

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 rather be regarded as by settlement, and if this be so the Statute 23 and 24 Victoria Chap: [*sic*] 121,² 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, Chapter 121.

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

²Repealed and replaced by the British Settlements Act, 1887

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.

D45 The Decree Asserting Jurisdiction over the Inhabitants of the German Protectorate

In the Imperial Letter of Protection granted to the New Guinea Company of 17 May 1885,¹ the German Emperor had allowed it to exercise the rights of territorial sovereignty asserted by Germany in the Protectorate. From this Letter of Protection presumably flowed the right, in German law, to assert jurisdiction over all persons in the Protectorate. However, as regards the New Guineans themselves, the position is made clear in the following Decree, which authorized the Company to exercise jurisdiction over them until 1897, subject to Imperial supervision.

The decree was translated from the original German and sent as an enclosure to a despatch dated 14 July 1888, from the British Ambassador in Berlin, Sir

Edward Malet, to the Foreign Secretary, the Marquis of Salisbury.

We, William, by the Grace of God German Emperor, King of Prussia, &c., ordain the following, in the name of the Empire:

The New Guinea Company shall undertake, without prejudice to the provision laid down in paragraph 2 of the Imperial Decree of the 5th June, 1886 ('Reichs-Gesetz-Blatt,' p.187), the execution of jurisdiction over the aborigines in their Protectorate until the end of the year 1897.

For the carrying out of the above Decree, the Chancellor of the Empire has to issue the necessary orders.

Given under our hand and seal, the 7th July, 1888.

Signed WILLIAM I.R.

Countersigned Count BISMARCK.

¹Van Der Veur, *Documents And Correspondence On New Guinea's Boundaries*, op. cit., pp. 14-16

SOURCE C.O. 424-4, (film 2686, at 133)

D46 The Law Officers' Report of 1887 on the German View of Jurisdiction in Protectorates

The German Government was not troubled with the sorts of problems that beset the Colonial Office and the Law Officers in 1884, when it was thought that, in the Protectorate of British New Guinea, jurisdiction could only be asserted over British subjects, because it was not possible to make treaties with the Papuan leaders, ceding jurisdiction over their followers.¹ The German view was that jurisdiction could be asserted over anyone in a German Protectorate, irrespective of nationality and there are indications in this Report that the practical advantages of the German view, particularly in those places where it was thought that the treaties could not be made, were not lost on some British officials.²

The German position is set out and assailed in this Report made on 29 June 1887, to the British Foreign Secretary, Lord Salisbury, at the request of Sir Julian Pauncefote, permanent Under Secretary of State at the Foreign Office. It is signed by Richard Webster, later to become Viscount Alverstone, who in 1887, was Attorney General; and by Edward Clarke, then Solicitor General, more often remembered nowadays

for his later role as senior counsel for Oscar Wilde in his various trials.

My Lord,

We were honoured with the commands of the Secretary of State signified in Sir Julian Pauncefote's letter of the 18th December last, stating that he was directed by the Earl of Iddesleigh³ to transmit to us the papers noted in the accompanying list relative to the legal position of the German Protectorates in South and West Africa, the South Seas, and elsewhere, a question which had lately formed the subject of discussion between the Imperial German Government and that of Her Majesty.

That we should observe from Count Hatzfeldt's *note verbale* of the 29th August of last year that a Protectorate proclaimed in the name of His Majesty the Emperor of Germany was not in its terms limited to the persons residing or sojourning in the protected territory, but extended to the district itself, and accordingly had a territorial character.

That all persons, moreover, being within such a Protectorate were, irrespectively of their nationality, subject to German jurisdiction, side by side with which the jurisdiction of any other State could not be exercised.

That in the opinion of the Imperial German Government the right of exercising jurisdiction in the Protectorate was based upon the fact that the protected territories were

¹Report of 11 December 1884, *supra*.

²E. G. Bramston's Memorandum of 12 March 1891, in McNair, op. cit., pp. 47-52

³Formerly Sir Stafford Northcote; in 1886 the Conservative Foreign Secretary

placed under the German suzerainty, and the exercise of supreme justice was not dependent upon the territories being declared parts of the German Empire, nor was the German supreme jurisdiction derived from the native Chiefs existing in the Protectorates.

That at the same time, on grounds of expediency, jurisdiction over the natives had, in some cases, been left by Treaty in the hands of their Chiefs.

