Samuel Carpenter, Answers to Written Questions, September 2010

Memo of Afeaki & Hirschfeld, 3 Sept 2010

[1] Mr Carpenter, Ngapuhi and other Rangatira Maori did not cede Sovereignty in Te Tiriti o Waitangi, that proposition is correct isn't it?

Answer:

This question highlights perhaps the key Treaty or te Tiriti debate of the last 30 to 40 years. However, my Report and evidence contends that this debate was not the key debate that was taking place in 1840 between the Crown and Māori, mediated by the Missions. Conceptions of Sovereignty in 1840 reflected wider debates concerning the nature, sources and limits of the Sovereign or Governing power in European states and Kingdoms.

Wheaton's 1836 text on international law defined 'Sovereignty' as 'the supreme power by which any State is governed'. He then went on to distinguish between 'internal sovereignty' and 'external sovereignty':

> This supreme power may be exercised either internally or externally.
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> Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law, *droit public interne,* but which may more properly be termed constitutional law.
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> External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all

> other political societies. The law by which it is regulated has, therefore, been called external public law, *droit public externe,* but may more properly be termed international law'.[1]

Prior to and following 1840, Rangatira Māori or hapū exercised a form of 'internal sovereignty' in accordance with Māori custom or tikanga. It could also be argued that Māori hapū were 'States' to the extent they conformed with Wheaton's definition:

> The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied.[2]

While Māori hapū pre-1840 might have been 'states' or 'sovereign states', there is little doubt that He Wakaputanga/ the Declaration failed to constitute an authority that was 'habitually obeyed' by the hapū and Rangatira of Taitokerau. Normanby's instructions to Hobson contained a similar analysis concerning the lack of a pan-hapū authority structure.[3]

Consistent with this analysis of 'internal sovereignty', prior to 1840 Māori hapū were also 'externally sovereign' or 'independent' in relation to each other. Following the Declaration of 28 October 1835 British officials acknowledged the 'sovereignty and independence' of New Zealand to a limited extent. The caveats involved in Britain's acknowledgement reflected the fact that there were no governing institutions for Nu Tirani as a whole.[4]

My report emphasized another sense of 'Sovereignty' that has usually been ignored in Treaty/te Tiriti interpretation. I named this the 'domestic' or 'constitutional' perspective on Sovereignty, informed as this concept inevitably was by common-place British understandings of their own Constitution. Hence, while William Blackstone gave a theoretical legal definition of sovereignty as 'a supreme, irresistible, absolute [and] uncontrolled authority', he also stated that English laws (stemming from Magna Charta) preserved English rights of personal security, personal liberty and private property. The

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[1] Wheaton, *Elements of International Law* (1836), para 20, ch 2, part 1; see Report, p 34 (fnt 100), and see Report, p 62, fnt 174, on the Ionian Protectorate, which was Busby's model for his 1837 Protectorate.
[2] Ibid., para 17, ch 2, pt 1; see Report, pp 32-33 (fnt 96).
[3] Normanby to Hobson, *BPP* 1840 [238], No 16, pp 37-38 (that is, the (in)famous passage concerning the New Zealand people consisting of '...numerous, dispersed, and petty tribes, who possess few political relations to each other...'
[4] See Normanby to Hobson (ibid), and Report, pp 48-54.

'spirit of liberty', Blackstone said, was 'deeply implanted in our constitution, and rooted even in our very soil'.[5] Williams applied this domestic constitutional perception to the Treaty, when he said: 'My view of the Treaty of Waitangi is, as it ever was, that it was the Magna Charta of the aborigines of New Zealand'.[6]

This 'constitutional' understanding of 'Sovereignty' is one in which even the Sovereign power itself becomes subject to a higher law. Blackstone explained that the 'law of nature, being *co-eval* with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this…'.[7]

