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Wai 1040, #3.3.20

IN THE WAITANGI TRIBUNAL

Wai 1040

Wai 1385
Wai 1507
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IN THE MATTER OF **The Treaty of Waitangi Act 1975**

AND IN THE MATTER OF **Te Paparahi o Te Raki (Northland) Inquiry**

Closing Submissions
Date: 21 January 2011

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INTRODUCTION

1. In these submissions, we apply two systems of law to show that the Treaty of Waitangi did not transfer Māori sovereignty to the British Crown. As McHugh rightly points out, it was not until the 1880s that indigenous people began to be subjugated at law with the rise of legal positivism. During the early 19th century, when natural law, Vattel and jus gentium were prevalent, law recognised the status of indigenous peoples.

2. Dame Anne Salmond has written that:

> . . . [A]s soon as the meeting at Waitangi was over, the Treaty in English was circulated as the 'official' version of the 1840 agreements, both in New Zealand and Britain. It subsequently became the focus of scholarly discussions (almost invariably in English) of the Treaty deliberations and their political and legal implications. This, however, tells us more about imperial assumptions; subsequent relationships between Maori, the Crown and the settlers in New Zealand; and the intersections between historiography and power than it does about the promises that were exchanged between the *rangatira* and the Crown in 1840. (Page 2, BOE)

3. Our inquiry must focus on the nature and extent of the promises that were exchanged in 1840. While today we recognise the Maori text alongside the English text, the situation was vastly different in the 19th century. And more vastly different under principles of international law in effect now and then.

4. Then, Te Tiriti o Waitangi (as we will refer o the Māori language Treaty) was not accorded its proper status as the official Treaty. Both the British and Settler Government proceeded to act on the basis of The Treaty of Waitangi and its very different terms. But official conduct reflected that the British officials did not have the legal right to govern Māori and did not actually attempt to govern

them for years to come. The focus of Stage 1 hearins is centered around 1840 so it is beyond the scope of these hearings to identify when the shift to British expressions of complete sovereignty took place. But we can say that it did not happen with the signing of Te Tiriti.

5. What then was the nature of the bargain made on February 6, 1840? And how do we determine this? As Dame Anne Salmond has rightly pointed out, we cannot take a Euro-centric approach, as the Crown has done in the presentation of their evidence. Such a one-dimensional approach examines only one party and does not get to the core of the promises that were exchanged.

6. The signing of Te Tiriti o Waitangi represents a collision of two worlds, and two world-views. Te Tiriti can only begin to be fully understood when it is analysed in relation to both of these world-views. First, however, Te Tiriti needs to be understood from the perspective of Te Ao Maori. Te Tiriti was written in te reo Maori, debated in te reo Maori, and signed in te reo Maori. Te Tiriti was signed at a time when the New Zealand lived under the legal system based on Tikanga; British common law had no application here.

7. These submissions are focussed on establishing the legal framework on which HW and TT should be assessed. In her brief of evidence, Nin Tomas provides detailed evidence of a Maori jural system in existence prior to, and at, 1840. Wharetatao King gave evidence of HW and the laws of New Zealand – most notably the 1858 letter from Governor Gore-Brown proffering the Laws of England for Māori to adopt as their own. The obvious implication of that inquiry is that Māori had the right to say No, and the pākehā government had no right to compel adoption.

8. Important to the British assessment of Māori civilisation was the conclusion that Māori lacked a legal system. The British determined that it was necessary for Māori to enact laws in order

to bring in an element of civilisation. Such a conclusion was completely in error.

9. In 1840 and for generations before, the legal system operating in New Zealand was tikanga Maori. Tikanga was a fully-functioning jural system, guiding and governing every aspect of life in New Zealand. It provided the rules and obligations of Maori society; early exchanges with Pakeha explorers, traders and settlers were all governed according to tikanga. The introduction of more pākeha and even the signing of Te Tiriti o Waitangi did not change this—legally or practically. Tikanga continued to operate as the dominant legal system in New Zealand throughout most of the remainder of the 19th Century. British law, the legal system relied on by the Crown for their justification of the usurpation of sovereignty and the subsequent colonisation of New Zealand, did not even begin to operate in New Zealand until 1854 and then it did not operate throughout all of New Zealand.

10. According to New Zealand law in 1840, Tikanga held that there can be no cession of mana – mana encompassing all elements of Maori existence, power and authority over whenua, tangata and tikanga.

11. The international law at the time, as described by Vattel's *Jus Gentium* was that free consent was required if actual sovereignty could be ceded, a position that is subject to question. A grant of authority to another to govern required true free consent, not the illusion of free consent as the settlers and government thereafter have clung to. The absence of informed consent supports the conclusion that there was no valid cession of sovereignty under a legal analysis of TT. This will be more fully examined below.

THE MAORI STATE AND SOVEREIGNTY

Te Ao Maori

12. Dr. Nin Tomas presented evidence refuting the notion that hapu-based authority and its system of law and government was unequal to the British monarch's authority. At paragraph 9 of her Brief of Evidence (Wai 1040, #C1) she states that:

> Contrary to these assertions, Maori had a full jural system of law that was based on a complex of identifiable ethics, concepts, principles and rules.

13. Dr. Tomas also rejected the notion that Tikanga was merely a series of quaint cultural practices and could have little relevance as law. (Paragraph 12)

> Although some may consider Tikanga to be merely a collection of cultural manifestations or an amalgam of discrete practices, at the time of the signing of Te Tiriti and before, it was a comprehensive system of enforceable law and government, containing elements common to hapu and iwi throughout Aotearoa/New Zealand. It featured, among other things, a system of governance, and it managed land holdings and resources, while regulating human conduct and providing conflict management. All of these are jural hallmarks that indicate the presence of an operating system of law.

14. Dr. Tomas' evidence presented a framework of tikanga as it is and as it was. The justification of tikanga rests in at least 700 years of constant use, modification and development. Maori tikanga is grounded in the very soil on which we currently stand. British law cannot withstand the same test.

15. In reviewing other treatment of customary law, Bennett writes that:

> Customary law derives from social practices that the community concerned accepts as obligatory. Normative systems of this nature are never directly accessible to the outsider. They must be discovered by questioning informants and on-the-spot observation, which are methods typical of the social sciences, or by consulting authoritative texts, which is the traditional legal method. In either case, the resulting data present a construction of reality that is coloured by the preconceptions of the informants and the researchers.[1]

16. The denial of the legal nature of tikanga by the British was not unique to New Zealand. Throughout the colonised world, local, custom law was denied by the British thus creating a need to impose their own authority on indigenous societies.

17. The denial of indigenous law was not restricted to New Zealand. in 1998 Effa Okupa described how the image of brutality in African societies and life was emphasised as a convenient colonial invention to justify imposing foreign laws and the subjugation of the natives:

> It is a myth that pre-colonial African societies were anarchical and brutal; ... Violence and cruelty in human societies have nothing to do with men's ethnic origin, as seen by twentieth century wars ... As such, African societies did not have a monopoly on violence, some indigenous communities were as beastly and cruel as the societies of the colonial powers. The myth of violence and brutality were

[1] Bennett, T.W. 2004 *Customary Law in South Africa*. Lansdowne: Juta, page 1

perpetrated to justify the application of colonial penal laws, public hangings and incarceration.[2]

18. It is perhaps illustrative to cite, in its entirety, Dr. Tomas' concluding remarks to her Brief of Evidence:

> 145. Maori Custom Law was clearly once the supreme law of Aotearoa/New Zealand. This is no longer the case and its application is now restricted by the English-based New Zealand legal system, although its power and authority still operate within the Maori community. At the time of the signing of Te Tiriti, however, it was the paramount law of the land.
>
> 146. As with any legal system, the tikanga that upholds it evolved over a period of many years, reflecting the culture in which it had evolved and which it served.
>
> 147. Commentators who deride Maori culture as uncivilised or undeveloped wrongly characterise the association of "mind", "culture" and "technology", and reflect a common fallacy that persists even today – the linking of the mental processes of an entire Maori culture to the non-availability of technology in the society in which they lived, and seeing the two as being parallel processes.
>
> 148. Maori culture pre-contact did not possess European technology and industrial processes. A lack of technology did not deprive Maori, however, of the ability to engage in the highly complex processes needed to intellectualise their world and produce the fully-operating and effective system of law that governed their affairs for centuries.

[2] International Biography of African Customary Law, Hamburg: LIT and International African Institute, page 63

149. Although different in emphasis and cultural underpinnings, Maori custom law governed Maori in much the same was as English common law governed the English. There were controls on personal conduct, succession of governance structures, widely recognised methods for controlling land and resources, engagement with other hapu, conditions for trade and warfare. The system possessed methods of punishing wrongdoing and protecting valued items and materials.

