

PROTECTORS AND PROTECTED: REGULATING LAND AND LABOUR IN THE NYASALAND COLONIAL PROTECTORATE



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ABSTRACT

Issues around land and labour are two of the most pervasive themes in British imperial history. Land was a contentious issue, with competing claims to its possession, access, and use permeating to the core of imperial orders. Similarly, labour issues regarding the abolition of slavery, labour migration and varying levels of unfreedom in labour arrangements reverberated throughout imperial contexts. In British colonial protectorates, where the Crown's dominion did not extend, and inhabitants were protected persons rather than subjects of the Crown, these conflicts assumed a distinct degree of complexity. This thesis examines the nature of protection and colonial subjecthood in a colonial protectorate through an analysis of the legal regulation of land and labour from the gradual extension of extraterritorial jurisdiction in the late 19th century, to the heavy-handed governmental response to the African uprising of 1915.

This thesis (1) Illustrates the central role of jurisdictional concerns in establishing protection in the region and considers shifts in protectionist rhetoric from the military allegiances and security arrangements of missionaries to the protection of lives and property of British settlers in treaty arrangements, and finally to the governability of Africans and the maintenance of order once a protectorate was established. (2) Examines Commissioner Johnston's land settlement programme (1892-1893) demonstrating his crude deployment of a pre-emption policy to deny Africans the authority to transfer land in a programme that evaluated settler claims to title and designated Crown land. (3) Argues that the regulation of labour on private estates took the acerbity of master and servant legislation to this rudimentary legal order and compounded it with a dependence on the land of the master and a racialised culture of fear and physical violence resulting in a distinctive form of labour unfreedom. (4) Argues that the colonial government's heavy-handed response to the native uprising through treason trials, executions and collective punishment highlights the reality of British protected persons in a colonial protectorate facing full subjection and without the protections of the law.

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ABBREVIATIONS

AC	Law Reports Appeal Cases (Third Series)
ALC	Africa Lakes Company
ALL ER	All England Law Reports
App Cas	Law Reports Appeal Cases (Second Series)
BDC	Blantyre District Court
BEAC	British East Africa Company
CCBCA	Consular Court British Central Africa
CO	Colonial Office
Day	Day's Election Cases
E & E	Ellis & Ellis' Queen's Bench Reports
EACA	East Africa Court of Appeal
ER	English Reports
FO	Foreign Office
HCBCA	High Court British Central Africa
HCBCA	High Court British Central Africa Protectorate
IRCL	Irish Reports Common Law
KB	King's Bench
LJ	Law Journal Newspaper
MNA	Malawi National Archives
NHC	Nyasaland High Court
Plowd	Plowden's Commentaries or Reports
QB	Queen's Bench

RIAA	Reports of the International Arbitral Awards
SI	Statutory Instrument
TNA	The National Archives (Kew)
UMCA	Universities' Mission to Central Africa
Wheat.	Wheaton's Supreme Court Reports
WLUK	Westlaw United Kingdom
WO	War Office

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INTRODUCTION

1. Overview

This thesis will analyse how the law framed land and labour issues in the British Central Africa Protectorate and discuss how the idea of protection influenced the genesis of the jurisdictional authority in the territory and permeated its governance.¹ Land and labour are two of the most pervasive themes in British imperial history. Land was a contentious issue, with competing claims to its possession, access, and use permeating to the core of imperial orders. Similarly, labour issues regarding the abolition of slavery, labour migration and varying levels of unfreedom in labour arrangements reverberated throughout imperial contexts. Conflicts over land and labour use were reflected in and articulated by contested and unstable doctrinal legal formulations. This was especially so in the nineteenth-century colonial protectorate, which was itself an evolving political institution.

The motives and causes behind the rapid global expansion of European colonial empires fin-de-siecle, and most notably the scramble for Africa, remain a mystery. Classic economic theories of imperialism posited that the drive for territorial expansion into virgin territories was fuelled by surplus capital and surplus population.² In addition, the rush for territory has been attributed, to some extent, to political and strategic motives such as rivalry

¹ A British protectorate was declared over the territory adjoining Lake Nyasa (Lake Malawi) in 1889. In 1891, the Protectorate was declared the British Central African Protectorate. In 1907, the territory was renamed the Nyasaland Protectorate.

² JA Hobson, *Imperialism: A Study* (James Nisbet 1902); Wolfgang J Mommsen, *Theories of Imperialism* (Weidenfeld and Nicolson 1981) 9.

with other powers and a desire to preserve control over territories previously acquired.³ Furthermore, the period of the scramble coincided with a rise in humanitarian concern for the well-being of the indigenous people in the wake of the slave trade.⁴ The British empire was often justified as a civilising force bringing law and order to far-off territories.⁵ A less explored factor behind the expansion of Britain's imperial influence was the empire's quest for jurisdiction - the desire to exert authoritative control over areas that were not under the rule of Her Majesty's domain.⁶ This view is suggested by Benton and Ford's categorisation of the thirst for imperial order as the driving impetus behind imperial pursuits.⁷

During the 19th century, much of Great Britain's overseas imperial activity constituted informal rather than formal empire.⁸ The significance of understanding informal empire to unravel the complexities of Victorian expansion has long been recognised.⁹ Formal empire involved the transfer of sovereignty and 'usually direct administrative control'.¹⁰ By contrast, informal imperialism referred to trade and diplomatic relationships often backed by treaties or

³ Mommsen (n 2) 9; Bernard Attard, 'Informal Empire: The Origin and Significance of a Key Term' [2022] *Modern Intellectual History* 1, 25; John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) 6 *The Economic History Review* 1, 6 They argue that 'imperialism may be only indirectly connected with economic integration in that it sometimes extends beyond areas of economic development, but acts for their strategic protection'.

⁴ Amalia Ribi Forclaz, *Humanitarian Imperialism: The Politics of Anti-Slavery Activism, 1880-1940* (First, Oxford University Press 2015).

⁵ Suzanne Miers, 'Humanitarianism at Berlin: Myth or Reality' in Stig Förster, Wolfgang J Mommsen and Ronald Robinson (eds), *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press [for] German Historical Institute 1988) 333.

⁶ W Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Duke University Press 1973) 321.

⁷ Lauren A Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Harvard University Press 2018); Johnston also suggested this view in Johnston (n 6) 250.

⁸ Gallagher and Robinson (n 3) 1.

⁹ Ronald Robinson, John Gallagher and Alice Denny, *Africa and the Victorians: The Official Mind of Imperialism* (2nd edn, Macmillan 1981).

¹⁰ J Darwin, 'Imperialism and the Victorians: The Dynamics of Territorial Expansion' (1997) 112 *English Historical Review* 614, 614.

force – stretching the reach of the imperial power.¹¹ The irony of the scramble period was great expansion coupled with a reluctance to incur all the responsibilities of formal acquisition and direct rule.

Homing in on the historical relationship between law and imperialism, this thesis seeks to understand the role of protection in the acquisition of jurisdiction and governance of the British Central Africa Protectorate. In this thesis, I describe the nature of protection, how this unfolded in the Nyasaland protectorate, what this tells us about the relationship between protection as a practice and the colonial protectorate as an institution, and what lessons this may hold for understanding comparative situations. In addition, I am concerned with the effect of the protectorate rule on the protected persons – the natives in Nyasaland. Diego de Saavedra Fajardo poignantly described the nature of protection with an analogy of a pair of wings that shelters the land below but also casts a deep shadow where the sun cannot shine.¹² While the gradual extension of protection over African states assisted in eliminating the slave trade, the colonial state fell into the pattern of coercing African labour creating a different but nevertheless profound sense of unfreedom.

In section two of this introduction, I outline the historical background of the region in question. In section three, I explain how my work complements, builds upon, and departs from existing scholarship in theoretical and empirical argument. Section four of this introduction

¹¹ Darwin (n 10) 614. This definition of ‘informal empire’ is contested, as is that of the concept of empire more generally. Katharine West, ‘Theorising about “Imperialism”’: A Methodological Note’ (1973) 1 *Journal of Imperial and Commonwealth History* 147, 148–149.

¹² Annabel Brett, ‘Protection as a Political Concept in English Political Thought, 1603–51’ in Lauren A Benton, Adam Clulow and Bain Attwood (eds), *Protection and Empire: A Global History* (Cambridge University Press 2018) 96.

then discusses the distinctive methodology employed in the thesis. Finally, section five gives an outline of the main claims of the thesis.

2. Background

The slave trade was the single most significant factor drawing Britain's attention to British Central Africa.¹³ The situation in the Nyasaland region bore little resemblance to and had little bearing on the strategic and economic considerations playing out on the global stage during the African scramble for territory.¹⁴ Economically, the Nyasa region had little to offer the metropole.¹⁵ Strategically, the region was insulated from the increasing competition and aggression in the North of Africa with the purchase of Suez Canal shares, nor was it directly connected to the growing imperialist interest in South Africa.¹⁶ Arguably labour exploitation dominated in the Nyasaland region rather than strategies over trade, resources or colonial settlement. Here, the slave trade occurred on a scale unparalleled in any other region in East and Central Africa in modern times.¹⁷

Missionaries of various stripes arrived and settled in the Nyasa region in the early 1860s, responding to David Livingstone's call to action.¹⁸ From about 1875, missionaries in the area began to call for protection from the metropole due to the turbulent situation of the

¹³ Isaac C Lamba, 'The Scramble for Malawi: A Case Study in Humanitarian Imperialism 1860-1890' (1977) 6 *Journal of Social Science* 96, 98.

¹⁴ Oliver Macdonagh, 'The Anti-Imperialism of Free Trade' (1962) 14 *The Economic History Review* 489; Gallagher and Robinson (n 3) 1.

¹⁵ Leigh Gardner, *Taxing Colonial Africa: The Political Economy of British Imperialism* (Oxford University Press 2012) 7; Lamba (n 13) 98.

¹⁶ Robinson, Gallagher and Denny (n 9) 222–226.

¹⁷ Robin Palmer, 'Johnston and Jameson: A Comparative Study in the Imposition of Colonial Rule' in Bridglal Pachai (ed), *The Early History of Malawi* (Longman 1972) 297.

¹⁸ Andrew Ross and Christine Kelly, *David Livingstone: Mission and Empire* (Bloomsbury Publishing 2004) 241; Thokozani Chilembwe and Todd Statham, "'Re-Righting" Mission Historiography: The Example of Harry Kambwiri Matecheta's Blantyre Mission' (2017) 49 *Fides et Historia* 65, 66.

ongoing slave trade and Portuguese aggression.¹⁹ Slowly and somewhat responsively, steps were taken to exercise extra-territorial control of the situation through the appointment of British consuls. The Portuguese interpreted this move as British intent to take over the region and retaliated by attempting to seize the Makololo region in the south of Nyasaland. It was then that circumstances conspired to necessitate and enable the declaration of a protectorate over the region.²⁰ Therefore, protective rhetoric regarding the abolition of the slave trade and the protection of the lives and property of British subjects played a decisive role in the eventual declaration of a protectorate over Nyasaland.²¹

Given the tumultuous state of the region, the colonial government led by the Commissioner and Consul General Harry Johnston began its quest for order. One of the first acts of the state was to regularise land sales and reconfigure the theory of land ownership in the country. In terms of the settlement programme, 15% of the most arable land in the protectorate was alienated to settlers.²² The remaining land was designated as either Crown or African land over which the Crown possessed ‘pre-emption’ rights.²³ As a result of this settlement, Africans on private land were compelled to work for landlords for the right to reside on the estates in an exploitative system known as *thangata*.

¹⁹ Alexander John Hanna, *The Beginnings of Nyasaland and North-Eastern Rhodesia 1859-95* (2nd edn, Clarendon Press 1969) 64; Eric Axelson, *Portugal and the Scramble for Africa, 1875-1891* (Witwatersrand University Press 1967).

²⁰ Stephen Samuel Murray, *A Handbook of Nyasaland* (Published for the Government of Nyasaland by the Crown Agents for the Colonies 1922) 16.

²¹ Lamba (n 13) 99–102.

²² Bridglal Pachai, *Land and Politics in Malawi, 1875-1975* (Limestone Press 1978) 41; Brian Morris, *An Environmental History of Southern Malawi: Land and People of the Shire Highlands* (Springer Science & Business Media 2016) 106.

²³ Clement Ng’ong’ola, ‘Colonial Law and the Inception of a Dual Land System in Nyasaland’ (1985) 18 *Law and Politics in Africa, Asia and Latin America* 283, 285.

Thangata was a customary institution of reciprocal performance which was transformed into a mechanism for coercion of labour in the colonial era.²⁴ *Thangata* was one of the chief characteristics of British rule in British Central Africa and one of the central aspects of Malawian colonial history on land tenure.²⁵ While it exhibited local specificities, the coerced labour phenomenon was not unique to the polity as comparable systems of coerced labour through customary devices and native authority can be observed in Kenya, Zambia, Uganda, and Rwanda.²⁶ Labour ordinances bearing the distinctive marks of master and servant legislation regulated the working lives of native people in Nyasaland. In addition, coerced labour on the private estates posed an existential threat to the colonial administration. It sparked unrest, resistance, litigation and prompted the colonial government to conduct several commissions of inquiry to address the challenges faced. Nyasaland faced persistent issues with labour for fifty years until the colonial government arranged to obtain land for African resettlement.

The institution of *thangata* was a microcosm of coerced communal labour prevalent throughout colonial Africa. However, it seems to be at odds with the protective moral thrust of the period in its campaigns against slavery and unfreedom. The state manipulation of traditional practice enabled the colonial government to distance itself from the practice.²⁷ Therefore, native authority and tradition became a basis for decentralised despotism'.²⁸ This thesis delves

²⁴ Terence Ranger, 'The Invention of Tradition in Colonial Africa' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1992).

²⁵ JAK Kandawire, 'Thangata in Pre-Colonial and Colonial Systems of Land Tenure in Southern Malawi with Special Reference to Chingale' [1977] *Africa: Journal of the International African Institute*; Melvin E Page, 'The War of Thangata: Nyasaland and the East African Campaign, 1914–1918' (1978) 19 *The Journal of African History* 87, 87.

²⁶ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996) 156.

²⁷ Opolot Okia, *Communal Labor in Colonial Kenya: The Legitimization of Coercion, 1912-1930* (Palgrave Macmillan 2012) 22.

²⁸ Mamdani (n 26) 138.

into the nature of *thangata* and how it was manipulated and mitigated against in order to shed light on the meaning of protection in the British Central Africa Protectorate and the role of the law in the regulation of the lives of British protected persons.

Exploitative labour practices on private estates caused African unrest and plagued the conscience of the protectorate government. The state acted to ameliorate the most overt abuses of *thangata* while maintaining a system inherently conducive to abuse. The conflict between African interests and settlers' proprietary rights was consistently decided in favour of estate owners. *Thangata* was only finally abolished when politics made a substantial turn in the form of the election of Africans to the Legislative Council, and land was finally purchased for African resettlement.²⁹

3. Approach and Contribution to the Literature

A rich theoretical literature explores the nature of protection in the context of empire. Protected states and protectorates were central in imperial practice and scholars are increasingly recognising protection a linchpin of the imperial order.³⁰ The language of protection informed jurisdictional politics and lay at the heart of the study of European empires.³¹ 'Protection' and 'protector' had already been an established part of English legal and political culture around the time of the English civil wars.³² However, scholars note that protection underwent a shift

²⁹ Roger Tangri, 'Inter-War "Native Associations" and the Formation of the Nyasaland African Congress' (1971) 1 *Transafrican Journal of History* 84.

³⁰ Lauren A Benton and Adam Clulow, 'Introduction: The Long, Strange History of Protection' in Lauren A Benton, Adam Clulow and Bain Attwood (eds), *Protection and Empire: A Global History* (Cambridge University Press 2018) 3.

³¹ Benton and Ford (n 7).

³² Brett (n 12) 93.

in meaning from the early to mid-nineteenth century, from a term that characterised ‘interpolity relationships of alliance to one that connoted imperial lordship over subjects’.³³

Protection was a malleable concept with a multitude of possible meanings.³⁴ Benton and Clulow identify that it could represent the dynamic between the church or sovereign and vulnerable persons.³⁵ Alternatively, it could refer to assurances of safe conduct, military arrangements for security, or ‘a corollary to divided or layered sovereignty’.³⁶ Protection as a reaction to, and acceleration of and violence often led to securitisation.³⁷ Securitisation is where a situation is presented as existentially threatening in order to justify extraordinary measures.³⁸ This device was often used in extending protection to indigenous tribes as will be shown to have been the case in Nyasaland.

In his discussion of protection claims around the Maori, Attwood describes different strains of the language of protection.³⁹ The first is ‘humanitarian protection’, advanced by abolitionists and aborigines’ protection groups.⁴⁰ This protectionist discourse casts peoples as sufficiently weak or vulnerable to justify some necessary intervention while being able to treat these peoples as more-or-less sovereign. The second strain of the language of protection is ‘protection-as-jurisdiction’ which are claims to protect a putative sovereignty, independently

³³ Bain Attwood, ‘Protection Claims: The British, Maori and the Islands of New Zealand, 1800–40’ in Adam Clulow, Bain Attwood and Lauren Benton (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 153.

³⁴ Benton and Clulow (n 30) 2.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ Luca Scholz, ‘Protection and the Channelling of Movement on the Margins of the Holy Roman Empire’ in Adam Clulow, Bain Attwood and Lauren Benton (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 20–23.

³⁸ *ibid.* 23.

³⁹ Attwood (n 33) 160–163.

⁴⁰ *ibid.*

of the needs of the populace. Here, making a claim to protect is a means of conjuring a form of authority that would not otherwise exist.⁴¹ Attwood notes that humanitarian registers of protection pale in comparison to jurisdictional ones but that the two can also be combined.⁴² Benton and Clulow advance a theory which recognises both ‘inside’ protection (the exercise of protection of subjects by imperial powers) and ‘outside’ protection (served to thrust imperial influence into new territories and realms).⁴³ In interpolity relations, arrangements of protection between two polities (outside protection) often shifted to become claims of partial sovereignty, as was the case in African protectorates.⁴⁴

In the African context, protection talk goes back to the 17th and 18th centuries, when it was readily employed in interpolity relations.⁴⁵ Protection was often preferred to the acquisition of territorial sovereignty in order to curtail the responsibilities of British legislation, which would become applicable in the territory once it was acquired, particularly the Slavery Abolition Act.⁴⁶ Protection was also a strategic way to avoid conflict with natives, as the practice of slavery had become entrenched in the indigenous communities.⁴⁷

⁴¹ ibid 169.

⁴² ibid 153.

⁴³ Benton and Clulow (n 30) 8.

⁴⁴ ibid.

⁴⁵ Inge Van Hulle, ‘British Protection, Extraterritoriality and Protectorates in West Africa, 1807–80’ in Adam Clulow, Bain Attwood and Lauren Benton (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 194; Colin Newbury, ‘Treaty, Grant, Usage and Sufferance: The Origins of Britain’s Colonial Protectorates’ in WP Morrell, GA Wood and PS O’Connor (eds), *A Tribute: Essays in Modern and Early Modern History Presented to William Parker Morrell* (University of Otago Press 1973) 101.

⁴⁶ Van Hulle (n 45) 204. Slavery Abolition Act 1833 (3 & 4 Will c 73).

⁴⁷ Johnston (n 6) 11–13.

Initially, treaties of protection concluded in West Africa were of a military nature.⁴⁸ However, during the 19th century, the relationships of protection came to involve an element of sovereignty which had the effect of intertwining protection and extra-territoriality.⁴⁹ Under the protection of the British, jurisdictional rights to adjudicate disputes were acquired, both between nationals and natives, as between the natives themselves. As this took the place of native adjudication over their own matters, it resulted in the informal extension of British influence, circumventing the need to ‘acquire territorial sovereignty’.⁵⁰ This informal extension of influence enabled by the Foreign Jurisdiction Acts 1843-1890, was reflected in the protectorate in its different forms.⁵¹

A distinction is drawn between a protectorate or ‘protected state’ and a colonial protectorate.⁵² Protected states are territories over which external sovereignty has been transferred to the protecting power while maintaining their internal autonomy.⁵³ By contrast, colonial protectorates were established in territories perceived as barbarous or semi-barbarous, and both the external sovereignty and internal autonomy were ‘absorbed into the personality

⁴⁸ Newbury (n 45) 101.

⁴⁹ Van Hulle (n 45) 194.

⁵⁰ *ibid* 194–195.

⁵¹ Foreign Jurisdiction Act 1843 (6 & 7 Vict c 9). Amended by the Foreign Jurisdiction Amendment Act 1865 (28 & 29 Vict c 116); Foreign Jurisdiction Amendment Act 1866 (29 & 30 Vict c 87); Foreign Jurisdiction Act 1875 (38 & 39 Vict c 85), and Foreign Jurisdiction Act 1878 (41 & 42 Vict c 67). Repealed and consolidated by Foreign Jurisdiction Act 1890 (53 & 54 Vict c 37).

⁵² JES Fawcett, *The British Commonwealth in International Law* (Stevens 1963) 116; Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans 1926) 180.

⁵³ Fawcett (n 52) 116.

of the protecting state'.⁵⁴ However, the extent of the absorption varied greatly depending on the terms of the treaties of protection and local circumstances.⁵⁵

Alfred Kamanda's study of the legal status of protectorates examined the status of protectorates in international law in terms of their establishment, treaties of protection, treatment by national legislatures, and the various legal consequences of the protectorate state.⁵⁶ While charting the history of the protectorate as an institution from the 13th to 20th century, Kamada's study explicitly excludes the 'colonial protectorate' from its ambit.⁵⁷ He regarded the colonial protectorate more as a political category than a juridical one.⁵⁸ Similarly, Alexandrowicz considered the colonial protectorate a mere political expedient adopted after the Berlin Conference.⁵⁹ However, Van Hulle characterised the colonial protectorate as the amalgam of extra-territorial rights in areas that stood under British protection.⁶⁰ This thesis adopts Van Hulle's approach to the nature of the colonial protectorate and seeks to analyse the content of the amalgam of rights exercised in Nyasaland.

Several studies have sought to understand how colonial protectorates came to be in the late nineteenth century. For instance, Johnston's seminal work 'Protection and Sovereignty' is

⁵⁴ Alfred Moses Kamanda, 'A Study of the Legal Status of Protectorates in Public International Law' (Université de Genève, Institut Universitaire de Hautes Etudes Internationales 1961) 25; Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984) 4–6, 44–45. Gong 4–6 The terms barbarous and semi-barbarous are used in several places throughout this thesis. They emanate from the European community's standard of civilisation; a way of distinguishing between communities who would be excluded from the law of nations (barbarous) and those who could be given partial recognition for particular purposes such as concluding treaties (semi-barbarous).

⁵⁵ Kamanda (n 54) 25.

⁵⁶ *ibid* 17.

⁵⁷ *ibid* 25.

⁵⁸ *ibid*.

⁵⁹ Charles Henry Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (Sijthoff 1973).

⁶⁰ Van Hulle (n 45) 194.

an administrative and legal history of how the concepts of ‘sovereignty’ and ‘protection’ developed in the Colonial and Foreign Offices.⁶¹ Johnston’s approach is primarily one of the developments of theory, and he does not concern himself with the ways in which that theory was implemented in specific territories.⁶² This thesis draws from the broad development of theory relating to the protectorate and charts its implementation within Nyasaland.

Taking the implications of the changing theory on local context further, Van Hulle illustrates the creeping extension of British jurisdiction in West Africa. She describes how the flexible language of protection circumvented the need for formal acquisition of sovereignty.⁶³ She notes that this practice paved the way for the use of protection to acquire complete sovereignty, as was done later in the 19th century.⁶⁴ Her account demonstrates that the growing use of the term ‘protectorate’ was connected to the increase in extra-territorial jurisdiction exercised in these areas.⁶⁵ However, her inquiry is aimed at the initiation of the protectorate rather than its governance and operation. Furthermore, the circumstances resulting in the establishment of the Gold Coast Protectorate and those of the British Central Africa Protectorate differ in significant ways.

Using the lens of protection, this thesis explores the establishment and governance of the British Central Africa Protectorate. In doing so, it contributes to the understanding of the effects and extent of humanitarian imperialism and its connection to jurisdiction and formal imperial acquisition. This approach aligns with the increasing focus on jurisdictional conflicts

⁶¹ Johnston (n 6) vi.

⁶² *ibid.*

⁶³ Van Hulle (n 45) 203.

⁶⁴ *ibid.*

⁶⁵ *ibid* 204.

that propelled change in the structure of colonial legal orders. Jurisdiction, in the words of Peter Rush, ‘refers us first and foremost to the power and authority to speak the name of the law and only subsequently after the fact is the law stated – and stated to be someone or something’⁶⁶

Relatedly, this thesis makes empirical contributions inextricably tied to the theoretical framework from which the thesis approaches the primary material. First, the thesis makes an empirical contribution to the pre-protectorate legal history in its exploration of the unlawful extra-territorial jurisdiction exercised by the missionaries. Previous research has demonstrated the range of problems that arose with the early missionaries in their acquisition of land, albeit from a purely historical perspective.⁶⁷ Conversely, this research adopts a legal approach and scrutinises the different legal claims to authority made by the mission, the validity of those claims, and the requests for protection that partially led to the establishment of the protectorate.

In Chapter 2 of the thesis, I draw from archival material from the National Archives Foreign Office documents (primarily F.O. 84/1564 and F.O. 84/1565) and Minutes of the Foreign Committee of the Church of Scotland Foreign Mission Committee from the National Library of Scotland to uncover some of the early land transactions between Yao chiefs and the Blantyre Mission and their focus on protection and exercise of jurisdiction. A commission of inquiry into the unlawful use of civil jurisdiction forms the core of my analysis in this chapter.

⁶⁶ Peter Rush, ‘An Altered Jurisdiction: Corporeal Traces of Law’ [1997] Griffith Law Review 144, 150; Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge 2012) 4; Lauren Benton, ‘Legal Regimes and Colonial Cultures’ [2002] Law and Colonial Cultures. Legal Regimes in World History, 1400-1900 56, 56. Benton defines jurisdiction more broadly as ‘vaguely defined legal authorities of the power to regulate and administer sanctions over particular actions of people including groups defined by personal status, territorial boundaries, and corporate membership’.

⁶⁷ Hanna (n 19) 26–27; Andrew C Ross, ‘The Blantyre Mission and the Problems of Land and Labour, 1891-1915’ in Roderick J MacDonald (ed), *From Nyasaland to Malawi: Studies in Colonial History* (East African Publishing House 1975); Peter Hinchliff, ‘The Blantyre Scandal, Scottish Missionaries and Colonialism’ (1984) 46 Journal of Theology for Southern Africa 29.

While previous research makes cursory reference to the outcome of the commission,⁶⁸ this thesis focuses on the African testimonies given to the commission to understand the effects of this early protection on the Africans under missionary protection.

Secondly, the thesis makes an empirical contribution to the legal history of the land settlement undertaken by Commissioner Harry Johnston in 1892-1893. The majority of existing academic research on the land settlement program adopts a social or economic historical approach.⁶⁹ For instance, Pachai's work details the history of land over the century between 1875 and 1975 chronicling the underinvestment and underdevelopment of the country. As Ng'ong'ola noted, while Pachai's account is empirically rigorous, the legal and procedural aspects of the land settlement were not given sufficient attention in Pachai's study.⁷⁰ Ng'ong'ola's account then went on to examine the policy and statutory evolution of the treatment of land in the protectorate. Ng'ong'ola examines Johnston's settlement and mentions that he may have had authority to conduct the land settlement in terms of 'rights of pre-emption'.⁷¹ However, he does not further examine the source or nature of these rights and how they may have influenced Johnston's treatment of native land rights.

Chapter 3 of this thesis explores the nature of Commissioner Johnston's legal authority to conduct the land settlement with a focus on a clause entered in each grant of title aimed at securing African rights to land. Further, it analyses Johnston's claims of having implemented the Crown's right of pre-emption and its use in a colonial protectorate. The Crown's right of

⁶⁸ Hanna (n 19) 26,30.

⁶⁹ Pachai (n 22); Bangalore Krishnamurthy, 'Land and Labour in Nyasaland (1891-1914)' (University of London 1964) 223-245.

⁷⁰ Ng'ong'ola (n 23) 283.

⁷¹ *ibid.*

pre-emption is a long-standing policy of the common law, stretching back to the 16th century or before, stating that native or indigenous titles to lands under imperial prerogative control were not freely assignable by private treaty, but rather had to be surrendered to the Crown, that is land had to be alienated from the native system as an act of cession to the suzerain.⁷² It illustrates the duties the Commissioner owed to the natives in the alienation of their land rights through an examination of the claims he reviewed in the land settlement. This analysis contributes to the understanding of land acquisition in imperial contexts.

Finally, the thesis makes an empirical contribution to the record of the institution of *thangata*. There is a wealth of literature that describes *thangata* from a labour history and social history perspective. For instance, sociologist labour historian Chipeta discusses *thangata* relations as a ‘process of proletarianisation’ in the protectorate.⁷³ Chipeta sought to depart from previous literature on *thangata*, arguing that existing literature was predominantly an analysis of government policy to the exclusion of the ‘demands of colonial capitalist agriculture’. While Chipeta was correct in noting that the structural forces leaving peasants in this state were worth exploring, his study emphasises local economic conditions without much attention to law; indeed to date there has been very little legal research in this area.

Banda’s work provides one of the few legal analyses of the institution of *thangata*. Banda traces the emergence of tenant workers in colonial Malawi and their treatment under the law after post-independence. Banda sought to isolate labour tenants as a discrete topic of

⁷² The doctrine of pre-emption, notably confirmed in *Johnson v M’Intosh* (1823) 8 Wheat. 543 reverberated across the British empire, taking root in settler colonial polities. For an comprehensive account of this case see Eric Kades, ‘The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands’ (2000) 148 University of Pennsylvania Law Review 1065; Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Belknap Press of Harvard University Press 2005).

⁷³ Mapopa Obryne Japhet Chipeta, ‘Labour in Colonial Malawi: A Study of the Growth and Development of the Malawian Working Class 1891-1961’ (Dalhousie University 1986).

doctrinal research. In doing so, he distinguished his approach from those of historical accounts, which referred to all residents of private estates as squatters.⁷⁴ Banda's study focuses on solutions to ongoing labour exploitation on agricultural plantations. Thus, his study does not focus on the relationship between the developments in the protectorate and trends elsewhere.⁷⁵ Recent studies in the field of imperial legal history chart new approaches to inquiry. The orthodox narrative of the transition from empires to nation-states has now emphasised the centrality and persistence of empires in world history.⁷⁶ Duve argues that the themes of land and labour, which were previously discussed from a national standpoint, are best understood using a transnational framework.⁷⁷ This thesis analyses *thangata* as a permutation of master and servant relations prevalent throughout the British empire, a seeming paradox as master and servant laws were progressively mitigated in the metropole.

Here the study homes in on imperial legal practice as the pursuit of imperial order.⁷⁸ This approach highlights British imperialism's self-conscious nature in its aim to limit despotism in the periphery of the empire to prevent its spread to the metropole.⁷⁹ The marshalling of 'middle power' was proposed as the solution to the problem of despotism. This meant strengthening jurisdiction to constrain arbitrary use of power by deploying loyal

⁷⁴ Sibonile Banda, 'The Limits of the Law: The Private Estate, the Tenant Worker and Commodity Production in Malawi' (National University of Ireland 2006); Sibonile Banda, 'Land Law Reform: A Comparative Analysis of South Africa's Labour Tenancy Contract and Malawi's Tenant Worker's Contract' (2006) 6 Oxford University Commonwealth Law Journal 201.

⁷⁵ PG McHugh, 'The Legal Historian and The Trials And Tribulations of An Imperial Past Legal History' in Markus Dirk Dubber and Christopher L Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 883.

⁷⁶ Lauren Benton and Richard J Ross, 'Legal Pluralism and Empires, 1500-1850' in Lauren Benton and Richard J Ross (eds), *Empires and Legal Pluralism Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World* (New York University Press) 1-2.

⁷⁷ Thomas Duve, 'Global Legal History A Methodological Approach' [2016] SSRN Electronic Journal.

⁷⁸ Benton and Ford (n 7) 1-25.

⁷⁹ James Epstein, *Scandal of Colonial Rule: Power and Subversion in the British Atlantic during the Age of Revolution* (Cambridge University Press 2012).

midlevel officials as an intervention in disordered colonial contexts. Law was central to the responses to local conflicts, and many of the decisions and rationales for significant decisions are found in the discourse of midlevel officials. In its focus on middling officials, chapter 4 of this thesis analyses the adjudication of *thangata* obligations in magistrates' courts which were the first port of call for disputes on the plantations.

Research Questions

In order to shed light on the shifting substance of protection and the effects of the protectorate on protected persons, the thesis asks the following questions.

- i. What was the nature of British protection in the region? In other words, how was protectionist rhetoric employed by colonial agents, missionaries, and Africans in order to shape the jurisdictional politics and legal authority in the region?
- ii. What was the role of protection in the administration's early years of controlling and evaluating land claims? This broader question includes how the imperial legal mind conceptualised customary rights to land and how settler claims to land were

established using doctrinal concepts such as the doctrine of tenures and estates,⁸⁰ the Crown's prerogative of royal mines,⁸¹ and the Crown's right of pre-emption.

- iii. How did the law respond in its protective attempts to curtail abuses of power in labour arrangements from the beginning of the institution of *thangata* to its eventual abolition in the specific context of Nyasaland?

This thesis focuses intensely on the rhetoric of protection and practice of and the jurisdictional jockeying of colonial agents, corporations, and missionaries. By recovering the story of a particular country and jurisdiction in detail we may attain deeper insights into the transnational nature of imperial practice, the role of mediate officials in the imperial search for order, the recognition of jurisdictional pluralism, and the centrality of protection. Thus, the law's framing of land and labour in the protectorate will be analysed showing how the circulation of legal ideas helped create this anomalous constitutional order. The approach introduces the legal history of an understudied region into contemporary research on imperial orders, allowing for a fruitful dialectic between universality and particularity of colonial domination.

⁸⁰ AWB Simpson, *A History of the Land Law* (2nd ed., Clarendon Press 1986) 85–89; Kevin J Gray and Susan Francis Gray, *Land Law* (7th ed, Oxford University Press 2011) 16; Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press 1989) 79–82. English land law is underpinned by the historical theory that all land is held of the sovereign. This view underlies the doctrine of estates and tenures, that one can only hold 'time in the land, or land for a time' in return for real or notional services as per *Walsingham's Case* (1573) 2 Plowd 547, 555.

⁸¹ *The Case of Mines (R v Earl of Northumberland)* (1568) 75 ER 472; *Woolley v Attorney-General of Victoria* (1877) 2 163; Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (Routledge 2021); William Bainbridge, *A Treatise on the Law of Mines and Minerals* (2d edn, Butterworths 1856). The Crown's prerogative of royal mines relates to the common law distinction between base mines and royal mines. The royal prerogative of mines allocates to the Crown gold and silver (royal mines). In terms of the prerogative, the right to royal mines does not pass or lapse under a grant from the Crown unless the intention that it pass is expressed in apt and precise words.

4. Methodology

In order to conduct the analysis described above I make recourse to multiple primary archival and secondary sources as described below. As such, the study is an external legal history which looks to wider sources than those generated by the legal process and seeks to recover the context of juridical thought in the period in question.⁸² As the research questions suggest, this is a study in legal history in the sense that it seeks to analyse the role and presence of law in a period of the past, rather than seeking to use the inquiry to substantiate claims in contemporary legal fora.⁸³ At the same time, I sustain inquiry into the internal lawyers' point of view – what they thought the law was doing within the terms of their system.

The starting point for my legal historical method is the archive, and official material was abundant. The late 19th century was an age of information revolution. The British empire was truly data-intensive and proliferated the production of information and knowledge, much of which remains in the form of the archive.⁸⁴ Foreign and Colonial Office records available at the National Archives in Kew and official sources of the British Central African government form the empirical centrepiece of my analysis.

The most valuable series for my research are the F.O. 84 (containing correspondence of the Slave Trade Department and several African departments prior to 1906), F.O. 2 (containing correspondence relating to various expeditions and missions to Africa prior to 1906), and C.O. 525 (containing original correspondence relating to the British Central Africa

⁸² Philip Handler, 'Legal History' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2017) 86.

⁸³ Bain Attwood, 'History, Law and Aboriginal Title' (2014) 77 History Workshop Journal 283. Bain Attwood, 'History, Law and Aboriginal Title' (2014) 77 History Workshop Journal 283

⁸⁴ Thomas Richards, *The Imperial Archive: Knowledge and the Fantasy of Empire* (Verso 1993).

Protectorate and Nyasaland between 1904 and 1951). Within these sources, one finds case law, legislation, ordinances, and legislative debates. Several cases in this period were reported in government gazettes or as appendices to colonial despatches or memoranda. The main sources of the government of British Central Africa include but are not limited to the British Central African Gazette (1889 – 1919), the British Central Africa Blue Books (1904 – 1938), the Annual Departmental Reports relating to Nyasaland (1907 -1964).

One of the challenges encountered in the methodological approach used is the relative abundance of official and governmental sources. This poses the risk of a narrative with an official bias. In addition, it is accepted that many official sources may contain a more palatable or self-serving version of the truth.⁸⁵ This challenge is not unique to my study. In the late 20th century, the perception of the archive began to develop from a source to a subject of inquiry among historians, legal historians, and historical anthropologists.⁸⁶ This shift involved an increasing recognition of the archive as a ‘site of epistemic and political struggle’ and there is an emerging consensus that the archive is ‘figured’.⁸⁷ The archive was formed through political contestations, uncertainties and choices regarding what would be included and excluded.⁸⁸ These efforts attempt to dislodge the archive as *the* definitive source of truth and knowledge

⁸⁵ Benton and Ford (n 7) 24–25.

⁸⁶ Carolyn Steedman, ‘After the Archive’ (2011) 8 Comparative Critical studies 321, 321.

⁸⁷ Renisa Mawani, ‘Law’s Archive’ (2012) 8 Annual Review of Law and Social Science 337, 344; Carolyn Hamilton, Verne Harris and Graeme Reid, ‘Refiguring the Archive’ in Carolyn Hamilton (ed), *Refiguring the Archive* (David Philip 2002) 7.

⁸⁸ Steedman (n 86) 332.

on the colonial past.⁸⁹ One of the chief concerns is the relationship between the archive and the state and how, when and if the ‘subaltern’ can speak.⁹⁰

A reading of the archive without considering and problematising the context of its production by the colonial state poses the risk of obfuscating the agency of the subaltern. However, reading against the grain has significant challenges, and Spivak, who originally posed the question, concluded that the subaltern could not speak.⁹¹ These critical modes of reading the archive are intended to elevate the voices of the marginalised and uncover something of their agency and experiences. These approaches reconsider the claims of truth stemming from the documentation.⁹² Of course, some things can never be recovered from an archive from which they are absent. Creative modes of reading and ascribing meaning not only to presences but also to absences and silences can go some way to rectifying this but not all, not nearly.⁹³ This is true not only in the quest for the voices of the subaltern but in the recovery of the past in general.⁹⁴ To account for the colonial archive’s peculiarities, Stoler suggests scholars read ‘along the grain’ and focus on the archive’s characteristics and productivity.⁹⁵

⁸⁹ Anjali Arondekar, ‘Without a Trace: Sexuality and the Colonial Archive’ (2005) 14 *Journal of the History of Sexuality* 10, 11; Richards (n 84) 10; Peter D Thomas, ‘Refiguring the Subaltern’ (2018) 46 *Political Theory* 861. Thomas, writing in the South Asian context, noted that the archive was had been consulted as though it were ‘positive and comprehensive’.

⁹⁰ The subaltern identity was configured through exclusion and subordination and defined by the deprivation of their capacity to speak by the dominant order in colonial and postcolonial settings. Thomas (n 89) 863; Cf Rosalind C Morris and Gayatri Chakravorty Spivak, *Can the Subaltern Speak?: Reflections on the History of an Idea* (Columbia University Press 2010).

⁹¹ Gayatri Chakravorty Spivak, ‘The Rani of Sirmur: An Essay in Reading the Archives’ (1985) 24 *History and Theory: Studies in the Philosophy of History* 247.

⁹² Ann Laura Stoler, ‘Colonial Archives and the Arts of Governance’ (2002) 2 *Archival Science* 87, 94.

⁹³ Cf Michel-Rolph Trouillot, *Silencing the Past: Power and the Production of History* (Beacon Press 2015).

⁹⁴ Steedman (n 86) 333.

⁹⁵ Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Course Book, Princeton University Press 2010) 53.

I apply Stoler's suggestion to read 'along the grain' by carefully examining the content, structure, and power dynamics inlaid within the sources. Furthermore, I seek to highlight instances of indigenous agency throughout the thesis by paying keen attention to official sources that include testimony and accounts of indigenous perspectives. Commissions of Inquiry became a critical colonial archive.⁹⁶ Some commissions, such as the Commission of Inquiry on the Blantyre Mission (1880) and Chilembwe Uprising (1915), include oral testimony of Africans who were encouraged to speak freely.⁹⁷ In addition, four commissions between 1904 and 1950 focused their mandate on land and African labour issues. In addition, the thesis mitigates the risk of an official bias by drawing on several different official sources to reveal some of the internal divisions of the state archive.⁹⁸ Finally, contemporaneous accounts and responses to ongoing conflicts by other actors, such as missionaries, settlers and Africans, will be used to correct for bias toward the view of the state archive.

A related challenge is a relative dearth of sources directly highlighting the 'African voice'. This limitation is particularly pronounced in the earlier years of the protectorate's history. The thesis responds to this challenge by drawing on auxiliary missionary sources which sought to protect and raise concern about African conditions. As early as 1905, Africans literate in English contributed their own accounts of events to be published in these missionary sources. Thus, missionary sources furnish a differing account to the official narrative. During the second year of the DPhil research, I spent three weeks in Edinburgh, accessing missionary sources in the special collections at the University of Edinburgh and the National Library of Scotland.

⁹⁶ Benton and Ford (n 7) 10–11.

⁹⁷ Luise White and others, *African Words, African Voices: Critical Practices in Oral History* (Indiana University Press 2001) 4.

⁹⁸ Marianne Constable and Samera Esmeir, 'Rhetoric and The Possibilities of Legal History' [2018] *The Oxford Handbook of Legal History* 79, 79; Handler (n 82) 86.

These include *Life and Work in British Central Africa* (1888 – 1915), which, while serving the traditional evangelical purpose of a missionary journal, also gave a forum for comment on current affairs in Nyasaland and Southern Africa. In addition, the *Aurora* journal of the Free Church of Scotland provides useful insight into African life.

The thesis also makes recourse to supplementary sources. For instance, *The Central African Planter* (1895-1897) later *The Central African Times* (1889 – 1907) which provides an account of the settler point of view, including detailed minutes of the Chamber of Agriculture and Commerce, letters to the editor on issues of land, labour and taxation, and African demands for improvement in living and working conditions.

The research experience was a recurring one of formulating initial directions of inquiries, but the final thesis was largely determined by what the archive uncovered. The surviving historical record in the archive is an incomplete and fragmented mosaic that must be reconstructed and interpreted. Thus, the approach taken sought to find what the archive shows, with a keen interest in situations where colonial administrators and courts interact with indigenous peoples and when the ‘voices’ of indigenous people are revealed – either through auxiliaries such as missionaries or when they are recorded through testimony given in commissions of inquiry.

5. Thesis Outline

Chapter 1: Introduction

In this chapter, I include a brief overview of the recent trends in imperial historiography, an analysis of the contributions in local and regional legal history and will highlight the difference

of approach taken in this thesis. The section also includes a discussion of the nature and limitations of the primary sources. This brief introductory section will outline the contributions of the thesis, the key research questions, as well as a chapter overview.

Chapter 2: Humanitarian Imperialism and Patterns of Protection

In this chapter, I draw from sources immediately pre-dating the formal colonisation of the Nyasaland region to illustrate the rhetoric around slavery, protection, and the extension of extra-territorial jurisdiction. The chapter foregrounds the effects of the Foreign Jurisdiction Act, the treatment of the law of the comity of nations as well as municipal law in the extension of sovereignty, and the consolidation of the colonial protectorate in Nyasaland. Finally, this chapter highlights the various protection arrangements and relationships with different African chiefs in the central and southern regions of the protectorate.

Chapter 3: Extra-territorial Jurisdiction, Protection and The Colonial Protectorate

This chapter of the thesis examines the foundation of British legal authority in the British Central Africa protectorate. But its more than that, it is tracing the encounter of a European and non-European entity and how their interactions were guided (or perhaps not) by principles of a positive international law. By tracing the actions of the British consuls and the agreements made with African political authorities, this chapter illustrates the role that treaties of protection served, why African signatories signed on, what the effect of the agreements were in the institution of the protectorate. While the role of the protectorate is to place the protected power under the control of the protecting power to shield it from external chaos, internally British protected persons were in an unenviable position.

Chapter 4: Dispossessing Protected Persons

This chapter of the thesis focuses on Commissioner Johnston's land settlement regime between 1892 and 1893. The chapter will explore the nature of the legal authority Commissioner Johnston acted under in conducting the land settlement and the legal mechanisms Johnston employed in facilitating the transfer of land from Africans to settlers. Specifically, the chapter analyses the use of the Crown's right of pre-emption in evaluating the purported land transfers that had taken place prior to the declaration of the protectorate.

Chapter 5: Land and Labour in the Nyasaland Protectorate: *Thangata* on Private Estates

This chapter of the thesis draws on missionary sources, oral testimony on Commissions of Inquiry as well as colonial reports to illustrate the nature and extent of unfreedom in African labour arrangements. In addition, it will establish how much English origins of colonial law influenced the conditions of settler estates which invested colonial landlords with greater power to discipline and exercise control over the social lives of their servants. In this regard, master and servant law and vagabond laws in their application in the Nyasaland region and South Africa will be analysed. Finally, this chapter compares the labour tenancy system in the protectorate with similar systems in Northern Rhodesia, Southern Rhodesia and Kenya.

Chapter 6: Abolition of *Thangata* and Repurchase of Settler Estates

This thesis chapter focuses on the numerous legislative attempts to regulate and limit the unrest, uncertainty and excesses of power exercised over the residents of settler estates. The analysis will highlight the role of the law in enabling or failing to prevent abuses of the indigenous peoples' previously guaranteed right of undisturbed occupancy.

Chapter 7: Conclusion

This chapter analyses the rhetoric of protection and humanitarian goals against the difficulty of their legal and social realisation during colonial domination in the protectorate. While the gradual extension of protection over African states assisted in eliminating slavery, the colonial state itself fell into the trap of coercing African labour. The disturbing conclusion is that the imperialist as protector all too easily slid into the role of oppressor; with the imperial laws exhibiting both faces of this dialectic

2. HUMANITARIAN IMPERIALISM AND PATTERNS OF PROTECTION

1. Introduction

In early 1880, a member of the Royal Geographic Society (RGS) by the name of Andrew Chirnside travelled to the Nyasaland region. On his return to England, he published a pamphlet detailing the horrors he had seen. His pamphlet contained several allegations against the Blantyre Mission of the Church of Scotland and its members. The central tale, on his account, goes as follows:

In March of 1879 two African men in the employ of the Mission, having lost track of a slave woman they ‘owned’, made threats against her.¹ Months afterwards, the body of a woman under the protection of the mission was discovered by a stream.² Upon this discovery, ‘the heads of the Mission immediately decided without any proofs that the other woman must have been murdered by the two natives in question’.³ The two men, though professing their innocence and maintaining they did not know the woman who was found dead, were then made to build stocks for their own imprisonment.⁴ One of the men escaped, but the other was tried by the Mission and put to death by a firing squad of eight other African residents of the Mission. In gruesome detail he continues,

[W]hen the smoke cleared, the poor fellow appeared to have received shots in every part of his body but a vital spot, as he still stood upright quivering in agony. There he stood while the guns were loaded, and some firing again one of

¹ Andrew Chirnside, *The Blantyre Missionaries: Discreditable Disclosures* (William Ridgway 1880) 12.

² *ibid* 13.

³ *ibid*.

⁴ *ibid* 13–14.

the shots went clean through his right lung, and yet he stood there bleeding and maimed, a sight too sickening for the whites...until one of the chiefs of the neighbouring village...stepped up to the writhing form in the grave and blew the man's brains out, at the muzzle of his gun.⁵

Chirnside then notes that as a result of this execution the mission is at threat of reprisals from surrounding chiefs who wished to do the mission and its residents harm.⁶

The incident Chirnside narrates occurred ten years before a protectorate was declared over the area just north of present-day Mozambique in 1889.⁷ While the veracity of his allegations was challenged by a rival publication,⁸ a Commission of Inquiry soon determined the tale was substantially true and recalled several members of the Blantyre Mission and cautioned the mission not to exercise civil jurisdiction.⁹

The narrative brings up several interconnected themes and facets which will be drawn out and explored in this chapter, and the thesis. First, it highlights the connection between protection and violence, and the gulf between the lofty goals of humanitarianism and possible effects of the humanitarian mission on its recipients.¹⁰ However, this incident stands out as exceptional and distinctive in mission history. While missions in Africa were known to have

⁵ ibid 14–15.

⁶ ibid 15.

⁷ A British protectorate was declared over the territory adjoining Lake Nyasa (Lake Malawi) 1889. In 1891, the region now known as Malawi was declared the British Central African Protectorate. In 1907, it was renamed the Nyasaland Protectorate. In 1953, the Nyasaland Protectorate was joined in the Federation of Rhodesia and Nyasaland becoming the independent state of Malawi in 1964.

⁸ Alexander Riddell and Andrew Chirnside, *A Reply to 'The Blantyre Missionaries: Discreditable Disclosures. By Andrew Chirnside, F.R.G.S.'* 2nd Ed. (1880).

⁹ TNA FO 84/1565 O'Neill to Granville, No. 13, 18 November 1880.

¹⁰ Penelope Edmonds and Anna Johnston, 'Empire, Humanitarianism and Violence in the Colonies' (2016) 17 *Journal of Colonialism & Colonial History*; Alan Lester and Fae Dussart, *Colonization and the Origins of Humanitarian Governance: Protecting Aborigines across the Nineteenth-Century British Empire* (Cambridge University Press 2014).

established systems of quasi-governmental authority this appears to be the only occasion where an execution at the hands of a mission was recorded.¹¹

Relatedly, it calls to mind the imperial networks that existed as this incident was only revealed through the travel of one member of the RGS, Andrew Chirnside, who visited Nyasaland and publicised the event in his pamphlet. Furthermore, this chance encounter and publication highlights the fractured nature of the surviving archives and how instances like this serve as a window into how the archive was constituted and its inchoate and incomplete nature.¹² The incident is presented only through the prism of a Commission of Inquiry which gathered statements from the parties involved, and the publications of Chirnside and Riddell.¹³

Secondly, it highlights the link between humanitarian activity and the exercise of extraterritorial jurisdiction, lawful or otherwise. Humanitarian efforts which involved the arrival of Western agents into the previously unventured to areas raised several safety and order issues. Either in a bid to protect themselves from lawlessness, or to protect indigenous people from alternative legal orders which seemed to them to be primitive, they extended jurisdictional authority. Elbourne has demonstrated that governance has long been an intrinsic part of humanitarian endeavours.¹⁴ Moreover, Benton and Ford note that the idea of protecting vulnerable people was central to imperial legal ordering leading to jurisdictional imperialism.¹⁵

¹¹ Robert I Rotberg, *Christian Missionaries and the Creation of Northern Rhodesia, 1880-1924* (Princeton University Press 1965) 58–60.

¹² Renisa Mawani, 'Law's Archive' (2012) 8 *Annual Review of Law and Social Science* 337, 342.

¹³ A brief account written years later can also be found in Duff MacDonald, *Africana: Or, The Heart of Heathen Africa* (Simpkin Marshall 1882).

¹⁴ Elizabeth Elbourne, 'Violence, Moral Imperialism and Colonial Borderlands, 1770s–1820s: Some Contradictions of Humanitarianism' (2016) 17 *Journal of Colonialism & Colonial History*.

¹⁵ Lisa Ford, 'Protecting the Peace on the Edges of Empire: Commissioners of Crown Lands in New South Wales' in Lauren Benton, Adam Clulow and Bain Attwood (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 178.

In Nyasaland missionaries sought to create a semblance of order and this incident and the chapter to follow explain the link between humanitarian efforts to protect and its tendency to thrust jurisdictional authority into the protected places. Missionary attempts to keep order sometimes veered into unacceptable forms of discipline and punishment that were subject to public scandal.¹⁶

Thirdly, the incident highlights an interdependent ‘circle of protection’ which could be fractured.¹⁷ The mission and the neighbouring chief were in a mutual relationship of protection with the Chief granting land and goodwill to the mission with the expectation that the missionaries would be able to protect his people from external threats from rival tribes. The mission would then be in a position to protect desolate people from the slave trade. Furthermore, the mission also depended on support from the metropole for its activities, the support sought for was in the form of jurisdictional authority and the declaration of a protectorate. Damage to these relationships and scandal caused by missionary endeavours was seen as risking the legitimacy of the imperial project.

Finally, and most pertinently, it raises questions about the nature of protection, a device which led to the emergence of protectorates as a key aspect of imperial practice in the 19th century.¹⁸ Protection is fundamentally about preservation from harm but does not promise that

¹⁶ Anupama Rao and Steven Pierce, ‘Discipline and the Other Body: Humanitarianism, Violence, and the Colonial Exception’ in Steven Pierce and Anupama Rao (eds), *Discipline and the Other Body: Correction, Corporeality, Colonialism* (Duke University Press 2006) 7.

¹⁷ ‘Circle of protection’ is a term used by Attwood to describe the protective arrangements devised by Marsden in New Zealand Bain Attwood, ‘Protection Claims: The British, Maori and the Islands of New Zealand, 1800–40’ in Adam Clulow, Bain Attwood and Lauren Benton (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 169.

¹⁸ Inge Van Hulle, ‘British Protection, Extraterritoriality and Protectorates in West Africa, 1807–80’ in Adam Clulow, Bain Attwood and Lauren Benton (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 203.

no harm will occur. Instead, it is about the penalty the protector is obliged or entitled to visit upon the offender once harm befalls the protected.¹⁹ As is clear here, the consequences can be as severe as death. Therefore, given its potential potency and centrality in the relationships in question, it is necessary to inquire into and analyse the meaning(s) of protection.

The language of protection was an important and ubiquitous part of Britain's imperial repertoire.²⁰ Scholars have noted the shifts in the meaning of protection throughout the 19th century from arrangements of military alliance to arrangements involving the exercise of extraterritorial jurisdiction.²¹ These shifts in protective arrangements which culminated in the emergence of the 'colonial protectorate' are exemplified in the process which resulted in a protectorate in Nyasaland. Though understudied, the region is a veritable cornucopia of reoccurring themes in British imperial legal history, including the prevalence of missionary activity, efforts to curtail slave trade, and the exercise of extraterritorial jurisdiction in the region.

Concurrently, law-making in imperial contexts was often an experimental process occurring incrementally by (wo)men 'on the spot' in the peripheries without the knowledge or oversight of the metropole.²² These intermediaries ranged from missionaries, merchants, African chiefs, to colonial personnel.²³ As a result, extra-territoriality seldom expanded as part

¹⁹ TB Lambert, 'Introduction: Some Approaches to Peace and Protection in the Middle Ages' in TB Lambert and DW Rollason (eds), *Peace and Protection in the Middle Ages* (Centre for Medieval and Renaissance Studies, Durham University 2009) 2–4.

²⁰ Attwood (n 17) 158.

²¹ Van Hulle (n 18) 194–195.

²² Inge van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (First, Oxford University Press 2020) 14.

²³ *ibid* 13; Lauren A Benton and Adam Clulow, 'Introduction: The Long, Strange History of Protection' in Lauren A Benton, Adam Clulow and Bain Attwood (eds), *Protection and Empire: A Global History* (Cambridge University Press 2018) 5.

of a thoroughly devised policy, but rather through these agents.²⁴ Thus, there is merit in focusing on intermediate lawmakers rather exclusively than on the abstract imperial state as a lawmaker.²⁵ This broadens the scope of sources for legal inquiry beyond that of cases, judges and international legal academics. In this chapter and the next, the focus is on the activities of missionaries, Slave Commissioners, and Consuls. This approach reveals the process of imperial law-making as a ‘cacophony of conflicting suggestions and actions’ often in response to disorder and chaos on the ground.²⁶

Britain’s efforts to solve the issue of petty despotism through legal checks on arbitrary power has been identified as a critical component of its quest for order.²⁷ In Nyasaland, a framework outlining the lawful exercise of jurisdiction was established in 1889.²⁸ However, various jurisdictional experiments occurred in the region from 1861 owing to the presence of British missionaries, adventurers, and consuls. These experiments included the exercise of civil and criminal jurisdiction by missionaries, and the African Lakes Company’s unsuccessful attempt to exercise protection over various tribes.²⁹ The unsupervised exercise of power often led to abuse, and there was a deep-seated fear that despotism or arbitrary exercise of justice could transplant into other imperial arenas or to the metropole itself.³⁰ Thus, scandals in the

²⁴ Van Hulle (n 18) 194.

²⁵ Hulle (n 22) 14.

²⁶ *ibid* 14–15.

²⁷ Lauren A Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Harvard University Press 2018) 6–7.

²⁸ This took the form of the Africa Order in Council 1889, Reproduced in *The London Gazette*, 22 October 1889, Issue 2596 5557.

²⁹ The African Lakes Company, formerly the Livingstonia Central Africa Company, founded in 1878 as the commercial arm of the Livingstonia Mission. A comprehensive account of the history and activities of this company can be found in Hugh Macmillan, ‘The Origins and Development of the African Lakes Company’ (Edinburgh University 1970).

³⁰ Benton and Ford (n 27) 6–8.

imperial law-making process were taken seriously and permeate not only this region but several other imperial beginnings.³¹

This chapter further extends the analysis of protection beyond settler colonies and looks at how it shaped social and legal relationships between imperial agents, missionaries, settlers, and indigenous people in other parts of the British empire. It traces how protection came to shape the lives of a diverse set of subjects. This chapter recounts and analyses the nature of Britain's interest in the area, and the gradual multifaceted process of increasing power exercised in the region which culminated in the proclamation of the British Central Africa Protectorate. Part 2 considers the meaning of protection and its relationship with humanitarianism, a key theme of this chapter and the entire thesis. Part 3 recounts the prevalence of slavery in the Nyasa region in the 19th century as a draw to humanitarian attention, the meaning and significance of different registers of protection, and their role on the emergence of the colonial protectorate in Nyasaland. Part 4 of the chapter turns to the legal framework governing extra-territoriality in Africa, the origins of the Foreign Jurisdiction Act and its implementation in this region. It also examines the missionary exercises of jurisdiction, focusing on the trial and execution of Manga and Piseni. This part of the history highlights the British preoccupation with legality and the fear of scandals delegitimising the Christian missions or imperial agenda. Finally, part 5 will conclude with some summarising thoughts of the intricate link between humanitarianism and empire. This discussion serves as an underpinning for further use of protectionist rhetoric, the formal declaration of the protectorate, and protectorate governance in the rest of the thesis.

³¹ Nicholas B Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (Harvard University Press 2009) 25; James Epstein, *Scandal of Colonial Rule: Power and Subversion in the British Atlantic during the Age of Revolution* (Cambridge University Press 2012).

2. Protection and Humanitarian Imperialism

Protection is closely associated with the influence of humanitarianism, and protection schemes are sometimes considered the invention of British humanitarians.³² However, the British empire drew on French, Spanish and Dutch practice in their adoption of relationships of protection for slaves and indigenous people.³³ In colonies formerly ruled by these foreign powers, the office of ‘protector’ or ‘guardian’ was then modified to suit English practice and spread throughout colonial possessions.³⁴ However, the language of protection was not at all foreign to English legal and political culture, used frequently in medieval English practice.³⁵

In late medieval England protection could take the form of personal immunities, often transitory for the completion of a task or voyage.³⁶ Edward Coke drew a distinction between two forms of personal immunity in his survey of protection traditions in the 17th century.³⁷ He wrote:

Protection is of two sorts, one, to give a man an immunitie or freedome from actions or suits, the second, for the safety of his person, servants and goods, lands and tenements whereof he is lawfully possessed from violence, unlawfull molestation or wrong.³⁸

³² Christina Twomey, ‘Protecting Slaves and Aborigines’ (2018) 87 *Pacific Historical Review* 10, 11.

³³ *ibid* 10.

³⁴ Alan Lester and Fae Dussart, ‘Trajectories of Protection: Protectorates of Aborigines in Early 19th Century Australia and Aotearoa New Zealand’ (2008) 64 *New Zealand Geographer* 205, 208.

³⁵ Annabel Brett, ‘Protection as a Political Concept in English Political Thought, 1603–51’ in Lauren A Benton, Adam Clulow and Bain Attwood (eds), *Protection and Empire: A Global History* (Cambridge University Press 2018) 93–95.

³⁶ Helen Lacey, ‘Peace and Protection in the Middle Ages’ in TB Lambert and DW Rollason (eds), *Peace and Protection in the Middle Ages* (Centre for Medieval and Renaissance Studies, Durham University 2009) 79.

³⁷ Quote appears in Lacey *ibid* 80 citing Edward Coke, *The First Part of the Institutes of the Laws of England, A Commentary on Littleton*, 19th ed, II, ii.199.

³⁸ *ibid*

The former sort is protection *from* authorities while the latter connoted protection *by* the authorities. Lacey explains that these two forms were not always clearly distinguished. However, the latter form, personal immunity from molestation, has been cast as a precursor to the general peace of the Common Law, whereby by the 12th century the Crown offered ‘protection from molestation’ to all subjects rather than to specific individuals.³⁹ Lacey argues that these personal immunities were wholly absorbed into the general peace, but that some immunities existed alongside the general peace and that these ‘ancient immunities’ were influential and persuasive into the later Middle Ages.⁴⁰

Relatedly, a strong emphasis on protection lay at the heart of early modern ideas about political authority.⁴¹ As expressed by Hobbes, protection denoted the duty of a sovereign to his subjects.⁴² Hobbes grounded his vision of governance on the idea of a central authority able to protect its subjects.⁴³ Benton points out that an individual or group that seeks protection from another might do so aware that they would also have to submit to that other’s authority.⁴⁴ There is, therefore, a link between protection and the duty to obey.

