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British Extradition Policy and the Problem
of the Political Offender
(1842 - 1914)

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by

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SUMMARY

Summary of Thesis submitted for Ph.D. degree

by Nicholas Adams

on

British Extradition Policy and the Problem

of the Political Offender

(1842 - 1914)

The aim of this study is to examine the nature of the British approach to extradition with particular reference to the definition of political offences and the position of political refugees in extradition law and practice. The attention of policy-makers and public opinion was always mainly focused upon these two issues, and this study will therefore concentrate upon them. In abstract terms, the definition of political offences was found to be generally impossible, although attempts to define them generated much important and interesting discussion. In practice, some guidelines were laid down in individual cases, but they did not amount to a solution of the general question.

Before 1870, fears that efficient extradition would necessarily endanger political refugees prevented Britain from establishing a system of extradition treaties, with the result that many common criminals escaped punishment. A shift in opinion took place, and it came to be accepted that efficient extradition and security for political refugees could co-exist, but even after 1870, efficient extradition was still hampered to an extent by statutory safeguards for the position of political refugees. Furthermore, on several occasions, amendments of the law that were desirable in the interests of the efficient administration of the law were abandoned on the grounds that they might endanger political refugees.

Foreign states resented British devotion to protecting political refugees, both because it hampered efficient extradition and because they resented British protection of refugees who were considered a threat to the security of foreign regimes. There was considerable pressure from abroad, and from certain sections of opinion within Britain, for her to abandon, or at least modify, her traditional stance vis-a-vis political refugees within extradition law and practice, and more generally, but it remained largely unaltered throughout the period under discussion. Up to 1914, political refugees were better protected by Britain than by any other nation. Thereafter, things began to change, as the peculiar conditions which had made such a policy both desirable and possible gradually altered and eventually disappeared.

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Abbreviations

British Library Additional Manuscript	BL Add. MS
<u>Canadian Historical Review</u>	<u>CHR</u>
Central Criminal Court	CRIM
Clarendon Papers	Clar. PP.
Colonial Office	CO
'Correspondence of Lewis Tappan', <u>Journal of Negro History</u> volume 12 (1927), pp.179-329 & 389-554.	'Tappan Papers'
Cowley Papers	Cowl. PP.
Director of Public Prosecutions	DPP
Foreign Office	FO
Herbert Gladstone Papers	H. Glad. PP.
W.E. Gladstone Papers	Glad. PP.
Granville Papers	Granv. PP.
<u>Hansard</u>	H [e.g. 3H, (L), 7, c.1 = Hansard, 3rd Series, Lords, vol. 7, column 1.
Harcourt Papers	WVH. PP.
Home Office	HO
Metropolitan Police	MEPO
Parliamentary Papers	<u>PP</u>
Russell Papers	Russ. PP.
Salisbury Papers	3M

PREFACE

Preface

Victorian and Edwardian extradition has remained very much unstudied by historians. Apart from a few lines here, a couple of footnotes there, and the odd chapter, the subject has been almost totally ignored (apart from a couple of isolated areas), and what has been written has not always been either accurate or illuminating. One reason for this lack of historical activity may have been the problem of gaining access to many of the relevant Home Office papers which survive: a difficulty which I am pleased to report has been overcome. The Home Office has been extremely co-operative in allowing me to consult large numbers of 'closed' files (in the classes HO 134, HO 144, HO 151 and HO 162), which had not previously been available for research. Another reason may have been the amount of research needed to produce a comprehensive study: more than 2,000 individual government files and volumes have been studied for this work, in addition to Hansard, the press, and so on.¹ Still, there is no good reason why extradition should have been so totally ignored, for it was certainly of great importance to the Victorians and Edwardians themselves. One writer was even moved to write of the 'Romance of Extradition',² but unfortunately most of his 'romantic tales' were inventions of his presumably love-sick imagination. This thesis is therefore unlikely to become a 'Mills and Boon Classic', but,

1. Only British sources have been available for this study.
2. 'A Solicitor', 'The Romance of Extradition', Chambers's Journal volume 13 (1909-1910), pp.629-32.

despite this grave failing(!), extradition does merit the historian's close attention.

Extradition stands in an almost unique position as a bridge between both foreign and domestic policy; almost like an estuary, where two separate rivers meet, mix, and flow out into the sea together as one. To take the analogy one step further, when rivers meet, a certain degree of turbulence is caused: similarly, the meeting of the competing, and sometimes mutually exclusive, needs of foreign and domestic policy was not always a very easy process. Foreign policy aims might dictate the need to pursue policy A; domestic considerations might dictate the need to pursue policy B; and the result might be policy C, which completely satisfied the needs of neither foreign nor domestic policy. It was rather like an arranged marriage: two partners forced together, rather unhappily, but without the option of a divorce when relations broke down irretrievably. It is this bridging position which produces the wider historical significance of extradition policy.

Extradition of course has an intrinsic importance, of interest in itself even if it had no wider significance. Although it did not cause any wars, extradition was of great importance on that lower, day to day level of international relations, which cumulatively could often mean so much. Extradition was also important to the growth and development of international law as a practical concept. It was one of the first branches of the law to become truly international, and even today, when the concept of international law is much appealed to, extradition remains one of the few areas of it

that is actually enforceable, and enforced. By the 1980s, extradition has become less commonplace than (as we shall see) it was before 1914, but cases that do arise tend to be increasingly important, involving Nazi war criminals, terrorists, 'drug-barons', and the like. On occasion, extradition still manages to 'hit the headlines'.

