An Exploration and Critique of the Sovereignty Assumed by the United Kingdom over New Zealand

STEPHEN WINDSOR*

I INTRODUCTION

Two hundred years ago Maori were free and independent from external control. Today Maori are subject to New Zealand law. A fundamental aspect of New Zealand's legal system is that Parliament can legislate without restriction on any subject matter, including Maori affairs.[1] How did Maori lose their autonomy? How can that be justified? Parliament's sovereignty is usually traced back to 21 May 1840 when Captain William Hobson issued two proclamations declaring the Crown's sovereignty over New Zealand.[2] Justice Richardson stated in *New Zealand Maori Council v Attorney-General* that:[3]

> It now seems widely accepted as a matter of colonial law and international law that those proclamations approved by the Crown and the gazetting of the acquisition of New Zealand by the Crown in the London Gazette on 2 October 1840 authoritatively established Crown sovereignty over New Zealand.

The purpose of this article is to question whether the United Kingdom's assumption of sovereignty was justified by international law. My analysis is based around a description of the rules and principles of international law that govern the acquisition of sovereignty over territory. These are elaborated on as they are applied to the New Zealand context. It is my view that the United Kingdom's seizure of power was illegal at international law. Finally, I deal with whether the revolutionary principle can be used. If the revolutionary principle were applied, Parliament's sovereignty

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1 For a description of how Parliament's sovereignty operates see the analysis of the Foreshore and Seabed affair in McHugh "Setting the Statutory Compass: the Foreshore and Seabed Act 2004" (2005) 3 NZJPIL 255; B.V. Harris "The Treaty of Waitangi and the constitutional future of New Zealand" [2005] NZ Law Review 189.

2 Joseph, *Constitutional and Administrative Law in New Zealand* (2 ed, 2001) 32.

3 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641(CA), 671. See also Somers J who stated emphatically that "the question of sovereignty in New Zealand is not in doubt. On 21 May 1840 Captain Hobson proclaimed the 'full sovereignty of the Queen over the whole of the North Island' by virtue of the rights and powers ceded to the Crown by the Treaty of Waitangi, and over the South Island and Stewart Island on the grounds of discovery ... The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that. Sovereignty in New Zealand resides in Parliament." At 690.

would be legal despite any inconsistencies with international law, as New Zealand has a functioning legal system and a substantial proportion of New Zealanders obey the government. However, the revolutionary principle is prevented from being applied because the conditions in which it becomes relevant are the same as that for prescription at international law. It is my opinion that the authority wielded by today's Parliament is inconsistent with what was given up by Maori and cannot be justified.

Trying to justify the assumption of sovereignty based on international law is at least problematic. International law was developed by Europeans and reflects a Western understanding of society. During the nineteenth century it was like "a code of honour among thieves."[4] Maori had their own sort of international law. They had rules governing inter-tribal agreements relating to trade, to settle border disputes, and to end wars. Under Maori customary law, rights to land could be justified by whenua raupatu (right by conquest), take tupuna (right by ancestry), taunaha whenua (right by discovery). These rights then had to be followed by ahi kaa (occupation) to establish a claim in the land.[5] This customary law was similar to the scope of international law in the nineteenth century. In relation to the New Zealand situation, why should the law used to govern the relationship between the United Kingdom and Maori necessarily be European international law? How is it just to apply a law to a people who had little or no say in its development, and little or no knowledge of its requirements?[6] Despite these questions, I will discuss the acquisition of sovereignty within the international law paradigm, as this is the context within which most of the previous discourse has taken place.

II MODES OF ACQUISITION

The legal rules and procedures for effecting change to sovereignty over territory lie at the core of international law.[7] Sir Robert Jennings has said, "[t]he mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis."[8] Oppenheim expressed the link between statehood and territory when he

4 Clarke, "Law and Race" in Botomley et al (eds) *Law in Context* (2 ed, 1997) 246.

5 While these doctrines are similar to international law principles relating to the acquisition of territorial sovereignty, it should be remembered that they are to do with land ownership and possession rather than sovereignty. Perhaps it may be possible to analyse the acquisition of sovereignty according to the consistencies between international law and Maori tikanga. See also Jackson, "Maori Law, Pakeha Law and the Treaty of Waitangi" in Young (ed) *Mana Tiriti* (1991) 15-16.

6 These questions are raised frequently in the discourse related to Britain's acquisition of sovereignty over Australia, see *Mabo v Queensland (No. 2)* (1992) 175 CLR 1; Brennan, Gunn and Williams, "'Sovereignty' and its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments" (2004) 26 Sydney L Rev 305; Dodson, "Sovereignty" (2002) 4 Balayi: Culture, Law and Colonialism 13.

7 Under current law, in the Montevideo Convention on the Rights and Duties of States (1933) a defined territory is a prerequisite for statehood.

8 Jennings, *Collected Writings of Sir Robert Jennings* (1998) 934.

wrote that "[a] State without a territory is not possible."[9] When Grotius set out the fundamentals of modern international law, state territory was identified as the private property of the monarch.[10] Consequently, rules for the acquisition of territorial sovereignty were developed by analogy to rules of Roman law concerning the acquisition of private property.[11] Most standard textbooks refer to five modes of acquisition: discovery and occupation, cession, conquest, prescription, and accretion.[12]

In practice these modes overlap and sovereignty over territory is sometimes acquired by a combination of them.[13] Ian Brownlie makes a strong criticism of the modes-based approach, "the whole concept of modes of acquisition is unsound in principle and makes the task of understanding the true position much more difficult."[14] It must be noted that when Brownlie made this comment he was particularly concerned with cases involving competing acts of sovereignty. The *Island of Palmas*[15] and *Minquiers and Ecrehos*[16] cases are two examples that he used. It is difficult to classify either of these cases according to any one of the possible modes. In each, it was unclear whether the court was dealing with a case of prescription or occupation. In the end the Courts did not specify a "mode of acquisition".[17] As the New Zealand case involves a usurpation of sovereignty rather than competing acts of sovereignty some of these problems are avoided. In the New Zealand context, analysis according to the traditional modes is appropriate, provided that the facts are analysed using the rules and not simply labelled.

The Doctrine of Inter-Temporal Law

The starting point for an analysis of the acquisition of territorial sovereignty is the doctrine of inter-temporal law. This doctrine provides that the effect of an act must be determined according to the law at the time it was done.[18] It is an aspect of the rule against retroactive laws, and to that extent is a general principle of law.[19] It means that concepts repugnant to modern international law may continue to produce legal effects. The authority

9 Oppenheim, *International Law, a Treatise* (8 ed, 1955), 451.

10 Ibid 545.

11 Evatt, 'The Acquisition of Territory in Australia and New Zealand' in Alexandrowicz (ed) *Grotian Society Papers 1968* (1970) 16.

12 With the exception of accretion, these will be explained in greater detail below. Accretion is where the shape of the land is changed by natural forces. See, Jennings, supra note 8, 939.

13 So for example, Jennings deals with occupation and prescription together. See Jennings, supra note 8, 952-956.

14 Brownlie, *Principles of Public International Law* (6 ed, 2003) 127 ["*Principles of Public International Law*"]; But see Lee, "Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law" (2000) 16 Conn J Int'l L 1.

15 [1928] 2 RIAA 831.

16 [1953] ICJ Rep 47.

17 Brownlie, *Principles of Public International Law,* supra note 14, 127.

18 See Brownlie, *Principles of Public International Law*, supra note 14, 124-125; Jennings, supra note 8, 960-964; Crawford, *The Creation of States in International Law* (2 ed, 2006), 259.

19 Jennings, supra note 8, 960.

usually cited for the doctrine is the arbitral award of Professor Max Huber in the *Island of Palmas* case. Huber stated that "a judicial fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled."[20] In the context of colonial acquisitions of sovereignty this approach favours the colonizers, as their law will be favoured, despite any developments in international law relating to indigenous peoples' rights. Notwithstanding the inherent bias of this approach, I will conduct my analysis in line with this orthodoxy.