150. Te Tiriti o Waitangi set the basis for a continuing relationship between Maori hapu and the British Crown as one in which tino rangatiratanga would be preserved. Failure to possess a single, unified polity or centralised Westminster-style system of government does not detract from tino rangatiratanga as a jural -principle or the rightful claim that Maori sovereignty (as the recognition of an exclusive, overarching Maori existing over the territory of Aotearoa) was recognised by the British in He Whakaputanga and then resiled from in later interpretations of the Treaty of Waitangi.

151. Neither does the vesting of "sovereignty" in several groups within a geographical area diminish the tino rangatiratanga of each of those groups. "Tino rangatiratanga" in effect, is at least the equivalent of "sovereignty". The claim that many "sovereign" hapu existed in Aotearoa/New Zealand at the time of European contact and continue into the present is based on acknowledgment of the system I have outlined. This is supported by the legal conclusions drawn by Chief Judge Morison in Investigation of Title to Wharo Oneroa a Tohe (90 Mile Beach), in 1957:

As a matter of jurisprudence the ownership of territory was not restricted to what *is termed the civilized world; the other races of the world also owned their territories.*

The Maori Tribes must be regarded as states capable of owning territory just as much *as any other peoples whether civilized or not: The Court is of the opinion that these tribes were the owners of the territories over which they were able to exercise exclusive dominion or control. The two parts of this land were immediately before the Treaty of Waitangi within the territories over which Te Aupouri and Te Rarawa respectively exercised exclusive dominion and control and the Court therefore determines that they were owned and occupied by these two tribes respectively according to their customs and usages.*

152. It is respectfully submitted that the words of Chief Judge Morison, spoken in reference to *descendants* of Ngapuhi living in the north, and which recognised the existence of Maori sovereign title and property rights under English law at 1840, are applicable as precedent to the claims being advanced by united hapu and iwi in this claim. The comprehensive Ngapuhi legal system outlined above shows that they were, at 1840, at least the equivalent of highly-developed, self-governing sovereign European states.

He Whakaminenga

19. One of the expressions of the sovereignty of the individual hapū was He Whakaminenga, known to English speakers as the Confederation of Chiefs. Although it was described in He Whakaputanga (Declaration of Independence), its existence pre-dated the 28 October 1835 document by a number of years.

20. He Whakaputanga *declared* the independent sovereignty of the hereditary chiefs of New Zealand; it did not *create* the sovereignty. It was declarative of an existing condition. The

declaration was accepted by English and Australian governments, and they conducted their relationships accordingly.

21. Article 3 of He Whakaputanga calls for He Whakaminenga to meet during Fall of each year for the purpose of framing laws, etc.[3] Although British evidence is that He Whakaminenga did not meet at all, He Whakaminenga had been meeting long before He Whakaputanga was written and continued thereafter.

22. Evidence of Ani Taniwha reflects that the He Wakaminenga began meeting in 1808. [4] Similarly, Nuki Aldridge's evidence also states that it was meeting since 1808, although the two witnesses give slightly different reasons for these meetings.

23. Ani Taniwha's evidence describes the location where some of the meetings took place, adjacent to moorings created by pou were anchored in the adjacent bay, where the Chiefs moored their waka while meeting together. This location identified before this Tribunal hearing process was begun and the matter became an issue.

24. The European record, however, is to the contrary. Dr. Loveridge's brief of evidence reflects that Busby concluded that the entire exercise in establishing self-government was a failure because He Whakaminenga had not met.[5] He had wanted to construct a Parliament building but had not achieved the funding needed to do so. He concluded that the chiefs would not be self-governing and another form of government would have to be implemented. Underneath this conclusion was the assumption that without these meetings there would be no law. Apparently, because it wasn't being done under British control, it wasn't being done.

25. The conclusion that He Whakaminenga had not met is not only wrong in fact, such a stated conclusion has limited bona fides in

[3] He Wakaputanga, section 3.
[4] Ani Taniwha Brief of Evidence, #B4a, paras 8, and 11-13
[5] Loveridge brief of Evidence, pp 234 and 235.

the context of He Whakaminenga. For example, He Whakaminenga was being circulated for signature, up until 1839. Had it been the dead letter we are meant to believe, there would have been no reason to continue circulation for signatures. Moreover, inasmuch as the hereditary chiefs held sovereign power, it was appropriate for them to meet whenever and however they determined, not as dictated by the wishes of the British government representatives in Niu Tireni at the time.

26. Busby's reaction to the conclusion that the Whakaminenga wasn't meeting leaves the distinct impression that he was not really concerned with whether they met, he was concerned with whether they met according to his plans. If he hadn't arranged, manipulated and controlled the meeting, it might as well not have happened.

27. Had the British establishment known that the Chiefs had been meeting regularly, Busby's conclusion would have been undermined. Of course the fallacy of this entire question is that the Chiefs ruled for centuries and would have continued to rule Aotearoa absent British interference and intervention.

28. It would seem likely that even if Busby was truly unaware that the Chiefs were meeting regularly, Henry Williams could have been likely to have known of their meetings. Unfortunately, the record does not reflect any such knowledge.

29. The record, however, does reflect knowledge of another British government representative, McDonnell. As the assistant resident, he worked with the Chiefs in the Hokianga region to successfully establish a liquor ban. He obviously knew that the chiefs met; he collaborated with them in a form of law-making in the Hokianga area that resulted in an enforced ban of alcohol. Busby himself conceded that the Hokianga chiefs amounted to a legislative authority competent to pass a law interfering with British

property.[6] Accordingly, it is difficult to appreciate just how this notion that He Whakaminenga never met got to be so accepted other than through colonising notions of superiority.

Legislation Not Needed for Māori Governance

30. The notion that formal legislation by the Māori rangatira was necessary had to be culturally inappropriate.

31. As described by several kaikorero witnesses, Nin Tomas, and Moana Jackson, as well as other tangata whenua witnesses, the Maori had a full system of law that was jural in nature, very complex and it had divine origins--tikanga. The chiefs regularly used Tikanga in addressing the problems that arose in daily life. This was not a legislative role, however, inasmuch as they were merely applying existing law to situations arising. To suggest that even powerful chiefs would lightly take on the role of passing legislation on command was culturally dissonant. The Māori already had law and it had been given to them by the gods.

32. Accordingly, although it has repeated and accepted that the He Whakaminenga did not meet, there is considerable traditional evidence that it did meet and corroborating evidence of English origin that reflect that it not only met, but was effective in achieving the desired objective.

33. It becomes apparent that it wasn't the lack of law that gave rise to objections about He Whakaminenga. It was the fact that the Māori chiefs had not embraced the British system of law and the settlers did not want to comply with Māori law. Thus, the rejection of local, custom law became the basis for imposing colonial law over and instead of Māori law.

A Confederation Does Not Equal Unity

[6]Loveridge Brief of Evidence, A18, p 62, para 69 and p. 60, para 66

34. First of all it is important to note that the language of He Whakaputanga did not establish a unified nation—or federation. Rather, He Whakaputanga, reflected an entity that was a confederation.

35. British concerns about the plurality of sovereignty were not going to be resolved by an annual legislative meeting of a confederation. The Chiefs would work together whenever they viewed it to be appropriate, but they were not obligated to act in unison in all matters in order to maintain sovereignty.

36. Establishing sovereignty does not require that a specific area be governed in a unified whole. The fact that hapū were individually sovereign rather than operating under one central government, does not mean that they were not sovereign. The British desire for a central government was for its own convenience. Its utility became obvious when it came time to solicit signatures on Te Tiriti o Waitangi. Had there been one Māori King with true control over all Māori hapū it would have been much easier (for the British) to obtain a transfer of sovereignty with one signature. In our view, this desire for ease continues to manifest itself in the large natural groups policy. Even though it is well known and accepted that sovereignty reposed in the hapū, the currenct government insists on dealing with larger groups constructed for the government's own convenience.

37. By striving to achieve a unity by means such as He Whakaputanga, the British were holding Māori to a standard not achieved elsewhere in the world, including Europe. Italy wasn't unified until the 1860s but it has not been seriously suggested that the Italian states were not sovereign in their own individual rights. It wasn't until very recently that the European states began to work collaboratively under the European Union. This did not mean that the component states were not sovereign and their "unification" does not mean that they have surrendered their

sovereignty. To impose on Māori a requirement of unity for maintenance of their sovereignty is just a unilateral justification by the British for the sake of their colonial convenience.

The Maori State in International Law

38. The Claimant evidence clearly asserts that Maori existed in a sovereign state prior to the signing of Te Tiriti o Waitangi, as affirmed in He Whakaputanga. This sovereignty had to be recognised in accordance with the governing principles of international law at the time. While late 19th century international law (known today as the Positivist International Law) classed non-European states as un-civilised and incapable of exercising sovereignty, the dominant international law doctrine of 1840, as espoused by Emmerich de Vattel in his seminal text *Le Droit des Gens; ou Principes de la loi naturelle appliqués a la conduit & aux affaires des Nations & des Souverains*[7] ("*Law of Nations*"), provides a framework recognising all peoples in their natural, and sovereign, state. This distinction is important because Crown and Tribunal evidence reference the positivist school of international law and use stadial beliefs to argue that Maori held a lesser form of sovereignty that justified colonial dominance.

