] State such as can be recognised as a member of the Family of Nations must be one in which there has been habitual obedience by its subjects to superior authority, and a power of forcing obedience to laws and the observance of the demands of International law in relation to other States.

176 *Carr v Francis Times & Co*, above n 174, 179.

177 *Hunt v Gordon* (1884) 2 NZLR 160.

178 *Hunt v Gordon*, above n 177, 202.

179 *Hunt v Gordon*, above n 177, 202-203.

180 *Hunt v Gordon*, above n 177, 200.

Not surprisingly, Johnston J then looked solely at whether a European style central government had ever enjoyed the backing of a substantial proportion of the population. Even though there was a government of this sort in the country at the relevant time and some treaties were made with the "so-called King and Government of Samoa", it was held that absolute anarchy prevailed.¹⁸¹ Thus Samoa was not a state. But this surely put the test too high. Had Johnston J read the 1866 edition of Wheaton's book he would have realised this. Johnston J might also have noted this passage which seems directly applicable to the Samoan situation:¹⁸²

... whatever be its internal constitution, or form of government, or whoever may be its rulers, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in the contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social tie...

Six years before the decision in *Hunt v Gordon* Britain had accepted a formal cession of sovereignty from Fiji. It would be interesting to know how the Court of Appeal would have dealt with that document, because to deny its legitimacy as a treaty would have been to deny that a valid cession had occurred. The Fijian treaty of 1874 was in fact considered by the American and British Claims Arbitration Tribunal in 1926.¹⁸³ That international body had little difficulty in deciding that the treaty was a valid one (although the question of validity was never directly argued before it).

Article 4 of the cession document provided:

That the absolute proprietorship of all lands, not shown to be now alienated, so as to have become the bona fide property of Europeans or other foreigners ... shall be and is hereby to be vested in [the Queen].

The plaintiff was an American citizen and a landholder from the Fijian chiefs, who had been denied title to his property by a land commission set up to enforce article 4. The validity of the treaty was presumed throughout the judgment, which found for the plaintiff. The "precise question" the Tribunal said, was:¹⁸⁴

Whether Great Britain, as the succeeding Power in the islands under the Deed of Cession of 1874 failed in any respect to observe and carry out any obligation ... which it may be properly said, from the point of view of international law, to have assumed.

181 *Hunt v Gordon*, above n 177, 201.

182 *Elements of International Law* (1866), above n 4, 32; 27.

183 "Burt Claim (1923)" in Fred K Nielsen (ed) *American and British Claims Arbitration* (Government Printing Office, Washington, 1926) 588.

184 "Burt Claim (1923)" above n 183, 595.

IV THE TREATY OF WAITANGI

A *The Treaty in its Pacific Setting*

Prendergast J called the Treaty of Waitangi a "simple nullity" because "no body politic existed capable of making cession of sovereignty", Aotearoa being "a territory inhabited only by savages". It has been demonstrated that it is difficult to apply such comments to the Pacific treaties, and certainly to those made with the monarchs of major island groups like Hawaii, Samoa, Tonga, Tahiti and Fiji. Where did the Treaty of Waitangi fit into this nineteenth century pattern of treaty-making? If on its face and in the record and negotiations surrounding it, it exhibits characteristics similar to these other Pacific treaties, particularly those made with the Pacific monarchs, then a good case may be made for its validity at international law.

As a first point it should be noted that the Treaty of Waitangi does not stand alone as the first agreement concluded between the Pacific peoples and the colonising powers, before any particular practice had developed. Britain herself had by 1840 already made a treaty with Hawaii and assisted the Samoan chiefs in drawing up port regulations. France had concluded five treaties with the Hawaii and Tahiti and was preparing to negotiate with the chiefs of the Marquesas Islands for a cession of their territories. The United States also had made treaties with Tahiti and Hawaii. So treaty-making and negotiation with "native" peoples was already the norm in the Pacific, or fast becoming so, when the Waitangi document was signed. Such a development was not surprising given the experience in Africa before this date also.