³⁹ Lacey (n 36) 83.

⁴⁰ *ibid* 96.

⁴¹ Philip J Stern, ‘Limited Liabilities: The Corporation and the Political Economy of Protection in the British Empire’ in Lauren Benton, Adam Clulow and Bain Attwood (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 115.

⁴² Lauren Benton, ‘Shadows of Sovereignty: Legal Encounters and the Politics of Protection in the Atlantic World’ in Alan Karras and Laura J Mitchell (eds), *Encounters Old and New in World History: Essays Inspired by Jerry H. Bentley* (University of Hawai’i Press 2017) 138; Thomas Hobbes, *Leviathan* (First Avenue Editions, a Division of Lerner Publishing Group 2018) 218.

⁴³ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011) 110.

⁴⁴ Benton (n 42) 138.

Of greater significance to English legal culture was the decision in *Calvin's Case*.⁴⁵ This was a contrived case arising from uncertainty about the jurisdictional consequences regarding the union of England and Scotland.⁴⁶ The issue was whether Robert Calvin, born in Scotland after the accession of King James I (James VI of Scotland) to the English throne could claim land in England when landholding was a privilege of English subjects and barred of aliens.⁴⁷ The question was, therefore, whether Calvin was 'within the allegiance' i.e., a subject, or an alien. On the corollary, the court also examined the question of who was a subject, as well as the mutual obligations between a sovereign and subjects.⁴⁸

On deciding that Calvin was indeed a subject owing to his bond with the English-Scottish monarch, Sir Edward Coke's report explored the nature of ligeance, expressing that it was a personal relationship that transcended political and legal distinctions between the separate domains of the King.⁴⁹ Coke further commented on the nature of protection writing, 'for as the subject oweth to the King his true and faithful ligeance and obedience, so the Sovereign is to govern and protect his subjects'.⁵⁰ Sir Edward Coke conceived of this relationship as a '*duplex reciprocum ligamen*' – 'a dual and reciprocal tie between sovereign and subject'.⁵¹ Moreover, he wrote that 'protection attracts subjection, and subjection protection'.⁵² As Brett explains, reciprocal tie of protection and obedience between sovereign

⁴⁵ *Calvin's Case* (1608) 7 Co Rep 1a.

⁴⁶ Gavin Loughton, 'Calvin's Case and the Origins of the Rule Governing "Conquest" in English Law' (2004) 8 Australian Journal of Legal History 143, 163.

⁴⁷ Except through 'a formal grant of letters patent of denization, and only prospectively and without heritability' Christopher L Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge University Press 2010) 84.

⁴⁸ Edward Coke and Steve Sheppard, *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund 2003) 174.

⁴⁹ Tomlins (n 47) 84.

⁵⁰ Coke and Sheppard (n 48) 175–176.

⁵¹ *ibid* 176.

⁵² *ibid*.

and subject was the premise for a broader assertion, that ‘it followeth, that seeing the King’s power of command and protection, extended out of England, that ligeance cannot be local, nor confined within the bounds thereof’.⁵³ This dictum has been invoked for the argument that the laws and protection of England follow English citizens wherever they may go.⁵⁴

In this way a connection has been found between the natural nature of ligeance and its exportability, not just for agents of the sovereign completing specific tasks but for all subjects as far as the sovereign’s power extended.⁵⁵ Thus, protection served as a way of extending power and defence within a political community.⁵⁶ Benton and Clulow call this ‘inside protection’ - imperial powers protecting their subjects wherever they might be.⁵⁷ However, protection also served as a framework for interpolity relations.⁵⁸ Sovereigns and their agents used the language of protection in promises to shield vulnerable people who were not their subjects from destitution and harm. This ‘protection talk’ bestowed credibility and legitimacy to their promises and enabled the projection of power to influence people and places outside their boundaries and jurisdictions.⁵⁹ Benton and Clulow call this ‘outside protection’.⁶⁰

Thus, protection is a fluid term with a myriad of meanings taking both formal and informal forms, and ubiquitous in the study of empire.⁶¹ Protection has been used in the analysis

⁵³ Brett (n 35) 97.

⁵⁴ Tomlins (n 47) 84; Daniel J Hulsebosch, ‘The Ancient Constitution and the Expanding Empire: Sir Edward Coke’s British Jurisprudence’ (2003) 21 *Law and History Review* 439.

⁵⁵ Brett (n 35) 97–98.

⁵⁶ Benton and Clulow (n 23) 1.

⁵⁷ *ibid* 8.

⁵⁸ Benton (n 42) 33.

⁵⁹ Benton and Clulow (n 23) 1–2.

⁶⁰ *ibid* 8.

⁶¹ Benton (n 42) 136–137.

of jurisdictional politics around multiple objects of protection often deemed special classes.⁶² For instance, the Catholic Church's protection of miserable peoples and the institutionalised role of protectors of slaves, aboriginal peoples or natives throughout European empires.⁶³ Moreover, protection sometimes involved actively shielding individuals under protection from acts of violence, with compensation for defence against assaults being orchestrated by military or maritime forces.⁶⁴ The malleable and fluid nature of protection was part of what made it a powerful piece of legitimising language for various actors across imperial history. Furthermore, it forestalled resistance for who would object to the protection of another?

Protection covered a broad spectrum and could be minimalist or maximalist, denoting mere shielding from violence or all-encompassing political welfare. From the late 18th century, concern for those on the receiving end of the imperial project began to rise. The early 19th century was then one of a surge of humanitarian interest driven by religious fervour. The idea of protection gained purchase as it signified a good level of intervention without great expense.⁶⁵ It allowed for minimalist protection to suffice but gave the option of increased intervention if it became necessary or desirable.⁶⁶

Often touted as the high watermark of humanitarian sentiment, the Report on Aborigines in 1837 emphasised the need to protect non-European wards of colonial

⁶² Benton and Clulow (n 23) 2.

⁶³ Benton and Ford (n 27) 86; Twomey (n 32) 15.

⁶⁴ Benton and Clulow (n 23) 2.

⁶⁵ Andrew Porter, 'Trusteeship, Anti-Slavery, and Humanitarianism', *The Oxford History of the British Empire: Volume III: The Nineteenth Century* (Oxford: Oxford University Press 1999) 199; Amanda Nettelbeck, *Indigenous Rights and Colonial Subjecthood: Protection and Reform in the Nineteenth-Century British Empire* (Cambridge University Press 2019) 195.

⁶⁶ Porter (n 65) 199.

governments.⁶⁷ Following on from the abolition of the slave trade in 1807 (and of slavery in British settlements in 1833), the report was a culmination of three decades of advocacy for aboriginal people.⁶⁸ As noted by Ford, there was a jurisdictional element to the form of protection recommended in the report. There was the imperative to ensure that natives or aborigines were ‘within the pale of the law’.⁶⁹ This placed the role of the protector squarely within the realm of the ‘courts and criminal law’.⁷⁰

There are different strands of protection to be encountered in an examination of the relationships between missionaries, residents of their mission, and African chiefs. In his discussion of protection claims around the Maori, Attwood describes different strains of the language of protection.⁷¹ The first is ‘humanitarian protection’ which was advanced by abolitionists and aborigines’ protection groups. The second is ‘protection-as-jurisdiction’ which are claims to protect. Attwood notes that humanitarian registers of protection pales in comparison to jurisdictional ones, but that the two can also be combined.⁷² This chapter demonstrates how the humanitarian protection transformed into protection-as-jurisdiction.

⁶⁷ Report from the Select Committee on Aborigines (British Settlements) House of Commons No 425, Parliamentary Paper 1837 (VI).

⁶⁸ Lester and Dussart (n 34) 208.

⁶⁹ Ford (n 15) 179–180.

⁷⁰ *ibid.*

⁷¹ Attwood (n 17).

⁷² *ibid* 153.

3. Protection in the Nyasaland Region

The slave trade was the most significant factor drawing British interest in the Nyasa region.⁷³ The reports of the activities of missions in far-flung regions outside British dominion had the effect of propelling mission activity from the confines of Christianity to a regular part of British public life.⁷⁴ Ordinary Britons were also kept abreast of early expeditions to Africa through the Royal Geographic Society, the Africa Civilization Society and reports in newspapers.⁷⁵ The specific interest in the Nyasa region began when David Livingstone of the London Missionary Society came upon the busy slave route from the Nyasa lake to the Indian Oceans.⁷⁶ He found that slavers would begin at Katanga (present-day Congo) and proceed along the southern edge of the Nyasa towards the Mozambique coast.⁷⁷ As they proceeded, they would buy slaves from the Yao tribe along the Nyasa for small amounts of calico.⁷⁸ The slaves procured would either be taken north to toil on the sultan's plantations in Zanzibar, towards Persia and Turkey or rerouted by the Portuguese to Cuban plantations and the French islands of Bourbon and

⁷³ Isaac C Lamba, 'The Scramble for Malawi: A Case Study in Humanitarian Imperialism 1860-1890' (1977) 6 *Journal of Social Science* 96, 96.

⁷⁴ John Barker, 'Where the Missionary Frontier Ran Ahead of Empire' in Norman Etherington (ed), *Missions and Empire* (Oxford University Press 2008).

⁷⁵ Susan Thorne, *Congregational Missions and the Making of an Imperial Culture in Nineteenth-Century England* (Stanford University Press 1999).

⁷⁶ Alfred Sharpe, 'Trade and Colonialism in British Central Africa' [1901] *The Scottish Geographical Magazine* 129.

⁷⁷ Iain McCalman, 'The East African Middle Passage David Livingstone, the Zambesi Expedition, and Lake Nyassa, 1858–1866' in Emma Christopher, Cassandra Pybus and Marcus Rediker (eds), *Many Middle Passages: Forced Migration and the Making of the Modern World* (University of California Press 2007) 43.

⁷⁸ *ibid* 43–44.

Réunion.⁷⁹ This route flourished as the Atlantic slave trade diminished, and these markets utilised the available supply.⁸⁰

While the Yao contributed to the ‘East African middle passage’, the tribe also engaged in a great degree of domestic slavery.⁸¹ The practice of domestic slavery was widespread throughout eastern and central Africa, and Nyasaland was no exception.⁸² Kandawire suggests that domestic slavery did not begin with the Yao, but likely emerged with the Maravi kingdom which reigned over the Nyasa region between the 15th and 17th century.⁸³ In the 19th century, the practice became fundamental to the Yao and Ngoni tribes as a way of growing their tribes, increasing political power,⁸⁴ and to ‘absorb, assimilate and socialise other ethnic groups’ within the dominant tribe.⁸⁵ These intricacies of African social life were unknown to the missionaries and consuls who often found it challenging to distinguish between domestic slavery and slave trading.⁸⁶

⁷⁹ ibid 43.

⁸⁰ Alexander John Hanna, *The Beginnings of Nyasaland and North-Eastern Rhodesia 1859-95* (2nd edn, Clarendon Press 1969) 51; Hugh Macmillan, ‘The Origins and Development of the African Lakes Company, 1878-1908’ 8; Randy J Sparks, ‘On the Frontlines of Slave Trade Abolition: British Consuls Combat State Capture in Cuba and Mozambique’ (2020) 17 *Atlantic Studies* (Abingdon, England) 327, 336.

⁸¹ JAK Kandaŵire, ‘Village Segmentation and Class Formation in Southern Malaŵi’ (1980) 50 *Africa: Journal of the International African Institute* 125, 137–138; J Clyde Mitchell, *The Yao Village: A Study in the Social Structure of a Nyasaland Tribe* (Published on behalf of the Rhodes-Livingstone Institute by Manchester University Press 1956) 35–37; Brian Morris, *An Environmental History of Southern Malawi: Land and People of the Shire Highlands* (Springer Science & Business Media 2016) 92.

⁸² Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985) 164–165.

⁸³ Kandaŵire (n 81) 139–140; T Price, ‘More about the Maravi’ (1952) 11 *African Studies* 75.

⁸⁴ John McCracken, *Politics and Christianity in Malawi: 1875-1940: The Impact of the Livingstonia Mission in the Northern Province* (Cambridge University Press 1977) 46.

⁸⁵ IC Lamba, ‘British Commerce as an Anti-Slavery Device in Malawi in the 1870s and 1880s: A Study in Miscalculated Strategy’ (1978) 9 *Rhodesian History* 13, 14.

⁸⁶ Andrew Ross, *Blantyre Mission and the Making of Modern Malawi* (Project Muse 2018) 64.

As was commonly the case, missionaries served as a prelude to the colonial governance of Malawi.⁸⁷ Indeed, Lamba has gone so far as to argue that humanitarians were the ‘sole catalysts of British imperialism’ in the region.⁸⁸ Missionaries would arrive in their designated areas and would have to seek permission to set up their camps and would be reliant on local populations for their provisions.⁸⁹ Therefore, they forged relationships with local elites but often failed to convert well-established members of society, and most of their following came from those in the margins such as slaves and refugees.⁹⁰ As missionaries settled in locales of political turmoil ravaged by slave trade, they often took on the role of not only spiritual but also temporal authority in the region.⁹¹ Some agreed to protect runaway slaves and refugees, took up arms to protect them from harm and adjudicate disputes. These decisions coupled with their repeated pleas for the protection of the government for themselves and for African people make the missions a valuable site of jurisdictional politics and protection as a touchstone of power in the region.⁹²

The connection between the growth of concern for people in far-flung regions of the world and the extension of the western empire has garnered increasing interest.⁹³ Skinner and Lester suggest the networks of concern for people ‘by humanitarians have always been intrinsic

⁸⁷ Barker (n 74) 86.

⁸⁸ Lamba (n 73) 96.

⁸⁹ Barker (n 74) 101.

⁹⁰ *ibid* 86.

⁹¹ Rhodian G Munyenembe and JW Hofmeyr, *Pursuing an Elusive Unity: A History of the Church of Central Africa Presbyterian as a Federative Denomination (1924-2018)* (Langham Publishing 2019).

⁹² Cf Luca Scholz, ‘Protection and the Channelling of Movement on the Margins of the Holy Roman Empire’ in Adam Clulow, Bain Attwood and Lauren Benton (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 14.

⁹³ Rob Skinner and Alan Lester, ‘Humanitarianism and Empire: New Research Agendas’ (2012) 40 *Journal of Imperial and Commonwealth History* 729, 730; Michael N Barnett, *The Empire of Humanity: A History of Humanitarianism* (Cornell University Press 2011).

to empire itself and nation-state formation'.⁹⁴ The rhetoric of the humanitarian achievements and concern eventually served as a valuable tool for legitimising imperial conquest.

4. Missions and Assumption of Civil Jurisdiction

Although the 19th century saw the increase in the correlation between the resort to extraterritorial jurisdiction and acquisition of territorial sovereignty, the two were not always linked.⁹⁵ Indeed the traditional view of extra-territoriality as a variety of imperialism is increasingly being questioned and instead recast as an instance of legal pluralism outside Europe.⁹⁶ As a pragmatic response to keeping order, the Crown had resorted to extra-territoriality since the Byzantine era to exercise jurisdiction over British subjects in the Ottoman empire.⁹⁷ Rights of adjudicatory jurisdiction were ceded through capitulations in terms of which the Ottoman sovereign ceded a portion of his jurisdiction in mutually advantageous arrangements.⁹⁸ These extraterritorial rights had been exercised through the Levant Company which was dissolved in 1826. The Levant Company's dissolution combined with the administrative problems relating to unauthorised extension of jurisdiction in the Gold

⁹⁴ Skinner and Lester (n 93).

⁹⁵ CR Pennell, 'The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty' (2010) 83 *Historical Research* 465, 467.

⁹⁶ David Todd, 'Beneath Sovereignty: Extraterritoriality and Imperial Internationalism in Nineteenth-Century Egypt' (2018) 36 *Law and History Review* 105, 107.

⁹⁷ HF Morris, 'Protection or Annexation? Some Constitutional Anomalies' in HF Morris and James S Read (eds), *Indirect Rule and the Search for Justice* (Clarendon Press 1972) 44; Umut Özsu, 'The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International Law* (1st edn, Oxford University Press 2016).

⁹⁸ Hulle (n 22) 150; Todd (n 96) 110.

Coast of West Africa aroused the need to place extraterritorial jurisdiction on a surer legal footing.⁹⁹

In 1843, the Foreign Jurisdiction Act was passed.¹⁰⁰ This legislation's initial title was the Levant Jurisdiction Bill. However, James Hope Scott, the principal drafter of the legislation, advised that the Act ought to have broader application to address similar issues of civil and criminal jurisdiction in other territories outside the Crown's dominions.¹⁰¹ Spagnolo has argued that the Act was a 'juridical simulation of conquest' in that it was an early stage of 'the formal assumption of empire'.¹⁰² However, Pennell illustrates that although this was the consequence of the Act, its intention was rather to extend jurisdiction over disorderly individuals in the Ottoman Empire rather than the acquisition of territory.¹⁰³

The preamble to the Foreign Jurisdiction Act 1843 stated that its purpose was to remove doubts about the extent of jurisdiction in regions where Her Majesty exercised power and authority 'by treaty, capitulation, grant, usage, sufferance and other lawful means'. It further reads:

It shall be lawful for Her Majesty to hold, exercise and enjoy any power or jurisdiction which Her Majesty now hath or may at any time hereafter have within any country or place out of Her Majesty's dominions in the same and ample manner as if Her Majesty had acquired such power or jurisdiction by cession or conquest of territory.

⁹⁹ Todd (n 96) 116–117; Colin Newbury, 'Treaty, Grant, Usage and Sufferance: The Origins of Britain's Colonial Protectorates' in WP Morrell, GA Wood and PS O'Connor (eds), *A Tribute: Essays in Modern and Early Modern History Presented to William Parker Morrell* (University of Otago Press 1973); Hulle (n 22) 117–118.

¹⁰⁰ Foreign Jurisdiction Act 1843 (6 & 7 V.C. 94).

¹⁰¹ Henry Jenkyns, *British Rule and Jurisdiction beyond the Seas* (Clarendon Press 1902).

¹⁰² John P Spagnolo, 'Portents of Empire in Britain's Ottoman Extraterritorial Jurisdiction' (1991) 27 *Middle Eastern Studies* 256, 256.

¹⁰³ Pennell (n 95) 467.

As Van Hulle notes, this range of means of acquisition of jurisdiction gave grounds for the valid exercise of jurisdiction stopping only at usurpation.¹⁰⁴ The Act would be implemented through the use of Orders in Council. Prior to the Order in Council of 1889, there was no means for Britain to exercise extraterritorial jurisdiction in the Nyasaland region.

In the late 19th century, the Anglo-Portuguese rivalry for Nyasaland was the immediate pressure resulting in the declaration of a protectorate. Portuguese interest in the region around the Nyasa dated back to the 15th century.¹⁰⁵ However, Portugal's interest was renewed when the English seized the Cape in 1795. Dr Francisco Lacerda warned of British South Africa creeping northwards and slicing a wedge between Portugal's eastern and western coastal possessions.¹⁰⁶ Portugal had possession of Mozambique, at the time, the only known route into Nyasaland. This posed a problem for Scottish missionaries and British consuls seeking to reside in Nyasaland. This issue persisted until 1889, when an alternative route to Nyasaland through the mouth of the Chinde river was found.

For Britain, humanitarian concern spiked interest in the region. The Anti-slavery movement set its sights to the slave trade after emancipation in 1833.¹⁰⁷ This reinvigorated interest resulted in Sir Thomas Fowell Buxton's text, 'The African Slave Trade and its Remedy'.¹⁰⁸ Buxton was Wilberforce's successor as the Leader of the Anti-Slavery Movement

¹⁰⁴ Hulle (n 22) 119.

¹⁰⁵ Stephen Samuel Murray, *A Handbook of Nyasaland* (Published for the Government of Nyasaland by the Crown Agents for the Colonies 1922) 8.

¹⁰⁶ *ibid* 8–9. Dr Francisco José Lacerda e Almeida (1753-1798), a Portuguese explorer.

¹⁰⁷ RR Follett, 'After Emancipation: Thomas Fowell Buxton and Evangelical Politics in the 1830s' (2008) 27 *Parliamentary History* 119.

¹⁰⁸ Thomas Fowell Buxton, *The African Slave Trade and Its Remedy* (J Murray 1840).

in the House of Commons.¹⁰⁹ His work included an appeal to the government arguing that while armed stockades, maritime exertions and diplomatic relations were useful, these measures alone would not be sufficient to remedy the slave trade. Buxton suggested that with government support, treaties ought to be concluded with indigenous people whereby they relinquish slave trading for legitimate commerce.¹¹⁰ As aspirations of ending the slave trade coincided with the opening up of sites in Africa, actors of different political inclinations could agree on the civilising mission at the heart of the activities in foreign territories as outlined by Buxton.¹¹¹

On the 1st of June 1840, David Livingstone heard Buxton speak at a public meeting at the Society for the Extinction of the Slave Trade and for the Civilisation of Africa. Rijpma suggests that this event galvanised Livingstone in his missionary zeal.¹¹² The remedy to the slave trade in the Nyasa region has been described as the Buxton-Livingstone thesis.¹¹³ According to Livingstone's interpretation of Buxton's ideas, the scourge of slavery was best dealt with through the creation of a civilised settlement introducing legitimate commerce. This would, in turn, lead to the eradication of the slave trade, and Christianity would be able to flourish.¹¹⁴ Livingstone's addition to Buxton's remedy was the idea of a self-sufficient 'colony of artisans'.¹¹⁵ However, Hinchliff suggests that Livingstone's use of the word colony was not

¹⁰⁹ Lester and Dussart (n 34) 208.

¹¹⁰ Follett (n 107) 127.

¹¹¹ Follett (n 107); Buxton did not see himself as an imperialist and stated conclusively 'we desire to usurp nothing, and to conquer nothing but the slave trade Buxton (n 108).

¹¹² S Rijpma, 'David Livingstone: A Usable Source of "General" Information?', *David Livingstone and the Myth of African Poverty and Disease: A Close Examination of His Writing on the Pre-colonial Era* (Brill: Leiden 2015) 184.

¹¹³ Peter Hinchliff, 'The Blantyre Scandal, Scottish Missionaries and Colonialism' (1984) 46 *Journal of Theology for Southern Africa* 29, 132.

¹¹⁴ *ibid* 132–133.

¹¹⁵ James Tengatenga, 'Dr. Livingstone, I Presume? The Legacy of Dr. David Livingstone' (2013) 66 *The Society of Malawi Journal* 1, 6.

in the imperial sense connoting domination or subjugation, but merely connoted a group of people living outside of their homeland.¹¹⁶ Dickie suggests otherwise stating that Livingstone's intention was to create a cotton growing British settler colony in the Shire Highlands.¹¹⁷

Nevertheless, even if Livingstone had only envisioned 'colonies' as a group of people living outside their homelands, the 'mission-colonies' which were erected in his name gradually began to resemble colonies as imperial domination by taking on an increasing role in governance and adjudication.¹¹⁸ In other words, the humanitarian language of protection which brought them to the region appears to have led to jurisdictional claims of protection over the people they encountered.

Missions in east Africa provided not only spiritual guidance, but also served as temporal authorities.¹¹⁹ Oliver notes that with the exceptions of Zanzibar and Buganda where there was some semblance of political stability, missionaries in East Africa established 'what amounted to a small independent states'.¹²⁰ This section analyses the extension of protection and (unlawful) jurisdiction over Africans encountered in the Nyasa region. It shows that before the legal framework for extraterritorial jurisdiction was established, imminent threats and fear for personal security were used to take potentially scandalous, extraordinary action.

¹¹⁶ Hinchliff (n 113) 32.

¹¹⁷ John Dickie, *The British Consul: Heir to a Great Tradition* (Hurst 2007) 36.

¹¹⁸ Ronald J Horvath, 'A Definition of Colonialism' (1972) 13 *Current Anthropology* 45, 50.

¹¹⁹ Roland Anthony Oliver, *The Missionary Factor in East Africa* (2nd edn, Longman 1965) 50.

¹²⁰ *ibid.*

a. Universities' Mission to Central Africa

On Livingstone's return to London from the Zambezi, he urged the University of Cambridge to continue on the path he had opened. His invocation led to the formation of the Universities Mission to Central Africa (UMCA) to establish a mission site in the Shire Highlands in collaboration with the Universities of Cambridge, Oxford, Durham and Dublin.¹²¹ In addition, Livingstone was appointed Her Majesty's Consul at Quelimane for the Eastern Coast of Africa to the south of Zanzibar and for the Independent Districts of the Interior'.¹²² He was granted government funding for a further expedition to the Zambezi.¹²³ This first UMCA mission in the Shire Highlands was a bitter failure and had to retreat within a year. The mission was faced with an untenable social and political situation on the ground.¹²⁴

The first challenge posed by the remoteness of the territory was the need to consecrate and ordain a Bishop, Charles Mackenzie, to serve in a region which was not under British political authority.¹²⁵ The solution was to consecrate the bishop in St George's Cathedral in Cape Town on 1 January 1861 as 'Bishop of the mission to the tribes dwelling in the neighbourhood of Lake Nyasa and the River Shire'.¹²⁶ However, the South African church had some concerns about the arrangement. The first was the oddity of a bishop being appointed before any 'flock had gathered'.¹²⁷ Secondly, that the mission of the bishop was not their

¹²¹ Sharpe (n 76) 129.

¹²² Robert I Rotberg, 'His Brother's Keeper: Charles Livingstone and the "Failure" of David Livingstone's Zambezi Expedition' (2019) 47 *The Journal of Imperial and Commonwealth History* 76, 71.

¹²³ Hanna (n 80) 3.

¹²⁴ Murray (n 105) 10.

¹²⁵ James Tengatenga, *Church, State, and Society in Malawi: An Analysis of Anglican Ecclesiology* (African Books Collective 2006) 52.

¹²⁶ Jonathan Newell, "'There Were Arguments In Favour of Our Taking Up Arms": Bishop Mackenzie and the War Against the Yao in 1861' (1992) 45 *The Society of Malawi Journal* 15, 17–18; Owen Chadwick, *Mackenzie's Grave* (Hodder & Stoughton 1959) 28.

¹²⁷ Newell (n 126) 18.

concern – that he had been sent by Canterbury to Central Africa. Finally, and most pertinently, they worried that they were party to sending a bishop beyond British authority and to ‘a method by which the church was leading the state towards more annexation of backward and expensive lands’.¹²⁸ This fear seems reasonable given the way events transpired in the following decades.

Livingstone, unlike Mackenzie, held the position of consul, possessing a somewhat nebulous consular authority that Mackenzie relied on for any activities unrelated to their missionary work. There was certainly enough space for such actions.¹²⁹ As luck would have it, the expedition of the UMCA coincided with the arrival of the Yao to the Shire Highlands.¹³⁰ The Yao tribes had been driven eastwards towards lake Nyasa and they divided into three factions.¹³¹ The first, settled between Matope on the Upper Shire and Blantyre, the second group settled in Mulanje, and the third group settled in Blantyre and Chiradzulu dispossessing the Mang’anja people.¹³² It was this third group which terrorised the Magomero site the UMCA had chosen for its mission.

Before arriving at the chosen site at Magomero, Livingstone, Mackenzie and their company began dispersing slaving caravans and freed the slaves who became the first of many to settle at their mission.¹³³ Their choice to settle and align themselves with one faction of the Mang’anja tribe had the effect of causing disunity among the Mang’anja who were already divided. Mackenzie found himself agreeing to Mang’anja requests for protection against their

¹²⁸ ibid 11 Newell quoting the Bishop of Cape Town to Bishop of London, 21 January 1861, Lambeth Palace Library, Archibald Campbell Tait Papers, TAIT 121, 56-57.

¹²⁹ ibid 18.

¹³⁰ Murray (n 105) 10; Hanna (n 80) 9.

¹³¹ Murray (n 105) 10–11.

¹³² ibid. See sketch map of British Central Africa in Appendix 1.

¹³³ Newell (n 126) 18–20.

Yao aggressors and wrote that in the absence of any other authority, the mission ought to ‘go on and lead the Mang’anja’.¹³⁴ This decision launched a series of military expeditions against the Yao to rescue victims of slavery, and to punish them for actions they had taken against the Mang’anja.¹³⁵ Unwittingly, the UMCA mission became a ‘quasi-military camp’.¹³⁶ However, these expeditions were ultimately futile because the Yao were not transiently raiding the Mang’anja lands. They were being pushed southwards by the Ngoni and had nowhere else to go.¹³⁷

After its futile struggle against the Yao, the mission lost its Bishop Mackenzie and three other members and retreated to the lower Shire and was recalled by the British Government and they left the Zambezi in 1864.¹³⁸ Mackenzie’s actions later brought disrepute onto the mission, and Livingstone felt that he was being unfairly scapegoated for the actions of the mission.¹³⁹ Here the difficulties arose because they had gone out into a distant land which was in political turmoil. The only chiefs with authority were the Yao and the Ngoni who possessed military power and plagued the weaker villages with which the missions identified.

The members of the UMCA wrote that their protection and policing actions were necessary given the dismal state of affairs they found. They spoke of the situation of the

¹³⁴ ibid 25–26 Newell cites Mackenzie’s Journal, Vol. 2, 9 August 1861.

¹³⁵ ibid 36.

¹³⁶ ibid 24.

¹³⁷ AEM Anderson-Morshead, *The History of the Universities’ Mission to Central Africa, 1859-1898* (England: Office of the Universities’ Mission to Central Africa, 1905 1905) 16; Newell (n 126).

¹³⁸ William Garden Blaikie, *The Personal Life of David Livingstone* (John Murray 1880) 293–295; Murray (n 105) 10–11.

¹³⁹ Newell (n 126) 23.

Mang'anja as 'a state of alarm and misery'.¹⁴⁰ Bishop Mackenzie explained why they engaged in armed battle stating:

There were arguments in favour of our taking up arms, the real reason of our doing so being, however, that when the chiefs... called upon us to help.... against a powerful enemy, and we felt that the result depended under God on our going or refusing, and we could not refuse.¹⁴¹

Thus, the activities of the UMCA amounted to an arrangement of protection of vulnerable people, justified on the grounds that there were grave threats to their security and that of the mission. While many of these actions were later condemned by the British public, they provide a useful illustration of a problem which would plague later missions to come. Upon visiting Mackenzie's grave in 1863, Livingstone wrote of him,

I have just been visiting Bishop Mackenzie's grave. At first I thought him wrong in fighting, but I don't think so now. He defended his 140 orphan children when there was no human arm besides to invoke. To fight even in self-defense must always be but a sad necessity; but to sit still and let blood thirsty slave-hunters tear away these orphans to cleave to us for protection must be suffering martyrdom for our own folly.¹⁴²

The experience of the UMCA showed that protecting vulnerable people required shouldering responsibilities in a region plagued with political instability and turmoil.¹⁴³ Furthermore, it gave a poignant illustration of protection as a military alliance. The retreat of the mission was seen as a failure and a fraud on the English public who had bought into the dream of the spiritual

¹⁴⁰ ibid 37 Newell cites Scudamore to Edward, 2 October, 1861, UMCA A1 (II) A/Scudamore MS/ 22-38.

¹⁴¹ ibid 26 Newell cites Mackenzie to Strong, 30 September 1861, UMCA AI (I) A/1/109 116.

¹⁴² Harvey Goodwin and Charles Frederick Mackenzie, *Memoir of Bishop Mackenzie* (2nd edn, Camb. 1865) 362 citing Livingstone's letter dated 23 January 1863.

¹⁴³ McCracken (n 84) 50.

and material gains of a mission in Nyasaland.¹⁴⁴ These aspirations of Livingstone were only to be realised decades later, but not without overcoming similar challenges.

b. Livingstonia Mission

The Livingstonia Mission was established in 1875 and faced several challenges, the most pressing of which was the dealing with the slave-raiding occurring in its vicinity.¹⁴⁵ However, the mission had firm policy against direct intervention in political and military matters. This spared the mission some of the troubles the UMCA faced before it and those that would plague the later Blantyre mission.¹⁴⁶

After Livingstone's death, the Foreign Committee of the Free Church of Scotland founded their East Africa Mission called Livingstonia in David Livingstone's honour.¹⁴⁷ However, unlike the UMCA this mission settled at Cape Maclear, which was distant from any slaving caravans, and more secure from tribal aggression.¹⁴⁸ As the number of Africans settling around the mission increased, the missionaries had trouble with theft and disciplining African residents of their settlement.¹⁴⁹ However, the Livingstonia mission consulted African 'juries' before punishing any offenders and in severe cases would opt to expel the offender from the

¹⁴⁴ *The Times* (London England), Issue 24460. 20 January 1863. The East Africa Mission – On Monday Last, “We were promised cotton, sugar, and indigo, commodities which savages never produced; and of course we got none. We were promised trade, and there is no trade, although we have a consul at 500l. a year. We were promised converts to the Gospel, and not one has been made....In a word, the thousands subscribed by the Universities, and the thousands contributed by the Government, have been productive of only the most fatal results”.

¹⁴⁵ Hanna (n 80) 18.

¹⁴⁶ Oliver (n 119) 51.

¹⁴⁷ James Stewart, *Livingstonia, Its Origin: An Account of the Establishment of That Mission in British Central Africa* (Andrew Elliot 1894) 1–3.

¹⁴⁸ Hanna (n 80) 19.

¹⁴⁹ Oliver (n 119) 59.

mission.¹⁵⁰ When the mission moved its station to Bandawe in 1881, it reconsidered sheltering runaway slaves and sent any offenders to African chiefs for disciplinary measures.¹⁵¹

In 1876, the mission requested that Edward Young be granted a consular position as this might enable him to be a more useful resource reporting directly to Kirk in Zanzibar on the dealings of the slave trade.¹⁵² This request was refused as the Foreign Office considered there to be insufficient consular duties to perform and were loath to ‘invest an official character’ to what was essentially a private settlement of British subjects.¹⁵³ After its failure to appoint a Consul, the mission received advice not to interfere with the political or slave trade in any way other than persuasion and appear to have followed these instructions.¹⁵⁴

A similar request was made two years later at the personal request of the Superintendent of the Livingstonia Mission Dr John Stewart, and the insistence of Cotterill.¹⁵⁵ Stewart requested that the Livingstonia Mission have ‘a consul of their own at Lake Nyassa in order that residents may be under a kind of British Protectorate’.¹⁵⁶ This led to the appointment of

¹⁵⁰ WP Livingstone, *Laws of Livingstonia: A Narrative of Missionary Adventure and Achievement* (Hodder and Stoughton 1922) 136–137; Oliver (n 119) 59–60.

¹⁵¹ Oliver (n 119) 60; Livingstone (n 150) 186.

¹⁵² Hanna (n 80) 64; Macmillan (n 29) 64. Edward Young was a Naval Officer on the east coast slave patrol who had accompanied Livingstone on his 1866 search expedition and served as part of the leadership of the Livingstonia Mission 1875–1876.

¹⁵³ Hanna (n 80) 64.

¹⁵⁴ *ibid* 65.

¹⁵⁵ TNA FO 84/1479 Stewart to Elton, 30 November 1876, enclosed in Elton to Derby, 3 February 1877; TNA FO 84/1479 Cotterill to Elton, 27 November 1876, enclosed in Elton to Derby, 3 February 1877. Cotterill was concerned about the scale of slaving activity and looking to pre-empt an expected Portuguese move on the region. He wrote ‘it would be the wisest step that we could take if we had the authority to declare the whole region at once under British jurisdiction’. Cotterill was the Bishop of Edinburgh’s son who accompanied Livingstone on his 1876 expedition.

¹⁵⁶ National Library of Scotland, Minutes of the Foreign Committee of the Church of Scotland Foreign Mission Committee, 16 October 1883.

James Frederic Elton who travelled to the Nyasa region in July 1877.¹⁵⁷ Elton died in December of the same year with his most significant role in the abatement of slavery being his posthumous book in where he proposed a commissioner in the interior to dissuade chiefs from their connection to the slave-trading ‘Arabs’.¹⁵⁸

Part of the vision of the Livingstonia Mission was to offer guidance in material needs as well as spiritual needs.¹⁵⁹ After about two years, the Livingstonia mission grew weary of attempting to do both. To ease the pressure, James Stewart appealed to a Glasgow merchant named James Stevenson who convened the Livingstonia sub-group. In April 1878, a limited company, The Livingstonia Central African Company, was formed under the management of John and Frederick Moir.¹⁶⁰ This company would later play a role in the extension of protection over tribes in Nyasaland.

All in all, the Livingstonia mission more capably navigated the political situation without resorting to acquiring more temporal authority than absolutely necessary, mostly due to its position away from political turmoil.

¹⁵⁷ Norman Etherington, ‘Frederic Elton and the South African Factor in the Making of Britain’s East African Empire’ (1981) 9 *The Journal of Imperial and Commonwealth History* 255, 268.

¹⁵⁸ James Frederic Elton and Henry Bernard Cotterill, *Travels and Researches among the Lakes and Mountains of Eastern & Central Africa, from the Journals of J.F. Elton, Ed. and Completed by H.B. Cotterill* (Lond 1879); Hanna (n 80) 56; Etherington (n 157).

¹⁵⁹ Stewart (n 147) 47. The term Arab is fraught with definitional complexities in this context. Macmillan (n 80) 28; Low Monteith Fotheringham, *Adventures in Nyassaland: A Two Years’ Struggle with Arab Slave-Dealers in Central Africa* (Sampson Low, Marston, Searle & Rivington 1891) 112. Fotheringham defined it in this way ‘The so-called ‘Arab’ may be divided into three classes: - the true Arab, the Mswahili, and lastly any wild up country native who may have willingly or unwillingly, joined the Moslem caravan, particularly if he can sport a garment and tie a dirty bit of calico around his head by way of turban’. Distasteful language aside, Fotheringham’s account reveals that ‘Arab’ in the sources was used to refer to groups of people, often associated with the Islam and slave trade, who may vary in ethnicity.

¹⁶⁰ Macmillan (n 80) The company changed its name to the African Lakes Company in 1883.

c. Blantyre Mission

The Blantyre Mission was notorious for wielding a civil and criminal jurisdiction that culminated in a scandal threatening its existence. The details of the mission's trial and execution of an African man they convicted of murder illustrates the intricate connection between the desire to set up refuge for slaves and their resort to temporal authority and coercion.

The Blantyre Mission was established 1876.¹⁶¹ Reverend Dr John Macrae, Minister of Hawick, was the driving force behind the formation of the Mission.¹⁶² He convened the Blantyre sub-committee of the Church of Scotland's Foreign Missionary Committee which had, prior to the Blantyre mission, had experience of missions solely in India. Hinchliff draws a connection between the views of Macrae and what he calls the 'Buxton-Livingstone thesis',¹⁶³ according to which the mission ought to establish a civilised settlement as a pre-condition of evangelical work.¹⁶⁴

Dr Macklin, a prominent member of the mission community, purchased the land on which the mission stood from the Yao Chief Kapeni. Dr Macklin told MacDonald that the ownership of the land carried with it rights of jurisdiction.¹⁶⁵ Henry Henderson stated on this purchase of land:

¹⁶¹ Ross (n 86) 15.

¹⁶² Hinchliff (n 113) 30.

¹⁶³ *ibid* 32.

¹⁶⁴ *ibid*.

¹⁶⁵ TNA FO 84/1564 O'Neill to Granville, No 13, 18 November 1880, Enclosure of John Walker's Statement to the Commission of Inquiry; MacDonald (n 13) Vol. 1, 111; Hanna (n 80) 27; Oliver (n 119) 59.

I cannot say how far [Kapeni] expected us to exercise jurisdiction over the natives residing on the land when we acquired it... but I had no doubt that he would expect us to administer justice among all those who attached themselves to us as their people.¹⁶⁶

Henderson further stated that he was given instructions by Macrae to ‘act as General Director and Christian Magistrate of the settlement’.¹⁶⁷ In addition, he was tasked to ‘frame laws and regulations’ for the settlement.¹⁶⁸ Thus, it was clear from the very beginning of the mission that the regular exercise of civil and criminal jurisdiction would be part of their mission life.

When Duff MacDonald was appointed as the first minister on the mission, he referred to the Blantyre mission as the ‘colonial settlement of the church of Scotland’.¹⁶⁹ Macrae communicated to Duff MacDonald that ‘Blantyre was to be a Christian colony with people under its protection’.¹⁷⁰ MacDonald later wrote, ‘Those that know the state of the country will not wonder that the Directors had assumed civil jurisdiction, and sanctioned flogging, and asked certain agents to act as magistrates’.¹⁷¹ He sought to justify the steps they took given the circumstances they found themselves in. The justification of unusual or exceptional measures aimed to civilise a rudimentary people would later become common in dealings with Africans.

MacDonald reasoned that the punishments offered by local African law were so excessive that they ‘could never be countenanced by English missionaries’.¹⁷² MacDonald’s

¹⁶⁶ ibid Enclosure of Henry Henderson’s Statement to the Commission of Inquiry, 22 September 1880.

¹⁶⁷ ibid Enclosure of John Walker’s Statement to the Commission of Inquiry, citing a letter from Macrae dated 19 October 1876.

¹⁶⁸ ibid.

¹⁶⁹ MacDonald (n 13) Vol. 2, 251.

¹⁷⁰ TNA FO 84/1564 O’Neill to Granville, No 13, 18 November 1880, Enclosure of Duff MacDonald’s Statement to the Commission of Inquiry, 7 October 1880; Hanna (n 80) 26; Oliver (n 119) 59; Hinchliff (n 113) 29.

¹⁷¹ MacDonald (n 13) Vol. 2, 42.

¹⁷² ibid.

statement reveals that part of the motive for exercising jurisdiction was to protect African residents of their mission from African law which they found repugnant. In addition, he suggests that the chaotic state of the region necessitated this intervention in order to preserve the life and property of the missionaries themselves.

Under the leadership of Macrae and Stewart, the mission developed a policy of corporal punishment of those who were caught stealing mission property.¹⁷³ There was an established practice of flogging for theft and fornication.¹⁷⁴ Indeed a crude system of precedent emerged whereby the number of lashes a native would receive for certain offences became standardised on the basis of previous punishments given. The incident which Chirnside disclosed in the pamphlet discussed earlier described an outrage occurring in 1879.¹⁷⁵ In this case two African men, Manga and Piseni, had allegedly murdered a woman who resided on the mission settlement. Piseni escaped from the mission after being caught, while Manga was tried, convicted, and sentenced to death. As recounted, Manga was then brutally executed by a firing squad in February of 1879.¹⁷⁶

Chirnside's first charge was that the mission 'not having the power of life or death in their hands, in executing a native for an alleged murder they exceeded their duty and took up a most improper position'.¹⁷⁷ Furthermore, Chirnside stated that he believed, as do many others, that the man who had been executed was innocent of the crime.¹⁷⁸ In addition, Chirnside alleged

¹⁷³ Hanna (n 80) 59.

¹⁷⁴ TNA FO 84/1564 O'Neill to Granville, No 13, 18 November 1880, Enclosure of Robert Henderson's Statement to the Commission of Inquiry, 30 October 1880.

¹⁷⁵ Chirnside (n 1).

¹⁷⁶ *ibid*; Livingstone (n 150) 172–173.

¹⁷⁷ *ibid* 12.

¹⁷⁸ *Ibid*.

that Africans at the mission were being flogged, sometimes to death, with buffalo hide whips and that salt was rubbed in their bleeding backs.¹⁷⁹ Finally, that ‘a pit had been sunk in the ground’ behind the blacksmith’s shop which was being used as a prison for Africans.¹⁸⁰

Hinchliff suggests that the mission concern over press coverage of the incident reveals how shaken the mission was by the incident because newspapers from the relevant period make no mention of the scandal.¹⁸¹ He further suggests this might mean the mission committee inflated the fallout in their own minds out of fear. However, there were several mentions of the scandal in news media,¹⁸² and evidence from private dispatches that colonial officials feared word of African mistreatment at their missions might discredit Britain’s humanitarian mission.¹⁸³ Though there was a means to try British subjects locally for murder, or for manslaughter including accessory to homicide using an imperial dominion jurisdiction, such action was never taken.¹⁸⁴

¹⁷⁹ ibid.

¹⁸⁰ ibid 22–23.

¹⁸¹ Hinchliff (n 113) 38 Hinchliff mentions that the Glasgow Herald, The Scotsman and The Courant make no mention of the scandal.

¹⁸² It seems the scandal was indeed widely reported. See ‘The Blantyre Mission Scandal’ *Edinburgh Evening News* (December 1880) 3; ‘Extraordinary Charges against Scotch Missionaries’ LVI *Manchester Courier and Lancashire General Advertiser* (December 1880) 7; ‘Serious Charges Against Scotch Missionaries’ *Dundee Courier* (December 1880) 6; ‘Serious Charges against an African Mission’ *Edinburgh Evening News* (December 1880) 2; ‘Missionaries and Civil Jurisdiction’ *Dundee Courier* (December 1880); ‘The Alleged Outrages By Missionaries’ 42 *Blackburn Standard* (December 1880) 2; ‘The Blantyre Case’ *Dundee Courier* (December 1881); ‘Established Church Commission’ *Dundee Courier* (December 1881) 3; ‘The Rev. Dr Smith on the Blantyre Mission’ *Glasgow Herald* (December 1881).

¹⁸³ TNA FO 84/1564 Henry O’Neill to Lord Marquis, No 11 Slave Trade, 3 February 1880, O’Neill writes ‘If there be truth in what we hear of the harsh treatment of natives it should be stopped before the Portuguese authorities hear of them and institute inquiries which would bring a storm of stress upon the whole mission and throw discredit upon all mission work and find occasion for abundant thrashing in the Portuguese press which will be slow to dislodge with respect to our humanitarian dealing in East Africa and the coast’.

¹⁸⁴ Offences Against the Person Act 1828 (9 Geo 4 c 31); Hanna (n 80) 32–33.

Once word of this pamphlet reached surrounding colonial officials in Mozambique, Vice Consul Nunes reported to Consul O'Neill that he tried to silence the rumours believing them to be either false or exaggerated.¹⁸⁵ However, when Dr. Macklin, a medical attendant of the mission, arrived at Quilemane, Nunes mentioned the reports expecting a flat denial, but Macklin confirmed the rumours asking, 'Well, what else were we supposed to do in such a case?'.¹⁸⁶ O'Neill then made an informal inquiry to Duff McDonald asking him about the details of Chirnside's report.¹⁸⁷ He found McDonald's response to be 'very unsatisfactory' and it confirmed to him that 'there is little doubt the atrocities have been committed'.¹⁸⁸

Duff McDonald's response to Consul O'Neill confirmed that flogging regularly occurred at the mission but denied having any knowledge of the extreme cases where salt was rubbed in the backs of Africans.¹⁸⁹ He also referred to the alleged pit sunk in the ground as a house which had 'some ground coming up behind it' and therefore led to the 'innocent exaggeration' that it was a pit.¹⁹⁰ On the matter of his authority to punish resident Africans in this way, McDonald stated, 'every case in which we inflicted a flogging or an imprisonment would by the native chiefs around us been punished by death'.¹⁹¹ Referring to the case where a man was executed, McDonald argued that this was a matter of native law over which he had

¹⁸⁵ TNA FO 84/1564 Henry O'Neill to Lord Marquis, No 11 Slave Trade, 3 February 1880.

¹⁸⁶ *ibid.*

¹⁸⁷ TNA FO 84/1564 Henry O'Neill to Lord Marquis, No 34 Slave Trade, 20 April 1880.

¹⁸⁸ *ibid.*

¹⁸⁹ TNA FO 84/1564 Henry O'Neill to Lord Marquis, No 34 Slave Trade, 20 April 1880, Enclosure 2, McDonald to O'Neill, 22 March 1880.

¹⁹⁰ *ibid.*; However, Macklin confirmed the existence of the subterranean prison in his testimony to the commission of inquiry TNA FO 84/1565 O'Neill to Granville, No 13, 18 November 1880, Enclosure of Macklin's Statement to the Commission of Inquiry, 21 June 1880.

¹⁹¹ *ibid.*

little authority writing, ‘...we felt that we could no longer stand between the natives and the administration of justice’.¹⁹²

Once there seemed to be a strong foundation of guilt regarding these allegations, the Church of Scotland appointed a commission of inquiry.¹⁹³ The church appointed two special commissioners, Reverend John Rankin, a minister of Mithil, and Pringle, a lawyer from Edinburgh.¹⁹⁴ The Commission report concluded that the missionaries’ actions had been unlawful, and three members of the commission were recalled, namely Duff MacDonald, John Buchanan and George Fenwick.¹⁹⁵ Interestingly, it included statements from not only the white missionaries, but also two Africans, Chief Kumalomba, and Zuze – baptised as Joseph Bismarck.¹⁹⁶

MacDonald’s testimony to the commission gives his justification for the action taken by the mission. MacDonald stated that Macrae told him that ‘Blantyre was to be a Christian colony with people under its protection’.¹⁹⁷ MacDonald, in defence of the mission’s actions, stated that Blantyre is described as an asylum for the slave, ‘Asylum implied protection, and protection to everyone who read the July issue implied the use of physical force’.¹⁹⁸ He further stated that the Blantyre mission did not operate differently on such matters to the Livingstonia

¹⁹² *ibid.*

¹⁹³ Hinchliff (n 95) 37; Hanna (n 20); Oliver (n 100).

¹⁹⁴ Hinchliff (n 113) 37.

¹⁹⁵ *ibid.*

¹⁹⁶ TNA FO 84/1564 O’Neill to Granville, No 13, 18 November 1880, Enclosure of Kumalomba’s Statement; Enclosure of Joseph Bismarck’s Statement.

¹⁹⁷ TNA FO 84/1565 O’Neill to Granville, No 13, 18 November 1880, Enclosure of Duff MacDonald’s Statement to the Commission of Inquiry, 7 October 1880.

¹⁹⁸ *ibid.*

mission given that Dr Laws also believed the man ought to be executed because ‘an injury to a person under our protection was an injury to ourselves’.¹⁹⁹

MacDonald referred to a document that had been signed by every member of the mission (except for Macklin who was ill) agreeing to the execution to the effect that ‘the man should be executed according to the laws of God and our native country’.²⁰⁰ As for evidence, MacDonald stated ‘I had no doubt as to their guilt, at the same time I considered that we had nothing to do with the evidence as it was a native matter’.²⁰¹ It seems curious that a trial convened by the mission following some manner of formality would not concern itself at all with the evidence at hand. However, Macklin’s testimony suggests that the mission indeed was concerned with evidence, stating that he took the suspects separately and questioned them on the matter.²⁰² Both Manga and Piseni maintained their innocence throughout, but were unable to provide an alibi.²⁰³

Bismarck’s statement sheds more light on the circumstances leading up to the trial and execution. Bismarck was an African resident of the mission who acted as an interpreter for the mission in their interactions with African chiefs. Bismarck explained that Manga and Piseni were cousins who lived close to the bar in Ndirande where they had been overheard talking.²⁰⁴ Manga’s late father had a concubine who Manga wanted to take as his wife, but the woman

¹⁹⁹ ibid.

²⁰⁰ ibid.

²⁰¹ ibid.

²⁰² TNA FO 84/1565 O’Neill to Granville, No 13, Enclosure of Macklin’s Statement, 18 November 1880.

²⁰³ ibid.

²⁰⁴ TNA FO 84/1565 O’Neill to Granville, No 13, Enclosure of Joseph Bismarck’s Statement, 18 November 1880.

refused and fled.²⁰⁵ Manga, seething, was overheard at a bar by his servant Pakomo saying that he would kill this woman, and fugitive slaves were known to reside at the Blantyre mission.²⁰⁶ Bismarck then wrote, ‘I know the woman who was murdered. In appearance she is not at all like the woman who Manga or Piseni wanted to marry. I do not think that they could have killed the one by mistake for the other’.²⁰⁷ However, the woman who had been killed was a slave concubine of Chief Kumalomba’s. The mission was being pressed by Chief Kumalomba to take action.²⁰⁸ On the other hand, the persons suspected to have murdered the woman were subjects of Kapeni, the chief from whom the Blantyre mission acquired its land.

This brings into focus the interdependent nature of the relationship between the mission and the surrounding chiefs. In Bismarck’s statement, he wrote that he believed Kapeni’s reason for granting use of land to the mission was to prevent the Mavite from ‘making war’ against his village.²⁰⁹ Bismarck wrote that it was well known that the English had fought against the Ajawa (Yao) on the side of the Mang’anja, and Kapeni felt that his village would be safe if the English were there to fight alongside him.²¹⁰ While no battle ever occurred, when threat of war loomed in 1877, McDonald noted that ‘we were prepared to fight alongside him’.²¹¹ Like the UMCA before it, the Blantyre mission found itself inextricably intertwined with local politics.

²⁰⁵ *ibid.*

²⁰⁶ *ibid.* Similar facts appear in Kumalomba’s statement (n 196).

²⁰⁷ *ibid.*

²⁰⁸ TNA FO 84/1565 O’Neill to Granville, No 13, 18 November 1880, Enclosure of Duff MacDonald’s Statement to the Commission of Inquiry, 7 October 1880.

²⁰⁹ TNA FO 84/1565 O’Neill to Granville, No 13, 18 November 1880, Enclosure of Joseph Bismarck’s Statement, 18 November 1880.

²¹⁰ *ibid.*

²¹¹ TNA FO 84/1565 O’Neill to Granville, No 13, 18 November 1880, Enclosure of Duff MacDonald’s Statement to the Commission of Inquiry, 7 October 1880.

The relationships here begin to look like what Attwood described as a ‘chain’ or ‘circle’ of protection.²¹² The agents of the Blantyre mission sought to set up a mission to protect victims of the slave trade. They believed (erroneously) that such protection entitled them to exercise civil and criminal jurisdiction. In order to set up their mission, they needed to acquire land. The land transaction seemed to Chief Kapeni to include an implied promise of protection from his enemies. Furthermore, the missions in the region felt they needed the protection of the Crown against the aggressions of the Portuguese.

Although the mission had been instructed not to exercise civil or criminal jurisdiction after the scandal, the remarks of consuls once a protectorate had finally been declared suggest that they did so anyway.²¹³ Indeed, in 1894 Acting Commissioner Sharpe referred to the Blantyre mission as an opposition party to the government.²¹⁴ Records of the missionary magazine *Life and Work in British Central Africa* indicate that the mission exercised some civil jurisdiction in till as late at 1888.²¹⁵ In April 1888, there is an account of DC Scott adjudicating a case between Chief Makata and Chief Malungu regarding the sovereignty of Ndirande.²¹⁶ The mission seems to have been compelled to take such matters into its own hands after repeated pleas for protection from the government.²¹⁷ On feeling having their pleas ignored the mission reported:

No one can expect her to follow every adventurer, trader, or missionary, that chooses to push his neck into danger, but with our history and the results we have to show, Government must have some better reason to give for not listening to our

²¹² Attwood (n 1) 155.

²¹³ TNA FO 2/67 Acting Commissioner Sharpe to Lord Kimberley, 31 October 1894.

²¹⁴ *ibid.*

²¹⁵ *Life and Work in British Central Africa*, April 1888.

²¹⁶ *ibid.*

²¹⁷ *Life and Work in British Central Africa*, March 1889, ‘We are consul-less and the work of this land has evidently not to be done by help from home, but by our own conquest and establishment’.

petition. We have not asked for annexation: we have only asked for what the Government is well able to do.²¹⁸

There is a sense that the missionaries held an expectation of protection from the government, not only because they were British subjects, but also because they were aware of the reputational value of their humanitarian endeavours and the public support they had garnered. Finally in September of 1889, a protectorate was declared over the territory in the south of Nyasaland.²¹⁹ In response to the declaration, the Blantyre mission reported,

This month there has dawned a new life upon this land. British protection was what we had hardly dared to hope for; the utmost we had been taught to expect was that we would not be driven out of this country by the Portuguese. We do not say that everything is accomplished, we only say that the possibilities of doing effective work have been secured. The work itself is yet to be done.²²⁰

Indeed, the years to follow would see the creation of consular courts, appointment of judicial officers and increased military action to drive Arab slave raiders out of the protectorate. Thus, at least some of Livingstone's aspirations bore fruit.

5. Conclusion

This chapter highlighted the connection between protection, jurisdiction and violence. Missionaries such as Bishop MacKenzie of the UMCA and MacDonald of the Blantyre mission espoused views amounting to the assertion that protection means exerting physical force when protected persons are harmed or in harm's way. In the case of the UMCA, this meant a military alliance against those endangering the Mang'anja. On the other hand, while the Blantyre

²¹⁸ *Life and Work in British Central Africa*, September 1888.

²¹⁹ The circumstances surrounding this development are examined in Chapter 3.

²²⁰ *Life and Work in British Central Africa*, September 1889.

mission would have fought the Mavite on Kapeni's side had that situation arisen, they exercised a form of jurisdictional authority in sentencing and executing their resident's alleged murderer.

As has been noted by scholars, one of the most powerful aspects of the language of protection is its ambiguity.²²¹ The overlapping and accelerating meanings of protection helped drive a process of increasing power exercised in the region, culminating in the proclamation of the British Central African Protectorate. The two main drivers of this process were the humanitarian protectionist aims from the missionaries, and the explorer-consuls who consolidated British protection and jurisdiction in the region. The very presence of increasing numbers of missionaries and settlers in the region in turn threw up fresh practical challenges in the maintenance of order in Nyasaland.

²²¹ Benton and Clulow (n 23) 8; Attwood (n 17) 154.

3. EXTRA-TERRITORIAL JURISDICTION, PROTECTION, AND THE COLONIAL PROTECTORATE

1. Introduction

The emergence of the protectorate and the increase of extraterritorial jurisdiction over territory outside of Her Majesty's dominions were contemporaneous.¹ As British influence grew beyond its territorial limits through agents such as traders, adventurers and missionaries, several questions regarding sovereignty and jurisdiction arose.² The theory underpinning sovereignty was that while an authority was sovereign within its own territory, it had no authority outside of it.³ Therefore, it followed that British subjects had to submit to the authority of the states in which they found themselves.⁴ However, British subjects, who held their own system of law and justice in high esteem were often unwilling to submit to legal systems perceived as inferior or even primitive.⁵ The most straightforward way of acquiring jurisdiction over a territory was through annexation but this was not always possible or desirable.⁶

¹ CR Pennell, 'The Origins of the Foreign Jurisdiction Act and the Extension of British Sovereignty' (2010) 83 *Historical Research* 465.

² W Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Duke University Press 1973) 11–13.

³ 'Extra territorium ius dicenti impune non paretur', *ibid* 13.

⁴ Henry Jenkyns and Courtenay Ilbert, *British Rule and Jurisdiction beyond the Seas* (Clarendon Press 1902); L Oppenheim and Hersch Lauterpacht, *International Law* (7th ed., Lond 1963) 286; Francis Taylor Piggott Sir, 1852-1925, *Exterritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (England: W Clowes, 1892 1892) 4–5.

⁵ Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (n 2) 12–13; HF Morris, 'Protection or Annexation? Some Constitutional Anomalies' in HF Morris and James S Read (eds), *Indirect Rule and the Search for Justice* (Clarendon Press 1972) 43. One reason annexation was undesirable was the requirement to eliminate slavery in colonies under the Slavery Act 1833.

⁶ Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans 1926).

As a solution to this quandary, the device of extra-territoriality was used to exercise a measure of jurisdiction over British subjects. In the 19th century, the Foreign Jurisdiction Acts of 1843-1890 were the principal means of the extension of jurisdiction over territories outside of the Crown's dominions.⁷ With a wide ambit, they enabled jurisdiction to be lawfully exercised in territories where Her Majesty had already exercised authority 'by treaty, capitulation, grant, usage, or sufferance' in territories outside the Her Majesty's dominions in as extensive a manner as though that jurisdiction had been acquired 'by cession or conquest'.⁸ As such, the Act was a 'juridical simulation of conquest' as it enabled the establishment of a British system of law in these territories.⁹ It permitted the Crown to legislate for British subjects in non-western territories through an Order in Council as in dominions, rather than having to go through Parliament.¹⁰

Consular service has long been linked with the exercise of extra-territorial jurisdiction through capitulations.¹¹ The jurisdictional authority exercised by consuls of the Levant Company were transferred to the Crown in 1825 and once that company was dissolved,¹² the Foreign Jurisdiction Act was passed in general terms for exercise in territories 'under conditions of civilisation so disparate from British conditions as to render it unjust and unfair

⁷ Foreign Jurisdiction Act 1843 (6 & 7 Vict c 9). Amended by the Foreign Jurisdiction Amendment Act 1865 (28 & 29 Vict c 116); Foreign Jurisdiction Amendment Act 1866 (29 & 30 Vict c 87); Foreign Jurisdiction Act 1875 (38 & 39 Vict c 85), and Foreign Jurisdiction Act 1878 (41 & 42 Vict c 67). Repealed and consolidated by Foreign Jurisdiction Act 1890 (53 & 54 Vict c 37).

⁸ Section 1, Foreign Jurisdiction Act 1843. This provision remained substantially similar in amendments and the consolidation Act, William Edward Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon Press 1894) 221.

⁹ Pennell (n 1) 482; John P Spagnolo, 'Portents of Empire in Britain's Ottoman Extraterritorial Jurisdiction' (1991) 27 *Middle Eastern Studies* 256, 266.

¹⁰ Inge van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (First, Oxford University Press 2020) 118.

¹¹ Arthur Berriedale Keith, *The Government of the British Empire* (Macmillan and Co 1935) 491.