39. Such conclusions however were developed well after the Treaty was signed. They have been used to justify government conduct that was otherwise outside the scope of the Treaty/Te Tiriti—either or both versions.

Principles of International Law

40. The aim of this section is to highlight the existence of international law principles as at 1840 by drawing on Vattel, McHugh, the Vienna Convention, Nin Tomas' and Claimant evidence demonstrating the existence and function of a Maori polity and jural system as sovereign states.

[7] The Law of Nations; or the principles of Natural Law

41. Vattel: Book 1 Of Nations Considered in Themselves; Chapter 1 Of Nations or Sovereign States:

1 Of the state, and of sovereignty.

A NATION or a state is, as has been said at the beginning of this work, a body politic, or a society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength.

From the very design that induces a number of men to form a society which has its common interests, and which is to act in concert, it is necessary that there should be established a *Public Authority*, to order and direct what is to be done in relation to the end of the association. This political authority is the *Sovereignty*; and he or they who are invested with it are the *Sovereign*.

4 What are sovereign states.

Every nation that governs itself, under what form soever, without dependence on any foreign power, is a *Sovereign State*. Its rights are naturally the same as those of any other state. Such are the moral persons who live together in a natural society, subject to the law of nations. To give a nation a right to make an immediate figure in this grand society, it is sufficient that it be really sovereign and independent, that is, that it governed itself by its own authority and laws.

19 Of states forming a federal republic

Finally, several sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will

> together constitute a federal republic: their joint deliberations will not impair the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. . . .

42. Vattel goes on to state in paragraph 11 that a state which has passed under the Dominion of another is no longer a state. He does, though, address the issue of protecting states exceeding their granted powers later in his treatise.

43. Vattel's thought was based on natural law. He provides a framework for sovereign states and sovereignty which applies not only to the European society he lived amongst, but also to the Maori society which he knew nothing of. It reflects a universal law of nature and, therefore, proves to be more applicable than any positivist notion of sovereignty which denigrated and denied the rights of indigenous societies.

44. Antony Anghie in a current examination of the practices of European states who colonised indigenous peoples commented on the one-sidedness of the treaty instruments that were used to wrest control of lands and resources.

45. "The resulting 'unequal treaties' – unequal not only because they were the product of unequal power, but because they embodied unequal obligations – were humiliating to the non-European states." [8] It was further noted that the colonial powers derived rights but never obligations from these treaties. Such is certainly the case here.

[8] Anghie, Antony, *Imperialism, Sovereignty, and the Making of International Law*, Cambridge University Press (1994), p 72

46. Book 1: Chapter 5 Of States Elective, Successive or Hereditary, and of Those Called Patrimonial[9]

> 69 Every true sovereignty is unalienable
>
> . . . Every true sovereignty is, in its own nature, unalienable. We shall be easily convinced of this, if we pay attention to the origin and end of political society, and of the supreme authority. A nation becomes incorporated into a society, to labor for the common welfare as it shall think proper, and to live accordingly to its own laws. With this view it establishes a public authority. If it entrusts that authority to a prince, even with the power of transferring it to other hands, *this can never take place without the express and unanimous consent of the citizens,* with the right of really alienating or subjecting the state to another body politic: for the individuals who have formed this society, entered into it in order to live in an independent state, and not under a foreign yoke. [Emphasis added.]

47. Vattel is saying that sovereignty is unalienable because it vests in the people. This was recognised in the American Constitution/Declaration of Independence which acknowledged sovereignty vested in the people.

THE MEANING AND EFFECT OF HE WHAKAPUTANGA

48. He Whakaputanga was signed by 34 chiefs in October 1835. It was witnessed by Henry Williams, and George Clarke, CMS Missionaries, and James Clendon, and Gilbert Mair, Merchants, and certified by Busby, who then sent it to the King. It was recognised by the Crown, in a letter from Lord Glenelg (the British Secretary of State for War and the Colonies) dated 25 May 1836. In other words, it was accorded all the formalities of an international document. It was a declaration between one set of

[9] Vattel, Law of Nations

sovereign entities and another. It was accepted as such and formed the basis for subsequent action.

49. It *declared* the sovereignty of the Māori chiefs, it did not *create* their sovereignty. He Whakaputanga has quite different origins to Te Tiriti or The Treaty. There is little, if any, of controversy surrounding its translation into te reo Māori. For example, there is traditional evidence that there was a Māori scribe –Eruera Pare Hongi—involved in its drafting. This is supported by the language of He Whakaputanga which is of archaic form and not easily translated into contemporary English vernacular.

50. Despite efforts to undermine the importance and meaning of He Whakaputanga, it has the indicia of an instrument of binding international significance and its signing produced a response from the English government consistent with its elements.

51. The evidence of Wharetatao King translated the archaic forms in accordance with the meanings she had been taught by people alive at the time and aware of the documents meanings.

52. Because it is written in a more archaic form of te reo Māori, we adopt the meanings ascribed to it in the evidence of Wharetatao King:

Ko matou - *we*

ko nga Tino Rangatira – *the sovereign rangatira representing our Sovereign Hapus*

o nga iwi o – *bones of*

Nu Tireni – *New Zealand* i.e. the entire country

i raro mai o Hauraki – *from every region below Hauraki*

kua oti nei te huihui - *have met, discussed, made decisions and fully completed our hapu meetings and we gave our full support for the meeting at*

i Waitangi i Tokerau i te ra 28 o Oketopa 1835 - *Waitangi in Tokerau on the 28th day of October 1835.*

Ka wakaputa i te rangatiratanga o to matou ake wenua *– the sovereignty of our own hapu regions is agreed and declared ongoing in our own meetings*

ka meatia *–our final action in the process now is*

ka waka putaia e matou *– to let those decisions be known publicly. We hereby announce*

he wenua rangatira *– that our various individual hapu regions are sovereign.*

Kia huaina *– let its name be*

ko te Wakaminenga o Nga Hapu O Nu Tireni. *The United Tribes of New Zealand*

53. Ms King offered the following understanding of Article 2:

ARTICLE 2

Ko te Kingitanga ko te mana i te wenua o te Wakaminenga o Nu Tireni. Ka meatia nei kei nga Tino Rangatira anake i to matou huihuinga. A ka mea hoki e kore e tukua e matou te wakarite ture kei te tahi hunga ke atu, me te tahi kawanatanga hoki kia meatia i te wenua o te Wakaminenga o Nu Tireni. Ko nga tangata anake e meatia nei e matou e wakarite ana ki te ritenga o o matou ture e meatia nei e matou i to matou huihuinga.

Ko te Kingitanga ko te mana i te wenua o te Wakaminenga o Nu Tireni - *Is it the King's monarchy that*

has mana, prestige and authority in the new nation, Te Wakaminenga o Nu Tireni?"

ka meatia nei – *we advise you unequivocally*

Tino Rangatira anake – *the mana, prestige and authority solely and exclusively rests with our elevated sovereign/ rangatira, our sovereign hapu representative, no one else.*

i to matou huihuinga - *as we collectively decided and recorded at our (hapu level) meetings,* ***prior*** *to 28 October*

A, ka mea hoki – *The outcomes or approved motions of our hapu meetings are:*

e kore e tukua e matou – *none of us will allow or permit ANYONE*

te wakarite ture – *to discuss or frame any law/kawa*

kei te tahi hunga ke atu - *we will NOT authorise in any way, any persons whomsoever,*

me te tahi kawanatanga hoki - *nor will we permit any governance structure*

kia meatia nei i te wenua o te Wakaminenga o Nu Tireni – *to establish itself, have application in, validation or authority in the territories of the Wakaminenga o Nga Hapu o Nu Tireni.*

Ko nga tangata anake e meatia nei e matou – *It will only be people of our choosing,*

e wakarite ana ki te ritenga o o matou ture – *those who can align themselves with, and practice our lore and laws*

e meatia nei matou i to matou huihuinga. – *This was our unanimous agreement at our hapu meetings.*

54. The following understanding of Article 3 was rendered:

ARTICLE 3

Ko matou ko nga Tino Rangatira ka mea nei kia huihui ki te runanga ki Waitangi a te ngahuru i tenei tau, i tenei tau ki te wakarite ture kia tika ai te wakawakanga kia mau pu te rongo kia mutu te he kia tika te hokohoko, a ka mea hoki ki nga tauiwi o runga, kia wakarerea te wawai ki a mahara ai ki te wakaoranga o to matou wenua a kia uru ratou ki Te Wakaminenga o Nu Tireni

