

Protectorates and Twists: Law, History and the Annexation of German New Guinea

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Introduction

The 'annexation' of German New Guinea is frequently mentioned in the rapidly growing body of — more of less 'scholarly' — literature on the history of the Southwest Pacific. There is, however, not a single detailed discussion. Moreover, a comparison between the available accounts discloses not only a surprising degree of vagueness and variation, but also an almost total lack of critical analysis. At first we may be tempted to put this down to a mixture of political prejudice and shoddy workmanship, but it soon becomes apparent that we are, in fact, confronted by the products of a much more general and complex process of ritualisation. There appears to be a universal assumption that an 'annexation' is a formal legal ballet, with a series of prescribed movements, whose actual performance can be taken for granted. Strictly speaking, so it seems, the 'annexation' of German New Guinea is a matter of law and not a matter of history, so that a historical account can and should do no more than to state that this legal event took place. On the other hand, an 'annexation' cannot simply be left as a black, legal hole: in the interests of a well-rounded narrative it must, at least, be covered with a heap of legal jargon and historical trimmings.

This problem is doubtless one reason why the process of ritualisation in the accounts of 'annexation' of German New Guinea reaches peaks of surrealistic absurdity. Consider, for instance, the following passage from the *Papua New Guinea Handbook*, where history has become a petrified chant that has long lost any connection with reality:¹

“In October 1899, the Germans incorporated the Marianas, Carolines and Marshall Islands (the three groups [sic] of Micronesia) into the administration [sic] and the following month, November 8, Bougainville and Buka were included as a result of an agreement with the U.S. and Britain. Nauru was included later.”

In fact:

1. the date of the relevant German decree relating to the Marianas and Carolines is 18 July 1899 (and that of the relevant agreement with Spain even earlier);
2. the Marshall Islands became German in 1885 but part of German New Guinea only in 1906 (that is, well after the Marianas and Carolines);
3. the relevant German-British agreement (not involving the United States) was dated 14 November 1899 and added the Shortlands, Choiseul and Ysabel to

1. *Papua New Guinea Handbook* (1974), 13–5.

the British part of the Solomons and not Buka and Bougainville to German New Guinea; and

4. Nauru became German in 1888.

But this passage also illustrates a tendency to present history in general — and not merely activities in minor legal enclaves — as a ritual ballet in its own right. Although history remains — on the surface — an accumulation of facts and figures, they become, taken individually, replaceable. They serve as decorations whose accuracy no longer matters. What counts are the mental images they convey. The aim is no longer truth but explanation. This explanation must transcend historical facts and often enters into the realm of historical ‘laws’, even if great care is taken to avoid making these ‘laws’ explicit. In short: the ritualisation of law is coupled with a ‘legalisation’ of history.

In the case of the ‘annexation’ of German New Guinea the conventional explanatory device is a ‘conspiracy theory’: Bismarck, who wanted the largest possible slice of the New Guinea region, was (wrongly) convinced that he could only get it if he kept his intentions secret and created a *fait accompli* which Britain had to accept. The ‘annexation’ thus takes the shape of a more or less sophisticated ‘good versus evil’ game (and it makes little difference if the pro-British ‘conspiracy theory’ is replaced by a pro-German counterpart, for instance, a ‘dog-in-the-manger theory’).

The natural focal point for a ‘conspiracy theory’ is the diplomatic foreplay to the ‘annexation’. It reduces the history of the ‘annexation’ of German New Guinea — if not the history of the division of the entire region between Germany and Britain — to a history of Bismarck’s diplomatic conspiracy.

The ‘conspiracy theory’ also combines neatly with the view that the ‘annexation’ was a matter of law and not a matter of history. The diplomatic game can be directly translated into geometrical dividing lines, drawn, in European capitals, on maps of the Pacific, and the ‘annexation’ itself either dissolves into thin air or lingers on as a comic or tragic dream in the no-man’s land between law and history.

Thirty years ago, Marjorie Jacobs published a critical examination of the ‘conspiracy theory’. Although the term ‘annexation’ is the keystone of her paper (‘Bismarck and the Annexation of New Guinea’), she says little about the manner in which the ‘annexation’ was actually carried out.²

“Throughout November and the early part of December [1884], Bismarck maintained his silence on New Guinea, while in the Pacific, the warships *Elisabeth* and *Hyäne* hoisted the German flag at Matupi on 3 November and at various points in the archipelago and on the north coast of New Guinea . . . Consequently, the announcement of the German protectorate on 19 December took the British Government by surprise.”

The implications are that the hoisting of the German flag was the technical, legal means by which a ‘protectorate’ was established.

Grattan avoids the term ‘annexation’, and settles for a (vague) later date.³ According to him the Germans “took” the north coast of New Guinea and the Bismarck Archipelago somehow in December 1884. Grattan does not say

2. Jacobs, M, “Bismarck and the Annexation of New Guinea”, (1951) 5 *Historical Studies* 23.

3. Grattan, C, *The Southwest Pacific to 1900: A Modern History* (1963), 498.

whether what the Germans "took" was a 'protectorate', yet, describing subsequent events, he freely uses technical, legal terms:⁴

"The boundaries were finally established in June 1885. The following year the Germans and the British signed a declaration in Berlin which defined their respective spheres of influence in the islands. In effect the Germans were given a free hand, up to the level of establishing protectorates, to the north of New Guinea, west of the Gilbert Islands."

There is no explanation of the significance of this upper limit. (Did it, for example, prevent the Germans from acquiring 'straight' colonies?)

McCarthy had a shrewd suspicion that there was more to the 'annexation' business than met the eye:⁵

"[O]n 23 October, 1884, Romilly, Deputy Commissioner for the Western Pacific, annexed the south-eastern part of New Guinea as a Protectorate of Great Britain. However, his annexation was premature, for on 6 November, another annexation took place when Commodore Erskine, on H.M.S. *Nelson*, carried out the same function. . . . The land was known as British New Guinea (now Papua) and it was a Protectorate; formal annexation as a Colony did not take place until 1888. Germany now made her claim to the north-eastern part of New Guinea. On 3 November 1884, the ceremony of annexation was carried out at Mioko and within a few weeks similar ceremonies were performed at New Ireland and the mainland."

This suggests that there are (at least) four different types of 'annexations': *premature* 'annexations', *informal* 'annexations' (of protectorates), *formal* 'annexations' (of colonies), and *accumulative* 'annexations' (in the case of the Germans).

An account by Price shows that the "ceremony of annexation" may also have been a more involved story.⁶

"[O]n 19th August [1884] the Germans instructed their Consul-General in Sydney to inform their Imperial Commissioner in New Britain that the German flag would be hoisted in the archipelago of New Britain and on the north-east New Guinea coast. On 1st September Dr Otto Finsch, an . . . officer of the German Neu Guinea Kompagnie . . . , left Sydney . . . to carry out these instructions, and, according to J.M. Ward, the German flag was raised in October in New Britain and on the north-east New Guinea coast . . . The date of the official German annexation of the north coast has been given as 16 November, but it was not until 19th December that an angry and humiliated British Government knew that Germany had annexed the north coast."

It is hard to understand what Price is trying to say about the hoisting of the German flag and the 'annexation', because the instruction Finsch supposedly carried out (to hoist the German flag) is different from that previously mentioned (to inform the Imperial Commissioner that the German flag would be hoisted). Also, Ward in fact wrote:⁷ "In October the Neu Guinea Kompagnie raised the

4. *Ibid.*

5. McCarthy, J, *New Guinea, Our Nearest Neighbour* (1968), 66-7.

6. Price, A, *The Challenge of New Guinea: Australian Aid to Papuan Progress* (1965), 67.

7. Ward, J, *British Policy in the South Pacific: (1786-1893)* (1948), 320.

German flag . . . apparently with Bismarck's acquiescence". Price merges the 'apparent acquiescence' in action X with the explicit instruction Y and turns it into an instruction to Finsch from the German Government to hoist the German flag.⁸ On that basis the situation looked as follows: Finsch as a representative of the Neu Guinea Kompagnie but under instructions from the German Government hoisted the German flag in October 1884. However, this flag-hoisting was not the official 'annexation' which occurred in a mysterious way on 16 November 1884.

It is easier to appreciate why Price was interested in stressing the flag-hoisting in October: it increased the time span between the date of the relevant German actions on the spot and the date of the notification of the British Government. Price wanted to strengthen the impression that the notification had been purposely delayed by Bismarck as part of his conspiracy to keep the British in the dark as long as possible.

But Price does not only get carried away where his ideological interests are at stake. There seems to be no reason to doubt him when he writes:⁹

"The two nations signed a boundary agreement in April 1885, which gave Germany some 63,000 square miles of north-eastern New Guinea, and Britain, some 60,000 square miles, Papua, in the south-east."

Yet, according to Van der Veur,¹⁰ the figures given at that time were not only 67,000 and 63,000 square miles respectively, but "Lord Granville [the British Foreign Secretary] conveniently, although probably unintentionally, underestimated the British share by some 27,000 square miles."¹¹

More importantly, Van der Veur explodes in passing the entire 'conspiracy theory', claiming:¹²

"The British Government had been informed that Germany 'intended to place under the direct protection of the Empire . . . those districts in which German commerce has become predominant, or to which expeditions, whose justification can be denied by no one, are about to be undertaken.'"

He even backs this assertion with a reference to an official British source: Enclosure 1 in no. 164, C-4273 of the British Parliamentary Papers — but apparently without appreciating its significance. Otherwise the fact that he quoted from a note by the German Ambassador to the British Foreign Secretary would have, perhaps, made him suspicious. In this case he might have checked the British response — which was duly published as Enclosure in no. 178 — and strongly denied that mention had been made:¹³

"of any German colonial undertaking in New Guinea, on any decision on the part of the German Government, either expressed or implied, to establish a Protectorate over any part of that island."

8. Part of the confusion arises from the fact that Ward overlooked that the flag-hoistings by Finsch in October only involved the German merchant (!) flag and were never intended to signify 'annexation' (see below, p.).

9. *Op. cit.* 68.

10. Van der Veur, P, *Search for New Guinea's Boundaries* (1966), 18.

11. *Ibid.*, 36.

12. *Ibid.*, 16.

13. *Ibid.*

Now, it can be argued that Van der Veur was merely 'in search of New Guinea's boundaries' and not concerned with their diplomatic pre-history, but why did he then not stay out of this area altogether, especially since the information provided on the 'annexation' of north-eastern New Guinea and the Bismarck Archipelago — with its obvious and immediate relevance for the boundary question — is hardly impressive. Van der Veur is satisfied to tell us that:¹⁴

“assisted by Dr Finsch, German flag-raising ceremonies took place during October-December [1884] on the north coast of New Guinea and the New Guinea islands”.

His version of the 'annexation' of the northern Solomons is more colourful:¹⁵

“an agreement, concluded in April 1886, defined British and German spheres of influence in the western Pacific. Not only was German authority confirmed over New Britain and New Ireland (the Bismarck Archipelago), but the 'conventional line of demarcation' which was drawn from the New Guinea coast along the 8th parallel of South Latitude swerved south of Shortland Island and south-west of Choiseul and Ysabel before turning north-easterly towards the central Pacific. In spite of the intermittent contact of British and Australian seafarers, traders, whalers, and missionaries with the Solomons, the northern half of this archipelago was placed under German authority.”

This passage implies that, had the conventional line of demarcation not swerved south, the whole of the Solomons would have been within the British sphere of influence. Instead, a continuation of the line in the direction in which it was running west of the Shortlands would have included not only Buka and Bougainville but also most of the Shortlands and the northern tip of Choiseul in the German sphere. In addition, Van der Veur fails to mention that before swerving south, the line had swerved north and that, had it followed the 8th parallel until turning north-east to the central Pacific, it would have cut through New Georgia and Ysabel. In other words, the departure from the 8th parallel was in Britain's favour and primarily necessary to give both powers an approximately even share in the Solomons without dividing any of the islands.

Why then the whole spiel? As a lead up for the suggestion that Britain had a better claim to the Solomons than Germany on account of intermittent contacts with British and Australian seafarers etc? What about the Spanish and French explorers, the American whalers and the German traders etc? And, why should any of these contacts (including those with Queensland labour vessels?) have given any of these powers any claim to any part of the Solomons? But then Van der Veur does not say that; it is just another innuendo. Instead, he turns around and says the 'right' thing:

“By 1886, then, New Guinea was divided among three European powers by geometrical lines which paid scant attention to . . . the particular needs of the inhabitants.”

One can feel his heart bleeding!

Some pages later, Van der Veur describes the partition of the Solomons as

14. *Ibid.*, 18.

15. *Ibid.*, 20.

“the direct result of the German flag-raising ceremonies in 1884”.¹⁷ Which way is it going to be? By virtue of the ‘Sphere of Influence’ agreement of April 1886 — which, according to Grattan, gave the Germans merely a free hand to establish protectorates or lesser claims? As a direct result of the German flag-raising ceremonies in October/December 1884? Or as a result of some other act or acts the necessity of which Grattan implies but which he does not specify?

And what about the Bismarck Archipelago and Kaiser Wilhelmsland? How and when did they become German? In October 1884, November 1884, December 1884, April 1885, June 1885, or in April 1886? Was it the result of flag-hoistings or proclamations, of annexation ceremonies or of some other act or process? Was German New Guinea a protectorate? Or was it a colony? Or was it neither one nor the other? What is a protectorate, a colony, a sphere of influence? And how are they established or acquired? Perhaps it is only necessary to establish the choreography of the mysterious legal ‘annexation’ ballet for all the pieces of the puzzle to fall into place.

Part I

(i) *Conquest and colonialism: Sir Henry Jenkyns*

In *British Rule and Jurisdiction Beyond the Seas* (1902),¹⁸ Sir Henry Jenkyns — at the time of the ‘annexation’ of German New Guinea Parliamentary Counsel — distinguishes two types of colonial territories: colonies and protectorates.¹⁹ The main difference between them was that the metropolitan power had, in the case of a colony, assumed full sovereignty, whereas it had — at least ideally — only assumed external sovereignty in the case of a protectorate. As a result only colonies but not protectorates formed legally part of the dominions of the metropolitan power. In contrast, a ‘sphere of influence’ gave the metropolitan power no rights of sovereignty at all. A sphere of influence was an area “which is the subject of diplomatic arrangements between European states.”²⁰

While a colony was, legally speaking, a straightforward creature, the legal nature of a protectorate required further explanation. According to Jenkyns,²¹ a “British protectorate is a country which . . . as regards its foreign relations, is under the exclusive control of the King . . . whilst, on the other hand, the Crown undertakes to protect the inhabitants of the territory from interference by any foreign power. In other respects the powers of the Crown vary . . . but in every case the territory is, as respects internal sovereignty, left more or less under an independent government . . . [T]he

16. *Ibid.*

17. *Ibid.*, 39.

18. Like most British lawyers of his day, Jenkyns emphasised the jurisdictional side of colonial expansion in a manner which is difficult to appreciate for an outsider. See Johnston, W., *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the late Nineteenth Century* (1955), and the still somewhat incredulous review by Firth, (1975) 10 *Journal of Pacific History*, 119–20.

19. The actual technical legal term in the British context is ‘possession’ as there were three (atypical) quasi-colonies which had to be covered as well. These exceptions were: the Channel Islands, the Isle of Man, and British India (*ibid.*, 2).

20. Jenkyns, *op. cit.*, 1.

21. *Ibid.*, 165–6.

protector is held according to international law to assume the external sovereignty . . . and the territory becomes . . . a semi-sovereign state.”

This ‘classical’ protectorate caused two problems for Jenkyns: it was, perhaps, theoretically impossible and, in practice, probably none of the existing British protectorates corresponded to its requirements. The theoretical problem stemmed from the even more ‘classical’ (constitutional law) view that sovereignty was indivisible (so that no semi-sovereign state could legally exist) — and we will disregard it. The practical problem was caused by the fact that the ‘colonial protectorates’ which dominated the scene did not fit into the ‘classical’ mould:²²

“Since the Ionian islands became part of the kingdom of Greece in 1863, there has not been any case of a civilized, or one should rather say a Christian, state under British protection; and all the protectorates which are now of so much importance, whether under the protection of the United Kingdom or of other states are non-Christian.”²³

Writers on international law never worked out the result of a state being protected or semi-sovereign, even where it was Christian, and they did not until recently even notice the position of a protected non-Christian state . . . During the last twenty years the question has, in the scramble for Africa, assumed European importance, and a system is now being gradually developed not merely as regards British protectorates, but also as regards those of other Powers.

In this respect, as in others . . . international law alters and grows with changing circumstances . . .; while international law writers invent principles or apply old principles so as to suit accomplished facts.

It is generally recognised that the rules of international law apply only to Christian countries . . . and that if they apply at all to non-Christian states they so apply with considerable modifications. Modifications must, therefore, also be made in the application of international law to the relations of Christian states *inter se* in their dealings with non-Christian states. It is said that Great Britain was the only country which refused at the Berlin Conference of 1884–5 to recognise the necessity for such modifications. Germany, at any rate, recognised the necessity, and in an early stage of the modern African protectorates, Prince Bismarck is said to have declared that he intended to make the African protectorates of which he had been the founder resemble India under the government of the East India Company.’²⁴

22. *Ibid.*, 167–8.

23. It would be easy but futile to ridicule Jenkyns’ ‘obsolete’ or ‘offensive’ terminology. He was trying to come to grips with real problems which do not disappear if we adjust our labels.

24. Jenkyns devotes much attention to what may be termed ‘indirect’ protectorates, that is cases where a colonial territory was governed by a European company (or even an individual) under a charter from a European power. These cases raise a number of involved legal points which would appear to be relevant since German New Guinea was, for many years, administered by the Neu Guinea Kompagnie under an imperial charter. Yet, in view of the special historical circumstances of the case, they prove, in the end, all to be immaterial. (The crucial legal questions arose when a company (or individual) acquired (or purported to have acquired) territory on its own behalf and placed itself subsequently under the protection of a European state — can private individuals acquire rights of sovereignty? — But this, as we shall see, is not what happened in the case of German New Guinea.

This shows the 'annexation' ballet in a new light. Firstly, it suggests that international law may not have applied to the New Guinea region at all until after its 'annexation' by European states. Secondly, it suggests that the 'colonial protectorates' which were established during the 1880's were established in a kind of legal vacuum. Thirdly, it suggests that the British and German views in this respect may have differed significantly. Yet all this does not mean that, according to Jenkyns, there were not rules of international law governing the 'annexation' ballet between 1884 and 1886. The rules we are primarily concerned with in this respect are those dealing with the acquisition of territory by European states rather than those defining the legal characteristics of 'colonial protectorates' and, at this stage, we do not even know whether German New Guinea was a 'colonial protectorate'.

As far as the acquisition of colonies is concerned Jenkyns can state bluntly²⁵ that "they are acquired by settlement or by conquest or cession."

They are acquired by settlement (or occupation) if the area in question is *territorium nullius*, that is ownerless under international law. If the area is owned according to international law, the acquisition depends either on cession, that is an agreement with the previous sovereign in which sovereignty is transferred — or on conquest, that is a military operation which destroys the existing sovereign as a subject of international law.²⁶

In the case of protectorates Jenkyns refers to none of these conventional modes of acquisition, but says instead that protectorates are assumed (not acquired!) "by treaty, by sufferance or by force."²⁷

The term 'treaty' is comparatively straightforward: it can be regarded as a synonym of 'cession', but what about 'sufferance' and 'force' — which point to something between 'cession' and 'occupation' and between 'cession' and 'conquest' respectively? These 'in-between-terms' give an indication of Jenkyns' dilemma. From a legal point of view it looked as if a protectorate — provided it could be justified at all — could *only* be acquired by cession. A protectorate presupposed the continued existence of a protected state which had transferred, by agreement, the rights of external sovereignty to the protecting power. Neither occupation nor conquest were 'proper' ways of establishing a protectorate, because the former presupposed that the area in question was ownerless, that is unoccupied by another state, whereas the latter presupposed the destruction of such a state. On the other hand, international law made it appear doubtful that 'uncivilised' countries could be treated as states able to cede external sovereignty, whereas the 'spirit of the time' made it increasingly difficult to treat the whole 'non-Christian' world as 'ownerless'.

Jenkyns first hints at these problems when contrasting two types of protectorate:²⁸

"In the first type . . . there is a native sovereign . . . capable of making a treaty . . . In protectorates of the second type there is no sovereign or

25. *Ibid.*, 2.

26. This summary again glosses over a number of legal problems. It is, for example, far from clear whether title by conquest is 'original' or 'derivative'.

27. *Ibid.*, 165.

28. *Ibid.*, 173.

organised government . . . [and t]here is no general treaty.”

But he adds immediately:²⁹

“though conventions are usually made with the petty kings or tribal chiefs, by which they cede their territories or surrender external and internal sovereign rights to the British Government.”

These conventions were usual, but were they legally necessary? Jenkyns cannot bring himself to accept this. Initially he aims at avoiding this result by arguing that a colonial protectorate — like a sphere of influence — exists primarily in relation between the protecting state and other ‘civilised’ states and is thus largely independent of the existence of a protected state. He becomes quite agitated when realising that this argument is not altogether convincing:³⁰

“If this view is sound, the jurisdiction will depend on the existence in fact of the assumption of the protectorate, and not on the question whether some naked chief living in the country is or is not sufficiently civilised to cede jurisdiction, or has or has not by some informal agreement in fact ceded it. It really seems absurd that the question of the jurisdiction of a British court should depend upon such a point.”