¹² This was done through the Dissolution of the Levant Company Act 1825 (6 Geo 4 c 33); Pennell (n 1) 474.

to subject British subjects to the control of their courts'.¹³ In the late 19th century, consuls entered into the treaties that enabled protectorates to be declared in African territories. On the basis of the Foreign Jurisdiction Act, these treaties could ground the right to exercise extensive jurisdictional authority. This 'deterritorialization' of space freed British citizens from subjection to the laws of the territories they inhabited.¹⁴

The late 19th century was characterised by a frenzy of new territorial acquisitions, even if taken reluctantly. The Berlin Conference, as a gathering in part designed to create a legal and political framework for the acquisition of territory in Africa, has attracted conflicting views on its efficacy. In one camp, authors such as Anghie suggest that the role of the conference was significant in its ability to transform Africa into 'terra nullius' and played an important role in the determination of Africa's future.¹⁵ On the other hand, historians such as Crowe have written that the conference had negligible legal significance.¹⁶ The principles of effective occupation and the need to prevent powers from establishing paper protectorates without any meaningful authority in the region became a central part of the conflict between Portugal and Britain over authority over the Shire Highlands in the Nyasa.¹⁷

Scholars have identified and critically analysed the hierarchical structure of international law, which Anghie termed the 'dynamic of difference'.¹⁸ Anghie describes it as

¹³ Keith (n 11) 491–492.

¹⁴ Luigi Nuzzo, 'Territory, Sovereignty, and the Construction of the Colonial Space' in Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press 2017) 271.

¹⁵ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005) 91.

¹⁶ SE (Sybil Eyre) Crowe, *The Berlin West African Conference, 1884-1885* (Pub for the Royal Empire Society by Longmans, Green and Co 1942) 4–5.

¹⁷ See Appendix 1 A Sketch Map of British Central Africa.

¹⁸ Anghie (n 15) 56.

‘the postulation of a gap between the European and non-European worlds which had to be bridged by positivist international law’.¹⁹ This dynamic of difference manifested itself in various ways. Pertinent to this chapter are the distinctions drawn between civilised and uncivilised or semi-barbaric territories which were increasingly subject to different rules as the 19th century progressed.

Part 2 of this chapter outlines the increasing need for jurisdictional authority in order to protect the lives and property of British subjects and foreign nationals. In addition, it examines the importance of this jurisdictional authority in the face of increasing tensions with Portugal. In doing so, it highlights the role of consuls and slave commissioners in the acquisition of jurisdiction over the territory. This section analyses what protection meant for the expression of the global consular network in Nyasaland. Part 3 of this chapter examines the legal status of the treaties concluded with indigenous actors, and their issue of their validity in international law. Furthermore, it examines the content of the treaties entered into in Nyasaland. Part 4 of this chapter analyses the colonial protectorate as an institution and the body of jurisprudence which emerged to regulate protectorates over what was considered barbarous or semi-barbarous territory. Finally, Part 5 concludes this chapter with the reflection on the legal position of British protected persons in a protectorate.

2. Jurisdictional Turmoil and British Consuls in Nyasaland

Streets-Salter recently argued that the time had come for the history of the consular network to be ‘brought into conversation with the history of imperialism and colonialism’.²⁰ During the

¹⁹ *ibid.*

²⁰ Heather Streets-Salter, ‘Consuls, Colonies and the World: Low-Level Bureaucrats and the Machinery of Empire, c. 1880–1914’ (2019) 20 *Journal of Colonialism & Colonial History*.

19th century, British consuls were the spearheads of what Huzzey has termed the ‘British anti-slavery state’ which came into existence after the abolition of slavery in 1838.²¹ British consuls all around the world formed a network feeding information to the Foreign Office in an attempt to make a dent on the slave trade through diplomacy and moral influence.²² A breed of explorer-consuls, or ‘empire-building’ consuls emerged in Africa in the mid-19th century.²³ Several of these consuls including Foot,²⁴ Goodrich,²⁵ and Johnston²⁶ found themselves around the Nyasa to deal with the prevalence of slave trading.

The consul bore multiple roles. A lesser relative of the diplomatic service, members of the consular service found themselves burdened with various responsibilities. Within the remit of the consular role were ‘many of the duties of the Statesman, the Magistrate, the Lawyer, the Notary, the Merchant, the Accountant, the Geologist, the Naturalist, the Linguist and indeed the man of science generally’.²⁷ As noted by Streets-Salter, consuls served significant political functions.²⁸ Initially, consular responsibility was intended to ‘protect and promote lawful trade of Great Britain...and to uphold the rights and privileges of British merchants’, but come the

²¹ Richard Huzzey, *Freedom Burning: Anti-Slavery and Empire in Victorian Britain* (Cornell University Press 2012) 40.

²² Streets-Salter (n 20).

²³ John Dickie, *The British Consul: Heir to a Great Tradition* (Hurst 2007) 33.

²⁴ Captain Charles Foot was the first consul of Nyasaland and served in the role from October 1883 until his death in August 1886.

²⁵ Lawrence Goodrich was Consul Foot’s assistant and was Acting Consul between August 1885 and January 1886 when Hawes was appointed.

²⁶ Harry Hamilton Johnston was Consul to Mozambique in November 1889, and then the Consul and Governor General of the British Central African Protectorate between 1891 and 1897.

²⁷ DCM Platt, ‘The Role of the British Consular Service in Overseas Trade, 1825-1914’ (1963) 15 *The Economic History Review* 494, 494 citing Samuel Vines, British Consul at Para, Vines to Clarendon, 15 November 1856, TNA FO 83/180.

²⁸ Streets-Salter (n 20).

19th century the consuls were plunged into a myriad of responsibilities which had little to do with commerce.²⁹

These increased consular functions were even greater in territories considered uncivilised or barbaric. In 1858, A report from the Select Committee on Consular Service and Appointments indicated that:

A latitude of discretion, and an exercise of authority, may be entrusted to consuls in a country where the customs and religion are more or less antagonistic to those of European civilization, and where the weakness of the rulers is unable to secure full protection to life and property, which would be utterly superfluous and unadvisable in the case of those who are resident amidst a well regulated community.³⁰

In the Nyasa region, repeatedly deemed uncivilised or semi-civilised, the consuls appointed had vague and wide-ranging responsibilities. After the Government's funding Livingstone's expedition into the interior and his appointment as a British consul, there was little action on the part of the British government in the area around the Nyasa.³¹ The disappointing results of Livingstone's mission meant it was twenty years till the question of opening up the Nyasa region to British commerce was seriously pursued. However, the effect of the Blantyre Mission scandal was to illustrate the need for a Consul who could legally exercise secular authority in the region.³²

²⁹ 'Commercial. No 16 (1886). Part I. Correspondence respecting the question of diplomatic and consular assistance to British trade abroad', House of Commons Command Paper, C.4779-I, Vol. LX.69, 173, 1886; Platt (n 27) 494–495.

³⁰ 'Report from the Select Committee on Consular Service and Appointments; together with the proceedings of the committee, minutes of evidence, appendix and index', House of Commons Papers, 1857-1858 Vol. VIII 482.

³¹ Stephen Samuel Murray, *A Handbook of Nyasaland* (Published for the Government of Nyasaland by the Crown Agents for the Colonies 1922) 10–12. An exception to this was the appointment of Elton who died shortly after as discussed in Chapter 2.

³² *ibid* 12.

The next consul, also known as ‘Slave Commissioner’, was Captain Foot.³³ In October 1883, Foot was appointed to be ‘Her Majesty’s Consul in the territories of African Kings and Chiefs in the districts adjacent to the Lake Nyassa’.³⁴ His instructions indicated that the main aim of his appointment was ‘the suppression of the slave trade’.³⁵ He was to avoid coming into conflict with natives but to ‘endeavour by every legitimate means in [his] power to gain their confidence, and impress upon them the ruinous effect which the slave trade produced in the countries where it is practiced’.³⁶

One of the most pressing issues Captain Foot faced was a dispute between George Fenwick and the Makololo chiefs who were not indigenous to the region. They were a group of porters originally from Barotseland whom Livingstone had left behind after his journey through the Zambezi.³⁷ The Makololo were armed and aggressive, and they managed to carve out their own chiefdoms and dominate the Mang’anja people in the Shire valley.³⁸ They maintained close ties with the British and called themselves English men.³⁹ In 1884, George Fenwick, who had been dismissed from the Blantyre mission following the Commission of Inquiry on Blantyre Mission, had a disagreement with Makololo Chief Chipatula regarding the

³³ J Greenway, ‘Captain Charles Foot First Consul of Nyassaland’ (1987) 40 *The Society of Malawi Journal* 37.

³⁴ Lister to Foot, 1 October 1883, ‘Slave Trade. No 1 (1884) Correspondence with British Representatives and Agents Abroad, and Reports from Naval Officers relating to Slave Trade’, House of Commons Sessional Paper C.3849, Vol. LXXV 1884, Lister to Foot, 1 October 1883.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ Murray (n 31) 11; H Graham-Jolly, ‘Livingstone’s Legacy The Makololo Chiefs of Chikwawa District’ (1966) 19 *Society of Malawi Journal* 7.

³⁸ Markku Hokkanen, ‘Imperial Networks, Colonial Bioprospecting and Burroughs Wellcome & Co.: The Case of *Strophanthus Kombe* from Malawi (1859-1915)’ (2012) 25 *Social History of Medicine* 589.

³⁹ Murray (n 31) 11.

purchase of ivory from Quilemane.⁴⁰ Following this dispute, Fenwick killed Chipatula and fled the scene.⁴¹ Fenwick was then hunted down and killed by Chipatula's men.⁴²

The dispute endangered the safety of all the white men in the region who were at threat of attack by the incensed Makololo. Chikusa, who succeeded Chipatula then demanded for the handover of Fenwick's wife Elizabeth, and a sum of money as compensation.⁴³ Further exacerbating this conflict, Chikusa had the support of Ramakukan, paramount chief of the Makololo. There was a substantial risk of violence between settlers and natives in the region.⁴⁴ In response to the murder, Chikusa and his men sank a steamer, 'Lady Nyasa' from the Zambezi with food and cloth for the sustenance of the white population. The currency used by the missionaries, calico, was dwindling, putting them at risk of starvation.

Consul Foot wrote to Ramakukan to offer friendship, 'pacify' the Makololo people by the river and propose an amicable solution to the issue.⁴⁵ He wrote,

I now write to you as chief of the Makololo and friend of the English people for many years. You know I have come as a friend to the African Chiefs in these parts to carry on the work performed by your old chief Dr Livingstone and am ready to assist and listen to anything they may say, in order that justice may be done to both sides. I am sure when you read this you will use your power to quiet your people and prevent bloodshed...Please give orders

⁴⁰ Harry Hamilton Johnston, *British Central Africa: An Attempt to Give Some Account of a Portion of the Territories under British Influence North of the Zambezi* (Methuen 1898) 69.

⁴¹ J McCracken, 'Marginal Men - The Colonial Experience in Malawi' (1989) 15 *Journal of Southern African Studies* 537, 546.

⁴² *ibid.*

⁴³ John McCracken, 'Class, Violence and Gender in Early Colonial Malawi: The Curious Case of Elizabeth Pithie' (2011) 64 *The Society of Malaŵi Journal* 1, 7–10.

⁴⁴ Foot's letter to Sir John Kirk, 24 February 1884, '...I found everyone in a great state of alarm for it was rumoured that the Makololo tribes were uniting for the purpose of making a combined attack on Mandala and Blantyre' reproduced in Greenway (n 33) 45.

⁴⁵ Foot's letter of 25 February 1884 reproduced in Greenway (n 33) 43.

that the steamer is not interfered with on her way up. Remember that she is carrying Her Majesty's Mail, and is entitled to fly the English Ensign.⁴⁶

Foot's intervention to Ramakukan, and advice to Moir, manager of the African Lakes Company to pay a monthly amount in compensation seems to have resolved the conflict.⁴⁷ In this way, Foot was able to avoid disaster by using his diplomatic influence. However, he died in August of the same year due to a grave fever, though it was speculated the stress of his role was a factor.⁴⁸ Foot's stay in this role was brief with Consul Lawrence Goodrich taking over as acting consul after his death.⁴⁹

Similar ruptures highlighting the lack of jurisdictional authority arose just two years later on Makololo land. On the 28th of August 1886, Chikusi and his men killed Hinkleman, a British-Australian trader, in a quarrel over trade, as well as a Portuguese trader and four of his men.⁵⁰ This led to the threat of invasion of Portuguese from Sena to punish Chikusi and his men.⁵¹ Writing on the matter, Anderson at the Foreign Office indicated:

Unless the English settlers have sufficient influence to cause murderers of whites and theft of their property to be punished it will be impossible for H.M.G. to resist offers from the Portuguese Government to chastise the offenders even if their doing so should lead to the ultimate occupation of them of the country.⁵²

⁴⁶ *ibid.*

⁴⁷ Alexander John Hanna, *The Beginnings of Nyasaland and North-Eastern Rhodesia 1859-95* (2nd edn, Clarendon Press 1969) 66.

⁴⁸ Consul O'Neill to Earl Granville, Mozambique October 1, 1884 'Slave trade. No 1 (1885). Correspondence with British representatives and agents abroad, and reports from naval officers and the Treasury, relative to the slave trade: 1884-85', House of Commons Sessional Paper C.4523, Vol. LXXIII 345.

⁴⁹ Kirk to Earl Granville, 23 October 1884, No. 102. 'Slave trade. No 1 (1885). Correspondence with British representatives and agents abroad, and reports from naval officers and the Treasury, relative to the slave trade: 1884-85', House of Commons Sessional Paper C.4523, Vol. LXXIII 345.

⁵⁰ Eric Axelson, *Portugal and the Scramble for Africa, 1875-1891* (Witwatersrand University Press 1967) 168-169.

⁵¹ *ibid.*

⁵² TNA FO 84/1751 Hawes to Iddesleigh, No 32, 3 December 1886.

It was clear that the lack of criminal jurisdiction in the area was a significant impediment to the peaceful coexistence of missionaries, settlers and Africans.⁵³

The increasing worries of powerlessness in the face of lawlessness came on the heels of the African Lakes Company's attempt to conclude treaties of protection with native chiefs in 1885.⁵⁴ These treaties were concluded after the Company had established a station at Karonga on the shores of Lake Nyasa among the Nkhonde tribe three years prior. The initially friendly relationships with Swahili Arab slave traders Mlozi, Malema and Kopa Kopa quickly became hostile when they barricaded themselves and began attacking the Nkhonde, selling them into slavery.⁵⁵ Before the situation came to a head, John Moir, the manager of the African Lakes Company procured signatures from many of the chiefs in the Nyasa district. The memorials included a petition from the chiefs requesting Her Majesty's Government to declare a protectorate over the territory. Secondly, if the petition were to be declined, seeking the Company's protection.⁵⁶ Goodrich ascertained from Ramakukan that the chiefs believed Moir to be acting as a representative of the Crown, and that he had procured the signatures by informing the chiefs they were in imminent danger from the Portuguese and required protection.⁵⁷ Given the events at Karonga, the African Lakes Company obtained the support of all the missionary groups, except the UMCA to fight on their behalf against the Arab aggressors.

⁵³ TNA FO 179/250 Iddesleigh to Hawes, 31 December 1886.

⁵⁴ Hanna (n 47) 88–90.

⁵⁵ PT Terry, 'The Arab War on Lake Nyasa 1887-1895' (1965) 18 *The Nyasaland Journal* 55, 56.

⁵⁶ TNA FO 84/1829 Goodrich to Salisbury, No 8, 9 August 1885.

⁵⁷ TNA FO 84/1829 Goodrich to Salisbury, No 9, 29 August 1885; Goodrich to Moir, 27 August 1885 including a copy of the letter received from John Moir on 27 August 1885.

Goodrich was opposed to the idea of the African Lakes Company acting as a protector in the region. He stated, ‘I have no hesitation in saying that the policy of the Company in its dealings with natives is unwise and mischievous both in regard to commerce and civilisation’.⁵⁸ Accordingly the Foreign Office was unconvinced that the company was equipped to take on the obligations it wished to.⁵⁹ Furthermore, the British Government was unwilling to declare a protectorate over this territory. Nevertheless, the constant threat of losing the territory to the Portuguese persisted.

The relationship between Portugal and Britain regarding the Nyasaland territory was fraught and unstable.⁶⁰ One bone of contention was that the local government at Mozambique, with the authority of the Portuguese Government, had been imposing taxes on the profits of the Lakes Company and Goodrich from 1884. In this way, they acted as though the Nyasa region were a part of Mozambique.⁶¹ The British were opposed to this practice citing Article 1 of the General Act of Berlin which sought to establish free trade in the Congo Basin.⁶² While this part of the Zambesi was not directly dealt with at the Conference, the British argued that the Portuguese claims flew against the ‘spirit’ of the Act and the ‘principles of commercial liberty’.⁶³

⁵⁸ TNA FO 84/1829 Goodrich to Salisbury, No 9, 29 August 1885.

⁵⁹ Hanna (n 47) 86–87.

⁶⁰ David Birmingham, *Portugal and Africa* (Macmillan 1999) 114.

⁶¹ Hanna (n 47) 126 citing TNA FO 84/1709, O’Neill to Granville, No 14, 24 January 1885.

⁶² *ibid.*

⁶³ Marquis of Salisbury to Mr Petre, No. 14, 29 March 1888, ‘Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa’ House of Commons Sessional Papers, C.5904, Vol LI.53.

Commercial liberty was a central part of the agenda at the Berlin Conference.⁶⁴ As Craven argues, one of the aims of the Conference was to create an internationalised Congo Basin by raising the hurdles for the possession of the territory.⁶⁵ However, Craven notes that there was a tension in this aim; the ‘opening up’ of a territory for free trade required an agency to develop the infrastructure and maintain the order necessary to make trade viable.⁶⁶ He argues that this tension led to the collapse of the internationalised space in the Congo. In this way, Craven suggests that the Berlin Conference actualised a ‘structural logic’ working at the interplay between ‘explicit aspiration and the material conditions for its possibility’.⁶⁷

An internationalised space was never explicitly envisioned for the interior of the African continent as the General Act of Berlin specifically referred to its application to the coast. However, the participating powers came to apply the Act to the regulation of the acquisition of the entire continent,⁶⁸ and this element was at least by Britain referred to as ‘the spirit’ of the Act. Furthermore, this ‘structural logic’ described by Craven underlies contention over the Shire Highlands in the Nyasa. While Britain had interests in the form of the mission settlements, it was content to maintain only a moral influence over the area until the actions of Portugal threatened freedom of commerce and navigation in the region.

⁶⁴ Freedom of commerce in the Congo basin was the first item on the agenda of the conference, Minute by T.V Lister on the West African Conference, 14 October, 1884. Reproduced in RJ Gavin and JA Betley, *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects, 1884/1885* (Ibadan University Press 1973) 46–47.

⁶⁵ Matthew Craven, ‘Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade’ (2015) 3 *London Review of International Law* 31, 53–55. Craven argues that the bar on collecting duty or taxation made it difficult for any power to recoup the costs of administering any potential colony.

⁶⁶ *ibid* 53–56.

⁶⁷ *ibid* 58.

⁶⁸ GN Uzoigwe, ‘Spheres of Influence and the Doctrine of the Hinterland in the Partition of Africa’ (1976) 3 *Journal of African Studies* 183, 194, 199; Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (n 2) 185.

In 1887 the Lisbon government published maps which illustrated the extent of Portuguese territory.⁶⁹ Within their ambit they included Nyasaland and Matabeleland as Portuguese territory.⁷⁰ Though this map indicated that the recognition did not prejudice the rights of other powers, this was an act that elicited protest by the British government. Citing the principle of occupation in the Berlin Act, Lord Salisbury asserted that the ‘archeological’ claims of the Portuguese could not be valid as they were not founded any ‘effective occupation’.⁷¹ However, the position of the Portuguese Foreign Minister, Barros Gomes, was that this principle in the Berlin Act applied to the coastal areas of Africa rather than the interior.⁷² The principle of ‘effective occupation’ in the General Act, though strictly applying to the coast, came to be seen as indispensable condition for acceptance of the validity of a claim to territory by the international community.⁷³

Despite Portugal’s official position denying the requirement of effective possession, within months, it launched expeditions into the Nyasa territory to conclude treaties with Nyasa chiefs and supply them with ammunition. Most disconcertingly to British settlers, Portuguese local authorities at Mozambique seized a steamer, ‘James Stevenson’ owned by the Lakes

⁶⁹ Marquis of Salisbury to Mr Petre, No 3, 2 August 1887, ‘Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa’ House of Commons Sessional Papers, C.5904, Vol LI.53. These maps were published in the White Books following negotiations between Portugal, Germany and France regarding the delimitation of their spheres of influence in central Africa.

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² Barros Gomes referred here to Articles 34 and 35 of the General Act of Berlin stating that they ‘solely and exclusively refer, in the clearest manner, to the occupation of the regions on the coast; they do not lay down any rules regarding the interior of the continent’. Senhor Barros Gomes to Mr de Bunsen, Inclosure in No 6, Mr de Bunsen to the Marquis of Salisbury, Lisbon, 22 August 1887, translated in ‘Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa’ House of Commons Sessional Papers, C.5904, Vol LI.53.

⁷³ Uzoigwe (n 68) 199.

Company.⁷⁴ This steamer would only be released if it were transferred to a Portuguese owner.⁷⁵

This action came as a surprise to the British Government given the representations made by the Portuguese delegate at the Berlin Conference.⁷⁶ Ostensibly turning back from their representations at the Berlin conference to foster free commercial transit for foreign powers.⁷⁷

The effect of this action at Mozambique, supported by the Portuguese Government, was to end free navigation of the Zambezi river. As the sole means of access to the Nyasa region, the inability to sail ships on the Zambesi effectively besieged the British settlers. The path to the Zambezi was regarded as the one maintaining the door to central Africa which Livingstone opened.⁷⁸ While Portuguese authorities later promised not to interfere with British vessels on the Zambesi, they did not concede their right to do so in principle.⁷⁹ Things went from bad to worse when Portugal refused to permit the Lakes Company from bringing ammunition into the Nyasa region to use against Mlozi in a dispute.⁸⁰

⁷⁴ Consul O'Neill to the Marquis of Salisbury, 2 March 1888, No 7 (Telegraphic), 'Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa' House of Commons Sessional Papers, C.5904, Vol LI.53. The History of the 'James Stevenson can be found in SG Williams, 'Some Old Steamships of Nyasaland' (1958) 11 The Nyasaland Journal 42.

⁷⁵ ibid Consul O'Neill to the Marquis of Salisbury, 12 March 1888. The transfer of the vessel to the Portuguese meant 'the sailing of the vessel under the Portuguese flag, captain and a proportion of Portuguese subjects as crew, and forbids the serving on board the vessel of any foreigner without special permission of his Consul'.

⁷⁶ *Hertslet's Commercial Treaties*, vol 17 (H M Stationery Office 1925) 1389.

⁷⁷ The Marquis of Salisbury to Mr Petre, Foreign Office, 29 March 1888, 'Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa' House of Commons Sessional Papers, C.5904, Vol LI.53. 'It is hardly credible that a Power which then publicly expressed such liberal sentiments should now deliberately adopt the policy of exclusion of foreign vessels from the navigation of the Zambezi as far as it flows through its own possessions, and still further, should stop altogether that transit trade which it engaged to promote and favour, and which has hitherto been enjoyed without hinderance to foreign nations; but it appears that this retrograde step has actually been adopted by the local authorities with the approval of Government'.

⁷⁸ 'The door to central Africa is the Zambesi, geographically and commercially, that no one can doubt'. Horace Waller, 'The Portuguese in East Africa' *The Times* (London, England) 4 April 1888, Issue 32351.

⁷⁹ The Marquis of Salisbury to Mr Petre, Foreign Office, 24 April 1888, No 18 (Telegraphic), Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa' House of Commons Sessional Papers, C.5904, Vol LI.53.

⁸⁰ ibid Mr Petre to the Marquis of Salisbury, No 51, 27 June 1888.

Until this point, Salisbury had maintained that the interests of the missions in Nyasaland were not sufficient reason to take formal action over the territory.⁸¹ Instead, he opted to appoint a consul as ‘a compromise between the desire of the missionaries to obtain a protectorate and the desire of the Home Government not to be involved in expensive operations’.⁸² Salisbury chose Harry Hamilton Johnston, the former Vice-Consul of the Niger Delta, for this position. On Johnston’s return to England in July 1888, Lord Salisbury summoned him to a meeting to be debriefed on his actions in the Niger.⁸³ Of this meeting, Johnston wrote that Salisbury suggested that he set out Britain’s policy towards Africa in a newspaper article to the British public.⁸⁴

In this article Johnston stated that ‘Africa was the new world of the 19th century. What America was to Europe in the 16th century, Africa had now become’.⁸⁵ He outlined the opportunities held felt were available to Britain, and the reason to act. As he saw it, ‘Germany, Britain and France show a somewhat natural dislike to our trade and religious propaganda in their territories, and endeavour to keep out the flood by all the barriers they raise’.⁸⁶ He continued:

All we want is a fair field and no favour, and it is to secure this for our commerce and civilisation that we are forced to extend our direct influence over a large part of Africa.

⁸¹ TNA FO 84/1922 Salisbury Minute, 15 May 1888.

⁸² *ibid.*

⁸³ Harry Johnston, *The Story of My Life* (Chatto & Windus 1923) 221.

⁸⁴ *ibid.* An African Explorer, ‘Great Britain’s Policy in Africa’ *The Times* (London, England), 22 August 1888, Issue 32471. The article was published under the author ‘An African explorer’, but Johnston subsequently admitted to Clement Hill that he was the author and had shown Lord Salisbury a draft before publication.

⁸⁵ *ibid.*

⁸⁶ *ibid.*

Roland Oliver describes Johnston's *Times* article as 'the clearest surviving exposition of Salisbury's Africa policy'.⁸⁷ Johnston urged a more active role on the part of the British stating, 'if free trade were a universal principle, it would matter relatively little to our merchants what particular nation ruled the new markets for our commerce'.⁸⁸ This highlights the commercial motivations for the scramble,⁸⁹ and is applicable to the concerns in the Nyasa area about the conduct of officials in Mozambique sealing off access to the Zambezi.

Before proceeding to Africa, Johnston received private instructions from Salisbury to visit Lisbon to negotiate the issue of territorial boundaries to prevent any further violent outbreaks in the region.⁹⁰ If Johnston had been known as the African explorer who had penned the article in *The Times*, it is unlikely that he would have been so warmly welcomed at Lisbon.⁹¹ Between April and March 1889, he negotiated an agreement with Barros Gomes in terms that Portugal would give up its claims to a transcontinental right stretching from the Zambezi to Angola as Britain would have a corridor running through it from north to south. The Shire Highlands, hallowed ground of Livingstone would fall under Portuguese territory, outside of British protection. Johnston thereby proposed to secure the freedom of all Christian denominations and free transit along the Zambezi.⁹² In an attempt to justify his position, he

⁸⁷ Roland Anthony Oliver, *Sir Harry Johnston and the Scramble for Africa* (Chatto & Windus 1957) 141; cf Ronald Robinson, John Gallagher and Alice Denny, *Africa and the Victorians: The Official Mind of Imperialism* (2nd edn, Macmillan 1981) 225-226. Robinson and Gallagher distance Salisbury from Johnston's 'Cape to Cairo' mission, insisting that the Prime Minister's aim was merely neutralisation of the tensions.

⁸⁸ An African Explorer, 'Great Britain's Policy in Africa' *The Times* (London, England), Issue 32471.

⁸⁹ DCM Platt, 'Economic Factors in British Policy during the "New Imperialism"' (1968) 39 *Past & Present* 120, 128.

⁹⁰ Johnston, *The Story of My Life* (n 83) 231.

⁹¹ RJ (Richard James) Hammond, *Portugal and Africa, 1815-1910: A Study in Uneconomic Imperialism* (Stanford University Press 1966) 115.

⁹² TNA FO 84/1969 Johnston to Salisbury, 22 April 1889.

wrote 'The sentiments of our missionaries in the Shire district are not the only element for consideration'.⁹³

The Established Church of Scotland and their Blantyre mission were vehemently opposed to the terms of Johnston's treaty. The Blantyre mission wrote that a deal which excluded the Shire Highlands from the British sphere of influence was tantamount to 'keeping the shell and giving Portugal the kernel'.⁹⁴ In Scotland the church managed to submit a petition with 11,000 ministers as signatories which was presented to Salisbury.⁹⁵ The agreement was therefore rejected, and Johnston was informed he was required to go to his post to deal with the situation there.⁹⁶ The rejection of Johnston's proposed agreement illustrates the influence that the missions had on Salisbury and on public opinion.

During the time between the conclusion of Johnston's deal and his arrival at Mozambique, two impediments to the British protection over Nyasaland fell away. The first was the discovery of the Chinde mouth of the Zambezi River which would enable access to Nyasaland without traversing the Portuguese territory of Mozambique.⁹⁷ This alleviated concern about the taxation of goods and ammunition being transported to the settlers and the company, as well as the risk that the settlers could be besieged. The second fallen impediment was financial. At a chance meeting of Cecil John Rhodes and Johnston where the former had agreed to part with £10,000 for efforts against the Arabs, and £9,000 annually for the

⁹³ *ibid.*

⁹⁴ *Life and Work in British Central Africa*, June 1889.

⁹⁵ WP Livingstone, *A Prince of Missionaries: The Rev. Alexander Hetherwick, C.B.E., D.D., M.A., of Blantyre, Central Africa* (J Clarke 1931) 49–52.

⁹⁶ *ibid* 52; Hanna (n 47) 138–140.

⁹⁷ Hugh Macmillan, 'The Origins and Development of the African Lakes Company' (Edinburgh University 1970) 239.

administration of the region.⁹⁸ The removal of the financial impediment allowed Salisbury to take a different, more active approach to the issue of the Shire Highlands in the Nyasa rather than relying on diplomacy.⁹⁹

Meanwhile, the Portuguese government had sent renowned explorer Serpa Pinto to Nyasaland to conclude treaties with native chiefs.¹⁰⁰ This was the third of such expeditions following Cardoso's expedition to make agreements with the chiefs in 1886 and Maas' attempt to have Nyasa chief Mlauri act as local administrator for Portugal.¹⁰¹ By September 1889 at least 25 chiefs or headmen, located between the Shire Highlands and South West Nyasa had entered into treaties with the Portuguese.¹⁰² Johnston therefore requested form treaties in order to conclude agreements 'of a character not necessarily committing the British government to actually granting protection, but still forestalling and precluding any attempts on the part of the Portuguese emissaries to bring the same districts by treaty under Portuguese sovereignty'.¹⁰³

Harry Johnston first arrived in Mozambique on 9th July 1889 and made his way up to the Nyasa region through the Chinde mouth of the Zambezi Delta, the first trip showing that the Royal Navy could reach the Shire Highlands.¹⁰⁴ Upon Johnston's arrival in the Nyasaland region, he serendipitously met Alfred Sharpe, a hunter who had turned down a colonial

⁹⁸ Hanna (n 47) 141; John S Galbraith, *Crown and Charter: The Early Years of the British South Africa Company* (University of California Press 1974) 232–233.

⁹⁹ Robinson, Gallagher and Denny (n 87) 228.

¹⁰⁰ TNA FO 84/1969 Johnston to FO, 27 May 1889.

¹⁰¹ Acting Consul Buchanan to Marquis of Salisbury, No. 46, 21 November 1888, 'Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa' House of Commons Sessional Papers, C.5904, Vol LI.53; *ibid* No 47, 27 November 1888.

¹⁰² *ibid* Acting Vice Consul Churchill to Marquis of Salisbury, No 268, 26 October 1889; Hanna (n 47) 130.

¹⁰³ *ibid*; TNA FO 84/1968 Johnston to Salisbury, 27 May 1889.

¹⁰⁴ Harry Hamilton Johnston, *British Central Africa: An Attempt to Give Some Account of a Portion of the Territories under British Influence North of the Zambezi* (Methuen 1898) 82.

administrative position in the Gold Coast and had gained a reputation as one of the big game hunters in Central Africa.¹⁰⁵ On the basis of that one chance meeting, Johnston styled Sharpe as his vice-consul.¹⁰⁶ Johnston was also joined by John Buchanan who was a missionary planter with ingenuity. Sharpe proved to be of immeasurable use owing to his knowledge of the geography and languages of the Nyasa region as well as his legal training which was particularly useful in the conclusion of treaties and the regularisation of land claims.¹⁰⁷ Sharpe would act as Johnston's second in command and would ultimately succeed him as the Commissioner of the protectorate from 1897-1912.¹⁰⁸ Buchanan's relationships with the missionaries were useful for treaty-making. Buchanan served as the acting Vice-Consul of the region when Johnston was away on administrative journeys.

Once Johnston arrived at the Ruo river, it was clear that Serpa Pinto intended to march his expedition into the Makololo country with a force of approximately 4,000 men. The Makololo were against this approach and had asked Buchanan what they ought to do in the event of Serpa Pinto's arrival.¹⁰⁹ Johnston noted that, if an attack were made on Blantyre, he would declare a protectorate 'in the last extremity', but if this were not to happen, the treaties he concluded with native chiefs would 'remain private'.¹¹⁰ Once the Portuguese attacked the Makololo country, a contingent of British settlers in Nyasaland composed a letter in protest

¹⁰⁵ Robert B Boeder, *Alfred Sharpe of Nyasaland, Builder of Empire* (Society of Malaŵi 1981).

¹⁰⁶ Roland Anthony Oliver, *Sir Harry Johnston and the Scramble for Africa* (Chatto & Windus 1957) 158.

¹⁰⁷ TNA FO 81/2197 Commissioner Johnston to the Earl of Rosebery, Despatch No 39, 13 October 1892, 6. Johnston had no other legal assistance in the issuance of protectorates.

¹⁰⁸ A Sharpe renamed into Governor and Commander in Chief with the Nyasaland Order in Council 1907 SI No 541 when the British Central African Protectorate was renamed the Nyasaland Protectorate.

¹⁰⁹ Buchanan to Marquis of Salisbury, No. 287, 8 November 1889, 'Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa' House of Commons Sessional Papers, C.5904, Vol LI.53.

¹¹⁰ TNA FO 84/1969: Johnston to Salisbury, No 8, Confidential, 9 August 1889.

urging that this action would ‘seriously endanger the lives and property of British subjects’.¹¹¹ Johnston instructed Buchanan to conclude a treaty with the Makololo extending British protection.¹¹² Ramukukan, the Makololo paramount chief had been succeeded by Mlauli who, while suspicious of signing treaties, eventually agreed to for British protection.¹¹³ Buchanan declared the protectorate over the Makololo countries in September 1889 following treaty conclusion with Yao and Makololo chiefs on Johnston’s instructions.¹¹⁴ On the declaration of the protectorate, the native chiefs looked to British officials in Nyasaland to make good on the promises of protection made to them.

Johnston and his team began by entering into treaties of friendship and then only when there was a war raging between the Portuguese and Mlauri on the South of the Nyasa region did Johnston instruct Buchanan to declare a protectorate over that region.¹¹⁵ When the entire British Central African Protectorate was finally declared it was done so by a proclamation in the London Gazette stating:

It is hereby notified for public information that, *under and by virtue of Agreements with the native chiefs*, and by other lawful means, the territories in Africa, hereinafter referred to as the Nyasaland Districts, are under the protection of Her Majesty the Queen.¹¹⁶ (my emphasis)

¹¹¹ Acting Consul Buchanan to the Marquis of Salisbury, No. 223, 19 August 1889, Inclosure No 2, Protest Against the Invasion of Makololo Country by Colonel Serpa Pinto, ‘Africa. No 2 (1890). Correspondence Respecting the Action of Portugal in Mashonaland and in the Districts of the Shiré and Lake Nyassa’ House of Commons Sessional Papers, C.5904, Vol LI.53.

¹¹² TNA FO 84/1969, Johnston to Salisbury, No 9, 26 August 1889; Hanna (n 47) 144–145.

¹¹³ Treaties with the Makololo chiefs can be found in TNA FO 881/6383 Memorandum on Land Claims in British Central Africa, List of Treaties Made on Behalf of Her Majesty’s Government, August 1893; TNA FO 84/168, Buchanan to Salisbury, 17 December 1890; *ibid* 145.

¹¹⁴ Treaties with the Makololo chiefs can be found in TNA FO 881/6383 Memorandum on Land Claims in British Central Africa, List of Treaties Made on Behalf of Her Majesty’s Government, August 1893.

¹¹⁵ These initial treaties had the signatory declare that he was at peace with the Queen of England. The declaration of a protectorate over Makololo country occurred in September 1889, a protectorate was then over the geographical territory of present-day Nyasaland Protectorate on 14 May 1891.

¹¹⁶ London Gazette, 15 May 1891 reproduced in Edward Sir Hertslet, *The Map of Africa by Treaty* (HMSO 1896) 286.

The declaration applied to all the areas in Nyasaland including those governed by chiefs who had not entered into treaties with Crown representatives.¹¹⁷ The agents received experienced different responses from the chiefs they approached. Johnston's experience was mixed. Jumbe at Kota Kota was reluctant to sign the treaties due to issues he had experienced with the African Lakes Company. In addition, he had a close relationship to the Arabs who had been procuring ammunition from him. Jumbe only agreed to sign the treaty because of Johnston's possession of a letter from the Sultan of Zanzibar, on the condition of his receiving compensation from the Company.¹¹⁸ In exchange, Jumbe agreed not to levy duties or taxes on British subjects settling in his region. Similarly, in Johnston's dealings with the Tonga at Bandawe where he spent several days, his letter from the Sultan at Zanzibar was useful in his concluding 23 treaties with the Tonga.¹¹⁹ Johnston made a difficult mission within the Arab stockades to meet Mlozi and after a week of deliberations concluded a treaty with them towards the end of October 1899.¹²⁰ On the other hand, Mponda on the upper Shire refused to sign a treaty with Johnston though he maintained we would remain friendly to the English.¹²¹ As for Sharpe, he met with Mpeseni, the Ngoni chief in Fort Johnston refused protection outright, stating that he required no protection as his neighbours feared him more than he feared them.¹²²

The result of these expeditions was a loose network of treaties signed with some chiefs but not others in the Nyasaland district.¹²³ In this expedition, Johnston pursued the line to the

¹¹⁷ TNA FO 881/6178, Foreign Office to Johnston, 24 March 1891.

¹¹⁸ TNA FO 84/1969, Johnston to Salisbury, 16 October 1889

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ TNA FO 84/1969, Johnston to Salisbury, 18 September 1889.

¹²² TNA FO 84/2052, Sharpe to Johnston, 26 March 1890.

¹²³ Oliver (n 87) 160.

west of the region while Alfred Sharpe pursued the line to the North. Wherever either man encountered a chief who was not willing to enter into a treaty, they would carry on ‘leaving a gap in the chain’.¹²⁴

The treaties signed by Johnston and his colleagues were concluded on standard Foreign Office forms.¹²⁵ These forms contained three clauses. The first clause stated that there would be peace between the signatories and the subjects. The second clause stipulated that British subjects would be able to ‘build houses and possess property in accordance to local laws in force’, and that in the event of any conflict between Africans and British subjects, the ‘dispute shall be referred to a duly authorised representative of Her Majesty whose decision in the matter shall be binding and final’.¹²⁶ The third clause stipulated that the undersigned would not

cede any of his territory to any other power or to enter into any agreement, treaty or arrangement with any foreign government except through the consent of her Majesty’s government.¹²⁷

While this clause does not expressly promise protection, Lindley states that protection is the corollary of provisions seeking to ‘control the external relations’ of a country.¹²⁸ One of the reasons suggested for the use of form treaties is the need for the agreements made to meet the

¹²⁴ Oliver (n 64) 160.

¹²⁵ Both the Model Treaty and full list of the treaties concluded are found in TNA FO 881/6383 Memorandum on Land Claims in the British Central African Protectorate, List of Treaties made on behalf of Her Majesty’s Government in the British Central African Protectorate, August 1893.

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ Lindley (n 6) 185.

legal requirements of the arrangements sought. Johnston requested from the Foreign Office ‘printed forms similar to those used in the Oil Rivers’.¹²⁹

There are several contradictory views of the virtues or lack thereof of Johnston's treaty-making expedition. For instance, Sir Clement Hill wrote ‘Sir H Johnston’s method is simple: treaty or compulsion, your money or your life’.¹³⁰ This view is in line with Hector Duff’s statement on Johnston that with only one exception, all the chiefs in the Nyasaland territory were compelled to submit to the Crown’s authority through recourse to arms.¹³¹ On the other hand, Stokes and Jones have noted that these statements were overstated.¹³² Jones detailed the differential responses of chiefs in the north and in the south of Nyasaland.¹³³

On the opposite end of the spectrum, Oliver praises Johnston's efforts as genuine treaty-making endeavours.¹³⁴ Oliver wrote that unlike treaties negotiated by their counterparts ‘mere meaningless scraps of paper signed in exchange of bottles of brandy with bogus chiefs who had no idea of what they were doing’, Johnston’s treaties were valid.¹³⁵ Oliver credited the validity of these treaties to the missionaries who had been resident with the tribes for up to 15 years. Johnston and his aides concluded treaties with chiefs who had had extensive interaction

¹²⁹ TNA FO 84/1969 Johnston to Marquis of Salisbury, 27 May 1889; Steven M Harris, ‘Manufacturing International Law: Pre-Printed Treaties in the “Scramble for Africa”’ (2021) 23 *Journal of the History of International Law / Revue D’histoire du Droit International* 439, 451; Johnston, *The Story of My Life* (n 83) 277. The forms Johnston received can be found in Appendix 4 of this thesis.

¹³⁰ TNA FO 2/204, Johnston to Salisbury, 13 October 1899; Eric Stokes, ‘Malawi Political Systems, 1891-1896’ in ET Stokes and R Brown (eds), *The Zambesian Past: Studies in Central African History* (Manchester University Press 1956) 371; Oliver (n 87) 299; Griff Jones, *Britain and Nyasaland* (George Allen & Unwin 1964) 70.

¹³¹ Hector Livingston Duff, *Nyasaland under the Foreign Office* (G Bell 1903) 18.

¹³² Stokes (n 130) 352.

¹³³ Jones (n 130) 70–80.

¹³⁴ *ibid* 277.

¹³⁵ Oliver (n 87) 160.

with English and Scottish missionaries for several years prior to his arrival. Oliver documents how the Chauncey Maples of the Universities' Mission assisted the fleet of Crown officials along the lakeside. Maples guided Johnston to the Chewa and Tonga tribes, offered his role as interpreter and lent them his credibility.¹³⁶

Ultimately, even if there had been actual force or the threat of force involved in the conclusion of treaties with natives, this would not invalidate the treaties. Under a positivist conception of international law, compulsion did not necessarily render the treaties invalid.¹³⁷ The clause accepting protection likely meant military protection to the native signatories, however, the development of protectorate practice gave further wide-ranging authority to the protecting power. Minor clashes with chiefs and Portuguese agents resulted in a recognition for the necessity of 'protection'. Initially this was envisaged as the ability to punish those who acted against the lives or property of British subjects – a kind of jurisdictional authority. These requests were repeatedly declined until a graver threat to the settlements in the Makololo country was observed. Chiefs signing the treaties considered their own threat to physical security when considering the proposals.

3. Treaties of Protection and the Berlin Conference

Both British and Portuguese agents sought to conclude treaties with native chiefs in Nyasaland between 1885 and 1892 as a way of bolstering their claims to authority in the region. This is unsurprising as the treaty of protection was an exceptionally valuable tool for the expansion of imperial interests in the late 19th century. The conclusion of treaties existed alongside strategies

¹³⁶ *ibid.*

¹³⁷ Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984) 43; Anghie (n 15) 71–73.

such as war, violence and diplomacy but served to lend a juridical legitimacy and morality to the imperial project.¹³⁸ However, conclusion of with non-European entities treaties which raised significant legal issues regarding the legal personality of the non-Europeans and the inclusivity of the law of nations.¹³⁹

The 19th century is often characterised as a period in which positivist jurisprudence overshadowed the naturalist thought which had been associated with modern international law since its foundation.¹⁴⁰ Naturalist jurisprudence divided into many voices and no longer represented a common wisdom.¹⁴¹ Yet Fitzmaurice suggests that it is inaccurate to represent the 19th century as a purely positivist period, when it was patently obvious that the international legal order lacked a sovereign issuing authoritative laws.¹⁴² Austin had pointedly argued that positive law or ‘law properly-so-called’ must be given by a sovereign to someone who is bound to obey, and lacking this quality, international law was instead a system of ‘positive morality’ in the same vein as honour or fashion.¹⁴³ Fitzmaurice notes that several jurists believe that some aspects of positive international law could only be sanctioned by natural law’s ‘moral force’.¹⁴⁴

¹³⁸ Saliha Belmessous, ‘The Paradox of an Empire by Treaty’ in Saliha Belmessous (ed), *Empire by Treaty: Negotiating European Expansion, 1600-1900* (Oxford University Press 2015) 2.

¹³⁹ Lindley (n 6) 181; Belmessous (n 138) 8.

¹⁴⁰ S Hall, ‘The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism’ (2001) 12 *European Journal of International Law* 269, 270; Anghie (n 15) 35; Malcolm N (Malcolm Nathan) Shaw, *International Law* (9th edn, Cambridge University Press 2021) 24; Arthur Nussbaum, *A Concise History of the Law of Nations* (Rev ed, MacMillan 1954) 232.

¹⁴¹ Casper Sylvest, ‘International Law in Nineteenth-Century Britain’ (2005) 75 *British Yearbook of International Law* 9, 24–25. See discussion on the different types of ‘naturalisms’.

¹⁴² Andrew Fitzmaurice, ‘Liberalism and Empire in Nineteenth-Century International Law’ (2012) 117 *The American Historical Review* 122, 124.

¹⁴³ John Austin and Wilfrid E Rumble, *Austin: The Province of Jurisprudence Determined* (Cambridge University Press 1995); Sylvest (n 141) 18.

¹⁴⁴ Fitzmaurice, ‘Liberalism and Empire in Nineteenth-Century International Law’ (n 142) 124.

In terms of a naturalist conception of international law, an overarching morality bound the activity of states and individuals, and since the system was based on rationality and prudential judgment, it had universal applicability to all nations.¹⁴⁵ State activity in this view was bound by a transcendental regime stemming from the ‘state of nature’.¹⁴⁶ Under this naturalist position, non-European legal actors would have the legal personality to enter into treaties. While not recognising all states as equal, differences between states were ‘bridged by a universal natural law’.¹⁴⁷ However, while useful, this standard projection has been countered by others who maintained that even in the 19th century and beyond, international law maintained strands of naturalist thought.¹⁴⁸

Nevertheless, several 19th century jurists propounded a positivist view of international law. Positivist jurists were hard at the task of creating a scientific epistemic version of the law, but Pitts notes that this was a normative act as well, projecting sovereignty over others.¹⁴⁹ By the early 20th century, positivism was perceived as having obtained dominance of international jurists with Oppenheim declaring ‘we are no longer justified in teaching a law of nature and a ‘natural law of nations’.¹⁵⁰ In contrast to naturalism, positivists rejected the idea that there was an overarching system of natural law that was binding on sovereign states thus severing the idea of any necessary connection between law and justice.¹⁵¹ Positivists instead emphasised

¹⁴⁵ Shaw (n 140) 15.

¹⁴⁶ Henry Wheaton and Coleman Phillipson, *Wheaton’s Elements of International Law*. (5th edn, Stevens and Sons 1916) 2 in an explanation of Grotius’ view.

¹⁴⁷ Anghie (n 15) 54.

¹⁴⁸ Sylvest (n 141) 37–46.

¹⁴⁹ Jenniffer Pitts, ‘Empire and Legal Universalisms in the Eighteenth Century’ (2012) 117 *The American Historical Review* 92, 98.

¹⁵⁰ L Oppenheim, ‘The Science of International Law: Its Task and Method’ (1908) 2 *The American Journal of International Law* 313; Anghie (n 15) 44.

¹⁵¹ Hall, ‘The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism’ (n 140) 272; Anghie (n 15) 43.

the will of sovereign states and state practice, and the scope of international law narrowed to focus on the legal and political acts of the ‘sovereign’.

Core to the positivist jurisprudence was the issue of membership in the law of nations and distinction between civilised and uncivilised states.¹⁵² Accordingly, while the naturalist school included all states in the law of nations, positivist jurisprudence excluded states which were considered uncivilised.¹⁵³ However, the extent of natural law’s universalism is not unanimous. In the mid 20th century, Alexandrowicz argued in favour of a history of legal inclusion by reference to ‘Asian states who for centuries had been members of the family of nations’ but had now found themselves in a ‘legal vacuum’ which stripped them of their legal personality and made them ‘candidates’ to acquire international legal personality.¹⁵⁴ More recently, Pitts demonstrates that Alexandrowicz’s representation of historic legal inclusion was overstated and treaties with non-Europeans were never seen as belonging to the same legal universe nor used as a source of international law.¹⁵⁵

The rub of this issue of inclusion is the validity or equality of treaties with non-Europeans. As Pitts has identified, it is not the exclusion itself from legal personhood that enabled and justified the dispossession and subjugation of non-European peoples.¹⁵⁶ Citing Richard Tuck’s illustration of the potentially negative consequences of inclusion among Asian

¹⁵² Anghie (n 15) 52; Jennifer Pitts, *Boundaries of the International: Law and Empire* (Harvard University Press 2018) 16.

¹⁵³ Anghie (n 15) 52–56.

¹⁵⁴ Charles Henry Alexandrowicz, ‘Mogul Sovereignty and the Law of Nations (1955)’ in Charles Henry Alexandrowicz, David Armitage and Jennifer Pitts (eds), *The Law of Nations in Global History* (Oxford University Press 2017) 63; Belmessous (n 138) 4.

¹⁵⁵ Pitts (n 149) 99–103; Pitts (n 152) 16–17.

¹⁵⁶ Pitts (n 149) 119.

states,¹⁵⁷ she notes that since the acceptance of the validity of treaties with leaders considered uncivilised was the means by which many peoples were dispossessed by the law of nations. Therefore, it is not the exclusion itself that was the cause or the enabler of this injustice.¹⁵⁸ Rather, it was the assumption that the other was ‘unintelligible, irrational, and inferior’.¹⁵⁹

Of concern to the occupying powers was how treaties with non-European actors who ostensibly lacked legal personality could be valid and relied upon.¹⁶⁰ One means, alluded to in the discussion of Alexandrowicz’ approach above is the doctrine of recognition which allowed for a non-member community to become a state legal personality through the recognition of established states.¹⁶¹ Alternatively, a state could be considered as possessing a partial or quasi sovereignty which enabled it to accept other states as members of the family of nations for some purposes, without necessitating full inclusion. This was done through ‘the standard of civilisation’,¹⁶² a means by which the perceived level of advancement of a tribe or nation would determine its eligibility for entrance into the law of nations.¹⁶³ Anghie suggests that in part, the reason for the conference at Berlin was insecurity over title to territory purportedly transferred by treaty to the governing power.¹⁶⁴

¹⁵⁷ Richard Tuck, ‘Alliances with Infidels in the European Imperial Expansion’ in Sankar Muthu (ed), *Empire and Modern Political Thought* (Cambridge University Press 2012); Pitts (n 149) 119.

¹⁵⁸ Pitts (n 152) 8; Pitts (n 149) 119.

¹⁵⁹ Pitts (n 149) 120.

¹⁶⁰ Anghie (n 15) 75, 91; Gong (n 137) 60.

¹⁶¹ Anghie (n 15) 75.

¹⁶² Brett Bowden, ‘The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization’ (2005) 7 *Journal of the History of International Law/Revue d’histoire du Droit International* 1, 1.

¹⁶³ Pitts (n 152) 14.

¹⁶⁴ Anghie (n 15) 71.

Prior to the Berlin Conference, there was uncertainty surrounding the effective distinction between annexation and protection, and a historical survey revealed that there was no consistent practice adopted by Britain.¹⁶⁵ Thus, the elucidation of this distinction was central to the conference. However, as Fisch notes, the power to annex African territories was not at issue. The discussions at the conference aimed to clarify how territory would be annexed and to limit the occurrence of conflicts in this process between rival colonial parties. The conference deliberations sought to clothe such appropriations with some legitimacy.¹⁶⁶ One significant outcome of the Berlin Conference was to afford recognition to existing treaties with African nations and to recommend treaty-making for colonial activities going forward.¹⁶⁷

At the time of the conference, there was a marked difference between the regulation of protectorates under different European powers. The German and French exercised wide-ranging powers of jurisdiction and control in their protected territories.¹⁶⁸ The British, on the other hand, honoured the distinction between protection and annexation in the 1880s.¹⁶⁹ The powers tended to avoid application of formal rules governing the steps to be taken to assume control over a protectorate, beyond the form of Article 34 of the General Act of Berlin

¹⁶⁵ Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (n 2) 171–173.

¹⁶⁶ Jörg Fisch, 'Africa as Terra Nullius: The Berlin Conference and International Law' in Stig Förster, Wolfgang J Mommsen and Ronald Robinson (eds), *Bismarck, Europe and Africa: the Berlin Africa Conference 1884-1885 and the Onset of Partition* (Oxford University Press [for] German Historical Institute 1988) 348.

¹⁶⁷ Belmessous (n 138) 5.

¹⁶⁸ Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (n 2) 183.

¹⁶⁹ Keith (n 11) 498; Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (n 2) 312.

regulating comity and cooperation between rival powers.¹⁷⁰ This article encapsulated a requirement to notify other signatory parties where one signatory establishes interests in territories on the African coast.¹⁷¹ In addition, Article 35 worked to limit the responsibility of the signatory powers in protectorates, only in occupied and annexed territories, for example on the African coast there was a duty to ensure the establishment of authority in the regions occupied. This duty did not apply to protectorates in the African hinterlands.¹⁷²

The discussions on protectorates and annexation at the Berlin conference ought to be considered against the background of the rules on effective possession.¹⁷³ The language of the articles of the General Act pertaining to the acquisition of territory contained a puzzling contradiction. Particularly, the use of the terms ‘taking possession’ and ‘occupation’, together with the idea of protection, represented a dogmatic contradiction.¹⁷⁴ Occupation and taking into possession (*prise de possession*) denote an original mode of acquisition of territory which had to be shown to be effective, while protection signalled a derivative mode of acquisition from

¹⁷⁰ Article 34: Any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which being hitherto without such possessions shall acquire them, as well as the Power which assumes a Protectorate there shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good claims of their own’. General Act of the Berlin Conference, 26 February 1885, C 4361 1885 (General Act of Berlin), in E Herstlet, *The Map of Africa by Treaty*, vol 2, 3rd ed, (HMSO, 1909), 128.

¹⁷¹ *ibid.*

¹⁷² General Act of the Berlin Conference, Article 35 ‘The signatory powers of the present Act recognise the obligation to ensure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and as the case may be, freedom of trade and transit under conditions agreed upon’.

¹⁷³ Fisch (n 166) 354–355.

¹⁷⁴ *ibid* 358. Lord Selbourne stressed the importance of this distinction between sovereignty and protection at the Berlin Conference, Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (n 2) 225.

an existing political authority.¹⁷⁵ Fisch points out that the juxtaposition of these ideas illustrates the instability and ambiguity of the content of both terms at the time of the conference.¹⁷⁶

The use of these terms, ‘occupation’ and ‘possession’, suggested that African territory was *terra nullius*, or ownerless.¹⁷⁷ However, it was understood that Africa was not, in fact, *terra nullius* as it was populated with various peoples who had their own systems of governance and with whom treaties were routinely concluded.¹⁷⁸ Nevertheless, the territory came to be considered ‘ownerless’ in the sense that it had no sovereign who could rule over the territory. This was the concept of *territorium nullius* which Fitzmaurice describes as ‘both the legal complement to treaty making and the legal expression of the protectorate’.¹⁷⁹ The concept of *territorium nullius* lowered the bar for the territories which could be occupied and possessed because it allowed for a recognition of a system of private property, and a concurrent perception of an absence of a sovereign. Thus, African tribes could cede rights attributed to them, such as property rights, or even personal sovereignty, without the implication that they had territorial sovereignty.¹⁸⁰

After the conference, jurists continued to grapple with the concept of *territorium nullius* and how territories possessing a rudimentary legal system and some measure of sovereignty could be occupied.¹⁸¹ These continuing debates, notably at the Commission for the study of

¹⁷⁵ Fisch (n 166) 354–355.

¹⁷⁶ Fisch (n 166); Craven (n 65) 44.

¹⁷⁷ Andrew Fitzmaurice, ‘The Genealogy of Terra Nullius’ (2007) 38 *Australian Historical Studies* 1.

¹⁷⁸ Fisch (n 166) 348–350.

¹⁷⁹ Fitzmaurice, ‘Liberalism and Empire in Nineteenth-Century International Law’ (n 142) 131.

¹⁸⁰ Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500 - 2000* (Cambridge University Press 2017) 287; Nuzzo (n 14) 278–282.

¹⁸¹ Fitzmaurice, ‘Liberalism and Empire in Nineteenth-Century International Law’ (n 142) 130.

effective occupation at Berlin in 1885, illustrated the broad spectrum of views existing between jurists present at the conference, and members of the *Institut de droit international*.¹⁸² The members of the committee were sorely divided and could not reach a unified stance on its application to territories in Africa.¹⁸³ At a subsequent meeting in Lausanne, Twiss' suggestion that all territories, inhabited or not, be considered *territorium nullius* was renounced.¹⁸⁴

Thus, the colonial protectorates to be established in Africa were an amalgam of extra-territorial rights resting upon unstable theoretical foundations. The extent of jurisdictional authority exercisable within these protectorates was still developing in the 1880s and 1890s. In African territories, Britain exercised extra-territorial jurisdiction in terms of the Foreign Jurisdiction Acts, intended to extend jurisdiction over British subjects. However, this did not include jurisdiction over natives, nor did it include jurisdiction over foreigners (with exception of the Gold Coast).¹⁸⁵ Jurisdiction over foreigners could only be exercised automatically in territories within the dominions of the Crown but not in protectorates, posing a problem for effectively securing order in a protectorate.¹⁸⁶ Jurisdiction over foreigners was to be acquired through consent. Only in 1890 was it accepted that consent of the signatories of the General Acts of Berlin and Brussels implied consent to their subjects being under British jurisdiction in protectorates as a means to fulfil their responsibilities under those Acts.¹⁸⁷ Jurisdiction over natives and control over land were a separate matter.¹⁸⁸

¹⁸² Fitzmaurice, *Sovereignty, Property and Empire, 1500 - 2000* (n 180) 272–275.

¹⁸³ *ibid* 289–290.

¹⁸⁴ *ibid*.

¹⁸⁵ The Gold Coast was an exceptional case. In terms of the Order in Council 1874 legislative and executive powers exercised had been acquired on the basis that they were 'already acquired in fact' Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (n 2) 234–235 citing TNA CO 417/48/25225 Minute, Fairfield, 9 January 1891.

¹⁸⁶ *ibid* 193–195.

¹⁸⁷ *ibid* 232.

¹⁸⁸ Control over land is explored in Chapter 4 of this thesis.

4. The Protectorate as a Legal Institution

In the 19th century, the protectorates established in Africa differed significantly from their historical counterparts in several aspects to be discussed below. This section examines the status of the protectorate in international law including the emergence of the ‘colonial protectorate’. In addition, it discusses the effects of establishing a protectorate in the 19th and early 20th centuries. As discussed above, in order to establish a protectorate, there has to be some recognition of a political authority to cede a portion of its sovereignty to the protecting power.

The protectorate was the most common form of dependent state in the 19th century, with a long history of antecedents.¹⁸⁹ A protectorate is characterised by a division between internal and external sovereignty.¹⁹⁰ A distinction has been drawn between classical protectorates and colonial protectorates. In a ‘classical’ or ‘true’ protectorate, the protected state cedes its external sovereignty to the protecting state which may not interfere with the internal sovereignty or administration of the protected state.¹⁹¹ However, classical protectorates were created with states that were perceived to be at a higher state of advancement, whereas a different sort of protectorate emerged where the protected state in question was considered to be ‘imperfectly

¹⁸⁹ Alfred Moses Kamanda, ‘A Study of the Legal Status of Protectorates in Public International Law’ (Université de Genève, Institut Universitaire de Hautes Etudes Internationales 1961).

¹⁹⁰ Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford University Press 1986) 47; L (Lassa) Oppenheim, RY (Robert Yewdall) Jennings and Arthur Watts, *Oppenheim’s International Law Vol. 1, Peace* (9th ed, Longman 2008) 268.

¹⁹¹ Lindley (n 6) 181–182.

civilised'.¹⁹² In a colonial protectorate this distinction between internal and external sovereignty was blurred such that it became akin to acquisition of territory.¹⁹³

The nature of colonial protectorates has been disputed, with Alexandrowicz arguing that these protectorates were 'the outcome of a para-legal metamorphosis and [have] no place in international law as a juridically justifiable institution'.¹⁹⁴ Similarly, in *Island of Palmas*, Judge Huber described colonial protectorates as 'a form of internal administration of a colonial territory on the basis of autonomy for the natives'.¹⁹⁵ In international law, Oppenheim argued that 'in the case of those British protectorates formerly exercised over certain African tribes, acquired through agreements with the chiefs of the tribes, these protectorates possessed no international status at all'.¹⁹⁶

However, in municipal constitutional practice, a distinction was drawn between classical protectorates, deemed 'protected states' and 'protectorates' more commonly known as colonial protectorates.¹⁹⁷ Though Wight described colonial protectorates as 'dependencies which are colonies in everything but legal status',¹⁹⁸ the British Nationality Act of 1948 clearly distinguished between the two, listing the following as colonial protectorates: the Aden Protectorate and Kamaran, Bechuanaland, British Solomon Islands, Gambia, Kenya, Nigeria,

¹⁹² William Edward Hall, *A Treatise on International Law* (2nd edn, Clarendon Press 1884) 130; Lindley (n 6) 182.

¹⁹³ Shaw (n 190) 47. With Lindley observing 'an essential feature of the colonial protectorate is that it is recognised by the other members of the international family as giving to the protecting power the right as against themselves to take steps in the direction of annexing the protected territory as its dominions'.