Ko matou ko nga Tino Rangatira - *We, the chosen and elevated sovereign/ rangatira, representatives of whanau hapu*

ka mea nei - *reiterate the motions agreed at meetings prior to 28 October and insist*

kia huihui - *it is important we meet*

ki te runanga ki Waitangi – *as a collective of open-minded visionaries, at Waitangi*

a te ngahuru i tenei tau, i tenei tau – *in the autumn of every year*

ki te wakarite ture – *to discuss and frame operational laws as initiated by hapu*

kia tika <u>ai</u> te wakawakanga - *to ensure the ignorance and/or arrogance of the practices of the newcomers are ceased;*

kia mau <u>pu</u> te rongo, – *with emphasis given NEVER to create anything that would not maintain peace*

ki a mutu te <u>he</u>, – *for as already discussed and agreed at these meetings the promotion and practice of peace would in turn end wrongdoings perpetrated upon us.*

kia tika te hokohoko, - *this cessation of wrongdoing would then align our focus on the art of trading with integrity*

a, ka mea hoki ki nga tauiwi, - *again we collectively reiterate to those who would "poke their nose (tau-ihu)*

o runga - *onto our shores/ land"*

kia wakarerea te wawai - common sense not prevailing, *you are ordered to let go of your ways. All the structures that you know of and are familiar with are gone, in the past*

ki a mahara ai - We *remind you our structures are purposely designed and focused on maintaining the peoples' wellbeing, including our healthy relationship with our environment, all that constitutes our universe, one song for all since all are one*

o to matou wenua – *here on the placenta from which we all gain sustenance*

a ki a uru ratou ki Te Wakaminenga o Nu Tireni - *consequently we now formally advise you, you have no option but to come under the auspices of Te Wakaminenga o Nga Hapu o Nu Tireni.*

55. Article 4 was interpreted as follows:

ARTICLE 4

Ka mea matou kia tuhituhia he pukapuka ki te ritenga o tenei o to matou wakaputanga nei ki te Kingi o Ingarani hei kawe atu i to matou aroha, nana hoki i wakaae ki te Kara mo matou. A na te mea ka atawai matou ka tiaki i nga pakeha e noho nei i uta, e rere mai ana ki te hokohoko, koia ka mea ai matou ki te Kingi kia waiho hei matua ki a matou i to matou Tamarikitanga kei wakakahoretia to matou Rangatiratanga.

Ka mea matou – *We* (the aforementioned)

kia tuhituhia - *write*

he pukapuka - *a book*

ki te ritenga - *formally commanding a verbatim copy*

o tenei, o to matou wakaputanga nei – *of this, our Wakaputanga, the proclamation to the world of our presence, an independent rangatira nation, be written and forwarded*

ki te Kingi o Ingarani – *as a notification and courtesy to the King of England*

hei kawe atu i to matou aroha - *as a demonstration of our love and appreciation*

nana hoki i wakaae ki te Kara mo matou - *for his keeping his promise to gift us a flag according us all associated rights, privileges and protections*

A no te mea - *Because*

ka atawai matou ka tiaki i nga pakeha - *we too have given our word to embrace the pakeha and care responsibly for those (unable to whakapapa to our land)*

e noho nei i uta - *who are living among us under our laws/ lore*

e rere mai ana ki te hokohoko - *or who are here for trading purposes under our laws/ lore*

koia – *departure now from individual hapu business*

ka mea ai matou ki te Kingi - *that is why we ask His Royal Highness*

kia waiho hei matua ki a matou - *to continue in the capacity accorded by the Tino Rangatira, that of a protective matua/parent to us*

i to matou Tamarikitanga - *while we are in a state of infancy in matters pertaining to global business*

kei wakakahoretia, to matou Rangatiratanga – *lest ANYONE obliterate our sovereignty, our culture, our existence, our very reason for being.* [10]

56. Some contend that the purpose of He Whakaputanga was to establish a protectorate with the British Crown. The handed down traditional information, however, was that it was meant to establish a trade relationship with the King.

57. Even if the purpose of He Whakaputanga were to establish a protectorate, its effect would have been to subordinate the Chiefs' dealings with other countries to the English King. There is apparently nothing in writing reflecting that the British government considered Niu Tireni to be a protectorate of Great Britain. Had that been so, there would have been no need for Te Tiriti under yet another posited threat from French colonisation.

58. In 1831 after seizure of the cargo on the George Murray, the chiefs petitioned the British King for protection. In 1833, the response from the King arrived, delivered by Busby, appointed to be the British resident. There was no suggestion that Britain was given any powers over Māori. It was after a flag was selected and recognised – another acknowledgement of Māori sovereignty— that He Whakaputanga was drafted.

59. Nor was the rudimentary language of government particularly British—it was couched in terms of the new American government – the legislature was referred to as Congress and the instrument itself was called after the American Declaration of Independence. This is particularly noteworthy given the participation of Henry Williams in the translation from Māori to English. Williams had been injured in the War of 1812 with the U.S. and likely would have been quite resistant to using American terms. The reference to Congress in He Whakaputanga could not have been based on the Treaty of Paris; the Congress described in the Treaty of Paris

[10] Brief of evidence of Wharetatao King , paragraphs 40-44

lacked legislative power. The American Congress had power to legislate and this was repeatedly Busby's statement of the purpose of He Whakaminenga. Its failure to discharge the duties Busby imagined for it was the ultimate purported basis for abandoning the effort to advance He Whakaminenga as government.

60. The British did not want to live under existing Māori Law but that did not make it any less Māori Law.

61. And why would the Māori want to declare independence? If such a declaration was viewed as a form of resistance to the threat of a French take-over attempt, it was a double-edged sword because it resulted in British acknowledgement of Māori sovereignty, a recognition that would haunt the British later when attempting to take that sovereignty for themselves.

THE MEANING AND EFFECT OF TE TIRITI O WAITANGI

62. The meaning and effect of Te Tiriti o Waitangi will be assessed according to:

a. The Text;

b. The Oral Debates;

c. International Law;

d. British Imperial Law; and

e. Post-1840 Events.

The Text

63. It was a consistent theme of the claimant evidence that Te Tiriti o Waitangi, and not the Treaty of Waitangi, should be considered the authoritative text as the Rangatira signed Te Tiriti at Waitangi and elsewhere in the rohe. Professor Dame Anne Salmond records the significance of this:

Although [the] final draft in English was read out by Captain Hobson at the beginning of proceedings at Waitangi, it contributed little to the discussions with the *rangatira*, since most (perhaps all) of them did not understand it. For this reason the proposal in English is, strictly speaking, irrelevant to the question of what was agreed between the *rangatira* and the British Crown at Waitangi and elsewhere in 1840." (BOE, page 2)

64. It is not enough to say that the English draft of Article 1 referred to the transfer of sovereignty and that, therefore, the gifting of Kawanatanga by Maori in Article 1 in Te Tiriti equates to the transfer of sovereignty. Such an approach is simplistic and its only purpose is to provide the Crown with an easy, if somewhat intellectually dishonest, answer to what is a very complex problem.

65. First of all, discussion of the English version is not particularly relevant to any aspect of these proceedings. Te Tiriti was read, debated, and signed *in te reo Māori*. The Treaty of Waitangi did not feature until it was sent to England for the government to rely on and published.

66. The language of Te Tiriti—the official reflection of the agreement between the two nations—then is critical to an understanding of what was actually agreed. *Kawanatanga* was word distinct to *tino rangatiratanga*. In order to understand the meaning and effect of Te Tiriti o Waitangi, we need to understand what *Kawanatanga* meant, and how it was intended to interact with the guarantee of *Tino Rangatiratanga* in Article 2. Instead of engaging on this issue, the evidence presented by the Crown instead amounts to little more than a post hoc justification of their assumption of sovereignty over New Zealand. The Crown's interpretation that *kawanatanga* and *tino rangatiratanga* flies in the face of its own common law interpretation of instruments. The use of two different words is understood to have two different

meanings. Whether understood to refer to a Governorship like that in the Bible or Sydney is subject to lengthy debate. It could have meant both, but it certainly was different to tino rangatiratanga.

67. The Crown position also fails to acknowledge that there was a course of conduct between the parties, partly reflected in He Whakaputanga. The phrase tino rangatiratanga had been used in He Whakaputanga to refer to sovereignty, and not just a passing mention of something summed up as "sovereignty" but a clear, powerful and unequivocal declaration of legal and political self-determination and independence. To after the fact describe tino rangatiratanga and the right to dispose of a few forests is a shameful reading down of one of the fundamental assertions of human political and legal power and authority. The Crown could not in The Treaty depart from such a usage between the parties without a clear, obvious and plainly accepted statement of such a departure. This was not done.