We thus encounter an internal contradiction in the definition of Sovereignty itself: how can the constitutional Sovereign be an absolute or irresistible authority and at the same time be subject to a higher Law? Blackstone's discussions of Sovereignty in fact incorporate two contradictory views of Sovereignty, one an 'older' Aristotelian or Medieval view, the other a 'newer' Hobbesian or 'Divine Right' view. But if the Aristotelian view was 'older' it is clear – from Blackstone's eighteenth-century articulations and Henry Williams' mid-nineteenth century view that te Tiriti o Waitangi was a Māori 'Magna Charta' – that this view was embedded in British understandings of their own Constitution. Renaissance and Medieval scholar C S Lewis explains lucidly this 'older' view:

> Two factors worked against the emergence of a theory of sovereignty [that is, the 'modern' or 'Hobbesian' view]. One was the actual dominance of custom in medieval communities. 'England', says Bracton, 'uses unwritten law and custom' (*De Legibus*, I, i) – speaking truly about England, though wrongly thinking that this was peculiar to her. A J Carlyle quotes coronation oaths (not English) in which the king swears to keep *les ancienes costumes*... This law or custom is the real sovereign. 'The King is under the Law for it is the Law that maketh him a King (Bracton, I, viii).... The other factor was the doctrine of Natural Law. God, as we know from Scripture (Rom I, 15), has written the law of just and reasonable behaviour in the human heart. The civil law of this or that community is derived from the natural 'by way of particular determination' (Aquinas, *Summa Theol*, Ia, 2ae, XCV, iv). If it is not, if it contains anything contrary to Natural Law, then it is unjust and we are not, in principle, obliged to

[5] Blackstone, *Commentaries*, vol 1, pp 48-49, 127-129; see Report, pp 34, 190.
[6] Williams to Bishop Selwyn, 12 July 1847, vol 100, p 53, MS 91/75, AML, p 53; see Report, p 190.
[7] Blackstone, *Commentaries*, vol 1, p 41; see Report, p 35.

> obey it... Thus for Aquinas, as for Bracton, political power (whether assigned to king, barons, or the people [or Kāwana or Rangatira!]) is never free and never originates. Its business is to enforce something that is already there, something given in the divine reason or in the existing custom. [square brackets added] [8]

It is this view of Law as Custom and the Natural Law of God – constitutional Sovereignty rather than the Hobbesian theory of absolute Sovereignty – that more closely approximates the worldview of Henry Williams and his mission colleagues (and in fact many humanitarian-inclined British officials of the period). I would suggest that this worldview was one of the main drivers of the Church-humanitarian 'lobby' in New Zealand during the period 1840 to 1860 and beyond. It explains why Bishop Selwyn and colleagues could lobby for the incorporation of the Kingitanga as a New Zealand Province, with the King as Superintendent, so as to 'reconcile the Unity of the Law with the Duality of Mana [the Governor's and the King's]'.[9] This phrase – which strikes one as astonishingly prescient or 'progressive' today – expresses clearly this older view that Law is paramount – *the Law is Sovereign* – not the Queen, not the Governor, not the Māori King, nor indeed the people. This 'domestic constitutional' perspective on the 'Sovereignty question' is critically important if we are to place te Tiriti o Waitangi in its proper context. This constitutes an important paradigm shift, one which is necessary to achieve a more nuanced interpretation of te Tiriti as it was conceptualized by British actors in 1840.

A further insight from C S Lewis concerns the understanding of Law as Custom, rather than legislation or positive law. This understanding accords with the humanitarian view of the Treaty that – in the words of Normanby's instructions – 'they [Māori] must be carefully defended in the observance of their own customs'. For if English law was historically 'common' or customary law – law which reflected time honoured traditions and ways of arranging things between conflicting parties – then Māori tikanga were likewise traditional custom to be legitimately recognised by the new (British) regime. State coercion or force was to be called on, if necessary, only in relation to 'human sacrifice', cannibalism and warfare. Otherwise, Hobson was instructed to recognise all other customs compatible with 'the

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[8] C S Lewis, *English Literature in the Sixteenth Century excluding Drama*, F P Wilson and B Dobrée, eds, Oxford History of English Literature series (Oxford: Clarendon Press, 1954), pp 47-48.

