PART 3

The Problem of Jurisdiction

In August 1884, after it had been decided to establish a British protectorate in New Guinea, Gladstone, in answer to a question in the House of Commons promised that law and order would be established in the new protectorate and that jurisdiction would be asserted over all persons in it, irrespective of race and nationality. ¹ (D43) His assurances appear to have taken the Colonial Office by surprise. Doubts were entertained there as to whether Great Britain had the right to assert jurisdiction over everybody in the protectorate. The opinion of the Law Officers of the Crown was sought. They considered that while New Guinea remained a protectorate, the only persons in it lawfully under the jurisdiction of Great Britain were British subjects; and that no authority could be lawfully exercised over Papuans or European foreigners in the protectorate. (D44) Only by annexing British New Guinea as a colony, and asserting sovereignty over it, could jurisdiction be lawfully asserted over all its inhabitants. ² This was because British jurisdiction was normally based on treaties or agreements negotiated with each local ruler or chief, and it was considered that the political organization of Papuan societies was such that treaties or agreements of this kind could not be made. In the absence of such treaties or agreements, British jurisdiction within protectorates was generally regarded at this time as depending solely on statute, and was confined to British subjects. ³

And so it was decided to annex British New Guinea.  (D47)

The Germans were not troubled by these problems of jurisdiction in their protectorate. Under German law, jurisdiction could be over all persons in a German protectorate, irrespective of race or nationality. Although the Germans often made treaties or agreements of a kind with local chiefs and rulers, they did not rely on these as the basis of their jurisdiction. ⁴ The powers they asserted in their protectorates were normally indistinguishable in scope from those normally exercised in a British colony. (D46)

In early 1885, the feeling grew in the Colonial Office, that should British New Guinea be annexed as British territory, without any permanent financial commitment from Australia, the cost of its administration might ultimately fall on the Treasury and the British taxpayer. Accordingly, the Australasian Governments were informed that annexation could not proceed until they had committed themselves to underwriting the finances of British New Guinea. ⁵ (D48) By this stage, Gladstone’s undertaking to establish an effective administration seems to have been forgotten or ignored in the Colonial Office.

Although some at least of the Australasian colonies were prepared to underwrite the costs of a colonial administration in British New Guinea, the problem arose of how, if at all, they were to have a say in the spending of the money they contributed. It was not until 1887 that a formula was worked out by the governments of Queensland, New South Wales and Victoria. This was approved, with some variations, at the Colonial Conference held in London in April of that year. (D49) Under this formula the Queensland Government agreed to pass a statute making itself primarily responsible for an annual grant of up to £15,000 for ten years, on the understanding that the governments of New South Wales and Victoria each guaranteed the payment of one third of this sum. The Queensland Government, on behalf of the eastern mainland colonies, was to have a say in the supervision of the New Guinea administration, while

¹Further Correspondence Respecting New Guinea And Other Islands, C-4217, London, 1884, pp. 35-6
²Report of 11 December 1884, C.O. 422-1 (film 2864, at 282 et seq.)
³There was a change in British thinking on this point, however, by 1895: Lord McNair, International Law Opinions, Cambridge, 1956, pp. 54-5
⁴Ibid., p. 43
⁵Colonial Office to Agent-General for N.S.W., 4 February 1885, Further Correspondence Respecting New Guinea And Other Islands In The Western Pacific Ocean, C-4273, p. 151
the Queensland Supreme Court was to be the court of appeal for the new Colony. The Governor of Queensland was to be empowered to give instructions to the Administrator of British New Guinea, although overall control was to stay with the Colonial Office.6

The British Settlements Acts were subsequently consolidated and amended to allow for appeals from the courts of British New Guinea to be heard in Queensland, (D51) and the protectorate was formally annexed as a colony on 4 September 1888. (D53) However, after the annexation, the Law Officers pointed out, rather inconveniently, that the new British Settlements Act of 1887 did not allow the Governor of Queensland to instruct the Administrator of British New Guinea in the performance of his duties, and that the provisions of MacGregor's Commission—made under the Act—requiring him to follow the directions of the Queensland Governor, were thus invalid.7 (D56) As the Conservative Administration anticipated difficulties in the House of Commons should a further amendment to the British Settlements Act be introduced, giving Queensland control over the New Guinea administration, the references to the Queensland Governor’s supervision in MacGregor’s Commission were deleted.8 At the same time MacGregor was given an administrative instruction to heed the advice of the Governor of Queensland. In practice he did not.9

6Details of the Conference agreement are to be found in C.O. 422-3 (film 2686, particularly at 282-3).

9A brief account of MacGregor’s administration is given by G. Souter, in New Guinea, The Last Unknown, Sydney, 1964, pp. 63 et seq., and in his own Annual Reports

LEGAL PROBLEMS IN THE PROTECTORATE OF BRITISH NEW GUINEA:
DOCUMENTS D37 to D44

General Scratchley, who was appointed Special Commissioner for British New Guinea after the Proclamation of the Protectorate, was not given any special powers. Rather, ad hoc arrangements were made within the structure of the existing Western Pacific High Commission, which had been established by Order in Council in 1877, (D39) under powers derived from the Pacific Islanders Protection Act, 1875. (D38) The Western Pacific High Commission was an experiment in minimum intervention in the Pacific; a device to assert British influence and authority over British subjects in the islands of the Pacific, without establishing territorial Sovereignty over them. The office of Special Commissioner was unknown in the Western Pacific High Commission. The High Commissioner normally held the Governorship of Fiji, and under him were Judicial and Deputy Commissioners.1

General Scratchley’s powers seemed to have been substantially derived, not from his Special Commissionership, but from his concurrent appointment as a Deputy Commissioner of the Western Pacific High Commission.2 (D37) His failure to realise this led to a lot of subsequent confusion. (D41; D42) Nevertheless, he does not appear to have been unduly troubled by uncertainties as to his powers and set out to punish the wrongdoer in the confident tradition of late Victorian Imperialism.3 (D40)