It is necessary to state at the outset that this study is not a legal history of extradition. Rather, the aim is to determine how the legal framework of extradition operated within its socio-political context. The law of extradition did not, and indeed could not, operate in a vacuum, and in many vital aspects was deeply influenced in its operation, application, and interpretation by the prevailing socio-political climate. Indeed, Britain's relationship with extradition during this period cannot be fully understood without reference to this climate. The fault of some of the many legalists who have dealt with extradition has been that they have left such factors out of their calculations altogether. The result tends to be a rather bland statement of the details of a statute or the facts of an extradition case, which by no means tell the whole story, sometimes coupled with some rather unhistorical comments.³

To be fair, not all legalists should be tarred with the same brush: in particular, Paul O'Higgins stands out as a legalist fully aware of his history. Nevertheless, it remains broadly true that legalists have not paid as much

3. Rather than including them here, out of context, examples will be noticed in the relevant part of the text.

attention to good history as they should have done. However, one should perhaps not be too critical of them for this, for, after all, there was hardly any historical writing for them to consult, and one cannot expect legalists to do detailed historical research. In any case, the result might have been very different from this thesis: historians and legalists necessarily approach extradition from a different perspective. Nonetheless, I would hope that it would be of some use to legal scholars, as well as filling a significant gap in historical research.

INTRODUCTION

Introduction

Extradition has been defined as, "the process by which one nation surrenders for purposes of trial and punishment, individuals accused of crimes committed outside its borders, to the nation in which the alleged crimes were committed."¹ Such surrender has always been considered unusual, an exceptional measure rather than the norm, and, as a result, it has been suggested that the process came to be known as extradition because it was 'extra-tradition', that is, against the tradition of giving refuge and sanctuary.² However, it seems more likely that the origins of the word extradition lie in the Latin extradere, which means the forceful return of a person to his sovereign. Extradition originated among the ancient Egyptian, Chinese, Chaldean and Assyro-Babylonian civilisations.³

1. B.A. Banoff and C.H. Pyle, 'To surrender Political Offenders', New York University Journal of International Law and Politics, volume 16 (1984), p.173. For other definitions: cf. G.V. LaForest, Extradition to and from Canada (New Orleans 1961) p.15; F. Kopelman, 'Extradition and Rendition', Boston University Law Review volume 14 (1934), p.591; J.H.W. Verzijl, International Law (Leiden 1972) volume 5, p.269; J.B. Moore, The Difficulties of Extradition (New York 1911) p.3; M.C. Bassiouni, International Extradition (Leiden 1974) p.1; and L.C. Green, 'Recent Practice in the Law of Extradition', Current Legal Problems volume 6 (1953), p.274.

2. In 1861, Travers Twiss (a future Law Officer) wrote extradition as "extra-tradition", so indicating his view as to the origins of the word: T. Twiss, The Law of Nations (Oxford 1861) pp.348-9.

3. For the early history of extradition, see: M.C. Bassiouni, op. cit., pp.1-5; C. Van den Wijngaert, The Political Offence Exception (Deventer 1980) pp.4-18; P. O'Higgins, 'History of Extradition in British Practice', Indian Year-book of International Affairs volume 13 (1964) pp.78-115; and I.A. Shearer, Extradition (Manchester 1971) pp.5-12.

The first recorded extradition arrangement dates from circa 1280 B.C., and is the second oldest document in diplomatic history:⁴ extradition was provided for as a part of the peace treaty signed between Ramses II, Pharaoh of Egypt, and the Hittite King, Hattusili II, after the latter's unsuccessful attempt to invade Egypt. The two sovereigns "pledged reciprocal aid... against internal foes, who were to be extradited when taking refuge with the ruler of the other country."⁵ Similar provisions may be found in treaties signed throughout the rest of the ancient period, the Middle Ages, and the Early Modern period. Extradition even makes an appearance in the Bible:

if any man hate his neighbour, and lie in wait for him, and rise up against him, and smite him mortally that he die and fleeth into one of these cities: Then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die.⁶

The traditional view⁷ has been that throughout this early period of extradition the process was devoted almost exclusively to the surrender of political and religious

4. It is carved in hieroglyphics on the Temple of Amman at Karnak, and is also preserved in clay tablets in Akkodrain at the Hittite archive at Boghazkoi.

5. A. Nussbaum, Concise History of the Law of Nations (New York 1954) p.2.

6. Deuteronomy, chapter 19, verses 11-13.

7. Exemplified by L. Oppenheim, International Law (8th edn. 1955) volume 1, p.696: "Before the eighteenth century, extradition of ordinary criminals hardly ever occurred. offenders; those guilty of treason, heresy, and the like.

More recently, however, this view has been challenged by Paul O' Higgins, at least so far as England is concerned.⁸ The first treaty concluded by an English monarch which included provision for extradition was the Treaty of Falaise, signed by Henry II and William of Scotland in 1174. In fact, from 1174 until the Anglo-Scottish Union of 1707, "there was a fairly continuous system of extradition in operation" between these two nations.⁹ For example, in 1204 King John ordered the Sheriff of Northumberland to deliver up certain outlaws to the Scottish King; in 1449 the Lord Wardens of the Marches were instructed to hand back fugitives fleeing from Scotland; and an English Act of 1606 provided for the delivery to Scotland of persons accused of any offence against Scottish law. O'Higgins also cites examples of similar English arrangements with France, Spain, Portugal, Flanders, and the United Provinces, which provided for the mutual surrender of pirates, murderers, thieves, and other criminals in addition to traitors, rebels, and heretics.¹⁰

Whilst O'Higgins does dispel the impression that extradition

8. P. O'Higgins, op. cit. The following paragraph owes much to O'Higgins' work. It has been asserted (C. Parry [ed.], British Digest of International Law [1965] volume 6, p.445) that further research "would probably explode the notion... that extradition... originated as a device for the punishment of treason and rebellion," but as yet, this remains unproven. As recently as 1980 it was asserted (V.P. Ravaschierre, 'Terrorist Extradition and the Political Offence Exception', Virginia Journal of International Law volume 21 [1980] p.166) that "before the nineteenth century, the primary function of extradition treaties was to capture political offenders."