¹⁹⁴ Charles Henry Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (Sijthoff 1973) 61–81.

¹⁹⁵ *Island of Palmas, United States v Netherlands Award* (1928) II RIAA 829

¹⁹⁶ Oppenheim, Jennings and Watts (n 190) 268–269; cf Kamanda (n 189) 25.

¹⁹⁷ James Crawford, *The Creation of States in International Law* (2nd ed, Clarendon Press 2007) 287.

¹⁹⁸ Martin Wight, *British Colonial Constitutions: 1947* (Clarendon 1952) 8.

Northern Rhodesia Protectorates, the Northern Territories of the Gold Coast, Nyasaland, Somaliland, Swaziland, Uganda and the Zanzibar Protectorates.¹⁹⁹ On the other hand, the protected states were the Malay states, Brunei, Tonga, the Maldives, the Persian Gulf states and the Trucial Sheikdoms of Oman.²⁰⁰ With the exception of the Aden Protectorate and the British Solomon Islands, all the colonial protectorates were African territories.²⁰¹

Throughout the existence of these British protectorates, a legal framework evolved, delineating the authority of the Crown within these regions. These cases highlight the nature of the subjection of the protected person in a British protectorate. This section will look at the availability of the writ of habeas corpus and the resort to the defence of an act of state which left protected persons in an ambiguous position, neither a British subject, nor an alien, but with the qualities of each.

In the case of *Earl of Crewe Ex Parte Sekgome*, the nature of the protectorate came into question.²⁰² This case involved the petition by Sekgome, the putative chief of a native tribe who had been detained, for a writ of habeas corpus to the Secretary of State for the Colonies. The Bechuanaland protectorate was a foreign territory under which the Crown acquired jurisdiction in terms of the provisions of the Foreign Jurisdiction Act 1890.²⁰³ One of the central questions was whether the writ of habeas corpus can be issued in a protectorate, a territory

¹⁹⁹ Section 30, British Nationality Act 1948 c 56.

²⁰⁰ *ibid.*

²⁰¹ Crawford (n 197) 301.

²⁰² *R v. The Earl of Crewe, ex parte Sekgome* [1910] 2 (KB) 576.

²⁰³ Exercised in terms of the Bechuanaland Order in Council 1891, 9 May 1891,, ‘the object of the statute is to enable the Crown, in cases where by treaty, capitulation, grant, usage, sufferance or other lawful means, the crown has jurisdiction in a foreign country to exercise legislative and other territorial jurisdiction by putting such a country for that purpose on the same footing as a territory in which the Crown has acquired such jurisdiction by cession’ (Vaughan Williams LJ) 584.

outside the Crown's dominions. The Habeas Corpus Act 1862,²⁰⁴ in terms preventing the writ issuing out of England to foreign dominions implied held that the Act had no effect in protectorates.²⁰⁵ In holding that the writ could not be issued in any protectorate, Vaughan Williams lamented that this result meant that the Crown

[H]as established laws which the dwellers in the Protectorate, whether natives or residents, must obey, and from which they surely must be entitled to receive protection when injured. Is the mere fact of absence of annexation and theoretical possession to deprive the Crown and those who are under the law from the writ of habeas?

He noted that a British subject might have the habeas but certainly not a protected person such as Sekgome. In addition, Kennedy LJ argued that the detention order was an act of state 'made in virtue of powers vested in the author' by an Order in Council under the Foreign Jurisdiction Act which should not be questioned.²⁰⁶ What the court appeared to argue is that the force of the law applied without the benefits of the protection of that law seems anomalous and unstable.

As pertains to habeas corpus, there seemed to be a change in the jurisprudence towards the end of the period of protectorates in *Ex Parte Mwenya* (1960).²⁰⁷ In this case, Mwenya, a native of Northern Rhodesia who was subject to restriction orders, applied for a writ of habeas corpus directed to the Secretary of State for the Colonies. It was dismissed in the Divisional

²⁰⁴ Habeas Corpus Act 1862 (25 & 26 Vict c 20). Section 1 stated that a writ of habeas corpus would not issue 'into a colony or foreign dominion of the Crown where Her Majesty has a lawfully established court...having the authority to grant and issue said writ and to ensure the due execution thereof through such colony or dominion'.

²⁰⁵ *Sekgome* (n 202) (Vaughan Williams LJ) 603. The Habeas Corpus Act 1862 did not apply to protectorates, and that even if the Act did apply, there was no such competent court in Bechuanaland.

²⁰⁶ JES Fawcett, *The British Commonwealth in International Law* (Stevens 1963) 131.

²⁰⁷ *Ex p Mwenya* (1960) 1 QB 241, 297. The only colonial protectorate to continue to exist for 'some time' after this judgment was the British Solomon Islands (Crawford) 311.

Court and appealed to the Court of Appeal.²⁰⁸ Instead of maintaining the line in *Earl of Crewe*, Lord Evershed MR noted that the court was only put to answer the question whether a writ of habeas corpus could be directed to a British protectorate.²⁰⁹ The court was confined to the preliminary objection for the purposes of which Mwenya was assumed to be a British subject, an issue Evershed stated he was particularly ‘uneasy’ about.²¹⁰ However, he noted that

[T]he question should not be determined by reference merely to the fact that the country in question bears the label ‘protectorate’, but must, or at least may, depend on the extent to which the Crown (or the Crown and Parliament) has in fact assumed and exercises jurisdiction on and over the affairs (and particularly the internal affairs of the country to the exclusion of any other, or other effective, jurisdiction.²¹¹

He held that in principle, the writ of habeas corpus could be directed to a protectorate since the exercise of jurisdiction there was ‘indistinguishable in legal effect’ from a colony.²¹² Therefore, if this is the case in the governance of Northern Rhodesia, then he saw no reason for denying the court this jurisdiction.²¹³ Mwenya was released shortly thereafter, and the matter was never heard by the House of Lords.²¹⁴

Fawcett points out that there are two types of protection that need to be distinguished. First, a protection under municipal law against arbitrary arrest and detention, and secondly, a

²⁰⁸ ibid 294. The Divisional court held that the terms of the Habeas Corpus Act 1862 ‘carried at least an implication (by reason of the Act’s limitation to the Queen’s dominions properly so called) that the scope of the writ was so conscribed and would not extend to a protectorate.

²⁰⁹ ibid 289-290.

²¹⁰ ibid 290.

²¹¹ ibid 296.

²¹² ibid Citing *Nyali v Attorney General* (1955) 1 All ER 646 1955; *Sobhuza II v Miller* [1926] AC 518.

²¹³ ibid 302.

²¹⁴ Fawcett (n 206) 132.

diplomatic protection under international law.²¹⁵ Noting the decision in *Mwenya* that a British subject could have the protection of the writ of habeas corpus in a territory under the exclusive jurisdiction of the Crown, he states that it would indeed be straining to see what possible jurisdiction the crown would be infringing upon in the protectorate by issuing the writ, and odd that one could have the diplomatic protection of the crown abroad, but somehow lack it in an area in which the crown has exclusive jurisdiction.²¹⁶

At the heart of these issues is of course the question, what is a protectorate, but also the question, who is a British protected person and what are they entitled to? In submissions on Mwenya's behalf, dictum in *Calvin's Case* was relied upon that 'a mandatory writ is not limited territorially; it follows subjection and ligeance, in what country or nation soever the subject is'.²¹⁷ The Divisional Court did not accept this argument,²¹⁸ however, Evermore MR in the Court of Appeal noted that this was part of the reasoning in *R v Anderson* and also relied on this.²¹⁹ The important point to note here is that it was assumed that Mwenya was a British subject, and therefore had the allegiance to the Crown. However, even if the writ did issue to protectorates, it is unlikely that it would apply to British protected persons.

In the previous chapter was discussed the tie between subjection and protection. However, it seems that even when the courts were prepared to accept that the reality of the protectorates (despite their constitutional status) involved extensive and exclusive jurisdiction

²¹⁵ ibid 133–134.

²¹⁶ ibid 134.

²¹⁷ *R v Earl of Crewe, ex parte Sekgome* (n 202) 609-10.

²¹⁸ ibid 275. The applicant argued that the dictum in *Calvin's Case* (1608) 7 Co Rep 1a was restricted to the writ of outlawry. The writ functioned as a means to punish criminals who evaded justice. The act of fleeing was regarded an acknowledgment of guilt, resulting in their outlawing without undergoing trial. The Court of Appeal stated that the observations in *Calvin's Case* apply to mandatory writs in general.

²¹⁹ *R v Anderson* [1861] 3 E & E 487; 30 LJ (QB) 129; *Mwenya* (n 207) 291-292.

akin to colonies, the status of a British protected person would disqualify them from access to this most important writ. However, in obiter it seems that the civilisational status of the protected persons ameliorates the harshness of this rule.

[T]he idea that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English lawyers... It is made less difficult when one remembers that the Protectorate is over a country in which a few dominant civilised men have to control a great multitude of the semi-barbarous.²²⁰

Similarly, the entitlements of protected persons were outlined by the defence of ‘act of state’. An act of state can be defined as ‘an exercise of sovereign power, and can hence not be challenged, controlled or interfered with by municipal courts’.²²¹ An act of state defence cannot be raised by an individual who is within the allegiance of the Crown, and as noted above, British protected persons were not within the allegiance. As Pollack notes, this defence relies on three parts; first, the individual does not owe allegiance to the Crown, secondly, the individual must not be located within Her Majesty’s dominions, and finally, the act is done with the authority of the Crown or ratified by it. The position of British protected persons is therefore an unenviable one as the act of state defence may be raised against them in respect of powers exercised by the Crown. that regardless of the provisions of concluded treaties, the Crown had a free hand in the administration of protectorates in terms of the Foreign Jurisdiction Act.²²² In

²²⁰ *R v Earl of Crewe, ex parte Sekgome* (n 202) 609-10.

²²¹ *Salaman v Secretary of State for India* [1906] 1 KB 613, 639-41; Peter Cane, ‘Prerogative Acts, Acts of State and Justiciability’ (1980) 29 *The International and Comparative Law Quarterly* 680.

²²² Clement Ng’ong’ola, ‘Colonial Law and the Inception of a Dual Land System in Nyasaland’ (1985) 18 *Law and Politics in Africa, Asia and Latin America* 283, 286; Clement Ng’ong’ola, ‘The State, Settlers, and Indigenes in the Evolution of Land Law and Policy in Colonial Malawi’ (1990) 23 *The International Journal of African Historical Studies* 27, 30–31.

cases such as *R v Crewe, Ex parte Sekgome*,²²³ *Sobhuza II v Miller*,²²⁴ and *Nyali Ltd v Attorney-General* the courts consistently stated that protectorate governments could, through acts of state, exercise the broadest possible jurisdiction as the courts would not intervene.²²⁵ In *Nyali* Lord Denning stated this principle emphatically:

Although the jurisdiction of the Crown in the Protectorate is in law a limited jurisdiction, nonetheless the limits may be extended indefinitely so as to embrace the whole field of government...The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction; nor will they enquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction.²²⁶

5. Conclusion

British interest in the Nyasa was begun and sustained by the missionary activity that held a special place in the minds and hearts of the British public owing to its association with David Livingstone. A declaration of protection over the region had long been undesired by officialdom, even after repeated calls, from the missionaries and from the African Lakes Company. Events on the ground threatening the lives and property of British missions and the increasing aggressions of Portugal made this situation take on fresh urgency, and the financing of Rhodes provided means to act.

Thus, British exercises of extraterritorial jurisdiction did not flow from a designed policy in the metropole but instead manifested from the decisions and actions in the peripheries

²²³ *Sekgome* (n 202).

²²⁴ *Sobhuza II v Miller* [1926] AC 518 4. Courts did not have the jurisdiction to challenge acts of state, but they did have the jurisdiction to determine whether an act in question was an act of state; *Musgrave v Pulido* (1879) 5 App Cas 102, 111-113.

²²⁵ *Nyali* (n 212).

²²⁶ *ibid* 15.

of empire, at the behest of imperial agents.²²⁷ The reality of empire involved geographically distant poles with significant hurdles in swift communication, with often weeks or months elapsing before messages could be exchanged. With certain decisions needed to be taken rapidly, the imperial agents had long leashes.²²⁸

Prior to the declaration of the protectorate, protection took the form of military alliances and physical force. All jurisdiction exercised by missions had been unlawful and posed a threat to Britain's humanitarian reputation in Nyasaland and elsewhere. The appointment of consuls was seen as a middle ground short of a declaration of a protectorate. Concurrently, from the discussions at the Berlin conference and in the minds of official policy makers, protection began to mean the exclusion of other European powers from the territory under protection. However, it also meant that they would need to bring an end to slave trading and 'make sure that the white men were not allowed to violate the civilised standard of conduct in dealing with natives and one another'²²⁹

The emergence of colonial protectorates, 'juridical monsters' as Baty calls them,²³⁰ abstracted protection from the concerns of the natives and missionaries on the ground, to a confluence of the need to secure jurisdiction over foreigners and natives in order to make good the promise of order and good government, but also to protect and defend the missionary settlements and conflicts between them. The changing meaning of 'protectorate' unfolds before

²²⁷ Hulle (n 10) 14.

²²⁸ Inge Van Hulle, 'British Protection, Extraterritoriality and Protectorates in West Africa, 1807–80' in Adam Clulow, Bain Attwood and Lauren Benton (eds), *Protection and Empire: A Global History* (Cambridge University Press 2017) 195.

²²⁹ Hanna (n 47) 173.

²³⁰ T Baty, 'Protectorates and Mandates' (1921) 2 *British Yearbook of International Law* 109, 114.

us, and with each successive variation, the connection to the real protection provided to those inhabiting these protected territories grows more distant.

4. DISPOSSESSING PROTECTED PERSONS

1. Introduction

Legal rules relating to the use, access, and control of land were one of the prime tools of the imperial endeavour.¹ While there exists a fundamental distinction between the acquisition of sovereignty (*imperium*) and acquisition of proprietary rights (*dominium*),² the English position is blurred by the ‘medieval tendency to confound jurisdiction with proprietary rights’.³ English land law is underpinned by the historical theory that all land is held of the sovereign. This view underlies the doctrine of estates and tenures, that one can only hold ‘time in the land, or land for a time’ in return for real or notional services.⁴ This fiction pervades the land law regime and holds an imaginative sway on the minds of legal actors, particularly in colonial contexts which pose legal problems striking at the comprehensive legal structure.⁵ As Lon Fuller stated, ‘only in illness, we are told, does the body reveal its complexity. Only when legal reasoning falters and reaches out clumsily for help do we realise what a complex undertaking the law is’.⁶ In the British Central Africa protectorate, legal reasoning was strained and the various colonial actors and legal minds sought refuge in various fictions to maintain the logic of the law. This chapter

¹ Patrick McAuslan, ‘Land Law and The Making Of The British Empire’ in Elizabeth Cooke (ed), *Modern Studies in Property Law*, vol 4 (Hart Publishing 2007) 239.

² Harry Post, ‘International Law Between Dominium and Imperium; Some Reflections on the Foundations of the International Law on Territorial Acquisition’, *Reflections on Principles and Practice of International Law* (Brill | Nijhoff 2000) 158–159.

³ Kent McNeil, *Common Law Aboriginal Title* (Clarendon Press 1989) 108.

⁴ *Walsingham's Case* (1573) 2 Plowd 547, 555; AWB Simpson, *A History of the Land Law* (2nd ed., Clarendon Press 1986); Kevin J Gray and Susan Francis Gray, *Land Law* (7th ed., Oxford University Press 2011) 16; McNeil (n 3) 79–82.

⁵ Douglas Sanderson, ‘The Residue of Imperium: Property and Sovereignty on Indigenous Lands’ (2018) 68 *The University of Toronto Law Journal* 319.

⁶ Lon L Fuller, *Legal Fictions* (Stanford University Press 1967) viii.

describes the issue at the core of the strain, that of the Crown's right to land in a colonial protectorate.

Beyond regulating a society's relationship to land, property relations played a diagnostic role as an indicator of the level of civilisation and order of a society.⁷ Much of the rhetoric in imperial cases on land turns on whether communities were sufficiently civilised to have a concept of property in land.⁸ The perceived level of civilisation of indigenous peoples was used to rationalise the differential treatment of territories perceived to be barbarous or semi-barbarous.⁹ The colonial protectorate provides salient instances of a courts using cultural interpretation in deciding how indigenous entitlement to land would be incorporated into its legal system, if at all. The incorporation of customary rights to land into the English legal system was a difficult undertaking necessitated by the assumption of jurisdiction.¹⁰ English legal history illustrates how this process was undertaken with a level of disdain towards indigenous legal systems as far back as the colonisation of Ireland and the *Case of Tanistry*.¹¹

⁷ Jedediah Purdy, 'Property and Empire: The Law of Imperialism in *Johnson v. M'Intosh*' (2007) 75 *The George Washington Law Review* 329, 356; Peter Fitzpatrick, *The Mythology of Modern Law* (1st edition, Routledge 1992) 83–84.

⁸ Most strikingly the rhetoric in *Re Southern Rhodesia* [1919] AC 211, 233 'Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged'.

⁹ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press 2005); Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984).

¹⁰ Ben Silverstein, 'The Rule of Native Title: A View of Mabo in the British Empire' (2007) 16 *Griffith Law Review* 55, 62.

¹¹ *Case of Tanistry* (1608) Day 28; 80 ER 516. An English translation can be found in *A Report of the Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland* (1762) 78 (Davies translation). For exegesis Shaunnagh Dorsett, "'Since Time Immemorial': A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry' (2002) 26 *Melbourne University Law Review* 32.

As noted by Brenna Bhandar, ‘the English common law became the *sine qua non* of civilised life and society, an axiom sharpened at the expense of indigenous peoples throughout the colonial world’.¹² McAuslan identified early attitudes to customary practices in Ireland as ‘the seedbed for expansion of the British empire’.¹³ He describes the law as ‘predatory’ and traces the justification of English imperialism in Ireland in the contemporary land law.¹⁴ McAuslan quotes Sir John Davies, the English Attorney General for Ireland, who orchestrated the legal arrangements, stating that Irish customary law was ‘no law at all but just lewd and unreasonable custom’.¹⁵ Davies went further to write that ‘His Majesty is bound in conscience to use all lawful and just courses to reduce his people from barbarism to civility’.¹⁶ There are clear indications of not only the desire to drag ‘barbaric’ territories into modern Anglo-American land regimes but indeed the imperative to do so.

This chapter analyses the question of the sovereignty or legal powers of indigenous actors as they interact with the imperialists, with a focus on the proprietary effect of treaties of cession concluded prior to, and immediately following the protectorate’s declaration. This lays the groundwork for the following chapters which analyse the conditions of labour tenants on private land. Section two of this chapter provides an outline the jurisdictional basis of the Crown’s authority in the British Central African Protectorate, the extension of jurisdiction to natives of the protectorate and the development of the protectorate’s judicial institutions. Section three then examines Commissioner and Consul-General Johnston’s land settlement programme. This land settlement programme is the method by which he reviewed settler claims

¹² Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press 2018) 4.

¹³ McAuslan (n 1) 245.

¹⁴ Ambreena Manji, ‘Patrick McAuslan: An Appreciation’ (2015) 24 *Social & Legal Studies* 331.

¹⁵ McAuslan (n 1) 245.

¹⁶ *ibid*; Ellen Meiksins Wood, *Empire of Capital* (Verso 2003) 81–82.

to land purportedly purchased from African chiefs and granted certificates of title to land to private individuals and corporations. In addition, the section reviews the reception of Johnston's actions by his superiors and illustrates the shaky legal basis of his actions. Section four then turns to the legal analysis of the validity and nature of the certificates of title granted. This section analyses the judgments of the High Court of the protectorate, the subsequent appeal to the Court of Appeal at Zanzibar, and the ultimate evaluation of the arguments presented in the cases by the Law Officers of the Crown. The issue involved the understanding of the vouchers of title which purported to grant 'estates in fee simple', the implication of the grants on mineral rights, the rights to land initially possessed and transferred by African chiefs, and the ability to read Crown prerogatives into anomalous protectorate grants. Section five deals with land which was not purchased by settlers, and the issue of the Crown's rights over waste and unoccupied land in the protectorate. Finally, section six concludes reflecting on the various fictions employed, the shifting of the meaning of a protectorate and the effect of these shifts on protected persons in British Central Africa.

2. Legal Order: The Colonial Protectorate in Flux

The extent to which protection enabled the Crown to exercise rights over foreigners and natives in protectorates was gradually evolving. As noted by Johnston, the hardened legal position on the effect of assuming a protectorate over semi-barbarous territory in the 1880s began to expand in the 1890s.¹⁷ This gradual modification of the position occurred as the protectorate administration was finding its ground.

¹⁷ W Ross Johnston, *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Duke University Press 1973) 280–282; Gong (n 9) 4–6, 44–45. The terms barbarous and semi-barbarous are used in several places throughout this thesis. They emanate from the European community's standard of civilisation; a way of distinguishing between communities who would be excluded from the law of nations (barbarous) and those who could be given partial recognition for particular purposes such as concluding treaties (semi-barbarous).

(a) Theory of Sovereignty and Consolidation of Foreign Jurisdiction Acts

The declaration of a protectorate in September 1889 coincided with the ongoing project to consolidate the various iterations of the Foreign Jurisdiction Acts.¹⁸ During this consolidation, the Senior Parliamentary Counsel Jenkyns sought to do away with the legal impediments to a fully policy-based exercise of foreign jurisdiction over foreigners. He proposed a declaration to remove all doubt on the view that the position in these protectorates was unclear.¹⁹ However, Wright, Junior Counsel for the Treasury, opposed Jenkyns' proposal on the grounds that assuming a protectorate was not sufficient to assume jurisdiction over foreigners.²⁰ Further, that the appropriate means for this was extension of sovereignty, and though practice may suggest a different approach for semi-barbarous states, this opinion was contrary to the views of the Law Officers.²¹

At the heart of this disagreement was the conception of sovereignty.²² Wright insisted on the indivisibility of sovereignty,²³ a principle widely accepted at the time that 'the incongruous epithet *half* or *imperfectly sovereign* obscures the essence of sovereignty'.²⁴ On the other hand, Jenkyns rejected the idea that sovereignty was indivisible and argued for a closer approximation of the German and French approaches to protectorates, which allowed

¹⁸ Johnston (n 17) 214–225.

¹⁹ TNA FO 97/562 Memorandum on Foreign Jurisdiction Amendment Bill, Jenkyns and Ilbert, 18 June 1888; *ibid* 215.

²⁰ TNA FO 97/562 Wright (Note A) Notes as to clause for British Protectorates, 15 November 1888.

²¹ *ibid*.

²² Johnston (n 17) 219.

²³ TNA FO 97/562 Wright (Note A) Notes as to clause for British Protectorates, 15 November 1888.

²⁴ John Austin 1790–1859, *Lectures on Jurisprudence; or, The Philosophy of Positive Law*, vol 1 (John Murray 1911) 253.

for a free hand in the exercise of jurisdiction.²⁵ On this instance, Lord Chancellor Halsbury rejected Jenkyns' views and stated that the nature of the protectorate did not allow for the exercise of jurisdiction over foreigners.²⁶ Thus, the Foreign Jurisdiction Act itself did not stretch the jurisdiction of the Crown in protectorates as far as it later came to mean.

However, the broad bases of extension of jurisdiction in the wording of the Foreign Jurisdiction Acts reflected an insecurity linked to past extension of jurisdiction and expediency of further authority.²⁷ While the opinion of wide powers of jurisdiction over foreigners and natives was not endorsed in the FJA 1890, opinions began approximating the German and French position on protectorates in 1895 and making use of the vague and encompassing wording of the Acts.²⁸ The Orders in Council illustrate the incremental escalation of internal sovereignty to be exercised in protectorates.²⁹

(b) Land in Colonial Protectorates

In colonies, through annexation the Crown acquires radical title to the soil. There is no necessary or immediate change in the proprietary rights of the inhabitants,³⁰ but the Crown has

²⁵ TNA FO 97/562 Memorandum on Foreign Jurisdiction Amendment Bill, Jenkyns and Ilbert, 18 June 1888; Henry Jenkyns and Courtenay Ilbert, *British Rule and Jurisdiction beyond the Seas* (Clarendon Press 1902) 166 'But this indivisibility of sovereignty, though it belongs to Austin's system, does not belong to international law. The powers of sovereigns are a bundle or collection of powers, and they may be separated from one another'.

²⁶ TNA FO 97/562 Halsbury, Memorandum, 28 March 1890.

²⁷ Inge van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (First, Oxford University Press 2020) 119–121.

²⁸ Johnston (n 17) 262–263.

²⁹ Jenkyns and Ilbert (n 25) 193.

³⁰ McNeil (n 3) 171–174 This is referred to as the doctrine of continuity, affirmed in a line of case law including *Re Southern Rhodesia* [1919] AC 211; *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399; Mieke Van Der Linden, 'The Neglected Colonial Root of the Fundamental Right to Property: African Natives' Property Rights in the Age of New Imperialism and in Times Thereafter' (2015) 75 Heidelberg Journal of International Law 791, 812.

the authority to deal with waste or unoccupied land.³¹ However, in protectorates, technically foreign territories in which the Crown has the right to exercise jurisdiction, the position was initially more constrained.³² Radical title was not acquired in protectorates and no grants could be issued in the name of the Crown.³³ The initial approach to colonial protectorates was outlined by the Colonial Office stating that it had

...no claim to the ownership of land which is still vested in the chiefs and tribes except insofar as it had been duly alienated to grantees or concessionaries. All that the Crown claims as protecting power to investigate and recognise or disallow the grant by chiefs and tribes of concessions and probably minor grants.³⁴

From this general principle, Crown inquiry into land transfers from native chiefs to settlers differed in its application in different protectorates.³⁵ For instance, in the Matabele Kingdom, concessions were ratified by the High Commissioner with the confirmation of the Secretary of State.³⁶ Similarly, the Bechuanaland protectorate established a Concession Commission to

³¹ Johnston (n 17) 271.

³² Claire Palley, *The Constitutional History and Law of Southern Rhodesia 1888-1965: With Special Reference to Imperial Control* (Clarendon 1966) 80.

³³ This view dates back to Herbert Jenner's Opinion of 29 June 1833 stating that the authority to alienate land does not lie with the office of the protector unless consent has been given by the protected state, Arnold Duncan McNair, *International Law Opinions: Selected and Annotated* (Vol 1, University Press 1956) 39. Though Jenner's view related to a 'classical' protectorate over the Ionian Islands, this view persisted on the emergence of colonial protectorates as indicated by the quoted dispatches on Bechuanaland in *Re Southern Rhodesia* [1919] AC 211, 241, 'It is true that strong expressions as to the importance and the significance of annexation in connection with land ownership are to be found in the official despatches. Thus in 1885 Lord Derby writes that before annexation titles cannot issue in the name of the Queen, but of the chief to whom the land originally belonged'.; Kenneth Polack, 'The Defence of Act of State in Relation to Protectorates' (1963) 26 *The Modern Law Review* 138, 150–151.

³⁴ TNA FO 881/6482, No. 77, Colonial Office to Foreign Office, 29 April 1890; Palley (n 32) 80.

³⁵ This principle was emphasised by the Colonial Office in 1894 stating that 'Whilst Her Majesty the Queen acquires powers of control and rule, more or less complete, the property in the soil does not necessarily pass to her by virtue of extending her protection. So far as the natives had the enjoyment of the land, they continue to enjoy it, subject to any laws which Her Majesty may subsequently make for the public good, and subject of course to any transfer of their title in land to Her Majesty which they make as a distinct act'. TNA FO 881/6613, No. 31, Colonial Office to Foreign Office, 19 July 1894.

³⁶ Palley (n 32) 80.

assess and validate land grants from natives to foreigners.³⁷ In the British Central Africa Protectorate,³⁸ it took the form of a lone consul's ratification procedure.

In August 1892 Harry Johnston, Commissioner of the British Central Africa Protectorate, sought to provide an orderly system for the regulation of land transfers between settlers and native people. This took the form of an ill-funded commission to settle claims for land made by settlers prior to the declaration of the protectorate. It involved unravelling the complex interactions that occurred between settlers and indigenous peoples and developing strategies for managing contact between British subjects and various indigenous groups, as well as between the empire and these indigenous communities. The effect of this commission can be said to not simply transfer proprietary interests, but to create private property in a system that hitherto had none.³⁹ This involved a transfer from the native system – which had no legal recognition, to the English legal system. The commissioner's pronouncements coupled with legal authority and cartographical representations of the new entitlements signalled the creation of a new order.⁴⁰

The Crown recognised the substantive proprietary rights of the inhabitants of Nyasaland and believed that they had a right to 'the occupancy and reasonable use of the country, and a power to grant reasonable rights to white men over lands and minerals'.⁴¹ While

³⁷ ibid; Kenneth O Hall, 'British Bechuanaland: The Price of Protection' (1973) 6 The International Journal of African Historical Studies 183.

³⁸ A British protectorate was declared over the territory adjoining Lake Nyasa (Lake Malawi) on 14 May 1891 and named the British Central Africa Protectorate, which was renamed the Nyasaland Protectorate in 1907. In 1953, the Nyasaland Protectorate was joined in the Federation of Rhodesia and Nyasaland, finally becoming the independent state of Malawi in 1964.

³⁹ Robert Nichols, *Theft Is Property!: Dispossession and Critical Theory* (Duke University Press 2020) 176.

⁴⁰ A sketch map drawn up by Commissioner Johnston in 1894 depicting land distribution in the protectorate following the land settlement can be found in Appendix 1.

⁴¹ TNA FO 881/6613 Colonial Office to Foreign Office, No 31 19 July 1894; Palley (n 32) 80.

in the Nyasaland context, the grants of interests in land from Africans to settlers appear in various forms such as treaties and private contractual documents, they are more appropriately termed concessions. Concessions have been described by analogy to municipal law as occupying the space between a contract and a treaty.⁴² This encapsulates the essence of the agreement between a private entity and a foreign government within a framework of legal pluralism.⁴³ This interaction between different legal actors from different legal settings lies at the heart of this chapter.

This question of whether the colonial government can grant land in a protectorate arose earlier in the context of ownership of land in the East Africa Protectorate.⁴⁴ The grants in question involved unoccupied land or wasteland which in a colony would be in the Crown's power to grant, but this was not the case with a protectorate.⁴⁵ The Foreign Office requested advice from the Colonial Office, and George Bower, Secretary to the High Commissioner for South Africa, opined that the Foreign Office did not have any authority to grant land in a Protectorate unless they possessed a grant to the land from a native chief as was the case in Mashonaland.⁴⁶ As a compromise, the Colonial Office recommended that the Foreign Office adopt in East Africa the system of 'certificates of occupancy' which were implemented in the

⁴² Peter J Liacouras, 'Some Aspects of International Concession Agreements, an Address by E. Lauterpacht' (1959) 1 Bulletin of the Harvard International Law Club 5, 5; Edward Cavanagh, 'Crown, Conquest, Concession, and Corporation: British Legal Ideas and Institutions in Matabeleland and Southern Rhodesia, 1889-1919', *Empire and Legal Thought*, vol 41 (Brill 2020) 523.

⁴³ Cavanagh (n 42) 523; Matthew Craven, 'Colonial Fragments: Decolonization, Concessions, and Acquired Rights' in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford University Press 2019).

⁴⁴ Johnston (n 17) 271.

⁴⁵ *ibid* 279.

⁴⁶ TNA FO 2/176 Chamberlain to Salisbury, 4 September 1896, Bower's Memorandum, 15 July 1896.

Gambia.⁴⁷ These certificates constituted grants from the occupying power to occupy land which had no owner.⁴⁸

Though Commissioner Johnston granted ‘land certificates’, his are distinguishable in two respects from those granted in the Gambia. First, Johnston’s certificates of claim purported to grant the holder estates in fee simple rather than ‘rights of occupancy’. Secondly, Johnston’s land settlement scheme involved granting land he claimed to have purchased or obtained ‘rights of pre-emption’ over from African chiefs, rather than unoccupied land or wasteland which supposedly belonged to no one. Nevertheless, his actions were contrary to clear advice to avoid granting estates in fee simple in territories such as these.

Despite an initial reluctance to exercise wide powers in a protectorate, jurisprudence eventually evolved to enable the Crown to exercise jurisdiction over land in a protectorate. This change in the legal position was ushered in by the Webster and Finlay’s report in 1899.⁴⁹ They stated that ‘protectorates, such as those now under consideration, really involve the assumption of control over all lands unappropriated’.⁵⁰ This opinion was reached on the consideration of an argument that native tribes such as these had no conception of property in land, and that all persons came under the jurisdiction of the Crown in protectorates.⁵¹

⁴⁷ Johnston (n 17) 272.

⁴⁸ *ibid* 273.

⁴⁹ TNA FO 2/259 Webster and Finlay to Salisbury, 13 December 1899.

⁵⁰ *ibid*.

⁵¹ Johnston (n 17) 274–279.

Throughout the land settlement programme Johnston conducted, the rhetoric of protection looms large, as he argues that he seeks to limit natives from entering into agreements they do not understand, or from being taken advantage of by settlers. Most distinctively, this rhetoric becomes embodied in a crude form of the Crown's right of pre-emption which he initiated by refusing to accept the alienability of native title to land. However, the method he employed in assessing claims aimed at the protection of native vendors by ensuring that they assented to the sale, received a sum he deemed fair, and that they did not part with more than they intended.

(c) British Central Africa Protectorate: Legal Order and Machinery of Justice

The British Central Africa Protectorate constituted a part 'British Central Africa' which comprised of the protectorate and the British Sphere North of the Zambezi.⁵² The Protectorate's exclusion from the British South African Company's control was advocated vociferously by the missionary groups in Nyasaland.⁵³ Harry Johnston, having come to an agreement with Cecil Rhodes, was commissioner of the protectorate, as well as the administrator for the British South Africa Company's rule over the Northern Rhodesia Sphere of influence.⁵⁴

Johnston was therefore in the uncomfortable position of serving two masters not dissimilar to James Douglas' role as Chief Factor of the Hudson Bay Company and Governor

⁵² Shula Marks, 'Southern and Central Africa, 1886–1910' in Roland Oliver and GN Sanderson (eds), *The Cambridge History of Africa: Volume 6: From 1870 to 1905*, vol 6 (Cambridge University Press 1985) 422; Alexander John Hanna, *The Beginnings of Nyasaland and North-Eastern Rhodesia 1859-95* (2nd edn, Clarendon Press 1969) 181.

⁵³ TNA FO 2/55 Johnston to Rhodes, 8 October 1893; *Life and Work in British Central Africa*, October 1890, 'but a Chartered Company is not a government and never can be. To be ruled by such is to be ruled for commercial ends by absentee directors and shareholders whose real interests are only served by tangible dividends'.

⁵⁴ Hanna (n 52) 181.

of Vancouver Island.⁵⁵ The Charter of the British South Africa Company excluded the protectorate but extended north as far as German East Africa.⁵⁶ The British Central Africa protectorate, known as the Cinderella protectorate, ran on a shoe-string budget paid from Rhodes' subsidies, as the Treasury declined to pay its expenses.⁵⁷ Johnston's efforts to maintain impartiality in his handling of the British South Africa Company's land and mineral claims ultimately led to a rather public breakdown of his relationship with Rhodes.⁵⁸

The first legal framework under which jurisdiction was exercised in the protectorate was the Africa Order in Council 1889.⁵⁹ This Order established a system of local jurisdictions for the regions in Africa and the island of Madagascar (excluding Zanzibar) including the British Sphere North of the Zambezi which had not been included in previous orders.⁶⁰ Article 13 of the 1889 Order provided the territory's reception clause establishing that civil and criminal jurisdiction would 'be exercised upon the principles of and in conformity with the law for the time being in force in England'.⁶¹

Thus, the establishment of the protectorate constituted British Central Africa as a local jurisdiction. The Order provided the authority for the commissioner to establish consular courts

⁵⁵ Stephen Arthur Royle, *Company, Crown and Colony: The Hudson's Bay Company and Territorial Endeavour in Western Canada* (IB Tauris 2011).

⁵⁶ Memorandum: Conditions on extending the Field of Operations of the British South Africa Company to the North of the Zambezi, February 1891, 'Africa. No. 2 (1895). Papers Respecting the British Sphere North of the Zambezi, and Agreements with British South Africa Company', C.7637 LXXI 563.

⁵⁷ Ronald Robinson, John Gallagher and Alice Denny, *Africa and the Victorians: The Official Mind of Imperialism* (2nd edn, Macmillan 1981) 249.

⁵⁸ John S Galbraith, *Crown and Charter: The Early Years of the British South Africa Company* (University of California Press 1974) 233–235.

⁵⁹ Africa Order in Council 1889, Reproduced in *London Gazette*, 22 October 1889, Issue 2596, 5557.

⁶⁰ 'Instructions for the Guidance of Her Majesty's Consular Officers in Giving Effect to the "Africa Order in Council, 1889".' [1891] Foreign and Commonwealth Office Collection; Johnston (n 17) 200 citing TNA FO 84/2271 Salisbury to Treasury, 2 March 1886.

⁶¹ Article 12, Africa Order in Council 1889; ML Marasinghe, 'Policies, Purpose and Aims of Reception Statutes in British Colonial Africa' (1976) 12 East African Law Journal 1.

in the designated local jurisdiction. On this authority, Commissioner Johnston established consular courts in the British Central Africa Protectorate. These courts could exercise jurisdiction only over British subjects.⁶² However, owing to the extension provided by the Africa Order in Council 1892, the courts' jurisdiction was extended to foreigners whose governments had submitted to the jurisdiction of the courts.⁶³ On this basis jurisdiction was exercised over natives in the protectorate who on the delegated authority of their chiefs, who had submitted to the jurisdiction of the courts. Early cases in the British Central Africa Gazette detail cases between natives and foreigners in the early years of the protectorate.⁶⁴

Further, law making authority was provided to the Commissioner in terms of Article 99 of the Africa Order in Council 1892 which authorised him to enact Queen's Regulations for the purposes of, *inter alia*, 'securing the observance of any treaty' and 'for the peace order and good government of British subjects'.⁶⁵ Between 1891-1902, appeal from the consular courts was to the Supreme Court of the Cape Colony, and finally to the Judicial Committee of the Privy Council.⁶⁶

Following a scathing critique of the position under earlier Orders by Chief Justice Nunan in *Cox v African Lakes Company*,⁶⁷ all previous Orders were repealed and replaced by

⁶² Article 19 Africa Order in Council 1889.

⁶³ Africa Order in Council 1892; Jenkyns and Ilbert (n 25) 187.

⁶⁴ Boyce Philip Wanda, 'Colonialism, Nationalism and Tradition: The Evolution and Development of the Legal System of Malawi.' (SOAS, University of London 1979).

⁶⁵ Article 99 Africa Order in Council 1889.

⁶⁶ Franz von Benda-Beckmann, *Legal Pluralism in Malawi: Historical Development 1858-1970 and Emerging Issues* (Kachere Series Zomba, Malawi 2007) 36.

⁶⁷ *Cox v ALC* (CCBCA 1901), in TNA FO 2/471 Sharpe to Marquis of Lansdowne, despatch No. 188, 341. There appear to be two versions of the judgment. The first, was reported in the *British Central Africa Gazette* of 31 July 1901. In later cases the Zanzibar Court of Appeal chastised Judge Nunan for his practice of altering his judgements.

the British Central Africa Order in Council 1902 which was of exclusively local application.⁶⁸ This Order established a more comprehensive court system. Article 15(1) of this Order constituted a High Court having ‘civil and criminal jurisdiction over all persons and all matters in the protectorate’.⁶⁹ This obviated the need to rely on the fiction that jurisdiction was delegated from African chiefs. Article 18 provided the authority to establish subordinate courts. District and sub-district courts which adjudicated matters between non-natives, as well as District Native and sub-district native courts were established for native matters.⁷⁰ There was no legal recognition of the native courts or systems of justice.⁷¹ Finally, the 1907 Nyasaland Order in Council changed the name of the protectorate from British Central Africa to Nyasaland and established both a legislative and an executive council.⁷²

3. Land Settlement: Creation of Private Property

As stated, Johnston’s land settlement which constituted the foundation of private proprietary interests in Nyasaland, involved a recognition and sale of the rights in land of Nyasaland chiefs and headmen. The contracts of sale entered into may fall somewhere in the spectrum of voluntary and involuntary, but the settlers acquiring land were constrained by a legal framework of the government’s own making. Johnston’s reports are the only source of the methods of his settlement and must be read with some caution. However, his description sheds light on the legal framework he employed and helps with the interpretation of the later history of the protectorate.

⁶⁸ British Central Africa Order in Council 1902, No 663. Published in the *British Central Africa Gazette*, 31 October 1902.

⁶⁹ *ibid* art 15.

⁷⁰ *ibid* art 18.

⁷¹ Benda-Beckmann (n 66) 38–39.

⁷² Nyasaland Order in Council 1907 SI No 541; Colin Baker, ‘A Hundred Years Ago: The Nyasaland Order in Council 1907’ (2007) 60 *The Society of Malawi Journal* 1.

Commissioner Johnston purported to grant estates in fee simple absolute in possession, the closest approximation of full ownership available in English law.⁷³ To recall the famed definition in *Walsingham's Case*, 'he who has a fee-simple in land has a time in the land without end'.⁷⁴ The holder of a fee simple estate is entitled to the subjacent soil, including precious stones and minerals as per the exaggerated maxim, *cuius est solum eius est usque ad coelum et ad inferos*.⁷⁵ The exception to this rule is the royal prerogative of mines which allocates to the Crown gold and silver (royal minerals).⁷⁶ Johnston's certificates granting estates in fee simple in the context of a protectorate raised various questions regarding the extent of the settlers' entitlement and whether Crown prerogatives could be read into his grants.

One of the first tasks Johnston was occupied with in his role as Commissioner of the Protectorate was to devise an orderly land system. In his first year of work, the relations of settlers and natives were fraught with land contestations that and much of his time was spent in an informal land court and land negotiations.⁷⁷ Despite the relatively small number of settlers, the claims over land in the south of the protectorate were extensive and overlapping, and Johnston sought to establish a central authority to oversee all land transfers. To the claims he considered valid, he granted 'certificates of claim'. Johnston issued a total of 73 certificates covering approximately 3,700,000 acres of land out of a total land surface of 23,161,924 acres,

⁷³ Gray and Gray (n 4) 17.

⁷⁴ *Walsingham's Case* (1573) Plowd 547, 557; 75 ER 805; *ibid*.

⁷⁵ *ibid* 5–6; Aaron X Fellmeth and Maurice Horwitz, 'Cuius Est Solum Eius Est Usque Ad Coelum (et Ad Inferos)' <www.oxfordreference.com/view/10.1093/acref/9780197583104.001.0001/acref-9780197583104-e-465> Accessed 15 December 2023 'To whomsoever it belongs, it is his all the way to the heavens and all the way to hell'.

⁷⁶ *The Case of Mines (R v Earl of Northumberland)* (1568) 75 ER 472; Noel Cox, *The Royal Prerogative and Constitutional Law: A Search for the Quintessence of Executive Power* (Routledge 2021) 76.

⁷⁷ TNA FO 2/54 Johnston to Rosebury, 5 January 1893.

some 16% of the territory.⁷⁸ The land acquired in the Shire Highlands was particularly arable, connected to transport nodes and had would experience high population increase due to immigration from Mozambique.⁷⁹ Thus landowners of estates in the Shire Highlands would wield far more influence than the percentage above would suggest.

Attempting to resolve the disorderly situation, Commissioner Johnston issued a declaration on the 18th of July 1891 stating that all land sales previously undertaken need to be submitted to him and that no further transactions would be recognised.⁸⁰ Thus, the legal framework under which land was acquired from native chiefs began to take form. The declaration read,

- 1) That no purchases or leases or other dealing in land with natives within the limits of British Central Africa made after this date will be recognised until they have received the sanction of Her Majesty's Commissioner
- 2) All persons claiming land within the said limits whether by purchase, lease, or otherwise should send in to the HM Commissioner full particulars of their claims together with all documents and evidence upon which such claims were based, accompanied by sketch maps showing distinctly the position, extent, and boundaries of such claims on or before the 31st day of July 1891.⁸¹

In a dispatch to the Foreign Office in response to a request that Johnston sends a copy of the circular described above, he offered the following rationale for introducing and seeking to maintain the restriction on alienation of native title to land:

Even when the land claims are all finally settled, I think it will be necessary for whoever represents His Majesty's Government in British Central Africa to be

⁷⁸ In addition, had acquired for the Crown 1,431,417 acres of land. TNA FO 881/6343 Memorandum of Land Claims in the British Central Africa Protectorate, 2. Bridglal Pachai, *Land and Politics in Malawi, 1875-1975* (Limestone Press 1978) 37–40.

⁷⁹ Jutta Bolt and Erik Green, 'Was The Wage Burden Too Heavy? Settler Farming, Profitability, And Wage Shares Of Settler Agriculture In Nyasaland, c. 1900–60' (2015) 56 *Journal of African History* 217, 221.

⁸⁰ TNA FO 881/6342 Memorandum on Land Claims in the British Central Africa Protectorate.

⁸¹ Office of Commission's Administration, Zomba 18 July 1891.

empowered to maintain these restrictions over land purchases from the natives in paragraph 1 of my circular for the following reasons:

1. Natives may sell land which does not belong to them or they may sell it three or four times over, or they may part with far more (on paper) than they ever intended to sell
2. On the greater part of Nyasaland, the Crown now possesses 'rights of pre-emption' or is actually the owner of the soil by purchase, cession, or in one or two cases, forfeiture where the owners have been at war with us and have abandoned their country refusing our terms of peace.
3. It is only fair that if a native chief is desirous of parting with land, the Crown should have the prior right to decide whether it requires all or any part of such land for Government purposes before it is offered to other purchasers. This assumption on the part of the Crown may be considered to come under the Sovereign in rights conferred on it by most of the Nyasaland chiefs.⁸²

Johnston was writing not only to justify his assumption of these powers but also to argue that the restriction on alienation ought to be maintained by subsequent Governors. In paragraph 1 of his justification, Johnston offers a three-part pragmatic rationale for restricting the alienation of native title. First, that natives may sell land which does not belong to them. In his role of regularising private sales of land, this appears to be a verification mechanism to ensure that the native chief alienating land is the chief responsible for that land.⁸³ Therefore, in the cases where rival chiefs were vying for sovereignty or where settlers set up rival chiefs from whom they claim to have purchased land Commissioner Johnston claimed the authority to determine which chief rightly has sovereignty.⁸⁴ Secondly, 'may sell it three or four times' suggests that there may have been some unscrupulous behaviour on the part of the chiefs. Thirdly, 'may part with

⁸² TNA FO 84/2197 Johnston to FO 19 November 1892; TNA FO 881/6343 Land Claims in the British Central Africa Protectorate, May 1893.

⁸³ Scholars have noted that according to African customary law, chiefs may not have had to authority to alienate land. For instance, Clement Ng'ong'ola, 'Colonial Law and the Inception of a Dual Land System in Nyasaland' (1985) 18 *Law and Politics in Africa, Asia and Latin America* 283; Bridglal Pachai, 'Land Policies in Malawi: An Examination of the Colonial Legacy' (1973) 14 *The Journal of African History* 681.

⁸⁴ TNA FO 84/2197 Johnston to Foreign Office, 19 November 1892.

far more than they ever intended to sell'. This appears to be protective of the African chiefs in that he seems to be ensuring that his unequal bargaining power or misunderstanding does not result in an unintended alienation.

In paragraphs 2 and 3, he argues in the alternative that either the Crown wields 'rights of pre-emption, or else is already vested as owner. He lists three modes of acquisition, being purchase, cession, or forfeiture. He places 'rights of pre-emption' in quotes without definition. One key question would seem to be whether by pre-emption Johnston meant he had secured an *exclusive* right to purchase or a *prior* right to purchase. In other words, whether the Crown is the only entity which can validly purchase land from the native chiefs; or that if native tribes wished to alienate their title to land would first have to offer it to the Crown and failing that they could offer it to other private purchasers which would be valid sales. This draws the distinction between the Crown's exclusive right of pre-emption and what is otherwise only a prior right to purchase, an option of first refusal.

The Crown's right of pre-emption is a long-standing policy of the common law, stretching back to the 16th century or before, stating that native or indigenous titles to lands under imperial prerogative control were not freely assignable by private treaty, but rather had to be surrendered to the Crown, that is land had to be alienated from the native system as an act of cession to the suzerain.⁸⁵ While Johnston used this term in seeking to restrict the

⁸⁵ The doctrine of pre-emption, notably confirmed in *Johnson v M'Intosh* (1823) 8 Wheat. 543 reverberated across the British empire, taking root in settler colonial politics. For an comprehensive account of this case see Eric Kades, 'The Dark Side of Efficiency: Johnson v. M'Intosh and the Expropriation of American Indian Lands' (2000) 148 University of Pennsylvania Law Review 1065; Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Belknap Press of Harvard University Press 2005).

alienability of native title, an examination of his methods reveals he simply employed a prior right to purchase as opposed to a strict monopsony or exclusive power of purchase. In his report on the land settlement, he wrote ‘I would not recognise any contracts made with native chiefs for the sale of land which were not entered into with my prior consent’.⁸⁶ Furthermore, Johnston concluded his report by stating, ‘In the case of land being sold by natives, but being subject to ‘rights of pre-emption’ on the part of the government, those latter rights are waived, unless there is good reason to the contrary, and a percentage of the sum paid to the native is retained by the Government’.⁸⁷

Johnston’s account of his land settlement methods suggests that in dealing with claims he had the protective justification foremost in mind.⁸⁸ Of the claims reviewed, he found three of the land claims to have been fabricated in their entirety from claimants who, without any documentary evidence, claimed they had purchased thousands of acres for ‘a few trade guns’.⁸⁹ On the other hand, he found two claimants were so cautious as to have purported to purchase the same piece of land from several chiefs to be certain of their claim.⁹⁰ The information available from Johnston’s dispatches suggests that in 18 cases (of 73 certificates granted) he merely confirmed the agreements reached between the buyer and seller.⁹¹ In addition, in 5

⁸⁶ TNA FO 2/54 Johnston to Rosebery, 5 January 1893.

⁸⁷ TNA FO 2/128 Report on the Settlement of Claims 18.

⁸⁸ TNA FO 2/128 Johnston to Rosebery, Report on the Settlement of Claims, 14 October 1893.

⁸⁹ TNA FO 2/54 Johnston to Percy Anderson, 21 January 1893.

⁹⁰ TNA FO 2/128 Report on the Settlement of Claims, 14 October 1893, 4-10. One instance of this was Eugene Albert Sharrer’s claim over land in the Ruo. Johnston wrote of his determination of Sharrer’s claim, ‘he, having purchased the land from three different sets of people, so as to satisfy any claimant’. Johnston describes the reason for this as the uncertainty regarding rightful sovereignty of the region between the Mang’anja people, the original possessors of the land, and the Yao and Makololo people, who had attacked the Mang’anja and assumed the right to dispose of the rights to the territory.

⁹¹ A table detailing the 73 Certificates of Claim granted by Johnston can be found in Appendix 2.

cases, Johnston included a condition that the purchaser pay the native vender an extra sum to accord with the value and extent of the land claimed.⁹² Alternatively, in 4 cases, Johnston reduced the extent of the plot claimed to accord with the amount paid for it.⁹³

Two specific claims occurring in the Blantyre region would seem to suggest that Johnston exercised an exclusive right of his government to purchase native title to land.

1. In the region of Blantyre, there was a large estate of Mitshiru which the Buchanan brothers claimed and occupied.⁹⁴ The Buchannan brothers purported to purchase this land from the native chief Kumtaja. However, Johnston wrote that he allowed this claim only on the condition that the Buchanan brothers pay extra money to the original native vendor or to give up a portion of the estate in order to make the transaction fair. Johnston goes on to state that ‘in the meantime the Government had acquired by purchase the rights of the native vendor’.⁹⁵ The Government then accepted a piece of land from the Buchanan brothers instead of the cash payment.⁹⁶
2. The case in west and north of Mount Tshiradzulu was similar to the one described above in that Commissioner Johnston decided that the original payment be supplemented by a further payment to the vendor. Johnston then stated that ‘the Government having

⁹² ibid; TNA FO 2/128 Report on the Settlement of Claims, 14 October 1893 6.

⁹³ TNA FO 2/128 Report on the Settlement of Claims, 14 October 1893 2-14.

⁹⁴ The Buchanan brothers were John Buchanan, an agriculturalist for the Blantyre Mission, and his two brothers Robert Buchanan and David Buchanan who joined him in the Nyasa region in 1883. John Buchanan introduced the farming of tobacco in the protectorate and cultivated it for export; WHJ Rangeley, ‘A Brief History of the Tobacco Industry in Nyaland Part 1’ (1957) 10 *The Nyasaland Journal* 62.

⁹⁵ TNA FO 2/128 Report on the Settlement of Claims, 14 October 1893, 8.

⁹⁶ ibid 8.

acquired and purchased the rights of the native vendor, this payment in money was waived in favour of a transfer to the Crown' of a separate estate in Namasi.⁹⁷

In these cases, even though the vendor had 'sold' his title to the settlers, in the course of Johnston's deliberations he managed to acquire by purchase the rights of the natives, such that if there were an extra payment due to the native, it would then accrue to the Crown. It may be that this took the form of double attornment where Johnston acquired the native title on behalf of the Crown for consideration, taking it out of the native so as to sell it on to the settler within the colonial system, as the only way that natives could 'transfer' land to settlers. However, several other cases involving additional payment to native vendors suggest that Johnston considered that the native had successfully alienated his title in the land. Other instances in Ruo demonstrate a simple repayment of sums due to the native, without the Crown placing itself at the centre of the transaction. Instances include Simpson's Chiromo estate,⁹⁸ Bradshaw's Chipolopolo estate,⁹⁹ the Buchanan Brothers' various Ruo estates,¹⁰⁰ and Simpson's Thucila estate.¹⁰¹ The rights that Johnston acquired on behalf of the Crown in the two cases listed above were therefore rights to the payment of further money due – or the Crown's portion of the sale or cession price.

The Certificates of Claim Johnston issued set out various terms. In the preamble of the

⁹⁷ ibid 7.

⁹⁸ Table detailing Certificates of Claim, Appendix 2, Claim No 1.

⁹⁹ ibid Claim No 2.

¹⁰⁰ ibid Claim No 36.

¹⁰¹ ibid Claim No 58.

certificates, he asserted that he was duly authorised to settle all land claims. In addition, the certificates included various terms such as the price to be paid for the estate; that no native plantations on the land were to be disturbed without the prior consent of the commissioner; and that 5% of the estimated value of all minerals, metals or precious stones obtained from the estate shall be paid to the British Government. This last term concerning mineral rights became highly contentious, as will be explored in section 4. Finally, Johnston reported that the Crown had acquired rights of pre-emption over the land in the Shire highlands in the hands of the natives'.⁵¹

Clement Hill, Percy Anderson's deputy in the Foreign Office Africa Department,¹⁰² was a man of conventional views who was uncomfortable with the extraordinarily wide authority granted to junior consuls such as Johnston.¹⁰³ Hill contended that the powers Commissioner Johnston exercised went beyond those available to him by virtue of his position, and therefore had to come from the natives 'by some form of deed which will bear investigation'.¹⁰⁴ Hill placed Johnston's land settlement in the context of the region and the constitutional status of other territories with similar practices.¹⁰⁵ Hill noted that in Mashonaland and the Bechuanaland Protectorates which shared similar constitutional status as British Central Africa, the Crown made no claim of ownership to the land.¹⁰⁶ The rule in these protectorates was that ownership was vested in the chiefs unless it was duly alienated.¹⁰⁷ This

¹⁰² Roger Louis, 'Sir Percy Anderson's Grand African Strategy, 1881–1896' (1966) LXXXI *The English Historical Review* 292, 293 Percy Anderson became the head of the Africa Department of the Foreign Office in 1883.

¹⁰³ Hanna (n 52) 193.

¹⁰⁴ TNA FO 2/128 Report on the Settlement of Claims, 14 October 1893.

¹⁰⁵ TNA FO 881/6383 Memorandum on Land Claims in the British Central African Protectorate, August 1893.

¹⁰⁶ TNA FO 881/6383 Memorandum on Land Claims in the British Central African Protectorate, Annex I, Colonial Office Methods of dealing with Land in Bechuanaland and Mashonaland, August 1893.

¹⁰⁷ Concession reproduced in TNA FO 881/6383 Memorandum on Land Claims in the British Central African Protectorate, Annex I, Enclosure 3.

state of affairs was contrasted with the Crown's rights in the British Bechuanaland, a Crown colony. Through the act of annexation, the Crown obtained supreme ownership of the soil [radical title] upon which the Governor was entrusted by law the duty of allotting land.¹⁰⁸

Hill then wrote to Johnston that the system in Nyasaland bore more similarity to the Mashonaland and Bechuanaland protectorates in which no authority to allocate land flowed from the territories' constitutional status. In Mashonaland, the British Crown had acquired no land rights, but the British South Africa Company had acquired land rights from a purchase of a concession from Lo Bengula to Edward A. Lippert.¹⁰⁹ In the Bechuanaland Protectorate, a Concession Commission was appointed to inquire into and report upon land grants. The commission reviewed purported grants of land from natives to settlers based on several conditions.¹¹⁰ Similarly, Johnston would have to identify the source of his authority.

In response to Hill, Johnston asserted that the treaties conferred upon the Crown rights of pre-emption and empowered the Crown to control all 'waste and unoccupied land' belonging to natives.¹¹¹ Johnston relied on the third clause of the Foreign Office model treaty concluded with native chiefs was the source of his authority.¹¹² However, Hill, who doubted the validity of this claim, was unsure whether the wording of the clause, forbidding native

¹⁰⁸ TNA FO 881/6863 Memorandum Annex I, Edward Fairfield, Colonial Office to Foreign Office, 29 April 1893.

¹⁰⁹ *ibid.*

¹¹⁰ TNA FO 881/6863 Memorandum Annex I, Enclosure 8, Sir Henry B Loch to Mr Surmon, Cape Town, 20 January 1893.

¹¹¹ TNA FO 2/66 Report on the Eastern Portion of British Central Africa, 31 March 1894.

¹¹² The third clause of the model treaties stipulated that the undersigned would not cede any of his territory to any other power or to enter into any agreement, treaty or arrangement with any foreign government except through the consent of her Majesty's government. Both the Model Treaty and full list of the treaties concluded are found in TNA FO 881/6383 Memorandum on Land Claims in the British Central African Protectorate, List of Treaties made on behalf of Her Majesty's Government in the British Central African Protectorate, August 1893.

chiefs from ‘ceding territory to any other power’, could rightly be applied to private transfers of land. Whatever the legality of the action, he regarded the overstep in authority as a fait accompli.¹¹³

More generally the fledgling colonial authority was often bolstered with claims of authority relying heavily on the terms of the treaties concluded with native chiefs. Johnston asserted that the treaties conferred upon the Crown rights of pre-emption and empowered the Crown to control all ‘waste and unoccupied land’ belonging to natives.¹¹⁴

4. Validity of Certificates of Claim

The irregular basis of the land settlement proved to be vexatious for the protectorate courts. The land settlement was irregular as it purported to grant ‘estates in fee simple’, and included terms on mineral rights. In 1901, Alfred Sharpe had taken over from Johnston as Commissioner and Nunan had been appointed Chief Judicial Officer and Vice Consul of the Protectorate.¹¹⁵ Nunan presided in the consular court at Blantyre which he had established as an informal appeal court for the other consular courts in the protectorate.¹¹⁶ Several questions arose regarding these certificates. Mainly, whether the Nyasaland natives were able to transfer interests in land directly to settlers, and what was the source of the additional terms in the certificates of claim.

¹¹³ TNA FO 881/6383 Memorandum on Land Claims in the British Central African Protectorate, 2; Ng’ong’ola (n 83) 292.

¹¹⁴ TNA FO 2/66 Report on the Eastern Portion of British Central Africa, 31 March 18.

¹¹⁵ TNA FO 2/212 Nunan to Foreign Office, 8 November 1899.

¹¹⁶ TNA FO 2/468 TNA FO to Sharpe, Despatch 230, 11 November 1901, Nunan J, Judicial Department’s report in the Report on Trade and the General Conditions of the British Central Africa Protectorate 1900-1901.

The first dispute involved questions around the rightful authority to grant land to settlers in the protectorate. In *Cox v The African Lakes Company* and *Pettit v The African Lakes Company* 1901 Chief William purported to grant the African Lakes Company a monopoly for the collection of strophanthus (*kombe*) seeds in his village.¹¹⁷ *Kombe* was a trailing plant which had been used for arrow poisons for centuries in Africa, and had been the site of bio-prospecting in the Nyasa territory for development of cardiac medicine.¹¹⁸ When the validity of this agreement was challenged in court, Judge Nunan found against the African Lakes Company on two grounds. First, that the agreement was invalid for want of consideration and secondly, that it was ultra vires for Chief William to enter into this agreement because he was no longer landlord of the land over which he was chief.¹¹⁹

Nunan highlighted the foundational nature of this case by stating that it raised ‘a matter of extreme importance, if not in international law, at least in our own municipal and constitutional law, viz, the whole question of our jurisdiction in the British Central Africa Protectorate’.¹²⁰ Nunan noted that at that time, in 1901, jurisdiction over natives was only exercised in terms of a fiction that it was through the delegated authority of the sovereign.¹²¹ He was annoyed by this legal impediment, noting that there was ‘a great deal of vagueness’ in the colonial governments relations to natives and their chiefs as well as foreigners whose

¹¹⁷ *Cox v ALC* (CCBCA 1901) (n 67).

¹¹⁸ Markku Hokkanen, ‘Imperial Networks, Colonial Bioprospecting and Burroughs Wellcome & Co.: The Case of Strophanthus Kombe from Malawi (1859-1915)’ (2012) 25 *Social History of Medicine* 589, 591–592.