III DISCOVERY

Discovery alone is insufficient to establish sovereignty over territory. In the *Island of Palmas* case Professor Huber stated that "an inchoate title of discovery must be completed within a reasonable period of time by the effective occupation of the region claimed to be discovered."[21] Huber states the law as it was in the late nineteenth century; however, this aspect of the law remained unchanged from how it stood in the eighteenth century, which is the relevant time in the New Zealand context.[22] Consequently, it cannot be claimed that Captain Cook's "discovery" of New Zealand was sufficient to establish sovereignty.

IV OCCUPATION

Requirements

Occupation, as a mode of acquisition in international law, developed by analogy to *occupatio* in Roman private law.[23] Through *occupatio*, title over property could be acquired if the property was not owned by anyone (*res nullius*). It involved an intention to assert ownership (*animus*) and some overt act of physical control (*factum*).[24] Occupation as a mode of

20 *Island of Palmas* [1928] 2 RIAA 831, 845. See also Jennings, supra note 8, 961; This rule has been affirmed more recently in *U.S. Nationals in Morocco* [1952] ICJ Rep 200 and in *Right of Passage over Indian Territory* [1960] ICJ Rep 90.

21 *Island of Palmas*, supra note 20, 846.

22 Captain Cook 'discovered' New Zealand in 1769-1770. He held flag raising ceremonies at Mercury Bay and Queen Charlotte's Sound. These acts were not believed to be sufficient to establish sovereignty, but were cited in support of annexation. See Evatt, supra note 11, 36-37.

23 Jennings, supra note 8, 952.

24 Evatt, supra note 11, 16; Donovan, "Challenges to the Territorial Integrity of Guyana" (2004) 32 Ga J Int'l & Comp L 661, 686-689.

acquiring sovereignty in international law has three similar requirements:[25] first, there must be the intention and will to act as a sovereign; secondly, there must be some actual exercise or display of sovereign authority; thirdly, the territory must not be subject to the sovereignty of any State, that is, it must be *terra nullius*.[26]

Application to the New Zealand Situation

In the New Zealand context the first two requirements are met. Hobson expressed the United Kingdom's intention to acquire sovereignty in his 1840 proclamations. Subsequent settlement and law-making has satisfied the second requirement and made the occupation "effective". The critical issue is whether or not New Zealand was *terra nullius*. The fact that Maori inhabited parts of New Zealand does not preclude New Zealand from being *terra nullius*.[27] The question to address then is whether or not Maori had sovereignty over New Zealand.

The inter-temporal doctrine requires that this assessment be made according to the law at the time. The early-mid nineteenth century is a problematic time for making assessments based on international law. During the nineteenth century the foundations of international law were reformulated to satisfy positivist theory, rather than the natural law on which it had been previously been based.[28] It is critically important to determine the relative significance of positivism and natural law in 1840 as this determination affects the rules that apply in assessing whether Maori had sovereignty as a matter of international law.

1 Natural Law and Positivism

Within the naturalist framework international law is derived from human reason. The sovereign's law-making capacity is restricted by natural law.[29] Consequently, during the sixteenth and seventeenth centuries early international law theorists were prepared to declare that the acts of monarchs were unlawful when these were at odds with the perceived natural law.[30] They argued that the law derives from human reason and so applies to everyone who has the capacity to reason. This means that it is applicable

25 For analysis of the requirements of occupation in greater detail see Jennings, supra note 8, 952-956; Brownlie, *Principles of Public International Law*, supra note 14, 133-138.

26 Brownlie, *Principles of Public International Law*, supra note 14, 133-135; For a description of *terra nullius* see Ritter, "The 'Rejection of Terra Nullius' in Mabo" (1996) 18 Sydney L Rev 5, 7-8; Donovan, supra note 24, 690-692.

27 Brownlie, *Principles of Public International Law*, supra note 14, 133; Ritter, supra note 26, 7-8.

28 Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1990) 40 Harv Int Law J 1, 11-17; Keal, *European Conquest and the Rights of Indigenous People: The Moral Backwardness of International Society* (2003), 107-112.

29 See Anaya, *Indigenous Peoples in International Law* (2 ed, 2004), 16-17.

30 See the example of Francisco de Vitoria referred to in Anaya, supra note 29, 17.

to Europeans and non-Europeans. Accordingly, the states governed by the Law of Nations are naturally constituted.[31]

Positivism, however, asserts that law is created by the will of the sovereign. During the nineteenth century international law was reformulated around this perception of law.[32] International law writers were influenced by the work of the positivist John Austin. Austin believed international law was not real law because there was no identifiable sovereign.[33] International law writers developed a jurisprudence to deal with Austin's objection.[34] The solution was found in the concept of "society". Sovereign states as they interact together within the 'Family of Nations' can consent to be bound by rules.[35] John Westlake explains how important society is when he writes:[36]

> [W]ithout society [there is] no law, without law [there is] no society. When we assert that there is such a thing as international law we assert that there is a society of states: when we recognise that there is a society of states, we recognise that there is international law.

Today international law remains formulated on positivist grounds. The two most prominent sources of international law are treaties and customary international law. Juristic writing is rarely cited as a source of international law. The works of jurists are merely used to lend additional support to arguments based on treaty law or customary international law. This is a reflection of the theory that law is the manifestation of the sovereign's will.

2 *Requirements and State Practice*

Proponents of occupation as the mode of acquisition usually point to dates between Cook's discovery of New Zealand in 1769 and the implementation of the English Laws Act in 1858. Usually emphasis is placed on the sovereignty proclamations made by Hobson during 1840.[37] Hobson claimed sovereignty over the North Island by cession and over the South Island by discovery. Consequently, according to the traditional approach to international law matters, the inter-temporal doctrine requires that one analyse Maori sovereignty according to the law circa 1840.

In 1840 international law contained a mixture of natural law and

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31 See Anghie, supra note 28, 22.

32 See Anaya, supra note 29, 26-31.

33 See Anghie, supra note 28, 13-15.

34 See the beginning of textbooks written by Westlake, Lawrence, Oppenheim as referred to in Anghie, supra note 28, 14; Oppenheim, supra note 9, 7-10.

35 See Anghie, supra note 28, 16.

36 As quoted in Anghie, supra note 28, 17.

37 See Chapman, "The Treaty of Waitangi" [1991] NZLJ 228, 230; Williams, "The Foundation of Colonial Rule in New Zealand" (1998) 13 NZULR 54; Kelsey, *A Question of Honour?: Labour and the Treaty, 1984-1989* (1990); McLintock, *Crown Colony Government in New Zealand* (1958).

positivism, as the shift towards positivism had not been completed. For that reason, my analysis is divided into two parts: first, I analyse Maori sovereignty against the requirements set out in juristic writing; secondly, I analyse Maori sovereignty against the practice of states.

(a) Requirements Set Out in Juristic Writing

M.F. Lindley is renowned as an authority on the status of tribal societies in international law.[38] Lindley divided jurists into three schools. The first school dated from the sixteenth century.[39] Jurists from this school wrote from a naturalist perspective. They believed that territory was not *terra nullius* and could not be acquired simply by occupation if inhabited by people connected by some form of political organisation, no matter how primitive.[40] From the eighteenth century a second school of jurists emerged.[41] Jurists in this school tried to reconcile positivism and natural law into an overall scheme of international law. They believed that tribal peoples had a limited or conditional sovereignty over their territory. A third school of jurists became established in the late nineteenth century.[42] These writers were heavily influenced by positivism. They did not recognise sovereignty in anyone who was not part of the "Family of Nations". Land inhabited by non-European tribal peoples was *terra nullius* and could be acquired simply by establishing effective occupation.

The inter-temporal doctrine requires that Maori sovereignty be analysed according to the law circa 1840. The earliest work from the third school was not published until 1876, so it would be a mistake to rely on their writing as authority.[43] Instead one should focus on the second school of jurists. The most prominent writer during this period was the Swiss jurist Emer de Vattel.[44] His work *The Law of Nations* (1758) was accepted as definitive.[45] It was the handbook of the English Foreign Office.[46]

For Vattel, statehood was characterised by internal governance and

38 Lindley's seminal study titled *The Acquisition and Government of Backward Territory in International Law* (1926) is cited often. See Joseph, supra note 2, 52-53; McKean, "The Treaty of Waitangi Revisited" in *The Treaty of Waitangi: Its Origins and Significance: A Series of Papers Presented at a Seminar Held at Victoria University of Wellington* (1972), 35, 35-37; Keal, supra note 28, 84-107.