9. P. O'Higgins, op. cit. p.81.

10. ibid. pp.81-7 and 88-105.

was solely a device for gaining possession of political offenders, the fact remains that this is precisely what it was used for in very many cases. There are some notable examples of this practice. In 1331 Castile surrendered Thomas de Gourney (one of the assassins of Edward II) to England; in April 1591 James VI of Scotland surrendered the Irish rebel O'Rourke to Elizabeth I; and after the English Restoration in 1660, Holland handed over three of the regicides.¹¹ That extradition should have been so used was eminently logical. The escape of ordinary criminals was not regarded as a danger to the state (the preservation of which was the primary interest of governments), whereas the converse was true with respect to political criminals, who were pursued and punished whenever possible. "A petty thief was not a threat to the political order, but a rival faction... might harbour the seeds of total annihilation."¹² Furthermore, states had little interest in handing back common criminals, for there existed "little, if any, conscious feeling of the existence of an international community which may have an interest in the suppression of common crimes; hence, there was no incentive to co-operate to that end."¹³

11. Similarly, by the fifth article of a treaty of alliance signed by Charles II and Frederick III of Denmark in 1661, the Danes agreed to hand over any regicides who might be found in Denmark. A copy of this article may be found in F. Kopelman, op. cit. p.594n.

12. V. Epps, 'Political Offender Exception', Harvard International Law Journal volume 20 (1979), p.62.

13. Harvard Research in International Law, 'Extradition', American Journal of International Law Supplement to volume 29 (1935), p.108.

Whatever its purpose, throughout its early history, extradition tended to be rather an informal business (which is hardly surprising given the fact that international relations tended to be conducted on a very personal level), a sign of goodwill between sovereigns, which was usually provided for within treaties of peace and alliance. Extradition may be "one of the oldest international institutions,"¹⁴ but that is not to say that it is also one of the oldest institutions of international law. It was not until the seventeenth century that extradition came to be thought of in strictly 'legal' terms. Scholars such as Dumoulin and Hugo Grotius (who constructed a "theoretical framework which is still the corner-stone of classic extradition law")¹⁵ began to emphasize the importance of extradition vis-à-vis the suppression of ordinary crime, and criticised governmental failure to pursue common criminals who fled abroad.¹⁶ By the mid-eighteenth century, Cesare Beccaria can be found asserting: "Impunity and Asylum are more or less the same... Asylum is a better invitation to crimes than punishment is a deterrent."¹⁷

Despite its consideration by such learned jurists, extradition could still hardly be called a branch of the law,

14. J.H.W. Verzijl, op. cit. p.270.

15. M.C. Bassiouni, op. cit. p.370.

16. cf. C. Van Wijngaert, op. cit. p.7.

17. C. Beccaria, Dei Delitti Delle Pene (Torino 1764). Quoted in ibid. p.8: "L'impunità e l'Asilo non differiscono, the di piu, e meno... gli Asili invitano piu ai celitti di quello, che le pene non allontanano." It was in the eighteenth century that the term 'extradition' came to be commonly used.

either municipal or international.

In any case, 'international law' was not widely recognised at this time: before the nineteenth century "the law of nations remained more a matter of doctrine than of state practice."¹⁸

As far as Britain was concerned, it was not until just before the nineteenth century that extradition became a formalised, legal process, aimed exclusively at common offenders. By Article 27 of the Anglo-American Jay Treaty of 1794 (signed 19 November), the extradition of murderers and forgers was provided for upon the production of prima facie evidence of the guilt of the accused. This provision of the treaty had no effect until ratified by the British Parliament under statute: for one thing, the arrest in Britain of an American fugitive would be illegal unless statutory provision was made for it. Such a fugitive had committed no crime in Britain, and so could not be liable to arrest in the absence of a statute implementing the treaty.¹⁹ For the first time,

18. A. Nussbaum, op. cit. p.ix.

19. Article 27 was implemented in 1797 by Section 26 of 37. Geo.III.c.97. On the Jay Treaty generally: cf. S.F. Bemis, Jay's Treaty (Yale 1965), which has a copy of Article 27 on p.482. cf. also M.M. Whiteman, Digest of International Law (Washington 1968) volume 6, p.751 and; C. Parry (ed.) op. cit. p.445. The treaty expired in 1806. Article 27 was reproduced in Article 21 of a new treaty signed in 1807, but the treaty never became operative. The primary aim of the Jay Treaty was to settle general problems: its signature, "averted a serious clash at almost the last possible moment... war... was no remote possibility:" B. Perkins (ed.), 'Lord Hawkesbury', Mississippi Valley Historical Review volume 40 (1953), p.291. There is a memorandum on extradition cases under the treaty in FO 5/400, ff.204-11.

extradition was given a definite standing in the law of the land, and in 1799 came the first modern British extradition case: the surrender of Nathan Robbins to Britain on a charge of murder arising out of a mutiny on board H.M.S. 'Hermione'.