¹¹⁹ *Cox v ALC* (n 67) 341. Chief William had ceded all sovereign and proprietary rights to the Crown by a Treaty dated 9th February 1892 concluded by Acting Vice-Consul Buchanan and the Makololo Chiefs.

¹²⁰ *ibid* 355.

¹²¹ *ibid* 349

governments are not signatories to the General Acts of Berlin and Brussels. He writes, 'I am inclined to welcome this case if it calls attention to the existing ambiguity'.¹²²

Nunan began his judgment by outlining a brief history of protectorates in British history, from the Ionian Islands to the present protectorates over 'barbarian Africa'.¹²³ He bemoaned the 'chary' British approach as compared to German and French protectorate practice.¹²⁴ He then argued that the 'Austinian theory of the indivisibility of sovereignty' was the cause of the hesitance to alter the legal position. Furthermore, that Austin's doctrine 'is now generally recognised to be erroneous and contrary to historical fact, and to the actual circumstances of modern times'.¹²⁵ Nunan then noted that consent is deemed as necessary, either through signing the General Acts, or native consent. He writes,

I am inclined to think that personally I should adhere to the theory that jurisdiction may be maintainable independently of statute, and in the interests of justice risk the creation of a leading case.¹²⁶

Nunan then turned to the treaties concluded at the founding of the protectorate, and regarding the land in question in this case, he noted that 'most of them distinctly express the intention of ceding not only sovereign rights, but proprietary rights'.¹²⁷ He goes on to state that 'in the British interests in this country, and in the interests of the natives themselves, I think that the very widest interpretation should be given to it'.¹²⁸ Engaging in a practical consideration of how land is acquired in the protectorate he noted that if anyone is desirous of purchasing land,

¹²² *ibid* 356.

¹²³ *ibid* 343.

¹²⁴ *ibid* 346

¹²⁵ *ibid* 347.

¹²⁶ *ibid* 357.

¹²⁷ *ibid* 350.

¹²⁸ *ibid*.

he ‘certainly pay[s] little attention to the wishes of the chief’.¹²⁹ Instead, he would make an application to the Commissioner of the Protectorate. Further, that any purchases of land before the founding of the protectorate had to be ratified by the Commissioner in order to make them valid in English law. He minimised the authority of the chiefs stating that ‘they are as reeds shaken in the wind’ without the power they derive from the Commissioner.¹³⁰

Nunan held that Johnston’s authority to conduct the land settlement stemmed not from the treaties themselves but by virtue of the declaration of ‘a protectorate over semi-barbarous natives’.¹³¹ Nunan argued that contemporary practice had established that there were two kinds of protectorates. One which was administered through the natives’ own political system and another kind which is governed as though it was a colony of the protecting power.¹³² Whether a protectorate would be one or the other would depend on the perceived state of civilisation that its inhabitants had reached. Applying this principle to the British Central Africa Protectorate, he held that since the natives in Nyasaland had not reached the appropriate stage of development, the Crown had complete power in the protectorate.¹³³

Even if Nunan’s claim of the Crown’s exclusive land-granting authority in the protectorate proved incorrect, subsequent legal rulings within the empire would have rendered the error inconsequential. Judicial pronouncements when incursions into the internal sovereignty of protectorates became commonplace, the defence of act of state prevented legal remedy. For instance, in the decision of *Sobhuza II v Miller* the Judicial Committee of the Privy

¹²⁹ ibid 351.

¹³⁰ ibid.

¹³¹ ibid 345.

¹³² ibid 359.

¹³³ ibid 340-350, 356. Nunan states, ‘No one will contest that Chief William is on the same plane of power or civilisation with the Sultanate of Zanzibar’.

Council held that the convention entered into between Great Britain and the South African Republic could not 'legally interfere with a subsequent exercise of the sovereign powers of the Crown or invalidate subsequent Orders in Council'.¹³⁴ Similarly, in the case of *Nyali v Attorney General*, Lord Denning declared with resounding clarity that even where the authority of the Crown in protectorates had been exceeded beyond its stated or conventional limits, it still had a residual power to act given its sovereign constitutional status.¹³⁵ Hence, the Crown could validly exercise complete control as the protecting power, and no court would question the validity of acts of state.

A year later the British Central Africa Mining Regulations were passed giving the colonial government the power to issue prospecting licenses on the land without the consent of the holder of the certificate of claim, and this soon spurred litigation.¹³⁶ The regulations stipulated that where certificates of claim expressly recognised the rights of the holder to mines and minerals, the regulations would not override those extant rights.¹³⁷ Three cases were quickly brought challenging the effect of these regulations, namely *Augusto Paolucci v Commissioner of Mines* (1904), *Crown Prosecutor v Augusto Paolucci* (1904), and *Crown Prosecutor v British Central Africa Company* (1904). The colonial government's position was that the exception to the regulation schema applied only where the certificate of claim conferred mineral rights only and specifically, not accompanied with title to land.¹³⁸ The issue before the

¹³⁴ *Sobhuza II v Miller* [1926] AC 518, 4. Courts did not have the jurisdiction to challenge acts of state, but they did have the jurisdiction to determine whether an act in question was an act of state; *Musgrave v Pulido* (1879) 5 App Cas 102 at 111-113.

¹³⁵ *Nyali v Attorney General* (1955) 1 All ER 646 1955.

¹³⁶ Section 2 of the British Central Africa Mining Regulations 1899, Reported in *British Central Africa Gazette*, October 31, 1904.

¹³⁷ *ibid* s 2(b).

¹³⁸ *Augusto Paolucci v Commissioner of Mines* and *Crown Prosecutor v Augusto Paolucci* (HCBCA, 2 February 1904) (*Augusto Paolucci v Commissioner of Mines*, HCBCA).

courts was therefore, whether clause 4 in the certificate of claim constituted a grant of all mines and minerals such that the land is exempt from the operation of the licensing ordinance.

In *Paolucci v Commissioner of Mines* the petitioner sought to establish that the mining regulations did not apply to land granted in terms of his certificates of claim.¹³⁹ The plaintiff petitioned to restrain the Crown from issuing prospecting licenses without his permission. In addition, he sought a declaration that he was entitled to all minerals on his land under the terms of the Certificate of Claim, subject only to a 5% royalty payment to the government.¹⁴⁰ On the other hand, the colonial government represented by the Crown Prosecutor and the Commissioner of Mines argued that it had the right to regulate prospecting on all lands within jurisdiction. In the cases *Crown Prosecutor v Augusto Paolucci*, and *Crown Prosecutor v British Central African Company*, the Prosecutor sought a declaration of Crown rights over land held under certificates of claim.¹⁴¹ In addition, the prosecutor argued that the Crown had a prerogative claim over minerals on such land and that it had the authority to grant mineral licenses without the owner's consent.¹⁴²

In the British Central Africa High court, one judgment was delivered for the cases *Augusto Paolucci v Commissioner of Mines* and *British Central Africa Company vs Crown Prosecutor* by Chief Judicial Officer Nunan. Nunan sought to place the land settlement in the protectorate within a historical context. He recounted the history of land ownership in English law from the Norman conquest to the Domesday book explaining how 'the sovereignty of the land had become identified with the ownership of the soil'.¹⁴³ Further, he reached back to

¹³⁹ ibid.

¹⁴⁰ ibid.

¹⁴¹ ibid.

¹⁴² ibid.

¹⁴³ ibid 96-97.

historical instances in which the customary rights of a community had been incorporated into the legal system by referring to the Irish context in which ‘the chiefs and subchiefs surrendered their tribal claims, receiving back estates of inheritance held of the Crown’.¹⁴⁴

Nunan commented on the ‘peculiar character’ of the certificates of claim and wrote

What then is a certificate of claim? It cannot a mere official recognition of the existence of a valid transfer of an estate in fee simple from a native chief or chiefs. An estate in fee simple is an entity peculiar to English law and unlikely to have developed independently from the inner consciousness of Kapeni or Chinsomba or to be thought of by Germans, Poles, Italians or Hungarians, to who most of the land held by the Certificates of Claim in the Shire Highlands was confirmed by the Crown.¹⁴⁵

Nunan therefore held that the landowners who submitted their claims for enquiry and settlement by Commissioner Johnston did so in an informal surrender of their lands to the Crown in order that the Crown could grant good title on its own terms.¹⁴⁶ Nunan went on to say,

I know no other theory which can bring the theory of land tenure in this country into harmony with English legal ideas which offers so ready a solution of the difficulties of a thorny question. Absolute ownership of land is impossible in a subject here as well as in England, and the lands held by Certificate of Claim as well as other lands in the Protectorate are held of the Crown. Title to land in this country depends upon the grant from the Crown and not upon any agreements with native chiefs.¹⁴⁷

The English legal idea he was swayed by was the doctrine of tenures which in the protectorate, as in other imperial contexts framed the legal actors’ understanding of the rights in land.

¹⁴⁴ ibid 97.

¹⁴⁵ ibid.

¹⁴⁶ ibid 98.

¹⁴⁷ ibid 99-100.

On the issue of mineral rights, Nunan reviewed appeals from colonies in which the Crown exercises its prerogative over mines in the same way it does in England.¹⁴⁸ Construing that the title held by the holders of the certificates of claim were grants from the Crown, Nunan insisted that the prerogative ought to apply to these grants. He explained that there was a distinction at common law between base mines and royal mines.¹⁴⁹ Further, he claimed that prerogative right of the Crown to royal mines does not pass or lapse under a grant of land from the Crown unless the intention that it pass is expressed in ‘apt and precise words’.¹⁵⁰ In addition, where both base minerals and royal minerals were present, a grant of mines would constitute a grant of only the base minerals.¹⁵¹ Therefore, grants of mineral rights in certificates of claim would only include base minerals, and the Crown was held to own royal mines and the Commissioner of Mines had the right to grant prospecting licenses without the permission of the estate holder.

Nunan explicitly outlined the policy reasons for this decision. He noted that in the protectorate it would not be ‘advisable to exclude vast areas of land from independent prospecting’, particularly in the British Central Africa Protectorate where ‘every encouragement ought to be given to settlers and prospectors’.¹⁵² Companies with mineral rights in the protectorate were displeased to find that the Crown owned royal mines in their land and

¹⁴⁸ ibid 100.

¹⁴⁹ ibid citing *Case of Mines – Plowden* (1568); William Bainbridge, *A Treatise on the Law of Mines and Minerals* (2d edn, Butterworths 1856) 39.

¹⁵⁰ *Augusto Paolucci v Commissioner of Mines*, HCBCA (n 138) 101 citing *Woolley v Attorney-General of Victoria* (1877) 2 AC 163; [1877] 2 WLUK 28.

¹⁵¹ *Augusto Paolucci v Commissioner of Mines*, HCBCA (n 138) citing *Attorney General of British Columbia v Attorney General of Canada* (1889) 14 App Cas 14 295; [1889] 4 WLUK 3.

¹⁵² ibid 107.

would have the right to prospect without a license.¹⁵³ This issue affected all land held in terms of certificates of claim. This constituted 95% of all land held by European settlers or companies in the protectorate.¹⁵⁴ An appeal to the Court of Appeal for Eastern Africa at Zanzibar was then made on the grounds that the certificates of claim only confirmed the good title conveying mines and mineral rights which had already passed from the native chiefs to the current holders.¹⁵⁵ In other words, that the certificates of claim were merely evidence of the prior, effective transfer from the natives and not a Crown grant. Secondly, that the conditions on the certificates of claim, including the mineral clause, could not be imposed upon their new holders and that they were free to refuse them. Thirdly, that these lands were exempt from the Mining Ordinances.¹⁵⁶

Griffin, the Crown Prosecutor of the Protectorate, abandoned Chief Justice Nunan's argument that the certificate of claim was a grant by the British Crown after a surrender by their holder. Instead, relying on *Johnson v M'Intosh*,¹⁵⁷ Griffin isolated the issue at hand as whether it was in the power of native inhabitants to give, and settlers such as Paolucci the receive, title to land valid in English courts.¹⁵⁸ He argued that the Nyasaland chiefs had no such

¹⁵³ The Board of the British South Africa Company which held mineral rights in the North Nyasa district was particularly incensed and wrote to Sharpe inquiring if the 'notice has been issued under a misapprehension. Then the board wrote to the Secretary of State for the Colonies requesting that the licensing ordinances be withdrawn in so far as they apply to the holdings of the company. This request was denied. TNA FO 525/11 Robert Codrington to Alfred Sharpe, 15 March 1904; TNA FO 525/11 Edward Lyttleton to Robert Codrington, 10 February 1903; TNA FO 525/11 Alfred Sharpe to Robert Codrington, 11 April 1904.

¹⁵⁴ *Augusto Paolucci v Commissioner of Mines for the BCA Protectorate and British Central Africa Company vs Crown Prosecutor for the BCA Protectorate*, (unreported) Civil Appeals No 7 and 8 of 1904. HBM Court of Appeal for East Africa, reproduced in C.O. 525/11, 1 April 1905. (*Augusto Paulucci v Commissioner of Mines*, EACA 1904) 107.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid* 43.

¹⁵⁷ *Johnson v M'Intosh* (1823) 8 Wheat. 543. In *Johnson*, Marshall CJ held that the federal government alone that had the right to buy Indian lands, and that any other purchase by sale or occupation was void and incapable capable of being validated within the American legal system by later governmental ratification.

¹⁵⁸ *Augusto Paolucci v Commissioner of Mines*, EACA (n 154) 45.

power and instead, they surrendered a moral right to the property. Griffin argued that the authority of *Cox v African Lakes Company* was that all title to land must be derived exclusively from the colonial government as Crown agents, and natives under protection had only capability of surrendering their title to the Crown. Therefore, the terms of the certificates, including the mineral rights clause, came from the Crown and not the natives.

The Court of Appeal at Zanzibar was critical of several aspects of the procedure followed by the court a quo. First, they noted that Chief Justice Nunan insists on a petition for leave to appeal in every case, which is not required under any British Central Africa Appeals Ordinance. Secondly, they noted that Nunan ‘seems to have rewritten his judgment one year after the delivery of the original judgment in Paolucci’s case and to have ordered that the rewritten judgment should be taken as the real judgment’.¹⁵⁹

Although noting that Griffin argued his case ‘fully and ably’, the Court of Appeal distinguished *Johnson v M’Intosh* on the ground that the exclusive right of the Crown to purchase native title was rooted in the doctrine of discovery.¹⁶⁰ They stated that in the Nyasaland natives, with whom treaties of protection were concluded, were capable of transferring valid title to land. This directly conflicted with Nunan’s view that the natives were incapable of conceiving of and transferring estates in fee simple unknown in their system.¹⁶¹ The court stated:

The correct view of the document seems to be that HBM Government, acting only as protecting power after the declaration of the protectorate, wished to protect the European purchaser of land as well as the native: and so confirmed the *prior* titles and the holders expressly agreed to the conditions laid down in

¹⁵⁹ ibid 44.

¹⁶⁰ ibid 46-47.

¹⁶¹ ibid 47-48, contra *Augusto Paolucci v Commissioner of Mines* HCBCA (n 138)

order to get the recognition of those titles clearly given by the Protecting Power.¹⁶²

The court relied on the various agreements made with the natives to transfer native title, and Johnston's statement on the Certificates of Claim that he had 'found in every case that the [native] venders were the sole and rightful owners of the land', as evidence that Nyasaland natives could pass title. The court rejected Nunan's surrender-and-regrant theory and Griffin's argument as fictions which were unsupported by evidence or law.¹⁶³ Finally, the court held that on the plain language of the Mining Regulations 1899, all land held under certificates of claim were exempt from the regulations.¹⁶⁴

Upon receipt of this judgment, Nunan requested that this case be further appealed to the Judicial Committee of the Privy Council arguing that the Court of Appeal's decision had upset the foundation of land ownership in the protectorate.¹⁶⁵ Nunan insisted on the distinction between protectorates over semi-barbarous territories such as Nyasaland, referring to his judgment in *Cox v ALC*.¹⁶⁶ Further, he argued that natives in the protectorate had no understanding or ability to transfer estates in fee simple.¹⁶⁷

Nunan's request for an appeal was not immediately rejected. Instead, Lyttleton, Secretary of State for the Colonies, wrote to the Law Officers of the Crown requesting advice on, *inter alia*, whether there is any ground for the theory that in assessing land claims shortly after the assumption of the protectorate the Crown accepted a surrender of all such claims and

¹⁶² *Augusto Paulucci v Commissioner of Mines* EACA (n 154) 46.

¹⁶³ *ibid* 47.

¹⁶⁴ *ibid* 50.

¹⁶⁵ TNA CO 525/7 Nunan to Alfred Sharpe, 31 March 1905.

¹⁶⁶ *Cox v ALC* (n 67).

¹⁶⁷ TNA CO 525/7 Nunan to Alfred Sharpe, 31 March 1905.

then re-granted them subject to the ordinary conditions which might attach to a normal grant of the Crown.¹⁶⁸

The Law Officers of the Crown, Finley and Carson, found that Nunan's surrender-and-regrant hypothesis, while 'not to be swept aside lightly,' was not based in fact.¹⁶⁹ They stated,

We are unable to accept the theories propounded on these points in the judgments either of the court of first instance or of the Court of Appeal. We cannot see any ground for the hypothesis upon which the court of first instance proceeded, that there was a surrender to the Crown followed by a regrant, and the proposition put forward by the Court of Appeal that the grantees from the native chiefs had an independent title and might have objected to the conditions imposed in the Certificates of claim, appears to us to be quite untenable.

The Certificates of claim were issued under the authority of the British Government as the Sovereign Power which assumed the right of confirming or disallowing any claims to land, and we do not think that the conditions imposed in these certificates could be questioned in any municipal courts.¹⁷⁰

Thus, the Law Officers found the Court of Appeal's finding that the holders of the certificate of claim had obtained their title from the native chiefs untenable given the conditions attached to the certificates.¹⁷¹ Ultimately, the law officers advised against an appeal because the most critical part of the case which was that directly related to the outcome, that mineral rights passed to the holders of the certificates of claim, was decided correctly by the Court of Appeal.¹⁷²

On the basis of this advice, the Colonial Office declined to appeal. Harris, a legal adviser to the Colonial Office, was sympathetic to some aspects of Nunan's judgment. He understood the impulse to read the Crown prerogative of royal mines into the purported estates in fee simple stating, '[Nunan] was probably right in affixing to the ownership of the Crown

¹⁶⁸ TNA CO 525/7 Lyttleton to Law Officers, 14 July 1905.

¹⁶⁹ TNA CO 525/10 Finley RB and Edward Carson to Alfred Lyttleton, 15 August 1905.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

¹⁷² *ibid.*

those attributes which we are accustomed to associate with it'.¹⁷³ However, he was critical of Nunan's position regarding the effect of the declaration of a protectorate. He stated,

There is nothing to the point in Mr Nunan's judgment that there is a difference in the classes of protectorates, which affects the rights of the Crown on the Proclamation of the Protectorate. As far as I know, the proclamation of a protectorate always affects the rights of the inhabitants in the same way, and our present general view is that it does not of itself deprive the inhabitants of their right to land. Yet such a view is not inconsistent with the theory that the protecting government ipso facto acquires all rights over the land and at once regrants those rights to the Chief, Stool or community, as the case may be, in the same degree as they held them before.¹⁷⁴

Harris reasoned that Johnston's actions in the land settlement were an attempt to 'protect the natives against undue fraud'.¹⁷⁵ He rejected the notion that the Crown had obtained radical title by the assumption of a protectorate and considered it untenable that the declaration of a protectorate should immediately dispossess protected persons of their rights in land.¹⁷⁶

The various attempts to read Crown prerogatives into certificates of claim highlight not only the irregular nature of the land settlement in the protectorate but also the strategic use of legal concepts from other imperial polities in order to substantiate desired positions. In *Cox v ALC* and the court of first instance in *Augusto Paolucci*, Chief Justice Nunan sought to reaffirm the inalienability of native title.¹⁷⁷ Nunan adopted this surrender and regrant mechanism from

¹⁷³ TNA CO 525/11, Minute, Harris to HB Cox, 26 May 1906.

¹⁷⁴ *ibid*; 'Stool' is a term most associated with traditional political authorities (such chiefs and subordinate chiefs) in West Africa. See further Sharon F Patton, 'The Stool and Asante Chieftaincy' (1979) 13 *African Arts* 74; Sara Berry, 'Unsettled Accounts: Stool Debts, Chieftancy Disputes and the Question of Asante Constitutionalism' (1998) 39 *Journal of African History* 39.

¹⁷⁵ *ibid*

¹⁷⁶ *ibid*

¹⁷⁷ *Cox v ALC* (n 67); *Augusto Paolucci v Commissioner of Mines* HCBCA (n 138)

Irish legal history. The phrase ‘surrender and regrant’, while never used officially, was commonly used by historians to refer to the attempt to integrate Irish land into the Tudor state.¹⁷⁸ McCoy explained the process as a ‘surrender by the lords of what they claimed to be their lands, followed by a grant made with the intention that these lands be held for future titles valid in English law’.¹⁷⁹ Although his argument was abandoned by Griffin in the Court of Appeal and rejected as a fiction unsupported by evidence, it appears to have been an inventive way to preserve the inalienability of native title, explain the Crown prerogatives in the certificates of claim, and preserve the colonial government’s control over royal mines.

The result of the decision hinging on whether the native grantors of rights to land were considered at a sufficient level of civilised social organisation and proprietorship, including powers of cession and alienation, can be criticised. The problem of identifying such a state of grace was not lost on imperial legal minds at the time such as the Senior Parliamentary Counsel, Sir Henry Jenkyns. Writing in an attempt to align legal theory more closely with the practice of assuming extensive jurisdictional authority in protectorates, he insisted that powers exercised by the Crown should depend on the fact of the declaration of a protectorate,

Not on the question of 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 seems really absurd that the question of the jurisdiction of a British court should depend upon such points.¹⁸⁰

¹⁷⁸ WF Butler, ‘The Policy of Surrender and Regrant. I’ (1913) 3 *The Journal of the Royal Society of Antiquaries of Ireland* 47.

¹⁷⁹ GA Hayes McCoy, ‘The Royal Supremacy and Ecclesiastical Revolution, 1534–47’ in TW Moody, FX Martin and FJ Byrne (eds), *New History of Ireland. Early Modern Ireland, 1534-1691* (Oxford University Press 2009) 48.

¹⁸⁰ Jenkyns and Ilbert (n 25) 180.

Jenkyns asserted that colonial protectorates existed in a kind of legal vacuum into which positive law could be introjected and its authority asserted.¹⁸¹ He argued that realistically, the situation in protectorates differs little from conquests since the British position in relation to foreign powers is that ‘we hold this territory, and if you attempt to interfere, we shall maintain our position by the sword’.¹⁸² However, Jenkyns maintained that there was no obligation on the protecting power to assume the internal sovereignty, and thus, the protectorate was a financially appealing option as it did not require extensive administration by the Crown.¹⁸³ Sack notes that this let the ‘economic cat out of the legal bag’,¹⁸⁴ for the colonial protectorate’s purpose was to further imperial expansion while minimising financial outlay.

On the other hand, Lindley, writing in the 1920s argued that international law recognised the rights of ‘backward’ nations in the process of acquisition.¹⁸⁵ Lindley wrote that there was ‘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’.¹⁸⁶ Lindley’s position seems to accord more closely with the archival record on the land settlement in the protectorate. The recognition of indigenous rights revolved around the manner in which they were deemed to have lost them.¹⁸⁷

¹⁸¹ ibid ‘The rule of international law, that as a matter of right no state can claim jurisdiction of any kind within the territorial limits of another was limited by the court in the *Laconia Case* 2 Moo PC (NS) 161 to European or Christian states and to independent states. The rule, therefore, is inapplicable to the present case, as the protected state is neither European nor Christian nor completely independent’.

¹⁸² ibid 181.

¹⁸³ ibid.

¹⁸⁴ PG Sack, ‘Protectorates and Twists: Law, History and the Annexation of German New Guinea’ (1987) 10 *Australian Year Book of International Law* 1, 10.

¹⁸⁵ Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans 1926); Sack (n 184).

¹⁸⁶ Lindley (n 185) 46.

¹⁸⁷ Sack (n 184) 15.

5. Crown Land and ‘Waste’ Land

While the history of the protectorate and the effect of protection on the natives was felt sharply by the African residents of private estates, the rest of the land in the protectorate was purchased by the Crown, subject to mineral rights of corporations and individuals, or unalienated or waste land. The unalienated land raised a separate issue of the right of the Crown to deal with ‘waste land’. The Crown was considered to have authority to deal with waste lands in a colony, and the legal position developed to enable the same exercise of power in protectorates over semi-barbarous territories. In 1899, a ‘revolution’ occurred in a theory of protectorates enabling the Crown to exercise rights to waste land declared Crown land.¹⁸⁸

The first set of treaties purporting to confer rights to the Crown were concluded between 1885 and the declaration of the protectorate in 1889.¹⁸⁹ These treaties were the source of Crown rights to the position of the initial government headquarters of the protectorate,¹⁹⁰ a ‘European health retreat’ on Mulanje mountain,¹⁹¹ and land around the Shire River at Chiromo.¹⁹² These early treaties sought to transfer only rights in land for minimal consideration.¹⁹³ In addition, in the land settlement programme, Johnston reported that the total acreage of Crown lands was 1,431,417 acres, acquired through treaty and purchase.¹⁹⁴

¹⁸⁸ Johnston (n 17) 277–282.

¹⁸⁹ Ng’ong’ola (n 83) 284.

¹⁹⁰ TNA FO 84/1751, Hawes to FO, 14 January 1886; *ibid*.

¹⁹¹ TNA FO 403/185, Johnston to Foreign Office, 18 October 1893, enclosure 2; *ibid*.

¹⁹² TNA FO 84/2021, 18 October 1890, No 59, Enclosure 1.

¹⁹³ Ng’ong’ola (n 109) 284–285.

¹⁹⁴ TNA FO 881/6383 Memorandum on Land Claims in the British Central African Protectorate, August 1893. This land lay in the Lower Shire (1,152,000 acres), Upper Shire (97,000 acres), Milanji (173,000 acres), South Nyasa, (9,200 acres), Zomba (200 acres), Blantyre (11 acres), and Ruvo (6 acres). See Map in Appendix 1 of this thesis.

In his memorandum, Commissioner Johnston asserted that ‘the Crown has acquired and purchased in cession all waste and unoccupied land in its British Central Africa Protectorate and its claims are supported by documents which should be in the possession of the Foreign Office’.¹⁹⁵ There is notable imprecision in his use of the terms ‘acquisition’ and ‘purchase’, and it appears that Johnston is using legitimating legal rhetoric in dispatches to his superiors in order to justify his actions. This view aligns with the observations of Benton and Straumann on the use of legal language as a political device and may also offer insight into Johnston’s allusions to the Crown’s right of pre-emption.

In asserting that Crown land had been ‘acquired and purchased’, Johnston was referring back to the treaties he had concluded with native chiefs on various terms.¹⁹⁶ Some of these treaties included the proprietary rights, and for those which did not, Johnston assumed the right to deal with waste land. Once the protectorate had been declared, the Foreign Office sent Commissioner Johnston model form treaties including clauses allowing British subjects to ‘build houses and possess property according to the laws in force in this country’, and promise that the signatory would not transfer territory or enter into any treaties with foreign powers.¹⁹⁷ As discussed above, Johnston also erroneously claimed that these treaties were the source of the Crown’s rights of pre-emption. Pursuant to this belief, the 1895 Government Land Regulations encompassed all land that had not been alienated by native chiefs and authorised the Commissioner to grant leases to settlers after a bidding process.¹⁹⁸

¹⁹⁵ TNA FO 2/128 Memorandum on Governmental Rights Over the Unoccupied or Waste Land in its BCA Protectorate, Johnston to FO 4 June 1897; TNA FO 84/2197 Johnston to FO, 13 October 1892.

¹⁹⁶ Complete list of treaties found in TNA FO 881/6383 List of Treaties made on Behalf of Her Majesty’s Government in British Central Africa Protectorate and Adjacent Territories.

¹⁹⁷ TNA FO 881/6383, Form Treaty sent to Commissioner Johnston, 31 May 1889.

¹⁹⁸ Queen’s Regulations Respecting Government Land Sales 1895, 10 April 1895. Reproduced in *British Central Africa Gazette*, 22 April 1895.

However, the ability of the Crown to grant land out of waste lands was awaiting definite resolution. Due to issues involving the assumption of these powers in the British East Africa Protectorate, in late 1899, the law officers stated that ‘protectorates, such as those now under consideration, really involve the assumption of control over all lands unappropriated’.¹⁹⁹ It was considered that tribes in uncivilised territories had a very limited conception of ownership in land and this assumption of power was necessary for the ‘good government and development of the protectorate’.²⁰⁰

Finally, the British Central Africa Order in Council defined Crown Land as ‘all public lands in the protectorate which are subject to the control of His majesty by virtue of any treaty, convention or Agreement, or of His Majesty’s Protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever’.²⁰¹ The Commissioner was vested with the power to dispose of this land.

6. Conclusion

The protectorate became one of the most powerful tools for the extension of the British empire without incurring all the responsibility of a colony.²⁰² However, the acquisition of land and the search for orderly proprietary relations in a protectorate was a thorny subject – being, as it were, an experimental medium, a politically expedient invention on uncertain footing. This chapter has analysed the purported grant of estates in fee simple in a protectorate, the anomalous nature of Crown lands in a territory outside of the Crown’s dominions, the authority

¹⁹⁹ TNA FO 2/259 Webster, Finlay to Salisbury, 13 December 1899; Johnston (n 17) 279.

²⁰⁰ *ibid.*

²⁰¹ British Central Africa Order in Council 1902 No. 663 Published in the *British Central Africa Gazette*, 31 October 1902.

²⁰² Sack (n 184).

of the native traditional authorities before and after the declaration of the protectorate, the global reservation of mineral rights and powers of assignment of these independently of the possessory owner, and the insistence that actions were undertaken for the protection of settlers and natives alike.

An analysis of Commissioner Johnston's communications regarding the land settlement programme reveals that he alluded to the Crown's right of pre-emption in hierarchical political contexts to clothe his actions in familiar legitimating language. An analysis of his methods show that he sought to ensure consent had been given for land alienated and that a fair price had been paid. Questions of the native chiefs' authority to alienate land out of their own system were subsumed by reference to the Crown's right of pre-emption and residual prerogatives to order the protectorate. In the subsequent jurisprudence of the protectorate, the question of native ability to alienate land was given more attention. Within the protectorate, Nunan rejected the notion that natives could be able to alienate estates in fee simple and rather sought to diminish the importance of native proprietorships and sovereignties. On the other hand, The Zanzibar Court of Appeal placed greater emphasis on the treaties concluded with Africans and departed from Nunan's view. The critical point of divergence between the two judgments hinged on where to position the Nyasaland Chiefs on the scale of civilisation.²⁰³

In this context, the words of Anghie ring true, that 'the development of the idea of sovereignty in relation to the non-European world occurs in terms of dispossession, its ability to alienate its lands and rights'.²⁰⁴ The legal doctrinal formulations used to elucidate the

²⁰³ *Augusto Paolucci v Commissioner of Mines* HCBCA (n 138); *Augusto Paolucci v Commissioner of Mines*, EACA (n 154) 107.

²⁰⁴ Anghie (n 9) 105.

foundation of private property were strained in the colonial protectorate and remained conceptually unresolved.

5. LAND AND LABOUR IN BRITISH CENTRAL AFRICA: THANGATA ON PRIVATE ESTATES

*Ife kuti muyende m'mudzimu tilipakati pa company konsekuno
Tikamamwalira timayikidwa nkati mwa company
Nde fuso nkumati; kodi ngati iwo malo ali awo, ambuyathu anayikidwa nkati mwa
company
Kodi mzunguyo chimukonda ndi chani kumayang'anila ambuyathu okufa kumeneko?*

If you walk around the villages, you will see we are surrounded by the company.
When we die, we are buried inside the company. The question then becomes; If the
land is really theirs, and our grandfathers are buried within the company, what
pleasure does it bring the white man to watch over our dead grandfathers?¹

--

You load sixteen tons what do you get
Another day older and deeper in debt
Saint Peter don't you call me 'cause I can't go
I owe my soul to the company store.²

1. Introduction

This chapter deals primarily with a system of labour used in southern Nyasaland known as
'*thangata*'.³ However particular the system was to southern Nyasaland, it bore significant
similarities to regulation and control of communal labour in other parts of British colonial
Africa and beyond.⁴ *Thangata* was a customary institution of reciprocal performance which

¹ LandNet Malawi, Documentary on Land Grabbing (2015) <<https://youtu.be/WAgY52VKD-I?t=1610>> accessed 20 February 2022. (My translation).

² The first lines of the song 'Sixteen Tons' penned by Merle Travis. Genuis, Sixteen Tons, <<https://genius.com/11900667>> accessed 9 February 2022.

³ A Nyanja word originally meaning 'to help'. David Clement Scott and Alexander Hetherwick, *Dictionary of the Nyanja Language: Being the Encyclopædic Dictionary of the Mang'anja Language* (Religious Tract Society 1929) 59.

⁴ Opolot Okia, *Communal Labor in Colonial Kenya: The Legitimization of Coercion, 1912-1930* (Palgrave Macmillan 2012); Rachel Smith, 'The Meaning of "Free" Work: Service as a Gift, and Labor as a Commodity for Ni-Vanuatu Labor Migrants' in CM Hann (ed), *Work, Society and the Ethical Self: Chimeras of Freedom in the Neoliberal Era* (New York: Berghahn 2021).

later became a mechanism for coerced labour in the colonial era.⁵ *Thangata* was one of the chief characteristics of British rule in Nyasaland and one of the central aspects of Malawian colonial legal history regulating occupation and activity on land.⁶ The emergence of *thangata* arrangements was a direct result of Commissioner Johnston's land settlement programme examined in the last chapter. Johnston inserted a non-disturbance clause into certificates of claim granting settlers title in order to protect the occupational rights of Africans on private estates.

The two texts quoted above are separated in time and space, yet both express conditions under different imperial conditions of exploitative labour relations in terms of a profound sense of unfreedom. And this exploitation is woven into the history of imperial law. The first quotation is from a disgruntled subsistence farmer from Thyolo, Malawi. He describes his context where the initial colonial dispossession of land has been coupled with land grabbing by multinational corporations. The quote reflects the deep ancestral connection to land felt by African labourers whose villages are encircled by plantations and settler estates on land their ancestors once owned. In their view, the perceived injustice of their situation is closely linked to the initial alienation of land they maintain rightfully belongs to them. This sentiment is deeply reminiscent of the lives of Africans living and working on private estates during the early colonial period in Nyasaland.

⁵ Terence Ranger, 'The Invention of Tradition in Colonial Africa' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press 1992); JAK Kandawire, 'Thangata in Pre-Colonial and Colonial Systems of Land Tenure in Southern Malawi with Special Reference to Chingale' [1977] *Africa: Journal of the International African Institute*.

⁶ Melvin E Page, 'The War of Thangata: Nyasaland and the East African Campaign, 1914–1918' (1978) 19 *The Journal of African History* 87; JA Kamchitete Kandawire, *Thangata: Forced Labour or Reciprocal Assistance?: A Case Study of the Conversion of a Traditional African Institution into a Colonial Institution of Production with Special Reference to Southern Malawi* (Research Publication Committee of the University of Malawi 1979); Bridglal Pachai, 'The Issue of Thangata in the History of Nyasaland' (1974) 3 *Journal of Social Science* 20.

The second quote is from a country song called ‘Sixteen Tons’ describing the conditions of the truck system. The truck system is defined as a ‘set of closely related arrangements whereby some form of consumption is tied to the employment contract’.⁷ The system was in existence since the 15th century in Britain, and once workers had contracted for a fixed term, they would be remunerated through clothing, board and lodging – coupled with exorbitant prices for goods and services.⁸ There is a strong argument that the prices at the truck store would be used to claw back some of the wage expenses.⁹ Between the 19th and 20th centuries, this system had spread to numerous parts of the British Empire, including South East Asia, Australia and sub-Saharan Africa.¹⁰ The striking aspect of the quote above is the feeling of belonging or owing oneself to the company. This bears similarity to the sense of belonging to the company even after death expressed in the quote above. These two quotes highlight the global and transnational nature of labour regulation in the 19th and 20th centuries prevalent throughout the metropole and imperial possessions.¹¹ In addition, the quotes poignantly express the point that the rest of this chapter illustrates: the role that settler corporations played in the lives of British protected persons throughout the empire and beyond was profound, defining, and enduring.

⁷ George W Hilton, ‘The British Truck System in the Nineteenth Century’ (1957) 65 *The Journal of political economy* 237; Karin Lurvink, *Beyond Racism and Poverty: The Truck System on Louisiana Plantations and Dutch Peateries, 1865-1920* (Brill 2017).

⁸ Simon Stevens, ‘A Social Tyranny: The Truck System in Colonial Western Australia, 1829-99’ [2001] *Labour History* (Canberra) 83, 85; Hilton (n 7) 237.

⁹ Hilton (n 7) 237.

¹⁰ Lurvink (n 7) 2; Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton University Press 1996).

¹¹ Douglas Hay and Paul Craven, ‘Introduction’ in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004).

In both contexts, labour was regulated by master and servant law.¹² This area of law fixed the legal boundaries between free and unfree labour in Britain and throughout its imperial possessions for over five centuries.¹³ Hay and Craven identify that although this law manifested in various iterations, there were three unifying characteristics.¹⁴ First, the regulation of labour between the employer and employee was a matter of private contract law whereby the servant agreed to perform certain tasks for wages.¹⁵ Secondly, there was commonly provision of summary enforcement by middling officials of the British or colonial regime in the event of breach – typically by unsupervised lay justices and magistrates.¹⁶ Thirdly, penal sanctions were readily levied against uncooperative workers. Instead of damages for breach of contract, the employee in breach would be subject to imprisonment, forced labour, corporal punishment, or fines.¹⁷

The juxtaposition of these disparate instances of labour regulation reflects the shift from the point of view of the nation-state towards the centrality of empire taking place in imperial legal history in general and imperial labour law history in particular.¹⁸ Duve argues that the themes of land and labour previously explored in terms of a ‘methodological

¹² Douglas Hay and Paul Craven, ‘Master and Servant in England and the Empire: A Comparative Study’ (1993) 31 *Labour* (Halifax) 175, 175 Craven and Hay describe Master and Servant law as ‘a complex of legislation and case law that defined the terms of the individual contract of employment...distinguished by the use of penal sanctions, notably for breach by the servant (but not the master)’.

¹³ *ibid.*

¹⁴ Hay and Craven (n 11) 1.

¹⁵ *ibid.*

¹⁶ *ibid*; Inge van Hulle, *Britain and International Law in West Africa: The Practice of Empire* (First, Oxford University Press 2020) 14.

¹⁷ Hay and Craven (n 11) 1.

¹⁸ Lauren Benton and Richard J Ross, ‘Legal Pluralism and Empires, 1500-1850’ in Lauren Benton and Richard J Ross (eds), *Empires and Legal Pluralism Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World* (New York University Press) 1; Alan Lester and Fae Dussart, ‘Trajectories of Protection: Protectorates of Aborigines in Early 19th Century Australia and Aotearoa New Zealand’ (2008) 64 *New Zealand Geographer* 205, 2.

nationalism’ are best understood using a transnational framework.¹⁹ Hay and Craven note that despite master and servant law being arguably the most significant in the lives of British imperial subjects, it does not readily lend itself to comparative (or transnational) analysis. They suggest the difficulty of analysis is due to this kind of law being handled in lower courts by lay justices.²⁰ Master and servant laws are typically creatures of statute housed in municipal regulations and colonial legislation.²¹ Furthermore, they argue that it was law ‘for dealing with poor people, recalcitrant serfs or labourers or artisans, and then ex-slaves, native workers, and indentured coolies’.²² Whether on the plantations in the West Indies, tea estates in Nyasaland, or the textile industry in Australia, labour regulation was a vital issue for the British Empire leading to an elaborate network of master and servant ordinances.²³

Despite master and servant law being perceived as ‘low law’, administered by lay justices or middling officials, there is much value in exploring the administration of justice in this protectorate. As Benton and Ford explain, imperial practice is framed as the pursuit of imperial order where middlemen were marshalled to decrease instances of despotism to prevent its spread to the metropole.²⁴ In the middling officials, much of the story of colonial governance is revealed as they would often make decisions without much oversight from the colonial government or the metropole.²⁵ In colonial Africa, due to the paucity of financial resources,

¹⁹ Thomas Duve, ‘Global Legal History A Methodological Approach’, *SSRN Electronic Journal* (2016); Marcel van der Linden, *Workers of the World: Essays toward a Global Labor History* (Brill 2008) 3.

²⁰ Hay and Craven (n 11) 55.

²¹ *ibid* 13.

²² *ibid* 55.

²³ *ibid* 4.

²⁴ James Epstein, *Scandal of Colonial Rule: Power and Subversion in the British Atlantic during the Age of Revolution* (Cambridge University Press 2012).

²⁵ Lauren A Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Harvard University Press 2018).

local variance of cultures, and slow communication, the administration tended to depend strongly on the expertise and judgement of the ‘man on the spot’.²⁶ Therefore, the majority of the interactions of African people with the machinery of colonial governance was through these middling officials and African’s lives were shaped by their decisions.

Section 2 explores the institution of *thangata*. It will recount the conditions of pre-colonial *thangata* and explain how the institution became a key part of colonial regulation of labour. Section 3 outlines legal conceptions of free labour in imperial history and of the development of master and servant law. This will frame the discussion on the specific iteration of unfreedom in labour agreements observable in Nyasaland and enables insights on ‘how law shapes and is shaped by the societies in which it is embedded’.²⁷ Section 4 examines the emergence of a colonial version of *thangata* on the large estates of southern Nyasaland and the futility of the labour regulations in force at the time. Particular focus is placed on the ordinances regulating the labour contracts and their enforcement in magistrates’ courts. Section 5 considers the legal challenges to *thangata* and the entrenchment of extra-legal enforcement of labour arrangements. Finally, section 6 concludes.

2. The Institution of Thangata

Thangata was a term for precolonial labour arrangements whereby members of a particular village would render labour services to the chief of that village. Precolonial *thangata* cannot be understood without a brief description of political authority in the Nyasaland region. The

²⁶ Bruce Berman, ‘Structure and Process in the Bureaucratic States of Colonial Africa’ (1984) 15 *Development and Change* 161, 176.

²⁷ Hay and Craven (n 11); Robert L Kidder, ‘Toward an Integrated Theory of Imposed Law’, *The Imposition of Law* (Academic Press 1979).

period under study, the Nyasaland region in the late 19th century, follows fall of the Maravi Empire, which was the tribal paramount authority that ruled from the 15th century.²⁸ For much of the 17th century, the Maravi empire, which depended on the trade of ivory to Kilwa and Mozambique, stretched nearly from Luangwa to the Mozambique island on the opposite end in the east.²⁹ On the traditional picture of the Maravi Empire, the empire emerged in the 15th century with the Phiri clan and then over time divided into separate subsidiary states due to divisions within the kingdom.³⁰ Once this powerhouse of authority fell away, there were several disparate chiefs in the region. This decline worsened in the 18th century with the arrival of the Yao and Bisa traders.³¹

In addition to the disintegration of central authority, there were several factors which further destabilised African political systems in Nyasaland. The first was the entrance of the Ngoni and Yao tribes who became overlords of the original inhabitants of the Nyasa region.³² The Yao chiefs raided other tribes and sold on people to the Arabs for transportation to Mozambique.³³ It is essential to note that the slave trade occurred on a scale unparalleled in any other region in East and Central Africa in the Nyasaland area.³⁴

²⁸ Brian Morris, 'The Ivory Trade and Chiefdoms in Pre-Colonial Malawi' (2006) 59 *The Society of Malawi Journal* 6, 59; T Price, 'More about the Maravi' (1952) 11 *African Studies* 75.

²⁹ Robin Palmer, 'Johnston and Jameson: A Comparative Study in the Imposition of Colonial Rule' in Bridglal Pachai (ed), *The Early History of Malawi* (Longman 1972) 297.

³⁰ Brian Morris, *An Environmental History of Southern Malawi : Land and People of the Shire Highlands* (Springer Science+Business Media 2016) 57–60 Morris Challenges this orthodox picture by questioning the unity and the power of the Maravi clan, arguing that it has been overstated over history and uses evidence from Portuguese travellers who had observed several distinct tribes.

³¹ Palmer (n 29) 297.

³² Morris (n 30) 57–63; Morris (n 28) 77.

³³ Landeg White, *Magomero: Portrait of an African Village* (Cambridge University Press 1987) 26–29.

³⁴ Palmer (n 29) 297.

Within these contested political units, those who had land rights did so in terms of African customary systems of landholding. This is a system of communal rather than individual rights to land where the land belongs to the community as a whole, is administered by the chief, and is allocated to families for use. While African customary land systems have many differences at the level of community and tribe, most have central defining features. There have been different theories to define these and describe the nature of African landholding. One model is that of the trust. This supposes that African political authorities are trustees and co-owners of the ‘communal land’.³⁵ These trustees then administer the land for the benefit of the members of the communities.³⁶ However, some have argued that the application of a ‘trust’ doctrine to the administration of the African customary land is a denial of the corporate character of African communities vesting proprietorship and control directly in the occupants.³⁷

A different theory is that of the ‘African Commons’³⁸ In his argument, Okoth-Ogendo defines the ‘commons’ as ‘ontologically organised land and associated resources available

³⁵ Kandawire, *Thangata: Forced Labour or Reciprocal Assistance?: A Case Study of the Conversion of a Traditional African Institution into a Colonial Institution of Production with Special Reference to Southern Malawi* (n 6) 2.

³⁶ *ibid.*

³⁷ HWO Okoth-Ogendo, ‘The Tragic African Commons: A Century of Expropriation, Suppression and Subversion’ [2012] Occasional Paper No. 24. Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape 111.

³⁸ *ibid* 109 Okoth-Ogendo argues that Hardin’s metaphor was rooted in a series of false assumptions based on a misunderstanding of customary land tenure. These false assumptions include the assumption that communities could not have a legal persona as communities, that decision making in a collective land ownership would have to be made through community participation, and that rights to property must ultimately derive from a sovereign.

exclusively to specific communities'.³⁹ He posits that land in the commons is held as a 'transgenerational asset', and that it has various levels of hierarchical social organisation that appealed to the common values and principles of the commons.⁴⁰ While land was held in this way prior to imperial intervention, communities were able to use the land 'without compromising the ontological demands of the past, and the heritage to future generations'.⁴¹

While sharing the general similarities with African customary land, there are some specificities borne by customary land in the Nyasaland region. Customary land is either matrilineal and uxori-local (southern Nyasaland) or patrilineal and virilocal (northern Nyasaland).⁴² Customary tenure is diverse but generally rights to land are a web of interests which are attained through accepted membership of a social unit such as kinship.⁴³ African occupants of Crown land continued to practice their customary rites without much interference. However, these practices brushed up against landowners' control of the estates where Africans were resident on private land.

³⁹ *ibid* 108; Alexandra Carleton, 'The "Other" Relationship to Land: Property, Belonging, and Alternative Ontology' (2021) 34 *Canadian Journal of Law and Jurisprudence* 29, 31–33 This is a description of an alternative conception of land rights where land is inextricably linked with identity, both of the possessor and of generations past and future. Carleton defines ontological in this sense as 'pertaining to the initial state, or underlying ethos of how one is'.

⁴⁰ Okoth-Ogendo (n 37) 108.

⁴¹ *ibid*.

⁴² Clement Ng'ong'ola, 'Design and Implementation of Customary Land Reforms in Central Malawi, The' (1982) 26 *Journal of African Law* 116.

⁴³ JA Kamchitete Kandawire, *Thangata : Forced Labour or Reciprocal Assistance? : A Case Study of the Conversion of a Traditional African Institution into a Colonial Institution of Production with Special Reference to Southern Malawi* (Research Publication Committee of the University of Malawi 1979) 38.

As the advent of protectorate rule transformed the political system in Nyasaland, the authority of the chiefs was in flux. At times, their authority was vehemently denied or invalidated. One instance of this was in *Cox v African Lakes Company* where Judge Nunan stated that ‘the chiefs have no power or influence or very little’.⁴⁴ He went on to state that African chiefs in Nyasaland without the support of the administration were as ‘a reed shaken in the wind’.⁴⁵ Yet it was difficult to deny that the relationship between the chiefs and the administration was at the very least interdependent, even in these early years before a policy of indirect rule was implemented.⁴⁶ For instance, the administrative officials often lamented about the difficulties of collecting tax or recruiting labour without the assistance of African political authority.⁴⁷

Thangata had roots in a system of voluntary reciprocal performance between members of a community. Kandawire describes *thangata* as a form of mutual action: assistance for one task could be reciprocated by assisting in a different task, staged amongst neighbours, friends, kin and the general community.⁴⁸ For instance, in building a hut, various members of the

⁴⁴ *Cox v The African Lakes Company* (CCBCA, 16 July 1901) in TNA FO 2/471 page 341, Consular Court at Blantyre, Tuesday 16 July 1901.

⁴⁵ *ibid.*

⁴⁶ Erik Green, ‘Indirect Rule and Colonial Intervention: Chiefs and Agrarian Change in Nyasaland, ca. 1933 to the Early 1950s’ (2011) 44 *The International Journal of African Historical Studies* 249.

⁴⁷ Colin Baker, ‘Tax Collection in Malawi: An Administrative History, 1891-1972’ (1975) 8 *The International Journal of African Historical Studies* 40, 49.

⁴⁸ Kandawire, ‘Thangata in Pre-Colonial and Colonial Systems of Land Tenure in Southern Malawi with Special Reference to Chingale’ (n 5).

community would assist and on a later date if someone else required assistance with another task that assistance would be proffered.⁴⁹

Thangata can be framed as a pattern of reciprocal gift-giving in pre-capitalist societies.⁵⁰ Mauss argues that in societies previously described as devoid of markets, there existed markets with exchange regimes that differed from the western capitalist system. In these markets, voluntary exchanges are not subject to priced conditions, but rather are governed by social pressure and expectations to receive and then reciprocate the gift, though the quantum, return, and even the destination of the return may be left to the discretion of the initial donee.⁵¹ The benefits in integration of the parties in a web of mutual obligation are considerable, but there can also be detriments in that power and domination can be exercised through the pressure of expectations allied to a risk of opportunism and defection and in the wielding of discretions. The impact of the capitalist colonial economy on Nyasaland society was to shift the Nyasaland political economy further away from gift exchange toward priced and conditioned commodity exchange both for good and bad.⁵²

Where *thangata* was practiced between a chief and the members of the village, it appeared on the surface to be a beneficial reciprocal performance on the Maussian gift

⁴⁹ Kandawire, *Thangata: Forced Labour or Reciprocal Assistance?: A Case Study of the Conversion of a Traditional African Institution into a Colonial Institution of Production with Special Reference to Southern Malawi* (n 6) 11.

⁵⁰ Marcel Mauss, Jane I Guyer and Bill Maurer, *The Gift* (HAU Books 2016). Mauss translated prestation as ‘provision of a service’ but shifted away from the liberal economic view that services were commodities.

⁵¹ CA Gregory, *Gifts and Commodities* (Academic Press 1982) 10–16.

⁵² ibid 17; Marshall Sahlins, *Stone Age Economics* (Routledge 2013).

exchange model. However, in White's study of the Magomero estate, he shows that prior to the colonial conception of the *thangata* system, Yao chiefs would use *thangata* as a way of coercing labour from members of their villages.⁵³ At the very least, this would suggest that in some tribes or villages, customary *thangata* was either subject to abuse or contained an involuntary element. A commission of inquiry into a 'native rising' that occurred in 1915 contains testimony from African witnesses on the nature of pre-colonial *thangata*.⁵⁴ Joseph Bismarck, a Mozambican migrant who was in the employ of the Blantyre mission, stated that the chief would prepare a feast, and the community members would work from the early morning till noon, when the food would be brought out.

They had no way of keeping time, but I should say it would be about 6.30am to 7am when they started working away till midday. And then the food and beer came. And after that they marched to the chief's village in peace and with no signs of grief. And they all sat around the chief's courtyard. And all the food was brought. And after feasting away, they began to dance.... This is what is known by the natives as Tangata.⁵⁵

The commissioners in seeking information about precolonial *thangata* asked Bismarck:

Casson: In times gone by the natives had to go pay tribute to the chief, and work for the chief, their headmen and also their fathers for two months also?

Bismarck: Never. – I was under chief Malemia, and the only tax he had was only one day's work.

⁵³ White (n 33) 57–58.

⁵⁴ Chapter 5 deals with the Chilembwe rising in detail. See also George Simeon Mwase and Robert I Rotberg, *Strike a Blow and Die: The Classic Story of the Chilembwe Rising* (2nd edn, Heinemann Educational 1975); George Shepperson and Thomas Price, *Independent African: John Chilembwe and the Origins, Setting and Significance of the Nyasaland Native Rising of 1915* (Edinburgh University Press 1969).

⁵⁵ Joseph Bismarck's statement upon appearing before the Commission of Inquiry into the Chilembwe Rising, 14 July, 1915 at TNA CO 525/66 folio 345; Lewis Mataka Bandawe and Bridglal Pachai, *Memoirs of a Malawian: The Life and Reminiscences of Lewis Mataka Bandawe* (CLAIM 1971) 61–62; 74–5; 135.

Metcalfe: But when they boys went away and worked, and came back they had to give some of the money to the chief?

Bismarck: If I have a child and he goes to work is it not right that he should give me part of his pay? It is not tax. It is simply a sign of love for the father.

Turnbull: Is it not the same with the Government – that the child should love his father?⁵⁶

Bismarck responded that the difference was the labour certificate, the document each resident had to get signed to avoid paying double the tax as will be explained below.⁵⁷ Furthermore, the extended feeling of kinship that existed between the chief and his villagers was missing from the new labour relationship with the colonial government. Thus, the previous motivations for doing the labour fell away. Once this shift from gift to commodity occurs services which may have had moral, sentimental, religious, and economic facets to it are ‘stripped down to leave purely economic exchanges’.⁵⁸

A different statement to the Commission described the coercive nature of the colonial *thangata* system:

Tangata means help, but the tangata which is done in the plantations is not tangata at all, it is compulsory labour. And the labour certificate is the same as the Tangata, a difficulty put upon the natives, the natives admit it for fear and nothing else, they know if they refuse, they will be punished. They say this is nkhondo (war) what can we do?⁵⁹

⁵⁶ Oral testimony of Joseph Bismarck, 14 July 1915, reproduced in John McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (First, Oxford University Press 2015) 165.

⁵⁷ *ibid.*

⁵⁸ Jonathan Parry, ‘The Gift, the Indian Gift and the “Indian Gift”’ (1986) 21 *Man* (London) 453, 457.

⁵⁹ Reverend Harry Kambwiri’s statement upon appearing before the Commission of Inquiry into the Chilembwe Rising, 13 July 1915 McCracken (n 56) 157.

These quotes are backward-looking, with Africans giving testimony as to the difference of colonial *thangata* from its precolonial origins. They describe the link between help or service and *thangata* which is now lost when the service is rendered to a landlord rather than a chief. It is important to note that amidst the changes in political society as a result of colonial governance, customary laws and norms were often asserted for particular ends, rather accurately recounted and preserved.⁶⁰ In the context of the commission interviews, it would have been beneficial for witnesses to idolise customary *thangata* to bolster their criticism of colonial *thangata*. However, this chapter argues that the characteristics of colonial *thangata* were uniquely oppressive.

3. Legal Conceptions of Free Labour

In order to usefully characterise the nature of the labour arrangements in Nyasaland, it is necessary to construct a theoretical framework with which to classify forms of labour. Work is traditionally systematised according to the human relations involved, for instance, slave and slave-owner or master and servant.⁶¹ Within these classifications are others to denote the degree of compulsion inherent in the labour characterisation. To this end, labour is typically categorised into either free or unfree labour. Here chattel slavery is on one end of the spectrum as unfree, while wage labour is considered to be on the other end.⁶² However, some argue this distinction bedevils the study of labour with unhelpful dichotomies and that a better approach

⁶⁰ Martin Chanock, 'Neo-Traditionalism and the Customary Law in Malawi' (1978) 10 *Journal of Legal Pluralism and Unofficial Law* 80; Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985).

⁶¹ Karin Hofmeester and others, 'The Global Collaboratory on the History of Labour Relations, 1500-2000: Background, Set-Up, Taxonomy, and Applications' (V1 edn, 2016) 5 <<https://hdl.handle.net/10622/4OGRAD>> accessed 22 February 2022.

⁶² GE. de Ste Croix, 'Slavery and Other Forms of Unfree Labour' in Léonie J Archer (ed), *Slavery and Other Forms of Unfree Labor* (Routledge 1988). Ste Croix discusses a three-fold classification of unfree labour, Chattel slavery, serfdom and debt bondage.

might involve analysing the ‘varieties of unfreedom’ while recognising that they are often ‘interlaced with dimensions of freedom’.⁶³ The boundary between free and unfree labour has shifted dramatically over the centuries and nothing about these categories is natural or logical. Indeed, the maintenance of the boundary has been argued to mislead about the nature of both slavery and employment.⁶⁴

This section of the thesis will explore how to address the issue of freedom in the labour *thangata* arrangements, which are essentially a form of wage labour with payment in kind – that is, access to land. Next, Master and Servant laws which regulated labour relations both in the metropole and in possessions will be discussed. This section ends with a note on how labour coercion was typically legitimised in the British empire generally, and in Africa specifically.

a. Free and ‘Unfree’ Labour

The grounds on which labour is considered ‘free’ or ‘unfree’ are many and varied. Consequently, the line between freedom and unfreedom has been drawn and redrawn differently throughout the centuries and between contexts. The boundary is not logical. It is a conventional boundary made on political and moral bases.⁶⁵ A modern distinction between the two focuses on whether the pressure brought to bear on the labourer is pecuniary (debt, fines,

⁶³ Stephanie Barrientos, Uma Kothari and Nicola Phillips, ‘Dynamics of Unfree Labour in the Contemporary Global Economy’ (2013) 49 *The Journal of Development Studies* 1037; Uma Kothari, ‘Geographies and Histories of Unfreedom: Indentured Labourers and Contract Workers in Mauritius’ (2013) 49 *The Journal of Development Studies* 1042.

⁶⁴ Hay and Craven (n 11) 28.

⁶⁵ Robert J Steinfeld, ‘Changing Legal Conceptions of Free Labor’ in Stanley L Engerman (ed), *Terms of Labor: Slavery, Serfdom, and Free Labor* (Stanford University Press 1999) 144.

removal of benefits) or nonpecuniary (corporal punishment, incarceration).⁶⁶ However, this has not always been the case, for instance, slavery – the classic example of unfreedom in labour was, in one tradition of thought, considered a ‘free’ or voluntary implicit agreement where the slave consented to total control over his person in exchange for his life.⁶⁷ Others have drawn this distinction on the basis of the conditions of employment or the length of the employment contract.⁶⁸ Considering the unfixed nature of the boundary, this section considers how labour freedom in Nyasaland will be analysed.

A pervasive narrative surrounding the progression of labour through the years goes as follows: after the abolition of chattel slavery in the 19th and early 20th century, only ‘free’ wage labour remained.⁶⁹ This idea flows from a view positing that with each new change in the historical arc came a distinctive form of labour.⁷⁰ For instance, the Middle Ages were defined by serfdom; then when feudalism fell away, mercantilism brought forth novel forms of labour in replacement of serfdom.⁷¹ In due course, the market regulation in mercantilism was relaxed, and a free market society emerged in the 19th century, and with it came free wage labour.⁷² While this narrative is no longer uncritically accepted, Steinfeld argues that it has significantly affected the way we think labour was constituted in the 18th and 19th centuries.⁷³ However,

⁶⁶ Robert J Steinfeld, ‘Introduction: Free Wage Labor in the History of the West’ in Robert J Steinfeld (ed), *Coercion, Contract, and Free Labor in the Nineteenth Century* (Cambridge University Press 2001) 14.

⁶⁷ *ibid.*

⁶⁸ *ibid* 1.

⁶⁹ Marcel van der Linden and Magaly Rodriguez Garcia, *On Coerced Labor : Work and Compulsion after Chattel Slavery* (Brill 2016) 1; Steinfeld (n 66) 1; David Eltis, ‘Labour and Coercion in the English Atlantic World from the Seventeenth to the Early Twentieth Century’ (1993) 14 *Slavery & Abolition* 207, 207.

⁷⁰ Steinfeld (n 66) 1.

⁷¹ *ibid.*

⁷² *ibid* 1–2.

⁷³ *ibid* 2.

Brass argues that the historical arc of labour relations does not necessarily progress from unfree to free, and though the nature of unfreedom may differ, modern capitalism remains wrought with forms of labour unfreedom.⁷⁴

In support of the common narrative of the chronological move towards labour freedom was the idea that the essential freedom of wage workers was the freedom from strict enforcement of their contracts.⁷⁵ On this view, employers could simply rely on market forces to compel labourers to work at prices employers were willing to pay.⁷⁶ In theory, employers would only resort to nonpecuniary compulsion in places where land was abundant, and labour was in short supply.⁷⁷ During the 19th century, this description characterised the periphery of empire, where settlers were taking on agricultural endeavours in relatively sparsely populated territories. However, Steinfeld notes his surprise at the continuing influence of this narrative given the growing literature illustrating the criminal sanctions English labourers were subject to on breach of their labour contracts in the 19th century.⁷⁸ Furthermore, Fogel and Engerman's study demonstrated that artisanal and industrial labourers subject to nonpecuniary pressures performed as well as those whose labour was free.⁷⁹ Evidence suggests that pecuniary and

⁷⁴ Tom Brass, 'Why Unfree Labour Is Not "So-Called": The Fictions of Jairus Banaji' (2003) 31 *The Journal of Peasant Studies* 101, 101–102; Tom Brass, 'Review Essay: Slavery Now: Unfree Labour and Modern Capitalism' (1988) 9 *Slavery & Abolition* 183.