68. Accordingly, the claim that either instrument transferred sovereignty lacks support.

69. In these Stage 1 proceedings, there was some opinion to the effect that The Treaty repealed He Whakaputanga. There is nothing in the text to reflect such a consequence. As a usage between the parties, there was mention made of the Confederation of Chiefs. Reference to the Chiefs without indicating that they were no longer going to operate as sovereigns or that the British no longer regarded them as sovereign would have required an explicit, clear statement to that effect. There is nothing in the record to indicate such an intention.

70. Several comments were made to the effect that the Treaty made the Māori into British subjects. This conclusion is not supported by the plain language of Article 3. Article 3 (in English) grants the Māori the benefits of British subjects. It does not impose on them

the obligations nor does it clearly state that they will become British subjects. It should go without saying that the British government could just have easily have clearly said it was granting British citizenship to Māori had it intended to do so. Without actually making the Māori into British subjects, later refusals to swear allegiance to the Queen could not be a valid ground for penalty.

The Oral Debates

71. The oral discussion of Te Tiriti is as important to understanding the agreement made on 6 February 1840 as the written texts. It demonstrates how the British sold Te Tiriti to Maori and induced them to sign. It is unlikely many Maori were able to read, let alone understand, the Euro-centric concepts set out in The Treaty as translated into te reo Maori. Moreover, with the traditional of kaikorero prevalent in Māori society, Maori listeners would have placed great emphasis on the oral debate that occurred on the 5th. It is through this oral debate that Maori would come to understand Te Tiriti and decide whether to agree to its terms.

72. McHugh provides evidence that sovereignty discussion in British government did not occur within Colonial Office circles until very late in the day – most of the 1830s was about protection – especially against and from foreign threats and unruly settlers. Given the context of these discussions, and the discussions with Maori during the 1830s, it becomes apparent that the idea of British protection in New Zealand was the dominant discourse. The Māori wanted the British to regulate the conduct of their unruly subjects, imposing British law and control over them.

73. If we are to understand what the British thought of Te Tiriti, then we can look to comments made by Hobson and Williams – the two men instrumental in convincing Maori to sign.

74. Dame Anne Salmond[11] sets out comments made by Captain William Hobson and Henry Williams to Maori on February 5th, 1840 regarding the meaning of Te Tiriti o Waitangi. Henry Williams, in particular, emphasised that the Chiefs would be preserved in their rights and protected from foreign invaders. At no point is it recorded that Henry Williams –or anyone else— explained to Maori that they were giving up any rights by signing Te Tiriti. Given that the British contend that the transfer of sovereignty is at the very core of The Treaty, it is strange that there is no recorded evidence of either Henry Williams or Captain William Hobson discussing what this would mean for Maori. It is difficult to construct informed consent out of this record.

75. Maori, as evidenced through the debate at Waitangi on the 5th, were aware that the British might claim they had the power to take away Māori rights to their land, although the chiefs are likely to have been swayed by Henry Williams' assurances that the British were here to protect Maori and preserve their rights in their land.

76. This lack of reference to Maori relinquishing their rights is also apparent in Captain Hobson's opening address to Maori[12]. The tenor of Captain Hobson's remarks indicates that he was promoting Te Tiriti on the promise of British governing British settlers in New Zealand and protecting Māori from their transgressions. This is vastly different from the text of The Treaty by which the British seized absolute sovereignty over New Zealand. Captain Hobson, after noting that British subjects were free to go where they pleased, and that the Queen is, however, ready to restrain them in their actions, stated that:

> Her Majesty, the Queen, asks you to sign this Treaty, and so give Her that power which shall Enable Her to restrain them.

[11] Anne Salmond brief of evidence, pages 7-8
[12] Anne Salmond brief of evidence, page 37

77. Dame Anne Salmond also goes on to cite comments made by Lavaund (referencing Bishop Pompellier) that "the Chiefs did not want to hear talk of obedience; they supposed that Captain Hobson would be an additional great Chief for the Europeans only, but not for them."[13]

International Law

78. International law, or the *law of nations*, provides that in order for sovereignty to be ceded by one sovereign state to another, the free consent of the citizens of the ceding state is required. Thus the question for determination is, whether Maori freely consented to transfer sovereignty to the British Crown.

79. In support of the proposition that Maori did freely consent to such a transfer, the Crown relies on the Treaty of Waitangi – the English text which is argued forms the basis of the Te Tiriti o Waitangi.

80. Claimant evidence, on the other hand, has overwhelmingly demonstrated in a number of ways – from He Whakaputanga, from the plain language of Te Tiriti o Waitangi, from a close reading of The Treaty of Waitangi, from the representations made by Captain Hobson, and based on the practice following the signing of Te Tiriti – that at no point did Maori ever cede their authority, their mana, their sovereignty over their people, land and resources to the British or to anyone else.

81. Free consent is not determined by a subjective analysis. According to Vattel it does not matter what the acquiring power thought they had achieved but rather whether sovereignty was transferred with "the express and unanimous consent of the citizens, with the right of really alienating or subjecting the state to another body politic: for the individuals who have formed the

[13] Ibid, p 9

society, entered into it in order to live in an independent state, and not under a foreign yoke."

British Imperial Law

82. The evidence of several Crown witnesses is that British law in the 1830s was not extra-jurisdictional. This arose in the context of explaining why the British could not enact legislation to enforce control over their subjects in New Zealand. As Moana Jackson pointed out, when the British went to France and other parts of the Continent they were expected to adhere to local laws yet when they went to a so-called heathen nation they felt they should not have to be subject to the local laws of that nation. This created an impetus for colonisation.

83. Ironically, this position supports an important concession to tikanga. If British law was not extra-jurisdictional (by their own admission and application of legal principles), it follows that the only law that could apply in New Zealand at the time was either the law of the land (tikanga); or international law, which gave deference to local law. Therefore, both HW and TT should be assessed in relation to the true legal context – either that of tikanga or international law. This would preclude application of "strict constitutional theory" that McHugh spoke about. It had no jurisdiction in New Zealand. In fact, it was not until 1854 that British law became a part of New Zealand law under the English Laws Act 1854 which purported to affirm the application of all English statutes in existence as at 14 January 1840 to New Zealand.

84. The English Laws Act 1854, the first Act of the Settler Government in New Zealand, imported British law into the colony. It was only at this point that British law, and British constitutional theory, held any possible relevance in the islands of New Zealand. Dr. Paul McHugh urged the Tribunal to refrain from interpreting the events of 1840 from the perspective of latter legal theories and

standards. While British law undoubtedly influenced the thoughts of the Colonial Office in their actions towards New Zealand, it is wholly irrelevant to assessing the legal effect of He Whakaputanga and Te Tiriti o Waitangi in New Zealand. The importance of discussing law in its correct historical context was explained by Dr. Paul McHugh:

> *There is a tendency today for us to regard our present-day idea of law and legal obligation (as, indeed, our own received idea of sovereignty) as enduring as stable. Yet the notion of law and the conception of sovereignty that it spawned were not the same in the 1830s as the late-Victorian era and after. We must historicise our idea of law and our idea of sovereignty.*

85. The dominant legal system operating in New Zealand today is the British common law system. That is our present-day idea of law. Law is derived from statute and the common law and Tikanga Maori operates in the limited field that statute[14] and common law allow it to operate within. This is a very positivist notion of law – law being the formal ("written") laws of Parliament and the Courts. The situation in the 1830s was vastly different. This is why Dr. McHugh wrote that we need to historicise our idea of law. In the 1830s, the law aligned itself more with notions of natural law. In New Zealand, natural law had, over 700 years, developed into Tikanga Maori. It was not until the revolutionary act of the 1854 Settler Government that Tikanga began to be replaced as the dominant legal system in New Zealand by the British common law system. And even so, it took many years before British common law was able to replace Tikanga Māori as the law of the land.

86. British Constitutional theory had no grounding in New Zealand in 1840. British Constitutional theory might have allowed for the usurpation of the rights of indigenous peoples by mere

[14] Te Ture Whenua Māori Act 1993, among other possibly applications

proclamation of such, but there is no indigenous law anywhere in the world that allows for such a unilateral usurpation. Nor did international law support such an outcome.

87. We cannot doubt what the British believed, and what their law was in 1840. We can, however, state unequivocally that British law had no standing in New Zealand at that time. We would today reject absolutely the notion that a foreign power could simply assert sovereignty over New Zealand without the full, complete and informed consent of the Māori people, and then hope to perfect such an assertion by proclaiming such an event in a European publication made strictly to colonial powers.

88. Strict British constitutional theory might have allowed such an act. However, the legal system prevalent in 1840 New Zealand did not allow for a mere proclamation of territorial rights. According to the tikanga, rights to the whenua arose through whakapapa, raupatu or tuku (descent, conquest, or gifting). It should be noted that there was not one word of traditional history evidence by any witness that described any Māori tradition regarding the proclamations. This is because the proclamations had no relationship to Māori and no effect in New Zealand law.