39 This school includes Victoria, Soto, Las Casa, Gentilis, Selden, Grotius, Pufendorf, Blackstone, Pasquale, Fiore, Woolsey.

40 See McKean, supra note 38, 35.

41 This school includes Vattel, Phillimore, de Martons, Bluntschi.

42 This school includes Westlake, Hall, Oppenheim, Lawrence, Martens-Ferras.

43 Joseph, supra note 2, 53. For an example of someone who made that mistake see EJ Haughey who writes that it was a "well-established rule and doctrine of International law that native tribes are incapable of exercising sovereignty". Haughey, "A Vindication of Sir James Prendergast" [1990] NZLJ 230.

44 It is also worth noting the opinion of the eminent international lawyer, Joseph Phillimore, as he specifically considered the New Zealand situation. Writing soon after the signing of the Treaty, he said that before the Treaty New Zealand was "a separate and independent state". See Kingsbury, "The Treaty of Waitangi: Some International Law Aspects" in Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 126.

45 McHugh, *Aboriginal Societies and the Common Law: a History of Sovereignty, Status, and Self-Determination* (2004), 110. ["*Aboriginal Societies*"].

46 Ibid 110.

territorial boundaries.[47] He defined states as "political bodies, societies of men who have united together and combined their forces in order to procure their mutual welfare and safety."[48] Paul McHugh writes that Britain's approach to imperialism "took a format explicable on no basis other than subscription to something approaching Vattel's theory of independent and equal state sovereignty."[49] Vattel wrote:[50]

> Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a sovereign State ... To give a Nation the right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws.

He stated that "every nation is ... obliged by the law of nature to cultivate the land that has fallen to its share."[51] For Vattel, the most important aspect of a state's sovereignty was its right of self government.[52] He asserted this even in the context of the right to send missionaries, stating: "[i]t is therefore certain that no one may interfere against a Nation's will in its religious affairs, without violating its rights and doing it an injury." While Vattel's definition is based on European concepts of social and political organisation, he believed that non-European peoples could qualify as states or nations. The size of a state was unimportant to Vattel as he equated the sovereignty of a "dwarf" state with that of the most powerful kingdom.[53] Vattel criticised the European expansionism in the Americas, writing:

> Those ambitious European States which attacked the American Nations and subjected them to their avaricious rule, in order, as they said, to civilize them, and have them instructed in the true religion — those usurpers, I say, justified themselves by a pretext equally unjust and ridiculous.[54]

It is my view that Maori hapu and iwi met the requirements of social and political organisation in 1840. Maori were arguably more qualified to meet the standards of statehood than most indigenous peoples.[55] Maori cultivated the land and had defined territorial boundaries. The fact that the tribal groups were small in some cases did not mean that they were not sovereign.[56]

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47 McHugh, *The Maori Magna Carta,* (1991) 177 ["*The Maori Magna Carta*"]; Anaya, supra note 29, 20-23.

48 Anaya, supra note 29, 22.

49 McHugh, *Aboriginal Societies,* supra note 45, 111.

50 Crawford, supra note 18, 7-8.

51 Paul Keal, supra note 28, 100.

52 McHugh, *Aboriginal Societies,* supra note 45, 110.

53 Wolf and Wolf, *Laws of War and International Law* (2002) 17.

54 See, Anaya, supra note 29, 22.

55 Orange, *The Treaty of Waitangi* (1987), 23.

56 If one looks at modern international law, Vatican City is recognised as a State even though it only has a population of 768, see Crawford, supra note 18, 52.

(b) The Practice of States

A study of state practice shows that colonial powers rarely established sovereignty based simply on occupation.[57] This was particularly the case during the nineteenth century, when treaty-making was standard practice. While the significance of treaties varied, they were usually treated as documents of international importance and published in official treaty series.[58]

In 1835, 34 chiefs signed the Declaration of Independence. Over the next three years 17 more chiefs added their signature and in July 1839 the paramount chief of the Waikato, Te Wherowhero, was added to the Declaration.[59] Under the terms of the Declaration, New Zealand was pronounced a sovereign and independent state.

A number of British officials acknowledged Maori sovereignty. Lord Glenelg wrote in 1837 that Maori had sovereignty over New Zealand, and further that "Great Britain has no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without Compulsion, and without Fraud."[60] Lord John Russell's "Despatch" to Governor Hobson of 9 December 1840 asserts that:[61]

> [The Maori tribes] are not mere wanderers ... nor tribes of hunters, or of herdsman; but a people among whom the arts of government have made considerable progress ... *they have been formally recognised by Great Britain as an independent state.*

In 1844 Lord Stanley wrote to Governor Fitzroy in response to claims by settlers that the Treaty was a fraud:[62]

> I utterly repudiate with the utmost possible earnestness the doctrine maintained by some that the treaties we have entered into with these people are to be considered as a mere blind to amuse and deceive ignorant savages ... I utterly deny that any treaty entered into and ratified by Her Majesty's command was or could have been made in a spirit thus disingenuous or for a purpose thus unworthy.

Other statements were not so clear. Lord Normanby's instructions to Hobson provided that:[63]

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57 See McKean, supra note 38, 36.

58 See Kingsbury, supra note 44, 122; Brownlie *Treaties and Indigenous Peoples* (1992) 8-9 ["*Treaties and Indigenous Peoples*"].

59 Ross, "The Treaty on the Ground" in *The Treaty of Waitangi: Its Origins and Significance: A Series of Papers Presented at a Seminar Held at Victoria University of Wellington* (1972) 18.

60 McHugh, "Constitutional Theory and Maori Claims" in Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 31 ["Constitutional Theory"].

61 Kingsbury, supra note 44, 122-123 (emphasis added).

62 McKean, supra note 38, 42.

63 See Kingsbury, supra note 44, 122. For analysis of Normanby's instructions see Moon, *Te Ara Ki te Tiriti: The Path to the Treaty of Waitangi* (2002), 108-118.

> We acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make the acknowledgement 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.

These statements are problematic in that they refer to a single Maori state, rather than a number of states, which would be the case if Vattel's formulation is applied. Because positivism had not completely changed international law by 1840, Maori outside the Confederation were not precluded from having sovereignty. Britain's failure to recognize sovereignty was based on the erroneous belief that the tribes who were not part of the Confederation were 'wild savages' and therefore not capable of meeting Vattel's requirements.[64]

The fact that Britain planned to design a treaty in which Maori agreed to cede their sovereignty suggests that Britain recognised and believed that Maori had sovereignty over New Zealand prior to 1840. Brownlie goes so far as to say that "[t]here can be no doubt, however, that the Treaty of Waitangi presupposed the legal and political capacity of the chiefs of New Zealand to make an agreement which was valid on the international plane."[65] In the *Western Sahara* case the International Court of Justice cited the fact that Spain had concluded treaties with local rulers as part of the evidence that led to them finding that *Western Sahara* was not *terra nullius*.[66]

The Governments of France and the United States of America respectively believed that Maori had sovereignty. The French Minister of Foreign affairs, François Guizot, commented on the New Zealand situation. He believed that the British had "by several public acts, by several acts of government, formally recognised the independence of New Zealand as forming a State under its native chiefs."[67] The American view on Maori sovereignty prior to 1840 is expressed in the *William Webster* case. It was held that:[68]

> [N]ot only had no foreign government ever asserted or claimed any sovereignty over New Zealand, but Great Britain had repeatedly recognised it as an independent State long before that most conclusive act of recognition, the treaty of February 6, 1840.

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64 Orange, supra note 55, 35-36.

65 See Brownlie, *Treaties and Indigenous People*, supra note 58, 8; See also Cox, "The Treaty of Waitangi and the Relationship Between the Crown and Maori" (2002) 28 Brook J Int'l L 123, 142.

66 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 39.

67 Kingsbury, supra note 44, 123-124.

68 Ibid 124.

Problems with the Acquisition of Sovereignty

The Declaration of Independence, the statements by British officials, the fact that Britain planned to design a treaty in which sovereignty was ceded, and the views expressed by the French and the United States, all suggest that Maori had sovereignty over New Zealand prior to 1840. However, the chaotic way in which the acquisition of sovereignty was carried out and the subsequent disrespect shown towards the Treaty casts doubt on this assessment and this requires explanation.