⁷⁵ Linden and Rodriguez Garcia (n 69) 2.

⁷⁶ *ibid.*

⁷⁷ Evsey D Domar, 'The Causes of Slavery or Serfdom: A Hypothesis' (1970) 30 *Journal of Economic History* 18.

⁷⁸ Steinfeld (n 66) 5. Steinfeld notes that the literature on the Master and Servant acts has until not too long ago framed these criminal sanctions for breaches of labour contracts as exceptional or outdated in the 19th century. Daphne Simon, 'Master and Servant' in John Saville (ed), *Democracy and the Labour Movement: Essays in Honor of Dona Torr* (Lawrence & Wishart 1954). Many have now rejected the view that penal sanctions were a hangover from feudalism.

⁷⁹ Robert William Fogel and Stanley L Engerman, *Time on the Cross: The Economics of American Negro Slavery* (Little, Brown 1974).

nonpecuniary consequences upon breach of contract are at least as efficient as each other and used in combination with each other, not just in the peripheries of empire or as an exception but was central to the constitution of employment relations within England.⁸⁰

The binary distinction between free and unfree labour obscures the types of labour that can be said to fall somewhere between these two poles.⁸¹ Upon the abolition of slavery, transitional arrangements of debt peonage, apprenticeship, indentured labour and sharecropping were often established for the economic continued profitability of the settler agricultural sector.⁸² Social and legal (dis)continuities between slavery and ‘free’ labour have authors taking a variety of positions.⁸³ While Tinker dubbed these transitional labour arrangements ‘slavery by another name’,⁸⁴ Hu-Dehart suggests that the presence of a contract suggested a marker of freedom as it was a ‘legal document between a free person and an employer’.⁸⁵

⁸⁰ Steinfeld (n 66) 8–18 Steinfeld suggest that interchangeability of pecuniary and non-pecuniary consequences of breach of contract show that using the type of pressure to determine whether labour is free or unfree may be misguided. Instead, he suggests that it is a question of ascertaining which kinds of pressures are legitimate and which are not.

⁸¹ *ibid* 10–11; Linden and Rodriguez Garcia (n 69).

⁸² Barrientos, Kothari and Phillips (n 63) 1037.

⁸³ Paul Craven and Douglas Hay, ‘The Criminalization of “Free” Labour: Master and Servant in Comparative Perspective’ (1994) 15 *Slavery & abolition* 71.

⁸⁴ Hugh Tinker, *A New System of Slavery: The Export of Indian Labour Overseas, 1830-1920* (Oxford University Press 1974).

⁸⁵ Evelyn Hu-Dehart, ‘Chinese Coolie Labour in Cuba in the Nineteenth Century: Free Labour or Neo-Slavery?’ (1993) 14 *Slavery & Abolition* 67.

There is a tendency to compare labour relations to the most extreme form of unfreedom, slavery. This tendency focuses the inquiry on the point of entry and possibility of exit.⁸⁶ Equal emphasis can, and perhaps should, be placed within the work process itself. At the wake of the industrial revolution, factory discipline altered the control of labourers during the course of employment.⁸⁷ Clark analyses the imposition of factory discipline on workers during the industrial revolution.⁸⁸ Here the employer would reward the employees not simply in accordance with their output, but also for their behaviour on the job and dictate when and how the work would be done.⁸⁹ Clark argues that the coercion inherent in this disciplinary system made the worker expend effort produce more than they would have willingly done otherwise.⁹⁰ While this idea emerged in the supervision of workers in a factory, literature comparing factories to plantations in agricultural settings can be found in the many studies of ‘factories in the field’.⁹¹

The *thangata* arrangements fall somewhere between the extremes with distinct elements of unfreedom interwoven into wage labour contracts. The nature and degree of unfreedom revealed itself in the various points of the arrangement, from the choice to enter into the agreement, when work was required, how the work was remunerated, and the inability

⁸⁶ Sallie Yea and Stephanie Chok, ‘Unfreedom Unbound: Developing a Cumulative Approach to Understanding Unfree Labour in Singapore’ (2018) 32 *Work, Employment and Society* 925, 926.

⁸⁷ Donna C Woods, ‘The Operation of the Master and Servants Act in the Black Country, 1858–1875’ (1982) 7 *Midland History* 93, 93.

⁸⁸ Gregory Clark, ‘Factory Discipline’ (1994) 54 *J. Eco. History* 128, 129.

⁸⁹ *ibid* 132.

⁹⁰ *ibid* 137–144 Clark uses empirical evidence to show that this theory is more persuasive than the alternative theory suggesting that factory discipline increased worker output by improving co-ordination in the factory.

⁹¹ Carey McWilliams, *Factories in the Field: The Story of Migratory Farm Labor in California* (University of California Press 2000); Alan L Olmstead and Paul W Rhode, ‘Were Antebellum Cotton Plantations Factories in the Field?’, *Enterprising America: Businesses, Banks, and Credit Markets in Historical Perspective* (University of Chicago Press 2014).

to work for other employers or oneself. The resultant arrangements are a blend between consensual and coercive due to both the legal framing of the arrangement, and its conduciveness to abuse.

In determining the unfreedom and inequality present in the contractual labour agreements in the period in question ‘free’ will be free in the sense of not being subject to legal coercion, and where it does exist the nature and degree of that coercion will be analysed.⁹² ‘Equal’, on the other hand will refer to whether the parties were treated symmetrically within the law governing the contract of employment. As the next chapter shows, the inequality was one of the key reasons leading to the repeal of penal sanctions for breach of employment contracts in England.

b. Master and Servant Law

England’s interest in labour relations can be seen in the 14th century with the Ordinance of Labourers and Statute of Labourers.⁹³ This legislation was enacted as a reaction to the severe labour shortages that occurred following Black Death which caused the death of between a third and half of the English population.⁹⁴ The intention of this body of law was to encourage idle men into the labour force and to fix workers to their contracts for the duration, and to

⁹² Maria Luisa Pesante, ‘Slaves, Servants and Wage Earners: Free and Unfree Labour, from Grotius to Blackstone’ (2009) 35 *History of European Ideas* 289, 290.

⁹³ Ordinance of Labourers 1349 (23 Edw 3 cc 1–8); Ordinance of Labourers 1349 (23 Edw 3 cc 1–8); Statute of Labourers 1350 (25 Edw 3 st 2) ; Hay and Craven (n 11) 5. For a more detailed examination of the early modern genesis of the legislation see Eltis (n 69).

⁹⁴ Lewis C Vollmar, ‘The Effect of Epidemics on the Development of English Law from the Black Death through the Industrial Revolution’ (1994) 15 *J Leg Med* 385; LR Poos, ‘The Social Context of Statute of Labourers Enforcement’ (1983) 1 *Law Hist. Rev* 27.

subordinate the worker to the employer.⁹⁵ Contracts of employment took on penal sanctions absent on the rest of the body of contract law, originally applying only to the servant and not the master.⁹⁶ From the 14th century, lay magistrates whose judgments were generally unrecorded and seldom reviews by superior courts, would summarily enforce this legislation.⁹⁷

Master and servant law maintained an element of a medieval asymmetrical legal status between masters and servants by binding both parties in the contract in dissimilar ways.⁹⁸ Imprisonment was the most severe of the penal sanctions an employee could be liable for in the event of breach, but others such as fines (in the form of abatement of wages) were regularly used.⁹⁹ On the other hand, breach by employers was regarded a civil matter whereby the master may be liable for damages.¹⁰⁰ The bulk of the early legislation's provisions were contained in the 1562 Statute of Artificers, and the categories created therein framed the master and servant law until the late 19th century.¹⁰¹

The master and servant relationship was contractual with penal consequences upon the servant's breach. Because servants were propertyless and often mobile, there needed to be another way to tie them to the contract and ensure performance. Furthermore, the cost of suit

⁹⁵ Douglas Hay, 'England, 1562–1875: The Law and Its Uses' in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004) 62,64.

⁹⁶ Hay (n 95).

⁹⁷ Hay and Craven (n 11).

⁹⁸ Ravi Ahuja, 'Making the Empire a Thinkable Whole: Master and Servant Law in Transterritorial Perspective' (2007) 52 *Int Rev of Soc His* 287, 287 As late as 1817, Lord Ellenborough distilled the issue at the heart of the application of master and servant law before the King's Bench as 'whether the master or the servant is to have the superior authority', *Spain v Arnott* (1819) 171 ER 638.

⁹⁹ Hay (n 95).

¹⁰⁰ Ahuja (n 98) 288.

¹⁰¹ Statute of Artificers 1562 (5 Eliz 1 c 4); Hay and Craven (n 11) 6; Douglas Hay, 'Master and Servant in England: Using the Law in the 18th and 19th Centuries' in Willibald Steinmetz (ed), *Private Law and Social Inequality in the Industrial Age: Comparing Legal Cultures in Britain, France, Germany, and the United States* (Oxford University Press 2000) 230.

often exceeded the petty sums at stake.¹⁰² Thus a link appeared the between propertylessness and criminality.¹⁰³ Though the Statute of Labourers legally compelled wage labourers to work, they were not considered unfree since they were seen as having entered the contract voluntarily.¹⁰⁴ Pesante explains that the justification of this view is found in a theory of contract that predates freedom of contract, where the underlying reason for the contract is the key source of its binding nature.¹⁰⁵

Until 1875, master and servant law which regulated the employment contract treated the employer and the employee patently unequally.¹⁰⁶ In the last phase of the operation of master and servant law, there were only three strictly defined forms of breach by the master – cruelty, dismissal with inadequate notice, or failure to pay wages due. On the other hand, breach by the servant was framed more broadly and included failure to start work at stipulated time, absence from work prior to completion, misdemeanours, and other misconduct in the worker's duties. Workers also felt that masters would use this legislation to weaken trade union activity and that the justices of the peace trying these cases were prejudiced against them. Finally, in 1875, unions succeeded in compelling the repeal of penal sanctions for breach of contract and reconstituting the employment contract as one between equal parties.¹⁰⁷

Differential terms of the operation of master and servant law began in the 17th century when this body of law was extended, on harsher terms, to colonial America and the

¹⁰² Steinfeld (n 66) 2.

¹⁰³ Hay and Craven (n 11) 35–36.

¹⁰⁴ Pesante (n 92) 293.

¹⁰⁵ *ibid* 293–294.

¹⁰⁶ Simon (n 78) 160.

¹⁰⁷ Hay (n 95) 62.

Caribbean.¹⁰⁸ Craven and Hay show that almost 2000 statutes and ordinances developed in over 100 colonies often adapting and subverting the metropolitan models.¹⁰⁹ In many of these territories, the provisions and operation the ordinances was more oppressive owing to the racial discrimination against indigenous people.¹¹⁰

c. Labour Coercion in the British Tropical Africa

Around the same time the metropole repealed the penal sanctions for breach of employment contract, this model was being extended to faraway colonies in Africa.¹¹¹ Anderson argues that this was not simply an example of ‘transplanting’ legal doctrine from metropole to periphery, but a conscious decision to implement legislation deemed unsuitable and outmoded in England.¹¹² Master and servant law was subject to oversight by the Colonial Office, but ordinances were drafted in the colonies and were discussed either at draft stage, or when enacted.¹¹³ The enactment of ordinances may be driven by a single colonial government or judicial officer, or by mining or planters associations.¹¹⁴

¹⁰⁸ Hay and Craven (n 11) 10, 21. Virginia 1631-32; Barbados acquired in 1625 where a full master and servant statute was enacted in 1661.

¹⁰⁹ *ibid* 10.

¹¹⁰ *ibid*.

¹¹¹ David Anderson, ‘Kenya, 1895 -1939: Registration and Rough Justice’ in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004) 500.

¹¹² *ibid*.

¹¹³ MK Banton, ‘The Colonial Office, 1820 - 1955: Constantly the Subject of Small Struggles’ in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004) 253–254.

¹¹⁴ *ibid* 255.

The level of attention given to the statutes and ordinances in the colonial office varied greatly, as Banton shows; it was contingent on the personnel in the colonial office, the policy perception of coerced labour at a particular point in time, human error, or chance.¹¹⁵ For instance, the harsh 1856 Cape Legislation which had substantial influence on the drafting of legislation in the Natal, Transvaal, East Africa Protectorate, and Tanganyika, and Southern Rhodesia was never examined at The Colonial Office.¹¹⁶ This was due to an oversight by a junior clerk who erroneously directed the legislation to the library rather than for examination by officials in London.¹¹⁷

In imperial contexts, legislation regulating the contract was often one part of a broader framework of labour law including vagrancy law, the implementation of pass systems, excessive taxation, and ownership of land.¹¹⁸ These measures were justified in many different ways, from references to local knowledge of the areas which required a tougher hand in order to lead to the development of the infant territories, the perceived laziness of the ‘natives’ and encouraging labour in cases of labour shortages. The civilising mission and the ‘gospel of labour’ suggested that it was for the benefit of the natives to have strict labour laws.¹¹⁹

¹¹⁵ *ibid.*

¹¹⁶ Master and Servant Act No 15 of 1856 (Cape); Master and Servant Act No 13 of 1880 (Transvaal); Norman Levy, ‘The State, Mineowners and Labour Regulation in the Transvaal, 1887-1906’, *Collected Seminar Papers. Institute of Commonwealth Studies* (Institute of Commonwealth Studies 1981).

¹¹⁷ Banton (n 113) 256–257.

¹¹⁸ Martin Chanock, ‘South Africa, 1841-1924: Race, Contract, and Coercion’ in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004).

¹¹⁹ Anderson (n 111) 498.

However, as a form of imperial law in colonial Africa, master and servant law superimposed its operation over the local system of authority and regulation of labour.¹²⁰ Master and servant law notably collided with communal labour organisation, which was found across many parts of Africa. Under colonial rule tribal obligations with elements of mutuality were reframed as obligations to serve private landowners. Many African cultures had a traditional practice of communal labour which was performed either for the benefits of traditional authorities or to benefit other members of the community.¹²¹ While going by the name *thangata* in Nyasaland, it was called *ubureetwa* in Rwanda, *bulungi bwansi* in Uganda, and *imimemo* in Swaziland.¹²²

Communal labour was merely one form of labour coercion in both British and French colonial Africa.¹²³ However, communal coercive labour occupied a unique space in the ecology of labour. For instance, when many forms of coercive labour were proscribed in the early 1920s, communal coercive labour was not.¹²⁴ As Mamdani wrote ‘from considering force an African custom, it was but a short step to considering Africans as accustomed to force’.¹²⁵

¹²⁰ PG McHugh, ‘The Legal Historian and The Trials And Tribulations of An Imperial Past Legal History’ in Markus Dirk Dubber and Christopher L Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press 2018) 884.

¹²¹ Mamdani (n 10) 157.

¹²² *ibid*; M Catharine Newbury, ‘*Ubureetwa* and *Thangata*: Catalysts to Peasant Political Consciousness in Rwanda and Malawi’ [1980] *Canadian Journal of African Studies / Revue Canadienne des Études Africaines*.

¹²³ Okia (n 4) 19; Mamdani (n 10) 148.

¹²⁴ Okia (n 4) 18–19.

¹²⁵ Mamdani (n 10) 162.

In addition to being a form of communal labour, *thangata* resembles systems of squatter labour prevalent in colonial Africa.¹²⁶ Youé categorises squatter labour prevalent in Southern Africa as either ‘kaffir farming’ which involves the payment of rent to absent landlords, ‘sharecropping’ which required labourers to provide a share of their crops, or labour tenancy which involves the provision of labour in exchange for occupying the land.¹²⁷ Squatter labour occupied an ambiguous space in relation to master and servant law, with jurisdictions making decisions and revisions to either include or exclude squatters from the ambit of the definition of ‘servant’.¹²⁸ Regarding squatters as ‘servants’ for the purposes of master and servant law empowered masters to resort to criminal penalties for breach of contract.

4. Labour: Landscape, Recruitment and Regulation

Within the protectorate, a key element of labour dynamics was the evolving demographic structure of southern Nyasaland. There was an influx of labourers fleeing Portuguese rule arriving in the south of Nyasaland.¹²⁹ At the same time, there were several Nyasaland men who

¹²⁶ Christopher Youe, ‘Black Squatters on White Farms: Segregation and Agrarian Change in Kenya, South Africa, and Rhodesia, 1902-1963’ (2002) 24 *International History Review* 558.

¹²⁷ *ibid* 560.

¹²⁸ In the Nyasaland protectorate, it was only in 1909 that labour tenants were regulated by master and servant law as is explained below. In the East Africa protectorate, squatters were not considered ‘servants’ for the purposes of master and servant ordinances until the Resident Native Squatters Ordinance of 1918. This decision was then revised when the Supreme Court ruled that labour tenants were not ‘servants in *Thati wa Mbatia v R*, Kenya Law Reports (1923).

¹²⁹ Historians have identified four significant phases of the immigration of the ‘Anguru’ to the southern Nyasaland region. First, before the declaration of a protectorate in 1891 in search of more fertile land; secondly, from 1892-1901 when missionary communities established relationships with Portuguese East Africa which happened roughly at the same time as ‘pacification’ wars and the subsequent 1900-1901 famine in Portuguese East Africa; thirdly, from 1903 to the 1920s, planters in Nyasaland actively recruited labour from the region and families would settle on European estates; finally, from the 1930s Anguru would seasonally work on Thyolo and Mulanje plantations; Wiseman Chijere Chirwa, ‘Alomwe and Mozambican Immigrant Labor in Colonial Malawi, 1890s-1945’ (1994) 27 *The International journal of African historical studies* 525, 527–528; White (n 33); Thomas Galligan, ‘The Nguru Penetration into Nyasaland, 1892-1914’ in Roderick J MacDonald (ed), *From Nyasaland to Malawi: studies in colonial history* (East African Publishing House 1975).

sought better labour conditions and pay going to mines in Southern Rhodesia, Northern Rhodesia and Nyasaland.¹³⁰

There were several demands on the labour pool in the early protectorate years. Estate owners were in competition with railway construction needs and labour-intensive portering.¹³¹ Nyasaland has been considered a region with the plight of a ‘chronic labour shortage’.¹³² However, Chirwa and Mandala have pointed out that Nyasaland had seasonal labour variability rather than chronic shortage.¹³³ This seasonal variability made it difficult for estates to recruit labour in the rainy season (between December to February) when labour was scarce.¹³⁴ Africans would use this time to tend to their own gardens, and this was the time when European agricultural estates most required the labour. In contrast, labour was abundant during the dry season (from March to November).¹³⁵ Estate owners had to find a way to divert the African labour from the food economy and competitors to secure a workforce for their estates.¹³⁶

¹³⁰ In addition to independent migration, the Foreign Office concluded an agreement with the Witwatersrand Native Labour association to recruit Nyasaland labourers for the Rand Gold Mines, TNA CO 525/3 Robert Codrington to Sharpe 25/06/04.

¹³¹ Chirwa (n 129) 528–529 The railway construction in 1903 by the Shire Highlands Railway Company was a big competitor for labour.

¹³² Leroy Vail, ‘The Making of an Imperial Slum: Nyasaland and Its Railways, 1895-1935’ [1975] *The Journal of African History* 89–112.

¹³³ Elias Coutino Mandala, *Work and Control in a Peasant Economy: A History of the Lower Tchiri Valley in Malawi, 1859-1960* (Wisconsin University Press 1990) 122; Chirwa (n 129).

¹³⁴ Mandala (n 133) 120–122.

¹³⁵ *ibid.*

¹³⁶ Elias Mandala, ‘Feeding and Fleecing the Native: How the Nyasaland Transport System Distorted a New Food Market, 1890s-1920s’ (2006) 32 *Journal of Southern African Studies* 505.

Despite the prevailing ideological opposition to forced labour in the early 20th century, private individuals and colonial administrators employed creative abstractions to portray some forms of coercion as acceptable in otherwise free wage labour contracts. One means to attract labourers to the employ of the settlers was the use of taxation. The administration collected tax from Africans from as early as 1891 when Commissioner Johnston negotiated a hut tax of 6 shillings a hut.¹³⁷ The decision to institute tax in these early years was controversial.¹³⁸ However, it reflected the reality at the time that much of British tropical Africa would have to be administrated using funds generated within the territories.¹³⁹ Tax collection was a labour intensive and arduous task. Even with the use of ‘collectors’ (district magistrates), police and soldiers, the administration would rely on the assistance of African chiefs to collect taxes.¹⁴⁰

The link between labour and taxation began indirectly, as Africans were incentivised to work in order to pay their taxes. Coercive methods of tax collection enhanced the efficacy of the ‘incentive’. In cases of unpaid taxes, expeditions were dispatched to the non-compliant village, resulting in the pillaging of homes and the burning of huts.¹⁴¹ However, employing taxation as a means of incentive posed a delicate equilibrium — the government recognised

¹³⁷ Baker, ‘Tax Collection in Malawi: An Administrative History, 1891-1972’ (n 47) 41. Exceptions include Northern Angoniland or Western Nyasa; Queen’s Regulations respecting Hut Tax 1894.

¹³⁸ Christian missions criticised the protectorate government for this decision. *Life and Work in British Central Africa*, October 1891, ‘We regret exceedingly that a policy of native taxation should inaugurate a British administration in Central Africa. It is decidedly un-English, and savours of Portuguese administrative methods in East Africa. It runs counter to all the past in our Central African history and we fear it will break down the good feeling between the natives and the English that the past 15 years work has generated’; See also Harry W Langworthy, ‘Joseph Booth, Prophet of Radical Change in Central and South Africa, 1891-1915’ (1986) 16 *Journal of Religion in Africa* 22.

¹³⁹ Leigh Gardner, *Taxing Colonial Africa: The Political Economy of British Imperialism* (Oxford University Press 2012) 5.

¹⁴⁰ Baker, ‘Tax Collection in Malawi: An Administrative History, 1891-1972’ (n 47).

¹⁴¹ *Life and Work in British Central Africa*, Extra Supplement June 1892, reports on a war in Chiradzulu between Commissioner Johnston and Chief Mitochi on the non-payment of taxes.

that if taxation rates were excessively high, Europeans might face pressure to elevate wages, thereby reducing profits. Conversely, if taxation rates were too low, tax obligations might not effectively encourage natives to offer their labour to Europeans.¹⁴²

The connection between labour and taxation began to take a less precarious, more palpable form in the new century. In 1901, Commissioner Sharpe introduced a differential rate of taxation.¹⁴³ Under this rate, Africans who could prove that they had worked for a European would be taxed 3 shillings, while all others were required to pay 6 shillings.¹⁴⁴ This system raised concerns that a coercive labour system was being introduced in the protectorate.¹⁴⁵ Chamberlain discussed the issue of taxing Africans in the colonies in the House of Commons, stating:

All men are forced to labour in one sense by the necessity of providing for their subsistence or by the competition which exists. I do desire that the negro may be forced to labour in that sense, but not in the sense of actual physical compulsion brought to bear upon him. The House may rest assured that no policy of that kind will receive from us the slightest support.¹⁴⁶

In fact, labour coercion by way of tax had already been scrutinised elsewhere in British tropical Africa. Northern Rhodesia implemented a "tax labor" system, which Clement Hill, the Head of the African Protectorates department in the Foreign Office, had openly criticized.¹⁴⁷ In 1903,

¹⁴² Baker, 'Tax Collection in Malawi: An Administrative History, 1891-1972' (n 47) 49.

¹⁴³ Hut Tax Regulations of 1901.

¹⁴⁴ Baker, 'Tax Collection in Malawi: An Administrative History, 1891-1972' (n 47) 50.

¹⁴⁵ TNA FO 403/336 Clement Hill to Commissioner Sharpe, Dispatch No 2 6 January 1903.

¹⁴⁶ HC Deb 29 July 1902, vol 112, cols 47-49 Bangalore Krishnamurthy, 'Land and Labour in Nyasaland (1891-1914)' (University of London 1964) 226.

¹⁴⁷ TNA FO 403/336 Clement Hill to Commissioner Sharpe, Dispatch No 2 6 January 1903; Commissioner Sharpe to Marquess of Lansdowne, 12 March 1903,

Major Codrington, the Administrator of Rhodesia, made extensive efforts to differentiate this system from labour remunerated by reducing the tax burden. Codrington stated:

Theoretically, the native who engages himself for work...is paid 3s which he immediately hands over to the Boma (government). In practice, his employer pays the taxes of a large number of men by cheque, and the actual cash does not therefore pass through the hands of the native.¹⁴⁸

Anderson was not convinced by these arguments. In response to Anderson's concerns, Sharpe, Commissioner of the British Central Africa Protectorate, responded:

I fully realise the danger pointed out, that when the natives are practically compelled to labour in order to earn money to discharge their hut tax, the door may be open for statements as to this course practically being forced labour.¹⁴⁹

Notwithstanding Sharpe's awareness of the risks posed by the system, it remained operational in the protectorate.

Due to difficulty in recruiting labour from within the protectorate, planters were drawn to recruit either from Portuguese East Africa or else resort to the use of tenants on their estates.¹⁵⁰ Recruitment of foreign African labour was not without its challenges, as illustrated by the case of Sinderam and Walker, two recruiters who recruited labour from Portuguese East Africa between 1898 and 1900. Sinderam and Walker had received an 18-month labour recruiting monopoly from Companhia de Zambezia.¹⁵¹ They recruited labourers for the Africa

¹⁴⁸ TNA FO 403/336 British South Africa Company to Foreign Office, 21 February, 1903, Dispatch No. 22.

¹⁴⁹ TNA FO 403/336 Commissioner Sharpe to Marquess of Lansdowne, 12 March 1903.

¹⁵⁰ Chirwa (n 129) 530.

¹⁵¹ This company had a concession from the Portuguese government over some territory populated by the 'Anguru'. See further Bjørn Enge Bertelsen, 'Colonialism in Norwegian and in Portuguese' in Kirsten Alsaker Kjerland and Bjørn Enge Bertelsen (eds), *Navigating Colonial Orders: Norwegian Entrepreneurship in Africa and Oceania* (Berghahn Books 2015).

Lakes Company (ALC) who leased the labourers out to other transport companies and estates. However, Sinderam and Walker made inadequate provisions for food, sanitation, or medical needs of the recruited labourers. Of 2000 workers recruited for the ALC, 1948 fled. Workers who were recaptured were brought back to Mandala and flogged. These incidents were reported in the *Central African Times* after the discovery of partially eaten or decomposing corpses in the surrounding areas.¹⁵²

To address this misconduct, labour regulations were promulgated in 1894 to formally govern labour recruitment and working conditions, as well as to prevent mass recruitment facilitated by chiefs.¹⁵³ The regulations aimed to ‘secure fair treatment to the employees and the employed and prevent the expatriation of the said natives without securing and regulating their regular and speedy return home’.¹⁵⁴ The protectorate was divided into 12 separate districts for the purpose of the regulations. The regulations distinguished between ‘negroes’ who were engaged from one of the other districts and those who were engaged in the district to which they were native or had resided for 5 years.¹⁵⁵ For the former, the regulations made it a criminal offence to engage labourers without adhering to the regulations. For the latter, fewer regulations applied and where they were not met, the contract would not be binding on the African labourer.¹⁵⁶

¹⁵² *Central African Times*, 21 July 1900.

¹⁵³ Queen’s Regulations Dealing with the Engagement of Native Labour in the British Central Africa Protectorate reproduced in *British Central Africa Gazette*, 1 February 1894, Vol 1, No 2.

¹⁵⁴ *ibid*, preamble to the Regulations. The regulations were intended to apply only to Black Africans. It would appear that no white persons were employed for agricultural work in the protectorate as in many parts of British tropical Africa. As stated by Chamberlain, “in areas where the white race is brought into close contact with a coloured race, the white race considers it a degradation for the white man to do the same labour the black man is performing”, HC Deb 29 July 1902, vol 112, cols 47-49.

¹⁵⁵ Queen’s Regulations Dealing with the Engagement of Native Labour 1894, Section 6.

¹⁵⁶ *ibid*.

For labourers engaged from districts other than their homes, the regulations provided that all labour contracts must be made in respect of an individual labourer.¹⁵⁷ This was intended to address the mischief of estate owners recruiting groups of Africans from chiefs or foreign territories without contracting with them individually.¹⁵⁸ In this way the duty to provide provisions and shelter was owed to each individual labourer. In addition, the regulations stipulated that each contract must have a specified rate of wages and a payment of conduct-money upon termination if the African must travel back to their home.¹⁵⁹ As an oversight mechanism, section 1(a) of the regulations required employment contracts to be executed in the presence of a magistrate.¹⁶⁰

In 1895 further regulations were passed including the minimum conditions under which an African labourer must be kept.¹⁶¹ Section 12 of the regulations stipulated that the ‘native’ must be properly housed and fed, given access to and provision for proper medicine. Furthermore, if a native should happen to die while in the employ of a European, the employer shall give immediate notice thereof to the nearest magistrate with, where possible, a medical certificate detailing the cause of death.¹⁶²

¹⁵⁷ ibid.

¹⁵⁸ ibid.

¹⁵⁹ ibid.

¹⁶⁰ ibid.

¹⁶¹ Queen’s Regulations Respecting Native Labour 1895 in TNA FO 403/336 Dispatch No 65, Enclosure 1.

¹⁶² ibid.

This stands in stark contrast to the practices observed in other colonial protectorates like the East Africa Protectorate, where early ordinances and regulations were devised chiefly to protect the interests of the employer.¹⁶³ Anderson suggests that no protections were afforded to the servants due to the perceived primitivity of their stage of development.¹⁶⁴ In the British Central Africa Protectorate there seems to have been some intention to secure rights of the servants, curiously even before stipulating those of the employer. However, despite the protections stipulated in the regulations, missionary sources suggest that many of these regulations were regularly violated.¹⁶⁵

In addition, a concerning practice began to emerge on one of the larger plantations.¹⁶⁶ This estate was comprised of an amalgamation of the estates of R.S Hynde and the Buchanan Brothers to become property of the Blantyre East Africa Company (BEAC).¹⁶⁷ The managers of the BEAC began demanding that the residents of their estates either pay rent or provide labour services. Several headmen then approached Commissioner Sharpe about this practice, which was contrary to the non-disturbance clause in the certificates of claim and a departure from the practice since the certificates were issued.¹⁶⁸ Commissioner Sharpe resolved this issue by agreeing to requests made by headmen to relocate several hundred disgruntled residents to Government land in Zomba.¹⁶⁹

¹⁶³ Anderson (n 111) 501.

¹⁶⁴ *ibid* Anderson noted that not a single provision in the East Africa Protectorate Master and Servant Ordinance 1906 protected the worker.

¹⁶⁵ *Life and Work in British Central Africa*, November 1901.

¹⁶⁶ TNA FO 403/336 Commissioner Sharpe to Marquess of Lansdowne, Dispatch No 84, 23 September 1903.

¹⁶⁷ *ibid*.

¹⁶⁸ *ibid*.

¹⁶⁹ *Ibid*.

This practice signalled the outset of a problem that would haunt the protectorate administration throughout its tenure. Although Commissioner Sharpe's relocation solution worked in the first instance, there were two glaring issues. The first was that there was insufficient suitable Government land to relocate all the African residents on private estates.¹⁷⁰ The shortage was pronounced in the areas where the land was most needed, around the larger centres of European population.¹⁷¹ Even where Government land was available, some of the land was occupied by other tribes with whom it would be difficult for the resident natives to integrate.¹⁷² Other portions of Government land were areas without sufficient water, too hilly, or on the lakebed of Lake Chilwa which was prone to flooding in the rainy season.¹⁷³ Secondly, this relocation did not address the question at the heart of the problem: the clear definition and protection of African rights on settler land.¹⁷⁴

In recognition that the labour regulations were doing little to protect land rights of resident Africans, Acting Commissioner Pearce recommended that the additional office of a Supervisor of Native Affairs be created.¹⁷⁵ The creation of this office was recommended on account of the 'comparatively enormous' areas granted under the certificates of claim and the

¹⁷⁰ TNA FO 403/336 General Administration Report for the Year 1902-1903, 56.

¹⁷¹ *ibid*; TNA FO 403/336 Acting Commissioner Pearce to Marquess of Lansdowne, Dispatch No 75, 7 July 1903.

¹⁷² *ibid*.

¹⁷³ TNA FO 403/336 Acting Commissioner Pearce to Marquess of Lansdowne, Dispatch No 75, 7 July 1903.

¹⁷⁴ TNA FO 403/336 Commissioner Sharpe to Marquess of Lansdowne, Dispatch No 84, 23 September 1903.

¹⁷⁵ TNA FO 403/336 Acting Commissioner Pearce to the Marquess of Lansdowne, Dispatch No 56A, 10 April 1903.

difficulty in investigating the rights and ensuring the welfare of Africans on private estates.¹⁷⁶

Like other protector offices throughout British imperial contexts, the Supervisor of Native Affairs was to shield vulnerable natives from abuse and sat at the intersection of humanitarian sentiment and the machinery of state authority.¹⁷⁷

This role required the Supervisor of Native Affairs to ‘systematically acquaint himself’ with the various agreements and contracts landowners had entered into with residents of their estates.¹⁷⁸ In addition, the Supervisor was to assess all arrangements for the migration of protectorate labourers to foreign territories.¹⁷⁹ Joseph Casson was confirmed as the man for the office.¹⁸⁰ After investigating the BEAC estates, Casson brought a test case to the Blantyre High Court so it could be determined what rights African residents on private estates would have. Consequently, the non-disturbance clauses in the certificates of claim were to be subject to legal scrutiny.

5. Legal Investigation of Thangata

The legality of practices of *thangata* were bound up with a ‘non-disturbance clause’ inserted in certificates of claim issued to settlers as proof of title to land between 1892 and 1893.¹⁸¹

¹⁷⁶ TNA FO 403/336 Enclosure in No. 56A, Memorandum Regarding the Duties and for the Information of the Supervisor of Native Affairs.

¹⁷⁷ Christina Twomey, ‘Protecting Slaves and Aborigines’ (2018) 87 *Pacific Historical Review* 10, 10.

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ Joseph Casson had first joined the administration of British Central Africa as the 4th Accountant in February 1896. In April 1900, he was promoted to Assistant Secretary to the administration before assuming his role as Supervisor of Native Affairs. Colin Baker, ‘Joseph Charles Casson, 1866-1946’ (1999) 52 *The Society of Malawi Journal* 37.

¹⁸¹ See Clause 7 in Appendix 3 Copy of a Certificate of Claim.

Harry Johnston, the first Commissioner of the protectorate, initiated the land settlement program when he sent out a circular requiring all European settlers to desist from purchasing land from indigenous chiefs and to submit all previously made claims to him.¹⁸² Upon examination of these claims, Johnston either i) granted a certificate of claim on the land claimed with no modifications, ii) granted the certificate subject to a reduction of the area of land, or iii) rejected the claim.¹⁸³ Johnston included six additional clauses in the certificates of claim, including the clause that no native villages or plantations be disturbed (the non-disturbance clause).¹⁸⁴ Clause 3 of the certificates read as follows:

That no native village or plantation existing at the date of this Certificate on the said estate shall be disturbed or removed without the consent in writing of Her Majesty's Commissioner and Consul-General, but when such consent shall have been given the sites of such villages or plantations shall revert to the proprietor of the said estate. No natives can make other or new villages or plantations on the said estate without the prior consent of the said [name of grantee] or his representative.¹⁸⁵

a. Analysis of the Non-disturbance clause:

i. 'No village or plantation existing at the date of this certificate'

Commissioner Johnston claimed that he inserted this clause into every certificate of claim where there had been native villages in occupation of the land.¹⁸⁶ However, it later transpired

¹⁸² *British Central African Gazette*, Office of Commission's Administration, Zomba, 18 July 1891.

¹⁸³ TNA FO 2/128 Johnston to Rosebery, Report on the Settlement of Claims in British Central Africa, 14 October 1893.

¹⁸⁴ TNA FO 84/2197 Commissioner Johnston to Earl of Roseberry, No 39 Central Africa, Zomba, October 13, 1892, Enclosure 3.

¹⁸⁵ *ibid.*

¹⁸⁶ *Supervisor of Native Affairs v British East Africa Company*, High Court of British Central Africa (HBCA, 28 April 1903), reproduced in the *British Central Africa Gazette*, 30 April 1903. (*Supervisor of Native Affairs v BEAC*).

that this was not the case as it came to light that in some certificates the clause was omitted entirely.¹⁸⁷

- ii. 'Shall be disturbed or removed'

This portion of the clause attempts to convey some measure of protection to the natives residing on these estates. Unfortunately, it is not clear on the nature of the rights that are protected under this clause, nor does it give any indication of in whom these rights would vest and what the recourse would be should these rights under protection be breached as they so routinely were.

- iii. 'without the consent in writing.... such villages or plantations shall revert to the proprietor of the said estate'

This portion of the clause suggests that the protection offered was transient and the reversion mechanism is unclear in the text.

- iv. 'No natives can make other or new villages or plantations on the said estate'

The application of this provision was complicated by the African practice of moving plots of pasture and agriculture at the end of each crop cycle.¹⁸⁸ As such it was unclear whether the land the surrounding lands they would shift to were included, or if they would lose their rights of occupation once they shifted villages.

The intended meaning of the aforementioned clause notwithstanding, challenges arose in its legal interpretation and implementation due to ambiguity regarding its intended purpose.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

Given its vague nature and the imbalance of power between the settlers and the residents of the villages, the living arrangement was exploited with the landowners beginning to enter into agreements with the natives to exchange labour for the right to remain in the villages.¹⁸⁹ According to Johnston's own account, the result of the land settlement in terms of the certificate of claim was to 'completely free the natives from any dependency on the white settler by restoring to them the inalienable occupancy of their villages and plantations.'¹⁹⁰ Subsequent chapters of the protectorates history refute this claim.

In the pre-colonial *thangata*, security of land rights did not depend on assistance of the chief when called upon. However, during the colonial era, the practice of *thangata* differed significantly from its traditional roots and became to connote a form of labour tenancy.¹⁹¹ Diverging from the contractual arrangement governed by master and servant ordinances with punitive elements, the initial contractual relationships in the protectorate intertwined contractual obligations with a proprietary dimension.

The legality of the proprietary aspect of labour contracts on private estates faced scrutiny in a test case initiated by Casson, the Supervisor of Native Affairs. The case, *Supervisor of Natives Affairs v British East Africa Company (BEAC)*, decided the land rights

¹⁸⁹ MNA S1/1330/25 HS Hynde, Memorandum on Private Estates in Nyasaland, 1925.

¹⁹⁰ Ordinances of Nyasaland, 1913, 113.

¹⁹¹ Clement Ng'ong'ola, 'The State, Settlers, and Indigenes in the Evolution of Land Law and Policy in Colonial Malawi' (1990) 23 *The International Journal of African Historical Studies* 27; JAK Kandawire, 'Thangata in Pre-Colonial and Colonial Systems of Land Tenure in Southern Malawi with Special Reference to Chingale' (1977) 47 *Africa: Journal of the International African Institute* 185.

of natives over the 60,000 acres of the BEAC.¹⁹² However, the ruling would apply to over 3.3 million acres of private land in the protectorate. Casson sought to set aside an agreement between Theodore Cox, the manager of the BEAC, and the headmen of villages on the Company's Ruo and Cholo estates. The agreement was typical of written agreements between natives and landowners since the 1894 Regulations.¹⁹³

In terms of an agreement entered into on the 26th of September 1902 in the presence of a Collector, African headmen agreed to 'renounce any claims they may have had under the certificates of claim' and occupy their villages and gardens as tenants.¹⁹⁴ This was said to be in consideration of the fact that they have been allowed to change their village and garden sites and enjoy 'various privileges as tenants'.¹⁹⁵ The agreement further stipulated that as tenants, they agreed to give two months' work if called upon during the rainy season or at any other time as may be required in lieu of rent.¹⁹⁶ Furthermore, if any of the tenants worked for any employer other than the landowner, such a person would be liable to pay a yearly rent for their house and gardens of 6 shillings per annum.¹⁹⁷ In terms of the agreement, the African resident promised not to make any new houses or gardens without, and not to receive any newcomers or allow them to build houses in the village without express permission. The agreement further

¹⁹² *Supervisor of Native Affairs v BEAC* (n 186).

¹⁹³ Queen's Regulations Dealing with the Engagement of Native Labour in the British Central Africa Protectorate reproduced in *British Central Africa Gazette*, 1 February 1894, Vol 1, No 2.

¹⁹⁴ The title 'Collector' referred to District Residents, colonial officials overseeing specific districts. The term 'collector' was used because District residents spent most of their time collecting tax payments.

¹⁹⁵ Clause 1 in the Memorandum of Agreement between BEAC and Headmen and people of Cholo Estate in *Supervisor of Native Affairs v BEAC* (n 186).

¹⁹⁶ *ibid*, clause 2.

¹⁹⁷ *ibid*, clause 6.

required the natives to move any of their gardens or villages, which the estate-holder may require to any new sites as indicated to them.¹⁹⁸

In exchange, the Company would pay the taxes of natives who work for the required two months as long as those taxes remain at 3 shillings.¹⁹⁹ The Company promised to remunerate the natives who worked in the second month – but did not state the rate of payment. Further, the Company would grant peaceful and undisturbed possession of their houses and villages throughout the agreement.

Casson argued that these agreements ought to be set aside on three grounds. First, the agreements were not registered in the Deeds Registry in accordance with provisions of the Registration Regulations;²⁰⁰ secondly, and more pertinently for our purposes, that the agreement was ‘inequitable and illegal’ as it violated the rights secured to the natives in the non-disturbance clause of the certificates of claim; and thirdly, that the chiefs or headmen were not legally capable entering into agreements of this nature which involved the disposition of freehold rights of their tribes.²⁰¹

Judge Nunan quickly disposed of the first ground. He stated that the registration requirement only applied to land held by Europeans or natives under a deed or a certificate of

¹⁹⁸ With a clause indicating that the new sites were to be as ample and suitable for occupation as their current sites.

¹⁹⁹ *Supervisor of Native Affairs v BEAC* (n 186).

²⁰⁰ Registration Regulations No 2 of 1901 require the registration of all land deeds for land held in terms of a Certificate of Claim.

²⁰¹ *Supervisor of Native Affairs v BEAC* (n 186).

claim but was not intended to apply to customary land held by natives either in terms of a certificate of claim or otherwise.²⁰²

On the third ground, Nunan noted that chiefs and headmen acting with the consent of their people, as ascertained by the Collector, should have the power to make valid agreements regarding the disposition of freehold rights, easements and profits a prendre. The court noted that to deny them this legal capability would be to ‘raise up ghosts of long decided questions involving titles’ not only of the parties involved in this case but of every individual holder in terms of a certificate of claim and the Crown itself as a landholder in the Protectorate.²⁰³ Here, Nunan referred to the decision of the Zanzibar Court of Appeal in *Augusto Paolucci v Commissioner of Mines* which he vehemently disagreed with.

Doubling down on his prior judgment, Nunan stated that in *Cox v ALC*, he held that African chiefs have no capacity, even with the consent of their people, to dispose of freehold rights, easements, or profits a prendre without the consent of His Majesty’s Commissioner in writing.²⁰⁴ He distinguished the decision in *Augusto Paolucci v Commissioner of Mines* on the basis that the ratio related to a African grants of land prior to the declaration of the protectorate.²⁰⁵ Furthermore, Nunan noted that the Collector had witnessed the agreements but cautiously refrained from expressing his approval. Nunan, therefore, concluded that the

²⁰² *Cox v The African Lakes Company* (CCBCA, Tuesday 16 July 1901) in TNA FO 2/471 page 341, Consular Court at Blantyre, Tuesday 16 July 1901.

²⁰³ *ibid.*

²⁰⁴ *ibid.*

²⁰⁵ *Augusto Paolucci v Commissioner of Mines for the BCA Protectorate and British Central Africa Company v Crown Prosecutor for the BCA Protectorate* (unreported) Civil Rights Appeals No 7 and 8 of 1904 HM Court of Appeal for East Africa, reproduced in CO 525/11, 1 April 1905.

agreement could be set aside on this ground alone because it was not made with the valid approval of the Collector as required.²⁰⁶

Nunan also noted that the supposed consideration for this contract was that the BEAC had allowed the African residents to shift their gardens and huts as they customarily do. Nunan relied on *Lampleigh v Braithwait* (1615) and the Irish case of *Bradford v Roulston* (1858) for the rule that past consideration will not hold unless it was tied to a previous request.²⁰⁷ Since there was no prior request made, Nunan held that the exception did not apply to the agreement between the natives and the estate holder.²⁰⁸ It is interesting to note the divergence between the rules on the creation of contracts for service between *thangata* work and all other work in the protectorate. As the other contracts for service moved towards individualisation – the employment of each servant with their master – agreements for the provision of *thangata* services were made with the whole village.

On the second ground, it was argued that the agreement was illegal and inequitable because it contravened the non-disturbance clause.²⁰⁹ The interpretation of this clause became crucial to the judge's reasoning. Nunan applied common law rules of construction to the written document. He noted that the words ought to be given their plain, grammatical, and ordinary sense unless to do so would lead to some absurdity, repugnance or inconsistency.²¹⁰ He stated that the court would not make a contract it deems should have been made but declared the

²⁰⁶ *Cox v ALC* (n 202) 348.

²⁰⁷ 'A mere voluntary courtesie will not have a consideration to hold an assumpsit. But if that courtesie were moved by a suit or request of the party that gives the assumpsit, it will bind' *Lampleigh v Braithwaite* (1615) 80 ER 25; *Bradford v Roulston* (1858) 8 IRCL 468.

²⁰⁸ *Supervisor of Native Affairs v BEAC* (n 186).

²⁰⁹ *ibid.*

²¹⁰ *ibid* citing *Robertson v French* (1803) 4 East 130 | [1803] 6 WLUK 39; *River Wear Commissioner v Adamson* [1877] 7 WLUK 93.

intention indicated by the words used under the circumstances.²¹¹ Though there was no direct evidence of the administration's intention, Nunan looked to an 1893 interview between Commissioner Johnston and Rufelle Scott, the Superintendent of the Blantyre Mission, reported by Dr Hetherwick in *Life & Work*.²¹²

In this interview, Scott expressed relief at the prospect of having the natives remain in their villages as opposed to carted off to native reserves, and that they would have their villages and village grounds with room for extension there on planters' estates.²¹³ Hetherwick wrote:

We buy the land with the burden and care of the natives on it, and we may rest assured that we shall not mar our own inheritance by the faithful discharge of our responsibilities towards the natives.... Even as the kinsman of Elimelech was not allowed by Boaz to purchase the inheritance without the encumbrance of Ruth, the widowed daughter of the dead man Elimelech, so the grantees were bound to take the land of the Shire highlands with the encumbrance of the natives who occupied it.²¹⁴

Nunan noted that it is likely from this interview that the non-disturbance clause originated or was fleshed out.²¹⁵

The court observed that initially the agreements had not been enforced on either side. Nunan observed that estate holders allowing natives to relocate their plantation sites as per their customary practice amounted to the estate holder's failure to enforce the non-disturbance clause

²¹¹ *Supervisor of Native Affairs v BEAC* (n 186).

²¹² *Life & Work in British Central Africa*, January 1893.

²¹³ *ibid.*

²¹⁴ *Life & Work in British Central Africa*, January 1893; Ruth Chapter 4; Dorothy Thompson and Thomas, 'Some Legal Problems in the Book of Ruth' (1968) 18 VT 79, 98; Ziony Zevit, 'Dating Ruth: Legal, Linguistic and Historical Observations' (2006) 117 *Zeitschrift für die Alttestamentliche Wissenschaft* 574.

²¹⁵ *Supervisor of Native Affairs v BEAC* (n 186).

if it meant Africans would lose their sites on relocation.²¹⁶ Furthermore, an increase in tenant population, attributed to the cessation of inter-tribal wars, the end of the slave trade, and the influx of the Angoni and Anguru tribes from Portuguese territories, was greeted by planters as an opportunity for additional labour.²¹⁷ The estate owner had been indiscriminately charging rent or labour payments from all the natives on their estates. This practice was either informal with no written agreements, or formal as in the agreement that lies at the heart of the present dispute.²¹⁸

Criticising this practice, Nunan stated that no body of men was suited to have absolute control of the liberties or property of others, ‘more especially those of a primitive and ignorant population of a primitive race’.²¹⁹ He went on to say, ‘there is a tendency to treat the native, whether he is an old or a new settler, and whether any rights were secured to him under the certificate of claim or not as a tenant at will or even as an unfree villein or *ascriptus glebae*’.²²⁰ Moreover, the main distinction between the native on a private estate and a medieval villein was that since the villein was bound to the soil he had security of tenure, while the native on a private estate had none since the agreement could be terminated at five months’ notice and the native would be required to vacate the estate.²²¹

Nunan’s terms to describe Africans’ tenure on private estates are likely used loosely and as analogous rather than as specific legal terms, but they do require elucidation. Several

²¹⁶ Ng’ong’ola (n 191) argues that it is unclear from the wording of the NDC whether the area granted to the natives includes the areas that the natives would have customarily moved to .

²¹⁷ *Supervisor of Native Affairs v BEAC* (n 186).

²¹⁸ *Supervisor of Native Affairs v BEAC* (n 186).

²¹⁹ *ibid.*

²²⁰ Paul Vinogradoff Sir, 1854-1925, *Villainage in England* (England: Clarendon Press 1892).

²²¹ *Supervisor of Native Affairs v BEAC* (n 186).

scholars have similarly used analogies to feudal tenure to describe the conditions of the tenants on private estates in the Shire Highlands.²²² As for Nunan's description of the residents as 'unfree villeins', villeinage had two possible meanings in medieval law, villein tenure or villein status (*villeinage de sank*).²²³ Where a 'free' man held land in villeinage, he held the land by unfree or undefined services but was not subject to all the disabilities that came with villein status.²²⁴ Villein status on the other hand was a form of bondage acquired by descent.²²⁵ While Nunan may have been wrong about the medieval villein having security of tenure, he seems to have described the situation on the private estates accurately as approximating villein tenure (rather than villein status).²²⁶ The social and personal effects of this kind of tenure on the residents will be discussed further below in the protectorate's later years.

Ultimately, the court held that the agreements were exceedingly unfair and one-sided.²²⁷ The court analysed the agreement in the following way: the manager of the Company, Hynde set the value of the fee simple at half-crown an acre.²²⁸ The area of a native garden was 2 acres

²²² JK Rennie, 'White Farmers, Black Tenants and Landlord Legislation: Southern Rhodesia 1890-1930' [1978] *Journal of Southern African Studies* refers to the situation in Nyasaland as a relation of serfdom; John McCracken, *A History of Malawi, 1855-1966* (James Currey 2012) 92 refers to the practice as 'quasi-feudalism'; Robert B Kaplan and Richard B Baldauf, *Language Planning in Malawi, Mozambique, and the Philippines* (Robert B Kaplan and Richard B Baldauf eds, Multilingual Matters 1999) 26 referred to as 'a feudal system of labour in exchange for land'; Human Rights Watch, *Where Silence Rules: The Suppression of Dissent in Malawi* (Africa Watch Committee 1990) 9 referred to thangata as a 'feudal-style' arrangement; Chikosa Mozesi Silungwe, 'Customary Land Tenure Reform and Development: A Critique of Customary Land Tenure Reform under Malawi's National Land Policy' (2009) 1 *Law, Social Justice & Global Development* 1, 15 thangata as akin to feudalism.

²²³ John H Baker, 'Status and Legal Personality', *The Oxford History of the Laws of England. Volume VI, 1483-1558* (Oxford University Press 2003) 598 'Tenure in villeinage did not make the tenant a villein, even if the services were of a lowly kind'.

²²⁴ Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (2nd edn, University Press 1905) 412.

²²⁵ Filip Batsel , *Liberty, Slavery and the Law in Early Modern Western Europe: Omnes Homines Aut Liberi Sunt Aut Servi* (Springer 2020) 32.

²²⁶ Pollock and Maitland (n 224) 414.

²²⁷ *Supervisor of Native Affairs v BEAC* (n 186).

²²⁸ 2 shillings and sixpence or an eighth.

which meant that the rental due to be paid would amount to an annual payment equivalent to 120% of the fee simple price.²²⁹ The 60,000 acres that were the subject of this judgment were purchased for 50 pounds in trade goods – a quantity of cloth, guns, powder, brass, wire, beads, amongst other things at a fifth of a penny per acre. Nunan considered that the consideration was past (that the natives had already moved their estates) and for the liberty to change village and plantation sites at an undetermined date, the natives acquired a ‘tenancy at will’ with a further condition of providing labour during the rainy season. Nunan stated,

The Central African native is paying a rental in excess of the present fee simple value, and 180 times as much as the original selling price of the holding upon nearly 2,000,000 acres of land in the Shire Highlands.

On these grounds, Nunan set aside the labour agreement between the parties. Having set the agreement aside, Nunan analysed the rights secured to natives in the certificates of claim. Nunan asked three questions, first, to whom were the rights under the certificates of claim secured in the non-disturbance clause? These rights might have vested in the tribe, the village community, or the natives as individuals. Secondly, what was the nature and extent of the rights secured? Thirdly, how are the persons or bodies in whom the rights inhere to be ascertained, and upon whom does the onus of proof lie?²³⁰

In determining the first question, the village community as a landholder came into focus. The court took an evolutionary view of the village community as a necessary stage in the development of societies.²³¹ Nunan stated:

We are thus brought into contact with the one great prominent feature of the life of primitive peoples all over the world, the village community as a holder of land. It is a stage which follows the wanderings of the tribe... In theory a body

²²⁹ *Supervisor of Native Affairs v BEAC* (n 186).

²³⁰ *ibid*

²³¹ *ibid*.

of kinsmen caused by the expansion of the family in practice containing many strangers admitted with or without ceremony of adoption the village community is found from Russia to Fiji, and from Central Africa to India and Brazil.²³²

Nunan held that the rights vested in the village community rather than to the tribe or the individual natives. This interpretation accords with the wording of the non-disturbance clause.²³³

Turning to the second question on the nature of the rights conferred, Nunan held that it was inevitable that the rights conferred to the estate-holders were estates in fee simple.²³⁴ However, the more challenging question was the nature of the right protected by the non-disturbance clause. Quite unexpectedly, Nunan held that the native rights protected were freehold estates without the possibility of disturbance, removal, or alienation except with the consent of the Commissioner.²³⁵ This is surprising for several reasons. Firstly, familiarity with African land custom as translated by the colonial legal system would lead one to assume that the rights reserved to Africans would be usufructuary. For instance, in the case of *Amodu Tijani v Secretary, Southern Provinces*, Viscount Haldane stated ‘a very usual form of native title is that of usufructuary right which is a mere qualification of or burden on the radical or sovereign title’.²³⁶ Indeed a very similar line of argument had been taken regarding Nyasaland Africans on Crown land in the case of *Cox v ALC*.²³⁷ Moreover, the mention of the ‘reversion’ of the

²³² Nunan refers to the work of Maine, Maitland, and Vinogradoff, among others, on the tracing of communal tenure in English history. See further Lorren Eldridge, *Law and the Medieval Village Community: Reinventing Historical Jurisprudence* (Routledge 2023).

²³³ *ibid*

²³⁴ *ibid.*

²³⁵ *ibid.*

²³⁶ *Amodu Tijani v Secretary of Southern Nigeria* [1921] 7 WLUK 58. This case is considered the locus classicus on Crown treatment of indigenous land in colonial Africa. Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Court* (Oxford University Press 2013).

²³⁷ *Cox v The African Lakes Company* (CCBCA, Tuesday 16 July 1901) in TNA FO 2/471 page 341, Consular Court at Blantyre, Tuesday 16 July 1901.

native resident's rights to the estate owner would suggest a right short of freehold. Similarly, DC Scott's analogy to the Book of Ruth and the 'encumbrance' of land suggests a right short of freehold.²³⁸

As for the extent of the grants, Nunan stated that the non-disturbance clause uses the word plantation in its 'strict etymological' sense.²³⁹ Therefore, the certificates of claim only reserved to the residents the land that had been cultivated and had crops growing. Nunan held that an estate owner who had watched native freeholders change their village was estopped from later claiming that such natives were not tenants.²⁴⁰ Finally, it was held that the onus of proof rests with the landholder to determine that the native he was dealing with was not one of the natives protected in terms of the non-disturbance clause.²⁴¹

After setting out the residents' rights on private estates as granted by the Certificates of Claim, Nunan held that it would be utterly impractical to distinguish between the original occupants included in the certificates of claim, and the new tenants who do not have such protection.²⁴² In addition, there had been many intermarriages and a natural increase in the population, which complicated the inquiry. As a result, Nunan recommended that the non-disturbance clause be abrogated and all tenants on private estates be required to pay a rent that could be commuted through cash or labour. In addition, he recommended that the landowners

²³⁸ *Life and Work in British Central Africa*,

²³⁹ *Supervisor of Native Affairs v BEAC* (HCBCA, 28 April 1903).

²⁴⁰ *ibid.*

²⁴¹ *ibid.*

²⁴² *ibid.*

co-operate with the upcoming land commission, which would investigate the situation further.²⁴³

b. Regulating *Thangata*: Penal Sanctions and Tenure Insecurity

The resultant Land Commission was headed by Joseph Nunan himself and gave recommendations almost identical to those in his *Supervisor of Native Affairs v British East Africa Company (BEAC)* judgment.²⁴⁴ The Commission's Report also noted some aspects of the labour relations that fell outside the agreement. The report stated that the native 'is frequently subject to the arbitrary demands of an autocratic and sometimes uneducated master'.²⁴⁵ In addition, evidence suggested that Africans were not permitted to sell the produce of their own gardens to anyone other than the proprietor of the estate.²⁴⁶ Furthermore, 'in nearly every case the custom of the estate permits him to work only for the proprietor'.²⁴⁷

The Commission Report (1903) expressed concern about the means of tax payment. The practice was that the owner of the estate was informally permitted to pay the resident's tax to the Collector in the without the resident appearing before the Collector.²⁴⁸ Landowners would retain the 'tax paper' even once the stipulated labour had been performed as an 'inducement to the native to comply with his demands for labour service whenever called

²⁴³ *ibid.*

²⁴⁴ *Supervisor of Native Affairs v BEAC* (n 186). Nunan was the President of the British Central Africa Land Commission, and was supported by Casson, the Acting Supervisor of Native Affairs, and Thomas Binnie, His Majesty's Judge and Vice Consul.

²⁴⁵ *ibid* 93.

²⁴⁶ *ibid.*

²⁴⁷ *ibid.*

²⁴⁸ TNA FO 403/336 Land Commission to Acting Commissioner Pearce, Inclosure No 1, 6 May 1903.

upon'.²⁴⁹ The report proposed that, in light of the system's abuses, residents should be mandated to pay their taxes directly to the Collector in person. It emphasized that the severity of these circumstances would have been mitigated if it had been easier for native tenants to depart the estate.²⁵⁰ As noted in the agreement above the native tenant had the option to give notice to quit to the landlord.²⁵¹ However, the report notes that due to the little available surrounding land, and the vast tracts of land that had been earmarked as part of the planned railway.²⁵²

The labour certificate or 'tax paper' referred to in the report became an exceptionally valuable document for all African inhabitants of the protectorate. If an employer withheld it from a native, the former could demand additional labour. In the event that a native was caught without one, he would incur a penalty of twice the tax.²⁵³ Furthermore, employers were instructed to refuse to engage any African in labour unless they could produce their previous labour certificate.²⁵⁴ The consequences for non-payment of tax could be severe - either the defaulter would be put to work on an agricultural estate, or his property would be levied in distress. Failing these remedies, the defaulter would be imprisoned, with or without hard labour.²⁵⁵

²⁴⁹ *ibid.*

²⁵⁰ *ibid.*

²⁵¹ *ibid.*

²⁵² *ibid.*

²⁵³ Hut Tax Amendment Ordinance No. 5 of 1907.

²⁵⁴ British Central Africa Gazette, June 1907, Notice from Jay Williams, Secretary to the Administration.

²⁵⁵ MNA BA 1/5/2 Native Criminal Case Book, *Rex v Bendera*, Case 42, 1/5/1909; *Rex v Silawila and Kamoto*, Case 46, 3/5/1909 in terms of section 2 of the Hut Tax Amendment Ordinance No 5 of 1907.

Instances of forgery, sale, and theft of labour certificates became more frequent in native courts, reflecting the significance attached to these certificates. In one case the Blantyre Native Court was able to recognise that a signature had been forged on the labour certificate.²⁵⁶ In another case, the court received testimony that on arriving to one village, every resident had a labour certificate regardless of whether they had worked that year.²⁵⁷ They stated that the estate *capitao* (foreman) came to sell labour certificates to them for 1/- each.²⁵⁸ In addition, labour certificates were sometimes stolen from those who had earned it in the hopes of hoping to submit it in their stead.²⁵⁹

The commission report stated that the conditions on private estates resemble serfdom, and to limit this tendency recommended fixing the rental amount, the rental period, and allocating to the Africans and their village communities land sufficient for their cultivation in terms of ordinary native custom.²⁶⁰ The Commission had three recommendations; first, that all European landowners with estates exceeding 800,000 acres set apart a portion of their estates not exceeding one-tenth in order to provide this land to the African resident community.²⁶¹ Secondly, that each tax paying native be entitled to 8 acres of land to be divided in the following way – 2 acres to grow food, 4 acres for the rotation of crops in accordance with custom, and 2 acres to account for the natural increase of the population.²⁶²

²⁵⁶ MNA BA 1/5/1 Native Criminal Case Book, Case 5, 17/9/1906.

²⁵⁷ MNA BA 1/5/1 Native Criminal Case Book, Case 6, 1/10/1906.

²⁵⁸ *ibid.*

²⁵⁹ MNA BA 1/5/1 Native Criminal Case Book, Case 242, 6/02/1909.

²⁶⁰ TNA FO 403/336 Land Commission to Acting Commissioner Pearce, Inclosure No 1, 6 May 1903, 94.

²⁶¹ *ibid.*

²⁶² *ibid* 95.