89. Dr. McHugh writes that in the early 19th century, the British Crown could exercise either territorial or extraterritorial jurisdiction.[15] While territorial jurisdiction gave the British Crown "complete control over a particular region", extraterritorial jurisdiction only provided the right of "governance over certain persons." In was not until May 1840 that the British claimed territorial jurisdiction over New Zealand. While McHugh argues that no extraterritorial jurisdiction was sought (instead, the British preferred "jurisdiction by legislation" and then full

[15] The Maori Magna Carta, New Zealand Law and the Treaty of Waitangi, Paul McHugh, 1991, Oxford University Press, p. 23. Legislation empowering extraterritorial jurisdiction was not passed until 1843 in the form of the Foreign Jurisdiction Act 1843.

territorial jurisdiction), the full powers that came with territorial jurisdiction did not accrue to the British until sometime during the "oven" of 1840. As the British had no rights or law over or in New Zealand until this point, not even over its own citizens, the events preceding the supposed acquisition of sovereignty, as a matter of British law, must be assessed according to the law of the recognised sovereign power of the time – Maori.

90. Indeed, during the 1820s, Imperial legislation went as far as to disavow any claim of sovereignty over New Zealand during the 1820s. On page 14 of his summary brief, Dr McHugh cited the 1823 and 1828 Imperial Acts and commented that "These Acts were expressly founded upon a disavowal of any sovereignty over New Zealand and deliberately avoided erection of an *imperium* in the islands." This could not change without "the iexpress and unanimous consent of the citizens" which was not obtained.

Proclamations

91. The Court of Appeal in the *Lands*[16] case considered the Proclamations to be determinative of British sovereignty over New Zealand. While this may be the case in British Imperial Law, it should not be considered as the only possible interpretation of the Proclamations.

92. In 1840, two separate jurisdictional communities co-existed in New Zealand. Maori and Pakeha. Dr. McHugh, under cross-examination, noted that the proclamations were primarily directed towards the New Zealand Company settlers in Port Nicholson but claimed that, under strict constitutional theory, these proclamations also applied to Maori. As outlined above, however, whatever the British thought was their constitutional theory and who it applied to, the reality of the situation in 1840 was that Maori were governed according to tikanga.

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

93. Ultimately, because the proclamations were directed to the community of European colonising nations, and added to substance to the interaction with Māori, they did nothing to enlarge or complete the degree of involvement otherwise granted to the British under HW or TT.

Introduction

94. There is not much written about Proclamations and their significance in International Law. Most authors and writers write about proclamations in relation to the Doctrine of Discovery, which is one of the acceptable modes of acquisition of territory under International Law.

NATURE OF PROCLAMATIONS

Meaning and Application

95. In English law, a proclamation is a formal announcement ("Royal Proclamation"), made under the great seal, of some matter which the King in Council or Queen in Council desires to make known to his or her subjects: *e.g.*, the declaration of war, the statement of neutrality, the summoning or dissolution of Parliament, or the bringing into operation of the provisions of some statute the enforcement of which the legislature has left to the discretion of the king in the announcement.

96. Royal proclamations of this character, made in furtherance of the executive power of the Crown, are binding on the subject, "where they do not either contradict the old laws or tend to establish new ones, but only confine the execution of such laws as are already in being in such matter as the sovereign shall judge necessary".[17]

97. Proclamations of the Crown, issued under the Royal prerogative, do not have the force of law.[18] Historically, the *Statute of Proclamations 1539* gave Henry VII wide powers of legislating

[17] http://en.wikipedia.org/wiki/Proclamation
[18] Wade and Ewing, Constitutional and Administrative Law, 14th ed, p 166.

without reference to Parliament by proclamation, which had replaced the ordinance as a form of legislation. It safeguarded the common law, existing Acts of Parliament and rights of property, and prohibited the infliction of the death penalty for a breach of a proclamation. Its chief practical purpose was undoubtedly to create machinery to enforce proclamations.[19]

98. In the *Case of the Proclamations* (1611), it was held that the King's prerogative is under the law, and that Parliament alone can alter the law which the King is to administer.[20]

As International Law Concept

99. Under International Law, there are three important modes of acquiring territory: discovery (and occupation), cession, and conquest. Although proclamation is not among these, most writers incorporate it as part of the doctrine of discovery, more particularly described as *symbolic annexation*.

100. *Symbolic annexation* may be defined as declaration or other act of sovereignty or an act of private persons, duly authorised or subsequently ratified by a State, intended to provide unequivocal evidence of acquisition of sovereignty over a parcel of territory or an island. There is no magic in the formal declaration of sovereignty by a government, whether or not this is preceded, accompanied, or followed by a formal ceremony in the vicinity concerned. In the case of uninhabited, inhospitable, and remote regions little is required in the nature of state activity, and a first and decisive act of sovereignty will suffice to create a valid title. Symbolic annexation does not give title except in special circumstances (as in the *Clipperton Island Case*) below.[21]

101. The diplomatic correspondence of Spain, England, France and the Netherlands, particularly during the seventeenth century,

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[19] Wade and Ewing, Constitutional and Administrative Law, 11th ed, p 66.
[20] Ibid.
[21] Brownlie, *Principles of International Law 6th ed.*, p 140.

contains evidence that the foreign offices of these nations, from the latter part of the fifteenth to the end of the seventeenth century, considered discovery with symbolic taking of possession an adequate basis for legal title to *terra nullius* in North America.[22] Later, in the contest over the north-western territory, in which the United States, England and Russia were involved during the first quarter of the nineteenth century, mere discovery with symbolic taking of possession was considered insufficient to vest legal title in any of the claimants. Later in that period, occupation was regarded as an essential concomitant in the acquisition of *terra nullius*.[23]

102. The age old practice of symbolic possession developed because mere physical discovery alone was not considered as sufficient to gain a title to *terra nullius*. Spain and Portugal were the ones who set in motion symbolic annexation of large territories and made it the basis of their claims of sovereignty. They were followed by France and England who comparatively relied less on symbolic annexation and more on effective occupation. With the passage of time and unfolding of modern periods, effective occupation became more important to claims and decisions about title to territory. This became particularly evident at the 1884 Berlin Congress convened to hammer out principles that could be applied in resolving *inter se* territorial conflicts arising from the partition of Africa among the colonial powers. Symbolic annexation was particularly applied in connection with claims to small and uninhabited, or sparsely inhabited islands, where the requisite evidence of occupation could not be collected.[24]

103. McDougal, Lasswell and Vlasic have expressed a more candid opinion that "states seldom regarded themselves as under legal obligation to refrain from entering and occupying lands which had

[22] James Simsarian, 'The Acquisition of Legal Title to Terra Nullius', *Political Science Quarterly*, Vol 53, No 1 (1938), p 111.
[23] Ibid, p 111.
[24] Sharma, *Territorial Acquisition, Disputes and International Law*, p 47.

previously been symbolically claimed by others, without accompanying actual occupation and use."[25] They added that despite Spanish and Portuguese protests, England, France and the Netherlands consistently occupied and traded with areas which had been symbolically annexed by Spain and Portugal. Similarly, the United States subsequently took effective occupation of areas that had been symbolically annexed by Spain, France and England.[26]

104. The *Clipperton Island Arbitration case* held that a symbolic act of proclamation could not be regarded as occupation[27] for purposes of obtaining sovereignty over territority. To say that a proclamation amounts to occupation, or that it constitutes the first step to occupation giving an 'inchoate title' is in fact, to deny that occupation is necessary. A proclamation is the means by which a title, claimed or acquired is announced. It is not a source of title or a means of acquiring it.[28]

105. On 17 November 1858 a French Naval Officer passing the Clipperton Island on board a commercial vessel proclaimed sovereignty over it. This fact was notified to the French Consulate who in turn informed the Government of Hawaii. The proclamation was also published in a local Hawaiian Journal. However, very little was done by France in relation to the Island until the year 1897 when a French warship visited the island. It was followed a month later by a Mexican warship landing there and forcing the three inhabitants to raise the Mexican flag and asserting its claim to sovereignty. The case of Mexico in this arbitration was based on the discovery of the Island by Spain to which it succeeded in 1836. The Arbitrator held that there was no evidence to prove that the Island had been discovered by Spain and that the proof of an historic right of Mexico was not supported

[25] Myres McDougal, Harold Lasswell and Evan Vlasic, *Law and Public Order in Space*, p 833.
[26] Ibid., pp 847-48.
[27] Lautherpacht, E., *International Law: Being the Collected Papers of Hersch Lauterpacht*, p 187.
[28] Ibid, p 188.

by any manifestation of her sovereignty over the Island, a sovereignty never exercised until 1897. Deciding the case in favour of France, the Arbitrator noted that at the time of the French Proclamation, the Island had the status of *territorium nullius*, and therefore, susceptible of an effective occupation. Then the Tribunal proceeded to examine whether France had fulfilled the twin requirements of territorial occupation: intention and will to exercise sovereignty (*animus occupandi*) and the actual taking of possession of the territory.