1 The Sense of Urgency in 1840

Hobson assumed his office of Lieutenant Governor on January 30 1840, prior to the Treaty being signed. However, this was not viewed favourably by other British officials and was regarded as premature.[69] On Hobson's arrival in the Bay of Islands, Captain Nias of the *HMS Herald* refused to give Hobson the 15-gun salute usually accorded to a Lieutenant Governor. Instead he gave Hobson the 11-gun salute of a visiting British consul.[70] James Busby, the "Official British Resident", was unhappy also. He advised Hobson to act in his capacity as a British consul until an agreement could be reached with Maori.[71]

(a) Land Sales

In the lead-up to Hobson's arrival land sales were increasing. Leading Sydney settlers and businessmen were laying claims to purchases of almost all of the South Island and large portions of the North Island's East Coast.[72] In some cases land had been sold several times over. There was pressure on the government to take control to prevent escalation of land sales and further confusion over title.[73] It is within this context that the January proclamations were issued.[74]

The extensive land purchases by the New Zealand Company in the Cook Strait region were another source of tension and added to the urgency.[75] On 2 March 1840, New Zealand Company settlers, realizing that Hobson's negotiations could be interpreted as applying only to the North and not their district, introduced their own form of government.[76] They asserted that their authority was derived from local chiefs. This

69 Orange, supra note 55, 34.

70 Ibid.

71 Ibid.

72 Ibid 33.

73 Ibid 34.

74 At Waitangi, the Kororareka chief Moka, was concerned about British settlers who were purchasing land after January 30. Hobson insisted that "all claims to lands, however purchased, after the date of the Proclamation would not be held to be lawful." See Orange, supra note 55, 47.

75 Orange, supra note 55, 73; Moon, supra note 63, 103-105, 118-123.

76 Orange, supra note 55, 84.

angered Hobson and he sent troops and mounted police to Port Nicholson to haul down the flag that was flown by the New Zealand Company and to demand allegiance to the Crown.[77] Hobson later explained that he issued his proclamation in May because of the actions of the New Zealand Company.[78]

(b) Lack of "Free and Intelligent Consent"

Another significant problem with the way the acquisition was carried out was that Hobson proclaimed British sovereignty over New Zealand before he had obtained the "free and intelligent consent" of Maori, which had been required by Normanby. This could be interpreted as evidence that Britain never actually believed that Maori had sovereignty.[79] However, the perceived urgency of the situation, the fact that Hobson thought that it was inevitable that Maori would cede their sovereignty and the fact that Hobson had an inadequate appreciation of both international law and Maori society were the causes of this premature proclamation.

For Hobson it was acceptable to proclaim sovereignty prematurely because he believed that it was inevitable the Maori would accede to the Treaty. Whenever Maori refused to sign the Treaty he found some reason other than that Maori wanted to retain sovereignty. Most commonly he blamed meddling Catholic missionaries. For example, after substantial debate at the Hokianga negotiations, Hobson wrote that "the influence against me was clearly traceable to the foreign Bishop of the Roman Catholic persuasion."[80]

With regards to the urgency, a number of factors were present: first, there was the ever-present danger of vast land sales already mentioned; secondly, there was the perceived threat from France, as French settlers were arriving in the South Island in mid-1840.[81] Hobson wanted to claim all of New Zealand for Britain before France had a chance to interfere.

2 Hobson's Deficiencies

Hobson also had both an inadequate knowledge of international law and Maori society. Paul Moon describes Hobson as having a "comparatively modest intellectual capacity."[82] When he proclaimed sovereignty over the South Island, he did so based on discovery. As has been already explained, discovery was not sufficient basis for the acquisition of territorial sovereignty in the eighteenth and nineteenth centuries. As a matter of

77 Ibid 84.

78 Cox, supra note 65, 136.

79 Indeed it has been interpreted in this way by Chapman for example, see Chapman, supra note 37. But it may be more of an indication of Hobson's thinking than the Crowns, see Moon, supra note 63, 128-132.

80 Ross, supra note 59, 30.

81 Orange, supra note 55, 60.

82 Moon, supra note 63, 128.

fact, Hobson stated that he had "perfect knowledge of the uncivilised state of the natives" of the South Island.[83] Hobson had no grounds for this conclusion. In fact, when Major Bunbury landed at Akaroa in the South Island he commented that the natives that met him were not "wild savages". Furthermore, according to Edward Williams most of them spoke English "pretty well."[84]

In summary, the imprecise way that the acquisition of sovereignty was carried out does not detract from the fact that Maori had sovereignty prior to 1840.

3 Subsequent Actions of Parliament and the Courts

Another argument is that the actions of New Zealand's Parliament and Courts in the years following the Treaty of Waitangi suggest that they never believed Maori had sovereignty. For example, there was the Native Lands Act 1865, which was designed to alienate Maori land; [85] the Suppression of Tohunga Act 1907 prohibited tohunga, as their spiritual and educational role was seen as an impediment to assimilation;[86] and the 1877 decision of Prendergast CJ in *Wi Parata v Bishop of Wellington* was influential.[87] In that case he held that:[88]

> [S]o far as that [treaty] purported to cede the sovereignty ... it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty nor could the thing exist itself.

There are several problems with this argument: first, it would be contrary to a fundamental principle of law to suggest that Maori sovereignty could be retrospectively invalidated; secondly, the absolute and indivisible nature of sovereignty from the English constitutional perspective meant that once the British believed that they had acquired sovereignty they had, at most, only a good faith obligation to respect the guarantees made to Maori in the Treaty. Moreover the English and New Zealand approach to international law is dualist. Treaties are not part of New Zealand law unless they are incorporated in a statute. Often the reason why rights under the Treaty could not be argued in Court was because of this dualism, not because Maori did not have sovereignty prior to 1840.[89] With regards to the dicta of Prendergast CJ, he was probably influenced by the fact that New Zealand had just emerged from the Land Wars. There was substantial

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83 Orange, supra note 55, 85.

84 Ibid 78.

85 Kelsey, "Legal Imperialism and the Colonization of Aotearoa" in Spoonley et al (eds) *Tauiwi: Racism and Ethnicity in New Zealand* (1984) 32-39.

86 Ibid 35.

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

88 Ibid 78.

89 McHugh, *The Maori Magna Carta*, supra note 47, 171-172.

ill-feeling amongst settlers towards Maori as it was believed that Maori were not respecting the Treaty. Furthermore, positivism had a growing influence in international law, which meant that sovereign rights were being taken away from indigenous peoples as sovereignty became limited to Christian, European states in the "Family of Nations".

In my opinion, it is likely that an international tribunal would reach the same conclusion as I have on this point. In the *Western Sahara* case the International Court of Justice offered an advisory opinion on whether the Western Sahara was *terra nullius* at the time of its colonization.[90] The Court outlined the law as it was in the 1880s. This remains a useful indication of the law in 1840, as the shift towards positivism would suggest that if the law was going to change at all between 1840 and 1880 it would be towards the non-recognition of tribal peoples. The Court found that:[91]

> [W]hatever difference 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 organisation were not regarded as *terra nullius*.

The fact that the International Court of Justice was prepared to say that about the law in the 1880s suggests that it is incredibly unlikely they would find that sovereignty over New Zealand was acquired by occupation.

Conclusion

In conclusion, sovereignty over New Zealand could not have been acquired by occupation. New Zealand was not *terra nullius* as Maori had sovereignty. Maori hapu and iwi met the requirements for statehood set out by Vattel and their sovereignty had been recognised by Britain.

V CESSION

Requirements

Cession is defined as "the transfer of territorial sovereignty by one State to another State".[92] Unlike other modes of acquisition, cession is a bilateral transaction. It requires the co-operation of the two States concerned. The ceding State must intend to relinquish its sovereignty and the receiving State must intend to accept it.[93] It confers a derivative title, in the sense that

90 *Western Sahara*, supra note 66.

91 *Western Sahara*, supra note 66, 39.