[9] Selwyn, Report on the Meeting at Peria, Oct 1862, *AJHR*, 1862, E-12, p 12; cited in G A Phillipson, ' "The Thirteenth Apostle", Bishop Selwyn and the Transplantation of Anglicanism to New Zealand, 1841-1868', DPhil (History) thesis, University of Otago, 1992, p 379.

universal maxims of humanity and morals'.[10] In 1858 C W Richmond attributed this conception of Māori policy to Protector George Clarke and Secretary of State Lord Stanley.[11]

Having explored the various senses of the word 'Sovereignty' at 1840, we can now return to the issue of whether this was 'ceded' by Māori to the Crown at 1840. At this juncture, it becomes apparent that the 'Sovereignty question', which has been so central to Treaty interpretation of the last 30 to 40 years – that is, whether Rangatira ceded 'Sovereignty' to the Crown – was not the key concern of British actors at the time (nor indeed, Māori actors). This is fundamentally because missionaries and the Crown understood the relationship established by te Tiriti as providing for a national Governance by the Queen's Governor and the maintenance of Rangatira Māori authority in relation to hapū affairs and tikanga. By contrast, recent Treaty interpretation reifies the issue of 'Sovereignty' into one of critical importance: the legitimacy of Williams' te Tiriti translation stands or falls on whether it correctly conveyed what 'Sovereignty' meant to the Rangatira. This 'Sovereignty' framework is flawed for a number of reasons, one being that it employs Blackstone's 'absolute and irresistable' notion of Sovereignty to the exclusion of the more nuanced notions of 'internal' and 'external' Sovereignty and the 'constitutional' notion of Sovereignty so central to British understandings. It also ignores the fact that Normanby instructed Hobson to intervene directly in Māori affairs only in relation to the practices of human sacrifice, cannibalism and inter-hapū warfare. Therefore, this Governance arrangement at the periphery of British Empire was a form of 'indirect rule', in which the allegiance and support of Māori leadership would be integral to the effective government of the country as a whole. 'Governance' or a national framework of law and order for Māori and incoming British settlers, and the perceived need to forestall other foreign powers, were the key concerns of the Treaty/te Tiriti.

International law or the law of nations at 1840 made the issue of 'Sovereignty' relevant. The issue amongst European nations concerned which state or kingdom exercised a paramount jurisdiction in or over New Zealand. When Britain established a British Governor by treaty with Rangatira Māori, it staked its claim in international law to this paramount jurisdiction or Sovereignty. This is the issue of 'external sovereignty' identified by Wheaton. As for the 'internal sovereignty', the constitutional arrangements or Governance of the new colony –

[10] Normanby to Hobson, *BPP* 1840 [238], No 16, p 40.
[11] 18 May 1858, NZPD 1856-58, pp 443-445; see Report, pp 154-155.

these were all convertible terms[12] – these were to be exercised so as to protect Māori custom or tikanga and the independence of the tribal polity based on a tribal land base. Rangatira Māori did not cede their essential customary authority – their 'tino rangatiratanga' – nor their hereditary or personal mana in te Tiriti o Waitangi. That status and authority was protected under article two. The Crown was not asking them to give up that authority in the Treaty/te Tiriti, (although the Kāwana's power would impinge on hapū or inter-hapū affairs in the three areas mentioned by Normanby). In Henry Williams' words, te Tiriti protected the 'Rank, Rights and Privileges' of Rangatira Māori.[13] What Hobson, Williams and colleagues were seeking from Rangatira was 'for the recognition of Her Majesty's Sovereign authority over the whole or any part of those islands' so as to establish a 'Civil Government' (preamble of English text). In their understanding, the Treaty and te Tiriti was about establishing a new national Sovereignty or Kāwanatanga/Government in Nu Tirani that would be recognised as the legitimate 'external Sovereign' in relation to other foreign states or powers and, internally, creating a paramount authority – an 'internal constitutional Sovereign' – above the level of hapū to ensure law and order or 'Civil Government'.[14]

In 1833 Busby recognised that hapū or their leadership exercised a form of 'Sovereignty' or authority.[15] In 1837 he ascribed to the Wakaminenga/ Confederation 'the rights of a Sovereign power' although these rights had been exercised only to a 'limited' extent pan-tribally.[16] Yet because those Rangatira Māori exercised a hapū-based sovereignty and a (limited) pan-tribal sovereignty in te Wakaminenga, they had the standing to grant, 'tuku' or 'cede' to the Queen of England a right of national Sovereignty or Governance which would stand in place of te Wakaminenga's nominal pan-tribal Sovereignty, while recognising or working with the ongoing hapū authority of Rangatira Māori .