The 1904 Native Locations Ordinance adopted these suggestions and authorised the Commissioner to require estate owners to set aside land as recommended by the Commission.²⁶³ In addition to the mere setting aside of land, the land selected was required to be favourable regarding soil, water, and firewood in the context of the land available in the protectorate.²⁶⁴ This ordinance was intended to provide all African residents of private estates the same rights regardless of whether they were residents promised ‘non-disturbance’ in the certificates of claim (original settlers).²⁶⁵ However, this meant that all residents were liable to pay annual rent of 4/-, including those who should not have had to by virtue of their rights in the certificates of claim.²⁶⁶

There is a curious mixture of observance of the freehold rights of the settler over the estate and attempts to regulate the lives and rights of the Africans resident on the estates in accordance with native custom. For instance, the allocation of 8 acres per family was intended to include the area for customary crop rotation.²⁶⁷ In addition, section 7(1) of the Native Locations Ordinance provided that a Commissioner may appoint a headman for each village

²⁶³ Native Locations Ordinance (No 5 of 1904) in British Central Africa Gazette, 30 November 1903. This Ordinance was to apply only to landowners in the Districts of South Nyasa, Upper Shire, West Shire, Zomba, Blantyre, Mlanje, Ruo and the Lower Shire as per Schedule A of the Ordinance.

²⁶⁴ *ibid* section 3(1), section 4.

²⁶⁵ Section 6(1) states that the locations would be allotted to village communities or separate native families, or groups of families residing on the estate at the date of this Ordinance on the basis of 8 acres per family. Also note section 6(2) which authorises the Commissioner to permit other families to settle on the locations but wherever possible these families shall be ‘connected by blood or marriage with the original settlers’. The Ordinance attempts to eschew the distinction between original settlers and new settlers and yet returns to it in order to determine whether newcomers may join the village community.

²⁶⁶ Section 9(1).

²⁶⁷ TNA FO 403/336 Despatch No. 75 Acting Commissioner Pearce to the Marquess of Lansdowne, July 7 1903, Enclosure 1 in No 75. Report of the Land Commission to Acting Commissioner Pearce.

community or location on the private estate.²⁶⁸ In section 8 titled ‘communal tenure of land’ the Ordinance states that land in the locations shall be ‘vested in the male tax paying heads of families for the time being in occupation of the same as joint tenants upon a lease for ever’.²⁶⁹ Such joint tenants were unable to sell, mortgage or pledge their interest in land, but tenants were permitted in terms of the ordinance to sell the crops they grew.²⁷⁰

The Native Locations Ordinance did not permit landowners to receive labour instead of rental payments. In the event of non-payment of rent at the stipulated date, after three months, the District Magistrate could raise the amount by selling crops, goods or chattels belonging to the tenant in default.²⁷¹ Where the tenant had not paid his rent for a year, the Commissioner could declare that tenant’s interest in land forfeited.²⁷² Once land is forfeited, the interest would revert to the landowner with the Commissioner’s consent.²⁷³

There seems to be an attempt here to flesh out the intended mechanism of the non-disturbance clause by couching it in the language of leasehold estates. As a result of this envisaged landlord-tenant relationship, the regulation of residents on *thangata* estates differed significantly from the regulation of other labour in the protectorate which was still subject to the 1894 Regulations.²⁷⁴ There appear to be no penal sanctions for breach of these agreements. The same issue of the British Central Africa Gazette also published the Native Labour

²⁶⁸ Section 7(1) Native Locations Ordinance 1904.

²⁶⁹ Section 8.

²⁷⁰ *ibid.*

²⁷¹ Section 9(2).

²⁷² Section 9(3)

²⁷³ Section 10.

²⁷⁴ Queens Regulations Respecting Labour 1894.

Ordinance which continued to criminalise the breach of employment contracts by only the master but not the servant.²⁷⁵ However, his plan to stamp out the practice of *thangata* was dead in the water as the Commissioner never exercised his authority to create native locations on private estates.²⁷⁶

It is interesting to note that the first regulations regarding labour in the protectorate were strictly protective of ‘native’ interests, and criminalised certain breaches by the employer and granted fewer protections to those ‘natives’ who were residing in the same district as their employer. The Native Labour Ordinance of 1904 took this a step further by criminalising the employment of labourers already engaged in an employment contract.²⁷⁷ This would be punished by up to 6 months imprisonment or a fine up to £250 or both.²⁷⁸ This Ordinance further stipulated that all contracts employing labour within the protectorate be in writing if the term exceeds one month, and that employee wages could only be deducted in the presence of a magistrate.²⁷⁹

Only with the 1906 Native Labour Ordinance did labour regulations in the protectorate include penal sanctions for breach on the part of the ‘native’ taking on the classic flavour of master and servant law.²⁸⁰ However, section 3 of the ordinance explicitly excluded landlords

²⁷⁵ Native Labour Ordinance 1904 No 4 of 1904 in British Central Africa Gazette, 30 November 1904. This Ordinance did not have the same strict geographic limitations as the Native Locations Ordinance and applied to native labourers who were not tenants of their master. The Native Labour Ordinance 1904 repealed the Queen’s Regulations Respecting Native Labour 1898 and 1895.

²⁷⁶ Ng’ong’ola (n 191) 37.

²⁷⁷ Native Labour Ordinance No 4 of 1904.

²⁷⁸ *ibid.*

²⁷⁹ *ibid* Part I.

²⁸⁰ Native Labour Ordinance No 7 of 1906 reproduced in the British Central Africa Gazette, 29 September 1906. This Ordinance did not repeal the 1904 Ordinance but was to be read and construed as one with it.

employing ‘native tenants’ from its ambit meaning *thangata* arrangements were excluded from the ambit of the master and servant style ordinance.²⁸¹

Three years later, Native Labour Ordinance 1906 was then repealed by the Employment of Natives Ordinance 1909 which applied equally to contracts of service for *thangata* as for all other employment of natives within the protectorate.²⁸² The Ordinance included clauses protective of employees such as the summary conviction of any employer who withheld payment of wages.²⁸³ Section 16 of the Ordinance criminalised desertion or misconduct including failing to commence work at the agreed time, performing work carelessly, becoming intoxicated during work hours, or unauthorised leave from work. As with violations of the ordinance by employers, employees were to be sentenced to a pay a fine, in default of which, would be imprisoned with or without hard labour.²⁸⁴ In the case of breach by an employee, section 17 stipulated that there would be a fine of up to 3 shillings, and in default, imprisonment, with or without hard labour, of up to one month. Any subsequent conviction would carry a fine of up to 9 shillings, or imprisonment, with or without hard labour, of up to three months – with or without the option of a fine.²⁸⁵ Finally, section 18 of the Ordinance provided for a larger fine of £1 where the contravention of section 16 was of an ‘aggravated character’.²⁸⁶

²⁸¹ *ibid* section 3 stipulates “‘Employer’ in the case of a Company means the manager thereof or any agent duly authorised to act therefor but shall not in the case of native tenants holding lands under an agreement to render labour in lieu of or in addition to a money rent, include the landlords of such tenants’.

²⁸² Employment of Natives Ordinance No 6 of 1909 reproduced in the British Central Africa Gazette, 30 November 1909.

²⁸³ *ibid* section 6

²⁸⁴ *ibid* sections 7, 8 and 17-19.

²⁸⁵ *ibid* section 17.

²⁸⁶ *ibid* section 18.

While the Employment of Natives Ordinance did not specifically mention flogging as a penalty for breach of contracts of employment, section 8(3) of the Nyasaland Punishments Ordinance gave courts in Nyasaland the discretion to order a *native* convicted of a crime punishable by imprisonment to be flogged or whipped in substitution of or in addition to the custodial sentence.²⁸⁷ Thus, flogging was a penalty exclusively reserved for Africans in the protectorate and applied to Africans on private estates by virtue of the Punishments Ordinance.

For a measure of leniency, the discretion to flog could not be exercised for the first violation of an ordinance.²⁸⁸ Therefore, for second convictions on violations of section 16 of Employment of Natives Ordinance 1909, the court had the discretion to order natives to be flogged or whipped.²⁸⁹ This would also be the case where a native had failed to return to work after a prior conviction for desertion.²⁹⁰

While required to be executed after a court order, planters would often resort to corporal punishment on their estates. Flogging became a key part of the disciplinary repertoire experienced by African residents on private estates, albeit unlawfully. Native testimony from the 1915 Commission of Inquiry suggests that the practice of flogging and kicking was

²⁸⁷ The Punishments Ordinance No 8 of 1908 reproduced in the British Central Africa Gazette, 30 September 1909.

²⁸⁸ *ibid*, section 8(3).

²⁸⁹ MNA BA/1/5/3 Native Criminal Case Book, *Caverhill v Wilfred*, Case 287, 13/04/1910.

²⁹⁰ MNA BA 1/5/4 Native Criminal Case Book, *GS Fiddes v Kabanaza*, Case 303, 25/1/1911.

widespread on private estates as recourse to the magistrates' courts was often seen as the very last resort.²⁹¹

6. Conclusion

This chapter has analysed the effects of the land settlement programme on Africans resident on private estates. The insertion of a 'non-disturbance clause' in Certificates of Claim aimed at protecting the rights of Africans on villages existing on these estates. Similarly, Casson's role as Supervisor of Native Affairs was to shield the vulnerable from the excesses of the colonial state and settlers. However, even when the 1903 judgment in *Supervisor of Native Affairs v BEAC* held that African villages constituted freehold estates, there was scant legal protection afforded to these rights.

The concepts of protection and amelioration originated in connection to labour and maintained a close interest in regulating labour arrangements between indigenous people and settlers across British imperial polities.²⁹² Drawing from commissions of inquiry reports, magistrates' courts decisions on the criminal sanctions for failure to adhere to labour obligations, and High Court decisions on the legality of the labour arrangements, the record demonstrates the extensive power of landlords to discipline and exercise control over the lives of their servants despite government efforts to ameliorate African conditions.

²⁹¹ The Commission of Inquiry into the Chilembwe Rising Report is discussed in detail in Chapter 6.

²⁹² Shaunnagh Dorsett, 'Metropolitan Theorising: Legal Frameworks, Protectorates and Models for Maori Governance, 1837-1838' (2016) 3 Law & History 1.

The exploration of *thangata* on private estates shows two sides of the colonial state.²⁹³ On the one hand, we see a system of governance capable of transmogrifying the lives of the native population, transforming the political and economic structure of the society and regulating all of this through an established system of law. On the other hand, the state appears to act as a somewhat handicapped mediator between the interests of the planter population and those of the native Africans in a chronic battle over rivalrous and precarious sovereignties over the land.

As Mamdani notes ‘it is ironic that a in period whose moral thrust was defined by a growing campaign against slavery, all colonial powers seemed to arrive at the same solution in the face of their dilemma: unfree labour’.²⁹⁴ The labour obligations of the residents of private estates were likely the most pressing and inescapable aspect of the colonial state’s legal regime, particularly since these obligations were linked to tax obligations and penal consequences. This regulation of labour took the usual acerbity of master and servant legislation and compounded it with a dependence on the land of the master and a culture of fear and physical violence in an ‘imperial slum’.²⁹⁵ While the *thangata* labour arrangements were sometimes couched in the language of the gift-like obligations of the precolonial past, the colonial *thangata* on private estates was far removed from its historical and societal meaning. Considering the strain exerted by the differential tax system, the looming threat of criminal penalties for contract breaches, the possibility of corporal punishment inflicted by estate owners, and the inseparability of land tenure from work obligations, exploitation on private estates likely surpassed any coercion experienced under pre-colonial *thangata*.

²⁹³ Berman (n 26) 176.

²⁹⁴ Mamdani (n 10) 148.

²⁹⁵ Vail (n 132) 89.

6. AFRICAN RESISTANCE AND THE ‘ABOLITION’ OF THANGATA

The prejudicial effect to the rest of the estate of taking away an important section of that estate is obvious: it may be compared to the effect of removing an internal organ from the human body.¹

1. Introduction

The quote above originates from a memorandum composed by the Nyasaland Planters Association in response to a clause in a Bill proposing the compulsory acquisition of ten percent of agricultural estates on which Africans reside.² The analogy to an organ from the human body is not only true of the protectorate government’s plan to acquire private estates, but also of the initial acquisition of arable, densely populated land at the initial land settlement conducted by Johnston in 1893. This chapter analyses the legislation enacted to regulate *thangata* – a form of labour tenancy in which Africans were compelled to work on the estates in order to remain.³ Though the plan to create separate locations for the accommodation of resident Africans was devised in the first few years of the 20th century,⁴ its implementation was stalled by settlers in the protectorate and side-lined in favour of attempts to ameliorate conditions on the estates.⁵ The eventual purchase of settler estates and relocation of Africans

¹ MNA S1/727/26 Nyasaland Planters Association Memorandum, A Bill to Regulate the Position of Natives Residing on Private Estates 1928: Section 25 Acquisition of Ten Per Cent, 1 May 1928; Robin Palmer, ‘White Farmers in Malawi: Before and After the Depression’ (1985) 84 *African Affairs* (London) 211, 216. The Nyasaland Planters Association served as the representative organization for 230 farmers within the protectorate.

² A Bill to Amend the Law as to Native Tenancies on Private Estates 1928 Bill, published in the *Nyasaland Government Gazette*, 10 October 1928, 210.

³ JA Kamchitete Kandawire, *Thangata: Forced Labour or Reciprocal Assistance?: A Case Study of the Conversion of a Traditional African Institution into a Colonial Institution of Production with Special Reference to Southern Malawi* (Research Publication Committee of the University of Malawi 1979) 5–10.

⁴ Lands Ordinance (Native Locations) No 5 of 1904.

⁵ Palmer (n 1) 217–218; Benjamin Marnell, ‘Imagined Communities: The British Planter in Nyasaland, 1890–1940’ (West Virginia University 2021).

was an arduous task given the protectorate tobacco industry's reliance on this form of labour and the influence of estate owners.⁶

Conversely, discontent of Africans resident on private estates was poised to erupt towards the end of 1914. The eruption came in the form of the Chilembwe uprising that occurred on the 23rd of January 1915.⁷ Labour conditions on private estates, though central, were not the only factor fuelling the insurgency. The advent of the first world war plunged the protectorate into a state of unease and drew over 200,000 Africans into direct combat.⁸ The Nyasaland Protectorate was just south of German East Africa and towards the south it was bordered by Portuguese Mozambique.⁹ Therefore, Nyasaland's geographical proximity to the battlefield necessitated active defence of its territory and pursuit of enemies into neighbouring German and Portuguese regions.¹⁰ Furthermore, Africans were anxious about the rate of social and political change in the protectorate. Colonial rule had transformed the political, economic and religious aspect of their lives, and the war brought those tensions to the fore.¹¹ One significant change was the emergence of 'new men' - Africans who had received mission education and were working as businessmen, clerks, teachers, and religious ministers.¹² Most of these men had been educated by Christian missions which provided far more education and

⁶ Brian Morris, *An Environmental History of Southern Malawi: Land and People of the Shire Highlands* (Springer Science & Business Media 2016) 216.

⁷ George Simeon Mwase and Robert I Rotberg, *Strike a Blow and Die: The Classic Story of the Chilembwe Rising* (2nd edn, Heinemann Educational 1975).

⁸ Melvin Page, 'Malawians and the Great War: Oral History in Reconstructing Africa's Recent Past' (1980) 8 *The Oral History Review* 49, 49.

⁹ Colin Baker, 'Civil Response to War: The Nyasaland Civil Service, 1914-1918' (1984) 11 *Journal of African studies* 25, 25.

¹⁰ *ibid*; Melvin E Page, 'The War of Thangata: Nyasaland and the East African Campaign, 1914-1918' (1978) 19 *The Journal of African History* 87.

¹¹ Martin L Chanock, 'Ambiguities in the Malawian Political Tradition' (1975) 74 *African Affairs* 326, 330.

¹² *ibid*; Roger Tangri, 'Inter-War "Native Associations" and the Formation of the Nyasaland African Congress' (1971) 1 *Transafrican Journal of History* 84, 87.

medical care than did the protectorate government.¹³ In 1912, these men formed Native Associations to voice the concerns of the people, while the government preferred to deal with the chiefs as representatives of the African voice.¹⁴

One of these ‘new men’, John Chilembwe, planned and executed an attack against plantation estates. The protectorate government’s response to this incident was a mixture of physical violence, increased censorship, and repressive legality. The legal measures adopted included declaring martial law in the protectorate, bringing charges of murder and high treason, collective punishment of villages believed to be involved, and deportation of undesirable individuals. Political trials of this sort, in addition to being a function of the judicial process, are distinctly political.¹⁵ As the colonial government scrambled in the aftermath of the threat on the security of the state, resorted to effective means that stretched the rule of law. Instances of inhabitants from a protectorate being convicted of treason are uncommon and therefore stand out as exceptional. As natives of a protectorate, Africans in Nyasaland were generally not considered ‘within the allegiance’, essential to a charge of treason.¹⁶ This raises questions about the nature of the subjecthood of the inhabitants of Nyasaland and the relationship between protection, allegiance and treason.

¹³ Markku Hokkanen, ‘The Government Medical Service and British Missions in Colonial Malawi, c. 1891–1940: Crucial Collaboration, Hidden Conflicts’, *Beyond the State: The Colonial Medical Service in British Africa* (Manchester University Press 2015) 39–40; Agnes Rennick, ‘Church and Medicine: The Role of Medical Missionaries in Malawi 1875–1914’ (ProQuest Dissertations Publishing 2003).

¹⁴ With the objective of initiating indirect governance, the District Administration (Native) Ordinance No 13 of 1912 designated principal and village headmen, subject to the oversight of District Officers. Despite these provisions, the implementation of the ordinance proceeded slowly, especially in regions surrounding settler estates, where efforts were made to preserve the rights of landowners and prevent interference; Tangri (n 12) 86.

¹⁵ Stacey Hynd, ‘Decorum or Deterrence?: The Politics of Execution in Malawi, 1915–66’ (2008) 5 *Cultural and Social History* 437, 438.

¹⁶ Helen Irving, *Allegiance, Citizenship and the Law: The Enigma of Belonging* (Edward Elgar Publishing 2022) 94–98.

Part 2 of this chapter describes the nature and origins of the Chilembwe Uprising. More specifically, it recounts evidence given to the Commission of Inquiry relating to the nature and terms of *thangata* service, the corporal punishment on the estates, and the ‘tax certificate’, a document which proved labour had been performed and thus freed a resident from paying twice the annual rent. Part 3 then discusses the legal response to the insurgency, with particular attention paid to the treason convictions and collective punishment of villages. Part 4 explores the reforms to the labour regulations following the rising, and further attempts to ameliorate the position of native tenants. Part 5 briefly explains the process of repurchase and relocation of resident tenants, and the reduction of private estates as a means to resolve the problem. Part 6 concludes that the outbreak of African resistance followed by stark colonial repression was driven by this long history of land expropriation and labour oppression.

2. The Chilembwe Uprising: African Resistance to Thangata

Compared to other expressions of African unrest within British colonial Africa in the early 20th century, the action of the Chilembwe uprising was fleeting – less than 900 active participants and lasting less than two weeks.¹⁷ Despite the relatively small scale of the movement, the rising has attracted a wealth of literature dedicated to unearthing and explaining the causes of the uprising.¹⁸ Shepperson and Price argue that if assessed as a rebellion against foreign rule, the Chilembwe uprising is ostensibly ‘singularly ineffective’.¹⁹ However, the uprising and the evidence it throws up in the form of the subsequent Commission of Inquiry sheds a great deal

¹⁷ John McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (First, Oxford University Press 2015) xv.

¹⁸ Jane and Ian Linden, ‘John Chilembwe and the New Jerusalem’ (1971) 12 *Journal of African History* 629; George Shepperson and Thomas Price, *Independent African: John Chilembwe and the Origins, Setting and Significance of the Nyasaland Native Rising of 1915* (Edinburgh University Press 1969).

¹⁹ Shepperson and Price (n 18) 267.

of light on the relations between Africans and Europeans in the Protectorate, and more broadly, is a microcosm of human relations throughout sub-Saharan Africa.²⁰ In this section the uprising is discussed as a window into the impact of the plantation economy and *thangata* on the Africans involved.

Early resistance movements against colonial rule, such as the Chilembwe rising, are typically termed ‘primary resistance’ movements.²¹ This term distinguishes them from the ‘secondary resistance’ movements that occurred shortly before attaining independence.²² As was the trend in African historiography, the uprising has been framed as an early instance of African nationalism.²³ It was more a clash of ideas than a clash of personalities, as it is sometimes classed.²⁴ Some of the fascination with the rising is due to a fixation on the *dramatis personae* involved, including John Chilembwe and William Jervis Livingstone.²⁵ However, to reduce the rising to a clash of personalities would be to underplay the strong evidence of deep-seated tensions that existed between the Africans and settlers in the protectorate. These tensions will be explored here with a focus on *thangata*’s role in the uprising.

²⁰ ibid 4, 267 they argue that it is the quality rather than the quantity of Chilembwe’s movement that gave it its significance.

²¹ Klaas van Walraven and Jon Abbink, ‘Rethinking Resistance in African History: An Introduction’ (Brill 2003) 3.

²² ibid.

²³ TO Ranger, ‘Connexions between “Primary Resistance” Movements and Modern Mass Nationalism in East and Central Africa: II’ (1968) 9 *Journal of African History* 631; van Walraven and Abbink (n 21) 1.

²⁴ DD Phiri, *Let Us Die for Africa: An African Perspective on the Life and Death of John Chilembwe of Nyasaland* (Expanded, Central Africana 1999) 45–46; John McCracken, *A History of Malawi, 1855–1966* (James Currey 2012) 133.

²⁵ McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) 1.

John Chilembwe, a Yao man,²⁶ had been educated at a Church of Scotland School in Blantyre before becoming an apprentice of the evangelist Joseph Booth (1851-1932), a radical missionary who held anti-colonial views and advocated absolute racial equality.²⁷ Chilembwe then travelled to the United States with Booth on a funding mission.²⁸ Chilembwe remained and enrolled in the Virginia Theological Seminary and College at Lynchburg and then returned to Nyasaland in 1900 as an ordained minister to start his independent church called Providence Industrial Mission. He then began to attract an impressive number of parishioners, and in 1913, he was able to construct a church that rivalled the Blantyre Mission's church in size. Chilembwe was able to draw adherents from the surrounding Bruce estates and neighbouring Portuguese East Africa.²⁹

Chilembwe's church appealed to Africans on whom the colonial regime heavily weighed because he preached about advancing Africans, the shortcomings of British rule, and a change in the system where the exploited would be able to govern themselves.³⁰ In addition to the church's ministry, Chilembwe had also bought land and harvested coffee, cotton, and tea crops. For this endeavour, he employed Africans. This was a challenge to the racial hierarchy and the intention to have Africans work on white-owned estates. The labour certificate was a particular grievance to Chilembwe and his African labourers who grew their own cash crops

²⁶ Chanock (n 11) 330.

²⁷ TNA WO 106/262 Report of Commission Appointed by His Excellency to Inquire into Various Matters and Questions Concerned with the Native Rising within the Nyasaland Protectorate, 31 January, 1916. While paragraph 13 noted that John Chilembwe was the 'originator' of the rising, the 'remote source' is in the 'machinations of Joseph Booth'; Mwase and Rotberg (n 7); Harry W Langworthy, 'Joseph Booth, Prophet of Radical Change in Central and South Africa, 1891-1915' (1986) 16 *Journal of Religion in Africa* 22.

²⁸ Klaus Fielder, 'Joseph Booth and the Writing of Malawian History', University of Malawi: Chancellor College History Department Seminar Series (Unpublished 1994).

²⁹ Mwase and Rotberg (n 7) xxi.

³⁰ Phiri (n 24) 50.

without the need to work for European estates.³¹ With hut tax rising in 1912 to 8s with a labour rebate of 4s, there was much discontent about what was considered a labour tax.³² By mid-1914, John Chilembwe would preach of tax evasion, and this was a warning to the administration that sedition was fomenting.³³

The effect of the Great War on Africans in the protectorate further exacerbated their frustrations. John Chilembwe wrote of his frustrations with the war in the *Nyasaland Times*:

We understand that we have been invited to shed our innocent blood in this world's war which is now in progress throughout the wide world... A number of our people have already shed their blood, while some are crippled for life. And an open declaration has been issued. A number of police are marching in various villages persuading well-built natives to join in the war. The masses of our people are ready to put on uniforms ignorant of what they have to face or why they have to face it... If it were a war...for honour, Government gain of riches, etc., we would have been boldly told: Let the rich men, bankers, titled men, storekeepers, farmers and landlords go to war and get shot. Instead, the poor Africans who have nothing to own in this present world, who in death leave only a long line of widows and orphans in utter want and dire distress, are invited to die for a cause which is not theirs. It is too late now to talk of what might or might not have been. Whatsoever be the reasons why we are invited to join in the war, the fact remains, we are invited to die for Nyasaland.³⁴

Chilembwe's article in the *Nyasaland times* escaped the Government censor, and reached print, whereupon it was seized.³⁵ He laments that Africans shoulder the heaviest burden in the battle,

³¹ Much attention has been given to the administration's reliance of European plantations as the only economic salvation of the protectorate. Cf Bridglal Pachai, 'Land Policies in Malawi: An Examination of the Colonial Legacy' (1973) 14 *The Journal of African History* 681.

³² Shepperson and Price (n 18) 196.

³³ *ibid.*

³⁴ See *ibid* 236, 470 especially footnote 126. Likely *Nyasaland Times* No 48, November 1914.

³⁵ *ibid* 235–236.

endure economic hardship in the protectorate and have a limited grasp of the reasons for their deployment to a war from which they have nothing to gain.

William Jervis Livingstone, one of the main targets of this uprising, was the manager of the AL Bruce estates at Magomero. The animus between Chilembwe and WJ Livingstone has been documented as going back to 1913 when Livingstone burned down two Providence Industrial Mission churches on his estate.³⁶ In 1913, the AL Bruce estates at Magomero and Lulukezi were incorporated, and there was a stated intention to grow the estate and increase productivity. This required stricter management of labour tenants when there was already significant discontent amongst the labouring class.³⁷ African discontent was targeted at Livingstone because he was a tangible symbol of the economic and political system against which they were revolting.

The events of the uprising were these: on Saturday evening, the 23rd of January 1915, a group of Africans journeyed approximately 8 miles from Chilembwe's Providence Industrial Mission to the headquarters of the AL Bruce estates at Magomero.³⁸ The attackers gained entrance into the estate and killed two Europeans including WJ Livingstone. Livingstone was decapitated and his head was transported back to Mbobwe where it was stuck on a pike and mounted in front of the congregation during Chilembwe's sermon the following Sunday.³⁹ The

³⁶ ibid 223–224.

³⁷ ibid 226.

³⁸ McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) xviii.

³⁹ ibid xviii–xix.

women and children at the estate, Livingstone's wife and children, were escorted through Phalombe to Mbobwe but were released unharmed before they arrived.⁴⁰ That same evening, there was an attack on the nearby Mwanje estate as well as the Blantyre African Lakes Company in Mandala. Finally, the Nguludi Catholic Mission was attacked and set alight on Tuesday 26th January.⁴¹

The events of the uprising came as an utter surprise to Europeans in Nyasaland.⁴² As they were trying to figure out how secure their administration was, blame was placed on Christian missionaries.⁴³ However, to their credit, Scottish missionaries requested that there be a Commission of Inquiry into the origin, causes and character of the uprising.⁴⁴ The Commission had four terms of reference, the first two are of particular relevance to the question of labour on private estates. First, the discovery of the 'origin, causes and objects' of the uprising.⁴⁵ Secondly, to uncover the grievances of the natives which caused the rising.⁴⁶ Thirdly, the adequacy of means the colonial government had of gathering information on 'the

⁴⁰ ibid.

⁴¹ Brian Morris, 'The Chilembwe Rebellion' (2015) 68 *The Society of Malawi Journal* 20, 40.

⁴² Shepperson and Price (n 18) 268.

⁴³ *Nyasaland Times*, No 15, 4 February 1915, 'In a sense all missions are responsible as it [the rising] is due to the effect of ill-digested teaching on the native mind...it is very plain that to educate natives very highly and then not find suitable employment for them is a mistake'. In the immediate aftermath of the rising, AL Bruce, proprietor of the Magomero estate, proposed in a Legislative Council meeting that all mission schools with native instructors be closed until the result of the Commission; Nyasaland Protectorate. *Summary of Proceedings of the Legislative Council, Fourteenth Session* (Zomba, 1915) ibid 366.

⁴⁴ McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) xix.

⁴⁵ TNA WO 106/262 Report of the Commission to the Native Rising in the Nyasaland Protectorate, 3.

⁴⁶ ibid.

state of native feeling.⁴⁷ Finally, the effect of missionaries and their teachings on ‘the native mind and character.’⁴⁸

On the first term of reference, the cause of the rising, the report found the direct cause and torch-bearer of the rising was John Chilembwe, while the indirect cause was Joseph Booth who had ‘sown the seeds of racial animosity’ in the protectorate.⁴⁹ Furthermore, the report recognised that there was unlawful treatment of Africans at all the estates but especially at Magomero.⁵⁰ In addition, the report found that the rising’s objective was the ‘extermination or expulsion’ of Europeans from the protectorate in order to establish a native state under the rule of John Chilembwe.⁵¹ Unsurprisingly, *thangata* was identified as a major grievance leading to the uprising. Furthermore, Africans faced significant challenges when their landlords withheld their labour certificates.

The evidence thrown up by the Commission of Inquiry provides an essential record of the uprising. It is important to isolate certain aspects of the Inquiry’s account. First, the uprising took place on one of several white owned estates in the protectorate. In inviting evidence, the question was whether the objectionable treatment of natives was attributable to a single estate or a single man, or whether it is evidence of widespread abuse in the protectorate. Given the

⁴⁷ ibid.

⁴⁸ ibid.

⁴⁹ ibid, 13.

⁵⁰ ibid.

⁵¹ Shepperson and Price (n 18) 254–255 Shepperson and Price argue that to consider this the aim of the rising is a ‘harmful simplification’ as there is evidence to suggest that Chilembwe and his co-conspirators never intended or expected the uprising to be successful. Instead, they considered it a ‘symbolic gesture’ to send the message that the current state of affairs was not acceptable.

tragic death of Livingstone, it might have been expected that he would rise as a martyr-like figure amongst his contemporaries. However, this was not the case.⁵² Instead, the Commission of Inquiry concluded that there had been significant abuses on all the estates.⁵³

Secondly, the composition of the members of the Commission unavoidably influenced the proceedings and the resultant report. Five commissioners were appointed, namely, Chairman Robert WL Grant, a High Court Judge; AGB Glossop, an Anglican Archdeacon of Likoma; Claude Metcalfe, a representative of the Shire Highlands Planting Community and the manager of the British Central Africa Company; Joseph Casson, the Supervisor of Native Affairs; and Aubrey Turnbull, Assistant Chief Secretary. The appointment of AGB Glossop was a particular thorn in the side of non-Anglican protestant missions which were the overwhelming majority of Christian missions in the protectorate. They were concerned that there would be a bias against protestant churches, and this bias was confirmed for them by the tenor of the report which stated that,

There is a certain danger that in the absence of adequate supervision religious instruction may possibly be made a vehicle for undesirable political propaganda by native teachers. In the Roman Catholic Church and Anglican Missions, this danger does not exist to the same extent owing to the nature of religious teaching entrusted to native teachers.⁵⁴

⁵² McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) 33.

⁵³ The idea of scapegoating Livingstone is reminiscent of Galligan's statement on the widespread objection to Sinderam and Walker's recruitment of Portuguese East Africa natives Thomas Galligan, 'The Nguru Penetration into Nyasaland, 1892-1914' in Roderick J MacDonald (ed), *From Nyasaland to Malawi: studies in colonial history* (East African Publishing House 1975) 114. Galligan argued that Sinderam and Walker's conduct was not different in any significant respect from how other recruiters conducted themselves but that the true motive behind the outrage was to rid the protectorate of the monopoly they held; TNA WO 106/262 Report of the Commission to the Native Rising in the Nyasaland Protectorate, 13.

⁵⁴ TNA WO 106/262 Report of the Commission to the Native Rising in the Nyasaland Protectorate, 14.

The Scottish Missions questioned the impartiality of the Commission and resented the scapegoating of their educational endeavours. The aftermath of the rising illuminates the rifts between Christian creeds, planters, and missionaries. Indeed, the Governor of the protectorate expressed some disillusionment about the goal of ‘civilising natives’.⁵⁵

Taking a closer look at some of the responses from the statements given in to the Commission of inquiry elucidates the nature and degree of the various restrictions of the labour tenants’ freedom. The commission was wary of ‘native evidence’,⁵⁶ but were able to conclude from it that ‘the treatment of labour and the system of tenancy on the Bruce Estates (labourers and tenants being practically interchangeable terms) were in several respects illegal and oppressive’.⁵⁷

a. Nature and terms of *thangata* service

Thangata service was regulated by the 1909 Employment of Natives Ordinance, a species of master and servant law, alongside all other native labour in the protectorate.⁵⁸ However, protections provided to Africans in this Ordinance such as the criminalisation of withholding

⁵⁵ Nyasaland Protectorate, *Summary of Proceedings of the Legislative Council, Fourteenth Session* (Zomba, 1915) 3, ‘Its effect [the rising] has been to shatter some of our beliefs in the efficacy of past attempts at Christianising and civilising the native population’.

⁵⁶ *ibid* 5.

⁵⁷ *ibid* 5-6.

⁵⁸ Employment of Natives Ordinance 1909. Unlike the previous 1906 Ordinance, it applied to *thangata* arrangements on private estates. Native Labour Ordinance, No 7 of 1906, s 3 stated that an ‘employer’ in the case of a Company means the Manager thereof or any agent duly authorised to act therefore but shall not in the case of native tenants holding lands under an agreement to render labour in lieu of or in addition to a money rent, include the landlords of such tenants’.

wages,⁵⁹ and the requirement that an accurate and permanent record of employment be kept,⁶⁰ were regularly flouted on the estates.⁶¹ Few, if any, of the roll books met the requirements of the Ordinance.⁶² A lengthy interview with A Livingstone Bruce on the roll books kept at the Magomero estate led the commission to note that because of the shoddy employment recordkeeping it was impossible to repudiate the complaints made by Africans about their payment being withheld and compulsion to work longer than their term of service.⁶³ The commission report noted that

The tenant system was that natives living on the land were compelled to work for the estates. No money rent was accepted. Natives had to work one month in the wet season for rent and another month also in the wet season for Hut Tax, that is two months' work. A month was reckoned at twenty-eight days actual work, and it was stated before the Commission that by various devices natives were compelled to work considerably longer periods, e.g. if a native did not complete his day's task, no credit was given to him for the time he had worked, and occasionally he had to work several days extra to make up for the day lost.⁶⁴

Further testimony that suggested that *capitaos*, the native foremen on the plantations, were encouraged to mark natives absent when they were unable to complete tasks assigned. Mwalimu, a foreman who oversaw over 140 labourers, testified that when Livingstone thought Mwalimu did not assign enough work, a confrontation would ensue. When asked how the tasks

⁵⁹ Section 6 Employment of Natives Ordinance 1909.

⁶⁰ *ibid* s 6.

⁶¹ TNA WO 106/262 Report of the Commission to the Native Rising in the Nyasaland Protectorate, 5 'The labour roll books of the estates were exhibited to the Commission, and it clearly appeared from them that the safeguards laid down in the 'Employment of Natives Ordinance' for ensuring the proper payment of natives were not complied with. It was impossible to discover from them either the rate of pay of an individual native or the days on which he had worked, or in some cases whether he had been paid or not'.

⁶² Oral testimony of A Livingstone Bruce, 31 July 1915, reproduced in McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) 350.

⁶³ A Livingstone Bruce, 31 July 1915, 349-355; Henry Cruise, Assistant Resident at Karonga testified that while he was not aware of the practice of marking natives as 'absent' for the day when they had completed part of their work. Furthermore, he stated that there was no significant difference between the conditions on Magomero and those on other estates 29 July 1915, 46-48.

⁶⁴ TNA WO 106/262 Report of the Commission to the Native Rising in the Nyasaland Protectorate, 5.

were set on Magomero, Mwalimu explained that once he had set a task, the *bwana* (boss) would say that the task was not large enough, and he would write ‘nothings’ in the book – indicate that no work was done on that day.⁶⁵

Grant: Suppose a boy has four rows to do for a day’s work, and he only finished three on that day and came the next day and wanted to finish the fourth row – could he do that?

Mwalimu: If a boy only finished three rows and didn’t finish the fourth row that day, it would be written as nothing in the book, and the next day he would be given four rows again.

Grant: He could not finish the fourth row the next day?

Mwalimu: No.⁶⁶

This suggests how it might have been that labourers worked for two or three times the required length of time in order to get their labour certificate signed. In addition, grievances regarding payment were expressed. Ndala from the Magomero estate noted that when a boy was not given the pay agreed upon and complained, Livingstone would say ‘you are a child, you only get that’.⁶⁷ Stephen Kundecha testified that labourers would receive part of their wages in tobacco rather than the cash payment agreed.⁶⁸ In addition, testimony from Kalino, an African worker at the Magomero plantation, describes the outcome when grievances were brought to the attention of the estate owner, and the hesitation to escalate the issue to the magistrate.⁶⁹

Casson: You say you were afraid to go to the Boma, and you also said you were afraid because the whiteman might say “Why did you go to the Boma?” –

⁶⁵ Oral testimony of Mwalimu, 7 July 1915, reproduced in McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) 313.

⁶⁶ *ibid*; Similar testimony given by Joseph Bismarck, 14 July 1915, 171 referring to the practice on the British Central Africa Company estates. However, examination of all testimony given to the commission shows some differences in the stated duration of the of work.

⁶⁷ Oral testimony of Ndala, 7 July 1915, reproduced in McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) 309.

⁶⁸ Oral testimony of Rev. Stephen Kundecha, 8 July 1915, reproduced in *ibid* 128.

⁶⁹ Oral testimony of Kalino, 7 July 1915, reproduced in *ibid* 308.

Then is it true to say that they were not afraid of the Boma but of their Bwana?

Kalino: Yes.

Casson: When Mr Livingstone gave the boys their wages and they said it was not enough - What happened?

Kalino: Mr Livingstone would simply throw it back at them.

The Employment of Natives Ordinance 1909 required African labour tenants to report the lack of payment in order for the penalty to be enforced. However, this testimony suggests that even if Africans were aware of their rights under the Ordinance (and this is doubtful due to its publication in only English) some may have been held back from coming forward by fear. There was also a disjuncture between the English system of justice and the native systems to which the natives were accustomed. In a written statement submitted to the commission as evidence, a native minister at Zomba church, Stephen Kundecha noted that with the natives ‘knowing and punishing came together at the same time’ in a foreign system.⁷⁰

A further grievance and limitation on labour tenants’ freedoms was their inability to work for other employers. Mwalimu testified that some labourers worked for other employers but had to do so secretly.⁷¹ Thus labour conditions on the private estates constituted a significant limitation on freedom. Though they were technically able to leave the estate, they required permission to settle on Crown land, and there was not enough Crown land for resettlement. Furthermore, some Africans on private estates often wanted to stay on their ancestral land.

⁷⁰ Written testimony, ‘Grievances of the Natives’, Submitted by Stephen Kundecha, 8 July 1915, reproduced in *ibid* 134.

⁷¹ Oral testimony of Mwalimu, 7 July 1915, reproduced in *ibid* 319.

b. Corporal Punishment and the Law

Despite regulations prohibiting the flogging or whipping of natives without court authorisation, such acts were frequently carried out on the estates.⁷² Furthermore, there may have been a view among the natives that reporting their woes to the magistrates' courts would be futile. Peter Kasanga testified that when it came to *thangata* work, the magistrates were not of assistance to natives. He said, 'If the native goes before a magistrate and makes a complaint, the magistrate says, 'You are a lazy man'.⁷³ It seemed that at least on the site where the uprising took place, natives were reluctant to go to the boma (government) for assistance and viewed the estate owner as the authority. Captain Charles Thorburn testified that to the natives, Magomero was like a boma and all their cases and complaints were handled on site.⁷⁴ In addition, there may have been fear among the natives regarding reporting issues to the government or courts. Robertson Namate noted,

If you report anything to the Boma they would give you a certain detention until strictly the matter is investigated, then in this way you may have to suffer for nothing.⁷⁵

Corporal punishment on the estates would be done using a *chikoti* (hippo hide whip) or boots for kicking.⁷⁶ While it seemed clear that corporal punishment was a practice on all the estates the view was that Livingstone was excessive in his manner. As testified by A Livingstone Bruce

⁷² Oral testimony of Henry Cruise, 29 July 1915, reproduced in *ibid* 46.

⁷³ Oral testimony of Peter Kasanga, 30 July, 1915 reproduced in *ibid* 65.

⁷⁴ Oral testimony of Captain Charles Thorburn, 5 July 1915 reproduced in *ibid* 297.

⁷⁵ Oral testimony of Robertson Namate, 6 July 1915 reproduced in *ibid* 108.

⁷⁶ Morris (n 41) 28.

‘[H]e always said there were two ways of dealing with natives and they were striking him with an open hand or kicking him on a certain part of his body’.⁷⁷ Natives were liable to be punished when for their behaviour on the job. For instance, AJ Wallace testified that he had witnessed Livingstone beat a boy for sitting under a tree singing while the cattle grazed around him.⁷⁸ Livingstone then said ‘that boy wants a thrashing, give him one’.⁷⁹ Mwalimu testified that labourers were beaten if they went to have a drink of water, and recalled an occasion where a boy was kicked, tied down and beaten for not ‘doing his work properly’.⁸⁰ Glossop asked him upon hearing some of the testimony:

Glossop: Is that true, or only what you have heard from other boys –
 did Livingstone ever beat you himself?
 Mwalimu: Often.⁸¹

c. Labour Certificate and Tax

One of the most pressing concerns which led to the uprising was the labour certificate. Testimony given on this issue suggests that it was not the labour certificate itself that was cause for complaint, but the abuses it opened the door to. Native testimony from the interpreter and chief typist at the boma in Chiradzulu, Peter Kasanga, and the Government secretariat clerk and typist, Robertson Namate noted that they wanted the abolition of the labour certificate because of the difficulty of getting a labour certificate signed even once work has been

⁷⁷ Oral testimony of A Livingstone Bruce, 30 June 1915, reproduced in McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) 277.

⁷⁸ Oral testimony of AJ Wallace Ross, 5 July 1915, reproduced in *ibid* 292.

⁷⁹ *ibid*.

⁸⁰ Oral testimony of Mwalimu, 7 July 1915, reproduced in *ibid* 314.

⁸¹ *ibid*.

performed.⁸² Opinions on the labour certificate different among the colonial administrators. For instance, Resident and Zomba and the Southern Province Commissioner Ernest Costley White added that he believed natives would continue to seek work even in the absence of the labour certificate system. He testified that he thought the *thangata* system unduly restricted the liberty of natives and that the native was practically forced to complete an excess of work by landlords withholding the certificate.⁸³ The Commission reported that ‘there was evidence to the effect that the labour certificate is a hardship in itself and is open to abuse’.⁸⁴

The restriction of freedom was exacerbated by the fact that natives with their own enterprises were not authorised to sign labour certificates.⁸⁵ There was an emerging class of African planters and businessmen who struggled to attract workers due to the differential tax policy.⁸⁶ It was from this class that many of Chilembwe’s co-conspirators came, frustrated with the colonial governments bias towards European planters.⁸⁷

⁸² Oral testimony of Peter Kasanga, 30 July 1915 and Robertson Namate, 6 July 1915, reproduced in McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) 64,114.

⁸³ Oral testimony of Ernest Costley White, 2 July 1915, reproduced in *ibid* 481.

⁸⁴ TNA WO 106/262 Report of the Commission to the Native Rising in the Nyasaland Protectorate, 7.

⁸⁵ Written testimony ‘Grievances of the natives’ Submitted by Rev Stephen Kundecha, 8 July 1915, reproduced in McCracken, *Voices from the Chilembwe Rising: Witness Testimonies Made to the Nyasaland Rising Commission of Inquiry, 1915* (n 17) 314.

⁸⁶ Morris (n 41) 26.

⁸⁷ Landeg White, ‘“Tribes” and the Aftermath of the Chilembwe Rising’ (1984) 83 *African Affairs* (London) 511, 520; Morris (n 41) 34.

3. Legal Response: Treasonous ‘Protected’ Persons and Collective Punishment

In the aftermath of the Chilembwe rising the colonial government was scrambling to maintain and demonstrate its authority. There was a dramatic display of force by the Nyasaland Volunteer Reserve, which included the hunting down and shooting of some of the insurgents, as well as the destruction of churches in which they prayed, and the burning of villages and property belonging to the rebels.⁸⁸ Martial law was declared,⁸⁹ over a hundred men were tried for treason, entire villages were fined for ‘rendering assistance’ in the Chilembwe rising, and men acquitted for their crimes were deported from the protectorate.

Governor Smith wrote that ‘1009 persons were apprehended and their cases investigated by either the District Magistrate or Other Magistrate’.⁹⁰ He stated that 547 of these cases were discharged, ‘the evidence being insufficient on which to proceed or acquitted on trial’.⁹¹ Further, that ‘the High Treason Court disposed directly of 119 cases, of which 11 were acquitted and 108 sentenced’.⁹² John Chilembwe and the other leaders of the rebellion were

⁸⁸ Paul Banda, *The State, Counterinsurgency, and Political Policing in Colonial and Postcolonial Malawi, 1891-1994*. (Lexington Books 2020) 92.

⁸⁹ Proclamation No 3 of 1915 in terms of The Nyasaland Defence Ordinance, *Nyasaland Gazette*, 26 January 1915.

⁹⁰ TNA CO 525/62 Governor Smith to Secretary of State for the Colonies, No 164, Native Rising, Transmits showing how the cases have been dealt with, 6 September 1915.

⁹¹ *ibid.*

⁹² *ibid.*

‘shot down resisting capture’.⁹³ 36 of the most notorious condemned men were publicly hanged.⁹⁴

There was no specific statute or ordinance importing the law of treason into the Nyasaland Protectorate, yet the protectorate government proceeded on the assumption that it applied. The reception clause in the Order of Council imported the law of England into the protectorate.⁹⁵ The English law of treason, with its origins in the Treason Act of 1351, would have been imported under the reception clause.⁹⁶ In terms of this Act, treason was defined as plotting the king’s death, waging war against the king, or providing assistance to the enemies of the king. However, as treason is concerned with the security of the state it seems to have required some adaptability to novel situations,⁹⁷ especially within the British empire.⁹⁸ Treason, a versatile offense, was often assumed applicable in other dominions, shifting from criminalising acts against the monarch to acts against the colonial government.⁹⁹

⁹³ *ibid.*

⁹⁴ Stacey Hynd, ‘Law, Violence and Penal Reform: State Responses to Crime and Disorder in Colonial Malawi, c.1900-1959’ (2011) 37 *Journal of Southern African Studies* 431.

⁹⁵ Article 13 of Africa Order in Council 1889, Reproduced in *London Gazette*, 22 October 1889, Issue 2596 5557. This article provided the territory’s reception clause establishing that civil and criminal jurisdiction would ‘be exercised upon the principles of and in conformity with the law for the time being in force in England’.

⁹⁶ Treason Act 1351(25 Edw 3 st 5 c 2); See also and the Treason Felony Act 1848 (11 & 12 Vict c 12).

⁹⁷ H Lauterpacht, ‘Allegiance, Diplomatic Protection and Criminal Jurisdiction Over Aliens’ (1947) 9 *Cambridge Law Journal* 330, 334.

⁹⁸ Michael Lobban, ‘The Travels of Treason’ (2024) 87 *Modern Law Review* 24, 26.

⁹⁹ *ibid* 50–51.

The essence of treason lies in a transgression against the allegiance owed to the Crown.¹⁰⁰ There is said to be a correlative relationship between allegiance and protection, what Edward Coke called a '*duplex reciprocum ligamens*— a dual and reciprocal tie between sovereign and subject'.¹⁰¹ From this Coke reasoned that 'protection attracts subjugation, and subjugation, protection'.¹⁰² However, protectorates were not a part of the Queen's dominions and Africans inhabitants of a protectorate were not British subjects.¹⁰³ This has been confirmed by the availability of the defence of act of state, which is not available against persons within the allegiance, against inhabitants of a protectorate.¹⁰⁴

As early as 1855, Law Officers opined on a case involving the Ionian Islands that inhabitants of a protected state could not be guilty of treason at common law.¹⁰⁵ Though this case pertained to a 'classical' protectorate, a similar position seemed to obtain in colonial protectorates.¹⁰⁶ In *Ol le Njogo* (1913) the inhabitants were said to owe only obedience rather than allegiance.¹⁰⁷ While the decision in *R v Christian* (1924) in the Appellate Division of the Supreme Court of South Africa held an inhabitant of that mandated territory guilty of treason,

¹⁰⁰ Irving (n 16) 94–98; Lobban (n 97) 24.

¹⁰¹ Edward Coke and Steve Sheppard, *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund 2003) 175–176.

¹⁰² *ibid* 176.

¹⁰³ Kenneth Polack, 'The Defence of Act of State in Relation to Protectorates' (1963) 26 *The Modern Law Review* 138.

¹⁰⁴ *R v The Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576; *Sobhuza II v Miller* [1926] AC 518, 4; *Nyali v Attorney General* (1955) 1 All ER 646 1955.

¹⁰⁵ Arnold Duncan McNair, *International Law Opinions: Selected and Annotated* (Vol 1, University Press 1956) 40; Polack (n 102) 141.

¹⁰⁶ Polack 142.

¹⁰⁷ *Ol Le Njogo v Attorney General* (1913) 5 EALR. 'But East Africa being a Protectorate in which the Crown has jurisdiction is in relation to the Crown a foreign country under its protection, and its native inhabitants are not subjects owing allegiance to the Crown but protected foreigners, who, in return for that protection, owe obedience',

that decision cannot be taken as the common law position as the case was decided under Roman-Dutch law.¹⁰⁸ Therefore, the treason convictions against 108 men in the Nyasaland protectorate seems to have involved a deviation from common law principles.

The Nyasaland Protectorate had measures in place to suspend the ordinary common law in the case of an emergency. The Nyasaland Defence Ordinance 1904 enabled the Governor to declare martial law when in his opinion, ‘an emergency affecting the public safety has arisen or is about to arise’.¹⁰⁹ However, section 3 of the Ordinance provided that

Every person who shall for the time being be within the limits of the Protectorate shall be subject to military law...in the same manner as if such person had been a person accompanying the His Majesty’s troops.

A person who is by virtue of this Ordinance subject to military law shall, unless the Governor directs otherwise, be tried by a competent civil court and not by court martial, for any offence for which he would be triable if he were not subject to military law.¹¹⁰

Three days after the night of the initial attack of the Chilembwe rising, the following Proclamation appeared in the Government Gazette:

Whereas circumstances have arisen which require sections 3 and 4 shall be applied to all parts of the Protectorate. Now therefore I declare that The

¹⁰⁸ *R v Christian* (1924) AD 101.

¹⁰⁹ Sections 2 and 3 Nyasaland Defence Ordinance No 11 of 1914.

¹¹⁰ *ibid* s 3.

Nyasaland Defence Ordinance 1914 in its entirety shall come and is declared to have come into operation throughout the whole protectorate.¹¹¹

Suspects in the insurgency seem to have been tried for treason in terms of section 3 of the Nyasaland Defence Ordinance 1914.¹¹² However, in terms of the section, they were to be tried by ‘competent civil law courts’ for offences for which they would be triable even if military law did not apply. Given the absence of a specific ordinance importing the law of treason, inhabitants of a protectorate ought not have been tried for treason, even in terms of this section. Having gone beyond the terms of the Defence Ordinance given the departure from common law principles the protectorate seems to have engaged in a necessary suspension of the ordinary law in order to preserve the legal order.¹¹³ While the law of treason became unmoored from its common law foundational principles within the empire, in the colonial protectorate the malleability of the concept stripped it of its classical link to allegiance.

On the conclusion of the treason trials, Governor George Smith sought to send a wider message through the imposition of fines on villages that had in some way aided in the rising. He stated:

But over and above such cases there remained for my consideration the question of certain villages and groups of villages which were undoubtedly implicated in Chilembwe’s plot in the passive sense that they must have known or had good

¹¹¹ Proclamation No 3 of 1915 in terms of The Nyasaland Defence Ordinance, *Nyasaland Gazette*, 26 January 1915.

¹¹² Section 3 Nyasaland Defence Ordinance 1914. This is a deduction based on references to the Defence Ordinance in dispatches regarding actions taken in the aftermath of the rising. Reference to treason trials in Executive Council meetings suggest that only oral reports of the trials were submitted to the Council, and I could not locate the case files. TNA CO 626/2 Minutes of the Executive Council, 16 March 1915, Resolution 138 ‘The judge attended and submitted verbal reports on the trial by the high court of the following persons sentenced to death in connection with the rising of John Chilembwe...’.

¹¹³ Christopher Roberts, ‘The Age of Emergency’ (2021) 20 Washington University Global Studies Law Review 99; David Dyzenhaus, ‘The Puzzle of Martial Law’ (2009) 59 The University of Toronto Law Journal 1.

reason to suspect its existence and must also knowingly have abstained to give information to the authorities regarding the whereabouts of the fugitive traitors. It is eminently necessary that natives should be made to understand that their duty to the Government, at any rate in the case of so heinous a crime as treason, does not end with mere abstention from the overt offence but it is incumbent on them to assist the authorities by disclosing what they know and by cooperating to prevent the escape of fugitives from justice.¹¹⁴

According to section 2(a) of the Collective Punishment Ordinance 1909 which made it an offence to collude, harbour or fail to take all reasonable means to prevent the escape of a criminal, all male residents of villages in Zomba, Mulanje, North Nyasa, Blantyre and Ntcheu were fined.¹¹⁵

Finally, measures were implemented to deport the 547 men who lacked sufficient evidence against them but were deemed undesirable.¹¹⁶ In terms of article 25 of the British Central Africa Order in Council, the Governor had the authority to deport these persons from the protectorate.¹¹⁷ After resolving the criminal aspects of the uprising, the protectorate government turned its attention to the underlying cause—the conditions existing on private estates.

¹¹⁴ TNA CO 525/62 Governor Smith to Secretary of State for the Colonies, No 126, 21 June 1915.

¹¹⁵ *ibid* Enclosure 2 Memorandum on Orders made under the Collective Punishment Ordinance 1909.

¹¹⁶ TNA CO 626/2 Minutes of the Executive Council.

¹¹⁷ British Central Africa Order in Council 1902, No 663. Published in the British Central Africa Gazette, 31 October 1902.

4. Regulating the Position of Africans on Private Estates 1915-1932

One of the most significant results of the uprising was the light it shone on the untenable position of land and labour affairs.¹¹⁸ The commission report recommended ‘the introduction of an Ordinance to regulate the position of native tenants on European estates’.¹¹⁹ Further, that work in exchange of rent should be abolished, ‘except at the option of the tenant’.¹²⁰ The report included additional measures to ameliorate the condition of resident Africans by stating that resident tenants also receive ‘reasonable notice to quit (so as to enable him to ingather his crop)’ and that any eviction should be undertaken by court order.¹²¹

In 1916, the colonial government drew up ‘A Bill to Amend the Law as to Native Tenancies on Private Estates’.¹²² This Bill was the basis for the Native Rents (Private Estates) Ordinance No 16 of 1917, but it did not repeal the Lands Ordinance of 1904.¹²³ As will be recalled, the 1904 Ordinance provided for the setting aside of one-tenth of estates for the settlement of Africans resident on private estates. However, owing to trenchant opposition from estate owners, it had never been implemented.¹²⁴ The aim of the 1917 Native Rents (Private Estates) Ordinance was to abolish the coercive element of *thangata* stating,

¹¹⁸ Shepperson and Price (n 18) 392.

¹¹⁹ TNA WO 106/262 Report of the Commission to the Native Rising in the Nyasaland Protectorate, 7.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² A Bill to Amend the Law as to Native Tenancies on Private Estates 1928 Bill, published in the *Nyasaland Government Gazette*, 10 October 1928, 210.

¹²³ Lands Ordinance (Native Locations) No 5 of 1904.

¹²⁴ Palmer (n 1) 215.

From and after the coming into operation of this Ordinance no landlord shall exact from any native residing upon his estate any service in lieu of rent nor shall he place upon him any restriction or obligation as an equivalent for permission to reside on his estate save as hereinafter provided.¹²⁵

Despite its aims, the resultant 1917 Ordinance had several shortcomings. First, the commission's recommendation of a formal hearing on the eviction of a tenant was omitted. Thus, it became impossible to determine whether a resident was evicted for refusing to work for the estate or otherwise.¹²⁶ Secondly, while the High Court judgment of *Supervisor of Native Affairs v BEAC* had previously placed the onus on landlords to determine which residents were original inhabitants, and therefore covered by the non-disturbance clause in the certificates of claim, this Ordinance placed the burden on the African tenant to demonstrate that they were entitled to rent free occupation.¹²⁷ Thus, the Ordinance recognised the rights of the original inhabitants secured in the non-disturbance clause of the Certificates of Claim, but outlined a wholly ineffective means of achieving them.

The Blantyre Mission was sceptical of the effect of the Ordinance, noting that the problem to be solved was 'far wider and more difficult than the one which this Bill attempts to deal with'.¹²⁸ The editorial went on to state 'some other provision will have to be made if this question is ever to be definitely and satisfactorily settled. We see no other way out of the present impasse than that the Government should buy over some of the undeveloped land in European

¹²⁵ Section 3 1917 Ordinance.

¹²⁶ Clement Ng'ong'ola, 'The State, Settlers, and Indigenes in the Evolution of Land Law and Policy in Colonial Malawi' (1990) 23 *The International Journal of African Historical Studies* 27.

¹²⁷ *Supervisor of Native Affairs v British East Africa Company*, High Court of British Central Africa (HBCA) (28 April 1903), reproduced in the *British Central Africa Gazette*, 30 April 1903.

¹²⁸ Editorial, *Life and Work in British Central Africa*, No. 3 October-December 1916.

hands'.¹²⁹ There was a great deal of foresight in this sentiment, as a few years later Governor Bowring came to the same conclusion.¹³⁰

Estate owners were reluctant to accept that any of the labourers on their estates had proprietary rights. Treating both communities the same, the estate owners did not maintain records of the residents of their estates to be able to distinguish them.¹³¹ As suspected, the provisions of the Native Rents (Private Estates) Ordinance did not secure the position of the African residents as several were simply evicted if they refused to work.¹³²

In a further attempt to resolve this problem, a Commission of Inquiry into land matters in the protectorate chaired by Jackson, a judge of the High Court, was conducted.¹³³ This commission had a different tenor and made no mention of the non-disturbance clause in the certificates of claim.

We do not see how this practice can be abolished, nor in our opinion is it objectionable if it is regularised by law and strictly supervised in its operation. It is clearly necessary that the landlords in the districts to which we refer (Blantyre and Mlanje) should be induced to accept and retain natives on their estates. There is not enough Crown land in the Blantyre district to support the

¹²⁹ *ibid.*

¹³⁰ TNA CO 525/109 Bowring to Secretary of State for the Colonies, 10 November 1924, 'I have come to the conclusion that the only satisfactory manner of dealing with the situation is for Government to reacquire from the landholders in convenient blocks a sufficient area of land to accommodate the natives at present residing on the estates'.

¹³¹ Sibonile Banda, 'The Limits of the Law: The Private Estate, the Tenant Worker and Commodity Production in Malawi' (National University of Ireland 2006) 129; Ng'ong'ola (n 123) 39.

¹³² Nyasaland Protectorate, Report of the 1920 Land Commission (Zomba, 1921), 3.

¹³³ *ibid* 13.

native population and in the Zomba district the greater part of the native population is collected in the Southern half which is almost all in the hands of private owners and large European estates. No owner of an agricultural estate would accept native tenants on payment of rent only, for the ordinary native could not pay in rent the equivalent of the value which he draws from the land; and if the landlord must have natives on his estate, he naturally prefers his own labourers.¹³⁴

This report, noting the failure of the previous Ordinances to implement separate native locations on private estates, accepted that *thangata* as a practice was intractable on private estates and sought simply to regulate it. In doing so, the Commission grounded the practice of *thangata* on private estates in the customary *thangata*, stating that the practice,

[S]eems to have had a foundation in the conditions of purely native life under which the member of a village community worked for a certain period in the gardens of the chief, the latter assuming towards the former a responsibility which has its parallel in the relation of the best landlords towards the tenants today. The practice was known from the beginning by the native word '*thangata*' meaning 'to assist'.

The Commission recommended that any African on private estates ought to be permitted to remain on the estate for a statutory term of four years. In addition, that a notice period of 6 months be given to each resident whom the estate owner wishes to evict.¹³⁵ If such notice is not given, then the resident may remain for a further 4 years. Furthermore, the Commission recommended a limitation on the number of residents who may be evicted in any one year.¹³⁶

¹³⁴ *ibid* 14.

¹³⁵ *ibid* 15.

¹³⁶ *ibid*.

No further legislation was passed following these recommendations and the unsatisfactory situation continued. Perhaps the inertia of the colonial government would have persisted had it not been for the East Africa Commission of 1924 chaired by Ormsby-Gore, the Under-Secretary of State for the Colonies.¹³⁷ The East Africa Commission was tasked with visiting the East African Dependencies of Northern Rhodesia, Nyasaland, Tanganyika, Uganda and Kenya to consider and report on, inter alia, ‘the steps necessary to ameliorate the social condition of the natives of East Africa, including improvement, of health and economical development’ and ‘on the economic relation between natives and non-natives with special reference to labour contracts’.¹³⁸

The East Africa Commission held a grim assessment of laborers on private estates in Nyasaland, emphasizing the urgent need for resolution. The Commission recognised that all certificates of claim contained a clause ‘forbidding disturbance of native villages or plantations without Government consent’.¹³⁹ Further, the report admonished the Nyasaland government for never having implemented the Lands Ordinance of 1904 which would have set aside a proportion of the land on private estates as native locations.¹⁴⁰ Commenting on the African’s obligations under *thangata* arrangements as affirmed by the 1917 Ordinance, the Report continued,

We are bound to say that there seems to be grave doubt whether the demands for rent made by many of the estate owners on resident natives are sound in law, and whether the government is justified in enforcing them. Our apprehension is increased by the fact that the native rights depending on identical documents in

¹³⁷ WGA Ormsby-Gore, ‘The Work of the East Africa Commission’ (1925) 24 *Journal of the Royal African Society* 165.