That the practical convenience of the view to which legislative sanction, as far as Germany was concerned, had been given by the German Imperial Law of the 17th April, 1886, that a country which submitted to German protection, or to which, being an uncivilized place, German protection was extended without any submission became *ipso facto* subject to the Reichstag, and to the laws made by that body, was evident; and that the Secretary of State would be glad to be favoured with our opinion as to whether or not the British Parliament also possessed, in analogous circumstances, a similar power to legislate for countries placed under British protection.

That the view taken by the German Imperial Government that all persons within a German protectorate were, *irrespective of nationality*, subject to German jurisdiction, indicated a conception of the rights and powers assumed by the establishment of a Protectorate which seemed to differ from that taken by the former Law Officers of the Crown, in advising Her Majesty's Government with reference to the extent of the jurisdiction exercisable by Her Majesty over the subjects of foreign civilized nations within British Protectorates.

That Sir Julian Pauncefote was specially to call our attention, as bearing upon the subject, to the various opinions of past Law Officers of the Crown which were sent therewith, and in which it would be observed that questions relating to the Foreign Jurisdiction Acts, which did not arise on the present reference, were to some extent also involved; and that he was to request our opinion as to whether the views expressed by the German Imperial Government might be accepted in their entirety; and if not, in what respects, and to what extent, we considered that they were open to objection.

That while requesting that we would take the papers transmitted therewith into our consideration, and that we would favour the Secretary of State with our opinion on the questions submitted in his letter, Sir Julian Pauncefote was also to ask that we would be good enough to add any general observations which we might have to offer on the case.

In obedience to the commands of the Secretary of State we have the honour to report:

That, having regard to the great importance of the questions raised in the papers to which our attention has been called, we have thought it right to delay our answer to those questions until we were in a position to submit to Her Majesty's Government a complete Memorandum upon the subject.

The particular form of Protectorate with regard to which our opinion is now asked is somewhat new to international relations, and no discussion of any such form of government can be found in the earlier writers upon international law. But the main principles which must be regarded as, in our opinion, well settled; one of these is that the right of jurisdiction over the persons found in any territory belongs only to the Power which is entitled to rights of territorial sovereignty. Those rights may be acquired by conquest, by cession or by settlement, and where they exist, the Power which possesses them is clearly entitled to exercise jurisdic-

tion over all persons coming within the limits of the territory, whether they be natives of such territory, or the subjects (other than Diplomatic Representatives) of a foreign Power.

But no Power has any right, according to international law, to exercise jurisdiction over the subjects of another Power, unless they are residing within its own territorial limits.

The municipal laws of any country cannot affect or enlarge its rights under international law, and it is not material, therefore, to refer, in a discussion of this question, either to the terms of the Foreign Jurisdiction Acts in this country, or to the provisions of the German Imperial Decrees.

The English Act⁴ show that it is doubtful whether, but for the authority given by them, Her Majesty would have any effective jurisdiction even over her own subjects in foreign countries, and it is clear that no provision in those Acts could operate to subject to English law any subject of a foreign State. The proposition now contended for by the German Imperial Governments is that it is competent to that Government to establish what may be properly called a Consular Protectorate in a foreign country, that is to say, a Protectorate in virtue of which the German Government does not claim the rights, or accept the liabilities, of territorial sovereignty. And it is claimed that, upon the establishment of that Consular Protectorate, the subjects of all other Powers become amenable to the jurisdiction of the officer appointed to administer such Protectorate, and to the Tribunal of the Protectorate by which the Consular Court is replaced.

It is curious to note, in regard to this claim, the opinion given by Dr Krauel to the German Government, and confidentially communicated to Mr Scott (Memorandum, 10th March, 1886) that, 'in those islands and places to be assigned to German influence by the declaration of demarcation,⁵ but not yet notified as placed under the German flag, Her Majesty's High Commissioner could certainly continue to exercise civil and criminal jurisdiction over British subjects, but that it would be almost impossible to permit this in regard to places where German sovereignty or Protectorates had already been established, as it would be a clear infringement of the rights of territorial sovereignty'. It will be observed that the claim to exercise an exclusive jurisdiction is put upon the ground which we conceive to be right in law, but which does not exist in the case of the Protectorate in question.

We are of opinion that the claim above stated is not justified by the accepted principles of international law. Substantially the same question has been on four occasions considered by our predecessors in office. In August 1880 the Attorney- and Solicitor-General expressed their opinion that Her Majesty could by Treaty with a native Chief obtain jurisdiction within his territories over subjects of foreign civilized States resident within such territories, but the exercise of any such jurisdiction might be made the ground of diplomatic objection by the civilized State to whose subject it was extended, and it should not, as a rule, be exercised without the concurrence of that State given generally or in the particular case.