Nevertheless, extradition still remained only an aspect, and not necessarily a very large or important one, of general treaties of peace and settlement, and was to remain so for some years to come. Article 20 of the Treaty of Amiens (signed by Britain, France, Holland, and Spain in 1802) provided for the extradition of persons accused of murder, forgery, or fraudulent bankruptcy.²⁰ Similarly, Article 10 of the Anglo-American Convention as to Boundaries, the Suppression of the Slave Trade, and Extradition of 1842 (the Webster-Ashburton Treaty), made provision for extradition.²¹ It was not until the signing of the Anglo-French Extradition Treaty of 1843 that Britain concluded her first extradition

20. A copy of Article 20 may be found in Harvard Research in International Law, op. cit. p.274. See also M.M. Whiteman, op. cit. p.751 and C. Parry (ed.) op. cit. p.445. The article was given legal standing in Britain by Section 21 of the 1802 Alien Act (42.Geo.II.c.92) but never came into force as a result of the renewal of the Anglo-French war. The provision re-appeared in the Anglo-French treaties of 1814 and 1815, but only applied to French and British Indian possessions.

21. On the treaty generally: cf. E.D. Adams, 'Lord Ashburton and the Treaty of Washington', American Historical Review volume 17 (1912), pp.764-82. Its main purpose was to settle long standing boundary disputes which had come to a head during the Canadian rebellion of 1837-38. On this: cf. W.P. Shortridge, 'Canadian-American Frontier', CHR volume 6 (1926), pp.13-26; and A.B. Corey, The Crisis of 1830-42 (New Haven 1941). The treaty led to a "general improvement" in relations [G.G. Van Deusen, Seward (New York 1967) p.79], and "brought to an end the ugliest Anglo-American crisis for many years:" H.C. Allen, Great Britain and the United States (1954) p.403.

treaty proper: it dealt exclusively with extradition. With the signing of this treaty, extradition was recognised as having an importance all of its own.²²

In parallel with the establishment of extradition in international and municipal law, so too can its modernisation be traced in the gradual removal of political offenders from its operation. It is not easy to give a simple, clear explanation for this "véritable révolution dans les idées, la substitution d'un idéal à un autre," to use the words of Jean Graven.²³ Most writers link the development and acceptance of this principle to the changes in state and society inspired by the American and French revolutions, and the ideas they promoted.

The rise of revolutionary ideology... brought about a totally new attitude towards political offenders and completely undermined the traditional conception that political crimes, being the most serious, ought to be subjected to the most severe penalties. The notion that resistance against oppression is legitimate was increasingly supported by political thinkers and philosophers.²⁴

The French and American revolutions had proclaimed and justified the right to revolt against unjust and oppressive

22. Still, the treaty was regarded as one of the means by which Britain and France "could give practical expression to their desire for renewed co-operation:" M.E. Chamberlain, Aberdeen (1983) p.344.

23. Quoted in C. Van den Wijngaert, op. cit. p.11.

24. ibid. p.9.

regimes, and indeed Article 120 of the Jacobin constitution of 1793 explicitly asserted that the French people "donne asile aux étrangers bannis de leurs pays pour la cause de la liberté. Il le refuse aux tyrants!"²⁵ As far as British writers are concerned, Francis Hutcheson, in his posthumous System of Moral Philosophy of 1755, was perhaps the first to advocate the exemption of political offenders from extradition. He said that, "political offenders were often good men who had already suffered loss of their fortunes and banishment from their native country because of their activities and accordingly it was humane not to surrender them."²⁶

As the years passed, the twin doctrines of the right of resistance and asylum entered mainstream political thought under the wings of men such as Burke, Bentham and J.S. Mill. In 1802 L. de Bonald (in his Législation Primitive) became the first legal writer to oppose extradition for political offences, and Kluit followed this lead in his De deditiane profugorum of 1829. These doctrines also came to be justified by leading politicians and statesmen. On January 30 1787, Thomas Jefferson wrote to James Madison that he held that "a little rebellion, now and then, is a good thing, and as necessary in the political world as storms in the physical."²⁷ In 1815 Sir James Mackintosh asserted that:

25. C. Van den Wijngaert, op. cit. p.9.

26. P. O'Higgins, 'Extradition - Offence of a Political Character - Terrorism', Cambridge Law Journal volume 32 (1973), p.182.

27. Quoted by S. Lubet, 'Extradition Reform', Cornell International Law Journal volume 15 (1982), p.249n.

"though nations may often agree mutually to give up persons charged with the common offences against all human society, civilised states afford an inviolable asylum to political emigrants... none of its principles more venerable, than the inviolable right of political asylum... Our territory [is]... a city of refuge; our flag... the symbol of security and the badge of hope to the eye of the oppressed exile."