Hence Jenkyns tries to crush the problem with an a fortiori argument:³¹

“If . . . the protector has a portion of the complete sovereignty of the protected state, there seems no reason why such portion of sovereignty should not be acquired in the same way as complete territorial sovereignty, namely, by conquest, cession or occupation.”

Having stated his goal, Jenkyns sets forth to reach it on the ground. In his belligerent mood, he marches in the direction of conquest rather than occupation. The first move involves blurring the distinction between cession and sufferance:³²

“In the case of an uncivilised state, cession maybe obtained by consent without any treaty, and that consent may be expressed by constant usage, permitted and acquiesced in by the authorities of the state.”

To reduce the requirements of a cession from a treaty to acquiescence is insufficient as even a minimal cession depends on the existence of someone who is able to cede. Jenkyns, therefore, takes the by now rather small step from cession by acquiescence to the acquisition of sovereignty by assumption — or rather, he asks a rhetorical question to this effect, to prepare the ground of yet another move:³³

If a native chief is not in a position to give jurisdiction over foreigners, why may not that jurisdiction be assumed by a sovereign who annexes the territory so far as not occupied by the native chief, but annexes it for certain limited purposes only, and not so as to make it part of that sovereign’s territorial dominions for all purposes?”

Not happy with this new mode of acquiring sovereignty by mere assumption, Jenkyns suggests the possibility of a mixed acquisition, moving the emphasis

29. *Ibid.*, 174.

30. *Ibid.*, 179–80.

31. *Ibid.*, 180.

32. *Ibid.*, 180–1.

33. *Ibid.*, 181.

back from the assumption of sovereignty by the protector to the sufferance of this act by the protected:³⁴

“It is difficult to see why sovereignty in each case can be acquired by one alone of the above modes, namely, conquest, cession, or occupation. A strong power may have acquired by conquest one part of certain territory, or a protectorate over certain tribes in it, and the natives of the adjoining part of that territory, or other tribes in it, may yield obedience to that power on account of fear without any actual cession. In such case the sovereignty of the protectorate may be acquired partly by conquest and partly by sufferance without there being the possibility of determining under which head the acquisition is to be placed.”

As sufferance is by itself a no more convincing mode of acquisition than assumption, Jenkyns is finally forced to move from sufferance by the protected to a quasi-conquest by the protector:³⁵

“If, in a region like New Guinea . . . a British officer enters and assumes control of the territory in the name of the King, either with or without agreements with the tribes dwelling there, is not that to all intents and purposes as much a conquest as if the territory was acquired by the defeat of the former sovereign and the consequent annexation of the country?”

Why stop there? Is not the acquisition of all colonial territory in whichever legal form in truth conquest? As Jenkyns continued:³⁶

“We say to foreign Powers, ‘We hold this territory, and if you attempt to interfere we shall maintain our position with the sword’. How does this differ from conquest? And yet surely there can be no obligation to assume the internal as well as the external sovereignty.”

This finally lets the economic cat out of the legal bag. The colonial protectorate was tailored to facilitate colonial expansion on the cheap. It allowed a European power to establish what was externally a colony — excluding all other powers — without having to shoulder the expensive administrative responsibilities which went with full internal sovereignty. However, Jenkyns says advisedly that there was no *obligation* to assume internal sovereignty. The European power was, of course, free to assume whatever parts of the internal sovereignty it desired — at its own speed. The Jenkyns’ protectorate looks like a Treasury dream. The question is: did international law permit European powers to get away with such an approach and did the European powers, particularly Germany in the case of the New Guinea region, in fact behave in the way Jenkyns suggests they could?

(ii) *The proof of the pudding: R.F. Lindley*

R.F. Lindley, writing a quarter of a century after Jenkyns, argues that they neither could nor did. In contrast to Jenkyns — who did not care about the sovereign rights of ‘uncivilised’ peoples (because they were so much better off under British rule that it did not matter how they got there) — Lindley wanted to show that such rights did not only exist but that they were also recognised by international law.

34. *Ibid.*

35. *Ibid.*

36. *Ibid.*

This exercise involved Lindley in a peculiar uphill battle: he was trying to upgrade the position of 'backward' peoples in international law, but the way he perceived the latter — he could only do this by presenting this new upgraded position as an established historical fact. Lindley accepts that there is only one international law, that of the advanced, Western states. He also accepts that most of its rules are inapplicable to the "conditions [!] of backward peoples". However, backward peoples could still have recognised rights under international law, because:³⁷

"it is . . . one of . . . [its] admitted functions to lay down rules by which the goodness or badness [not the legal validity!] of a territorial title claimed by a member of the International Family may be tested."

Only if it could be shown:³⁸

"that all the territory that has been acquired by members of the International Family otherwise than from others of its members, has been acquired by the same process"

and that this process was occupation, would it be justified to conclude that international law disregarded the sovereign rights of backward peoples, because it would be clear in this case that the areas in question had been treated as *territorium nullius*, and consequently that the title acquired to such territory had been regarded as an original title. If, on the other hand, it could be shown that title was regarded as derivative, it followed that previous rights of sovereignty of the backward peoples in question were recognised by international law.

According to Lindley there is:³⁹

"abundant evidence to show that advanced governments do recognise sovereign rights in less advanced peoples . . . and do, in general, deal with such peoples on a treaty basis when acquiring their territory."

Therefore:⁴⁰

"any rule of international law which regarded the territory of independent backward peoples as being under no sovereignty and belonging to nobody would not only be based upon 'evidence of usage to be obtained from the actions of nations' but would be in direct conflict therewith."

Lindley cannot go as far as asserting that there was a rule of international law according to which the territory of backward peoples could *only* be acquired by treaty because he (reluctantly) also accepts that international law (as it stood at the time) recognised conquests as a valid mode of acquiring title to territory.⁴¹ Instead he neutralises the conquest problem by putting it into the colony basket and concentrates on showing that at least the rules governing the acquisition of colonial protectorates conformed to his ideas.

In the chapter on protectorates he merely states his position:⁴²

"The necessary and sufficient condition for the setting up of a protectorate is the conclusion of an agreement with the local independent government or

37. Lindley, M, *The Acquisition and Government of Backward Territory in International Law* (1969), 46.

38. *Ibid.*

39. *Ibid.*

40. *Ibid.*

41. *Ibid.*, 47.

42. *Ibid.*, 203.

chief by which the external relations of the district to be protected are placed in the hands of the protecting Power.”

We have to go back to the chapter on cessions to discover how he arrived at it. In that chapter Lindley starts by attacking again the notion that “International Law takes no account of the rights of backward people”.⁴³

“A consideration of the circumstances surrounding one important type of cessions — that of the external sovereignty upon which a colonial protectorate is based — lends considerable support to his position. The consensus of civilized States, upon which the rules of International Law rest, can, and frequently can only, be proved ‘by evidence of usage to be obtained from the action of nations in similar cases in the course of their history’; and it is difficult to see how, having regard to the universality of the practice of grounding a colonial protectorate upon an agreement with the local authority, and to the importance attached by the European Powers to these agreements in their relations *inter se*, the requirement for such an agreement can be regarded otherwise than as a rule of law.”

The sole argument put forward by Lindley for this view is thus the claim that acquisition by agreement had been the universal practice of the colonial powers. This puts the ‘annexation’ ballet once more in a new light. The historical events making up an ‘annexation’, so it seems, are not governed by rules of international law, rather, the rules of international law are a product of these historical events. But again, this does not justify the conclusion, that the ‘annexation’ of German New Guinea was only a matter of history and not a matter of law. It might well be, and is indeed asserted by Lindley, that relevant historical practice had already crystallised into rules of international law before the ‘annexation’ of German New Guinea took place. Nonetheless, taking Lindley’s view, the comparative weight of law and history in this field changes significantly. The ‘annexation’ ballet may not become purely a matter of history, but its choreography must be established by historical research rather than by legal analysis.

Lindley’s own survey covers “four centuries and four continents”, but, as he devotes just twenty pages to the exercise (although he presents relevant information elsewhere in his book), he has to be brief. As far as the Pacific is concerned, he only considers British practice, a procedure, one could argue, which made it from the outset impossible to collect an adequate sample.

Lindley begins with Australia, noting with regret:⁴⁴

“As the facts presented themselves at the time, there appeared to be no political society to be dealt with; and in such conditions, whatever ‘rudiments of regular government’ subsequent research may have revealed among the Australian tribes, occupation was the appropriate method of acquisition.”

He therefore quickly turns to the ‘annexation’ of New Zealand, the

43. *Ibid.*, 175–6.

44. *Ibid.*, 41. For a more recent legal discussion of ‘The Acquisition of Territory in Australia and New Zealand’ see Evatt “The Acquisition of Territory in Australia and New Zealand”, (1968) *Grotian Society Papers* 16–45.

centre-piece of his idyll, quoting with relish from the instructions of Captain Hobson of 14 August 1839:⁴⁵

“we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty’s immediate predecessor, disclaims, for herself and for her subjects, every pretension to seize on the islands of New Zealand, or to govern them as part of the dominions of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usage shall be first obtained.”

Lindley does not quote the terms in which the authorisation to ‘annex’ New Zealand was justified;⁴⁶ nor does he mention that, having received these instructions, Hobson hastened to point out that he would perhaps be able to ‘treat’ in this way with the North Island (or at least the northern part of it) but hardly with the South Island which “in respect of its advancement to civilization” was “essentially different”.⁴⁷ It also does not appear from Lindley’s account that the amended instructions to Hobson regarding the South Island were a consequence of this objection.

The relevant passage — which Lindley only quotes in part — reads as follows:⁴⁸

“If the country is really, as you suppose, uninhabited except by a very small number of persons in a savage state, incapable, from their ignorance, of entering intelligently into any treaty with the Crown, I agree with you that the ceremonial of making such engagements with them would be a mere illusion and pretence, and ought to be avoided.”

Nevertheless — and here Lindley misses a point — Hobson was again instructed to proceed by treaty “if that be possible” and that only insofar as it was not, sovereign rights were to be asserted on the ground of discovery (which Lindley reports without making clear that a title based on discovery involves the most blatant disregard of existing sovereign rights).

This was the basis on which the Waitangi Treaty was concluded on 5 February 1840. It led to the issue of a proclamation on 21 May (although signatures from Maori chiefs in the North Island were still collected in October and some never signed),⁴⁹ in which British sovereignty is based on cession. However, on the

45. Quoted *ibid*, 41.

46. “Believing, however, that their own welfare would . . . be but promoted by the surrender to Her Majesty of a right now so precarious and little more than nominal and persuaded that the benefits of British protection [!] and of the laws administered by British judges would far more than compensate for the sacrifice by the natives of a national independence, which they are no longer able to maintain, Her Majesty’s government have resolved to authorise you to treat [!] with the Aborigines of New Zealand for the recognition of Her Majesty’s sovereign authority over the whole, or any, part of those islands which may be willing to place themselves under Her Majesty’s dominion” (British Parliamentary Papers, 1840, vol xxxiii no. 16).

47. *Ibid*, no. 17.

48. *Ibid*, no. 18.

49. See Evatt, *op cit*, 39, and Grattan, *op cit*, 175.

same day a second proclamation was made asserting sovereignty over all the islands of New Zealand. Lindley does not specify the mode of acquisition, but mentions in passing that:⁵⁰

“steps had then already been taken to obtain treaties of Cession with such chiefs as were found in the South Island and Stewart Island.”

In contrast to the impression Lindley is thereby trying to create, it appears that at least title to the South Island was based on Cook's discovery more than 150 years earlier — despite an express disavowal of his unauthorised ‘annexation’ in 1817 — although the Colonial Office was not altogether happy about this course of action.⁵¹

Having progressed from a straight occupation and a complete denial of existing sovereign rights (and even property rights to land) in the case of Australia to a mixed recognition of such rights and a mixed acquisition (cession plus discovery) in the case of New Zealand, Lindley now advances to his first case of straight (?) cession: the annexation of Fiji in 1874. And there he rests on his laurels — but with an excuse: had the sovereignty of the peoples of the Pacific not been impressively recognised in an Act of the British Parliament in 1875?

Lindley refers to the “Pacific Islanders Protection Act” (aimed primarily at establishing British jurisdiction over British subjects in the ‘independent’ islands of the Pacific), Section 7 of which becomes the keystone of his whole survey:⁵²

“Nothing herein or in any such Order in Council contained shall extend or be construed to extend or 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”.

On the basis of this legal rhetoric, Lindley took it apparently for granted that henceforth any acquisition of sovereign rights by Britain in the Pacific would have been in the form of a cession treaty. But can he? What about New Guinea, the Solomons, the Gilbert, Ellice or Cook Islands? It is doubtful that Lindley could have produced a single treaty of cession preceding the proclamation of a British protectorate in the Pacific in the 1880's and 1890's. It appears that the first attempt was made — unsuccessfully — by Basil Thomson in Tonga, where the King refused to agree to placing “truly and unreservedly himself, his subjects and his dominions under her Britannic Majesty”.⁵³ Thomson was more effective on Niue where a treaty was signed in April 1900 — but the proclaimed British protectorate lasted just over one year.⁵⁴

Taking Britain and the Pacific as an example, Lindley's claim that it had been universal practice to acquire colonial protectorates by means of cession treaties rests — to put it mildly — on shaky historical grounds. But even if he had been

50. Lindley, *op cit*, 42.

51. *Ibid*.

52. Quoted *ibid*, 43.

53. Morrell, W, *Britain in the Pacific islands* (1960), 328.

54. Niue was ‘annexed’ to New Zealand on June 10 1901; see *ibid*.

able to make the point convincingly, it would not have been much of a victory. Lindley admits that — in one respect — himself:⁵⁵

“No doubt, in many of the cases of Cession, the native chief did not realise what he was transferring under the treaty; but the fact that the form employed was that of Cession shows that the Power concerned did not consider that the territory was one that belonged to nobody. No doubt, also, in many cases the treaties were obtained under compulsion, but forced treaties are not unrecognised in international affairs”.

But he immediately sets up a smokescreen:⁵⁶

“The Powers themselves, as we have seen, have in large numbers of cases accepted sovereign rights from the chiefs, and based their titles upon such cession, and, unless one is prepared to argue that the maxim *Nemo dat quod non habet* has no application to such a case, it must be admitted that the chiefs themselves possessed those rights. ‘The power of making an agreement’, it was urged on behalf of Great Britain in the Delagoa Bay arbitration, ‘implies the ability to refuse to make such agreement, and is a mark and test of independence’”.

Lindley, it appears, did not appreciate the irony of his position: he tried to establish the recognition of the sovereign rights of ‘backward’ peoples by looking at the way in which they were taken from them. The proof of the pudding lay in the eating and Lindley, the champion of native rights of sovereignty, was compelled to praise the legal table manners employed in European colonial expansion. No wonder that Jenkyns cried: let us be honest and admit that any form of taking over ‘backward’ territory amounts to conquest. Yet, to switch from hypocrisy to cynicism does not necessarily achieve legal clarity.

Moreover, it did not follow from Jenkyns’ premise that one had to argue: ‘as we are prepared to hold this territory by force, it is always as if we had acquired it by force’. Instead, one could assert — more logically and also more in line with the requirements of real-politik: ‘since we are willing and *able* to hold this territory — if necessary by force — it does not matter how we acquired it’. In other words: what counted was the ability to hold a territory which — expressed less aggressively — amounted to its ‘effective occupation’. Rather than moving out onto the creaking limbs of conquest or cession, one could rejuvenate the old trunk of occupation by pruning them off altogether. At least, this was the

55. Lindley, *op cit*, 44.

56. *Ibid.* Lindley does not consider the systematic status of the argument. To show that to acquire colonial protectorates by means of treaties had been universal practice can only prove that this was a legitimate mode of acquisition (which is undisputed). To prove that it was the *only* legitimate mode of acquisition, it would have to be established that contrary practice had been universally denied recognition (which, according to Lindley, was impossible). Moreover, Lindley accepts conquest as a legal mode of acquiring colonies. To prove that it was not a legal mode of acquiring protectorates (and to counter Jenkyns’ a fortiori argument), he would have had also to show that a protectorate was essentially different from a colony — which would have gone against all the evidence he himself produces. In addition, Lindley’s treatment of positive prescriptions as a mode of acquiring title to a protectorate gives the argument in any case a hollow ring. He comes (*ibid* 175–7) at least close to arguing that while title to a protectorate can only be based on cession and not on effective occupation, effective occupation will cure any defects of title (including the lack of a cession treaty) and give valid title by positive prescription (because the criteria are the same).

predominant view at the Congo Conference in Berlin which dealt with these questions during the latter stages of the 'annexation' of German New Guinea.

(iii) The Berlin Conference

The American delegate, Kasson, tried to move the Conference in the direction of cession, in order to achieve an official recognition of the sovereign rights of native tribes — with little success. The President of the Sitting on 31 January 1885, during which Kasson made his proposal (it happened to be the German delegate, Busch) responded that it "touched on delicate questions, upon which the Conference hesitated to express an opinion"; it would be sufficient to include the declaration — for the record — in the Protocol.⁵⁷

The Conference was not against the recognition of such rights; it was merely uneasy about the legal problems involved. No one, it appears, expected that the acquisition of the territories of 'native' tribes would require conquest, and no one felt that the assumption of sovereignty over such territories by a European power was in any way doubtful in terms of justice or morality: on the contrary, it was in the best interests of the tribes concerned who would all willingly co-operate.

The problem was not 'native' consent, but the extent of the administrative responsibilities and, in particular, the costs which the European colonisers had to shoulder. This was the question which worried Britain. It was the main reason why her representative fought against an acceptance of the effective occupation doctrine (pushed in particular by Germany) and for the survival of the colonial protectorate (about which Germany had very different — though not very clear — ideas).

Britain had only accepted the invitation to the Conference (where she knew she would be the 'odd-person-out') on the understanding:⁵⁸

"that all that would be required would be the practical application of the principles unanimously laid down by the jurists and Judges of all lands, including England".

But, as Malet reported to Granville on 21 February, 1885:⁵⁹

"when the project of declaration was laid on the table it was apparent that it involved new principles of international law. There could be no objection to the provisions contained in it that a Power undertaking a Sovereignty or Protectorate should notify the fact to the other Signatory Powers, but the treatment of Sovereignities and Protectorates as enforcing identic [sic] obligations was novel, and required consideration. It devolved upon me, after receiving special instructions from your Lordship to contend that it would be an inconvenient precedent to confound the two systems. I explained that Great Britain had no wish to avoid responsibility, and that it was in her interest that Powers assuming the control of territories in Central

57. The declaration appears in Protocol no 8 (British Parliamentary Papers, C-4361): "Modern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle, my Government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression".

58. *Ibid.*, 3.

59. *Ibid.*, 3-4.

Africa should undertake the obligations resulting from it, but that it was essential for her, considering the extent of her Colonial Empire, to weigh words, and have a clear perception of their meaning; that she could not admit the identity of Sovereignties and Protectorates; nor could she admit that the equal treatment of the two was consistent with the understanding that the Conference was only to apply acknowledged principles of international law . . . In the discussions which followed, the practical importance of my contention became evident to all the Representatives, and the result was a unanimous decision that no mention should be made of the obligations of Protectorates . . . the only stipulated requirement, that of notification, being rather an act of courtesy than a rule of law.”

The bone of contention had been the German draft of Article 35 which stipulated that the powers:⁶⁰

“acknowledge the obligation to establish and to maintain in the territories or places occupied or taken under their protection, a jurisdiction sufficient to secure the maintenance of peace [and] respect for rights acquired.”

The final version of that article, as Malet indicated, was restricted to colonies (or possessions) and also excluded the (international) obligation to maintain (internal) peace.⁶¹

The wording of (the unproblematic notification) Article 34 is nevertheless interesting, because it indicates how the ‘International Family’ viewed the acquisition of colonial territory:⁶²

“Any Power which henceforth *takes possession* of a tract of land on the coasts of the African continent . . . as well as the power which *assumes* a protectorate there, shall accompany the respective *act* with a notification thereof.”

Obviously, all three (main) conventional modes of acquiring territory were regarded as legally problematic: areas inhabited by ‘native’ tribes could not be conquered (because the tribes were not states) nor could they be occupied (because the areas were not *territorium nullius*), nor could they be acquired by a cession treaty (because the tribes were not part of the ‘International Family’). Thus, the whole question of recognising the sovereignty of ‘native’ tribes (or rather the question of the appropriate legal form of its recognition) was left in abeyance and the emphasis was placed exclusively on the relationship between the ‘advanced’ states. The weight attached to the act of notification was just one minor manifestation of this tendency.

Nonetheless, the acquisition of title was still seen as the instant legal effect of a particular legal act. Effective occupation was perceived as being closely akin to occupation in the sense of taking possession of ownerless territory. The effectiveness — to which Britain objected in the case of protectorates — was more an obligation resulting from the acquisition of title than a condition of the acquisition itself. It took many years before international law was prepared to go

60. *Ibid*, 194.

61. *Ibid*, 312.