As with other Pacific treaties, the Waitangi document deals with matters of international significance – the cession of sovereignty by the Maori tribes in return for the privileges of British subjects. Cessions of sovereignty were taken by France in the Marquesas in 1842 and in New Caledonia in 1844. Britain had purported to take the sovereignty of Hawaii even earlier, in 1794. Cession treaties were also being concluded in Africa at this time. Some of these bear a remarkable similarity to the Treaty of Waitangi. In the 1820s, Britain signed a series of agreements setting up the West African colony of Sierra Leone. A typical one in 1825 guaranteed that in exchange for a cession of sovereignty over certain territories, the African parties were to retain "the full, free and undisturbed possession and enjoyment of the lands they now hold and occupy", and gave "the protection of the British Government, the rights and privileges of British subjects".¹⁸⁵ The wording is almost identical to articles 2 and 3 of the Treaty of Waitangi.¹⁸⁶

185 Hertslet, above n 89, 32.

186 These are similarities also to French treaties with chiefs on the coast of Senegal in 1839: Pacao Convention between France and the Chiefs of the Houand Dhiogué, Bissery etc and Soumboudou and Pacao (Senegal) (17, 21 and 23 December 1839) 89 CTS 447-450. The chiefs cede their sovereignty over the coastal lands but retain the right to work their cultivations (*les longans*) and to continue to exploit the palm trees (*les palmiers*) on the ceded territory. The King of France promises in return amity and protection.

The manner of the Treaty's negotiation and signing is also familiar. The process of calling gatherings of chiefs and explaining the document to them is similar to the "declaration of protectorate" process in the Gilbert and Ellice and Solomon Islands, except that here signatures had to be gained. The French treaty in New Caledonia in 1844 must have been concluded in this way also.¹⁸⁷ The records of negotiations left by Colenso, Hobson and others have parallels with the descriptions of treaty negotiations in Africa.

As for the understanding of the Treaty on the Maori side, in the *New Zealand Maori Council* case,¹⁸⁸ Bisson J noted "I think it must be accepted that there would have been a problem in the Maori Chiefs who signed the Treaty being able to have a full understanding of what was meant in the English version."¹⁸⁹ He then examined the speech of Tamati Waka Nene at Waitangi, which, according to the contemporary European commentators, was central to the Maori decision to sign. This chief discusses the ostensible reason for the Treaty, namely the increasing presence and problems of European settlement, and notes that it is too late for the Maori to reject this immigration. Therefore he asks the Governor to stay in New Zealand and "remain for us – a father, a judge, a peacemaker". This indicates a good grasp of the content of the Treaty and Bisson J concludes "accepting that there are differences between the English and Maori versions of the Treaty and accepting that there would be differences of understanding as to the significance of the Treaty by Captain Hobson on the one hand and by the Maori Chiefs on the other, its basic provisions are clear enough."¹⁹⁰

Richardson J's analysis seems to be somewhat at odds with this conclusion. He noted that:¹⁹¹

... [I]t is not at all clear on what understanding more than 500 Maori signatories at the various venues signed ... Given the emphasis on oral discussion and decision making and limited literacy their understanding would necessarily have depended on what explanations were given to the particular signatories and their appreciation of the concepts involved. That was recognised by those present when Colenso interrupted proceedings just before the first Maori subscribed at Waitangi on 6 February. And the New Zealand Maori Council in its paper *Kaupapa – Te Wahanga Tuatahi* ... concluded that '... the Treaty was drawn up by amateurs on the one side and signed by those on the other side who understood little of its implications.'

187 According to the treaty document, it is concluded on 1 January 1844. The French flag was not raised over the territory until 20 January. This time was probably spent collecting signatures.

188 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641.

189 *New Zealand Maori Council v Attorney-General*, above n 188, 714.

190 *New Zealand Maori Council v Attorney-General*, above n 188, 714-715.

191 *New Zealand Maori Council v Attorney-General*, above n 188, 671-672.

He also noted Claudia Orange's contention that "the Maori might naturally have drawn the conclusion from explanations of the Maori texts that they were being asked to share some of their authority with a British administration and that it was a protectorate type relationship that was being represented at Waitangi, one in which power and authority would be shared."¹⁹²

Despite these problems it is quite clear that the principle "pacta sunt servanda", that the Treaty was a solemn understanding, was understood on the Maori side. This is clear from the many speeches in opposition to the Treaty, the extent of the debate and fact that some chiefs like Te Heu Heu and Waharoa refused to sign.

What were the intentions of the British Government in relation to the Treaty? Unquestionably, one primary reason was to exclude the claims of other colonial powers, especially the French, to the country. As in the other Pacific islands, once title by this means had been established, it was not seriously threatened. According to the nineteenth century practice, Britain would have had a very weak right if any to claim the sovereignty of Aotearoa had the Treaty not been signed.

The extensive preamble to the Treaty itself gives further clues of British intentions. The English Queen is "anxious to protect" the "just Rights and Property" of Maori, as well as to secure "Peace and Good Order", both of which, it is implied, are threatened by the influx of settlers. The British side wishes to "treat" for the cession of sovereignty and the Maori chiefs are "invited" to give it by accepting the Treaty Articles.