It became apparent soon after the Protectorate was established that, quite apart from problems relating to the powers of the Special Commissioner himself, the jurisdiction of the Crown itself within the Protectorate was drastically limited in law. (D44) This problem came to a head at the end of 1884. Earlier, in August of that year, Gladstone had promised in the House of Commons to establish a satisfactory system of law and order in the new Protectorate. (D43) As this would necessarily have involved asserting jurisdiction over all the persons in the Protectorate, there was some embarrassment when the Law Officers of the Crown advised in December that

1D. Scarr, Fragments Of Empire, Canberra, 1967, pp. 23 et seq.
2Griffith’s opinion of 4 December 1885, C.O. 422-2, (film 2685, at 64-6)
3G. S. Fort, Chance Or Design?, London, 1942, pp. 65 et seq.
the Crown had no authority over either the Papuans, or foreign Europeans in the Protectorate.4 (D44)

These legal difficulties contributed substantially to the decision to annex the Protectorate, and to establish British jurisdiction in New Guinea on the firm basis of territorial Sovereignty. (D47) After this decision was made, however, more mundane questions involving the finances and administration of the new Possession, (D48) delayed the annexation for almost four years.

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D37 General Scratchley’s Appointment and Instructions

Although the Protectorate over British New Guinea was established on 6 November 1884, arrangements for its administration proceeded in a leisurely way, and Major General Scratchley was not sent the letter appointing him Special Commissioner, and containing his instructions, until 17 November of that year. A Commission passed under the Royal Sign Manual and Signet was issued to him on 20 November.1

Scratchley had served in the Crimean War, and in India. He was well known in Australian official circles, having spent some years in Australia advising the colonial governments on their defences. At the time of his appointment as Special Commissioner, he was Adviser to the Colonial Office on Australian defence.2

He did not actually arrive in the Protectorate until August 1885,3 and Romilly remained in charge until that time, subsequently serving under Scratchley and taking over control of the administration again on his death until Douglas became Special Commissioner.4

It will be seen from the following letter that, in the Colonial Office, it was envisaged that Scratchley’s powers were essentially those of a Deputy Commissioner acting under the Western Pacific Orders in Council. The letter is dated 17 November 1884, and was signed by Sir Robert Herbert, the Permanent Under-Secretary of State at the Colonial Office.

Sir,

You are aware that steps have been taken to proclaim Her Majesty’s Protectorate and jurisdiction over the southern shore of New Guinea and the country adjacent thereto, from the 141st meridian of east longitude eastward as far as East Cape, including any island adjacent to the mainland in Goschen Straits, and to the southward of the said Straits as far south and east as to include Kosman Island.

I am now directed by the Earl of Derby to inform you that Her Majesty has been pleased to appoint you to be her Special Commissioner, to exercise her authority within this Protectorate, and that the necessary Commission will shortly be transmitted to you.

Until Her Majesty shall be pleased to make further provision for administering law in the Protectorate, that territory, as well as all other parts of New Guinea up to the 145° east longitude, remain under the operation of the Western Pacific Orders in Council; it is, therefore, necessary that you should be enabled to exercise the authority which is vested by those Orders in the deputies of the High Commissioner, and Sir William Des Voeux has been instructed to forward to the care of the Governor of New South Wales an instrument appointing you to be a Deputy Commissioner. As it is proposed to place a steamer at your disposal for the duties of the Protectorate, you will have more ready means of access to the islands near New Guinea than are at the command of the High Commissioner, and it has accordingly been decided that your powers as Deputy Commissioner shall extend to the islands lying to the north of latitude 15° south, and to the west of longitude 100° east, and for so much of the Solomon Islands as lies beyond these limits. Copies of the Western Pacific Orders in Council of 1877, 1879, and 1880 are forwarded herewith.5

You will, however, be independent of the High Commissioner in respect to the Protectorate, and will correspond direct with the Secretary of State for the Colonies as regards matters occurring beyond the Protectorate; but within the limits assigned to you as Deputy Commissioner you will act on your own discretion, without referring to the High Commissioner for instructions; but you should, as far as practicable, inform him of your proceedings.

The Australasian Colonies have agreed to provide 15,000/ during the year ending June 1, 1885, for the expenses of the Protectorate, and upon your arrival in Australia you will ascertain by communication with the several Governments whether the Colonies will provide in subsequent years a sum adequate to the due maintenance of the Protectorate, as it is clearly understood that the Protectorate is established at the desire of the Colonies, and is not to be a source of expense to this country. You will, therefore, fully understand that you are not to contemplate or to incur any expense in New Guinea for providing buildings for yourself or your officers

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1C-4273, op. cit., pp. 36-7
2Ibid., op. cit., pp. 31-2
3Ibid., p. 44
4See Romilly’s Letters From The Western Pacific And Mashonaland, op. cit.
5Made under the Pacific Islanders Protection Acts, 1872 and 1873, and the Foreign Jurisdiction Acts, 1843 to 1875
until the wishes of the Colonies as to the continuance of the Protectorate have been ascertained, and the necessary funds provided.

6 Upon your arrival in New Guinea you will place yourself in communication with Mr Romilly, a Deputy Commissioner of the Western Pacific, who has been placed in temporary charge of the Protectorate pending your arrival, and will take over the charge from him.

7 You will be supplied in Sydney with a copy of the instructions given to him by the Commodore when leaving him in charge.

8 It is not possible for Lord Derby, with the limited information which he possesses as to the circumstances of the country, to now give you instructions in detail respecting the duties which you will have to perform as Special Commissioner. You should proceed to make yourself acquainted with the country, its harbours and general features; and you should lose no time in entering into friendly relations with the natives, and in endeavouring by all means in your power to inspire their confidence, and acquire their goodwill.