106. Regarding the first condition, the Arbitrator attributed to the French Proclamation of 1858 the intention to consider the Island as French territory. The second requirement consisted of the actual, and not the nominal, taking of possession. The degree of authority to be exercised in order to constitute actual possession, in the opinion of the Tribunal, depended upon the nature of the territory (whether populated or not). In this case, the Island was awarded to France on the ground that it was legitimately acquired by it on 17 November 1858, and the symbolic proclamation was treated as an act of possession.[29]

107. An important rationale of this award was that symbolic activities were accorded the definite status of *animus occupandi* which could be determinative of the title if the territory in question was uninhabited and was under its complete control from the very beginning without any intervening exercise of sovereignty by another state. Nevertheless, Waldock noted that France's complete inactivity for thirty nine years, without even any external manifestation of sovereignty, would surely have been fatal to her claim in the face of an intervening exercise of sovereignty by another state.[30]

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[29] Sharma, p 49-50.
[30] Ibid, p 50 citing Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies", 25 *Brit. Y. B. Int'l L.* 321 (1948), p 325.

Comparison to other modes of acquiring territory

Discovery and Occupation

108. Discovery, in the sense of bare sighting or physical discovery as a mode of acquisition of territorial rights, was acknowledged by eminent writers on the law of nations such as Vitoria, Freitas and Suarez during the fifteenth and sixteenth centuries. But as a source of title it still stood on shaky grounds, since it failed to receive the approval of reputed jurist like Hugo Grotius and Purendorf, and was contrary to state practice and the Roman Law from which rules of international law were deduced. As it could not stand independently, it was accorded at most the status of an inchoate title which had to be perfected by some other evidence. In the words of Chief Justice Marshall in *Johnson v McIntosh*[31], it had to be consummated by possession.[32]

109. For a time in the fifteenth and sixteenth centuries, the mere sighting of a previously unknown territory may have been enough to give good title to a state, although even this is doubtful. But soon it became established that a symbolic act, such as planting of a flag or a formal proclamation, was also required to confirm the claim. And by the mid-sixteenth century, discovery was seen as conferring no more than an inchoate title that needed to be completed by effective occupation.[33]

110. A distinction must be made between mere discovery and the legal act of appropriation by means of land marks and symbols. This difference is better felt than perceived by the theorists and statesmen of the 16th and 17th centuries when they tried to discriminate between "discovering" and "finding". For it was evident that to 'find' required possession, and that which was not

[31] *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823)
[32] Sharma, p 40.
[33] Aust, *Handbook of International Law*, p 36.

taken or possessed could not be said to be found, although seen or discovered.[34]

111. Historically, although not required, discovery used to be accompanied by some form of symbolic activity by discoverers like the hoisting or planting of the national flag, firing a salute, or erecting a cross or a monument. At times a monument will bear royal arms or enclose a formal document stating that possession of the territory had been asserted. Claims of title to territory were occasionally rooted exclusively in the acts of proclaiming sovereignty. These practices of symbolic acts were seen as representing the actual occupation or possession.[35]

112. Ultimately, occupation is an original method of acquiring title over territory which is not subject to *any* sovereign power (that is, *terra nullius*). In principle, a claim based on occupation must demonstrate: (a) that prior to the acts of occupation the territory was *terra nullius*; (b) that the occupation was for and on behalf of a state rather than individuals; (c) that there must have been an effective taking of possession; and (d) an intention to occupy as sovereign.[36]

113. Territory occupied by tribes or peoples with some form of social and political organisation should not be regarded as *terra nullius*.[37] Accordingly, the doctrine of discovery had no applicability to any part of New Zealand, a place occupied by a umber of recognised sovereign entities.

Conquest and Annexation

114. In the past, *conquest* (sometimes called *subjugation*), followed by annexation, was a means of acquiring valid title to territory. Whether annexation now provides good title will therefore depend

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[34] Von der Heydte, 'Discovery, Symbolic Annexation and Virtual Effectiveness in International Law', *American Journal of International Law*, 1935, p 452.
[35] Sharma, p 47.
[36] O'Brien, *International Law*, p 208.
[37] O'Brien, p 208 citing *Western Sahara Case* (1975) 59 ILR 14.

on: (1) the international law at the time (the intertemporal principle), (2) possibly whether the annexing state has established control over the territory, and (3) whether other states have recognised the annexation. Even in the period between the two World Wars, it was not clear if a state could acquire good title by conquest and annexation. Now Article 2(4) of the UN Charter prohibits the threat and use of force against the territorial integrity of another state or the acquisition of territory by force.[38]

115. Intention to annex was a crucial aspect of the equation so that, for example, the conquest of Germany by the Allies in 1945 did not give rise to an implied annexation by virtue of the legislative control actually exercised because the Allies had specifically ruled out such a course in a joint declaration.[39]

116. Conquest, however, did not automatically impose the conqueror's laws over the conquered. The *Case of Tanistry*[40] resolved whether the Irish method of succession to estates would prevail following English conquest of Ireland. The rationale for rejecting Irish succession was *not* based on conquest but rather was based on legal grounds including uncertainty.

Cession

117. Cession involves a transfer of territory from one state to another; this is normally accomplished by a treaty. It is therefore an example of derivative title. The *Island of Palmas Case*, which was heard before the International Tribunal in 1928, discussed the concept of cession. In this case, the United States claimed that it had acquired sovereignty by cession from Spain under the terms of the Treaty of Paris of December 1898. However, Arbitrator Judge Max Huber found that at the time of the purported transfer title lay not with Spain but with The Netherlands. Thus, as Spain

[38] Aust, p 37.
[39] Shaw, p 423, citing *Oppenheim's International Law*, pp 669-670.
[40] Le Case de Tanistry {1608} 516 Davis, 28

did not have good title, the United States could be in no better position.[41] One cannot grant title greater than what is held.

118. Other examples of cession are Gibraltar and Alaska.[42]

119. Cession has often taken place within the framework of a peace treaty following a war.[43] Also, the orderly transference of sovereignty by agreement from a colonial or administering power to representatives of the indigenous population could be seen as a form of cession.[44]

120. Ultimately, then, proclamation adds no substance to the British claim of sovereignty over New Zealand as it relates to the conduct between Māori and the British government. Proclamation is a subset of other bases for obtaining sovereignty and is really about giving notice to other European colonising powers of a claim by another European colonising power. To rest any weight on the proclamations lacks merit.

BRITISH PROCLAMATION IN NEW ZEALAND

Captain James Cook

121. On 15 November 1769, Captain James Cook claimed formal possession at a flag raising ceremony at Mercury Bay on North Island. A similar ceremony was held at Queen Charlotte's Sound on 31 January 1770.[45]

122. The performance of symbolic acts of possession by Captain Cook could not form a valid basis for acquisition of sovereignty unless they were authorised by the British Government. The acquisition of sovereignty is a state act, and if the act of a discoverer is to have any validity in international law it must be endorsed by the

[41] O'Brien, p 207 citing (1928) 2 RIAA 829.
[42] Aust, p 37.
[43] Shaw, *International Law*, p 420.
[44] Ibid, p 421.
[45] Evatt, The Acquisition of Territory in Australia and New Zealand', in *Grotian Society Papers 1968: Studies in the History of the Law of Nations*, C.H. Alexandrowicz, ed. p 36 citing Beaglehole, *Journals of Captain James Cook.*

State.[46] Captain Cook's act was not expressly authorised except possibly in regard to the taking possession of "convenient stations" and was never thereafter ratified.[47]

123. The extent of territory covered by Captain Cook's symbolic annexations is doubtful and is certainly less than was ultimately acquired by Great Britain in both Australia and New Zealand. It seems that he acted in the belief that he was entitled to claim for the British Crown all territories of which he was the first discoverer, while refraining from claiming territories known to have been visited before by a European.[48] His claims, however, were never ratified by the British government, nor were they followed by occupation.

124. Moreover, Captain Cook was not first to discover New Zealand. As was described in kai kōrero evidence, the Māori navigators had discovered New Zealand hundreds of years before and occupied it themselves. Of course this occupation meant that New Zealand could not be considered *terra nullius* and the doctrine of discovery would never apply to any part of New Zealand, including the South Island.