62. *Ibid*, emphasis added.

a stage further and treat the acquisition of title as a process of 'historical consolidation'.⁶³

(iv) *Historical consolidation à la Schwarzenberger*

Schwarzenberger followed this course with particular energy, taking it as a challenge to embark on a review of the traditional theories about the acquisition of territory which had beclouded the situation because international lawyers had "succumbed . . . to the temptation of pressing the available judicial and diplomatic material [the main ingredient of history!] into apparently ready-made molds [sic] of private law analogies".⁶⁴

"Overestimation of the significance of private law analogies tends to obscure . . . the character of consolidation as an essentially historical process . . . Review of this issue in historical perspective provides the clue to the direction in which a more fruitful search may proceed. By way of a working hypothesis, it may be assumed that the operative rules are not particular rules, but the rules governing the relevant fundamental principles of international law. At the same time the possibility remains open that in their application to the specific problem of territorial titles the interaction of these rules may have produced more concrete rules of a secondary character."

According to Schwarzenberger, the operative rules for the acquisition of territory are primarily shaped by three basic principles, those of sovereignty, recognition and consent. Under the heading 'sovereignty' he disposes deftly of the problem which worried Lindley — and to a lesser extent also Jenkyns:⁶⁵

"[R]ights and duties under international law exist only between subjects of international law. Thus, if territories are inhabited by communities which lack international personality . . . the unilateral assumption of jurisdiction over such territories by a subject of international law is an effective root of

63. Discussion about 'historical consolidation' was sparked off by the Anglo-Norwegian Fisheries Case in 1951 (see Johnson, D, "Consolidation as a Root of Title in International Law", (1955) 2 *Cambridge Law Journal* 215–25. This does not mean that the idea was new. Jenkyns, for instance, saw the acquisition of (full) title to colonial territory, ideally, as a three stage process, moving from a sphere of influence to a protectorate and then to a colony. He characterises a sphere of influence as something "which has not yet developed into a protectorate" (Jenkyns, H, op cit, 1, (emphasis added) and says that "there are still one or two groups of protected islands, but other places have been made part of colonies . . . [or] into a separate colony" (ibid, 169, emphasis added). Nonetheless, the differences are clear. For Jenkyns, the three stage process was a political strategy, each step consisting of certain legal acts causing certain confined, instant, legal effects. The idea of international law as a field of gradual historical processes would have been foreign to him. The 'effective occupation doctrine' also did not appear suddenly in 1884. Von der Heydte traces it back to feudal law. He claims that it grew into a "rigid theory which recognised effective occupation to be in every possible case the only sufficient title of territorial sovereignty" (Von der Heydte, F, "Discovery, Symbolic Annexation and Effectiveness in International Law", (1935) 29 *American Journal of International Law* 448–71) and that it was during the phase of colonial expansion "that the practice of nations . . . broke the narrow frame of that theory" (ibid). We are again in a different world.

64. Schwarzenberger, G, "Title to Territory: Response to a Challenge", in (L. Gross, ed) *International Law in the Twentieth Century*, 287 and 291.

65. Ibid, 293.

territorial title. Whether such communities . . . submit peacefully or otherwise is irrelevant”.

Having said this Schwarzenberger quickly moves from the assumption of sovereignty to the “effective control of the territory in question”. He describes it as “the essential element” of title, but happily admits: “what amounts to effective occupation varies from place to place”.⁶⁶ It can even shrink to a symbolic manifestation of the assumption of sovereignty and remain effective until terminated by another subjective act.⁶⁷

“an initial display of sovereignty may suffice even to maintain the title unless evidence of any subsequently expressed intention to abandon such jurisdiction is forthcoming”.

What Schwarzenberger has produced so far — in his escape from private law analogies — is suspiciously similar to the definition of possession in Roman property law. He only moved attention from the different modes of *acquiring* title to the elements of *holding* title as a uniform state of affairs. His argument seems to be: as the subjective will to hold sovereign rights and the objective ability to exercise them is necessary and sufficient for having title these two elements are also necessary and sufficient for acquiring title — which does not sound too convincing.

If we were in the realm of state law this would be the end of the story. The acquisition of title would be identical with the acquisition of absolute title (protected by the State). The question of recognition could not arise, and the question of consent — if it were relevant at all — would have already been answered (no consent, no title). Is the situation in international law indeed as different as Schwarzenberger makes it out to be? It is true that international law — as he rightly stresses — lacks the central practical authority of state law, but is this lack sufficient explanation for a basically different approach in state law and international law, and if there is such a difference, is the approach supported by Schwarzenberger for international law different enough? Is international law, perhaps, another species of law rather than a version of the state law type which the lack of a central political authority is preventing from reaching perfection and which will reach perfection (and become identical with state law) once mankind has ‘advanced’ far enough to establish and maintain such an authority? Is Schwarzenberger chasing wild geese when looking for the operative *rules* of international law? Is he forced to persist with this chase because such rules are essential for turning international law into the kind of law he wants it to be?

If international law were governed by rules, one would expect it also to include rules demanding the recognition of legitimate titles and prohibiting the recognition of illegitimate titles. But this is not the way Schwarzenberger sees it, although he characterises recognition first of all as “an eminently suitable means for the purpose of establishing the *validity* of a territorial title in relation to other states.”⁶⁸ The mechanism by which validity is established is purely negative and individualised.⁶⁹

66. *Ibid.*, 294.

67. *Ibid.*, 294–5.

68. *Ibid.*, 295, emphasis added.

69. *Ibid.*, 295–6.

“However weak a title may be . . . recognition estops the state which has recognised the title from contesting its validity at any future time”. Yet, “recognition of the territorial claims of another state cannot affect adversely the legal position of the effective occupant” beyond depriving him of the possibility of obtaining recognition of his title by the recognising state.

This proves, according to Schwarzenberger, not only the relativity of title by effective occupation, but also offers a means of making it absolute.⁷⁰ The “device of recognition can be employed as an independent root of title”⁷¹ — presumably in the sense that, if a title has been recognised by all other states, its original validity (or invalidity) becomes irrelevant. But the significance of recognition reaches still further:⁷²

“Persistent refusal on the part of the preponderant majority of states to recognise territorial claims in forms which, in principle, are unacceptable to other states, had contributed decisively to the shaping of the actually operative rules”.

The principle of recognition, according to Schwarzenberger, removed title by contiguity completely from international law, reduced discovery to an inchoate title and greatly assisted the element of effective control to acquire its prominent place among the roots of title.⁷³

There is no need to be confused by these metamorphoses of the principle of recognition as it dissolves altogether, along with the principle of sovereignty. In the end Schwarzenberger identifies the process of historical consolidation of title instead with the concept of acquisitive prescription and pronounces the latter to be the only means of making a territorial title absolute:⁷⁴

“If the conditions of effective, continuous and peaceful exercise of territorial jurisdiction are fulfilled, a relative title grows into an absolute title which is valid *erga omnes*. Acquisition of title in this manner may be called title by way of acquisitive prescription . . . The composite nature of any title based on acquisitive prescription becomes evident from the fact that it rests on the interplay of rules underlying the principles of sovereignty, consent [not recognition!] and good faith [a new addition!].”

These principles, however, do not provide the justification for this uniform mode of acquisition. Rather, acquisitive prescription:⁷⁵

“derives its justification from the difficulties, which grow with the passing of time, of furnishing evidence of matters lying far back”.

And if this justification is insufficient there are other possibilities:⁷⁶

“the tendency not to change a state of things which actually exists and has existed for a long time . . . [and] the strength of the . . . exercise of effective jurisdiction as compared even with rights of sovereignty in the abstract”.

70. *Ibid.*

71. *Ibid.*, 297.

72. *Ibid.*

73. *Ibid.*, 296–7.

74. *Ibid.*, 301.

75. *Ibid.*

76. *Ibid.*

Title to territory is a chameleon sunning itself on the rock of actual possession which can become invisible, leaving the bewildered beast suspended in a web of pseudo-rules. Instead of treating the acquisition of title as a historical process, Schwarzenberger turns the notion of historical consolidation into a legal sham-concept. Perhaps the reason is that legal rules are designed as causal laws, that they are concerned (and can only be concerned) with effects, that processes are beyond conventional legal explanation, because they require an explanation in other terms than the artificial, normative causality which legal rules can provide. In any case, it may be just as well that historians prefer to stick to their own picture book version of international law: a deep, dark pool marked on the surface by sailing instructions, flag-hoistings, proclamations and diplomatic correspondence — which fits so neatly into their own picture book version of history.⁷⁷

“On 2 February 1892, Lord Charles Scott, Rear-Admiral commanding the Australian station, was ordered to send a vessel to the Gilberts immediately after the hurricane season. On 22 April Captain E.H.M. Davis of H.M.S. *Royalist* was given his sailing orders. Landing on Abemama on 27 May, he explained his mission to the chief (Tembinok’s young son) and his council in the *maniaba* or meeting house in the presence of three or four hundred islanders. No taxes would be levied without their consent; their laws and customs in their relations with one another would not be interfered with. If they ‘wished a white man to reside in the group for their better protection’ they must contribute to his support. The Queen would protect any of them who accepted any engagements within her realms but could not do so outside. Davis then read a proclamation declaring a protectorate and hoisted the Union Jack. The supply of arms and liquor to the islanders was henceforth prohibited.

Such a ceremony might satisfy the international lawyers but it was hardly enough in a group of sixteen islands under thirteen different governments. Davis therefore repeated it at Tabiteuea (29 May), Onotoa (30 May), Tamana (31 May), Arorae (1 June), Nukunau (2 June), Beru (3 June), Nonuti (4 June), Tarawa (8 June), Marakei and Abaiang (10 June), Butaritari (12 June), and at Maiana, completing the circuit, on 17 June.”

Here is finally someone who really knows what he is talking about, who has not only counted the islands in the Gilberts, but has also established how many of them had ‘governments’, who is familiar with the vernacular term for meeting-house on Abemama and who can assure us in a footnote that a reference is to “an item in the Royal Commonwealth Society which resembles, but is not identical with, a confidential print in FO 6262 in the P.R.O.”;⁷⁸ a man who naturally sides up with the old salt Davis (who has become mysteriously independent of his sailing instructions) against the shadowy, anonymous international lawyers with their silly rules; a man who gives us all the names and all the dates. Who in his right mind, surrounded by this nest-warm security, would inquire into the accuracy of individual facts or figures given or into the

77. Morrell, *op cit*, 274–5.

78. *Ibid*.

appropriateness of the individual descriptive terms used, and, more importantly, would want to question the validity of the implied message?

What counts is to create the impression of knowing what really happened and telling it in the form of a story which makes (conventional ideological) sense. For historians, it appears, the meaning of history is real, but history itself is an illusion (although it must be presented as fact), whereas for international lawyers, historical practice is real while the law itself is an illusion (although it must be presented as a coherent system of rules). Just as the desire for historical meaning leads to a ritualisation of facts, the need to adapt to historical practice leads to a ritualisation of the rules of international law. Because of this shared tendency to ritualise, historians accept as eagerly their own ritualised version of international law as international lawyers accept their own ritualised version of history. For the latter history becomes an accumulation of legal causes and effects, perceived as a rule-creating mechanisms, for the former international law becomes a timeless system of norms which gives mysterious legal meaning to the historical facts it produces.

Interlude

(i) No matter what happened, what counts are the reasons

It is recognised that the political and economic motives behind German colonial expansion require further study. It is also accepted that "the reasons for Bismarck's change of front in the colonial question in 1884 are still open to discussion" and that it is essential to appreciate "the conditions under which he reversed his attitude" to understand "the methods by which the German annexation in New Guinea was achieved".⁷⁹ There is no indication in the literature, however, that the 'annexation' itself would warrant attention. In particular, there is no suggestion that a closer scrutiny of the German sources was needed, that, for instance, unpublished German Foreign Office records could throw new light on the questions under discussion. The impression is that all the relevant facts are known and that only a fully satisfactory explanation is still wanting.

Yet, anyone looking at the known facts with an open mind must become suspicious. Is it not strange, for example, that while the 'Erskine Proclamation', said to have established a British protectorate in New Guinea, figures prominently in the literature, its German counterpart is never discussed? Apparently no one has seen it, but everyone assumes not only that it exists but also that it is of the same type as the 'Erskine Proclamation'.

The relevant German White Book⁸⁰ — which does include a German translation of the 'Erskine Proclamation' — contains neither the text nor an acknowledgement of the existence of its German counterpart. Instead it reproduces a paraphrase of telegraphic reports by the German naval commander and the Imperial Commissioner, according to which:⁸¹

79. Jacobs, *op cit*, 14.

80. Reichstag, Aktenstück no 167, *Deutsche Interessen in der Südsee II* (henceforth quoted as *Südsee II*). All translations of German source material are mine, unless otherwise indicated.

81. *Ibid*, no 36.

“The land acquisitions made by citizens of the Reich have been supported by the conclusion of treaties with the chiefs. In order to protect the same, our warships have hoisted the German flag at several points at the north coast of New Guinea east of the Dutch border, and in the New Britain Archipelago”.

Who or what was protected? The German citizens, their land acquisitions or the chiefs? How did the hoisting of the German flag afford protection? Was the ‘annexation’ of German New Guinea based on cession treaties rather than flag-hoistings or proclamations?

The mystery deepens if these reports are compared with the text of the Imperial Letter of Protection granted to the Neu Guinea Kompagnie in May 1885.⁸² It ‘confirms’ that the Emperor had assumed “Oberhoheit” ((superior?) sovereignty?) — which is distinguished from the “Landeshoheit” (territorial (internal?) sovereignty?) given to the Company (together with Imperial protection) — over certain geographically defined areas. The same vague term ‘area’ (Gebiet) is used before in two different meanings: the “western parts of the South Sea” and “the harbours and stretches of Coast” which the Neu Guinea Kompagnie had “acquired and taken into possession” — and which (which which?) were “thereupon placed under Imperial protection by German warships”. There is no mention of treaties concluded with chiefs.

When and how did the German Emperor assume ‘sovereignty’ — if it was sovereignty? What was the relation between the protection granted to the Neu Guinea Kompagnie in this charter and the ‘protection’ established by the German warships?

On the one hand, there exists in the Commonwealth Archives Office in Canberra a contemporary copy of the proclamation establishing German protection over the northern Solomons in 1886 which indeed reads like a standard form for the ‘annexation’ of a protectorate of the ‘Erskine’ type.⁸³ If the Germany naval commanders had used the same model in 1884, there was clearly nothing to worry about. On the other hand, there is a puzzling passage in Richard Parkinson’s “*Im Bismarck Archipel*”, written shortly after the 1884 ‘annexation’, according to which:⁸⁴

The taking into possession by the Government of the German Reich of individual small areas in New Britain will contribute little or nothing to the opening up of this island. If the fertile and potentially productive land is to be cultivated and exploited, the whole group of islands must first of all be declared a colony of the Reich.”

— or was this merely an argument for turning the just established protectorate promptly into a colony?

What did Finsch have to say, this most prolific of writers? Very little in his “*Samoafahrten*” or in the published version of his reports in the “*Nachrichten aus Kaiser Wilhelmsland*”. More than ten years later he published yet another, even more self-indulgent, but also more revealing account under the title “*Wie ich Kaiser Wilhelms-Land erwarb*” (“How I acquired Kaiser Wilhelmsland”).

82. *Nachrichten aus Kaiser Wilhelms-Land*, 1885, no 1, 2–4.

83. See C.A.O. AA63/83 Box 228 and below, p 24.

84. Parkinson, R, *Im Bismarck-Archipel* (1887), 68.

Commenting on his first land acquisition, Finsch states that he was certain that the chiefs of Bongu, Gumbu and Korendu-Mana had understood perfectly well the significance of the signs they were placing on the contract of purchase and sale with him, but that he was "less certain that this also applied to the treaty of friendship Herr von Oertzen [the Imperial Commissioner] concluded with them".⁸⁵

So there had indeed been treaties (or at least one treaty) but they were treaties of friendship rather than treaties of cession. But what was the point of concluding treaties of friendship when at the same time 'annexing' the territory of the chiefs in question? And this is precisely what Finsch claimed a few pages later:⁸⁶

"Everyone knew the text of the Imperial proclamation, according to which "the area which is to be placed under the protection"⁸⁷ stretches from 141 E. Longitude [the Dutch border] to Huon Gulf inclusive".

But then, how could the text of an 'annexation' proclamation from which Finsch purports to quote be phrased in the future tense?

In one of the many books published by retired German navy men, Harry König's "*Heiss Flagge! Deutsche Kolonialgründungen durch S.M.S. 'Elisabeth'*" ("Hoist Flag! The Founding of German Colonies by S.M.S. '*Elisabeth*'"), there appeared fifty years after the event, what is presented as the full text of the first 1884 proclamation:⁸⁸

"On the morning of 3 November, 1884, the German flag was ceremoniously hoisted on Matupi by S.M.S. '*Elisabeth*'. Captain Schering read the following proclamation:

His Majesty the German Emperor, has sent me . . . to Matupi to hoist the German flag as a token that the establishments of Messrs HERNSEIM & Co. and those of the Deutsche Handels-und Plantagen-Gesellschaft der Südsee, as well as the land owned by them are to be placed under the direct protection of the Imperial German Reich. In execution of this order I herewith hoist the Imperial Flag on Matupi and request those present to join me in three cheers to His Majesty Emperor Wilhelm I: Long Live His Majesty, the German Emperor."

If *this* was the official proclamation, it certainly did not establish a protectorate of the 'Erskine' type.

Perhaps the text of the proclamation read when the German flag was hoisted in New Guinea was different? König obligingly quotes it as well (in connection with a ceremony in Friedrich Wilhelmshafen on 20 November 1884). This time Schering proclaimed he had been sent to New Guinea to hoist the flag as a token:⁸⁹

"that the existing German land acquisitions and those in the process of being carried out at the north coast from 141° East Longitude east to Huon Gulf inclusive, are being placed under the direct protection of the Imperial German Reich.

85. Finsch, O, "Wie ich Kaiser Wilhelms-Land erwarb", (1902) 1 *Deutsche Monatschrift für das gesamte Leben der Gegenwart* 541.

86. *Ibid*, 544.

87. "... das Gebiet welches unter Schutz gestellt werden soll."

88. König, *op cit*, 68.

89. *Ibid*, 76.

The differences are important: a reasonably precise geographical definition is given and the 'protection' is no longer described as a future event (although it seems strange that land acquisitions which had not yet taken place should be included). But do they justify König's conclusion that the whole northern part of eastern New Guinea had become "thereby" a German colonial possession (unless the German land acquisitions comprised the entire area)? Nevertheless, as there is no reason why König should have tampered with the text of the proclamations (so as to make his own conclusion even less tenable?), it is now most unlikely that the 'annexation' of German New Guinea took place in any of the forms suggested in the recent literature.

What did in fact happen? In the absence of an authoritative legal choreography for 'annexations', there is no choice but to treat the 'annexation' of German New Guinea seriously as an historical process, if an answer is to be found. But where did this process begin, when did it end and what did it involve? Was it sufficient to locate some 'missing' documents, in particular the official text of the proclamations read at the German flag-hoistings? Did they have to be supplemented by the diplomatic correspondence between the German and British Governments on the subject of 'annexations' in the New Guinea region, say between July and December 1884? Was it necessary to start earlier (perhaps with the German/Tongan Friendship Treaty of 1876?) or to continue until a later date (the Anglo/German 'Samoa Treaty' of 1899?)? Was it essential to consider the internal German correspondence between the Foreign Office, the Admiralty and the Neu Guinea Kompagnie — and to do the same in the case of Britain? Was it important to appreciate first of all the issues shaping German colonial policies at home? Was the 'annexation' of German New Guinea part of a world-wide swing from free-trade to protectionism? Was it an upshot of an alliance between East-Elbian estate owners and Hanseatic merchants seeking markets for the cheap liquor distilled from surplus potatoes? Was it the product of an attempt by Bismarck to create tensions with Britain to curb the growing influence of the pro-English 'Crown-prince Faction' in Germany which threatened his position? Did it all stem from Bismarck's personality, or his dislike for Gladstone, or the incompetence of the British Colonial Secretary or the German Ambassador in London? Was it a clash between British arrogance and Teutonic ruthlessness? Did it really begin and end with the financial collapse of Egypt?

Confronted by this array of fascinating questions, it is necessary to remind ourselves firmly that the purpose of this exercise is not to discuss *why* German New Guinea was 'annexed' but *how* it was 'annexed'. The only relevant 'why' is: why it was 'annexed' in a particular way because this may provide a key to understanding the elusive 'how'. Or is there a more specific, 'legal' way of proceeding?

If lawyers have no rules under which they can subsume the facts of a case they begin looking for precedents — unless they muster the courage for a direct analysis of the interests at stake — a risky method, involving embarrassing generalisations and dubious a priori evaluations. Yet sometimes, these are necessary evils.

(ii) *Diving into the deep end: a model*

During the early 1880's both Britain and Germany became convinced that they

had to acquire some kind of territorial rights to areas in Africa and the Pacific so far unclaimed by European powers. Both formed this conviction with reluctance, as they were both trying to avoid — primarily for financial reasons — the acquisition of ‘crown’ colonies. The fear that the others would ‘get in first’ was for both countries a major motive for territorial expansion.

The main difference was that Germany did not possess any colonies whereas Britain already owned a colonial empire, in particular the Cape Colony in South Africa and Australia and New Zealand in the South Pacific — all settler colonies with a dominant and growing white population and large, as yet underdeveloped, economic resources. Therefore the aim of protecting national economic interests in the unclaimed areas was, in the case of Britain, overshadowed by ‘strategic’ interests: the interests of the existing British colonies in preventing foreign powers from occupying neighbouring territory.