9 You will especially make it your duty to explain to them that Her Majesty, in taking them under her protection, has their welfare in view, and that you are sent to secure to them the safety of their persons, the enjoyment of their property, and particularly to protect them from being deprived of their lands by force or fraud. At the same time you will make it known to them that if it shall be decided to allow Her Majesty's subjects or others to purchase land, such transactions must in every case be conducted through you; that their wishes in these matters will be respected, and that the purchase money will be paid through you to them, unless in any case it shall appear desirable to apply it in their behalf for some object in which they are directly interested. You will also explain carefully, and satisfy yourself that they comprehend, that by the sale of land they deprive themselves of all further claim to it, and that it becomes the absolute property of the purchasers. In the event of any such purchases being
made, it will be your duty to see that both parties agree as to the boundaries of the land, and that these boundaries are defined by beacons or other easily recognisable marks. All such transfers should be carefully recorded in a register, and all subsequent transactions must be similarly recorded, or they will not be recognized by Her Majesty's Government.

10 You should give all proper encouragement to peaceful and legitimate trade between the natives and persons who may visit the Protectorate; and in this, and in other matters, you will, doubtless, receive willing and efficient aid from the missionaries who have settled in New Guinea, and established a friendly intercourse with the natives.

11 It will, however, be your duty to prohibit all dealings with the natives in arms or ammunition, explosive substances, or spirituous liquors, and to enforce by all means in your power the regulation issued by the High Commissioner on the 5th of April 1884, to prohibit the supply of arms, ammunition, and explosive substances to natives of the Western Pacific Islands....

12 It is probable that attempts may be made to engage labourers for Queensland, and, possibly, other places, from among the natives in the Protectorate; and should such attempts be made, it will be your duty to place every lawful obstacle in their way. Natives from New Britain and other islands near the Equator have proved not to possess the physique required for continuous labour, and heavy mortality followed their introduction into Queensland. The Government of that Colony have, in consequence, prohibited their further engagement by vessels sailing from Queensland ports. It will be your duty to second these praiseworthy efforts of the Colonial Government, and to prevent the recruiting of natives of the Protectorate for employment away from their own country.

13 Power is given to you by your Commission to appoint such necessary officers as you may think expedient; but at present you should make no other appointments than of an officer to give you general assistance, and of a private secretary. You are at liberty to appoint Mr Romilly to the former of those two positions; the experience he already possesses of affairs in New Guinea and its neighbourhood should prove of value to you, and as he is a Deputy Commissioner for the Western Pacific, you will be able to utilize his services within the Protectorate or beyond it, should you find it advisable to detach him for services to which you cannot personally attend; it being intended that in both capacities he should act under your immediate instructions.

I am, &c.
Signed ROBERT G. W. HERBERT

Source: Further Correspondence Respecting New Guinea And Other Islands, C-4273, London, 1885, pp.29-30

D38  The Pacific Islanders Protection Act 1875 (38 and 39 Vic., c. 51)

General Scratchley's instructions mentioned his appointment as a Deputy Commissioner of the Western Pacific High Commission. The High Commission was set up under powers derived from the Pacific Islanders Protection Acts, 1872 and 1875, and the Foreign Jurisdiction Acts, 1843 to 1875. It was an attempt at translating the British policy of minimum intervention in the Pacific into practice.¹

The Pacific Islanders Protection Act of 1872 dealt primarily with the control of Britons involved in the recruiting, transport and repatriation of indentured labourers, but the Act of 1875 authorized the establishment of a more extensive jurisdiction over British subjects in Pacific Islands not under the control of other European states. Without otherwise interfering with the independence of Pacific Islands societies, which was recognised in Section 7 of the Act, jurisdiction was asserted over British subjects in the islands, and provision was made for the appointment of a High Commissioner to control them. This legislation evidenced a consistent reluctance to establish colonies and protectorates at this time, together with a growing awareness of British responsibility to control the activities of British subjects in the Pacific, a task which was often particularly difficult for Pacific Islands chiefs and rulers.

Jurisdiction thus existed over British subjects in New Guinea before the establishment of the Protectorate, and was not enlarged in any significant way by its Proclamation. Between 1884, and the annexation of the Protectorate in 1886, only Britons in the Protectorate were lawfully subject to the Crown.²

6 It shall be lawful for Her Majesty to exercise power and jurisdiction over Her subjects within any islands and places in the Pacific Ocean not being within Her Majesty's dominions, nor within the jurisdiction of any civilized power, in the same and as ample a manner as if such power or jurisdiction had been acquired by the cession or conquest of territory, and by Order in Council to create and constitute the office of High Commissioner in, over, and for such islands and places, or some of them, and by the same or any other Order in Council to confer upon such High Commissioner power and authority, in Her name and on Her behalf, to make regulations for the government of Her subjects in such islands and places, and to impose penalties, forfeitures, or imprisonments for the breach of such regulations.

It shall be lawful for Her Majesty, by Order in Council,

¹Scarr, op. cit., pp. 21-2

²Law Officers' Report, 11 December 1884, C.O. 422-1, (film 2864, at 282 et seq.)
to create a court of justice with civil, criminal, and Admiralty jurisdiction over Her Majesty's subjects within the islands and places to which the authority of the said High Commissioner shall extend, and with power to take cognizance of all crimes and offences committed by Her Majesty's subjects within any of the said islands and places, or upon the sea, or in any haven, river, creek, or place within the jurisdiction of the Admiralty; and Her Majesty may, by Order in Council, from time to time direct that all the powers and jurisdiction aforesaid, or any part thereof, shall be vested in and may be exercised by the court of any British colony designated in such Order, concurrently with the High Commissioner's court or otherwise, and may provide for the transmission of offenders to any such colony for trial and punishment, and for the admission in evidence on such trial of the depositions of witnesses taken in such islands and places as aforesaid, and for all other matters necessary for carrying out the provisions of such Order in Council.