¹³⁸ Report of the East Africa Commission, 1924-1925 IX.855 Cmd. 2387 3.

¹³⁹ *ibid* 109.

¹⁴⁰ *ibid*.

Northern Rhodesia have been fully protected and residents on estates being treated as freeholders and not disturbed without compensation...We cannot but regard it as anomalous that in Southern Nyasaland the machinery of Government is being used to impose on native residents claims by landowners to rights which are, *prima facie*, not included in their titles, while such claims are not enforced in Northern Nyasaland and are excluded in Northern Rhodesia. This condition of affairs is likely before long to lead to agitation and possibly to litigation.¹⁴¹

With this indictment of the Nyasaland Government on their failure to enforce the non-disturbance clauses and safeguard the interests of Africans, a further attempt was made at regulating *thangata*. This came in the form of the Private Estates Ordinance 1928 and repealed the prior 1917 and 1904 ordinances.¹⁴² This new Ordinance established an interim system for the regulation of *thangata* while putting into place a mechanism for the acquisition of land for the separate settlement of Africans.

The Private Estates Ordinance 1928 sought to differentiate the various African residents on private estates. The Ordinance designated three categories, that of 'exempted natives', 'natives under a special agreement' and 'resident natives'.¹⁴³ Exempted natives constituted domestic servants residing in the dwellings of the owner, while natives under a special agreement were Africans contracted to temporarily reside on the estate with the purpose of growing specified economic crops.¹⁴⁴ The class of resident natives was the largest, covering long term residents of the estates. Resident natives were defined as male or unmarried female

¹⁴¹ *ibid* 109-110.

¹⁴² Private Estates Ordinance No 15 of 1928.

¹⁴³ *ibid* section 3.

¹⁴⁴ *ibid* section 23; Further information on these 'visiting tenancies' can be found in John McCracken, 'Share-Cropping in Malawi: The Visiting Tenant System in the Central Province' in Centre of African Studies Edinburgh (ed), *Malawi: An Alternative Pattern of Development: Proceedings of a Seminar Held in the Centre of African Studies, University of Edinburgh, 24 and 25 May, 1984* (Centre of African Studies, Edinburgh University 1985).

Africans ‘residing in a hut on an estate with the knowledge of the owner’ or for a period of three years.¹⁴⁵ Resident natives were required to inform the estate operator whether they wished to pay their rent in cash or in labour.¹⁴⁶ Where a resident native has elected to provide labour and the estate operator fails to offer work on his estate, the estate owner must provide ‘reasonable facilities to grow economic crops on the estate.’¹⁴⁷ Where neither is done, the estate owner is deemed as having received the rental amount owed.¹⁴⁸ In exchange for the rent, resident natives were entitled to ‘a site for a hut and cultivable land within a reasonable distance from his hut’.¹⁴⁹ Furthermore, resident natives were entitled to compensation if the estate owner required them to move to a different site on the estate.¹⁵⁰

While the Ordinance permitted the exchange of occupation for labour, it put in place various safeguards. First, estate operators were required to keep and maintain a register of each of the African residents on their estates.¹⁵¹ This register could be inspected by a District Commissioner and its accuracy verified against the number of residents present on the estate on demand,¹⁵² and must be submitted to the District Commissioner at least annually to furnish his record.¹⁵³ Secondly, the annual rent to be paid by residents was to be set by District Rents Board and was capped at ‘three months average pay of agricultural workers in the district.’¹⁵⁴

¹⁴⁵ Private Estates Ordinance 1928, section 3.

¹⁴⁶ *ibid* section 16(2).

¹⁴⁷ *ibid* 17(2).

¹⁴⁸ *ibid* section 17(3)

¹⁴⁹ *ibid* section 11.

¹⁵⁰ *ibid* section 12.

¹⁵¹ *ibid* section 5.

¹⁵² *ibid* section 6.

¹⁵³ *ibid* sections 7 and 8.

¹⁵⁴ *ibid* sections 9 and 10.

Thirdly, resident natives had a right to residence for a quinquennial period (5 years).¹⁵⁵ Estate owners could only evict resident natives on the provision notice in the prescribed form six months prior to the end of the quinquennial period.¹⁵⁶ Once ordered to leave the estate, the Government was required to allow the evicted person to 'settle rent free' on Crown Land'.¹⁵⁷

Thus, we see a complex attempt to ameliorate the conditions of labour tenants on private estates. The District Commissioner and Rents Board stipulated conditions of the agreement, however, these were resented by private estate owners as interferences into their proprietary rights. Any recognition of the non-disturbance clause rights of original inhabitants was difficult as the colonial government were weary of upsetting the estate owners. Chief Secretary Wade pointed this out in 1930 stating, '[W]e have to remember that however good a law we may seem to devise, a native tenant's position will always be to some extent precarious if we antagonise his landlord'.¹⁵⁸

The longer-term measures involving the compulsory acquisition of private estates was contemplated in the 1928 Ordinance. Section 25 stipulated:

It shall be lawful for the Governor in Council to acquire compulsorily for native settlements an area or areas not exceeding one-tenth of the area of any private estate which exceeds three thousand acres by giving in exchange Crown Land of equivalent total value in another or other parts of the Protectorate.¹⁵⁹

¹⁵⁵ ibid section 3 A quinquennial period was defined as 'every period of five years from the date of the application of this Ordinance to a part of the Protectorate in respect of which the term is used'.

¹⁵⁶ ibid section 21(1).

¹⁵⁷ ibid 21(7).

¹⁵⁸ MNA S1/698/30 Minute by Wade, 21 October 1930.

¹⁵⁹ Private Estates Ordinance 1928 section 25.

The Nyasaland Planters Association composed a memorandum on the issue requesting the Charles Bowring, Governor of the Protectorate, to forward a copy of it to the Secretary of State for Colonial Affairs to recommend that royal assent to the Bill to regulate the position of Natives residing on private estates be withheld.¹⁶⁰ The memorandum expressed the frustration the planters in Nyasaland felt towards section 25 of the Bill. They stated that the principle of acquiring land that has been in the possession of the planter, and has potentially been developed, was ‘a grave injustice and might well have within it the seeds of racial friction’.¹⁶¹ Further, they insisted that the proposed compensation was ‘purely illusory’.¹⁶² As per the quote at the beginning of this chapter, they stated that they were granted is arable and suitable for planting, as well as close to transport connections, especially the railway.¹⁶³ On the question of value, they noted ‘it is very doubtful that the government has land in its possession that it would be willing to exchange and that would be to the landowner whose land is being compulsorily acquired, of equivalent value’.¹⁶⁴ Finally, the memorandum insisted that the lower limit of 3,000 acres for acquisition was indefensible, suggesting instead that the lower limit ought be 10,000 at the very least.¹⁶⁵

¹⁶⁰ MNA S1/727/26 Nyasaland Planters Association to Chief Secretary of Nyasaland, 18 April 1928, Enclosure 2 Proposed Cablegram from the Nyasaland Planters Association to His Majesty’s Secretary of State for the Colonies; MNA S1/727/26 Governor Charles Bowring to Lieutenant Commander LMS Amery, Secretary of State for the Colonies, 9 May 1928. Charles Bowring was the Governor of the Nyasaland Protectorate from 1923 to 1929.

¹⁶¹ MNA S1/727/26 Nyasaland Planters Association Memorandum, A Bill to Regulate the Position of Natives Residing on Private Estates 1928: Section 25 Acquisition of ten per cent, 1 May 1928 5.

¹⁶² *ibid* 4.

¹⁶³ *ibid*.

¹⁶⁴ *ibid* 5.

¹⁶⁵ *ibid*.

Although the Bill was ultimately passed,¹⁶⁶ it was promulgated at the same time as a Bill for its amendment in view of the opposition.¹⁶⁷ Clause 5 of the Bill was to amend section 25 of the Private Estates Ordinance to reduce the scope of compulsory acquisition from estates of 3,000 acres to those of over 10,000 acres. The estate owners were further able to delay the passing of legislation for the exchange of their land until 1931, and actual implementation of a repurchase scheme until 1952.¹⁶⁸

The 1928 Private Estates Ordinance gave rise to unforeseen challenges, notably in the confrontation between African traditions and the proprietors' control over residency on their estates. The Ordinance contemplated that male tenants might have multiple wives and regulated occupancies for this eventuality.¹⁶⁹ However, the matrilineal and uxori-local culture of tribes in southern Nyasaland was not contemplated in the Ordinance. Under these customs, the new husband is entitled to move to the village of the bride's family.¹⁷⁰ No problem arose where a woman married a man who was also resident on the same estate. However, where a woman married a man who was resident on Crown land, estate owners objected to the presence of a new resident on their estates.

¹⁶⁶ MNA S1/727/26 The Natives on Private Estates Ordinance, 1928, Report by the Attorney General Pursuant to the Colonial Regulation No 182.

¹⁶⁷ A Bill to Amend the Law as to Native Tenancies on Private Estates 1928 Bill, published in the *Nyasaland Government Gazette*, 10 October 1928, 210.

¹⁶⁸ Palmer (n 1) 217.

¹⁶⁹ Private Estates Ordinance 1928 section 14(1).

¹⁷⁰ Simon Roberts, 'Matrilineal Family Law and Custom in Malawi: A Comparison of Two Systems' (1964) 8 *Journal of African Law* 77; J Clyde Mitchell, 'Marriage, Matriliney and Social Structure among the Yao of Southern Nyasaland' (1962) 3 *International Journal of Comparative Sociology* 29.

The case of *Rex v Jeremiya and Solomon*, an appeal from the Blantyre District Commissioner's Court to the High Court of the Nyasaland protectorate, dealt with this very issue.¹⁷¹ In this case, the manager of the British Central Africa Company discovered the accused men had been living on his estate on huts they constructed next to their wives'. The manager ordered them to leave the estate and destroyed their huts. Both accused men rebuilt their huts and when ordered to leave once more, refused. In the District Commissioner's Court, the two men were held to be in contravention of section 22 of the Natives on Private Estates Ordinance, refusing or neglecting to leave the estate after being summarily evicted.¹⁷² They were sentenced to one months' imprisonment with hard labour.¹⁷³

On appeal, the High Court contemplated that section 3 of the Natives of Private Estates Ordinance 1928 defined a resident native as one 'who resides in a hut with the knowledge of the owner'.¹⁷⁴ Thus, once the estate owner became aware of the residence of the two men, they would become resident natives. Resident natives could only be evicted with six months' notice prior to the end of the quinquennial period.¹⁷⁵ The judge proceeded, 'I see nothing in this Ordinance providing for the owner to summarily turn off his land and destroy the huts of natives already on his land, and making it a criminal offence if the native does not obey his order'.¹⁷⁶ However, the judge noted that the estate owner retained a remedy in civil trespass if he did not wish for the two men to remain. It was contemplated that doing so would fulfil his duty under

¹⁷¹ MNA S1/727/26 *Rex v Jeremiya and Solomon*, NHC No 3 (1930), 13 June 1930; District Commissioner's Court No 9/30 (*Rex v Jeremiya and Solomon*)

¹⁷² Section 22 Natives on Private Estates Ordinance 1928.

¹⁷³ *Rex v Jeremiya and Solomon* (n 171).

¹⁷⁴ Section 3 Natives on Private Estates Ordinance 1928.

¹⁷⁵ *ibid* section 21.

¹⁷⁶ *Rex v Jeremiya and Solomon* (n 171).

section 4 of the Ordinance.¹⁷⁷ The court held that rather than imprisonment, ‘the native would appear to be entitled to compensation for the destruction of his hut also to reap any growing crop on his holding’.¹⁷⁸

The reversal of the District Commissioner’s judgment represents a clear effort to maintain the right of Africans on private estates to practice marital customs even if they interfered with the rights of the estate owners. However, estate owners continued to complain about women on their estates bringing their husbands onto their estates without their permission.¹⁷⁹ Jennings, the District Commissioner at Zomba, writing on the concerns of landowners, noted that the Natives on Private Estates Ordinance 1928 seemed to give estate owners the right to restrict the number of Africans on their land. He continued,

If this were not so, the position would become intolerable, and might be likened to a run-holder in other parts of the world who allow rabbits to become established on their land, finding themselves in a very few years to become deprived of the use of their land owing to the increase in the number of tenants, the rabbits.¹⁸⁰

Anderson, the Provincial Commissioner of Southern Nyasaland, was in full agreement with Jennings. He noted that, ‘in my opinion, native custom must give way to the rights of landlords

¹⁷⁷ Section 4 Natives on Private Estates Ordinance 1928, ‘No owner shall allow any native to reside on his estate except (i) a resident native and his wives and families; (ii) an exempted native; (iii) a native under a special agreement’.

¹⁷⁸ *Rex v Jeremiya and Solomon* (n 171).

¹⁷⁹ MNA S1/727/26 District Commissioner, Zomba to Chief Secretary, Unmarried Female Resident Natives on Private Estates, 26 July 1932.

¹⁸⁰ *ibid.*

to control the number of tenants on their land'.¹⁸¹ Anderson was concerned about landowners being gradually deprived of the beneficial occupation of their land 'through having an excessive number of resident natives on it'.¹⁸² The position of the estate owners and several members of the administration was clear, resident natives were a burden on private estates and their customary practices which result in the increase numbers of resident natives ought to be limited. However, proposals to amend the Natives on Private Estates Ordinance 1928 by incorporating the criminal trespass provisions failed due to the risk of abuse by estate owners.¹⁸³ The Acting Attorney General, though sympathetic to the position of the estate owner, stated 'I cannot recommend any amendment which would confer arbitrary powers of ejectment on the owner of an estate merely because he alleges any native to be a squatter'.¹⁸⁴ Thus, in contrast to how the customary rights of African residents have been previously portrayed,¹⁸⁵ there was a distinct attempt from the colonial government to protect these rights.

It would seem from the drafting of the Ordinance that there was a misapprehension or a lack of consideration of the marital customs of the Africans in Southern Nyasaland. However, British administration in Nyasaland had long been intervening in the institutions of African customary marriage, and were aware of matrilineal and uxrilocal customs of the tribes of southern Malawi.¹⁸⁶ Matrilineal customs were possibly omitted from the Ordinance due to the

¹⁸¹ MNA S1/727/26 Provincial Commissioner of Southern Province to Chief Secretary, Rights of Tenants on Private Estates, 28 July 1932.

¹⁸² *ibid.*

¹⁸³ MNA S1/727/26 Acting Attorney General, Note on Solomon and Jeremiya, 29 July 1930.

¹⁸⁴ *ibid.*

¹⁸⁵ Pachai (n 31) 689.

¹⁸⁶ Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge University Press 1985) 197–216.

protectorate government's view of them as irregular or regressive, with some instances of active discouragement.¹⁸⁷ Furthermore, conquest, intermarriages, and colonial governance altered traditional customs, resulting in the fluctuation of ethnic boundaries.¹⁸⁸ Therefore, the drafters may not have realised how often the practice would occur.

Thus, in the years between the uprising and 1932, there were various attempts to resolve some of the tensions on private estates, none of which aimed to abolish *thangata*. The protectorate government aimed instead to ameliorate labour conditions while denying Africans resident on private estates those rights formally secured to them in the certificates of claim. Weighing the economic worth of this labour form against a reluctance to unsettle landowners, the measures implemented primarily aimed to curb the most egregious abuse within a system that was inherently conducive to exploitation.

5. 'Abolition' of Thangata

Though this thesis focuses on the period before the formal establishment of indirect rule in 1933,¹⁸⁹ it is worth briefly outlining how *thangata* came to a gradual conclusion. The Colonial Office bemoaned Nyasaland's slow adoption of the policy of indirect rule as it was trailing East African dependencies in this respect.¹⁹⁰ As a result of increased pressure from the Colonial

¹⁸⁷ *ibid* 175.

¹⁸⁸ Joey Power, 'Individualism Is the Antithesis of Indirect Rule: Cooperative Development and Indirect Rule in Colonial Malawi' (1992) 18 *Journal of southern African Studies* 317, 392; Chanock (n 183) 177, 238.

¹⁸⁹ Erik Green, 'Indirect Rule and Colonial Intervention: Chiefs and Agrarian Change in Nyasaland, ca. 1933 to the Early 1950s' (2011) 44 *The International Journal of African Historical Studies* 249.

¹⁹⁰ TNA CO 626/10, Annual Report on Native Affairs, 1931.

Office, Governor Young accelerated the steps for the implementation of indirect rule.¹⁹¹ The Native Authority Ordinance 1933 was passed in order to give chiefs authority.¹⁹² *Thangata* was only resolved, as suggested by the mission in 1917, by the purchase of private estates for the settlement of Africans on private estates. However, the acquisition process was dilatory and contentious, only accelerating when nationalist movements gained an African majority in the legislature.¹⁹³

The Natives on Private Estates Ordinance 1928 had established five-year intervals at the end of which estate owners could evict up to 10% of the African residents on their estates. The colonial government was anxious about the possibility of landowners exercising their statutory right to evict the maximum number of African residents.¹⁹⁴ The first quinquennial period which ended in 1933 passed without the dreaded number of evictions as a result of the prevailing economic depression reducing their need for labour.¹⁹⁵ In total, 781 notices to quit were served affecting 3124 people.¹⁹⁶ The second quinquennial period in 1938 also passed without much trouble. Although 928 notices were served,¹⁹⁷ the majority of tenants managed

¹⁹¹ Green (n 186) 255.

¹⁹² Native Authority Ordinance No. 13 of 1933.

¹⁹³ Simon Roberts, 'The Growth of an Integrated Legal System in Malawi: A Study in Racial Distinctions in the Law' (University of London 1967) 185.

¹⁹⁴ MNA S1/727C/26 Annual Report of the Southern Province for the year ended 31st December 1930, 'The lack of Crown Land is still a great difficulty in this District, and I can foresee that the position is likely to become more acute when the first quinquennial period under the Natives on Private Estates Ordinance 1928 occurs. If a large number of landlords take advantage of being able to give 10% of their native tenants orders to quit, then I shall not have sufficient Crown Land on which to accommodate these natives'.

¹⁹⁵ Report of the Abrahams Land Commission (Zomba, 1946) 36.

¹⁹⁶ Only two estates in Thyolo belonging to the British Central Africa Company evicted the maximum number of tenants These notices were served in Thyolo: 299, Zomba: 208, Chiradzulu: 207, Mulanje: 42 and Blantyre: 45. In 1933, there were 141,312 Africans living on private estates in the Shire Highlands.

¹⁹⁷ Nyasaland Protectorate, Annual Report of the Provincial Commissioners (Zomba, 1939) 18. Of the notices served, the British Central Africa Company served 359 across their estates, the British and East Africa Company served 289 and the Bruce Estates served 123.

to conclude agreements with landlords to remain on the property in terms of special agreements.¹⁹⁸ However, when the third quinquennial period ended in 1943 during World War II, the 1250 notices to quit covering over 5000 people were served by the British Central Africa Company in Thyolo, and Africans resisted eviction.¹⁹⁹ The colonial government stepped in to reduce evictions and pledged another commission of inquiry to look into the situation.²⁰⁰

The subsequent Commission of Inquiry was chaired by Sir Sidney Abrahams. The commission report concluded that the quinquennial periods were impractical in the event that estate owners opt to exercise their statutory rights. The Report noted the ‘irreconcilable conflict of interests’ between estate owners and resident natives. Estate owners were only interested in having Africans who were willing to work for them on their estates,²⁰¹ while the 200,000 Africans resident on private estates wanted to have labour-free occupation on what they considered to be their customary land similar to their counterparts on Crown land.²⁰² Once more, the report noted that ‘the only solution was the clear cut one of getting rid of the status of resident native and leaving him free to quit the estate or stay there on terms satisfactory to

¹⁹⁸ Pachai (n 31) 690–691.

¹⁹⁹ *ibid* 692.

²⁰⁰ *ibid*.

²⁰¹ Nyasaland Protectorate, Report of the Abrahams Land Commission (Zomba, 1946), 71-73 ‘To my mind compromise is out of the question. What does the landlord want? He wants to be able to exercise his legal right in requiring any resident native on his land either to work or pay rent as consideration for his residence there and in the case of the working estate the general need of the landlord is for work, not for rent...He is often ready and willing to be sympathetic to native customary practices among his tenants, but where the exercise of such practices becomes burdensome or inconsistent with his economic interests that he has a right to say so.

²⁰² *ibid* 73-75 ‘On the other hand what the native on private estates really wants is to live precisely as his brother on Native Trust Land (Crown Land) lives, free of rent or of any obligations in lieu of it, with security of tenure and liberty to live according to native law and custom, and to have the right to select his employer or the person to whom he will sell the product of his labour, With such ideas as these, how can it be expected that he will accept the existing law with all its restraints, its obligations and its prohibitions?’.

himself and the landlord, substituting contractual for statutory rights'.²⁰³ However, this option would only be viable if there existed ample Crown land to accommodate those opting to leave the estate. Therefore, the report reaffirmed earlier recommendations to acquire portions of private estates.

Pursuant to the aim of acquiring undeveloped portions of private estates, in 1948 the Acquisition of Land for Public Purposes Ordinance was passed and a Land Planning Committee was constituted.²⁰⁴ The committee's first report included a recommendation that the government immediately purchase 545,857 acres of private land from the protectorate's total of 1,200,000 acres of private land.²⁰⁵ Acquisitions were sluggish with only 294,675 acres acquired by mid-1956.²⁰⁶

An Ordinance regulating the position of Africans on private estates was passed in 1952.²⁰⁷ This Ordinance removed the quinquennial period for fear that a further mass eviction would place the administration in a position unable to relocate evicted Africans. All evictions other than for misconduct were placed under the oversight the Provincial Commissioner on an Arbitration Board with three African members and three estate owners.²⁰⁸ Although this provision reduced the power of the estate owner to arbitrarily evict African residents, several

²⁰³ ibid 17.

²⁰⁴ Acquisition of Land for Public Purposes Ordinance No 18 of 1948.

²⁰⁵ MNA SMP/10521/I Report of the Land Planning Committee 1948, Appendix 1.

²⁰⁶ Nyasaland Protectorate Legislative Council Proceedings, Seventy-First Session, 1956, 5; Ng'ong'ola (n 123) 42.

²⁰⁷ Africans on Private Estates Ordinance No 8 of 1952.

²⁰⁸ ibid sections 10 and 16(1).

aspects of the Ordinance made this instrument retrogressive. For instance, the rent payable by resident Africans rose sharply.²⁰⁹ As a result of the effect of this new Ordinance, unrest erupted on several estates in Thyolo.²¹⁰

In 1956, African Elected members joined the Legislative Council and advocated for the abolition of *thangata* and pursued the purchase scheme with vigour.²¹¹ An amendment to the Africans on Private Estates Ordinance 1952 closed the class of ‘resident natives’ by stipulating that no one could achieve this status in the future. The following provision was inserted into the Ordinance, ‘an African who is not, nor is deemed to be, a resident African on the 18th day of July 1956, shall not thereafter acquire the status of a resident African’.²¹² This provision eliminated the possibility of new occurrences of *thangata*. However, full abolition of the status of ‘resident native’ for all was only achieved by the passing of the Africans on Private Estates Ordinance 1962 which provided that

...a person who on the 30th day of June 1942 was a resident native on an estate under the provisions of the Natives on Private Estates Ordinance 1928, or is a descendent according to African law and custom of such a person should be exempted from paying rent.²¹³

²⁰⁹ ibid sections 11-17. Annual rent increased from 20 shillings to 52 shillings.

²¹⁰ Nyasaland Protectorate, Report of the Commission of Inquiry into Disturbances at Mangunda Estates (Zomba 1953).

²¹¹ Nyasaland Protectorate Legislative Council Proceedings, Session 71, 1956, 5-6.

²¹² Section 2 Africans on Private Estates (Amendment) Ordinance No 21 of 1956.

²¹³ Africans on Private Estates Ordinance No 12 of 1962, section 11(2).

Thus, all Africans resident on private estates who previously were subject to labour obligations or rent were returned to the position envisaged by Commissioner Johnston, one of 'non-disturbance'. By 1962, only 2.4% of land (280,280 acres) was privately owned, a significant reduction from the 15% initially granted through certificates of claim. A great portion of the body taken from the protectorate in the form of private land was thus returned to its native inhabitants.

6. Conclusion

With a focus on labour conditions, the resulting uprising, and the measures taken in response to it, this chapter has explored the impact of protectorate governance on the African inhabitants. Examination of testimony given to the Commission of Inquiry on the Chilembwe rising illustrates the harsh realities endured by laborers on estates, where unlawful corporal punishment and extended working terms were commonplace. Furthermore, laborers were constrained in their ability to seek employment elsewhere through the labour certificate held by estate owners, and disallowance by their employers. Their only apparent escape seemed to entail relinquishing their customary land and attempting to secure space on already overcrowded Crown Land.

The protectorate's response to the insurgency included repressive legal measures including anomalous trials and executions for treason, collective punishment, and deportation. The regime intensified the grip of the colonial legal order in its moment of precarity, subjecting the inhabitants of the protectorate to the full force of the coercive laws but without the normal procedural and substantive protections. Public and demonstrative penal sanctions were deemed

necessary as a means of employing civilizing violence to pacify Africans and instruct them in acceptable behaviour.

The protectorate government's response to the labour exploitation as the root cause of the insurgency was, however, both slow and ineffective. As early as 1903, Judge Nunan's decision in *Supervisor of Native Affairs v BEAC* characterised labour tenancy arrangements as unlawful and oppressive to African labourers.²¹⁴ Despite this early recognition, successive Ordinances and commissions sought to find a way to ameliorate the labour conditions on settler estates, while retaining the coercive and exploitative system of labour tenancy. The resulting conflict between African customs and settlers' proprietary rights was decided ultimately in favour of African residents on private estates, but the underlying problem remained until politics made a major turn and land was finally purchased for African resettlement.

²¹⁴ *Supervisor of Native Affairs v British East Africa Company*, High Court of British Central Africa (HBCA, 28 April 1903), reproduced in the British Central Africa Gazette, 30 April 1903.

7. CONCLUSION

In the 19th century, the colonial protectorate surfaced as an amalgam of institutions exploiting the freedom and vagaries of extraterritorial jurisdiction. While Britain initially hesitated to exert extensive jurisdictional authority in its protectorates, barriers to such exertion gradually dissolved, ultimately rendering the protectorate scarcely distinguishable from the more familiar settled colony. This thesis has traced the shifts in the role of protection and the effect of protectorate rule on the inhabitants of the British Central Africa Protectorate later named the Nyasaland Protectorate.¹

The study began with an examination of the nature, meaning and role of protection in the Nyasa region before the declaration of the protectorate, and the relationship between humanitarian endeavours, governance, and violence (Chapter 2). The next chapter then analysed the gradual extension of extraterritorial jurisdiction in the form of the consular service, and the inability of the service to maintain the humanitarian aims due to weak or absent jurisdictional authority. This chapter further explored the legal framework of the scramble for Africa and analysed the Berlin conference as the birthplace of the colonial protectorate (Chapter 3). The following chapter dealt with the acquisition of proprietary rights from indigenous people highlighting the strategic deployment of legal rhetoric as a legitimating mechanism embedded in a hierarchical political context, and the subsequent judicial pronouncements of actions taken in the settlement programme (1892-1893). The chapter

¹ A British protectorate was declared over the territory adjoining Lake Nyasa (Lake Malawi) 1889. In 1891, the region now known as Malawi was declared the British Central African Protectorate. In 1907, it was renamed the Nyasaland Protectorate. In 1953, the Nyasaland Protectorate was joined in the Federation of Rhodesia and Nyasaland becoming the independent state of Malawi in 1964.

reveals the complexity in applying legal concepts such as the crown's prerogative of royal mines and the estate in fee simple to the transfer and grants of title to land in the colonial protectorate (Chapter 4).

The next two chapters focused closely on the nexus between land and labour initiated by the grant of land to settlers in certificates of claim with a clause purporting to secure on that land rights of non-disturbance to indigenous communities. The study continued with an examination of a pre-colonial concept of *thangata*, a reciprocal gift-like service exchanged between villages and chiefs. It then describes how the agricultural requirements for labour on tea and coffee plantations corrupted this term inescapably, turning it into an obligation for villagers to work on the estates that enclosed their villages, subjected to masters' discretions undermining the freedom of labour (Chapter 5). This chapter also examined a grim feature of the colonial regime in Nyasaland, labour coercion tied to tenure security, tax obligations and penal consequences. Finally, the study explored the reality of life on the settler estates by examining testimony from the Commission of Inquiry into the Chilembwe Uprising.² Within this analysis, the nature of colonial rule was explored through the regime's repressive strategies to quell insurgency, alongside its inclination to slightly ameliorate the most flagrant abuses within a system inherently conducive to exploitation (Chapter 6).

Evoking the image of a tangled safety net, protection began to resemble knotted ropes, offering security from a fall while simultaneously ensnaring its captives. The tale unfolded in this thesis depicts sporadic and limited attempts to reign in despotism through legal

² TNA WO 106/262 Report of the Commission to the Native Rising in the Nyasaland Protectorate.

pronouncements of officials and judges, afforded by commissions of inquiry, often prompted by admonishment from the metropole.

1. Humanitarian Protectors and Jurisdictional Imperialism

The exploration of the genesis of protection through the efforts of Christian missions in the region highlight the role of the humanitarian project as the moral compass of British imperialism.³ For Nyasaland, the missionary adventures of David Livingstone of the London Missionary Society propelled the region into public consciousness. Narratives and images of the rampant slave trade inspired Christian missionaries to travel to the edge of the world for the protection of vulnerable people. And so they did. The experiences of Christian Missionaries in the region prior to the formal declaration of a protectorate reveals four features of humanitarian protection. These findings contribute to the understanding of the effects and extent of humanitarian imperialism and its connection to jurisdiction and formal imperial acquisition.

First is the intrinsic link between humanitarian protection and governance. There existed a tension between the desire to protect vulnerable people, on the one hand, and the realisation that institutions needed to be put in place to facilitate that endeavour. The Universities Mission to Central Africa, the Livingstonia Mission, and the Blantyre Mission arrived in locales without centralised authority, and their records illustrate how easily the desire to protect projects authority and humanitarian endeavours become mired in violence out of

³ John Barker, 'Where the Missionary Frontier Ran Ahead of Empire' in Norman Etherington (ed), *Missions and Empire* (Oxford University Press 2008).

necessity to safeguard the people under their protection and themselves. Further, the different relationships maintained with various chiefs in the Nyasa region show the tendency of humanitarian endeavours to become embroiled within local politics. This is most significantly illustrated in the trial and execution of Manga, a subject of Chief Kapeni and whose alleged victim was a slave concubine of Chief Kumalomba. Chapter two of this thesis demonstrates how the various missions were either drawn into operating as a temporal authority in the region (such as the UMCA and the Blantyre Mission) or else relinquished the desire to aid and protect enslaved people in order to avoid assumption of responsibility. This serves as a first point of entry into the connection between protection and subjection, that link Coke described in *Calvin's Case*.⁴

Secondly, the presence of increasing numbers of missions and settlers raised a number of jurisdictional concerns necessitating the extension of extra-territorial jurisdiction. Christians in the protectorate travelled with models of legality that they imposed on residents in their mission. After staunch criticism of their extension of unlawful jurisdiction, they began to call for protection from the metropole. While jurisdictional concerns were a factor in the declaration of the protectorate, the immediate cause for the declaration was the Portuguese attack on Mokololo country. However, regard for vested interest in the reputation of the missions means that without their pleas, it is unlikely Nyasaland would have ever been a protectorate. This picture emphasises the role of humanitarian interest in the scramble for Africa.

⁴ Edward Coke and Steve Sheppard, *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund 2003) 176.

Thirdly, in their interactions with native groups, the records of missionary activity in Blantyre demonstrated a disdain for indigenous legal systems and a desire to protect residents of the missions from the consequences prescribed by native law. Turning to the Blantyre Mission, their early encounters with Yao Chief Kapeni illustrates the vague legal models and patterns that missionaries begin to mimic and emulate, for example, orchestrating a mock trial with only informal interviews of the accused as the forensic technique. Once vague consular authority was bestowed on men in the territory, they were unable to maintain their grasp on the region in the absence of a means to act to punish those who did foreign subjects harm.

Fourthly, the potency of protection as a touchstone of power is revealed in the influence and impact of the Blantyre Mission. As stated by Mbembe, ‘the ultimate expression of sovereignty largely resides in the power and capacity to dictate who is able to live and who must die’.⁵ Without any formal jurisdictional backing the relationships of protection had an effect akin to sovereignty on the people they came to protect. At its core protection entails preservation from harm, but it does not guarantee that harm will not occur. Rather it revolves around the repercussions the protector is obliged or entitled to visit upon the offender once harm befalls the protected.⁶ Protection therefore implies a call to act. This insight drives home the link between protection and violence.

⁵ Achille Mbembe and Steve Corcoran, *Necropolitics* (Duke University Press 2019) 66.

⁶ TB Lambert, ‘Introduction: Some Approaches to Peace and Protection in the Middle Ages’ in TB Lambert and DW Rollason (eds), *Peace and Protection in the Middle Ages* (Centre for Medieval and Renaissance Studies, Durham University 2009).

Thus, prior to the declaration of a protectorate, protection took the form of providing refuge to enslaved persons, medical assistance, military alliances and physical force. The system aimed at the protection of the indigenous inhabitants, but also the British subjects who had travelled to Africa, their lives and their property. However, archival evidence shows that the endeavour could not be sustained without a firm jurisdictional basis. Once the framework for this jurisdiction slipped into place, the meaning of protection became further and further abstracted from the welfare of the inhabitants of the protectorate; the primary motives were forestalling imperial rivals, protecting British subjects, and maintaining general order.

2. Sovereignty and Property

The colonial protectorate as a concept was birthed at the Berlin Conference, a gathering designed to reflect on the legal framework regulating the acquisition of territory in Africa. As a result of Conference at Berlin, the treaties concluded with African communities were recognised as title good against imperial rivals. This posed the problem of indigenous sovereignty – would Africans be recognised as sovereign states. A great deal of time went into devising a theory under which consent in the form of treaties was necessary, but denied Africans full sovereignty. As stated by Fitzmaurice, *territorium nullius* was ‘both the legal complement to treaty making and the legal expression of the protectorate’.⁷

Territorium nullius also enabled a recognition that indigenous communities had substantive proprietary rights. Johnston’s land settlement programme represented an endeavour

⁷ Andrew Fitzmaurice, ‘Liberalism and Empire in Nineteenth-Century International Law’ (2012) 117 *The American Historical Review* 122, 131.

infuse order as an agent of the protecting power into the disorderly system where various exchanges had occurred. The quest for order of imperial actors is characteristic of agents of British imperialism.⁸ However, this benign search for orderliness takes on a darker image once one realises that the local political institutions, concepts of property, and customs of indigenous people were often considered disorderly and irregular. The land settlement programme shows how Johnston grasped at vaguely held concepts of legality such as the Crown's right of pre-emption and the doctrine of estates and tenures in setting the foundations of the legal order. Johnston deployed these terms politically in order to clothe his actions in familiar legitimating language rather than as accurate legal descriptions. This finding accords with those of Benton and Straumann who write on the use of legal language as a political device.⁹

The acquisition of property from indigenous people is an area in which protection of indigenous interests seems counter-intuitive or contradictory given the historical and present-day effects of dispossession in imperial contexts. Conversely, an analysis of Commissioner Johnston's methods the land settlement programme (1892-1893) reveals a layered dual objective. The archival record demonstrates a clear commitment to protecting the interests of both indigenous vendors and white purchasers of title to land. This is shown by Johnston's paternalistic intervention into agreements by supplementing payment to African vendors or reducing the acreage of the property where the price paid does not accord with its value. Similarly, he strategically deploys the concept of the Crown's right of pre-emption to justify the inalienability of native title. Johnston's intervention land transactions likely, in the short

⁸ Lauren A Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Harvard University Press 2018).

⁹ Lauren Benton and Benjamin Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice' (2010) 28 *Law and History Review* 1.

term, reduced the sales of title to land. Further, the inclusion of non-disturbance clauses in the certificates of title indicates not only a recognition of substantive proprietary rights, represented an active measure to protect them. On the other hand, the measures of protection exhibited a Janus-faced quality, providing modest protections for indigenous rights, while solidifying imperial authority and control over real property. This centralized authority deprived indigenous communities of their autonomy in managing their land as they saw fit. Further, the inclusion of the non-disturbance clause left inhabitants perilously exposed to coercive labour arrangements and tenure insecurity, as evidenced by the subsequent turbulent history of private estates in the protectorate. In this context, protectionist rhetoric and actions were not entirely absent; rather they exhibited a paradoxical and subverting nature, playing a limited role in the broader framework of imperial governance.

Throughout the protectorate's history, the non-disturbance clause served as the singular anchor upon which arguments advocating for the protection of indigenous land rights could be tethered. Notably, violation of the non-disturbance clause was cited as evidence of illegality and exploitation in *Supervisor of Native Affairs v British East Africa Company* (1903),¹⁰ served as the impetus behind the unrealised Natives Locations Ordinance 1904,¹¹ and formed the basis of scathing criticism directed at the protectorate government in the report of the East Africa Commission.¹² The ultimate abolition of *thangata* was framed as a partial realisation of the rights encapsulated in the non-disturbance clause.

¹⁰ *Supervisor of Native Affairs v British East Africa Company*, High Court of British Central Africa (HBCA, (28 April 1903), reproduced in the British Central Africa Gazette, 30 April 1903.

¹¹ Native Locations Ordinance No 5 of 1904 in British Central Africa Gazette, 30 November 190.

¹² Report of the East Africa Commission, 1924-1925 IX.855 House of Commons Command Paper 2387 3.

While protectionist motivations guided some actions, other such as Johnston's designation of large tracts of land as 'waste land' exemplify the absence of this. Waste land was a concept used to indicate that the land in question was underutilised, providing a means of excluding indigenous claims and possessing it for the imperial power.¹³ With all land initially characterised as either private land or Crown land, indigenous people in the protectorate were at the mercy of the colonial state, and so vulnerable to dislocation and loss of ancestral lands or livelihoods.

3. Ameliorating Labour Conditions on Settler Estates

Protection has a long history in the amelioration of labour conditions for vulnerable people.¹⁴ Amelioration dilutes the vigour of protection by posing it as the mitigation of an inherently harmful endeavour, while enabling the imperial sovereign to claim moral superiority. In the Nyasaland protectorate, the land settlement had purportedly secured for indigenous people rights of 'non-disturbance' on their land contained within settler estates. The meaning and protection of this security was ignored and rather than providing stringent protection, their conditions were alleviated only at the margins.

The series of legislative measures enacted to address the oppressive characteristics of *thangata* arrangements illustrate the negotiated aspect of imperial governance, where the

¹³ John C Weaver, 'Concepts of Economic Improvement and the Social Construction of Property Rights: Highlights from the English Speaking World' in John McLaren, AR Buck and Nancy E Wright (eds), *Despotic Dominion: Property Rights in British Settler Societies* (UBC Press 2003) 88.

¹⁴ Caroline Quarrier Spence, 'Ameliorating Empire: Slavery and Protection in the British Colonies, 1783-1865' (Harvard University 2014).

priorities of plantation owners appeared to hold the greatest weight in setting policies. The effect of these measures was to reinforce existing power dynamics and maintain the status quo. Some protection of indigenous rights emerged from the courts in the protection of the matrilineal systems of tenure and inheritance. The rhetoric of provincial and district commissioners who adjudicated cases in the first instance offered partial support of the practice. Unfortunately, the colonial archive is fragmented and incomplete and it may be impossible to know how often this practice occurred.¹⁵ However, attempts to amend the Private Estates Ordinance 1928 to allow husbands moving onto their wives' estates under local customs nonetheless to be summarily evicted suggests that there was continued adherence to the old ways despite modern pressures.¹⁶

The examination of the conditions of Africans on private estates reveals that the regulation of labour on private estates took the longstanding acerbity of master and servant legislation into this rudimentary legal order and compounded it by subjecting servants to dependence on the land of the master, augmented by a racialised culture of fear and physical violence. All of this resulted in a distinctive form of labour unfreedom, that can even be seen to plague the consciences of the imperialists, though thoroughgoing repressions continued.

4. Protection as a Lens for Imperial Governance

The tensions between maintenance of order and humanitarian and civilising aims run through each chapter of the thesis. The study reflects on complexity of the colonial legal process using

¹⁵ Renisa Mawani, 'Law's Archive' (2012) 8 Annual Review of Law and Social Science 337.

¹⁶ Private Estates Ordinance 1928 No 15 of 1928.

a narrow, focused perspective on the particular territory of Nyasaland; and simultaneously utilising a broad, encompassing view to observe the overarching imperial processes that encompass that diminutive location. The term protection varied considerably throughout the period in question, and indeed throughout history.¹⁷ This was precisely its strength as it allowed for its content to change to suit the intentions and objects of the protectors, who could vary protection in degree and effect to enhance their power. Protection initially allowed for maximal imperial expansion with minimal financial outlay.¹⁸ Protecting powers were under no obligation to assume internal sovereignty and only did so when the need arose.

Employing protection as a lens for imperial governance reveals certain contradictions occurring in colonial rule. The inhabitants of Nyasaland were British protected persons, able to avail themselves of diplomatic services if they travelled abroad, and they could do so on a British passport.¹⁹ However, the constitutional status of the state meant that certain measures not available to subjects of the state could be taken. For instance, the defence of act of state was regularly used in protectorates to deny its African inhabitants the protection of the rule of law against imperial agents.²⁰ A further denial of the protections of the law came in the denial of the writ of habeas corpus to protectorates.²¹ Finally in the aftermath of the Chilembwe rising,

¹⁷ Annabel Brett, 'Protection as a Political Concept in English Political Thought, 1603–51' in Lauren A Benton, Adam Clulow and Bain Attwood (eds), *Protection and Empire: A Global History* (Cambridge University Press 2018).

¹⁸ PG Sack, 'Protectorates and Twists: Law, History and the Annexation of German New Guinea' (1987) 10 *Australian Year Book of International Law* 1, 10.

¹⁹ H Lauterpacht, 'Allegiance, Diplomatic Protection and Criminal Jurisdiction Over Aliens' (1947) 9 *Cambridge Law Journal* 330.

²⁰ *Sobhuza II v Miller* [1926] AC 518; *Nyali v Attorney General* (1955) 1 All ER 646 1955.

²¹ *R v. The Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576; *Ex Parte Mwenya* (1960) 1 QB 241.

the several of the accused were tried, convicted, and publicly executed for treason despite the common law understanding that they were not subjects and did not owe allegiance.

This area presents an opportunity for deeper exploration. For example, it would be valuable to delve into the significance of rhetoric promoting benevolent or civilizing violence in the enforcement of treaties of protection through the use of force. This phenomenon is particularly noteworthy in Nyasaland but is reproduced in numerous other imperial contexts. By examining such instances, a more comprehensive understanding can be gained of the ideological justifications, the role of the law in governing the use of force, and power dynamics underlying colonial practices in extending imperial dominance.

In the end the picture is clear. It may be true that the gradual extension of protection over African communities assisted in eliminating slavery, and that law and policy curtailed some of the most egregious abuses of authority. However, the disturbing conclusion is that the imperialist as protector, armed with a panoply of fair-sounding laws and sentiments, all too easily slid into the role of oppressor.

SKETCH MAP
OF
BRITISH CENTRAL AFRICA.
SHOWING EXTENT OF SANCTIONED CLAIMS.

Copied in the Intelligence Division, War Office,
from the Original by M^r H. H. Johnston C. B.
Consul General, British Central Africa.

Land belonging to the Crown.
(purchased and ceded.)

Land over which British South Africa
Chartered Co. has mining rights
of pre-emption, etc.

Claims of British South African
Co. not yet examined.

Land purchased by private
individuals.

Land purchased from native chiefs
by African Lakes Co. and made over
by them to British South Africa Chartered Co.

NOTE.—The spaces left white indicate land
which remains in the hands of native chiefs
subject to Treaty rights of Her Majesty the Queen.

APPENDIX 2: TABLE DETAILING CERTIFICATES OF CLAIM

Certificate of Claim No.	Date	Owner	Name of Estate	District	Extent (in acres)	Method of settlement
1	7//9/92	A.C. Simpson	Chiromo	Ruo	1,154	Extra payment to native vendor required
2	30//9/92	K.B. Bradshaw	Chipolopolo	Ruo	11,355	Extra payment to native vendor required
3	6//12/92	E.C.A. Sharrer	Kupimbi	Zomba and Blantyre	68,582	Claim overlapped with government rights to land. Transferred out of Crown land.
4	6//12/92	E.C.A. Sharrer	Chelumbo	Zomba	112,586	Claim sanctioned without modification
5	6//12/92	E.C.A. Sharrer	Cholo	Blantyre and Ru0	153,298	Claim reduced in accordance with amount paid
6	8//12/92	Father van Oost	Kirandamusi	Nyasa-Tanganyika Plateau	No information found	No information found
7	31//12/92	Harry F. Pettitt	Mudi Retreat	Blantyre	70.75	Claim sanctioned without modification
8	31//12/92	Harry F. Pettitt	Naperi	Blantyre	308	Claim sanctioned without 'much' modification

9	31//12/92	Harry F. Pettitt	Namazi	Blantyre	81,000	Claim sanctioned without modification
10	11//1/93	E.C.A. Sharrer	Kubula	Blantyre	28,578	Settlement by arbitration failed. Court decision divided claims of Steblecki and Buchanan
11	11//1/93	E.C.A. Sharrer	Maperere, Malomba, Mitole, Namalinda	Blantyre, Ruvo, West Shire	No information found	Claim sanctioned without modification
12	12//1/93	Kasimir Sas Steblecki	Chilomoni Road	Blantyre	7.50	Claim sanctioned without modification
13	12//1/93	Kasimir Sas Steblecki	Makungwa	Blantyre	2,701	Claim sanctioned without modification
14	14//1/93	Thomas M. Hastings	Mombezi	Blantyre	2,944	Claim reduced in accordance with amount paid. Government acquired and purchased rights of native vendor. Right to payment waived in favour of Crown estate of 75 acres.

15	18//1/93	Universities Mission	Likoma Island	Lake Nyasa	5,730	No documentary evidence. Claim supported by continuous occupation
16	19//1/93	Church of Scotland Mission	Blantyre	Blantyre	1,551.25	No documentary evidence. Claim supported by continuous occupation
17	19//1/93	Church of Scotland Mission	Mbulumbuzi	Blantyre	409	No documentary evidence. Claim supported by continuous occupation
18	19//1/93	Church of Scotland Mission	Sakata	Zomba	483	No documentary evidence. Claim supported by continuous occupation
19	20//1/93	Church of Scotland Mission	Masea	West Shire	5	No documentary evidence. Claim supported by continuous occupation

20	23//1/93	James Lindsay	Limbe	Blantyre	4,740	Johnston indicated that the native vendor was 'overpaid'. Claim consisted of two leases and one sale. Native vendor persuaded to convert leases into sales to and accept further payment
21	30//1/94	K.B. Bradshaw	Kada	Mlanje	2,000	Reduced 'slightly' in extent to accord with price paid to native vendor.
22	21//3/93	Buchanan Bros.	Michiru	Blantyre	3,065	Extra payment to native vendor required, taken by the government.
23	21//3/93	African Lakes Corporation	Mandala	Blantyre	6,940	Claim sanctioned without modification. Supported by continuous occupation and improvement.
24	1//4/93	Kumtaja	Chilingani	Blantyre	37,947	Only native certificate of claim. Claim reduced to accord with price paid
25	1//4/93	Buchanan Bros.	Mulilima	Chikwawa	3,830	No information found

26	1//4/93	Mrs. Jane F. Moir	Mount Sochi	Blantyre	2,380	Claim sanctioned without modification
27	7//4/93	James Rankin	Ntichiti	Blantyre	4,423	Claim sanctioned without modification
28	24//4/93	Horace Waller	Chiradzulu	Blantyre	5,441	Claim sanctioned without modification
29	24//4/93	Buchanan Bros.	Lunzu	Blantyre	10,240	Claim sanctioned without modification
30	21//5/93	Buchanan Bros.	Mlungusi	Zomba	42,476	Claim sanctioned without modification
31	21//5/93	Buchanan Bros.	Malosa	Zomba	7,760	Claim sanctioned without modification
32	25//9/93	London Missionary Society	Nyamkolo	Tanganyika	No information found	No information found
33	25//9/93	London Missionary Society	Kawimbe	Tanganyika	No information found	No information found
34	6//6/93	Buchanan Bros.	Zomba and Chiradzulu	Zomba and Blantyre	48,789	No information found
35	8//8/93	Hugh C. Marshall	Chiklombe, West Chiromo	Ruo	10,122	Claim reduced in accordance with amount paid
36	11//8/93	Buchanan Bros.	Roseberry Park, Namaluzi, Cholo, Zoa	Ruo	59,429	Extra payment to native vendor required

37	19//9/93	Livingstonia Mission	Livingstonia	South Nyasa	3,660	No documentary evidence. Claim supported by continuous occupation
38	19//9/93	Livingstonia Mission	Njuyu	Mombera	3.50	No documentary evidence. Claim supported by continuous occupation
39	19//9/93	Livingstonia Mission	Ekwendeni	Mombera	2.50	No documentary evidence. Claim supported by continuous occupation
40	27//9/93	African Lakes	Kumpata, Chenjowe	West Shire, Blantyre	23,040	Claim reduced 'to a very large extent'. Reduced to portions they could show long occupation and much improvement. Calculated in accordance to sum paid to native vendor
41	26//9/93	Jonathan Duncan	Upper Mudi	Blantyre	740	Slight reduction owing to boundary dispute with Certificate No 26.
42	19//11/94	Alexander L. Bruce	Likulezi	Mlanje	5,200	Claim reduced in accordance with amount paid

43	28//4/94	Alexander L. Bruce	Magomero	Zomba, Mlanje, Blantyre	154,690	No information found
44	21//3/94	Livingstonia Mission	Bandawe, Tipura	West Nyasa	330	Claim sanctioned without modification
45	21//3/94	Livingstonia Mission	Chirenji	North Nyasa	640	Claim sanctioned without modification
46	23//1/93	Stan. Sas Stelbecki	Ntonda Hill	Blantyre	965	Claim sanctioned without modification
47	June 1893	African Lakes Corporation	Katunga	West Shire	201	Claim sanctioned without modification
48	18//9/93	African Lakes Corporation transferred to John Moir	Midima	Blantyre	13.803	No information found
49	18//9/93	African Lakes Corporation	Chiromo	Ruo	approx 30	Native estates detached from land claimed, and in exchange, government land granted on Mount Mlanje (30 acres)
50	18//9/93	African Lakes Corporation	Namonde	Mlanje	880 acres - 40 given to Mission	Claim reduced in accordance with amount paid
51	18//9/93	African Lakes Corporation	Mambwe	Tanganyika	No information found	No information found
52	20//9/93	African Lakes Corporation	Urungu	Tanganyika	No information found	No information found

53	15//9/95	Livingstonia Free Church Mission	Gowa	Upper Shire	320	Claim sanctioned without modification. Supported by continuous occupation
54	15//9/95	Livingstonia Free Church Mission	Livelezi	South Nyasa Upper Shire	40	Claim sanctioned without modification. Supported by continuous occupation
55	15//9/95	Livingstonia Free Church Mission	Kunamali, Pakamusa, Madunga, Kola, Malimba, Mpondera	South Nyasa Upper Shire	36	No information found
56	19//1/93	Church of Scotland	Domasi	Zomba	610	Claim sanctioned without modification. Supported by continuous occupation
57	6//9/92	A.C. Simpson	Gomba	Ruo	5,130	Reduced 'slightly' in extent to accord with price paid to native vendor. Claimant compensated with land to the east bak of Shire
58	7//9/92	A.C. Simpson	Thucila	Ruo	2,500	Extra payment to native vendor required
59	Cancelled					
60	Cancelled					

61	19/9/93	African Lakes Corporation	North West Nyasa	Nyasa District	2,704,376	Claim sanctioned without modification
62	22/12/98	Church of Scotland		Mlanje	500	No information found
63	22/12/98	Church of Scotland		Mlanje	2,620	Claim sanctioned without modification. Supported by continuous occupation and improvement.
64	31/1/94	Universities Mission	Plots 25, 26, 27, 37, 38, 39	Fort Johnston	–	Claim sanctioned without modification. Supported by continuous occupation and improvement.
65	19/9/93	African Lakes	(Mining)	Marimba	mining rights	Claim sanctioned subject to Government royalty ad valorem of 5%
66	19/9/93	African Lakes	(Mining)	Mwase Kasungu	mining rights	Claim sanctioned subject to Government royalty ad valorem of 5%
67	20/9/93	African Lakes	(Mining)	Chikuse, Southern Angoniland	mining rights	Claim sanctioned subject to Government royalty ad valorem of 5%
68	20/9/93	African Lakes	(Mining)	Undi, Likungwi, P.E.A.	mining rights	Claim sanctioned subject to Government royalty ad valorem of 5%

69	21//9/93	B.S.A. Company	(Mining)	Chiwere, Tambala, Mapanga, Central Angoniland	mining rights	Claim sanctioned subject to Government royalty ad valorem of 5%
70	25//9/93	B.S.A. Company	(Mining)	Chiwere, Tambala, Mapanga, Central Angoniland	mining rights	Claim sanctioned subject to Government royalty ad valorem of 5%
71	25//9/93	B.S.A. Company	(Mining)	Chiwere, Tambala, Mapanga, Central Angoniland	mining rights	Claim sanctioned subject to Government royalty ad valorem of 5%
72	23//12/93	African Lakes Corporation	Bandawe	West Nyasa	100	Claim sanctioned without modification
73	29//3/94	Stanislas S. Steblecki	Bandawe	Cholo	9,600	Post-proclamation acquisition. Reduced in extent from 64,000 acres to 9,00 acres in accordance with sum paid to native vendor Makwira

This table was compiled with information obtained from the following sources

1. MNA Lands Registry – Contains list of all certificates of claim, claimant, name of estate and extent in acres.
2. This was supplemented by Johnston's dispatches detailing his methods in the land settlement in F.O. 2/128 Memorandum on Land Settlement

APPENDIX 3: COPY OF CERTIFICATE OF CLAIM

Inclosure 3 in No. 1.

Certificate of Claim.

I, HENRY HAMILTON JOHNSTON, Esq., Companion of the Most Honourable Order of the Bath, Her Majesty's Commissioner and Consul-General for the territories north of the Zambesi, &c., being authorized by Her Majesty's Government to inquire into and settle all land claims within the territories under British influence north of the Zambesi, and to grant to all claimants whose titles shall be proved to be true and just a certificate to that effect under my hand and seal, specifying the extent of land over which the claim extends, and the exact nature of the claim, together with any limitations, restrictions, or conditions which I may think fit to attach to this recognition, the said certificate then becoming a voucher for the legality of the claim ;

Do hereby certify that I have inquired into the claim of Hugh Bloomfield Bradshaw, planter, of Milanji, Nyassaland, to have purchased an estate, in fee-simple, at Tshipolopolo, on the right bank of the River Ruo, in the Ruo district, Nyassaland, from Mbengwa, a Makololo Chief, on the 16th day of April, 1891 ; and that, having visited the said estate, and ascertained that there are no valid counter-claims to its possession, and that the vendor, Mbengwa, was the sole and rightful owner of the land on which the estate was situated and of which it formed an integral part, I declare the above-mentioned claim of Hugh Bloomfield Bradshaw to be established, and to be recognized as legal and valid by the Government of Her Britannic Majesty, under the following conditions :—

1. That the boundaries of the said estate shall be these :

Starting from a point on the right bank of the Ruo, which is distant 300 yards from the most easterly house existing at this date in Tshipolopolo's village (and which in consequence is not more than 500 yards distant in any direction from the Mona footpath), the boundary shall follow the Ruo bank up stream for not more than 4 miles until a certain dry watercourse is reached, or should the dry watercourse not be recognizable, then for a distance of 4 statute miles measured along the river bank ; and from the confluence of this dry watercourse with the Ruo, or from the termination of the 4 measured miles, the boundary shall be carried inland at right angles to the

* August 14, 1890, was the date, I believe.—H. H. J.

general course of the River Ruo for a distance of 4 statute miles; and from the point where these 4 measured miles terminate shall turn at right angles, and be carried for a further distance of 4 statute miles; and from the termination of this measurement shall be carried back to the starting-point near Tshipolopolo's village, on the right bank of the Ruo—thus forming a block approximately 4 miles square, and containing about 2,560 acres.

2. That the said Hugh Bloomfield Bradshaw shall, on or before the 31st December next, pay to the vendor, Mbengwa, a further sum of 4*l.* to complete what Her Majesty's Commissioner and Consul-General decides to fix as a fair purchase price.

3. That the said Hugh Bloomfield Bradshaw shall pay the cost of surveying the said estate according to the scale of charges fixed by Her Majesty's Commissioner and Consul-General and approved by Her Majesty's Government, the plan made by the said survey and approved by Her Majesty's Commissioner and Consul-General to be attached by the Consular seal to the certificate of claim, and constitute, in common with the definition of boundaries herein given, the only valid and legal evidence as to the extent of the said estate.

4. That on all minerals, metals, or precious stones worked on or obtained from the said estate a Royalty of 5 per cent. *ad valorem* shall be paid to the British Government.

5. That Her Majesty's Government shall at all times have the right to make roads, railroads, tramways, or canals for the public use across any part of the said estate, provided that such roads, railroads, tramways, or canals do not alienate more than one-sixth of the entire area of the said estate, and that compensation is paid for the disturbance of buildings or of growing crops.

6. That Her Majesty's Government retains the right of control over all running and stagnant water, the extent of which is not wholly included within the boundaries of the said estate.

7. That no existing native village or plantation on the said estate is to be disturbed or removed without the consent in writing of Her Majesty's Commissioner and Consul-General.

And in witness to the validity of the afore-mentioned claim of the said Hugh Bloomfield Bradshaw, subject to the foregoing conditions, I have hereunto set my hand and seal, this 30th day of September, 1892, at Pangomani, in the Milanji district, Protectorate of Nyassaland.

(Signed)

HENRY HAMILTON JOHNSTON,

Her Majesty's Commissioner and Consul-General.

Signed, sealed, and delivered by the said Henry Hamilton Johnston, in my presence, this 30th day of September, 1892.

(Signed)

WILLIAM M. FARRELL.

I, Hugh Bloomfield Bradshaw, do hereby agree to the foregoing seven conditions which are attached to this recognition of my claim.

(Signed)

HUGH BLOOMFIELD BRADSHAW.

Signed, sealed, and delivered by the said Hugh Bloomfield Bradshaw, in my presence, this 30th day of September, 1892.

(Signed)

WILLIAM M. FARRELL.

[*Note.*—This certificate claim deals with an estate the boundaries of which are simple. In some other cases, where the claim is very valuable or lies in a township, several pages may be taken up with Condition No. 1—the definition of the boundaries. The sanctioned price paid for this estate, 12*l.* + 4*l.* = 16*l.*, is exceptionally low, less than 1½*d.* an acre, but it is saddled with the condition that none of the existing villages or native plantations shall be disturbed, and as these occupy about one-half to two-thirds of the ground purchased, the proprietor of the estate has really only about 1,100 acres at his disposal.—H. H. JOHNSTON.]

TNA FO 84/2197 Commissioner Johnston to Earl of Roseberry, No 39 Central Africa, Zomba, October 13, 1892, Inclosure 3
Foreign Office Records, National Archives, Kew

APPENDIX 4: COPY OF FORM TREATY

Form of Treaty sent to Commissioner Johnston, May 31, 1889.

Treaty made at _____, in _____, in the year 18____, between
 this _____ day of _____
 for and on behalf of Her Majesty the Queen of Great Britain and
 Ireland, Empress of India, &c., her heirs and successors, on the one part,
 and the Undersigned, _____, for _____ heirs and
 successors, on the other part.

_____, the Undersigned, _____, do in the presence of
 Headmen and people assembled at this place hereby promise:—
 1st. That there shall be peace between the subjects of the Queen of
 England and _____ subjects.

2nd. That British subjects shall have free access to all parts of
 _____, and shall have
 the right to build houses and possess property according to the laws in force
 in this country; that they shall have full liberty to carry on such trade or
 manufacture as may be approved by Her Majesty; and should any difference
 arise between the aforesaid British subjects and _____ the
 said _____ as to the duties or customs to be paid to
 the said _____ or the Headmen of the towns in
 country by such British subjects or as to any other matter, that the dispute
 shall be referred to a duly authorized Representative of Her Majesty, whose
 decision in the matter shall be binding and final; and that
 will not extend the rights thus guaranteed to British subjects to any other
 persons without the knowledge and consent of such Representative.
 3rd. That _____ the said _____ will at no time
 whatever cede any of _____ territory to any other Power, or enter
 into any Agreement, Treaty, or arrangement with any foreign Government
 except through and with the consent of the Government of Her Majesty
 the Queen of England, &c.

Done at _____, 18____, this _____ day of _____
 Signed in the presence of _____

We, the Undersigned, do swear that we have truly and honestly
 interpreted the terms of the foregoing Agreement to the Contracting Parties,
 in the _____ language.
 Witness to signatures:

TNA FO 881/6383 Memorandum of Land Claims in the British Central Africa Protectorate,
 August 1893
 Foreign Office Records, National Archives, Kew.

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