92 Jennings, supra note 8, 948.

93 See Jennings, supra note 8, 948-952; Lee, supra note 14, 8.

the validity of the acquired title depends on the validity of the title of the ceding State.[94] For sovereignty to be acquired by this method the ceding party must possess territorial sovereignty. Usually cession involves two elements: first, an agreement to cede embodied in a treaty; secondly, the actual handing over of the territory.

Application to New Zealand

If New Zealand was acquired by cession, the relevant cession agreement would be the Treaty of Waitangi. Two issues must be dealt with in relation to the Treaty of Waitangi: first, whether was sovereignty ceded under the Treaty; secondly, whether the chiefs who signed the Treaty were capable of ceding sovereignty over all New Zealand.

1 Was Sovereignty Ceded in the Treaty of Waitangi?

(a) Differences Between the Treaty Texts

The Treaty of Waitangi is comprised of texts in two different languages: English and Maori. It is clear in the English versions of the Treaty that it was intended that Maori would cede sovereignty through the Treaty. Each of the four English versions read that Maori chiefs "cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of Sovereignty."[95] Article two of the English text provides that the Queen "confirms and guarantees ... the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess." The Maori text, on the other hand, refers to the cession of sovereignty as "ka tuku rawa atu ki te Kuini e Ingarani ake tonu ate — te Kawanatanga katoa o o ratou whenua" and the confirmation of possession was translated as "te tino rangatiratanga o o ratou whenua o ratou kainga me o ratou taonga katoa". So, where in the English text Maori ceded sovereignty but were guaranteed possesion, in the Maori text Maori gave up "kawanatanga" and were assured "te tino rangatiratanga".

Kawanatanga is not an indigenous Maori word. It comes from the word "kawana", which is a transliteration of governor.[96] The addition of the suffix tanga makes the word governorship. The governors Maori were most familiar with were Pontius Pilate in the Bible and the governors of New South Wales.[97] In these contexts kawanatanga had connotations of a loose authority[98]. On the other hand, Maori were guaranteed "te tino

94 Jennings, supra note 8, 948; See *Island of Palmas* case where it was crucial "that Spain could not transfer more rights than she herself possessed." *Island of Palmas*, supra note 20, 842.

95 See Ross, supra note 59, 19.

96 Ross, supra note 59, 20.

97 Brookfield, "The Treaty, the 1840 Revolution and Responsible Government" (1992) 5 Canta L R 59, 60.

98 Orange, supra note 55, 41.

rangatiratanga". This was a Maori concept with which Maori were familiar. The Waitangi Tribunal noted in its Orakei Report that there is no ideal translation of "te tino rangatiratanga" but that its meaning is best understood if it is translated as "full authority".[99] In the Declaration of Independence, rangatiratanga had been used to describe Maori people's independent, sovereign status.[100]

In the Maori text, Maori agreed to give up a loose authority, but were guaranteeing for themselves the autonomous rights of chiefs. If anything Maori would have thought that the Treaty was guaranteeing their sovereignty.[101] Hugh Kawharu, in evidence before the Waitangi Tribunal, stated, "what the chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death."[102] Ranginui Walker asserts that Maori understood kawantanga to mean "the establishment of a system of government to provide laws that would control British settlers and bring peace among warring tribes."[103] This assessment of the Maori understanding of the Treaty is reinforced by the statements made by Maori chiefs at Treaty negotiations. For example, the paramount chief of Te Rarawa, Nopera Panakareao, discussed the meaning of the Treaty with the missionary William Puckey and government officials and concluded that "the shadow of the land goes to Queen Victoria but the substance remains with us."[104]

The story of the acquisition of Te Hapuku's signature is notable.[105] Te Hapuku was a prominent Hawkes Bay chief and a signatory to the Declaration of Independence. He initially refused to sign the Treaty, alleging that Ngapuhi had become slaves because of their signature.[106] He drew a diagram, showing the Queen above all the chiefs to illustrate his point. In response Major Bunbury asserted that the British government would not "lower the chiefs in the estimation of their tribes", rather if he signed it he could only increase his authority. With this assurance from the British official, Te Hapuku signed te Tiriti.[107] Clearly there was a difference in both the texts and the understandings of the Treaty.

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99 Waitangi Tribunal, *Orakei Report* — Wai 9 (1987) 131.

100 Orange, supra note 55, 41.

101 Ibid 41.

102 Waitangi Tribunal, *Kaituna River Claim* — Wai 4 (1989) 4.

103 Walker, *Immigration and National Identity in New Zealand: One People, Two Peoples, Many Peoples?* (1995) 282.

104 Orange, supra note 55, 82-83; Walker, "The Treaty of Waitangi as the Focus of Maori Protest" in Kawharu (ed) *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 264 ["*The Treaty of Waitangi*"] See Ross, supra note 59, 25.

105 Orange, supra note 55, 81-82; Moon, supra note 63, 132.

106 Orange, supra note 55, 81.

107 Ibid 82.

(b) Rules at International Law

In international law, rules have been developed to resolve ambiguities and conflicts in treaties.[108] The general overarching principle is that treaties are to be interpreted in "good faith". This was recognised by early writers like Grotius, Pufendorf and Vattel, and is now embodied in article 31 of the Vienna Convention on the Law of Treaties, which is recognised as representing customary international law.[109] In Lord McNair's authoritative work *The Law of Treaties* he states that the main purpose when interpreting a treaty is to give effect to the expressed intention of the parties. The starting point is the words of the treaty and they are to be interpreted "in the light of the surrounding circumstances."[110] McNair places emphasis on the overall purpose of the treaty.

For the British, their chief purpose was to have Maori cede sovereignty. This is clear from Hobson's instructions. For Maori, the main goal was to maintain their authority whilst giving the British enough power to control troublesome settlers and prevent tribal war. The exact extent of the power that Maori were willing to give up is unclear and probably varied between tribes. Withoubt doubt, however, the British assumed more power than Maori gave up. It is not easy to reconcile the conflicting intentions.

(c) Preferring Maori Understandings of the Treaty

In cases of treaties between Western States and tribal societies the rules at international law have been modified.[111] The *contra proferentum* rule has been applied by international tribunals.[112] It provides that when a document's meaning is unclear it is to be construed against the party who drafted it.[113] In *Jones v Meehan* the United States Supreme Court stated that treaties must be construed "in the sense that they would be naturally understood by Indians."[114] The reason for the rule is that the Indians were not familiar with the legal expressions used in the treaty and were totally reliant on United States officials for their interpretation.[115]

In the *Cayuga Indians* case the *contra proferentum* rule was applied to a treaty from 1789 between the Cayuga Nation and New York.[116] The tribunal stated that the treaty included legal terminology "which the covenantee had no part in framing and no capacity to understand" and cited "general and universally admitted principles of justice and right dealing" in

108 See Kingsbury, supra note 44, 121-134; McHugh, *The Maori Magna Carta*, supra note 47, 232-237.

109 McHugh, *The Maori Magna Carta*, supra note 47, 231; Kingsbury, supra note 44, 127-128.

110 McNair, *The Law of Treaties* (1961) 365.

111 McHugh, *The Maori Magna Carta*, supra note 47, 235.

112 *Cayuga Indians* [1928] 6 RIAA 173.

113 Ibid 236.

114 *Jones v Meehan* (1899) 175 US 1, 11 (USSC) as cited in Kingsbury, supra note 44, 132.

115 Ibid.

116 *Cayuga Indians* [1928] 6 RIAA 173.

reaching its decision to construe the treaty in the Cayuga Nation's favour."[117] Similarly, the Ontario Court of Appeal in *R v Taylor and Williams* stated that "if there is any ambiguity in the words or phrases used, not only should the words be interpreted as against the framers or drafters of such treaties, but such language should not be interpreted or construed to the prejudice of the Indians if another construction is reasonably possible."[118]

The *contra proferentum* rule requires that the Maori interpretation of the Treaty should be favoured. Further evidence in favour of the Maori understanding of the Treaty is found in the fact that almost all of the more than of 500 chiefs who signed the Treaty, signed only the Maori text. The only exceptions were at the Waikato Heads where 33 chiefs signed an English test and at Manukau where another 6 rangatira signed an English text.[119] Moreover, the treaty negotiations were dominated by debates conducted in Maori.