It shall also be lawful for Her Majesty, by any Order or Orders in Council, from time to time to ordain for the government of Her Majesty's subjects, being within such islands and places, any law or ordinance which to Her Majesty in Council may seem meet, as fully and effectually as any such law or ordinance could be made by Her Majesty in Council for the government of Her Majesty's subjects within any territory acquired by cession or conquest.

The person for the time being lawfully acting in the capacity of High Commissioner, and any Deputy Commissioner duly appointed and empowered under the provisions of any such Order in Council as aforesaid, and acting under the directions of the High Commissioner, shall have and may exercise and perform any power, authority, jurisdiction, and duty vested in or imposed upon any British consular officer by the principal Act or by any other Act having reference to such consular officers, passed either before or after the passing of this Act; and every such Act shall be construed as if the said High Commissioner and Deputy Commissioner were named therein in addition to a British consular officer.

7 Nothing herein or in any such Order in Council contained shall extend or be construed to extend to invest Her Majesty, her heirs or successors, with any claim or title whatsoever to dominion or sovereignty over any such islands or places as aforesaid, or to derogate from the rights of the tribes or people inhabiting such islands or places, or of chiefs or rulers thereof, to such sovereignty or dominion, and a copy of every such Order in Council shall be laid before each House of Parliament within thirty days after the issue thereof, unless Parliament shall not then be in session, in which case a copy shall be laid before each House of Parliament within thirty days after the commencement of the next ensuing session...

10 This Act shall be proclaimed in each Australasian colony by the governor thereof within six weeks after a copy of it has been received by such governor, and shall take effect in the said colony from the day of such proclamation...

D39 The Western Pacific Order in Council, 1877

In this Order in Council, and its amendments, appeared the details of the jurisdiction asserted in the Pacific Islands Protection Act, 1875. Provision was made for the appointment of a High Commissioner, assisted by Judicial and Deputy Commissioners. The High Commissioner was empowered to make regulations for the control of British Subjects in independent Pacific Islands, and a court with Civil and Criminal Jurisdiction was established with jurisdiction over them.

This court had no jurisdiction over foreigners, without their consent, and the consent of their own governments. Nor did it have jurisdiction to try Pacific Islanders.

The High Commissioner also had wide powers to deport British subjects from one part of the Pacific to another.

General Scratchley had been appointed as a Deputy Commissioner under the provisions of the Western Pacific Order in Council, and it appears likely that his judicial powers as a Deputy Commissioner were not actually increased in any significant way by his appointment as Special Commissioner for the Protectorate. This was a source of some confusion, as can be seen in his unsuccessful attempts to deport two beachcombers, described subsequently.

It is also of some interest that the geographical limits of operation of the Western Pacific Order in Council did not extend to the west of the meridian of longitude 143° East of Greenwich whereas the western boundary of the Protectorate was the meridian 141° East of Greenwich. The Special Commissioner's powers as a Deputy Commissioner did not therefore extend throughout the Protectorate.

Throughout the Protectorate period, it does not appear that the Special Commissioner's powers under the Western Pacific Order in Council of 1877 were augmented in any way.

1 Articles 7, 9, 10
2 Articles 6, 12, 17
3 Articles 145
4 Articles 25, 26
5 Griffith's opinion of 4 December 1885, C.O.422-2, (film 2865, at 64-66)
6 Article 5 (3)
7 Proclamation of 6 November 1884, C-4273, op. cit., p. 150
The Western Pacific Order in Council

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AT THE COURT OF OSBORNE HOUSE,

ISLE OF WIGHT

The 13th day of August 1877

PRESENT

THE QUEEN’S MOST EXCELLENT MAJESTY
IN COUNCIL.

WHEREAS Her Majesty the Queen has power and jurisdiction within some Islands and places in the Western Pacific Ocean, particularly described in this Order, and therein collectively referred to as the Western Pacific Islands, the same not being within Her Majesty’s Dominions, and not being within the jurisdiction of any civilized Power:

NOW, THEREFORE, Her Majesty, by virtue and in exercise of the powers in this behalf by The Pacific Islanders Protection Acts 1872 and 1875, and by The Foreign Jurisdiction Acts 1843 to 1875, or otherwise, in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

1. This Order may be cited as The Western Pacific Order in Council of 1877.

4. In this Order—

4. (4.) ‘British Subject’ means a subject of Her Majesty by birth or by naturalization;

6. (6.) ‘Foreigner’ means a subject or citizen of a State in amity with Her Majesty;

5. The islands and places in the Western Pacific Ocean to which this Order extends and applies, and which are in this Order collectively referred to as the Western Pacific Islands, are the following, namely:

1. The groups of islands known as—

2. The Island of Rotumah

3. The part of the Island of New Guinea eastward of the 143rd meridian of longitude

4. The Islands or Archipelago of New Britain and New Ireland

5. The Louisiade Archipelago

6. All other islands in the Western Pacific Ocean not being within the limits of the Colonies of Fiji, Queensland, or New South Wales, and not being within the jurisdiction of any civilized Power.

7. The waters within three miles of every island or place aforesaid.

6. This Order applies to—

1. All British subjects, for the time being, within the Western Pacific Islands, whether resident there or not.

2. All British vessels, for the time being, within the waters mentioned in Article 5 of this Order.

3. Foreigners, in the cases and according to the conditions in this Order specified, but not otherwise.

7. There is hereby created and constituted, from the date of this Order, the office of High Commissioner in, over, and for the Western Pacific Islands; and the person for the time being filling that office shall be styled Her Britannic Majesty’s High Commissioner for the Western Pacific (and is in this Order referred to as the High Commissioner).

10. There shall be Deputies of the High Commissioner, each of whom shall be styled one of Her Britannic Majesty’s Deputy Commissioners for the Western Pacific (and is in this Order referred to as a Deputy Commissioner).