More evidence of British intentions is contained in the instructions to Hobson from the Colonial Secretary:¹⁹³

We acknowledge New Zealand as a sovereign and independent state, so far as least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert.

This would suggest that, try as they might, the British authorities did not find in Aotearoa a body with sufficient capacity to cede sovereignty. Accordingly, the situation is similar to that in New Guinea where cession without negotiation was urged on the basis that "there is no native government that could be helped and strengthened to meet the case."¹⁹⁴

But in Aotearoa by 1840 steps had already been taken to form a local government able to "meet the case" (that is, cede sovereignty). In 1835 British Resident Busby had organised the

192 *New Zealand Maori Council v Attorney-General*, above n 188, 672.

193 Reproduced in Thomas Lindsay Buick *The Treaty of Waitangi: How New Zealand Became a British Colony* (reprint, 3 ed, Capper Press, Christchurch, 1976) 72.

194 Morrell, above n 52, 251.

"Confederation of the United Tribes", a move which echoes British attempts in the same period to build compliant and (to them) recognisable governments in Samoa and Hawaii. In 1840 the possibility was indeed quite open for the development of an independent Maori government. Busby put forward a plan for the rule of the country by the Confederation and other chiefs, all under the protection of Great Britain which would hold some extra-territorial rights also. Hobson proposed that "factory" settlements be established, within which the common law would prevail, while outside, Maori independence under suitable British influence would continue.¹⁹⁵

In the Treaty itself, the Maori chiefs are not styled as simply "kings and chiefs" as some of the other Pacific documents provide, but are given the title "Chiefs of the Confederation of the United Tribes of New Zealand" and chiefs outside the Confederation are "separate and independent chiefs". This seems to be an attempt to recognise a higher degree of organization than the Colonial Office instructions describe.

Had the Treaty of Waitangi been concluded towards the end of the nineteenth century, perhaps after further British efforts to shape a "government", there would be little doubt about the ability of the Maori chiefs to cede sovereignty. The Treaty would then be treated in a manner equivalent to the Fijian cession of 1879. But should this passage of time and colonial interference determine its validity? The British and American Claims Arbitration Tribunal seems to have thought that it should not. Their decisions on land claims in both countries clearly implied that treaties of this type, whether signed in 1840 or 1874 were equally valid at international law.¹⁹⁶

V CONCLUSION

The Treaty of Waitangi has at times been considered to be invalid because there was no state in being at 1840 with which an international agreement could be signed. International law theory before the 1830s suggested that a state came into existence when there was a settled population with some form of leadership exercised over it. The practice of the colonial powers in concluding treaties which ceded sovereignty or regulated their dealings with Pacific island peoples on an ongoing basis suggests that basic states were presumed to exist. This certainly seems to be true of large islands like Hawaii and Tonga where monarchs reigned for much of the century. But this also appears true for much smaller islands also.

¹⁹⁵ Ward, above n 38, 105.

¹⁹⁶ "Burt Claim (1923)", above n 183, has already been discussed. "Webster Claim (1926)" in Fred K Nielsen (ed) *American and British Claims Arbitration* (Government Printing Office, Washington, 1926) 540 found that "all those who had any claim to represent the aboriginal natives, as politically organised, entered into a treaty ceding sovereignty to Great Britain ... an exclusive right of pre-emption of lands was given to the Crown. This was a matter of sovereignty. It was a legal regulation of alienation, not a conveyance of property."

Writing in 1907 about treaties giving extra-territorial powers, the Chief Justice of Hong Kong commented:¹⁹⁷

... [T]he sovereignty of the potentates of these oriental states, as well as of barbarous chieftains, is recognised to be as full an extent as that of Sovereigns of what was formerly called "Christendom". The basis of the King's foreign jurisdiction is treaty: and although "other lawful means" are recognised as a sound foundation for the exercise of the jurisdiction, and indeed have occasionally to justify it, treaty is resorted to wherever possible for its establishment. The due observance of these treaties is as much regarded by the Executive, and, if need be enforceable by the Courts, as in the case of treaties with civilised powers. They are concluded by the British Sovereign as with an equal Sovereign Prince.

This summarised well the position of most of the Pacific treaties.

In the end, despite all the intervening scholarship, there are still doubts about just what was done and believed in 1840 by the British authorities and the Maori chiefs. Placing the Treaty in its historical-legal Pacific background helps to answer a few more questions but of course not all. However the question of whether Aotearoa really was a state in 1840 and capable of concluding treaties should not be open to too much doubt.

¹⁹⁷ Francis Taylor Piggott *Exterritoriality: the Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (Kelly and Walsh, Hong Kong, 1907) 4.