Hobson's 1840 Proclamations

125. On 21 May 1840, British sovereignty of the North Island was proclaimed on the ground of cession, but the process of obtaining signatures was not yet completed and continued until October 10. Thus, even without the signatures of all the rangatira of the North Island – or perhaps relying on proclamation as a substitute for actual cession of all the chiefs—sovereignty of Britain over New Zealand was proclaimed. On the same day, sovereignty was also proclaimed over the South Island on the ground of discovery by Captain Cook though the report of Major Bunbury who had been

[46] Ibid, p 25.
[47] Ibid, p 37.
[48] Ibid, p 42.

sent to investigate the situation there was not received until June 28.[49]

126. When Major Bunbury reported in June, he had proclaimed sovereignty over the South Island on the ground of cession.[50]

127. The settlement of New Zealand was rapid, a number of sites being occupied in 1840 and 1841, and on 3 May 1841, New Zealand was declared a separate colony.[51]

128. Hobson's proclamations incorrectly asserted that the North Island chiefs had given their 'universal adherence' to the Treaty of Waitangi, and that the South Island chiefs were too uncivilised to do so.[52] How the uncivilised Soth Island chiefs could later have ceded sovereignty has not been explained. And why they were asked to cede sovereignty (if they were so backward as to prevent themselves from granting it) remains a mystery.

129. It was the proclamations of 21 May 1840, issued by an authorised agent of the Crown, and the subsequent official gazetting of these proclamations on 2 October 1840, that made New Zealand British in terms of English Constitutional Procedure. And since the proclamations themselves were based on a legally invalid treaty of cession and non-existent 'right of discovery', it follows that New Zealand became a colony by an Act of State of the British Crown and was unilaterally confirmed as such by occupation and settlement.[53]

130. Hobson was authorised to proclaim the Queen's sovereignty over the whole of New Zealand, though only on conditions defined in his instructions, the most important condition being that of obtaining the consent of the chiefs of the North Island. In respect, therefore, of those territories in the North Island, the chiefs of

[49] Ibid, p 39.
[50] Donald M. Loveridge brief of evidence, 17 December 2009 pp. 281-282.
[51] Ibid, p 39 citing Act of 1840, 3 & 4 Vic c. 62, Letters Patent were issued on 16 November 1840 and declared in New Zealand on 3 May 1841.
[52] Adams, *Fatal Necessity: British Intervention in New Zealand 1830-1847*, p 160.
[53] Ibid, p 162.

which had signed the Treaty, Hobson did have the explicit authority for proclaiming some authority for establishing civil government.

Treaty of Waitangi

131. The English government and the French government as well, in their dealings with native peoples in the period before 1800, made numerous agreements which bore the name of "treaties" but that the name was a misnomer, that such acts had no international significance, but were legislative acts on the part of the European state or devices and subterfuges whereby domestic peace was promoted or the interests of the European government advanced, while sovereignty at all times resided in the European state.[54]

132. The proposition that the Treaty of Waitangi was a nullity and of no international legal significance was asserted in Pakeha political debate in New Zealand and in England as early as the 1840s, and appeared to secure judicial endorsement in *Wi Pirata v The Bishop of Wellington and the Attorney General.*[55]

133. Doubt has been cast upon the status of the Treaty of Waitangi in International Law, mainly on the ground that the chiefs could have no sovereignty[56], with the result that the acquisition of New Zealand is classed as discovery and occupation. The Treaty of Waitangi has been recognised not only by British Courts[57], but also by an international tribunal[58].

134. The Treaty was a valid international treaty, and the parties in 1840 were recognised as having the necessary legal capacity to enter into such a treaty. This is clear from the examination of the general context of British policy towards indigenous peoples in the

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[54] Ibid,14-15
[55] Benedict Kingsbury, 'The Treaty of Waitangi: some international law aspects', in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, I.H. Kawharu, ed., p 121.
[56] Evatt, p 41 citing Rutherford and Wi Pirata v Bishop of Wellington (1877) 3 N.Z. Jur. R. (N.S.), 70.
[57] Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] A.C. 308, 324.
[58] American and British Arbitration (agreement of 1910) 6 R.I.A.A. 166, 541, 543.

1830s and 1840s, the specific instructions given by the British Government to her emissaries to New Zealand.[59]

135. The mass of evidence, including public documents, indicates a clear British intention to enter formally into an effectual treaty whereby they could at least set up a civil government, even if only to rule their own subjects. Maori presumably acted in reliance on their own sovereignty exercised over hundreds of years in entering into the Treaty and accepting the promises made therein, which may in itself be sufficient to found an estoppels in international law.[60]

136. International arbitral tribunals have twice indicated that the Treaty of Waitangi was a valid and effectual treaty of cession: *Rogers & Co*[61] and *William Webster*[62]. The same conclusion was reached by the Privy Council in the case of *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board*[63]. Of course, these cases analysed The Treaty not Te Tiriti.

137. The Tribunal in the *Ngai Tahu Land Report* supported the view that the Treaty of Waitangi was a valid treaty under international law. This reinforces the view that the Tribunal expressed in the *Orakei Report* (1987), that, given the intention of the British government to treat with the Maori people as a sovereign independent nation, it is surely reasonable to apply to the interpretation of the Treaty, general principles of treaty interpretation as applicable under municipal law. It reiterated the Tribunal's view that "whatever its strictly legal standing, good faith and the honour of the Crown call for such an approach."[64]

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[59] Kingsbury, p 122.
[60] Kingsbury, p 123.
[61] *Record of the Proceedings of the Committee and Umpire*, UK Public Records Office, File FO 97/32.
[62] Award of 12 December 1925—(1926) 20 *American Journal of International Law* 391.
[63] [1941] AC 308.
[64] Orakei Report (1987), p 127.

CONCLUSION

138. Ultimately, then, the Māori hapū were sovereign nations and were recognised as such when it suited British colonial circumstances. Once sovereignty had been conceded, however, it became important to construct a basis by which Māori hapū no longer had sovereignty. This has been done by the elaborate construction of the fiction that Māori ceded sovereignty by Treaty.

139. Reference to Te Tiriti o Waitangi, by rights the official document reflecting the agreements made in 1840 between the Māori rangatira and the British, was suppressed in favour of the Treaty of Waitangi which held the magic words of cession. The objections of Māori raised over a period of 140 years that sovereignty was not ceded were swept away by the magic of colonisation. Talk about lack of civilisation, protectionism, and other attributes of the veil of colonial thought were superimposed upon Māori understandings, thus blurring the image that stands out after these proceedings: If Britain thought it was obtaining sovereignty limited by its own constitutional conventions (but not by Māori power), there was no meeting of the minds because Māori very emphatically did not intend to cede their rights of government and control—their sovereignty—to the British government or anyone else.

140. Absent a meeting of the minds, there is no basis for a treaty.[65]

141. Another viewpoint is that there was a meeting of the minds. All parties agreed at the time that the British were to set up a civil government over settlers and that the Māori would continue to apply tikanga over their own people and resources. This is like an uneasy joint tenancy agreement, but is somewhat consistent with much of the conduct. When it came to lands takings, however, things fell apart and war began. Even though British post-Tiriti conduct was rife with over-reaching, it was evident that they

[65] Vattel section 157

viewed Māori as a fetter on the exercise of their authority. Otherwise, why would they not have simply adopted the English Laws they sent to some northern hapū and imposed it on everyone?

142. And if the Treaty or Te Tiriti permitted the construction of a civil government that ruled British subjects, how did it come to pass that this limited powers civil government could somehow claim to legitimately regulate Māori affairs, confiscate their land and sea rights, ban the practice of their religion and knowledge, use their resources, and generally dictate when and how their language was spoken? None of these reflect the legitimate exercise of government under either version of Te Tiriti/The Treaty.

143. Currently, a de facto sovereignty is being exercised by the successors to the British government established under The Treaty. The existence and operation of this government, however, does not somehow render it legitimate.

Findings and Recommendations

144. We request that the Tribunal find that Te Tiriti was the official version of the agreement between the Māori chiefs and the British government in 1840 and that it should be treated as such in all official acts of the New Zealand government.

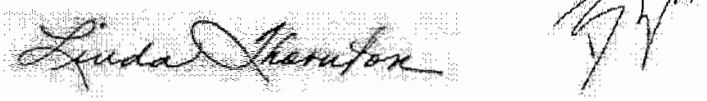
145. We request that the Tribunal recommend that He Whakaputanga be recognised as an official constitutional instrument of New Zealand and that all interpretations of Te Tiriti be done in the context of He Whakaputanga and its declarations pertaining to Māori; and

146. Such other recommendations as are appropriate to the conclusions that Māori sovereignty was not ceded and official conduct under colour of law is without legal legitimacy.

147. We also regretfully remind the Tribunal that the time and management of these Stage 1 hearings remains inadequate to

effectively scrutinise and challenge Crown claims as to the origins of the current form of government.

Respectfully submitted



Linda Thornton Bryce Lyall[66]

[66] We acknowledge the participation of Joshua Hitchcock in the preparation of this document.