If it was Germany’s aim to protect national economic interests without having to shoulder the financial and administrative burdens of ‘crown’ colonies, it was natural to revive the idea of chartered companies to make those whose immediate interests were protected foot the bill. If it was Britain’s primary aim to prevent other powers from acquiring territory adjoining existing British settler colonies, it was equally natural — since handy legal weapons such as title by contiguity or by discovery were no longer serviceable — to justify the acquisition of limited territorial rights with the need to protect the indigenous population from interference by individual Europeans.

Both Germany and Britain were thus moving towards a ‘protectorate’ alternative, but they approached it from opposite directions. Germany wanted to establish German companies as self-supporting European governments to be given external protection by the Reich. Britain used the lack of an indigenous government capable of maintaining law and order in the face of European intrusion as a justification for establishing protectorates over the indigenous population.

Examined more closely, this sharp distinction tends to blur: firstly, because Britain was anxious to off-load the costs of administering these ‘protectorates’ onto the neighbouring British settler colonies (in whose interest they were really established), and secondly, because the protection of the indigenous population usually went hand in hand with an extension of British jurisdiction, preferably over the total European population, and also over the indigenous population insofar as lawless acts against Europeans (in particular British subjects) were concerned.

In other respects the differences remained real. For instance, as the German companies were supposed to carry the full financial and administrative burdens and as they were keen to develop the full economic potential of the area, Germany was not concerned to minimise the internal responsibilities of the colonial power in a ‘protectorate’. On the contrary, it was in her interest to increase the legal responsibilities of colonial powers so as to make it difficult for other powers to interfere with her interests by establishing territorial paper claims. For Britain, on the other hand, a ‘colonial protectorate’ which involved a minimum of responsibilities and could be easily established was the ideal.

Since Britain had to emphasise the helplessness of the indigenous people and the need for their protection, she tended to treat them as minors, incapable of

concluding cession treaties. Germany, by contrast, had nothing to lose by demanding that interested German parties procured treaties of cession to make their claims legally more respectable — and also as a token that they would be able to exploit the areas in question peacefully. These areas could also be comparatively small. A decent harbour and a few hundred square miles with good economic potential could go a long way, whereas Britain was interested in large, unbroken strategic buffer zones. This increased the practical difficulties in proceeding by way of cession treaties considerably, especially in areas like Melanesia which lacked substantial, indigenous 'states'. The unilateral assumption of external sovereignty by proclamation was thus often the only realistic option left for Britain.

While Britain's strategic interest turned her 'colonial protectorates' into dubious legal creatures, Germany's logistic disadvantages forced her to use dubious diplomatic methods in establishing them. The areas in question were at the door-steps of British colonies with naval bases and established communication links with the motherland whereas the brand-new German Reich with its infant navy had to operate from the other side of the globe. If there was to be an open race, Germany had lost it before the start. The only 'honest' alternative was a bilateral 'annexation' moratorium for the duration of diplomatic negotiations — or an advance capitulation of Britain — both of which obviously depended on an unlikely balance of interest, power and trust.

(iii) Does history repeat itself? The Southwest African precedent

This is the general background of 'interests' against which the 'annexation' of the German New Guinea must be seen. There is also a 'precedent' with which it can usefully be compared: the 'annexation' of German Southwest Africa, the first modern German colony, which was still incomplete when the 'annexation' of German New Guinea was getting under way.

The area is that between the British Cape Colony in the south and Portuguese Angola in the north. Until the early 1880's little official interest was shown in it. European missions were active (the German Rhenish Mission since the 1860's) and traders had established themselves, including the German merchant Lüderitz. Britain had claimed Walfisch Bay, the key harbour in the centre of the coast (plus a chain of small off-shore islands to the south), in the 1870's and had even collected duties for a short period, but they were later refunded as neither Britain nor the Cape Colony were prepared to take on the corresponding responsibilities.

There had been intermittent discussion about the protection of German citizens between Germany and Britain since 1868, but a new game began when Lüderitz approached the German Government in November 1882 asking whether land he intended to acquire around Angra Pequena could be placed under the protection of the Reich.

In February 1883 Germany informed Britain of Lüderitz's plans and asked whether she claimed sovereign rights over the area. In August Germany instructed her consul in Cape Town to give Lüderitz consular protection and to advise him that he could expect to be granted the protection of the Reich, provided his claims did not interfere with established claims by Britain or the local population. On 12 November — the February inquiry still unanswered —

the German Ambassador in London was instructed to inquire again whether Britain claimed the Angra Pequena area and, if so, on what legal basis she founded her claims. Britain replied on 22 November that she only asserted sovereignty over Walfisch Bay but that claims by another power, whether to sovereignty or jurisdiction, would infringe her legitimate rights. Nevertheless she was confident that arrangements could be made which would allow German merchants to participate in the settlement of Angra Pequena.

On 31 December Germany asked again for the legal basis for the British position, because she felt obliged to support and protect her citizens wherever sufficient legal protection was not guaranteed by a recognised government. On 24 April 1884 — no reply having been received to the December note — Germany instructed her consul in Cape Town to declare officially that Lüderitz's establishments were under the protection of the Reich.

On 3 June 1884 the German consul reported the Cape Colony was ready to take over the coast between its border and Walfisch Bay, including Angra Pequena. Germany therefore instructed her Ambassador in London to inform Britain confidentially that such an annexation would not be recognised.

On 10 June, Bismarck sent a lengthy despatch to Count Münster, the German Ambassador in London which Aydelotte summarises as follows:⁹⁰

“He [Bismarck] had tried to ascertain England's rights over Angra Pequena “without unnecessarily awakening fears about them”. For this reason, he had put his question in the form of whether England was in a position to grant protection to German settlements in South Africa. Although he already knew that this was not the case, he had desired an official statement from the British Government. His question as to England's claims and title could have been answered in a week, without reference to the Cape Government. An examination of the list of English annexations would have sufficed. But this simple question had been interpreted by Lord Derby [the Colonial Secretary] and Lord Granville [the Foreign Secretary] to mean that Germany had asked whether England would perhaps like to annex something besides Walfisch Bay on that coast. The claim that the vicinity of English possessions gave England the right to exclude other powers from the territory in question was grossly unfair, and Bismarck thought England had not treated Germany with justice. He had, he said, discussed this question with Lord Ampthill [the British Ambassador in Berlin] the day before, and had explained to him that Germany could not refuse protection to her citizens when it was demanded. Bismarck added that he did not intend to establish a colonial system like the English one, “with garrisons, governors, and officials”, but was thinking of something along the lines of the English East India Company. He asked Münster to gather from this despatch the line he should take with Lord Granville, and said that it was essential to avoid making the impression of having sacrificed the vital interests of Germany to a good understanding with England, however desirable that might be in itself.”

Münster apparently did not act upon this despatch since one of Bismarck's sons, Herbert, arrived in London to negotiate directly with Granville. As a result

90. Aydelotte, W, *Bismarck and British Colonial Policy* (1937), 90–1.

Granville took the 'Angra Pequena question' for the first time to Cabinet and informed Herbert Bismarck on 22 June 1884, that:⁹¹

"after careful consideration . . . we are not in a position to question the right of the German Government to afford protection to its own subjects who had settled there."

The official British response to the German note of December 1883 was dated 19 July 1884. Britain declared that she was prepared to recognise the right to give protection to German subjects at Angra Pequena as soon as Germany would give assurances that she would not set up a penal colony. A few days earlier Britain (that is the Colonial Office) had cabled to the Cape Colony, that she would not oppose the German intentions regarding Angra Pequena but was ready to proclaim under British protection any other places on the coast where British subjects had claims, provided the Cape Colony would pay the costs. On 16 July the Cape Parliament voted unanimously for the annexation of the entire coast, including Angra Pequena. In response the German flag was hoisted by S.M.S. "*Elisabeth*" in Angra Pequena on 7 August and the coast between the Cape border and Angra Pequena was proclaimed to be under German protection.

On 17 August 1884 Germany informed Britain that she had been embarrassed by the decision of the Cape Parliament as she had made "exactly the same decision". This mysterious pronouncement was clarified two days later when the German Embassy in London was instructed to notify Britain that German subjects had made acquisitions by treaty with native chiefs north of those of Lüderitz and had asked for protection by the Reich, which Germany was disposed to grant. On 23 August orders were given to hoist the German flag on the land acquired by a Germany company (involving von Hansemann, the 'leader' of the Neu Guinea Kompagnie) near Walfisch Bay and on 26 August a note was delivered in London, requesting that a sanctioning of the decision of the Cape Parliament be refused.

It seems that the order to restrict the flag-hoisting — for the time being — to the acquisitions near Walfisch Bay had been overtaken by events and that S.M.S. "*Wolf*" had hoisted the flag in various places up to the Portuguese border. The German Government was informed of this by cable from Cape Town on 5 September. The British Government was notified three days later and the reply was given in a note of 22 September:⁹²

"[I]f, as Her Majesty's Government gather from the information now before them, it is the intention of Germany to establish in the region described a Colony or territorial political protectorate of a defined type, Her Majesty's Government will welcome Germany as a neighbour on those parts of the Coast which are not already within the limits of the Cape Colony, and not actually in British possession."

This was, roughly, the state of affairs concerning the 'annexation' of Southwest Africa a few weeks before the German and British flags were hoisted in New Guinea. Aydelotte has given a detailed account of the many steps involved to which — as far as it goes — perhaps little can be added.⁹³

91. Quoted *ibid.*, 98.

92. British Parliamentary Papers, C-4262, Enclosure to no 42.

93. I have not attempted to consult the primary German sources relating to the 'annexation' of Southwest Africa.

Two features stand out: on the one hand the embarrassing wealth of diplomatic communications; on the other, a dearth of information on what might be called 'actions on the spot' — the treaties concluded by Lüderitz and others, the proclamations (if any) read by the German naval commanders etc. Aydelotte depicts the 'problem of Southwest Africa' as an ellipse centering on Berlin and London with Cape Town very much at the periphery and Angra Pequena somewhere in outer space. For him, the 'problem' was caused by misunderstandings between Granville and Bismarck. Granville, together with the German Ambassador in London and the British Ambassador in Berlin, had failed to recognise that Bismarck had changed his mind and Bismarck had failed to state his new aims clearly. If he had only disclosed what he wanted, the British Government, in particular Prime Minister Gladstone, would have been only too glad to give it to him. However, because Cabinet did not know, the Colonial Office under the weak Lord Derby was put in a position where it yielded to the chauvinistic demands of the British colonies and did things or allowed things to happen which the rest of Cabinet neither knew or wanted and which angered Bismarck.

In this scheme of things 'actions of the spot' as well as most political or economic — let alone legal — consideration indeed hardly mattered. The task was reduced to opposing the bungling inefficiency of British democracy with the purposeful manipulations of Bismarck's autocracy. Nonetheless, handling the scheme required some delicacy on the part of Aydelotte. While allocating most of the immediate blame to Britain, he was convinced that the ultimate responsibility lay with Germany. His solution was to 'neutralise' Granville by turning Lord Derby into the main villain and by building up Gladstone as the secret hero of the piece. As for Germany, or rather Bismarck, Aydelotte saw the decisive fault curiously enough in his underestimation of the strength of the German position in the 'colonial question'. Bismarck could have declared his plans without having to fear that Britain would have thwarted them; he could have been honest!

This is the first leg of the argument. The second leg is that Bismarck knew at any point in time precisely what he wanted. It is worth quoting the relevant paragraph of Aydelotte's conclusion in full:⁹⁴

'It is clear that Bismarck did not act deceptively at the beginning of the negotiations, for at that time he had probably not decided on a colonial policy. But when he changed his plans he made no effort to inform the British Government, and his earlier communications thus served in effect as a screen for his intentions. Of particular interest is Bismarck's use of the word "protection". With considerable skill, he avoided defining it throughout the entire course of the negotiations. At the time of his first enquiry he left the impression that this term as used by him definitely did not connote annexation. Hence the British Government failed to realise what he was about when he indicated he might extend protection or when he actually did so. Later he explained to England that the possibility of a British annexation had now been excluded, and when England expressed surprise at this situation, Bismarck pointed to his announcement of

94. *Ibid.*, 128.

“protection”. The meaning he attached to this ambiguous word changed in the course of time, but this change was never explained to England. It is certain that Bismarck deliberately kept Münster incompletely informed. It is certain also that he expected opposition to his projects from the English side, and in view of the whole history of the negotiations, he can hardly be absolved from the charge of seeking to further his aims by concealing them.”

This is the argument that transforms the many and varied “misunderstandings” into a coherent conspiracy theory. Whatever its merits as an explanation for the tensions over Southwest Africa, its application to the ‘re-run’ in New Guinea must be far less convincing. Perhaps Aydelotte was still using too much black and white, and not enough grey (not to mention other colours)? Perhaps Bismarck was not quite as efficient as the ‘conspiracy theory’ makes us believe and perhaps Britain bungled with some purpose?

Part II

(i) Diplomatic foreplay

In 1880 a group of influential German businessmen, headed by the banker A. von Hanseemann, asked Bismarck for support for an ambitious colonial enterprise in the New Guinea area. Although its centre was to be in Mioko Harbour in the Duke of York Islands (which had been ‘purchased’ for the German Reich in 1878), the main concern was to establish trading stations at the north coast of New Guinea between East Cape and the Dutch border.⁹⁵ Support was rejected because the defeat of the ‘Samoa Bill’ (aimed at assisting the foundering Godeffroy enterprise in the Central Pacific) by the German Parliament had shown that there was not sufficient support for an active colonial policy. Nevertheless the plans were not abandoned and began to gather new momentum when Hanseemann and his friends were joined by Dr Otto Finsch as a Pacific expert in late 1882. Hanseemann hoped to finalise the preparations by April 1883, but it proved impossible to complete “the political arrangements”.

In March 1883, Chester, Resident Magistrate on Thursday Island, had been instructed by the Government of Queensland to annex the whole, non-Dutch, eastern half of New Guinea on behalf of Britain, largely as a protective measure to forestall a German ‘annexation’. Chester carried out his instructions on 4 April, but the British Government refused to approve the annexation because the apprehensions of foreign annexations were unfounded and because, in any case, the annexation of the whole of eastern New Guinea would not be justified on these grounds.⁹⁶ However, Lord Derby added to this disavowal:⁹⁷

“I trust that the time is not now distant . . . when the Australasian colonies will effectively combine together, and provide the cost of carrying out any policy which after mature consideration they may unite in recommending, and which Her Majesty’s Government may think it right and expedient to adopt.”

95. See *Südsee* II, no 1.

96. See British Parliamentary Papers, C-3691, Enclosure in no 14.

97. *Ibid.*

Hansemann decided to lie low and let things calm down. The moment for renewed action came a year later. On 24 April 1884 Bismarck had announced that the acquisitions of Lüderitz in Southwest Africa had been placed under German protection — and Hansemann hoped for a similar treatment. He also knew he had to act quickly since it became known in May that the British Government was prepared to station a Commissioner (plus staff and steamer) in New Guinea as soon as the Australasian colonies committed themselves to contribute to the costs. Under these circumstances it was resolved to send out an expedition under Finsch as soon as possible.

Finsch left Berlin for Sydney on 16 June but Hansemann waited until 27 June before asking for the protection of the Reich. Again the timing was closely connected with developments in respect of Southwest Africa. Having just learned of Britain's recognition of the protection given to Lüderitz, Bismarck used the debate of a shipping subsidy bill on 23 June 1884 to make a fundamental statement of his new colonial policy in Parliament.⁹⁸

‘It is my intention . . . to proceed not so much by way of annexing overseas provinces to the German Reich but by granting charters . . . and by leaving the administration of colonies essentially to those interested in them . . . [I]t is not our intention to found provinces but to protect commercial enterprises, but those at the highest level of development, even those which acquire a sovereignty, which will, however, ultimately always remain a commercial sovereignty dependent on the German Reich. . . . We will protect the free development of such enterprises from attacks from the neighbourhood as well as from oppression and injury by other European powers. We naturally hope that the tree will flourish . . . as a result of the endeavours of the gardener who planted it, but if it does not, if the planting was a mistake, then the damage will be felt less by the Reich . . . than by the entrepreneurs who have embarked on the misconceived enterprise.’

This was a reasonably clear statement of Bismarck's political aims, but the legal means by which they were to be achieved were left unspecified — not because Bismarck did not want to disclose them, but because he did not know himself. Bismarck envisaged the acquisition of sovereign rights, at least on the part of the German companies, but he was not sure how far and in what way this would involve the Reich, although he saw that there was ultimately little choice but to accept some kind of international responsibility over these ‘company colonies’.

On 27 June Hansemann addressed a lengthy petition to Bismarck, setting out the historical background of the enterprise and assuring that it was designed in accordance with the principles laid down by Bismarck in Parliament. Finsch had been given the task of acquiring land on the largest possible scale and in such a way that it would form the basis for a viable colony. The petition concluded:⁹⁹

‘Dr Finsch and Captain Dallmann have been instructed to keep their plans secret and to proceed in particular to the southern part of New Britain and

98. Quoted in Koschitzky, M von, *Deutsche Kolonialgeschichte*, vol 1, 164. Bismarck used the feudal term ‘lehnbar’ — for ‘dependent’ — which, like the rest of this flowery speech, is difficult to translate.

99. *Südsee* II, no 19.

the northeast coast of New Guinea opposite, up to 140° Longitude, whereas a visit to the southeast coast of Torres Straits has been explicitly excluded.”

The request was “to grant the enterprise . . . protection insofar as occasion arises”, and in particular “to issue the consular officials and naval commanders with the orders and powers required to register the land acquired and to place it in suitable forms under the protection of the Reich”.¹

As can be seen, Hansemann was as vague as Bismarck. He did not ask for a formal Imperial charter or that a certain defined geographical area should be placed under Imperial protection — nor did he indicate that rights of territorial sovereignty were to be acquired.

Partly in response to this petition the German Foreign Office prepared a memorandum for Bismarck on 10 July.² It referred first of all to recent orders by Bismarck to instruct the Ambassador in London to bring the German interests in the Pacific again to the attention of the British Government, since previous communications had received only evasive and incomplete replies during the last ten months. It appeared that the attitude of the British Government was now more responsive, so that it was, perhaps, a good time for reaching a general agreement about the respective German and British interests in the Pacific. If such an agreement was not reached there was, in view of the push for annexations on the part of the Australasian colonies, a serious danger that existing German commercial interests would be destroyed or at least not be permitted to expand.

The Hansemann petition is then introduced and considerable emphasis is placed on the disclosure of Hansemann’s plans by the Deputy Bamberger in Parliament, a disclosure which was not only bound to have repercussions in Australia, but which had probably already speeded up the decision of the British Colonial Office to station a Commissioner in East New Guinea.³ The memorandum concluded:⁴

“Under these circumstances open and trusting [*vertrauensvolle*] negotiations with the British Government are perhaps the best way of avoiding that German interests are seriously damaged”.

Dr. Stübel, the acting Consul General for the Pacific islands, had suggested introducing German jurisdiction in all areas in which an annexation by Australia was to be prevented since, if this was not done, British jurisdiction would soon be introduced (in accordance with proposals made by the Western Pacific High Commission) — whereupon a proclamation of British sovereignty would be merely a question of time.

It was more important, however, to reach an understanding with Britain about respective spheres of interest and about the principles according to which they

1. *Ibid.*

2. It must be remembered that Bismarck was the Chancellor of the Reich (and the counterpart of Gladstone) and that the German Foreign Secretary, primarily responsible for diplomatic negotiations with Britain (and the counterpart of Granville) was, at the time, Count Hatzfeld.

3. This decision had been announced in the British Parliament on 7 July, the Australian Colonies having agreed to contribute the £15,000 required.

4. *Südsee* II, no 19.

were to be defined.⁵ Consequently, the memorandum also did not propose that immediate action should be taken on the Hansemann petition. Instead, further instructions to the German Embassy in London were suggested.⁶

Before diplomatic negotiations began, the climate had already changed, mainly as a result of events in relation to Southwest Africa. Bismarck had announced the new German colonial policy in Parliament on 23 June in the belief that Britain had accepted Germany as a new colonial power and that, in particular, the Angra Pequena question had been settled. Less than a month later this belief was shattered.⁷

On 30 July Hatzfeld signed a second memorandum for Bismarck's (other) son, Wilhelm, as a basis for a report to his father who had retreated to this country seat, Varzin. It was accompanied by a large collection of documents and far more complex than the previous one. The main thrust was this: Attempts to form a joint colonial front with France had failed. France was eager to utilise German/British tensions over colonial issues but reluctant to cooperate with Germany. Britain, on the other hand, showed no signs of seeking an agreement with Germany over the respective colonial claims in the Pacific. On the contrary, under pressure from the Australian colonies it was preparing the ground for new annexations. Thus Germany would be well advised to acquire "pledges" to improve its bargaining position in subsequent diplomatic negotiations with Britain.