2. Every Deputy Commissioner shall be appointed, in the name and on behalf of Her Majesty, by the High Commissioner, by writing under his hand and official seal.

3. There shall be as many Deputy Commissioners as the Secretary of State from time to time thinks fit.

12. There shall be a court styled Her Britannic Majesty’s High Commissioner’s Court for the Western Pacific (in this Order referred to as the High Commissioner’s Court).

17. All Her Majesty’s jurisdiction, exercisable in the Western Pacific Islands in criminal and civil matters, shall, subject and according to the provisions of this Order, be vested in and exercised by the High Commissioner’s Court.

24. (1.) The High Commissioner shall, by virtue of this Order, have power and authority to make from time to time in the name and on behalf of Her Majesty, by writing under his hand and official seal, such Regulations as to him seem fit for the government of British subjects in the Western Pacific Islands, and for securing the maintenance (as far as regards the conduct of British subjects) of friendly relations between British subjects and all kings, chiefs, and other authorities in those islands, and persons subject to them.

(2.) The Regulations may define offences against the same; and acts thereby defined to be offences are hereby declared to be offences against the Principal Order; and the Regulations may impose a punishment for any such offence, as follows:

(i) Imprisonment for any term not exceeding three months, with or without hard labour, and with or without a fine not exceeding ten pounds; or

(ii) a fine alone, not exceeding ten pounds, without any imprisonment; and

(iii) in case of a continuing offence, in addition to any such punishment by imprisonment or a fine, or both, as aforesaid, a further fine, not exceeding in any case ten shillings for each day during which the offence continues after the day of the commission of the original offence.

(3.) The Regulations shall be so framed as to allow that less than the highest punishment imposed by the Regulations may be adjudged in any case; and the Regulations shall not be so framed as to impose a fixed punishment in any case, or to prevent the Court from adjudging in any case at lower a punishment as the Court in its discretion may think fit.

(4.) The Regulations shall be affixed, and, as far as practicable, at all times kept exhibited, at each Court-house, or at some other public place in each district.

(5.) Copies of the Regulations shall be sold at such price as the High Commissioner directs.

(6.) The Regulations shall, as soon as practicable, be published in the Royal Gazette of Fiji, and be printed separately.

(7.) The High Commissioner on making Regulations shall forthwith report them to the Secretary of State.

(8.) Every Regulation shall, unless approved by the Secretary of State, cease to be in force at the expiration of eighteen months from the making thereof, except as regards things done and rights and liabilities accrued and incurred thereunder before the expiration of that time, and the institution and prosecution thereafter of any proceeding, civil or criminal, in respect of any such thing, right, or liability.
The Western Pacific Order in Council

(9.) The High Commissioner may at any time, in manner aforesaid, revoke or alter any Regulation; and the Secretary of State may at any time direct the revocation of any Regulation.

(25 (1.) Where it is shown by evidence on oath, to the satisfaction of the High Commissioner, that any British subject is disaffected to Her Majesty's Government,—or has committed or is about to commit an offence against the Pacific Islanders Protection Acts 1872 and 1875,—or is otherwise dangerous to the peace and good order of the Western Pacific Islands,—the High Commissioner may, if he thinks fit, by order under his hand and official seal, prohibit that person from being in the Western Pacific Islands, within the limits specified in the order, during any time therein specified, not exceeding two years.

(2.) If the person named in the order of prohibition fails to obey, or acts in contravention of the order—

(i) He shall be guilty of an offence against this Order, and, on conviction thereof, shall be liable to imprisonment for any time not exceeding two years, without prejudice to the operation of the order of prohibition;

(ii) Whether the offender has been convicted of, or imprisoned for, that offence or not, the High Commissioner may, if he thinks fit, by order under his hand and official seal, authorize and direct that he be taken into custody, and be removed in custody to some place named in the order of removal, being a place in the Western Pacific Islands, beyond the limits specified in the order of prohibition;

(iii) The offender shall be taken into custody and removed accordingly; and in such removal force may be used, if necessary; and he shall be discharged from custody at the place named in the order of removal.

(3.) An appeal shall not lie under this Order against an order of prohibition or removal.

(4.) The High Commissioner, by order under his hand and official seal, may, from time to time, vary any order of prohibition (not extending the duration thereof), and may revoke any order of prohibition or removal.

(5.) The High Commissioner shall forthwith report to the Secretary of State every order made by him under this Article, and the grounds thereof, and the proceedings thereunder.

26. (1.) (i.) Where it is proved that there is reasonable ground to apprehend that a British subject is about to commit a breach of the public peace,—or is about to commit an offence against the Pacific Islanders Protection Acts 1872 and 1875,—or that the acts or conduct of a British subject are or is likely to produce or excite to a breach of the public peace,—the Court may, if it thinks fit, for reasons recorded in the minutes, cause him to be brought before it, and require him to give security to the satisfaction of the Court to keep the peace, or for his future good behaviour, as the case may require;

(ii) Where a British subject is convicted of an offence before the Court, the Court may, if it thinks fit, require him to give security to the satisfaction of the Court for his future good behaviour, and for that purpose may (if need be) cause him to be brought before the Court:

In either of these cases, if the person required to give security fails to do so, the Court may, if it thinks fit, order that he be deported from the Western Pacific Islands to a place named in the order.

(2.) The place shall be either in Fiji, or in some other part of Her Majesty's dominions out of the United Kingdom, the Government whereof have consented to the reception therein of persons deported under this Order.

(3.) A Judicial Commissioner or Deputy Commissioner making an order of deportation shall forthwith report to the High Commissioner the order, and the grounds thereof; and the order shall not be carried into execution without the direction of the High Commissioner, by writing under his hand and official seal.

(4.) The person to be deported shall be detained in custody until a fit opportunity for his deportation occurs.