In 1816, Castlereagh declared that, "there could be no greater abuse of the law than to allow it to be the instrument of inflicting punishment on foreigners who had committed political crimes only."²⁸

We have seen that during the early years of the nineteenth century the phrase 'political crime' began to enter the vocabulary of statesmen and writers in the context of extradition. However, the precise meaning of the term was by no means clear. Some acts (treason for example) constitute crimes simply because of their political nature, without which they would not be regarded as criminal: as such they are relatively easy to define, and have come to be known as 'pure political offences'. On the other hand, there

28. 1H, (C), 29, cc. 1138-1151, (1 March 1815); and 1H, (C), 34, c. 453, (10 May 1816). cf. Lord Hawkesbury to Merry, 10 June 1802, quoted in, N.W. Sibley and A. Elias, The Aliens Act and the Right of Asylum (1906) p.126. During 1798-1802 there occurred the first case of the surrender of a political offender arousing widespread protest and controversy: the case of Napper Tandy. On this see: P. O'Higgins, 'Unlawful Seizure', British Year-book of International Law volume 36 (1961), pp.298-300; R.J. Coughlan, Napper Tandy (Dublin 1976); S.N. Chinneide, Napper Tandy (Dublin 1962); J.S. Watson, Reign of George III (Oxford 1960); and C. Parry (ed.), op. cit. p.653.

are 'relative political offences', the definition of which is more difficult. These are ordinary offences to which a political motivation or justification may be sought to be ascribed. Almost any crime may be committed with a political motive or in pursuit of a political aim, and the question whether such an offence may be called 'political' does not depend on any quantifiable objective criteria. Imponderable factors such as the motivation of the offender have to be considered and evaluated, so making the resolution of the issue extremely problematical.

Perhaps the most significant landmark in the early history of the non-extradition of political offenders came with the enactment of the Belgian extradition law of 1833. As well as being the first law devoted exclusively to extradition, it contained "the first official codification of the political offence exception." The law provided that under extradition treaties concluded by Belgium, "l'étranger ne pourra être poursuivi ou puni pour aucun délit politique antérieur à l'extradition, ni pour aucun fait connexe à un semblable délit."²⁹ In November 1834 the Franco-Belgian Extradition Treaty became the first to include the political offence exemption.

However, it should not be thought that at this time the political offence exemption was all conquering. At this stage its application and observation was very much limited

29. C. Van den Wijngaert, op. cit. p.12-13. The gradual adoption of the principle was in itself of some importance in abstract terms, for it was "one of the first legal principles which clearly and unequivocally contemplated the protection of the individual:" ibid. p.37.

to the more liberal European states. As far as the 'despots' of Europe were concerned, not much has changed since the Middle Ages. In 1817, Captain Massenbach, accused of treason, was extradited from Frankfurt to Prussia, and in 1832 Bruggeman, a student with "revolutionary leanings" was surrendered to Prussia by Baden.³⁰ The treaties concluded in 1832-36 between Austria, Prussia, Russia, and the Germanic Federation, which established the 'Holy Alliance', made express provision for the extradition of persons accused of explicitly political offences, such as high treason and rebellion.

These illiberal continental powers approached the question from a perspective which was very different from that of Britain and other liberal nations. The continental despots "believed it was incumbent on all the powers in the interests of European stability to co-operate to ensure the security of their established regimes from internal subversion as well as external aggression." Such a perspective gave rise to policies which included, for example, "mutual aid against dissidents and revolutionaries who operated across national frontiers: collaboration between police forces, extradition for political offences, (and) denial of asylum to refugees."³¹ Britain would have nothing to do with such things. By the 1840s the granting of an inviolable asylum to political refugees had become very widely accepted as a revered national institution, as

30. J.H.W. Verzijl, op. cit. p.303.

31. B. Porter, Britain, Europe and the World (1983) p.23.

precious as any other.³² Such conflicting approaches to extradition and asylum sowed the seeds for conflict between Britain and her neighbours. As yet, such conflict had not arisen to a serious extent, but the potential for it was very real indeed.

Despite the persistence of almost medieval attitudes in parts of the continent, by the mid-1830s extradition had entered its modern and recognisable phase, and the Victorian era was to see it transformed into a system which cannot be markedly distinguished from that which operates today. Particularly as far as Britain is concerned, the procedures and limits of extradition established during the Victorian era remain very much the same in the 1980s.³³ The fundamental battle lines of the development of extradition (the position of political refugees and the definition of political offences) had also been established by the mid 1830s, although as yet these issues had only been sketched in outline rather than fully developed or tested. However, during the following 80 or 90 years, these issues came to the fore of British domestic politics and international relations, and it is on this process that this study will concentrate.

32. In 1844 there was a "parliamentary storm... bitter debates in both houses... outcry in the press...(and a) series of public protest meetings" when it was revealed that the government was opening Mazzini's mail, and communicating the contents to the Italian authorities: F.B. Smith, 'British Post Office Espionage, 1844', Historical Studies (Melbourne) volume 14 (1970), p.189; cf. B. Porter, Refugee Question (Cambridge 1979) p.54.

33. Unless of course the present government has its way. Plans are afoot to radically alter British extradition procedure and policy: cf. Sunday Times 8 December 1985; Guardian 9 December 1985; Independent 18 November 1987.

CHAPTER ONE:

GENESIS (1842-1859)

Chapter One: Genesis (1842-1859)

In 1842, Article 10 of the Webster-Ashburton Treaty (signed on 2 August and negotiated in Washington by Lord Ashburton and Secretary of State Daniel Webster) established extradition between Britain and the United States, and in 1843 an Anglo-French extradition treaty was concluded: the Britain extradition experience thus entered its modern phase. As did all treaties which affected British domestic law, they had to be confirmed by statute, so giving Parliament an opportunity of discussing this novel but important policy matter. It is difficult to emphasise just how novel the concept of extradition was, and how ill-acquainted people were with it. In 1846 the Law Times could be found asserting that extradition was "a branch of law very ill understood by the Profession, and upon which information is difficult to be obtained when required".¹ Since readers of this study may be equally unfamiliar with it, it would perhaps be helpful to reproduce the terms of the extradition arrangements of 1842-1843.

Article 10 provided for the extradition of persons accused of murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, upon production by the country seeking extradition of such evidence of criminality as, according to the laws of the place where the fugitive... shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed.