Turning to the Hansemann petition, Hatzfeld regarded it as "self-evident" that the request for instructions to consular officials and naval commanders to place the land to be acquired under the protection of the Reich should be granted. He proposed therefore — subject to possible counter-orders from Bismarck — to instruct the Imperial Commissioner in the New Britain Archipelago, von Oertzen, accordingly. But was this sufficient? Was it not necessary to go further and hoist the German flag in the New Britain Archipelago and along the north-eastern coast of New Guinea where German settlements already existed or were in the process of being established?⁸

"Since the Cape Colony — acting on direct instructions from the British Colonial Office — has recently, during our negotiations with Great Britain over Angra Pequena, declared in one move the annexation of the entire [Southwest African] coast . . . with the exception of the area which Lüderitz had already acquired by contract, it must be feared that otherwise the British flag will either precede or follow the German enterprises wherever the German flag is not already flying. It appears to me essential to acquire by quick action as many negotiable objects as possible to obtain the most favourable factual basis for diplomatic negotiations with Great Britain over the Pacific questions."

5. The memorandum uses the term "Schutzgebiet" in this context which is usually translated as "protectorate", but the technical German term for 'protectorate' is "Protektorat". The term "Schutzgebiet" was a new creation without a precise meaning, but certainly at that time much closer to a 'sphere of interest', an area where, in relation to the other power, Germany or Britain would have the exclusive right of granting 'protection' (Schutz), whatever legal form this was going to take.

6. Reichs-Kolonial Amt (henceforth: RKA): File 2789.

7. See above, p 33.

8. *Ibid.*

Should Bismarck agree with this approach, Hatzfeld would send the necessary instruction to von Oertzen and the Commanders of S.M.S. “*Hyäne*” and “*Elisabeth*” by coded cable to the German Consul General in Sydney.

Bismarck agreed, but no decisive action was taken until reports of the crucial meeting between the German Ambassador in London, Count Münster, and Granville on 8 August 1884 had been received.

On 2 August Hatzfeld had sent a dispatch to Münster outlining the German view of the current British colonial policy in the Pacific: the British Government wanted to avoid the costs involved in the acquisition of new crown colonies, but was prepared to extend the British sphere of power provided the existing colonies assumed the main political and financial responsibility. It had to be a matter of concern for Germany that the independent parts of the Pacific where German commerce could until now develop freely and which could also be regarded as targets for German colonial enterprises were suddenly treated as the natural domains of Australia. It was necessary to prevent the realisation of these extravagant Australian plans. It was hoped that a friendly agreement with the British Government could be reached based on mutual good will.

The despatch was accompanied by a pro-memoria which instructed Münster to discuss the matter with Granville as soon as possible, in a friendly manner, but in such a way that the latter was left in no doubt that the German Government wanted to know quickly and for certain what the chances of arriving at an understanding with the British Government were.⁹ It is certain that Münster did not deliver the pro-memoria to Granville. On the other hand, there is no doubt that he discussed it with him. What is in question is the form this discussion took. According to Granville, Münster merely communicated its ‘substance’;¹⁰ according to Münster, he read it (or at least an abbreviated version of it) to Granville, who made notes.¹¹

From our point of view this difference is not essential. Whatever happened during the discussion, the German Government did (and could reasonably) proceed on the basis that the British Government had been informed about the German position as outlined in the pro-memoria.¹² The four key points were:

1. Germany wished to place those areas in which German trade either already dominated, or to which expensive expeditions were in the process of being undertaken, under the direct protection of the Reich;
2. Germany wished to arrive at an understanding with Britain about the geographical limitations of the respective spheres of interest;
3. Germany denied that Britain had a claim to certain groups of islands, in particular New Britain, New Ireland and the Solomons; and

9. *Südsee* II, no 20.

10. See Jacobs, M, op cit, 14–26, where she discusses the meeting and its implications in some detail. While her conclusion — that it “is impossible to determine just what occurred” — is sound, her assessment is in other respects less convincing. In particular, she does not make sufficiently clear that, to appreciate Bismarck’s position, it is more important to establish what he *believed* to have occurred.

11. Report to Bismarck of 13 January 1885, RKA: File 2796.

12. Jacobs, op cit, makes no attempt to show that Bismarck knew that Granville had not been properly informed by Münster or that he did not even want him to be properly informed — which would be essential to substantiate a ‘conspiracy theory’.

4. Germany recognised that the wish of the Australians to prevent a foreign power from occupying the south-east coast of New Guinea was justified but regarded as unjustified the claim that the whole eastern half of New Guinea was a natural annex of Australia and that land acquisition by Germans or the exercise of German protection was therefore an infringement of legitimate Australian interests.

Of the two conclusions drawn, the first applied specifically to New Guinea while the second had more general implications:¹³

“Those parts of New Guinea where no civilised power actually exercises sovereignty are thus with equal justification the target of German and British enterprises. In the interests of our respective subjects and in order to avoid frictions between them we wish to reach in advance agreement with the British Government about the boundaries of our respective areas of protection [Schutzgebiete] on this island and in the Southsea Archipelago in general.”

What the German Government did not know, and what Granville did not tell Münster on 8 August was that the British Government had decided on 6 August to declare a protectorate over the entire eastern half of New Guinea.¹⁴ Whatever Münster discussed with Granville convinced the latter that it would be appropriate to reconsider this decision. He consulted with Cabinet and on the same day addressed the following private letter to Münster, a copy of which was immediately sent to Bismarck.¹⁵

“Dear Münster,

I have had the opportunity of consulting my colleagues on the subject of our conversation on the South Sea islands.

I am authorised to add that we have no desire to oppose the extension of German colonisation of the islands of the South Sea, which are unoccupied by any European powers.

The extension of some form of British authority in New Guinea which will be shortly announced will only embrace that part of the island which specially interests the Australian colonies without any prejudice to any territorial questions beyond these limits.

Yours sincerely,
Sgd. Granville”

Although the precise meaning of this letter (in particular the phrase “without prejudice to any territorial questions beyond these limits”) is not altogether clear, the general tenor is beyond doubt: a green light for German colonisation in the Pacific. Yet, the impact of this letter on German policy decisions should not be overestimated. While it was a reassuring response to the questions raised in the pro-memoria of 2 August (or so it looked at least from the German point of view), the revised German course of action (diplomatic negotiations combined with the acquisition of ‘negotiable objects’) had already been decided, and the instructions by the German Foreign Office, although despatched on 19 August, were based on drafts prepared before the Granville letter was received and not significantly amended afterwards.

13. *Südsee II*, Enclosure in no 20.

14. See Jacobs, *op cit*, 20; see also Münster’s report of 9 August, *Südsee II*, no 23.

15 RKA: File 2791.

There was, first of all, a draft for a coded cable to Consul General Krauel in Sydney:¹⁶

“Inform Commissioner von Oertzen in New Britain by steamer “*Samoa*”: it is intended to place under the direct protection of the Reich land acquisitions by German nations on the undoubtedly independent islands of the New Britain Archipelago and along the north-eastern coast of New Guinea, east of 141° Longitude — that is the Dutch border — to Huon Bay, inclusive. He is empowered to support these acquisitions by concluding treaties and to register them — subject to valid claims of third parties — as German property. Naval vessels will soon hoist the German flag at the more important places.”

The request of the German Foreign Office to the Imperial Admiralty of the same date and the subsequent sailing instructions to Captain Schering of S.M.S. “*Elisabeth*”¹⁷ were mainly concerned with logistic details. Only the preamble to the former document requires attention.¹⁸

“His Majesty the Emperor has graciously approved that, in order to protect our interests in the Western part of the Pacific, in particular in the islands of the New Britain Archipelago and on that part of the north-eastern coast of New Guinea which is outside the legitimate Dutch and British spheres of interests, the German flag is to be hoisted forthwith, wherever German establishments already exist or are in the process of being established, so as to prevent the hoisting of another flag in these areas, before we have the opportunity to place these areas in appropriate forms under the protection of the Reich.”

The emphasis on the defensive nature of the flag-hoistings is as obvious as the growing awareness that a distinction had to be made between the German establishments (to be placed under protection now) and the geographical areas which it was hoped to place under German protection at a later stage, and in appropriate forms which had not yet been worked out.

These instructions out of the way, Hansemann was informed on 20 August that the planned land acquisition would be placed to the same extent and in the same forms under the protection of the Reich as the Hanseatic enterprise in Southwest Africa:¹⁹

“as soon as the independence of the areas whose acquisition is intended has been established, that it to say, as soon as it has been proven that your claims do not interfere with the legitimate rights of other nations.”

Just as in the case of Southwest Africa, the green light given by Granville was followed by a shot across the bow by Derby, although it was this time left to the

16. RKA: File 2790. The published version (*Südsee* II, no 24), not purporting to do more than paraphrase its content, differs significantly from the text given here. It contains no reference to the ‘Huon Bay’ but describes the area within which the German flag was to be hoisted as the New Britain Archipelago and “that part of the north-east coast of New Guinea which is outside the legitimate Dutch or British spheres of interest”.

17. See RKA: File 2793.

18. Partly because it defines the geographical area in question in terms which are identical with those used later in paraphrasing the telegram to Krauel. See RKA: File 2790.

19. *Südsee* II, no 25.

Foreign Office to pull the trigger of the gun the Colonial Office had loaded. On 19 September a note informed the German Government:²⁰

“that Her Majesty’s Government now proposes to proclaim and establish the Queen’s prerogative over all the coasts of New Guinea not occupied by the Netherlands Government, except that portion of the north coast, comprised between the 145th degree of East Longitude and the Eastern Dutch Boundary.”

The extension of the foreshadowed protectorate over the south-east coast to cover almost three quarters of the north-east coast was justified as follows:²¹

“The 145th degree of Eastern Longitude has been fixed as the Western British limit on the northern coast, in order that it should embrace the territory owned by the natives on the Maclay Coast, whose claim for British protection has long been under the consideration of Her Majesty’s Government, and was one of the principal reasons which determined the Cabinet to advise the Queen to assume the responsibility of establishing a protectorate in New Guinea.²² The Maclay Coast extends to the southward as far as Cape King William, where commences that part of the coast extending to the Dutch Southern Boundary, which for obvious reasons it is indispensable to bring under British control.”

Granville had instructed the Embassy in Berlin to add:²³

“that Her Majesty’s Government had been actuated by their earnest desire to promote the friendly understanding which the Government of the Emperor has proposed to establish with reference to these territorial questions.”

It is not difficult to imagine the German reaction to this response to the August offer to negotiate about the limits of the respective spheres of interests in the Pacific. But how should Germany reply? Should she again put the cards on the table and protest on the basis that a German colonial enterprise was in the process of being carried out on the north-east coast of New Guinea? Britain, so it looked from the German point of view, was not prepared to take notice. The view that the acquisition of territorial pledges was needed before meaningful diplomatic negotiations could begin had been confirmed. A settlement of the Pacific questions was a matter of bargaining strength rather than mutual trust. Germany closed her visor and merely lodged a formal protest in a notice to Granville on 27 September:²⁴

“[T]he projected extension of the British protectorate in the north and north-east of New Guinea, after the previous declarations of your Excellency, comes unexpectedly to the Imperial Government, and they wish temporarily to reserve to themselves the adoption of any attitude on the

20. British Parliamentary Papers, C-4273: Enclosure in no 14.

21. *Ibid.*

22. For the story behind this reference involving the Russian Nicolai Mikloucho-Maclay, see Greenop, F, *Who Travels Alone* (1944), (especially the appendix) and Germer, E, “Miklucho-Maclai und die Koloniale Annexion durch das Kaiserliche Deutschland” (1961) *Museum für Völkerkunde*, Leipzig.

23. C-4273: Enclosure in no 14.

24. This translation was published as Enclosure in no 15 in C-4273 of the British Parliamentary Papers.

subject. According to the conception of the Imperial Government, the delimitation of the areas which interest both sides on that stretch of coast should be the subject of a friendly understanding by means of a commission."

In a note of 9 October the British Government back-tracked:²⁵

"[t]he declaration to be made shall limit the British Protectorate to the whole of the south coast . . . instead of that . . . at first proposed. This will be done without prejudice to any territorial question beyond these limits. It is with great satisfaction that Her Majesty's Government have come to an arrangement in which they find themselves in perfect accord with Germany. In case any questions should arise as to those districts which lie beyond the limits described, Her Majesty's Government are of the opinion that it would be better to deal with them diplomatically than to refer them to the Commission which it is proposed to appoint with regard to the islands of the Pacific."

On 15 October the German Charge d'Affaires called on Granville to express the Imperial Government's satisfaction²⁶ — and this is where the diplomatic aspect of the matter rested for a while.

(ii) Treaties and land acquisitions

Finsch had left Sydney with the "*Samoa*" on 11 September. He arrived in Mioko, in the Duke of Yorks, on 26 September and departed on the 7 October, accompanied by the Imperial Commissioner von Oertzen, on his first trip to New Guinea. On 11 October, the "*Samoa*" dropped anchor in Constantinhafen:²⁷

"We remained . . . until the 18th, visited the neighbouring villages, and got to know the natives who soon lost their shyness. By and by, I learned enough words to purchase a piece of land on which we built a house."

What Finsch fails to mention is that the Neu Guinea Kompagnie had already begun to spin a net of red tape for the new colony. It had supplied Finsch with two sets of printed forms for his land acquisitions: one for purchases, the other for the taking into possession of ownerless land.

To maximise the political significance of these land acquisitions, the vendors not only transferred their property rights but also renounced in favour of the purchaser all public and sovereign rights they held in relation to the land in question. They further agreed that the land was to be registered as German property in the records of the competent German Consulate, that it was governed by German law and placed under the protection of the Reich. As it was unlikely that Finsch would get very far with the purchase of large areas of land in New Guinea, another clause had been added in which the vendors agreed that the purchaser also entered "with all aforementioned rights" into the possession of all adjoining land which could be shown to be neither owned nor occupied by

25. Published as Enclosure in no 16 (*ibid*). If Granville had not switched back to diplomatic negotiations, but had, like Germany, appointed a commissioner, the commission could have started work well before any German or British flag-hoistings.

26. *Ibid*, no 15.

27. *Nachrichten aus Kaiser Wilhelms-Land*, 1885, vol 1, 9.

'natives'. The definition of the limits of this 'ownerless' land was left open in the form. Finsch chose a generous interpretation and inserted as a matter of course:²⁸

"The area stretching from the property described above northwest to 141° E. Longitude and southeast to the Huon Gulf, inclusive."

The area actually purchased on 17 October 1884 for 150 Marks worth of trade goods amounted at the most to 100 hectares — no impressive beginning for "land acquisitions on the largest possible scale as a basis for a viable colony" — but then Finsch had, with good reasons, not a high opinion of Constantinhafen as a port. Since he was primarily trying to secure the key harbours, he steamed across Astrolabe Bay where Friedrich Wilhelmshafen (Madang) was conveniently discovered and named on 19 October:²⁹

"To purchase land was impracticable as the natives only claim their gardens . . . Furthermore, it would hardly have been possible to identify the owners as several settlements share one garden."

Finsch therefore used the deed for the occupation of ownerless land and took possession of the harbour on 21 October. The form was shorter and did not include the splendid clause according to which the local people agreed to the occupation of all ownerless land between Vanimo and Morobe. Still, having certified that a defined area of ownerless land had been taken into possession:

"including the shores of the harbour, off-shore islands and reefs within the distance recognised by international law, as well as all adjoining lands on the mainland, rivers, lakes, forests and mountains which can be shown not to be owned or occupied at present by any natives, including all private, public and sovereign rights . . ."

having stated that the area was to be registered as German property, to be governed by German law and to be placed under German protection, and that in token of all times the German merchant (!) flag had been hoisted, the form announced that the whole procedure had taken place:³⁰

"in the presence, and under the applause of numerous natives from neighbouring villages after the significance of the action had been explained to them."

Friedrich Wilhelmshafen secured — again in the presence of von Oertzen — Finsch returned to Mioko where he arrived on 29 October, two days after S.M.S. "*Hyäne*". S.M.S. "*Elisabeth*" turned up on 1 November, ready to continue the hoisting of the Imperial (!) German flag which she had started to do at Angra Pequena in August.

The destination of Finsch's second voyage was the Huon Gulf. On 18 November Adolphhafen (Morobe) was discovered and quietly taken into possession — that is to say without "the applause of numerous natives" — since Finsch found the swampy shores uninhabited and therefore merely certified that even the hoisting of the German merchant flag had been unnecessary.

Having searched in vain for harbours in the inner Huon Gulf, Finsch was pleased to find a "nice little harbour" just north of Cape Cretin on 23 November. He named it Deutschlandhafen; however, it was renamed shortly afterwards by

28. See enclosures to the report by Hansemann to Bismarck on 20 February 1885 (RKA: File 2798).

29. *Nachrichten aus Kaiser Wilhelms-Land*, 1885, vol 1, 10.

30. *Ibid.*

the German Navy, Finschhafen, in his honour. Finschhafen was duly taken into possession on 25 November; this time again with full honours, although not in the presence of the Imperial Commissioner. This was the sum total of Finsch's land acquisitions with political significance.³¹

Commissioner von Oertzen was puzzled when he received the instructions to support Finsch's land acquisitions by concluding treaties with chiefs. He justified the approach taken in a report to Bismarck on 3 December:³²

"The signatories are heads of families, in the extended sense, that is clans. They . . . have acquired an outstanding position within their tribes by their personal qualities, property, age and so on. Real chiefs like those in Polynesia, belonging to a separate and higher social class, do not appear to exist in New Guinea any more than in the New Britain Archipelago, let alone a few high chiefs . . . possessing rights of territorial sovereignty with whom a proper international treaty could have been concluded. I was also in some doubt as to whether the authority conferred on me by Your Highness extended so far. I therefore cast the treaties simply in the form of a political agreement which might correspond to the prevailing circumstances and be adequate to the purpose".

The two treaties concluded in Constantinhafen and Friedrich Wilhelmshafen were almost identical; in Oertzen's own summary:³³

Article 1 of both treaties states that peace and friendship shall prevail between the parties [the German Government being one of them].

Article 2 ensures German settlers freedom of trade, of navigation and of conducting any economic activity the right to acquire land and to use it as they wish.

Article 3 guarantees the same the safety and inviolability of their persons and property and assistance in the case of hostile attacks.

Article 4 lays down that any disputes between the settlers and the natives are to be decided by an Imperial Official in accordance with the orders of the Imperial Government.

Article 5 reserves to the Imperial Government the approval of these treaties and the right to conclude further agreements.

Oertzen did not accompany Finsch on his second trip to New Guinea, but he concluded instead a third treaty in the New Britain Archipelago, on 3 November, after the hoisting of the Imperial Flag on Matupi.

In this treaty, which had been enlarged by a clause dealing with assistance for German ships and a most favoured nation's clause, Oertzen went a major step further by acquiring the waters, harbours and beaches surrounding Matupi, especially Greet Harbour, Simpson Harbour and what he calls "Blanche Bay",

31. The following acquisitions took place when the annexation game was again firmly in the hands of the diplomats in London and Berlin, despite some hectic activity on the spot, see below, pp xx ff.

32. RKA: File 2797.

33. Since these treaties never gained practical importance it is hardly worth examining them or their relation with the contracts concluded (or deeds of occupation drawn up) by Finsch. It appears that Oertzen was not concerned that the acquisition of sovereign rights by Finsch may have left no room for treaties of any kind or that the registration of such rights as private German property could present legal problems.

for Germany. Oertzen knew that he had no explicit authority to take this step but he referred to the political importance of securing these harbours and to the precedent of the purchase of the Mioko and Makada harbours by S.M.S. "Ariadne" in 1878. In contrast to Captain von Werner, Oertzen remained within the spirit of a "political agreement" and did not pay anything. As in the case of the New Guinea treaties the Matupi treaty was conditional on the approval of the German government.³⁴

(iii) *Flag-hoistings and proclamations*

Now it is the turn of the navy, or rather the navies, because we must catch up with Commander Erskine before focussing on the German flag-hoistings.³⁵

The 'annexation' of British New Guinea began in earnest on 8 October with a letter from the Colonial Office to the Admiralty:³⁶

"The Protectorate will for the present extend along the southern shore of New Guinea and over the country adjacent thereto, eastward as far as East Cape, including any islands adjacent to the mainland in Goschen Strait, and to the southward of the said straits as far south and east as to include Kosman Island . . . [It should be noted that no inland boundary is given.] Lord Derby understands that the Commodore on the Australian Station is . . . awaiting instructions, and . . . will be obliged if the Lord Commissioners will instruct him by telegraph to proceed forthwith to New Guinea and proclaim Her Majesty's Protectorate as defined in this letter at a sufficient number of places along the coast."

Commodore Erskine was duly instructed by cable the same date. A few days later he inquired:³⁷

"Am I to hoist and salute national flag, Port Moresby and other ports? . . . Will issue the proclamation at various ports. Propose making presents to influential chiefs."

The Admiralty transmitted this inquiry to the Colonial Office and for once there was an immediate reply: Erskine should hoist and salute the flag wherever he thought desirable and he was also welcome to make presents, provided he limited himself to the principal chiefs, the presents were suitable, and the cost reasonable.³⁸ This was the closest the Colonial Office came to acknowledging that the local population could have a part to play in the establishment of a British protectorate over them.

On 14 November, the Admiralty sent the Colonial Office the paraphrase of a telegram from Erskine dated Port Moresby, 11 November:³⁹

"He proclaimed Protectorate . . . Proceedings have given pleasure to the

34. RKA: File 2797, Report of 4 December 1884. Oertzen does not mention the possibility of Finsch acquiring the harbours on behalf of the Neu Guinea Kompagnie. It is clear, however, that this would have, at least, caused difficulties with the Hensheim firm whose headquarters were on Matupi.