(5.) He shall, as soon as is practicable,—and in the case of a person convicted, either after execution of the sentence, or while it is in course of execution,—be embarked in custody, under the warrant of the High Commissioner, on board one of Her Majesty's vessels of war, or, if there is no such vessel available, then on board any British or other fit vessel bound to the place of deportation.

(6.) The warrant shall be sufficient authority to the commander or master of the vessel to receive and detain the person therein named, and to carry him to and deliver him up at the place named, according to the warrant.

(7.) The Court may order the person to be deported to pay all or any part of the expenses of his deportation. Subject thereto, the expenses of deportation shall be defrayed as the expenses relating to distressed British subjects are defrayed, or in such other manner as the Secretary of State from time to time directs.

(8.) The High Commissioner shall forthwith report to the Secretary of State every order of deportation made under this Order, and the grounds thereof and the proceedings thereunder.

(9.) An appeal shall not lie under this Order against an order of deportation.

(10.) If any person deported under this Order returns to the Western Pacific Islands without permission in writing of the Secretary of State (which permission the Secretary of State may give), he shall be deemed guilty of an offence against this Order, and shall for every such offence be liable to imprisonment for any term not exceeding one month, with or without hard labour. and with or without a money penalty not exceeding ten pounds, or to a money penalty not exceeding twenty pounds alone.

(11.) He shall also be liable to be forthwith again deported under the original Order, and a fresh warrant of the High Commissioner.

145 (1.) Where a foreigner desires to bring in the Court an action against a British subject, or a British subject desires to bring in the Court an action against a foreigner, the Court shall entertain the same, and shall hear and determine it, and (although the case, if between British subjects, would not be triable, or necessarily triable, with Assessors) if all parties desire, or the Court thinks fit to direct, a trial with Assessors, then with Assessors, but in all other respects according to the ordinary course of the Court:

(2.) Provided that the foreigner first obtains and files in the Court the consent in writing of the competent authority on behalf of his own nation to his submitting, and does submit, to the jurisdiction of the Court, and, if required by the Court, gives security to the satisfaction of the Court, by deposit or otherwise, to pay fees, damages, costs, and expenses, and abide by and perform the decision to be given by the Court, or on appeal.

Source Sir Arthur Gordon, High Commission Papers
In September and October 1885 General Scratchley and his staff inspected the coasts of the eastern and north-eastern section of the Protectorate, travelling in the chartered steamship Governor Blackall. The following extract from a letter written by Deputy Commissioner Romilly to his mother, from East Cape, on 19 October 1885, suggests that the legal limitations on the Special Commissioner's powers did not inhibit his punitive activities to any extent.

It is of interest that Romilly noted in his journal before this expedition began that

"... in the present state of affairs, before the Queen’s sovereignty has been proclaimed, we have no legal right to issue regulations or to punish,..."

indicating that one member, at least, of the Protectorate administration was well aware of its limited jurisdiction.

"... We have got as far as East Cape on our tour of inspection, and now we have got to go all the way back to Port Moresby for coals and provisions. We have been burning towns and smashing canoes, and other police work. We all hate it, and feel very mean while we are doing it. The natives have sworn to kill every white man, and they have killed a good many. They say they were stolen by Queensland ships, and half their men died in Queensland, and they must have revenge ...

We mean to cruise up the N.E. coast as far as the boundary, and if we have time we may have a look at the German country. I don’t know what we can do up that coast, as we have no interpreters for it and the natives are sure to be frightened of us, but I suppose we must be able to say we have visited it. I am sorry to say the men I landed in the ‘Victoria’ are the most busy at murdering: one of them came on board the other day and coolly confessed to having"

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1Fort, op. cit., pp. 59 et seq.
2Romilly, op. cit., p. 235

Plate 75: An expedition to Redscar Bay, 1885. (Seated L. to R.) G.S. Fort, H.H. Romilly, unidentified man, Sir Peter Scratchley (Standing on left) Rev. James Chalmers (Seated at rear) Lord Askwith
The Special Commissioner

killed a white man, saying at the same time he had brought payment for him, viz., four arm shells and a pig's tooth. Such is the value of a man's life here. The poor wretch was much astonished when he was put in irons, he could not understand it at all. It will take years before we have friendly intercourse with the natives of all these groups of islands. At present they hate us, and I think with justice.


D41 The Powers of the Special Commissioner in the Protectorate of British New Guinea

Uncertainty arose within the Protectorate, as well as outside it, as to the scope of British jurisdiction. When General Sir Peter Scratchley issued Prohibition Orders against two beach-combers, he sought the opinion of S.W. Griffith, then Premier of Queensland, and later to become Sir Samuel Griffith, Chief Justice of the High Court of Australia. Sir Peter argued that, within the Protectorate he had all the powers of the High Commissioner for the Western Pacific and was thus able to exercise the powers of prohibition and deportation granted to the High Commissioner under the Western Pacific Order in Council of 1877. Nevertheless, Scratchley was a little unsure of the correctness of this view, and decided neither to imprison nor remove the beach-combers should they disobey his Order of Prohibition, pending the sanction of the Secretary of State for the Colonies, which never appears to have been given. In fact the beach-combers appear to have ignored the Order of Prohibition, and returned to the Protectorate.

Griffith's opinion as to the extent of the Special Commissioner's powers, written in response to Sir Peter Scratchley's request for advice, was written on 4 December 1885 and follows:

It is highly probable that it was intended by the framers of the Commission to the Special Commissioner for the Protected Territory in New Guinea that he should have and exercise, within the limits of the Protectorate, all the powers of the High Commissioner for the Western Pacific, under the Western Pacific Orders in Council. This intention may be collected from the Despatch of the Secretary of State to Sir G.W. De Veoux of 17th November 1884, as well as from Sir Robert Herbert's letter to Sir Peter Scratchley of the same date.