Another reason why the Maori comprehension of the Treaty should be favoured is that British officials and missionaries acting on behalf of the British endorsed and fostered the understanding that the chiefs came to. The aforementioned story of Te Hapuku's signing shows this point. Claudia Orange describes the explanations at treaty negotiations as "[c]ouched in terms designed to convince chiefs to sign, explanations skirted the problem of sovereignty cognisable at international law and presented an ideal picture of the workings of sovereignty within New Zealand."[120] Further, it is impossible to argue that the English text should be favoured because that is the way treaties were interpreted at the time. In 1836, the King's Advocate John Dodson advised that the English text of a treaty with Mexico could not be regarded as authoritative "and that endeavour should be made to settle the matter by amicable agreement."[121]

(d) Summary

In summary, Maori understood that the Treaty guaranteed their full authority as chiefs, and this understanding was fostered by British officials' explanations of the Treaty. The *contra proferentum* rule requires that the Treaty be interpreted in line with the Maori understanding. The full sovereignty that was assumed by Britain over New Zealand was not ceded by Maori in the Treaty. To interpret the Treaty in any other way would essentially be to argue that the English language is superior or to interpret the Treaty in bad faith. Accordingly the current approach to the Treaty by Parliament and the Courts is wrong. It may be appropriate to use "principles" rather than the strict terms of the Treaty as this puts more

117 Ibid 183.

118 *R v Taylor and Williams* (1981) 62 CCC (2d) 227, 235-236.

119 See Ross, supra note 59, 17.

120 Orange, supra note 55, 56.

121 McNair, supra note 110, 432-433; McHugh, *The Maori Magna Carta*, supra note 47, 235.

emphasis on the debates at Waitangi and has regard for Maori oral culture. Nevertheless, the principles remain subject to the sovereignty assumed by Britain. Ultimately the principles can be overridden if Parliament chooses to do so. The recent legislation concerning the foreshore and seabed demonstrates how easily this can happen. The fact that the guarantee of "full authority" is not reflected in the current approach to the Treaty of Waitangi shows that essentially the British intentions for the Treaty are being favoured over the Maori understanding of the Treaty. This approach is both dishonest and an erroneous application of the relevant legal rules.

2 *Were the Chiefs Who Signed the Treaty Capable of Ceding All Maori Sovereignty?*

Even if one were to disregard the fact that Maori did not cede sovereignty under the Treaty, there would be another problem. There were some chiefs who did not sign the Treaty. In particular, Te Wherowhero of Waikato, who later became the first Maori King, refused to sign.[122] The Arawa and Tuwharetoa people were never signatories to the Treaty.[123] If the different tribes are believed to be free and independent, how can they be committed to the Treaty without their consent? In my opinion this is an issue that cannot be reconciled and it further reinforces the fact that sovereignty over New Zealand was not ceded under the Treaty.

However, the findings of the Waitangi Tribunal in its *Te Whanau o Waipareira Report* (1998) should be noted.[124] The tribunal claimed that "[t]he Treaty of Waitangi was signed by rangatira of hapu, on behalf of all Maori people, collectively and individually."[125] It is my view that the Tribunal interpreted history in the way it did because of the strange facts of the case. There were possibly policy reasons for the conclusion reached. The claimant was an organisation believed to be representative of West Auckland Maori. They were not a hapu or iwi that signed the Treaty. Nowadays many urban Maori do not identify with a particular hapu or iwi. The Tribunal reached the conclusion it did because it wanted to protect urban Maori interests.[126] Moreover, this verdict was inconsistent with the conclusion reached in the Fisheries cases, which maintain the importance of hapu and iwi connections.[127] Consequently, the Tribunal's finding in *Te Whanau o Waipareira Report* should not be seen as an authoritative description of the law or New Zealand history.

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122 Brookfield, *Waitangi and Indigenous Rights* (1999), 98.

123 Ross, supra note 59, 30.

124 Waitangi Tribunal, *Te Whanau o Waipareira Report* — Wai 414 (1998). See also Mikaere and Milroy, "Maori Issues" [1998] NZ Law Review 467.

125 *Te Whanau o Waipareira Report*, supra note 124, xxv.

126 Ibid 2-3.

127 See for example Waitangi Tribunal, *Ngai Tahu Sea Fisheries Report* — Wai 414 (1998) 271-273.

Conclusion

In the end the issues related to the fact that some chiefs did not sign the Treaty is a purely academic matter when it comes to the transfer of territorial sovereignty. The chiefs who did sign the Treaty did not cede sovereignty regardless. Sovereignty over New Zealand was not acquired by cession.

VI CONQUEST

Requirements

Prior to World War II, conquest was a recognised mode of acquiring sovereignty over territory.[128] It should not be seen as strange that war could create legal rights, as war itself was legal. Vattel wrote that states had the right "to use force to obtain justice, if it can not otherwise be had, or to follow up on one's rights by force of arms."[129] Conquest had specific requirements that needed to be met for it to be a way of acquiring sovereignty. It was not as simple as seizure of territory by force of arms. There were three requirements: first, the territory must have been taken and occupied by force during war; secondly, the conqueror's occupation must have been done with a willingness to extend its own sovereignty to include the conquered territory; and thirdly, the control over the territory must have been uncontested.[130]

Application to New Zealand

Although conquest as a "mode of acquisition" has not been analysed in any great detail in the New Zealand context, the wars that may constitute conquest in the New Zealand context are the New Zealand wars of 1845-1872.[131] There are significant problems with the argument that New Zealand was acquired by conquest: first, only a small part of New Zealand was obtained as a result of the wars; and secondly, the wars were not as simple as a conflict between Maori and British. Throughout the campaigns of 1864-1868 colonial forces had the support of kupapa.[132] Kupapa did not share British goals, but instead had their own aims.[133] The kupapa acted as

128 See Jennings, supra note 8, 986-987; See Article 2(4) of the Charter of the United Nations, forbidding the use of force.

129 Neff, *War and the Law of Nations: A General History* (2005) 95.

130 See Oppenheim, supra note 9, 566-574.

131 Although Belich has suggested that "[p]erhaps the Taranaki and Waikato conflicts were more akin to classic wars of conquest than we would like to believe." See Belich, *The New Zealand Wars* (1986) 80.

132 Belich, supra note 131, 211-213.

133 Ibid 212.

a third side in what was a multi-faceted conflict.[134] This means it cannot be argued that their support of the British troops is evidence that they were consenting to British sovereignty. For example, Ngati Kahungungu of the Napier region were prepared to fight anyone who threatened their economic relationship with Napier settlers.[135] Rongowhakaata began to fight vigorously against Te Kooti only after he killed some of their relatives.[136]

The New Zealand wars were more like a few separate nations fighting each other than a colonial power subjugating a homogenous group. Maori were treated as rebellious British subjects rather than a defeated foreign nation.[137] Usually wars end with a peace treaty of some sort. The New Zealand wars were never formally declared to be over, indeed, some Maori from Tuhoe and Taranaki would argue that they continue today.[138] Consequently, Davies and Ewin have suggested that parts of New Zealand may still be in a state of war.[139]

VII PRESCRIPTION

Requirements

Brownlie has said, "[t]he essence of prescription is the removal of defects in a putative title arising from usurpation of another's sovereignty by the consent and acquiescence of the former sovereign."[140] Its place in international law has been disputed from time to time.[141] It is a complicated concept and is regarded by jurists as having three forms: immemorial possession, competing acts of sovereignty and cases of acquiescence.[142]

Immemorial possession is when the origin of the current state of affairs is unknown, but is presumed to be legal.[143] Competing acts of sovereignty cases arise when there is no original sovereign and no deliberate usurpation of sovereignty. Instead there are contemporaneous competing acts of sovereignty over the same territory. In these cases acquiescence

134 Ibid 211.

135 Ibid 212.

136 Ibid.

137 See McHugh, *Constitutional Theory*, supra note 60, 41.

138 See Davies and Ewin, 'Sovereigns, Sovereignty, and the Treaty of Waitangi' in Oddie and Perrett (eds) *Justice, Ethics and New Zealand society* (1992) 45-46.