35. The confusion resulting from the uncertainty of the respective roles of the diplomatic/administrative arm (Romilly) and naval arm (Erskine) of the British Government will be disregarded.

36. C-4217: no 32.

37. *Ibid.*, Enclosure in no 44.

38. *Ibid.*, no 45.

39. C-4273: Enclosure in no 41.

natives, who place themselves with confidence under Her Majesty's protection."

It was 19 January 1885 before the first of Erskine's reports reached the Colonial Office.⁴⁰ It was dated 2 December and had in fact overtaken an earlier report — dated 11 November — which was transmitted on 24 January 1885.⁴¹

The proclamation read by Erskine for the first time in Port Moresby on 6 November 1884, justifies the British Protectorate as follows:⁴²

"Whereas it has become essential for the protection of the lives and properties of the native inhabitants of New Guinea, and for the purpose of preventing the occupation of portions of that country by persons whose proceedings, unsanctioned by any lawful authority, might tend to injustice, strife, and bloodshed, and who, under the pretence of legitimate trade and intercourse, might endanger the liberties and possess themselves of the lands of such native inhabitants, that a British Protectorate should be established . . . I . . . do hereby, in the name of Her most gracious Majesty, declare and proclaim the establishment of such Protectorate over such portions of the coast and the adjacent island as is more particularly described in the Schedule hereunto annexed".

In a subsequent address, Erskine expressed his personal hopes for the new Protectorate, admitting, at the same time, that there were also other motives for its establishment:⁴³

"May the British flag . . . be to the people of this portion of New Guinea, the symbol of their freedom and their liberty, and the proclamation which I have just read, the charter of their rights and privileges: may it be to them a Protectorate in deed as well as in name . . . , may the blessing of civilization and Christianity, the seeds of which have already been sown by English hands . . . increase and multiply exceedingly amongst them, and lastly . . . I most fervently pray that these shores may tend to ensure the integrity and inviolability of the great Australian Colonies, and promote the best interests of their people."

Whereas this address was primarily meant for European ears — and not only those present — Erskine had prepared another address directed specifically at Papuans. It was first read by him on 5 November on board H.M.S. "*Nelson*" to a collection of chiefs to explain to them the meaning of the proclamation ceremony which was to be carried out the following morning. It was this address which includes the famous (rhetorical) promise to Papuans "your lands will be secured to you", and it presents throughout the paternalistic knight of late 19th century British Imperialism in his most shining armour:⁴⁴

"[F]rom this time forth, you are placed under the protection of Her Majesty's Government, that evil-disposed men will not be permitted to occupy your country, to seize your lands, or to take you away from your homes. I have been instructed . . . to give you the strongest assurance of

40. *Ibid.*, Enclosure in no 148.

41. *Ibid.*

42. *Ibid.*, Enclosure no 148. The schedule corresponded to the instructions of 8 October.

43. *Ibid.*

44. *Ibid.*, Enclosure in no 134.

Her Majesty's gracious protection of you, and to warn bad and evil-disposed men that if they attempt to do you harm they will be promptly punished . . . Your lands will be secured to you. Your wives and children will be protected . . . You will look upon all white persons whom the Queen permits to reside amongst you as your friends . . . The Queen will permit nobody to reside here who does you injury. You will under no circumstances inflict punishment yourselves upon any white person; but if such a person has done you wrong, you will tell Her Majesty's officers of that wrong, in order that the case may be fairly inquired into . . . You will all keep peace amongst yourselves, and if you have disputes with each other you will bring them before the Queen's officers, who will settle them for you without bloodshed. Should bad men come amongst you bringing fire arms and gunpowder and intoxicating liquors, you are not to buy them; and are to give notice at once to the Queen's officers, so that such men may be punished. Always keep in your minds that the Queen guards and watches over you — looks on you as her children, and will not allow anyone to harm you."

By comparison the literary efforts of the German navy certainly lacked in style. There were no emotional addresses, but instead, several prosaic variations on a basic proclamation theme.

The first version, read on Matupi on 3 November, corresponds almost verbatim with the text given by König (quoted above, p 24) and is the most specific.⁴⁵ Captain Schering announced that the German Emperor had sent him to Matupi to hoist the German flag as a token that the German establishment of Messrs Hershheim & Co, as well as the establishments of the German Trading and Plantation Company and the landed property belonging to them were to be placed under the direct protection of the Reich.

The proclamation read on New Britain (five times between 5 and 10 November, in Nodup, Kinigunan, Raluana, Kabakada and Kabaira) referred, instead of Matupi, to New Britain and did not name the owners of the protected German lands and establishments.⁴⁶ On the other hand, it referred specifically to establishments and land on New Britain (not elsewhere). The proclamations read in Mioko and Makada in the Duke of Yorks on 4 and 5 November respectively, and in Nusa and Kapsu on New Ireland on 12 November, were similarly phrased — with the appropriate geographical variations.

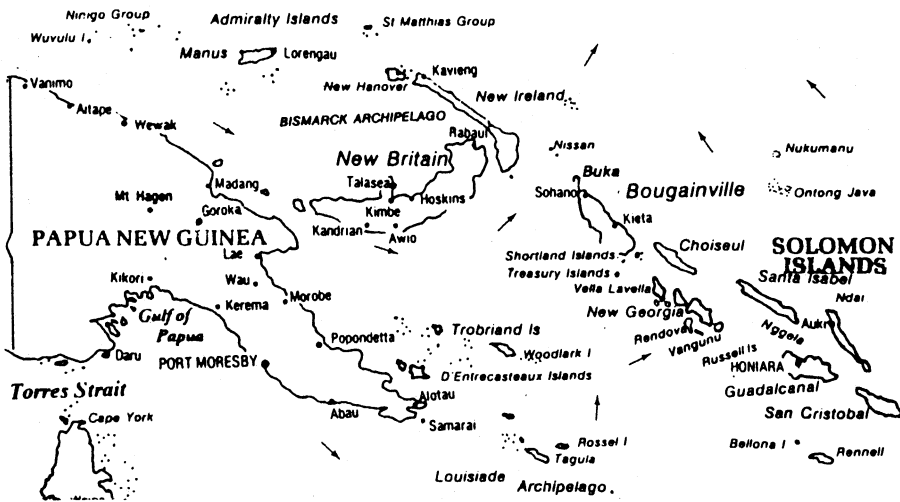
However, in the case of the version read by Schering in New Guinea, the text quoted by König leaves out one crucial word: the word "sollen". In fact the New Guinea proclamations were, in this respect, identical with those read in the New Britain Archipelago: the German land acquisitions in New Guinea too were not "being placed" under protection but were "to be placed" under it.⁴⁷

In short, it is now certain that the hoisting of the German flag in November 1884 did not amount to an 'annexation' of Germany New Guinea. It was merely

45. Enclosure in Oertzen's report on 28 November, RKA: File 2797. The only difference is that the König text uses "derselben" (land belonging to the Trading and Plantation Company) instead of "dieselben" (land belonging to that company *and* Hershheim & Co.).

46. Another minor difference is that the Matupi proclamation refers only to S.M.S. "Elisabeth" whereas the subsequent proclamations also refer to S.M.S. "Hyäne".

47. *Ibid.*



the solemn expression of the intention to place land owned by Germans some time in the future in some form under the protection of the Reich.

Nor was the geographical area within which these land acquisitions had to be situated clearly defined. For New Guinea a reasonable precise limitation was provided: the north coast between 141° E. Longitude and the Huon Gulf, inclusive. But in the New Britain Archipelago — if this was to be the limit — the situation was ambiguous. The Matupi proclamation did not refer to any geographical limitations whereas the others referred specifically to New Britain, the Duke of York Islands and New Ireland, plus surrounding smaller islands. It is unlikely that the Matupi proclamation could be interpreted to apply, for instance, to land the German Trading and Plantation Company had acquired in Samoa or which Hensheim had acquired in the Marshall Islands. But what about German land acquisitions in the Solomons or the Admiralty Group?

Schering's sailing instructions also were no model of precision. They spoke about the protection of German interests in the:⁴⁸

“western part of the Pacific, in particular in the islands of the New Britain Archipelago and on that part of the north-eastern coast of New Guinea which is outside the legitimate Dutch and British spheres of interest . . .” and ordered him to hoist the German flag “wherever [in which area?] German establishments already exist or are in the process of being established”.

S.M.S. “*Elisabeth*” returned to Matupi after hoisting the German flag in Friedrich Wilhelmshafen on 20 November. Schering had been warned about the dangers of a malaria infection and indeed soon almost one tenth of the crew was down with fever. He was relieved when the replacement for his ship, the S.M.S. “*Marie*” arrived on 1 December. On the same day S.M.S. “*Hyäne*” returned from New Guinea where it had rendezvoused with the “*Samoa*” and hoisted the German flag in Deutschlandhafen/Finschhafen on 27 November.⁴⁹

48. See above, p 44.

49. To even the score, a neighbouring bay was named after Langemak, the Commander of the S.M.S. “*Hyäne*”. Schering and Captain Dallmann of the “*Samoa*” had already been taken care of in Friedrich Wilhelmshafen, the main promontory and the main entrance respectively having been named after them.

In addition there came a surprise visitor: H.M.S. "Swinger", under Lieutenant Marx, returning labourers from Queensland. This meant that the British Government was likely to learn sooner about the German flag-hoistings than Bismarck. Commissioner von Oertzen tried to make the best of the situation. He informed Lieutenant Marx officially and asked him to act as postman, taking the official reports for the German Government to Cooktown from where they could be sent to Berlin by cable.⁵⁰

H.M.S. "Swinger" left Matupi on 6 December for Port Moresby, passed the mail on to H.M.S. "Raven", about to leave for Cooktown, where it arrived on 17 December and the cables were sent to Berlin.

Oertzen's cable to the German Foreign Office, in clear text, arrived safely in Berlin the same day. It read:⁵¹

"Instructions received. Land acquisitions supported by treaties. Warships hoisted flag in New Guinea and New Britain Archipelago."

Schering's cable to the German Admiralty using the official naval code, on the other hand, suffered considerable distortions:⁵²

"Have hoisted flag with *Elisabeth* and *Hyäne* in New Britain Island, Sable Island fleet (?) in 10 places on New Guinea 3 (?) places Marie arrived here in Matupi 1 December. *Elisabeth* sails to Japan (?)"

But for the chance presence of H.M.S. "Swinger" in Matupi, it would probably have been January 1885 before the world would have learned about the German actions.⁵³

(iv) *British reactions*

On 19 December Bismarck informed Malet, the British Ambassador in Berlin, of the German actions. He immediately cabled to the Foreign Office, which rushed the news to the Colonial Office:⁵⁴

"the German flag has been hoisted at three places on the north coast of New Guinea, and at ten places in New Britain, Ireland, and Sable Land."

It only took the Colonial Office until the next morning to decide that determined action was needed.⁵⁵

"Malet should be instructed to protest strongly against the course taken in regard to New Guinea, and to ascertain more precisely the extent of the territory on the coast of New Guinea thus occupied, and whether the action taken was in pursuance of instructions from home . . . [I]n view of this action on the part of the German Government, the Queen's Protectorate should at once be extended to the southernmost limit of this territory, and should include Long Island, Rook Island, and the Louisiade Group."

50. Oertzen would, in any case, have been unable to code them, since the German Consulate in Samoa had had no spare copy of the official German key when he was posted to the New Britain Archipelago.

51. RKA: File 2794.

52. Ibid. This cable is the origin of the mysterious "Sable Land" in the diplomatic correspondence. It was meant to read "York Island" (See Admiralty to Foreign Office, 2 January 1885, RKA: File 2795). The question marks are part of the German text as recorded in Berlin.

53. Finsch arrived in Cooktown on 2 January 1885 and S.M.S. "Elisabeth" reached Yokohama on the same day.

54. C-4273: no 72.

55. Ibid, no 75.

While this letter was on its way, Granville sent a second, complacent letter to the Colonial Office, inquiring about Derby's assessment of the German actions:⁵⁶

"in view of the understanding which had been come to, that both Great Britain and Germany should abstain from further annexations in the Pacific, pending the proposed discussion and settlement of the question of British and German interests in those regions."

On the other hand, upon receipt of the Colonial Office's reply, he could see "no objection to offer to the proposed extension of the British Protectorate".⁵⁷

The Colonial Office lost no time in acquainting the Admiralty on 21 December of "the decision of Her Majesty's Government".⁵⁸

"that the coast of New Guinea, from East Cape to Huon Gulf, at the point where the German Protectorate ceases, should, with the land adjacent, be brought under Her Majesty's protection and jurisdiction in the same manner as the southern coast."

These instructions were based on 'intelligence' conveyed by the Admiralty to the Colonial Office on 17 December rather than on the Foreign Office's letter of 19 December quoted above, a copy of which was also enclosed. The 'intelligence' was a cable sent by Erskine from Cooktown when the German reports were transmitted to Berlin. It was, in geographical terms, much more precise than the former:⁵⁹

"The Captain of the '*Elisabeth*' states they have hoisted the German flag on the north coast of New Guinea, from 141° meridian as far as Huon Gulf, including Admiralty, Hermit, Anchorite, New Britain, New Ireland Groups."

Thus, before the official German notification had been received, the flag-hoistings had already become, for Britain, a 'German Protectorate', extending, as far as New Guinea was concerned, to a still unknown point in or near Huon Gulf (probably at its north-western end).

The counter-measures proposed by the Colonial Office were not its first attempt to extend the British Protectorate as proclaimed on 6 November. Just a month later, without knowing anything about the German flag-hoistings, the Colonial Office had already persuaded Granville to permit the inclusion of the D'Entrecasteaux Group, describing it euphemistically as being "off the south-east coast of New Guinea".

Erskine had been embarrassed when he was instructed to direct a vessel:⁶⁰

"to proceed without delay for the purpose of proclaiming the Queen's Protectorate over these islands and any smaller islands adjacent to them."

Having just re-enacted the earlier Romilly proclamation over the southeast coast, he was anxious to avoid anything that could involve a cancellation of his own proclamation and yet another re-enactment. He consulted with the Governor of

56. *Ibid.*, no 78.

57. *Ibid.*, no 76.

58. *Ibid.*, no 79.

59. *Ibid.*, Enclosure in no 66. At the time the German flag had not yet been hoisted in the Admiralty, Hermit, or Anchorite area, although it was intended that S.M.S. "*Hyäne*" should carry out this task.

60. *Ibid.*, no 61.

New South Wales and the two gentlemen settled for a fiddle with the schedule. In the latter's words:⁶¹

"We came to the decision that it would be inadvisable to cancel the previous Act of Proclamation, and the object would be best obtained by adding to the Schedule after the word 'Goschen Straits' the following: 'and also the D'Entrecasteaux group and smaller islands adjacent thereto.'"

Two weeks later, the run was also not entirely smooth. Erskine's sailing instructions ("proclaim protectorate New Guinea between East Cape and Huon Gulf up to German boundary"),⁶² while based on the letter of the Colonial Office to the Admiralty of 21 December, did not take into account the Colonial Office's wish to include Long Island, Rook Island and the Louisiades which Granville (and Cabinet?) had approved. In addition, the Colonial Office had in the meantime discovered that, while some suitable islands (especially Woodlark) had been overlooked, Rook and Long Island were, perhaps, included in the 'German Protectorate'. Thus, on 22 December a second letter was sent to the Admiralty requesting:⁶³

"that further instructions may be sent to the Commodore to extend the Protectorate to the Louisiade and Woodlark groups, and to Long Island and Rook Island, should it appear that the two last named islands are not included in the German Protectorate."

Even after the instructions had been amended accordingly,⁶⁴ they remained ambiguous. Was the British Protectorate to be extended beyond Huon Gulf if the border of the 'German Protectorate' was found to be further west? Captain Bridge of H.M.S. "*Espiegle*" opted for this broader interpretation and hoisted the British flag in January 1885 as far west as Cape King William, as there was "no sign of German flag, and nothing known by natives of them up to that point",⁶⁵ although this was not in line with the text of the proclamation which Erskine had drafted and cabled to Lieutenant-Commander Ross of H.M.S. "*Raven*" in Cooktown on 23 December.

This time Erskine had controlled his romantic enthusiasm. No justification for the establishment of the protectorate was given and no address to assembled chiefs were envisaged.⁶⁶ Instead, the new proclamation simply stated:⁶⁷

"Whereas by a Proclamation dated 6 November 1884, Her Majesty, Queen Victoria, was pleased to establish a Protectorate over certain portions of the southern shore of New Guinea, with adjacent islands thereto, together with the islands in the Goschen Straits, and also the 'D'Entrecasteaux group and smaller islands adjacent, I (blank), Senior Naval Officer, do now hereby declare and proclaim . . . that the British Protectorate shall include the coast of New Guinea between East Cape and Huon Gulf inclusive."

There was as yet no reference to the Louisiades, Woodlark, Rook and Long

61. *Ibid.*, no 151.

62. *Ibid.*, no 81.

63. *Ibid.*, no 82.

64. *Ibid.*, Enclosure in no 83.

65. *Ibid.*, Enclosure in no 147.

66. Perhaps the dangers for the lives and the property of the local population did not extend to the north coast or Erskine had become aware that, under the circumstances, these dangers could not possibly be used as reasons for declaring a British Protectorate?

67. *Ibid.*, Enclosure in no 167.

Islands, but Erskine had put his head on the block as far as the north coast of New Guinea was concerned: the Huon Gulf was to be included — irrespective of the eastern border of the ‘German Protectorate’.

This is all that needs to be said about the second round of British flag-hoistings, and we can return to London and the 22 December 1884, remembering that all British decisions made up to this time — including the amended instruction to Erskine — were made on the basis of the informal notification of the British Ambassador in Berlin and Erskine’s cable of 17 December.

(v) *What to do next?*

The instructions for the official notification — to be formally handed over by the German Ambassador in London (and his colleagues in other capitals) were signed by Bismarck on 23 December. The covering letter requested the German Ambassadors to notify their hosts of the ‘recent placing of certain areas in the south seas under the protection of the Reich’. In the case of the Embassy in London, a special instruction was added:⁶⁸

“Please inform Lord Granville orally that our occupations do not prejudice the negotiations . . . over the limitations of the respective spheres of interest in the South Seas . . . any more than the recently proclaimed placing of the South Coast of New Guinea under British protection.”

The substantive part of the enclosed draft note had the following text:⁶⁹

“Since subjects of the German Reich have founded factories and acquired land by contracts of purchase and sale with the natives along the north coast of New Guinea, east of the Dutch border, and on the islands of the New Britain Archipelago, the areas in question have been placed under the protection of His Majesty the Emperor, subject to valid rights of third parties, and the German flag has been hoisted as token of the occupation.”

The note was handed over in London on 26 December. On 29 December, the Foreign Office informed the Colonial Office, enclosing a translation of the note as well as of the ‘oral communication’ by the German Ambassador, who this time had stuck verbatim to his instructions.

These translations are of special interest because they demonstrate how strongly the British assessment of the legal significance of the German actions was based on pre-conceived notions rather than careful interpretation. The assumption was that Germany had established the same kind of protectorate over the New Britain Archipelago and part of the north coast of New Guinea as Britain had established over the south-east coast. As a result the ambiguities in the German text — and there were many because Bismarck himself had no clear idea as to the legal significance of the German actions⁷⁰ — were in the English rendition removed by adjusting the presumed German to the actual English position.

In the instructions the German “occupations” (Besitzergreifungen) are

68. *Südsee* II, no 37.

69. *Ibid*, Enclosure.

70. Bismarck certainly did not go out of his way to explain the position, nor did he help matters by treating the German actions as — politically speaking — the equivalent of the establishment of the British Protectorate.

contrasted with the British “protectorate” — the English translation speaks in both places of “protectorate”. At the end of the note, where the German text again uses the vague term “Besitzergreifung”, the English translation even uses the term “annexation”. Another shift occurred with regard to the extent of the “occupations”. Instead of saying explicitly that only the German factories and the land acquired by Germans⁷¹ had been placed under protection Bismarck used the term “the areas in question” (die betreffenden Gebiete). The English translation, however, renders “Gebiet” as “district” (Bezirk) giving the impression of well-defined political territories.⁷² In fact, Bismarck was careful, apart from the harmless reference to the Dutch border, not to tie himself to any geographical limits. This reflected not only his opinion that the precise limits of the respective German and British spheres of interest should and could only be settled by diplomatic negotiations, but had also special reasons.

When Hansemann learned in October that the British Protectorate was to be, for the moment, limited to the southeast coast, he became anxious to extend his operations to East Cape and even to the D’Entrecasteaux group. By letter of 11 November he instructed Finsch to gain a foothold on the group or, at least, on a point close to, but north of, East Cape.⁷³

On 20 December — the world still intact after the news of the German flag-hoistings had been broken — Hansemann petitioned Bismarck for Imperial protection to extend the enterprise in this way. He put forward two arguments: that the easternmost part of the north coast and the D’Entrecasteaux Islands were particularly fertile and their inhabitants particularly friendly, thus giving the area prime economic importance, and that the mountainous backbone of New Guinea, which continued right to East Cape, would form an ideal natural boundary between the German and British spheres of interest.⁷⁴

About the previous limits of the German activities in New Guinea he had this to say: while the petition of 27 June had referred to the whole north-east coast, Finsch had left Sydney with the instructions — the limits of the proposed British Protectorate then still being unknown — to proceed east to 150°E. Longitude [not East Cape], provided “the area in this direction was still free”.⁷⁵

On 22 December the German Foreign Office (with Bismarck’s approval) sought the Emperor’s permission to extend Imperial protection to East Cape and the adjoining islands. The application was primarily based on political grounds: it was desirable because this was the limit of the British Protectorate and because “the danger could not be excluded that Britain would take by proclamation possession of all areas of the island which were still ownerless”.⁷⁶ Little did the German Foreign Office know that these instructions had already been issued.