1. Anon, 'Review of Charles Egan's The Law of Extradition', Law Times volume 7 (1846), p.501.

Applications for extradition were to be heard by a competent judge or magistrate, whose duty it was to decide whether sufficient evidence had been adduced.² The Anglo-French treaty followed the same forms of words, the only difference being that it applied to fewer crimes: murder, attempted murder, forgery, and fraudulent bankruptcy.³ Both treaties also applied to fugitives seeking an asylum in the colonies of the signatories.

The two necessary bills were introduced as a pair into the Lords on 26 June 1843. Generally speaking, both were well received, and the principle of extradition was warmly supported. Lord Brougham "highly approved" of them; Lansdowne believed the "general policy of [the] bills it was impossible for him or for the Parliament to "doubt"; Peel regarded them as a "great advance in civilisation"; and there were calls for the scope of the treaties to be

2. Copies of Article 10 may be found in PP (1843) LXI: 'Treaty between Her Majesty and the United States of America', p.7; FO 5/2206; and The Times 15 September 1842, p.5. cf. M.E. Chamberlain, op.cit. p.331. C.M. Fuess, Daniel Webster (Hamden 1963) volume 2, p.113, incorrectly states that the treaty provided for "the enlargement of the number of offences for which extradition might be asked": before the treaty was signed, Anglo-American extradition was not possible at all. R.N. Current, Daniel Webster (Boston 1955) p.121, erroneously implies that Article 10 applied to Canada and America only.

3. For the exact terms of the Anglo-French treaty, cf. C. Parry (ed.), op.cit. p.446; The Times 17 March 1843, p.6; FO 881/1446, pp.29-31; and FO 27/676. The correspondence (which began in November 1842 and was initiated by France) preceding the conclusion of this treaty may be found in FO 27/659. W.W. Fifield ('A History of the Extradition Treaties of the United States', Unpublished Ph.D. Thesis, University of Southern California [1936], p.31) describes the treaty as "very comprehensive", which, considering that it only applied to four crimes, is hardly accurate.

enlarged.⁴ The story was much the same outside Parliament. The Times spoke of the "palpable and self-evident absurdity of any of shadow of opposition to a project in every way so reasonable and desirable... its importance can hardly be over-rated". For Charles Buller, the "only subject for surprise or regret" was "that such an arrangement has not long ago been established between all the civilised nations of the world".⁵

Although there was no opposition to the principle of extradition, nor to the practical implications of the Anglo-French treaty, disquiet was felt with regard to the possible ramifications of the American arrangement. It was feared by a considerable body of opinion that Article 10 would enable American slavers to recover fugitive slaves from Canada (where there were approximately 12,000 such escapees by the 1840s, each of whom represented a financial loss to his master, and an encouragement to other slaves)⁶ and other havens in the British colonies. There can be no doubt that this was precisely what many in America hoped for, and in the past, slavers had tried (unsuccessfully) to make use of local

4. 3H, (L), 70, c. 475, (30 June 1843); ibid. c. 1325, (25 July 1843); 3H, (C), 71, c. 583, (11 August 1843); cf. the speeches of Lansdowne and Campbell: 3H, (L), 70, cc. 1325 & 1327, (25 July 1843); and Peel: 3H, (C), 70, c. 583. (11 August 1843). When passed they became 6 & 7 Vict. c. 75 & c. 76.

5. The Times 4 July 1843, p. 4; and C. Buller, 'Lord Ashburton', Westminster Review volume 39 (1843), p. 196. cf. The Times 13 January 1843, p. 5 and 14 August 1843, p. 4

6. R.W. Winks, Blacks in Canada (New Haven 1971) p. 169.

Canadian laws to recover fugitive slaves.⁷

As soon as the terms of the treaty became known, abolitionists on both sides of the Atlantic began a campaign to have slaves positively excluded from its operation. Abolitionist fears were exacerbated by the surrender of Nelson Hackett (a slave) in February 1842. This seemingly contradicted the policy pursued in the 1830s, when Canada had repeatedly refused to surrender fugitive slaves accused of crime, but the Hackett case was in reality very different from its predecessors. In the earlier cases, slaves had been charged with, for example, stealing horses on which to escape. However, in addition to stealing the horse on which he escaped, Hackett had also stolen - as he admitted - a

7. By the statute 3.Will.4.c.7, ('An Act to provide for the Apprehending of Fugitive Offenders from Foreign Countries, and delivering them up to Justice') Upper Canada had made provision for surrendering fugitives accused of murder, forgery, larceny, or other crimes punishable in Upper Canada by "death, corporal punishment... or by confinement at hard labour". A copy of this Act may be found in PP (1842) XXVIII: 'Canada (Nelson Hackett)', pp.141-2. On attempts to extradite fugitive slaves under its provisions, cf. F. Landon, 'Fugitive Slave in Canada', University Magazine volume 18 (1919), pp.270 & 275-6; J.M. Leask, 'Jesse Happy', Ontario History volume 54 (1962), pp. 87-98; A.L. Murray, 'Fugitive Slaves', CHR volume 43 (1962), p.299 and n; and 'Canada and the Anglo-American Anti-Slavery Movement', Unpublished PH.D. Thesis, University of Pennsylvania (1960), pp.123-33; W.R. Riddell, 'Slave in Canada', Journal of Negro History volume 5 (1920), pp.261-377; and 'An International Complication', Journal of the Illinois State Historical Society volume 25 (1932), pp.123-6; R.W. Winks, op.cit. pp.168-71; and R.J. Zorn, 'Criminal Extradition', CHR volume 38 (1957), p.284. In 1826-28, Clay had tried to negotiate for the return of fugitive slaves, but Britain spurned his advances: cf. J.M. Callahan, American Foreign Policy (New York 1937) p.208; R.J. Zorn, op.cit. p.284; and F. Landon, op.cit. p.270. Canada was not the only place from which the return of slaves was sought. cf. 3H, (L), 60, cc.317-27, (14 February 1842); 3H, (C), 65, cc.322-3, (19 July 1842); 'Tappan Papers' pp.216-21; and A.L. Murray, 'Fugitive Slaves'. pp.303-5.