⁴In particular, The Foreign Jurisdiction Act 1843-1878; and in the Pacific, the Pacific Islanders Protection Acts, 1872 and 1875

⁵The Anglo-German Declarations of 1886, C-4656, *op. cit.*, dividing Melanesia into German and British Spheres of Influence, were being then considered in draft form.

Again, in December 1884, the same Law Officers advised that legal jurisdiction over persons other than British subjects could not, under the circumstances (there being no native Power capable of ceding to the Queen jurisdiction over the natives, or, in fact, over any one), be acquired within the protected area in question unless it became British soil.⁶ In August 1885 the then Attorney- and Solicitor-General (Sir Richard Webster and Sir John Gorst) used the following words: 'That, in our opinion, neither the native African Chiefs nor any of the bodies of freebooters settled in Bechuanaland could, either by Treaty or sufferance, confer upon Her Majesty jurisdiction over the subjects of any civilized Power other than Great Britain'... 'The effect of the duly promulgated Order in Council of the 27th January, 1885, is to enable the High Commissioner to constitute Tribunals in Bechuanaland having jurisdiction over British subjects and protected natives, but not over the subjects of other civilized States'... 'The Bestuur, or any other establishments in Stellaland which Sir Charles Warren has created or sanctioned, so far as they are consistent with the Order in Council, may be regarded as the particular methods by which he has thought fit to exercise his jurisdiction over British subjects and protected natives in Stellaland. In this sense, but in no other, they have a legal status. The subjects of the other civilized States who are in Stellaland cannot be interfered with by the Bestuur, or any Tribunals that may be instituted under its authority, without the consent of their own Governments.'

⁶This is the Report of 11 December 1884, on New Guinea, printed *supra*.

And finally, in April 1886, other Law Officers (Sir Charles Russell and Sir Horace Davey) expressed their opinion 'as against the Chiefs (assuming that they have sovereign territorial authority, and do not merely exercise tribal personal authority as Chiefs) Her Majesty can lawfully acquire by Treaty with them the right to exercise civil and criminal jurisdiction over subjects of civilized Powers other than Great Britain within the territories of the Chiefs; but as against the subjects of other civilized Powers, we think that the jurisdiction (whatever may be its theoretical limits) should be exercised with, and cannot safely be exercised without, the assent of the Power concerned, given generally or in the particular case.'

We entirely concur in the advice which has been given to Her Majesty's Government by our predecessors in office for the guidance in its action in reference to territories over which this Government exercises a Protectorate, and we are of opinion that the German Government should be notified that the claim to exclusive jurisdiction over British subjects in territories with respect to which it only exercises a Consular Protectorate is not one which Her Majesty's Government can admit.⁷

We have the honour to be etc.
RICHARD E. WEBSTER
EDWARD CLARKE

SOURCE Lord McNair, *International Law Opinions*, Cambridge, 1956, Vol. I, pp.42-6

⁷Their successors changed their tune in 1895, substantially admitting the validity of the German view: McNair, *op. cit.*, pp. 54-55

BRITISH NEW GUINEA: ANNEXATION, ADMINISTRATION AND FINANCE: DOCUMENTS D47 to D57

It became apparent by the start of 1885, that if an effective administration was to be established in British New Guinea, then its Protectorate status must be brought to an end, and the territory annexed. This involved the assertion of British sovereignty and territorial title over British New Guinea, neither of which rights being derived from its Protectorate status.¹ (D44)

Nevertheless, the Colonial Office, which remained consistently reluctant to burden itself with the administration of New Guinea on a long term basis, was unwilling to take the decisive step of annexation before the Australians had committed themselves to permanently underwrite the costs of the administra-

tion of the new Possession.² (D48) For their part, the Australians wanted a say in the administration they were paying for.³

However, the Australian Governments were not yet federated, and had no power to conduct external relations or administer dependent territories. Obviously the administration had to be primarily in the hands of the Colonial Office, and performed in the name of the British Government, but if it was to be paid for by the Australians then some formula had to be worked out whereby the Colonial politicians could

²Colonial Office to Agent General for New South Wales, 4 February 1885, C-4273, *op. cit.*, p. 151

³This was eventually achieved, following the 1887 Colonial Conference in London: see *The British New Guinea (Queensland) Act of 1887*

¹Law Officer's Report, 11 December 1884, *supra*