71. The note also referred no longer to land acquisitions “in the process of being made” and replaced the general term “acquisitions” by the specific (and more respectable?) term “purchase”.

72. See C-4273, no 91 and Enclosure.

73. Since the following embarrassing episode contributed substantially to Finsch’s spoiling his chances of becoming German New Guinea’s first Administrator (as he had hoped), he discussed it in some detail in his defence (Finsch, O, “Wie ich Kaiser Wilhelms-Land erwarb”, 580–4; 728–9).

74. RKA: File 2794.

75. *Ibid.*

76. *Ibid.*, File 2794.

Permission was granted and on 23 December Hatzfeld approached the German Admiralty:⁷⁷

“I intend to request the Imperial Consul General in Sydney by cable to convey to the Imperial Commissioner von Oertzen by the shortest way possible the instruction that the northeast coast of New Guinea, east of Huon Gulf (or, respectively, 150° E. Longitude) to East Cape, including the adjacent islands, is to be placed under the protection of the Reich.”

Then followed the request to transmit corresponding instructions — perhaps using the same channel — to the commanders of S.M.S. “*Marie*” and “*Hyäne*”.⁷⁸

In his hurry Hatzfeld had made two mistakes. The first was picked up by the Admiralty which replied on 24 December⁷⁹ that it had settled for the Huon Gulf as the western starting point since 150°E. Longitude ran, in fact, 240 nautical miles further east (and did not correspond with the sailing instructions given in August). The second mistake was discovered by the Foreign Office when the cable of the Admiralty was received for transmission to the Consul General in Sydney: it had been overlooked to restrict the protection to the *German land acquisitions* in the area between Huon Gulf and East Cape. The necessary alteration in the text of the cable was made before it was sent to Sydney on 24 December and the Admiralty complained, quite correctly, two days later, that the need for this restriction had not been indicated.⁸⁰

How were the instructions to get from Sydney to von Oertzen and the German warships in Matupi? Hansemann was prepared to charter a ship in Cooktown to take “a reliable German” on board to seek out Finsch and the “*Samoa*” who was then to contact the German warships. As it happened, Finsch, who had not yet received Hansemann’s letter of 11 November, was on his way to Cooktown where he arrived on 2 January 1885.

To speed up matters Hansemann had also sent a cable for Finsch to Sydney:⁸¹

“Please continue with your operations, acquire East Cape and D’Entrecasteaux; South Sea Island Company⁸² has asked for Government help which is expected to be granted; British Government took possession up to East Cape.”

Finsch received this cable on 4 January and Hansemann’s November letter a few days later (the letter explaining the December cable reached him in April in the Duke of Yorks). Still, he was left in no doubt about the need for quick action. He was bombarded by cables “Expedite as much as possible, more detailed instructions will follow”, “Upon receipt of the Sydney cables for German warships, you will depart immediately with the greatest possible speed to find them”, and.⁸³

77. Finsch, op cit, 580–3.

78. Ibid.

79. Ibid.

80. The (amended) text of that from the Admiralty read: “Quickly place under protection of Reich German land acquisitions on northeast coast New Guinea east of Huon Gulf to East Cape plus adjacent islands” (ibid).

81. Ibid.

82. That is the Neu Guinea Kompagnie which had still not been officially formed.

83. Finsch, op cit, 580–3. The archives of the Neu Guinea Kompagnie were destroyed during World War II in Berlin, so that the basis for reconstructing its side of the story no longer exists.

“Bismarck issued instructions. Please execute orders as best as possible, to be able to report that land has been purchased everywhere and that harbours and coasts have been secured also islands between Astrolabe Bay and Cape Ann (New Britain).⁸⁴ Please expedite execution of orders as much as possible as one tries to anticipate us. We have failed to receive notification ‘land has been purchased’ re D’Entrecasteaux and Huon Gulf to East Cape”.

This was too much for Finsch and he began to defend himself even then. He thought he had done his job and done it magnificently and was keen to return to Berlin to reap his rewards. Yet, even if he had desperately wanted to take immediate action, his path would have been filled with obstacles. The first was already plainly in sight: the engines of the “*Samoa*” had broken down again and spare parts had to be cast before she was able to leave.

On 18 January 1885 H.M.S. “*Raven*” anchored in Cooktown to report the completion of the second round of British flag-hoistings — naturally without telling Finsch — who finally left on 24 January and arrived in Mioko on 1 February only to learn that S.M.S. “*Hyäne*” had gone to Cooktown and S.M.S. “*Marie*” was stuck on a reef in northern New Ireland.

On 22 February S.M.S. “*Hyäne*” returned with the news of the British flag-hoistings but also with a cable from Hansemann of 2 February to Finsch: “Depart immediately, expedite execution of orders as much as possible, undeterred”.⁸⁵

As a result Finsch founded the first operative German station in New Guinea near East Cape during the first days of April 1885, barely two weeks before the Anglo/German Boundary Agreement was finalised in Europe. Being on the wrong side of the line, the station was withdrawn not long afterwards and the whole abortive second round of German activities was covered with a veil of silence.

(vi) *Diplomatic exchanges*

While the German Foreign Office was still fuming because Germany’s logistic impotence had once again been demonstrated, Meade, the British Delegate to the Congo Conference, was knocking at the door, seeking an interview with Bismarck to discuss a general colonial settlement. The interview took place on Christmas Eve.

For the New Guinea region, Meade’s proposal ran roughly as follows: The British Protectorate over the south coast of New Guinea was non-negotiable and not to be weighed in any territorial bargaining. However, Britain was prepared to recognise the German Protectorate over the New Britain Archipelago, provided Germany accepted the extension of the British Protectorate over the entire northeast coast of New Guinea (up to the Dutch border).

The German reaction to Meade’s proposals was as predictable for any outsider as it was apparently unexpected for the British Foreign Office. In any case, the interview achieved the opposite of that which it had (according to the story) set out to do — a hardening of the front and the adoption of a position which was, from the German point of view, the counterpart of Meade’s proposal.

84. That is primarily Long Island and Rook Islands.

85. Finsch, *op cit*, 728.

The only existing significant economic interests in the region were those of Germans in the New Britain Archipelago. The German claim to this area was therefore beyond discussion. Moreover, Germany alone had plans to establish significant economic interests in East New Guinea. Only because she wished to maintain friendly relationships with Britain had these plans been restricted to the northeast coast and the — legally irrelevant — strategic British interest in the southeast coast been recognised. Hence, a recognition by Germany of the British Protectorate over the whole south-east coast was already a major concession and no further concessions could be expected.

No more friendly and flexible diplomatic negotiations! Britain had promised to limit its claim to the southeast coast and Germany's attempts to acquire "territorial pledges" as "negotiable objects" in the New Britain Archipelago and along the northeast coast of New Guinea were becoming firm territorial claims to the entire area. German protection began indeed to turn into the German Protectorate Britain was wrongly assuming Germany had already established.⁸⁶

The interview with Meade formed the basis of strong instructions to Münster, dated 29 December.⁸⁷

"In view of the repeated assurances by Lord Granville, that the British Government sympathised with German colonial enterprises in the South Seas and West Africa, I can only assume that the proposal of Mr Meade is not in accordance with the attitude of the British Foreign Office. I rather regard it as another symptom that the feelings of Lord Granville towards us are kinder than the policies of the British Colonial Office. I request Your Excellency respectfully to discuss the matter with Lord Granville without leaving any doubt that we would be unable to regard belated English or Australian attempts to create difficulties for the German enterprises on the North Coast of New Guinea between the Dutch border and East Cape as compatible with the promise of the British Government at the time of the occupation of the South Coast that the British Protectorate would be limited to this southern part of the island. Although, under the circumstances, I can see no hope that continued negotiations with Mr Meade will achieve success we are still prepared to reach agreement about the *internal* boundaries between our respective protected areas on New Guinea and about the limitations of our respective spheres of interest in the independent islands of the South Seas . . . by means of a commission as previously discussed."

The change compared with the instruction accompanying the notification of the German flag-hoistings a week earlier is marked. Instead of clarifying that Germany had merely placed certain land acquisitions by German nationals under Imperial protection and that it was now ready to settle the boundaries of the spheres of interest by negotiation, Bismarck asserted: you have taken the southeast coast, we have taken the northeast coast (and the New Britain Archipelago) and all that remains to be done is to fix the inland boundary in New Guinea and to deal with the other islands.

The German Ambassador saw Granville on 3 January 1885. By then the

86. For Bismarck's version of the Meade interview see *Südsee* II, no 39, for that of Meade, C-4290, 6-11.

87. *Südsee* II, no 39.

Colonial Office had become active after the Christmas Break (having been prodded by the Foreign Office on 29 December.⁸⁸ On 31 December three separate letters were sent to the Foreign Office. The first merely suggested that:⁸⁹

“The course now taken in proclaiming German jurisdiction over the coast, without any previous communication with Her Majesty’s Government appears to require explanation.”

The second letter argued that as a result of the German actions, Britain had required freedom of action,⁹⁰ while the third took into account that this new freedom could only serve as a post factum justification of decisions already made:⁹¹

“I am also to suggest, for Lord Granville’s consideration, whether . . . it may not be desirable to intimate to the German Government that their action in New Guinea had rendered it necessary . . . to extend Her Majesty’s protection over the remaining portions of New Guinea and the islands in the neighbourhoods.”

Granville was not at all anxious to make this confession and remained silent about the ordered extension of the British Protectorate when he met Münster on 3 January. In general, it still seems to have been another of the friendly old get-togethers, each side reporting afterwards how valiantly it had fought for its country’s cause, while at the same time trying to make the stand taken by the other more palatable.⁹²

On 14 January, the day after Granville had signed the official response to the German notification of 26 December, Münster was again standing on his doorstep, shaken by a sneering reply from Bismarck to his report on the previous interview with Granville,⁹³ and armed with a lengthy aide-memoire, which Bismarck had enclosed in the despatch of 29 December and which was to be delivered physically to Granville.

The aide-memoire reviewed the entire development from the German point of view and contains nothing new.⁹⁴ Its British counterpart, Granville’s despatch of 13 January, which the British Ambassador presented as a note to Bismarck on 17 January, is more rewarding because it was prepared independently from the German aide-memoire. It was primarily designed as an official British protest against the hoisting of the German flag “in token of annexation”:⁹⁵

“Her Majesty’s Government were quite unprepared for such an announcement, for the recent negotiations with the German Government . . . had led them to believe that a friendly understanding had been arrived at between the two Governments, in virtue of which neither Power would make fresh acquisitions in the Pacific Ocean pending the meeting of the Anglo-German Commission which had been agreed upon.”

88. See C-4273: no 91.

89. *Ibid.*, no 102.

90. *Ibid.*, no 100.

91. *Ibid.*, no 103.

92. *Ibid.*, Enclosure in no 118, and *Südsee II*, no 40.

93. *Südsee II*, no 41.

94. The English translation was published as Enclosure in no 135 in C-4273.

95. *Ibid.*, Enclosure in no 131. Granville had conveniently forgotten that, according to his October proposal, the matter was to be dealt with diplomatically, see above, p 39.

The second aspect was the unavoidable confession of the extension of the British Protectorate, presented as a response to the German actions:⁹⁶

“In view of the action of the German Government, instructions have been sent to the Commodore on the Australian station desiring him to proclaim the Queen’s Protectorate in New Guinea from East Cape to the Gulf of Huon, which is understood to be the limit of the German annexations, and over the Louisiade and Woodlark groups of islands. The D’Entrecasteaux islands are included in the previous proclamation.”

As can be seen, Granville, too, was reluctant to put all the cards on the table: there is no mention of Long or Rook Islands and the inclusion of Huon Gulf in the ‘proposed’ British Protectorate is not made explicit.

In an attempt to further soften the blow, Granville also claimed that Britain was not trying to get even with Germany but that her action had:⁹⁷

“been promoted in a great measure by the desire to obviate all the inconveniences that might arise from an absence of jurisdiction on the coast.”

Granville did not improve matters when he elaborated this point — in response to Bismarck’s prompt protest.⁹⁸ Bismarck pounced on this elaboration in a dispatch to Münster of 26 January, accompanying a lengthy draft note in reply to the British note of 17 January, using for the first time the term ‘annexation’:⁹⁹

“if the British Government did not know that Germany was planning further annexations [Annexionen] east of Huon Gulf this could only be attributed to the fact that our communications in this matter did not receive the degree of attention which we, in view of the friendly relations between our countries, expected.”

Bismarck added that it would have been more consistent with the position taken by the British Government if it had sought an understanding with Germany before issuing instructions to occupy this stretch of coast in New Guinea which — as Granville had claimed — was the target of ‘free-booters’. But as all uncertainty about the German plans was now removed, it was hoped that Britain would refrain from further pursuing these instructions.

The text of the note delivered by Münster to Granville on 28 January is entirely Bismarck — even to the extent that the Berlin draft provided summarised what Münster had said to Granville during their conversations in London¹ — and served two purposes: firstly to refute the British protest against the German ‘annexation’ in November and secondly, to protest against the extensions of the British Protectorate beyond the southeast coast. This caused a dilemma, since the more the note strengthened the first case, the more it weakened the latter and vice versa. The solution was predictable. Instead of admitting that Germany really had not annexed anything so far, the note continued the gradual process of firming German ‘protection’ into a ‘protectorate’, hiding uncertainty behind increased aggressiveness directed at real or perceived weak points of the British case.

96. *Ibid.*

97. *Ibid.*

98. Cable of 20 January, *Südsee* II, no 44.

99. *Ibid.*, no 46.

1. The German original of the Berlin draft was published as Enclosure in no 46 (*Südsee* II). For an official English translation of the note see Enclosure 1 in no 164, C-4273.

Much of the argument centred around the 'legal' meaning of the diplomatic correspondence in August and October. Did Britain make in August (and again, in October) a unilateral promise to Germany to limit annexations (for the time being) to the southeast coast of New Guinea — or did Germany and Britain reach in October a bilateral agreement that neither side would — for the time being — carry out 'fresh' annexations, that is annexations in addition to the proposed British Protectorate over the southeast coast? What did "without prejudice to territorial questions" mean: did it give a free hand to one side or to both, or did it bind one side or both? In addition, the note complicated matters by attacking in a hypothetical fashion the British Protectorate over the southeast coast which Germany obviously had accepted.

The first group of arguments was primarily concerned with New Guinea itself. Germany claimed that Britain had been informed in advance about her plans:²

"After the negotiations which had been carried on between the two Cabinets on this subject since the beginning of August last, the Royal British Government cannot have been less prepared for the announcement of the German occupation³ than were the Government of His Majesty the Emperor in October for the news that England had taken possession by Proclamation of the whole of the south coast of New Guinea and of the adjacent islands."

Germany also denied that she had agreed to an 'annexation' moratorium in October. It could not be assumed that she had bound herself for an indefinite period, even if the negotiations lasted for years, not to take possession of any land in any part of New Guinea or elsewhere, while England considered herself justified in occupying the whole south coast of New Guinea, including the coastline of the eastern extremity, because such an assumption was contrary to the basis of any friendly understanding between two nations, namely their equality.

The final point was particularly dear to Bismarck's heart, for whom Britain's refusal to treat Germany as an equal was at the root of the recent colonial problems. It also caused a string of subsidiary arguments which unnecessarily weakened the German case against the extension of the British Protectorate. Instead of concentrating on the D'Entrecasteaux Group — the Achilles' heel of the British position — the extension of the British Protectorate to include this group was presented in the note as a minor adjunct to a brave but foolish attack on the initial proclamation of the Protectorate in November (which was said to have been in breach of the October moratorium, whose existence Germany denied, *if* this non-existence moratorium was interpreted in the light of the equality argument put forward by Germany):⁴

"The statement made in Sir E. Malet's note of the 17th instant, to the effect that the D'Entrecasteaux Islands, off the north coast, were already included in the Proclamation of a Protectorate made by England on the 6th November last year, is equally at variance with the assurance given to the Imperial Government by Her Majesty's Government on the 9th August and 9th

2. *Südsee II*, Enclosure in no 46.

3. The official British translation on which the text given here is based, uses the term 'annexation' in this context — which is, in view of the use of this term in Bismarck's covering letter, no longer inappropriate although, linguistically speaking, still misleading.

4. *Südsee II*, Enclosure in no 46.

October of last year, as well as with the text of the Proclamation and the boundary clearly marked on the officially published map.”

This was the build up for Germany’s formal protest:⁵

“against the Proclamation of the Protectorate over the part of the north coast of New Guinea between East Cape and Huon Bay, and also over the D’Entrecasteaux, Woodlark, and other islands adjacent to the north coast, as contrary to the promise of the English Government given to the Imperial Government in official despatches.”

Bismarck was probably glad that Granville had laid himself open to attack by asserting that Britain had been motivated by the wish to avoid a jurisdictional vacuum in which free-booters could entrench themselves. This, the note came close to saying, was ‘nonsense’.⁶ Perhaps this provocation would distract from the vagueness with which Germany presented her own position; a task made particularly difficult by a separate inquiry of Malet as to where the precise boundaries of the German ‘Protectorate’ were.

Rather than admitting that the eastern limit of German protection had been the Huon Gulf and that the German Government itself did not know as yet where precisely the German flag had been hoisted, the note moved in two steps in a different direction. The first emphasised the German intentions rather than actions, omitting any reference to the fact that the protection had been limited to German land acquisitions:⁷

“The Imperial Government intended from the beginning to place the entire north coast, from the Dutch Border to East Cape, including the adjacent islands under its protection.”

The second step turned ‘protection’ for the first time, verbally, into a ‘protectorate’:⁸

“It is not decisive in how many places the German flag has been hoisted as an outward manifestation of the German Protectorate [Protektorat].”

The note stopped short of asserting that Germany had already acquired sovereignty. It still referred to Germany’s ‘right’ (Recht) to the whole of the northeast coast and not to her ‘title’ (as the official English translation rendered it). Besides, in trying to refute the British protest, the note admitted that Germany had refrained from ordering the ‘annexation’ of the whole north coast in August:⁹

“The Imperial Government would have been fully justified in at once issuing the order to take possession of the whole north coast as far as East Cape. This, however, was not done, because it was assumed by Germany that the proposed Commission for the settlement of the geographical delimitation of the respective territories in the South Sea was to deal with the interior limits of the island as far as New Guinea was concerned and that the latter might offer more difficulties in the narrow eastern promontory than westwards towards the interior.”

5. Ibid.

6. The note in fact said that the German Government was “unable to accept . . . [this explanation] as correct”, which the official English translation rendered politely as “cannot be regarded as sufficient” (ibid).

7. Ibid.

8. Ibid.

9. Ibid.

This was not merely a self-advertisement of German modesty and reasonableness in August;¹⁰ it was also an indication that some flexibility remained. But it was now limited to New Guinea and the 'independent' islands in the Pacific. The New Britain Archipelago was a different matter. Here Germany was as firmly committed as Britain in relation to the southeast coast of New Guinea.¹¹

"There was never any intention on the part of the Imperial Government to make the occupation [*Inbesitznahme*] of these islands the subject of negotiations between Germany and England."

The only (European) establishments there were German and they existed on such a scale that the British Government would have regarded a fraction of them as sufficient to have seized the entire archipelago long ago. If Britain now objected that Germany should have sought an understanding with Britain before occupying these islands because of possible interests on the part of herself or her colonies, such an objection would contradict her own recent (closing-in) behaviour in Africa (and not only in the southwest of that continent). After Germany's experiences there she would now, perhaps, have to expect the news of British flag-hoistings in the New Britain Archipelago if the "German establishments" [!] had not been placed in time under German protection. Still the German Government also wished:¹²

"to guard against any cause of differences between the two Governments by coming to an understanding with the British Government . . . respecting the inland boundaries of the Protectorates [*Protectorats-Gebiete*] of both parties in New Guinea, and more especially in the east corner of the islands to which reference has so frequently been made and also in the independent islands of the South Sea".

There was thus little doubt that the matter would now be handed over to a joint commission of specialists. Indeed, before officially responding to the German note, Granville announced, on 3 February, the appointment of Thurston as British Commissioner¹³ — the German Commissioner having been appointed as far back as October 1884.¹⁴ But the German note of 28 January still had to be answered.

(vii) The outcome is no surprise, but it takes time

On 27 January the Colonial Office had informed the Foreign Office that the extension of the British Protectorate had been carried out. It found no difficulty in bringing the actions of the British Navy — the inclusion of the Huon Gulf, irrespective of the German boundary, in the British Protectorate and the hoisting of the British flag beyond the Huon Gulf — in line with the proposal approved by the Foreign Office, according to which the British Protectorate was to be extended "from East Cape to Huon Gulf, at the point where the German Protectorate ceases". From "East Cape to Huon Gulf" acquired the invisible

10. At the time the British position appeared, from the German point of view, to be equally flexible. Granville had announced that the "extension of some form of British authority in New Guinea will only embrace that part of the island which specially interests the Australian colonies" (see above).

11. *Südsee* II, Enclosure in no 46.