My Report discussed what the Crown, but particularly its missionary interpreters, understood by te Tiriti. My evidence amounts to the view that if 'the Treaty' and 'te Tiriti' are understood in their right contexts, they can be reconciled. George Clarke's 1860 argument

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[12] See Report, pp 159-160.

[13] 'Statement by Henry Williams re 400 Copies of Treaty', 16 Sept 1844, vol G, p 104, MS 91/75, AML; see Report, pp 107-108.

[14] Refer to Wheaton's 1836 *Elements of International Law*, cited in my Report at pp 5-6, 32, 34, 60, 62, 63, 180 (in the footnotes); see especially citations discussing the distinction between 'internal sovereignty' and 'external sovereignty' – cited in the opening paragraphs, above.

[15] Busby to Colonial Secretary NSW, 13 May 1833, No 3, pp 31-32; see Report, p 16.

[16] Busby to Col Sec, 16 Jun 1837, No 112, p 251; see Summary of Evidence, p 11.

provides evidence that at least some Māori and British minds did in fact 'meet' at Waitangi and other locations in 1840:

> the rights of Chieftainship over the tribes and lands were fully recognized and protected by the Treaty of Waitangi. The expressive language used and fully understood by both parties to the Treaty was this – that 'the *shadow* of the land was to be the Queen's (meaning the Queen's sovereignty) 'and the *substance* to remain to the native Chiefs;' – their lands and the 'tino rangatiratanga' (chief chieftainship) over their own tribes.[17]

At the least this demonstrates a Mission view that the 'Sovereignty' of the English text was compatible with the 'chief chieftainship' of Rangatira Māori . Although te Tiriti had brought about a new unitary polity, this polity did not comprise a paramount Governor solely, but a paramount Governor *and* the local authority of hapū leaders. In Bishop Selwyn's words, 'Mana' or authority was to be exercised by Governor and Rangatira within the overarching authority of the Law.[18] To this extent the proposition is correct in saying that Rangatira Māori and Ngāpuhi did not cede their 'Sovereignty' – their mana or customary chieftainship – to Queen Victoria. What they did cede to Her Majesty was the right to exercise a 'national Sovereignty' or 'Kāwanatanga'.

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[17] G Clarke, *Pamphlet in Answer to Mr James Busby's on The Taranaki Question and the Treaty of Waitangi by Sir William Martin (Late Chief Justice of New Zealand)*, reprint (Auckland: A F McDonnell, 1923), p 11; see Report, p 148.

[18] See Selwyn quote above, at fnt 9.

Memo of Afeaki & Hirschfeld, 3 Sept 2010

[1] Counsel refer Mr Carpenter to Pages 11 and 19 of his evidence (Wai 1040#A17).

[2] Mr Carpenter, you refer to '***Tareha***' in the last paragraph of page 11 and page 19 at footnote 57.

[3] There were three tipuna in Ngapuhi known as 'Tareha' during and around the time of Busby and Williams. One was from Waimate, one from Ngati Rehia and the other from Ngati Rahiri and Ngati Kawa, who was later referred to as Tareha Kaiteke Te Kemara. In earlier times this tipuna was referred to as Tareha.

[4] Please clarify which Tareha you are referring to in your report.