beaver coat, a gold watch, and a saddle (in addition to that used on the horse he rode), which could hardly be said to be necessary to his escape. Hackett was therefore treated as a common criminal, and surrendered.⁸

Even before he left the United States, Ashburton was approached by American abolitionists, whom he managed to reassure: Lewis Tappan (a prominent figure in American anti-slavery circles) wrote that "our fears respecting any action adverse to the safety of fugitive slaves subsided". The Times felt that abolitionists were exaggerating the danger, but British activists were not so easily calmed as their American colleagues.⁹ Whilst accepting that the government did not want to endanger fugitive slaves, they maintained that they should be specifically exempted from extradition. This was "the theme of a campaign which was carried into the far corners of the British Isles".¹⁰ Twenty-four anti-slavery societies petitioned Parliament, and the leaders of the British and Foreign Anti-Slavery Society lobbied dozens of politicians. Throughout the campaign, the abolitionists'

8. On the Hackett case: cf. CO 42/488; FO 5/386; PP (1842) XXVIII: 'Canada (Nelson Hackett)', pp.133-42; 3H, (C), 64, cc.640-1, (27 June 1843); R.W. Winks, op.cit. pp.171-2; R.J. Zorn, op.cit. pp.285-8; and 'An Arkansas Fugitive Slave Incident', Arkansas Historical Quarterly volume 16 (1957), pp.139-149; A.L. Murray, 'Fugitive Slaves', pp.303-5; and 'Tappan Papers' p.226.

9. L. Tappan to J. Beaumont (17 November 1842), quoted in A.L. Murray, 'Fugitive Slaves', p.309; and The Times 14 August 1843, p.4. cf. R.N. Current, 'Webster's Propaganda', Mississippi Valley Historical Review volume 34 (1947), p.197.

10. A.L. Murray, 'Fugitive Slaves', p.310. cf. Morning Herald 24 & 29 September 1842, p.4.

aim was to amend the treaty in Parliament.¹¹

When the treaty came before Parliament, government spokesmen at once tackled the slavery question. Aberdeen acknowledged the fear "that a fugitive slave might be delivered up", but attempted to reassure his audience that this was an "unfounded notion". No British court would consider a slave guilty of crime for stealing a boat or horse as a means of escape. Requests for extradition would be made by the Federal government, which was "itself... a considerable security against an improper application"; colonial governments would seek advice from London "in case of any difficulty arising"; and if attempts were made to abuse the treaty, Britain could terminate it at once. Ashburton himself asserted that it was "settled... that a slave once landing on any part of our dominions could never be claimed".¹² Their Lordships were broadly satisfied: even the abolitionist spokesman, Brougham, expressed his "gratification" on hearing Aberdeen's statement, although he added that at some stage it might be worth considering

11. The best accounts of the abolitionist campaign may be found in: 'Tappan Papers' passim; A.H. Abel-Henderson and F.J. Klingberg, 'Sidelight on Anglo-American Relations', Journal of Negro History volume 12 (1927), pp.122-78; H. Temperley, British Anti-Slavery (1972) pp.203-5; R.J. Zorn, 'Criminal Extradition', pp.288-91; and 'Arkansas Fugitive Slave Incident', pp.146-9; and A.L. Murray, 'Fugitive Slaves', pp.308-314; cf. Earl Leslie Griggs, Thomas Clarkson (1936). W.D. Jones, The American Problem (1974) p.19, wrongly states that "the extradition treaty would cause no difficulties".

12. 3H, (L), 70, cc. 473-4 & 478-9, (30 June 1843). cf. a similar speech by Sir Fredrick Pollock (Attorney General): 3H, (C), 71, cc. 565-8, (11 August 1843).

"whether it would be better to introduce some explanatory clause into the bill, in order to do away with all ambiguity on this point".¹³

In the Commons, this was precisely what was advocated. Sir Benjamin Hawes (Liberal MP for Lambeth), who feared that the treaty "would lead to an encroachment on the principle to which England owed so much of her glory - the principle, that a slave, the moment he touched her soil, became a free man",¹⁴ proposed a motion positively excluding slaves from its operation. The government resisted it, pointing out that slaves could hardly be given a free hand to commit whatever crime they liked, however odious, in the certain knowledge of impunity if they could reach British territory. Hawes' motion was defeated by 59 votes to 25. The abolitionist campaign had failed.

However, just months later, colonial governors were informed that when they received an extradition request, copies of the depositions supporting it were to be sent to London. This was clearly an attempt to ensure that no slave was surrendered without the London authorities first having an opportunity to consider the merits of the case, and advise as they thought fit.¹⁵ Further, when pressed by the

13. 3H, (L), 70, c.475, (30 June 1843).

14. 3H, (C), 71, cc. 580 & 585, (11 August 1843). Other speakers who shared these fears were V. Smith and Macaulay: *ibid.* cc. 564 & 568-72.