139 Ibid, 45-46. Dodson makes a similar point in the Australian context, see Dodson, supra note 6, 18.

140 Brownlie, Principles of Public International Law, supra note 14, 145.

141 The international law writers, Heffter, F de Martens and Rivier in the nineteenth century argued that it had no place in international law. See Brownlie, *Principles of Public International Law*, supra note 14, 145. Judge Moreno in the *Right of Passage* case referred to prescription as "a private law institution which I consider to find no place in international law." *Right of Passage*, supra note 20, 88. In the *Chamizal* the International Boundary Commission described prescription as "very controversial." *Chamizal Arbitration* [1911] 11 RIAA 316, 328.

142 Ibid 150.

143 Ibid 146.

by the other sovereign is not strictly necessary to establish sovereignty, because the other state never had sovereignty anyway.[144] The third type of prescription recognised in international law is where one state deliberately usurps another's sovereignty and the former sovereign acquiesces. There are four requirements to this type of prescription: first, the new sovereign must display state authority; secondly, the possession must be peaceful and uninterrupted; thirdly, the possession must be public; fourthly, possession must persist.[145]

Application to New Zealand

In New Zealand the relevant form of prescription is the third type, so its requirements must be analysed in more detail and applied to the New Zealand context. The requirements that there be a display of state authority and that possession be public are uncontroversial in the New Zealand context and do not warrant further discussion. The fourth requirement is that possession must persist. The length of time necessary is not prescribed by international law. Instead it is regarded as a matter of fact depending on the particular case.

1 Has Possession Been Peaceful and Uninterrupted?

In New Zealand the crucial question is whether possession has been peaceful and uninterrupted. Any conduct that indicates a lack of acquiescence will prevent this requirement from being satisfied. Sovereignty cannot be acquired through adverse possession. Protest is sufficient to establish a lack of acquiescence.[146] For example, in the *Chamizal* arbitration the United States claimed that they had acquired a tract of the Rio Grande formerly under the sovereignty of Mexico through prescription. The claim failed because the United States possession had not been unchallenged. The requirement had not been met because there had been diplomatic protests in Mexico.[147] The tribunal explained that "the Mexican government had done all that could be reasonably required of it by way of protest against the alleged encroachment."[148] Protest is only necessary in cases where it might be reasonably expected.[149] It should be emphasised that it is the tacit abandonment, surrender or acquiescence by the original sovereign, not the amount of activity on the part of the "prescripting" state that amounts to acquisition of sovereignty by prescription.[150] In the New Zealand context

144 The *Island of Palmas* and *Minquiers and Ecrehos* cases are examples of competing acts of sovereignty.

145 These are set out in more detail in Brownlie, *Principles of Public International Law*, supra note 14, 148-149.

146 See *Chamizal Arbitration*, supra note 141.

147 Brownlie, *Principles of Public International Law*, supra note 14, 154.

148 *Chamizal Arbitration*, supra note 141, 329.

149 Donovan, supra note 24, 713-714.

150 Jennings, supra note 8, 963.

the questions are, have Maori as the former sovereign acquiesced to the current state of affairs? Have they protested? If they have not protested, is it reasonable to expect that they would?

(a) Early Protest

It is my view that Maori have never acquiesced to the British assumption of sovereignty and continue to use various forms of protest to reassert their sovereignty. One of the earliest incidents of protest took place in 1843. The Ngati Toa chief, Te Rauparaha, exercised his chiefly right to object to land sales in Wairau.[151] He believed that this right had been guaranteed in the Treaty. The New Zealand Company, however, presumed that sovereignty had been ceded in the Treaty. When the New Zealand Company used force to move Maori off their land fighting started. An estimated thirty Europeans and half a dozen Maori were killed.[152] This example is significant particularly because of how Governor Fitzroy responded. Fitzroy blamed the settlers for the incident.[153] For Maori this reinforced their belief that they maintained control over their own affairs.[154]

(b) The Kingitanga Movement and New Zealand Wars

As the Pakeha population grew, British policy changed and the sovereignty presumed to have been ceded under the Treaty was extended. Maori protested in response, upholding their claim to rangatiratanga guaranteed in the Treaty. The Kingitanga movement is a prominent example. The main goals of the movement were to restrict encroaching settler government and maintain Maori control over land.[155] Moderate Kingites did not want to completely get rid of Britain. The aim was for there to be an equal relationship between the Crown and Maori. This was explained symbolically in the image of a whare: New Zealand was the house, Pakeha were the rafters on one side, Maori the rafters on the other and God was the ridgepole.[156] The Kingitanga movement also included members with more extreme goals. There were some that totally rejected European rule and wanted the end of European influence.[157] By 1860 a substantial section of North Island Maori looked to the King.[158]

The wars of the 1860s are another example of Maori protest to Britain's assertion of sovereignty. Fighting in Taranaki was precipitated when Governor Browne attempted to enforce a land sale at Waitara,

151 Orange, supra note 55, 117.
152 King, *The Penguin History of New Zealand* (2003) 182.
153 Ibid 117.
154 Ibid 117.
155 Ibid 142.
156 Ibid 143.
157 Ibid.
158 Ibid 142.

contraveing Wiremu Kingi Te Rangitake's chiefly right of veto.[159] The Government argued that Kingi could not veto the sale as sovereignty had been ceded in the Treaty, while Kingi and his followers felt justified because rangatiratanga had been guaranteed in the Treaty.[160] Governor Browne, when writing about the Waitara purchase, stated that "I must either have purchased this land or recognised a right which would have made William King virtual sovereign over this part of New Zealand."[161]

In May 1861, Governor Browne sent a proclamation to the Waikato people accusing them of violating the Treaty and requiring "submission without reserve, to the Queen's sovereignty and the authority of the law."[162] The Kingites maintained their right to be independent, as guaranteed in the Treaty. War ensued and the government passed the New Zealand Settlements Act 1863 which allowed for confiscation of Maori land as punishment for the war. Three million acres of land was confiscated.[163] Despite this major setback Maori continued to assert their right to autonomy. The Kotahitanga movement of the 1890s was an endeavour to secure the independence guaranteed in the Treaty.[164] It was argued that there should be a Maori authority independent of the government. Several unsuccessful attempts were made to gain government sanction. The last formal gathering of the Kotahitanga movement was held in 1902.[165]

(c) Other Action

Deputations were sent to Britain during the late nineteenth and the early twentieth century to take the dispute to the Crown directly. In 1914 King Te Rata of the Tainui Confederation managed to obtain an audience with King George V. He hoped to have Maori rights under the Treaty recognised. All he received was a promise that his submission would be referred back to the New Zealand government.[166]

(d) Ngata's Explanation of the Treaty

The failure of early protests determined the attitude of many Maori during the twentieth century. In 1922, Apirana Ngata wrote an influential explanation of the Treaty.[167] He explained the Treaty using only the English text, ignoring the Maori version.[168] He stated that sovereignty had been

159 Ibid 144.
160 Ibid 144.
161 Belich, supra note 131, 79.
162 Orange, supra note 55, 157.
163 Walker, *The Treaty of Waitangi*, supra note 104, 272.
164 Orange, supra note 55, 226.
165 Ibid 227.
166 Walker, supra note 104, 274.
167 Ngata, *The Treaty of Waitangi, An Explanation: Te Tiriti o Waitangi, he Whakamarama* (1963).
168 Ibid 5-14.

ceded in the Treaty and that chiefly authority had been transferred to the Crown forever.[169] Of crucial significance is the fact that Ngata believed that protest would be wasted and that Maori should focus on what benefits they might reasonably expect to get under the Treaty.[170]

Maori who have interpreted the Treaty like Ngata should not be seen as acquiescing to the assertion of sovereignty. Instead it indicates the belief that protest would be futile. If protest is believed to be pointless it can hardly be reasonably expected.

Despite the feeling of hopelessness exemplified in Ngata's approach, Maori protest has continued. During the 1970s and 1980s there were protests by Nga Tamatoa and the Waitangi Action Committee. The 2004 Hikoi on the Foreshore and Seabed Act generated a huge Maori response and was a reassertion of tino rangatiratanga, this indicates that the resistance continues.

Conclusion

In summary, Maori have never acquiesced to Britain's assumption of sovereignty. For most of the last 160 years Maori have protested, and at the times that Maori have not protested it could not have been reasonably expected as protest was believed to be futile. As there has been no acquiescence, sovereignty over New Zealand was not acquired by prescription.