But it does not appear to me that this intention has been carried into effect by any formal instrument or instructions conferring the powers which it was intended that the Special Commissioner should exercise.

Paragraph 3 of Sir R. Herbert's letter expressly states that the protected Territory is to remain under the operation of the Western Pacific Orders in Council, until other provision is made for administering law within its limits, and, in order to enable the Special Commissioner to exercise the authority vested by those Orders in the Deputies of the High Commissioner, Sir P.H. Scratchley was to be appointed a Deputy Commissioner.

Paragraph 4 of the same letter informs him that in respect to the Protectorate he 'will be independent of the High Commissioner' and will correspond directly with the Secretary of State.

I do not think, however, that this instruction is of itself sufficient to enlarge the powers of the Special Commissioner acting as a Deputy Commissioner under the Orders in Council, which, as far as I am aware, are [sic] the only instrument which any authority to exercise force is conferred on the Special Commissioner. The extent of his powers is therefore, in my opinion, to be ascertained from the Orders in Council themselves, under which it is clear that an Order of Deportation made by a Deputy Commissioner cannot be carried into effect without the sanction of the High Commissioner.

I am therefore of opinion that the Special Commissioner cannot exercise within the Protectorate the powers conferred by the Orders in Council on the High Commissioner or his Deputies except under and subject to all the conditions defined by the Orders themselves.

The defect does not seem to be capable of being cured except by a further Order in Council, to the necessity for which I have already drawn attention.

SOURCE C.O. 422/2, (film 2685, at 64-6)

1 The Australian Encyclopaedia, op. cit., sub nom., Griffith
2 C.O. 422-2 (film 2685, at 56 et seq.)
3 C-4275, op. cit., pp. 36-37

D42 The Colonial Office View of the Special Commissioner's Jurisdiction

The Colonial Office appears to have been unaware of Scratchley's request for advice as to the extent of his jurisdiction, and on 21 May 1886 his successor, Douglas, wrote to the Secretary of State for the Col-
The Gladstone Undertaking

D43 The Gladstone Undertaking of 1884

The following is a report of questions and answers in the House of Commons on 11 August 1884, in which the Liberal humanitarian M’Arthur manoeuvred the Prime Minister into giving an undertaking which went beyond the mere agreement to establish a Protectorate in New Guinea. M’Arthur’s views on British policy in the Western Pacific were frequently the same as those expressed by Protestant Missionaries working in the Islands, and humanitarian organizations like the Aborigines Protection Society, which were concerned with the welfare of the Islanders. He was concerned more with the protection of Pacific Islanders from exploitation by labour recruiters and settlers seeking their land, than with the political and strategic aspects of imperial expansion, which he saw as a mixed blessing.¹

Sir W. M’Arthur asked the First Lord of the Treasury whether the ‘protection’ mentioned in Lord Derby’s despatch of May 9, 1884 to the Governors of the Australian

Colonies, as intended to be established in New Guinea, and towards the cost of which the Australian colonies had agreed to pay 15,000£ for the year, would establish the complete jurisdiction of the British Government over New Guinea and the adjacent islands, so as to afford protection to the natives, not only against the lawlessness of British subjects, but against the lawlessness of the subjects of other nations.

Mr Gladstone.—The protection mentioned in the despatch of Lord Derby is in the nature of a protection which Her Majesty’s Government advised the Queen to establish over so much of the coast of New Guinea as lies to the eastward of the Dutch claim upon the southern coast of that island, but excluding portions on the northern side of the island. I cannot give a minute definition now of the line up to which this protectorate will extend, but within the limits of it, it will answer the purpose mentioned by my hon. friend in his question, that is to say, the jurisdiction of the Government will be sufficient to afford protection to the natives against lawless action, by whomsoever taken, whether by British subjects or foreigners. The jurisdiction does not extend to the islands to the north and east of New Guinea ...

Sir H. Holland² asked whether an independent High

¹Legge, op. cit., p. 102 n., 144, Scarr, op. cit., pp. 78-79

²Secretary of State for the Colonies in Lord Salisbury’s administration, 1886-1892
On 11 August 1884 the Liberal Prime Minister promised that the jurisdiction of the Protectorate Government in New Guinea would be sufficient to protect the Papuans, not only against Britons bent on their exploitation, but against foreigners as well.

This appears to have caused embarrassment in the Colonial Office, and its Permanent Head, Sir Robert Herbert, felt obliged to seek legal advice on behalf of the Colonial Secretary, Lord Derby, as to how the undertaking to protect the inhabitants of British New Guinea was to be carried out.

He appears to have realized that there was a clear distinction between claiming a Protectorate, to keep other nations out of the protected country, and setting up an effective system of administration within it. He was aware that, in 1884, British jurisdiction in protectorates and foreign countries depended, for the most part, on treaties, but believed that no effective treaties could be made with the Papuan leaders. Herein lay his dilemma. If no treaties could be made, then it was believed that jurisdiction could not be lawfully asserted over anybody in the Protectorate who was not a British subject.

Advice was sought from the Law Officers of the Crown, the Attorney General and Solicitor General for the time being, both members of the Government, with seats in the House of Commons. Their Report was given under the signatures of Attorney General James, who later became Lord James of Hereford, and Solicitor General Herschell, who later, as Lord Herschell, was Lord Chancellor. It is dated 11 December 1884.

We were honoured with Your Lordship's commands signified in Sir Robert Herbert's letter of the 31st Oct. last stating that he was directed to inform us that Her Majesty having assumed the Protectorate of a portion of the Southern Coast of New Guinea, it became necessary to consider by what means effect might be given to the statement made by Mr Gladstone in the House of Commons on the 11th Augt [sic] last, viz: 'that within the limits of it [the Protectorate] the jurisdiction of the Government will be sufficient to afford protection to the natives against lawless action, by whomsoever taken, whether by British subjects or foreigners.'