12. *Ibid.*

13. C-4273: Enclosure in no 165.

14. *Ibid.*, no 19.

addition “inclusive”, the Huon Peninsula turned into a broad “promontory”, marking its northern end, and Cape King William into its “northern point”.¹⁵

The next task was more difficult. The Colonial Office had to provide a cover-up for the D’Entrecasteaux blunder. It sweated over the answer until 18 February and Granville was well advised not to wait for it before replying to the German note.

As will be remembered, the British case against the German flag-hoistings rested on the claim that the two countries had agreed on an ‘annexation’ moratorium in October, excepting the British Protectorate over the southeast coast. For this reason the Colonial Office’s argument that the D’Entrecasteaux Islands “from their position specially interested the Australian Colonies” was irrelevant, just as Germany’s special interest in the New Britain Archipelago was, on that basis, irrelevant. It was equally irrelevant and also dangerous to stress that the measures “were actually in progress before Her Majesty’s Government were aware that the German Government intended to hoist their flag in New Guinea”, since the same kind of argument could and indeed had already been used by Germany.¹⁶

The only chance of explaining away the facts — apart from admitting that, as far as the Colonial Office was concerned, Britain had not bound itself to refrain from fresh ‘annexations’ — was to turn the D’Entrecasteaux Group into a part of the south coast and that was precisely what the Colonial Office was trying to do, although it must have known that it was fighting for a lost cause.¹⁷

“[I]t might be explained . . . that Her Majesty’s Government in deciding to include the D’Entrecasteaux Islands in the New Guinea Protectorate did not consider that they were precluded from so doing by reason of the Notes of the 9th August and 9th October; for these islands, which his Excellency by some misapprehension speaks of as “lying off the North Coast” of New Guinea, are at the south end of the Island contiguous to East Cape and Goschen Straits . . .¹⁸ Count Münster will, therefore, have no difficulty in perceiving that the language in which Sir E. Malet was instructed to communicate to the German Government the inclusion of these islands in the British Protectorate was really consistent with the facts of the case. The map to which his Excellency refers shows, and was only intended to show, the effect of the instruction originally transmitted to the naval officers in Australia.”

As indicated, Granville did not wait for this pathetic effort and replied officially to Münster on 7 February¹⁹ — avoiding the D’Entrecasteaux issue altogether. He

15. See C-4273, no 150. Van der Veur put the extreme point of the British flag-hoistings “near present day Sador” (Van der Veur, P, op cit, 18) — another 100 miles west. In fact it had been Tamate Beach about 10 miles east of Cape King William.

16. One of the supplementary arguments in the note of 28 January had been that the German ‘annexation’ orders had been given in August, after a British declaration that she had no intention of occupying the whole of East New Guinea, and long before a moratorium could be possibly said to have come into existence.

17. C-4273: no 186.

18. There is (and was) no doubt that D’Entrecasteaux Island lies technically “off the North Coast” — although it is true that Normanby Island forms the other side of Goschen Strait and that the eastern ‘extremity’ of New Guinea is at the same time its southernmost point.

19. C-4273: Enclosure in no 178.

also abandoned his 'free-booter argument' and was careful not to revive the equally spurious claim made in September that the wish to protect the Maclay Coast people had been the main motive for Britain's interest in the northeast coast — although he otherwise argued for a return to the September situation.

Granville denied that Münster had informed him about the German plans in August and emphasised, correctly, that Germany during subsequent communication, had never stated that she was in the process of 'annexing' the northeast coast of New Guinea or the New Britain Archipelago, although the opportunity had repeatedly arisen, in particular in connection with the British September proposal to extend the Protectorate to 145° E. Longitude on the northeast coast:²⁰

"[O]ut of deference to the representations of the German Government, Her Majesty's Government consented to restrict their Protectorate to East Cape, upon the understanding, as I have shown, that all questions having reference to the districts beyond that limit should be reserved for ulterior discussion. The sudden establishment, therefore, of the German Protectorate over a portion of the coast from which Her Majesty's Government had thus withdrawn, and over the vast islands lying off the north-east coast of New Guinea, without any previous understanding with Her Majesty's Government entirely altered the position, and Her Majesty's Government consider that they were fully entitled to resume their liberty of action as regards the extension of their Protectorate up to the German boundary . . . Her Majesty's Government cannot, therefore, admit the validity of the protest . . . against the extension of the British Protectorate over the northeast coast of New Guinea and the islands adjacent . . ."

Now came the 'but' which shows that the Foreign Office had studied the last German note with greater care:²¹

" . . . but, as the claims advanced by the German Government appear to extend beyond the limits of the coast actually taken possession of by its officers, if the German Government continue of the opinion that the boundary proclaimed by Her Majesty's naval officers has encroached upon the limits of the German Protectorate, and that there has been a mutual misunderstanding on the subject, her Majesty's Government are willing to examine the question in a friendly manner with the German Government, in order to settle the best point on the northeast coast of New Guinea for the Boundary of the British and German Protectorates."

Granville already knew where this point should be. He assumed, on the basis of the Erskine cable of 17 December, that the German 'Protectorate' extended from 141° E. Longitude to Huon Gulf, exclusive, which was close enough to Cape King William where, according to the British note of 19 September, "commences that part of the coast which for obvious reasons it is indispensable to bring under British control".²²

The note of 7 February thus implied the following compromise (apart from a tacit recognition of the German claim to the New Britain Archipelago): despite

20. *Ibid.* It is difficult to see, however, why Germany should have objected to the British September proposal at all, if she did not consider that she deserved a slice of the northeast coast that went beyond 145° E. Longitude — which should also have been apparent to Britain at the time.

21. *Ibid.*

22. *Ibid.*, Enclosure in no 14.

your naughty flag-hoisting we offer you the Maclay Coast, in addition to the Coast between 141° and 145° E. Longitude, provided you recognise the extension of our Protectorate to the northwestern end of Huon Gulf (where we, in any case, suspect your actual boundary is). Taking into account the German flexibility in the 'eastern extremity' (and the failure of the second round of German flag-hoistings), the remaining bone of contention was thus the Huon Gulf. Allowing further for the fact that the British Cabinet must have by then been almost as annoyed with Derby as with Bismarck, the outcome of negotiations in the joint commission, which began mid-February, was predictable.

They nevertheless dragged on for another two months until the New Guinea boundary was settled by an exchange of notes at the end of April.²³ The point chosen was the intersection of the 8th parallel with the northeast coast, roughly the southeastern end of Huon Gulf. Bismarck had got more or less what he wanted.

(viii) The legal niceties

This is still not the end of the story. For Britain that looks to have come with a publication in the "London Gazette" of 19 June 1885:²⁴

"the following agreement has been agreed upon between the Governments of Great Britain and Germany as to the boundaries of the possessions of the two countries in New Guinea . . . The British possessions lie to the south of the line thus defined, the German to the north. The British possessions will not include Long Island or Rook Island, or any of the islands adjacent to New Guinea to the northward of the 8th parallel of south latitude."

Yet, the legal significance of this notice is far from clear. Did it express or confirm the assumption of external (?) sovereignty by Britain over those areas defined as British in the Boundary Agreement and not covered by the (amended) 'Erskine Proclamation' of 6 November 1884 — in particular the vast inland area? Did it cancel or amend the proclamation of January 1885, at least insofar as it purported to establish a British Protectorate over areas now defined as German? Did the notice, or the Boundary Agreement, include a tacit cession of any rights Britain might have acquired within those areas? Why did the notice speak of British possessions (plural!) rather than of *the* British Protectorate; and why did it announce that those 'possessions "will" not (not: *do* not!) include Long Island or Rook Island? Did the "British possessions", even by 19 June 1885, not have a firm legal existence?

Whatever the answers to these questions, it cannot possibly be said that British New Guinea was 'annexed' by Britain (even as a Protectorate) by virtue of the "Erskine Proclamation" of 6 November 1884. It is important to keep this in mind, when looking at the German attempts to sort out the matter.

There were no flag-hoistings or amended proclamations as a result of the Boundary Agreement on the part of the German Government. Instead the Neu Guinea Kompagnie was granted an Imperial Letter of Protection on 17 May 1885. It began with a long series of "whereases" summarising the relevant

23. C-4584: nos 84 and 87.

24. *Ibid.*, Enclosure in no 123.

history and reflecting the ambiguity of the German measures. Then followed the 'performative' clause:

"We now grant the Neu Guinea Kompagnie this Our Letter of Protection and confirm herewith that we have assumed the sovereignty [Oberhoheit] over the areas in question."

For New Guinea the subsequent definition followed the Boundary Agreement, but the Letter of Protection also defined the island part of what was now officially called the "Schutzgebiet". It comprised the New Britain Archipelago, re-named "Bismarck Archipelago" (the German part of New Guinea having been named "Kaiser Wilhelms-Land") and all other islands between 141° and 154° E. Longitude and the Equator and 8° S. Latitude.

The Neu Guinea Kompagnie undertook to establish and to maintain certain "staatliche Einrichtungen" (institutions of government)²⁵ in this area and was granted the corresponding rights of "Landeshoheit" (territorial (in contrast to international?) sovereignty). These rights were to be exercised under the "Oberhoheit" of the Emperor who, *inter alia* reserved for himself the right to direct and conduct the relations of the 'Protected Territory' with foreign governments.

The whole terminology indicates that, while some progress had been made, the German Government was still not certain how it should legally organise its new colonial acquisitions. Nor was it worried about these uncertainties. Satisfied to have created internationally recognised, political facts, it was prepared to leave it to the lawyers to work out afterwards what their legal significance was — if they could, and as the need arose.

The German Government clearly proceeded on the assumption that Finsch had acquired no suitable rights of sovereignty on behalf of the Neu Guinea Kompagnie (which, by the way, was still not a properly constituted legal person).²⁶

It disregarded the treaties concluded by von Oertzen and was also well aware that the proclamations read at the flag-hoistings provided a very dubious base. Thus German sovereignty over the geographical areas defined in the Letter of Protection — and there are no indications that it was in any way limited — must be seen as an offspring of legal parthenogenesis. Legally speaking, so it appears, German New Guinea came into being through an implicit and unilateral act of will performed on the other side of the globe some time during the first half of May 1885, by the Emperor himself, by Bismarck or even by a minor official in the German Foreign Office. Its birth was not accompanied by naval splendour; instead it may have emerged, fully armed, from the semi-conscious mind of a Prussian bureaucrat — an idea which would have horrified Bismarck more than anyone else.

This is the likely scenario under German metropolitan law. That under international law is, probably, even more disappointing. Since Germany accepted, at the time, the 'effective occupation' doctrine, under which legal title

25. The parallel to the German draft for Article 35 of the Act of the Congo Conference is obvious (see above).

26. It is by no means certain that the Neu Guinea Kompagnie acquired any rights of sovereignty under the Letter of Protection from the Reich either. There are good reasons for arguing that the Charter merely granted the company a 'licence' to exercise some of these rights on the Emperor's behalf without vesting them in the company.

depended on actual occupation, German New Guinea could not become German until the Neu Guinea Kompagnie had, at least, created minimal institutions of government along the coast. For the interior, it could be argued that, based on a strict interpretation of the 'effective occupation' doctrine, for instance, Mount Hagen never became German territory.

On the other hand, the German Government — just as the British when it came to the crunch — was not overly concerned with such legal niceties. Politically speaking, Germany joined the ranks of the colonial "haves" in the Pacific in April 1885 and within a year German attitudes and methods had become distinctly 'anglicised'. This showed clearly when the Spheres of Interest Agreement had been concluded in April 1886.

(ix) A lesson learned

Not long afterwards the Neu Guinea Kompagnie asked Bismarck to include the Northern Solomons in its "Protected Territory", insisting that this was to be the limit, since further extensions would involve it in greater responsibilities and expenses than it was prepared to shoulder. The inclusion of the northern Solomons was requested, however, because members of other nations, in particular Australians, were successfully trying to secure the best harbours and large areas of land on these islands by means of contracts with the 'natives'.²⁷ This 'invasion' was likely to make the occupation and utilisation of these islands by Germans difficult and could only be halted by formally placing them under German protection — thus a summary of the company's position by the German Foreign Office in a letter to the Admiralty of 19 June 1886.²⁸ Bismarck, the letter continued, was sympathetic to the company's requests and would recommend acceptance to the Emperor. It suggested that preparations for the hoistings of the German flag were made forthwith — adding that the conclusion of treaties with the 'natives' did not appear necessary.

On 22 June the Admiralty offered S.M.S. "Adler" for the mission, which could be reached by cable in Singapore until August.²⁹ Imperial permission granted, the German Foreign Office asked the Admiralty on 28 June 1886 to issue definite sailing instructions to her Commander. It also suggested that:³⁰

"It would be useful if the proclamation to be read by the commander would also, for the time being, prohibit the acquisition of land from the natives and the supply of arms, ammunition and liquor to them."

Corresponding instructions were issued to Captain von Wietersheim on 30 June 1886. They emphasised in particular:³¹

"The choice of the locations . . . at which the flag is to be hoisted is left to you. As far as possible, however, the proclamation . . . is to take place in locations where it is practical for the local inhabitants to come together to participate in the ceremonies. As it is out of the question to leave the [imperial] flag on shore without a guard, it is to be lowered before the

27. Hansemann was worried by the frantic and successful land buying activities of Queen Emma (Farrell/Forsayth) and her clan, particularly on Bougainville and Buka, where the land claims amounted to 100,000 strategic hectares.

28. RKA: File 2642.

29. *Ibid.*

30. *Ibid.*

31. *Ibid.*

departure of the cruiser and to be replaced by another token . . . , for instance a post painted in the German colours with plaque and inscription." S.M.S. "Adler" cast anchor in Bambatani, Choiseul, on 27 October 1886 at 3 p.m.:³²

"During that same afternoon [Captain von Wietersheim reported on 15 November] I sent the interpreters [whom he had engaged on Mono island] ashore with an escort, to bring the chief on board. When the boats approached the beach, the natives who had gathered there assumed a hostile attitude — it looked as if they were about to shower the boats with spears and arrows. However, repeated attempts by one of the interpreters who spoke the Bambatani language, succeeded in calming the people, so that the boat could land under the protection of the cutter. About an hour later the boats returned with the report that the 'king'³³ had recently died but that the accompanying natives were now the local chiefs.³⁴

They were informed of the purpose of the presence of S.M.S. "Adler", presented with gifts and returned to shore after I had caused them to be told that the German flag would be hoisted in the morning and that as many of the natives from the neighbouring villages as possible should come together.

On 28 October at 7 a.m. the landing corps disembarked under the sounds of the band, and was landed in a small cove near the hamlets of Bambatani. At this sight the natives who had gathered on the beach ran into the bush and despite great effort only some of them could be coaxed back. The flag was hoisted with the usual honours and the proclamation, a copy of which is enclosed, was read. Then a plaque with the emblem of the Reich and the inscription "Imperial German Protected Territory" was erected on the beach . . . and the band gave a concert.

Before the landing corps re-embarked, the flag was lowered and the proclamation, packed in a tin container, was handed over to one of the alleged chiefs who could speak some English and whose name was Saka Paka, together with a small German merchant flag which had been made on board. Plaque, proclamations and flag were declared to be "*tabu*" in the presence of the natives who all promised to follow this order."

The cash costs of the three German flag-hoistings in the Solomons amounted to 118.22 Marks: 48.57 for three plaques with the German emblem from the Tanjong Tagar Dock Company in Singapore, the rest for beads, tobacco, knives, mirrors and eighteen mouth-organs as presents for the 'natives'. The interpreting service was almost as expensive: 91.80 Marks in fees and 3.48 Marks worth of tobacco.

For this outlay Germany acquired a reasonably clear and well-defined territorial title. The proclamation read by Wietersheim referred neither to German land acquisitions nor to protection which would be granted (in appropriate forms) in the future. Its wording could have been taken straight from instructions issued by the British Admiralty:³⁵

32. *Ibid.*

33. "King" in the German original.

34. "Chef" not "Häuptling" in the German original.

35. Then follows the prohibition of the acquisition of land by Europeans and the supply of arms, ammunition and liquor to 'natives' (RKA: File 2643).

“By command and in the name of His Majesty . . . I herewith assume protection over the islands Choiseul, Bougainville and Ysabel, as well as all islands of the Solomon Group which are situated north of the line of demarcation agreed upon by Germany and Great Britain in the convention of 6 April 1886 and proclaim all these islands a German Protectorate.”

Looking at the text of the Letter of Protection granted to the Neu Guinea Kompagnie on 13 December 1886 it is hard to appreciate how much the German approach had, in fact, changed since August 1884, and how quickly a new ritual had become established:³⁶

“Whereas the Neu Guinea Kompagnie in Berlin has made the request that those islands of the Solomon Group which are situated north of the line of demarcation agreed upon between Our Government and the Royal Government of Great Britain on 6 April 1886 be united with its protected territory; Whereas the Neu Guinea Kompagnie has also agreed to assume the rule [Herrschaft] over the aforementioned islands under Our Sovereignty [Oberhoheit] in accordance with the provision in Our Letter of Protection of 17 May 1885; Whereas they thereupon have been placed under Our Protection by an officer of one of Our warships under Our orders; We now grant the Neu Guinea Kompagnie this our Letter of Protection for the islands of Solomon Group referred to above in accordance with the provisions of our Letter of Protection of 17 May 1885 and confirm herewith that we have assumed sovereignty over these islands.”

Conclusion

This is but one tip of the iceberg and even its contours are by no means certain. Nonetheless, they obviously bear only vague resemblance to the shapes presented in the literature reviewed above. It is also clear, even at this stage, that any simple explanatory model must be inadequate. In particular, while the story certainly includes elements of conspiracy, there are many others which are, at least, equally significant. More importantly, conventional European explanations may not only be incapable of accounting for the factual complexities, but may have become altogether meaningless.

If the ‘annexation’ of German New Guinea is seen — as it increasingly must be seen — as part of the history of Papua New Guinea rather than as a marginal and largely obsolete episode in German history (or, for that matter, Australian history), there seems to be little point in discussing it in terms of a Britain versus Germany game. Even the time of presenting it — together with the other ‘annexations’ — in the context of a ‘colonisers versus colonised’ model, has already passed. What force remains in the argument that European powers paid scant attention to the needs, let alone legal rights, of the local population when dividing up the New Guinea region, after the ‘colonies’ have become independent and have started to defend their accidental, colonial borders? The clash between different social, economic, political, legal and cultural institutions, processes and values which the ‘annexation’ of German New Guinea manifests, has long been internalised.

Under these circumstances it could well be claimed that the ‘annexation’ of German New Guinea has lost any possible relevance as a historical episode in its

36. *Deutsche Kolonialgesetzgebung*, vol 1, 436.

own right. Yet, it remains crucial for Papua New Guinea's historiography. Whether one likes it or not, the 'annexations' are the starting points of official, state history in the area. Their treatment thus becomes a touchstone for the kind of history Papua New Guineans will build for themselves.

Perhaps this discussion will help them in identifying European tribal mythology when they are confronted by it and in appreciating that there is a price to be paid for any form of historical meaning, including the meaning they choose to give their own history. Perhaps it will alert them to the dangers of uncritically absorbing foreign ritual and of accepting fictitious walls, such as that between law and history, which seem to permit those who accept their existence to ride roughshod over the facts they are trying to explain. For example, it may assist them in recognising some of the original chords behind tone-poems such as this:

"In October 1884 ten men from the Bogadjim area of what is now the Madang Province of Papua New Guinea, put their marks on a piece of paper shown to them by Germans who came in a steamship. According to the piece of paper, which the Germans called a 'treaty' those New Guineans allowed Germans to settle, obtain land, lay down plantations, and mine from the earth without hindrance; promised the Germans that their property and lives would be safe; and undertook never to dispute the Germans' ownership of the land they acquired under German law. Near modern Madang, men wearing elaborate, symmetrical pendants and armlets of teeth and shell signed a similar treaty. The New Guinean signatories to these documents did not get copies of them. There was no point in giving them copies, a German official noted, because 'even if a translation into their language had been possible, which however, was not the case, they would not have been able to read it, and besides it could fall prematurely into unauthorised hands' . . . On 3 November 1884 the black-white-red flag of Imperial Germany was raised on the island of Matupit in East New Britain, which had been the home of a German copra trader for a half a decade. For form's sake, the farce of making a treaty was repeated. Whether they knew it or not, ten Tolai men ceded the vast areas of Blanche Bay to Germany."

Strange as it may seem, this is a major part of a 1979 version of the 'annexation' of German New Guinea, which was written with full access to all the German sources used in this paper (as shown by the sinister sounding, unidentified quotation from Commissioner von Oertzen's report on his treaties). Since it says nothing about their relation with Finsch's land deeds or the flag-hoistings of the German Navy or indeed about the role of all these activities in the 'annexation' process, it is difficult not to conclude that the author was simply not interested, because he was satisfied with his own preconceived and ritualised explanation. For him, the 'annexation' of German New Guinea happened the way it happened, whichever that was, because:³⁷

"Germany was a new power seeking new influence, and annexed a whole colonial empire in 1884 and 1885 to prove it. Britain was different . . ."

Of course Britain was different, but so was the 'annexation' of German New Guinea and so is 1986 in Papua New Guinea and elsewhere. In history, a rose rarely is a rose, is a rose . . .

37. Griffin, J, Nelson, H, and Firth, S, *Papua New Guinea: A Political History*, (1979), 7-8.