VIII THE REVOLUTIONARY PRINCIPLE

The period from 1789-1848 has been called "the Age of Revolution."[171] Charles Tilly considers a revolution to be "a forcible transfer of power over a state in the course of which at least two distinct blocs of contenders make incompatible claims to control the state, and some significant portion of the population subject to the state's jurisdiction acquiesces in the claims of each bloc."[172] The revolutionary principle is used to explain how the constitutional changes that take place in a revolution become legal. The revolutionary principle is that the success and effectiveness of a revolutionary seizure of sovereignty is sufficient to establish legality.[173] If a significant proportion of the population obeys the new sovereign, the legality of the change in sovereignty will be established.[174] Writers such as Jock Brookfield have argued that the revolutionary principle can

169 Ibid 5-6.

170 Orange, supra note 55, 229.

171 Hobsbawm, *The Age of Revolution: Europe, 1789-1848* (1988).

172 Tilly, *European Revolutions 1492-1992* (1993) 8.

173 Brookfield, *Waitangi and Indigenous Rights*, supra note 122, 34.

174 Tilly, "Revolutions and Collective Violence" in Greenstein and Polsby (eds), *Handbook of Political Science* (vol 3, 1975) 520-521.

be applied in the New Zealand context.[175] Brookfield claims that while Britain assumed more power than was given to them by Maori, Britain's sovereignty became legal when a functioning legal system was established and when the majority of New Zealanders obeyed the government.[176]

The Revolutionary Principle or Prescription?

The revolutionary principle is problematic in the context of changes to sovereignty over territory because it covers the same substantive matters as prescription. Both are related to the establishment of legality of constitutional change through the passage of time. This causes a dilemma, because in the New Zealand context different results will be reached depending on which law is applied. If prescription is applied, the lack of acquiescence by Maori to the change of sovereignty will prevent the transfer from being legal. If the revolutionary principle is applied, the fact that New Zealand has an operative legal system and that the majority of New Zealanders obey the government means that the change in sovereignty has become legal.

1 International Law

It is necessary to consider which of the rules should be applied. At international law, rules have been developed to deal with conflicts of laws. This issue was discussed by the International Court of Justice in the *Ambatielos* case. Judge Hso Mo stated that "[i]t is a well recognised principle of interpretation that a specific provision prevails over a general provision."[177] The ICJ in the *Asylum Case* recognised that a specific regional custom can override a general rule of international law.[178] Lord McNair notes that the Latin maxim *generalia specialibus non derogant*, that is "the specific prevails over the general", can be used to choose between conflicting treaty rules. The revolutionary principle is a general rule that can apply to a variety of circumstances. It can apply to changes of sovereignty within a state and it is argued that it applies to the transfer of sovereignty between sovereign states.[179] In comparison to the revolutionary principle, prescription is specific. Its application is limited to the transfer of sovereignty between sovereign states. According to the maxim that a specific provision should prevail over a general rule, prescription should apply.

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175 See Brookfield, *Waitangi and Indigenous Rights*, supra note 122.

176 Brookfield, *Waitangi and Indigenous Rights*, supra note 122, 108-115.

177 *Ambatielos (Greece v United Kingdom)* [1952] ICJ Rep 27, 88; See also Fitzgerald, "The Law and the Procedure of the International Court of Justice, 1951-4" (1957) 33 Brit YB Int'l L 203, 236-238.

178 *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 277.

179 Tilly, supra note 174, 520-521.

2 Analogy with Domestic Law

Similar conflicts of laws occur within domestic legal systems. Occasionally, parliament passes a law that conflicts with an earlier statute. This was an issue in the New Zealand Court of Appeal case *R v Pora.*[180] The Court noted that as a general rule there is a presumption that a specific provision will override a general provision but that it is part of an overall "common sense" approach.[181] In private international law the need to reach a just result is a guiding principle; hence the development of the "flexible exception" in tort choice of law by Lord Wilberforce in *Boys v Chaplin.*[182] It may be argued that the jurisprudence that has developed in municipal law should be taken into account when choosing between prescription and the revolutionary principle.

3 Wider Considerations

The wider considerations of "common sense" and the need for justice must be taken into account. One must reflect on the wider effect that application of the revolutionary principle would have. A characteristic of the international rules relating to the transfer of sovereignty is that the losing sovereign must give consent to the transfer. Sovereign rights derived from conquest are a limited exception. This is evident in the rules relating to cession and prescription. The application of the revolutionary principle would defeat the consent requirement. For example, in the New Zealand context, legality could be established by mass immigration of Pakeha settlers. Once Pakeha outnumbered Maori by a significant proportion and a legal system was created there would be legality. If it were legal to acquire sovereignty over territory by large-scale migration, the whole regime of international rules relating to the transfer of sovereignty over territory would be defeated. This would surely not be "common sense".

One may try to respond by saying that allowing prescription to displace the revolutionary principle would have an equally negative effect. It must be remembered that the choice between prescription and the revolutionary principle is only necessary because there was a regime of international rules in place when sovereignty over New Zealand was assumed. Furthermore, the displacement of the revolutionary principle would be restricted to circumstances involving the transfer of sovereignty between states. In cases involving a change of sovereignty within a state the revolutionary principle would remain the law, because international law "modes of acquisition" would not be relevant. Consequently, the application of prescription over the revolutionary principle makes more sense and is more just. Furthermore, with regard to justice, applying the

180 [2001] 2 NZLR 37.
181 Ibid [42].
182 [1971] AC 356, 384-393.

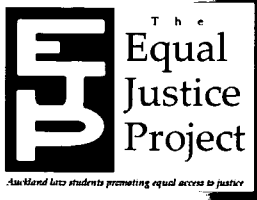
acquiescence requirement would be more in line with indigenous peoples' right to self-determination.[183]

IX CONCLUSION

In summary, Britain's seizure of sovereignty over New Zealand was illegal. In reaching this conclusion it is crucial to determine whether or not Maori had sovereignty over New Zealand prior to 1840. The inter-temporal doctrine requires that Maori sovereignty be assessed according to the law at the time New Zealand was occupied. The writing of Vattel is authoritative. Maori hapu and iwi met the required level of social and political organisation in 1840, so Maori had sovereignty. This has been confirmed by the approach taken by the International Court of Justice in the *Western Sahara* case. Once it is established that Maori had sovereignty over New Zealand prior to 1840, it is not possible for New Zealand to have been acquired by occupation. New Zealand was not acquired by cession either. The application of the relevant rules of treaty interpretation to the Treaty of Waitangi shows that the sovereignty assumed by the United Kingdom exceeded the authority conceded by Maori. The Land Wars do not constitute a conquest so New Zealand was not acquired by that mode. New Zealand has not been acquired by prescription either, as Maori have never acquiesced to Britain's seizure of sovereignty. One is forced to conclude that the United Kingdom's assumption of sovereignty over New Zealand was illegal. As the legality of the current constitution is traced back to the United Kingdom's annexation, the current constitution is illegal.

New Zealand's approach to constitutional change is characterized by lethargy. The realization that the current constitutional system is an illegality should provide the impetus necessary for change to occur. New Zealand's unique history requires a different constitutional system from the one imported from Britain. Diceyan parliamentary supremacy is inappropriate considering what Maori relinquished in 1840. The emergence of human rights and its effects on constitutions worldwide show that modifications to the traditional understanding of sovereignty are possible. Negotiations must take place between Maori and the Crown to decide the way forward. Debates in the wider community would add to the legitimacy of this process. The starting point and overall understanding behind any negotiations and debates must be that the United Kingdom's acquisition of sovereignty over New Zealand was illegal.

183 The right to self-determination is referred to in articles 1(2) and 55 of the United Nations Charter. Subsequent state practice has established it as an important legal principle. McHugh, *The Maori Magna Carta*, supra note 47, 193-199.



www.equaljustice.co.
info@equaljustice.co.
Ph: (09) 3737599 ext 8

Postal Address
The Equal Justice Pro
Faculty of Law
University of Auckla
9 Eden Crescent
Private Bag 92019

Physical Address
Room 101, Level 1
The Fisher Building
18 Waterloo Quadran
Auckland City

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