That by the Foreign Jurisdiction Act of 1843 (6 and 7 Vict, Cap. 49 Sect. 1) Her Majesty may hold exercise and enjoy any power or jurisdiction which Her Majesty now hath, or may at any time have within any country or place out of Her Majesty's Dominions in the same and as ample a manner as if Her Majesty had acquired such power or jurisdiction by the Cession or Conquest of Territory.

That the Preamble of the Act recited that such power or jurisdiction might be acquired by 'Treaty, Capitulation, Grant, Usage, Sufferance, or other lawful means.'

That Orders in Council had been at various times issued, under that Act, and subsequent amending Acts, for establishing Courts in foreign countries, e.g. China and Japan for exercising over British subjects the jurisdiction possessed by Her Majesty in such countries; and that questions having arisen in South Africa as to the power of acquiring by Treaty, jurisdiction over the subjects of foreign civilised states, the Law Officers on the 3rd [sic] August 1880 advised 'that Her Majesty can by Treaty with a native Chief obtain jurisdiction over subjects of foreign civilised states resident within such territories, but that the exercise of such jurisdiction might be made the ground of diplomatic objection by the civilised state to whose subject it is extended, and that it should not as a rule be exercised without the concurrence of that State given generally, or in the particular case.'

That the Foreign Jurisdiction Act 1878 (41 and 42 Vict, c.57 Sect. 5) conferred power and jurisdiction over British subjects resorting to countries not subject to any Government from whom Her Majesty might obtain power or jurisdiction by Treaty or any of the other means mentioned in the Foreign Jurisdiction Act 1843.

That it might be taken, for the purposes of the present reference, that there was not in New Guinea any Government from whom Her Majesty might obtain power or jurisdiction by any such means.

That one of the reasons, if not the principle reason, which induced Her Majesty to assume a Protectorate in New Guinea, had been the desire to preserve the natives in the enjoyment of their lands, and to protect their persons and property from outrage at the hands of unprincipled white men, and that with that object to obtain and enforce, for the present, full control of all settlement upon the protected area.

That there would appear to be sufficient power under the Foreign Jurisdiction Acts 1873-1878 to control the actions of British subjects, by means of Orders in Council passed under those Acts; but that a jurisdiction which conferred
no protection on British subjects against the acts of Natives, and which conferred no protection on either natives, or British subjects, against the acts of foreigners, subjects of civilised states, did not meet the necessities of the present case.

That it, therefore, became important to consider whether the protected area should not be brought more directly under the Sovereignty of The Queen, not with any desire for the acquisition of the soil, but as the best means of securing effective and legal control over all persons resorting thereto.

That Sir R. Herbert was accordingly to request us to favour Your Lordship with our opinion:
1 Whether legal jurisdiction over persons other than British subjects can in any way be acquired within the protected area, if it does not become British soil?
2 Whether if a British officer, acting under authority of Her Majesty’s Government, were to proclaim the extension of Her Majesty’s Sovereignty to the territory in question, it would thereupon become part of Her Majesty’s Dominions?
3 Whether in that case it would be territory acquired by cession or conquest, so as to give Her Majesty the right to make laws within it?
4 Whether it would be competent to Her Majesty by Commission, under Her Sign Manual and Signet, to appoint an officer to be Administrator of the territory, and by proclamation to make laws in the name, and on behalf of Her Majesty?

In obedience to Your Lordship’s commands we have the honour to Report:
1 That we are of opinion that legal jurisdiction over persons other than British subjects cannot, under the circumstances, be acquired, within the protected area in question, if it does not become British soil. We understand that there is no native power within that area, capable of ceding to The Queen jurisdiction over the natives, or, in fact, over anyone.
2 We are of opinion that if a British officer, acting under authority of Her Majesty’s Government for that purpose, were to proclaim the extension of Her Majesty’s Sovereignty over the territory in question, and were also to assume possession of it, it would thereupon become part of Her Majesty’s dominions.

And we think that if Her Majesty were to appoint an Officer to administer and govern the territory over which the Protectorate has been declared, and to send him, in pursuance of that appointment to such territory, that would amount to an assumption of possession on behalf of Her Majesty.

3 We much doubt whether, in such a case, the territory could be said to be acquired either by cession, or by conquest. It appears to us that the acquisition must either be regarded as by settlement, and if this be so the Statute 23 and 24 Victoria Chap: [sic] 121, which empowers the Crown to legislate, by Order in Council, or to delegate legislative powers, in the manner therein pointed out, in all possessions, of Her Majesty, not acquired by conquest or cession, and not within the legislative authority of any of Her Majesty’s possessions abroad, will apply.

4 We are of opinion that it would be competent to Her Majesty, by Commission under Her Sign Manual, to appoint an Officer to be Administrator of the territory. Such officer would not have power to make laws by proclamation; we have already pointed out that the power to make laws, in such a territory, is conferred by the Statute 23 and 24 Victoria, Chap. 121.

Source C.O. 422-1, (film 2684, at 282 et seq.)

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**JURISDICTION IN THE GERMAN PROTECTORATE:**
**DOCUMENTS D45 to D46**

After the establishment of the German Protectorate, a chartered company, the New Guinea Company, was placed in charge of its administration. There were many precedents for chartered company rule in the nineteenth century, notably in Africa and North Borneo, and it was a device adopted in the interests of cheap administration and money making, by both the British and German Governments.¹ The device of chartered company rule was not, however, adopted in British New Guinea in which there was less economic enterprise than in New Guinea, and, in particular, the Bismarck Archipelago.²

The Germans had no hesitation about asserting jurisdiction over everybody in their Protectorate and justified their position with reference to German law, which differed from British law on this topic. (D46)

¹Jenkyns, op. cit., pp. 172-3, 177, 183-4

²Souter, op. cit., pp. 110 et seq.