Answer:

I have checked the reference to Tareha, at p 11 of the Report (#A17). This is quite clearly Tareha of Ngati Rehia, the rangatira whose kainga 'were at Kerikeri and Taka' (according to L Rogers, *Te Wiremu*, p 107, footnote 1). By the 1830s, it seems that missionaries and Europeans generally referred to Tareha of Ngati Rehia as 'Tareha', and Tareha Kaiteke as 'Te Kemara'. I am not sure about the Tareha of Waimate you refer to. See Colenso, *The Treaty of Waitangi*, 1890 as evidence of this (he refers to Te Kemara of 'Ngatikawa', and 'Tareha' of 'Ngatirehia').

For the reason just given, I would say that the second reference to Te Kemara noted by you (at footnote 57, p 19 of the Report), which dates from 1834, also refers to Te Kemara of Ngati Rehia. Another indication of this is the association with Titore. It is my understanding that Te Kemara was a clear ally of Titore in the 'northern alliance'.

Crown Questions, memo of 3 Sept 2010

13. Do you agree that in translating the word 'sovereignty', the Crown needed to distinguish the form of authority that it was asking rangatira to cede (or agree to) under Article One, from the guarantee to Maori of their continued ownership of their properties under Article Two?

14. Do you agree that this is a further reason to the reasons you provide (at pages 161-168 of your main report, #A17) for why 'mana' would have been an inappropriate translation for 'sovereignty'?

Question 13.

Yes, the Crown needed to distinguish the form of authority or sovereignty that it was asking rangatira to cede/agree to – for which the term 'Kāwanatanga' (Governorship) was chosen – from the article two guarantee of 'tino Rangatiratanga'. The British Government was asking Māori / Māori rangatira to give to the Queen the right to establish a Civil Government in New Zealand, by way of a Governor. That is expressed adequately by the preamble and article 1 of te Tiriti. The form of sovereignty or overarching authority the Crown was intending to establish was a Governor/Civil Government. The Crown was not establishing a King or Prince in Nu Tirani (that is, a 'Kingitanga'): the Queen was not coming herself to New Zealand, she was sending her Governor. Nor was the Crown establishing a parliament/paremata, nor any other form of legislative or executive authority.[19] This is what I meant in my Summary of Evidence, at para 51, that 'Williams' use of kawanatanga to translate sovereignty was both functional and theoretically-correct...'. The understanding of Williams' te Tiriti translation must be placed in its 'empire context'. By the Treaty/ te Tiriti, New Zealand was being incorporated within the British Empire, an empire governed or administered in different ways in different places.

[19] In technical terms, Hobson was initially a Lieutenant-Governor under the authority of the Governor of New South Wales. The new British settlements in New Zealand were also incorporated into that existing machinery of Empire: 'Whatever may of be the ultimate form of government to which the British settlers in New Zealand are to be subject, it is essential to their own welfare, not less than to that of the aborigines, that they should at first be placed under a rule, which is at once effective, and to a considerable degree external [i.e., the Colony and Governor of NSW]'; see Normanby to Hobson, *BPP* 1840 [238], No 16, p 40.

However, I do not agree with this question's statement that Māori were simply being guaranteed in article two 'the continued ownership of their properties', if by this is meant *mere property rights*. Rather, the phrase 'tino Rangatiratanga' in article two and the phrase 'o ratou rangatiratanga, me to ratou wenua' in the preamble strongly suggests that the customary authority of chiefs in relation to their own people, lands and resources was to be preserved. Moreover, article two's guarantee 'ki nga Rangatira, ki nga Hapu, ki nga tangata katoa' suggests the maintenance of tribal or hapū identity or a form of tribal 'independence' (remembering that 'rangatiratanga' is used for 'independence' in He Wakaputanga).

Therefore, Williams rendering of the English text provisions as 'kawanatanga' and 'tino rangatiratanga' established a new authority and maintained the existing (hapū) authorities at the same time: 'the Unity of the Law' was to be reconciled with 'the Duality of Mana' – the mana of both Kāwana and Rangatira.[20]

Question 14.

The reasons given above further establish (though they are certainly implied in my Report) why 'mana' was completely inappropriate to translate 'sovereignty'.

[20] See quotation from Bishop Selwyn above, reference at fnt 9.