15. A copy of the circular may be found in CO 854/3, No. 84, f. 201. cf. A.L. Murray, 'Fugitive Slaves', p.311.

Americans, Aberdeen admitted that the government regarded extradition in a manner favourable to slaves.¹⁶ With reference to this circular, one authority asserts that "abolitionist vigilance checkmated the potential Southern use of criminal extradition. It was abolitionist agitation that induced Britain to exclude slaves from extradition under the Webster-Ashburton treaty". He also states that this was a "newly defined" policy.¹⁷

However, the foregoing represents a misinterpretation of the situation.¹⁸ The government did not need to re-define policy in an effort to protect slaves. From the time when extradition was first discussed, the one thought upper-most in the minds of British ministers had been the need to ensure such protection.¹⁹

In 1839 Palmerston (Foreign Secretary) emphasised that any arrangement with the United States should "not... Embrace the Cases of Runaway Slaves", and in 1840, at his instance, the British authorities decided not to include horse-theft in any future treaty on the grounds that its inclusion might facilitate the surrender of slaves who stole horses to

16. ibid. p.313 and n.

17. R.J. Zorn, 'Criminal Extradition', pp.291 & 294.

18. Zorn makes very little use of primary sources. He only uses published primary sources, such as Parliamentary Papers, which do not always reveal the whole story. He makes no use of the records of government departments.

19. A.L. Murray, 'Fugitive Slaves', passim.; and R.W. Winks, op.cit. pp.169-71.

escape on.²⁰ In 1841 Lord Sydenham (Governor General of British North America) expressed himself strongly in favour of a treaty, as long as it contained "provisos which effectively prevent its abuse by the United States in the case of Slaves".²¹ One could go on. Similarly, throughout the negotiation of Article 10, the position of slaves was not forgotten. Ashburton himself noted that "slave desertion... must remain untouched by any treaty".²² Furthermore, when Webster suggested the inclusion of mutiny on board ship in an effort to cover the case of slaves who mutinied to secure their freedom, the proposal was blocked.²³ To conclude discussion of this aspect of the study, it is important to note that no slave was ever extradited to the United States

20. Memorandum by Palmerston (FO. 11 September 1839): FO 5/333, f.20. cf. Memorandum by Palmerston (FO. 31 March 1840): FO 5/386, f.4; Addington to Colonial Office (FO. 12 June 1844): FO 5/419, ff.125-126; Addington to Home Office (FO. 26 October 1850): HO 45/398, /24; Clarendon to Crampton (No.16) (FO. 22 April 1853): FO 5/561, ff.173-174; Russell to Orne (No.7) (FO. 7 July 1859): FO 80/136, f.62; Layard to Home Office (FO. 2 February 1863): HO 45/7386, /3; Rogers to Foreign Office (CO. 7 April 1863): FO 37/412; and 'Tappan Papers' p.453.

21. Sydenham to Russell (No.76) (Kingston. 21 June 1841): CO 42/479, f.277.

22. Ashburton to Aberdeen (No.5) (Washington. 12 May 1842): FO 5/379, f.82. cf. A.L. Murray, 'Fugitive Slaves', p.306.

23. cf. Ashburton to Aberdeen (No.5) (Washington. 28 April 1842) enclosing the extradition clause suggested by Webster: FO 5/379, ff.52-57 & 76-77; Aberdeen to Ashburton (No.10) (FO. 3 June 1842): FO 5/378, ff.94-5; Aberdeen to Ashburton (Private. 3 June 1842): Aberdeen Papers, BL Add. MS 43123, ff.122-124; Ashburton to Aberdeen (No.12) (Washington. 29 June 1842): FO 5/379, ff.201-208; and Ashburton to Aberdeen (No.18) (Washington. 9 August 1842): FO 5/380, ff.164-166, cf. M.E. Chamberlain, op.cit. p.321; C.M. Fuess, op.cit. op.cit. volume 2. p.113; and W.D. Jones, op.cit. p.23.

under Article 10.²⁴

In September 1843, Gersdorff announced the desire of the Saxon government to conclude an extradition treaty with Britain, based on the model of the Anglo-French treaty. Although no-one at the Foreign Office had any positive objections to the proposal, permanent under-secretary Horatio Addington felt that "more experience of the Conventions already concluded" might be "desirable before a decisive answer is returned".²⁵ In contrast, Home Secretary Sir James Graham saw:

no objection to extending the application of the Principle of Extradition as established in the recent Treaty with France.... A similar Engagement with Saxony.... might lead to the general adoption of this international policy, which appears to me sound.²⁶

Nevertheless, Gersdorff was informed that the government had decided not to conclude further treaties "until they shall have had greater experience of any practical deficiencies or

24. cf. R.W. Winks. op.cit. p.174, and H. Temperley, op.cit. p.205. The Americans did attempt to extradite slaves: the first occasion occurred in December 1843: cf. PP (1844) XXXIX: 'Fugitive Criminals (United States)', pp.297-306; R.J. Zorn, 'Criminal Extradition', p.291; and H. Temperley, op.cit. pp.204-5. In 1860-61, as will be seen, a particularly important case occurred.

25. Gersdorff to Aberdeen (16 September 1843); and minute thereon by Addington (FO. n.d.): FO 68/53.

26. Minute by Graham (HO. 20 September 1843): HO 45/445. D.W.J. Johnson, 'Sir James Graham as politician and Home Secretary', Unpublished B.Litt. Thesis, Oxford University (1948), contains no reference to extradition whatever.

inconveniences which may be inherent in those already concluded".²⁷

Such a policy was wise, for 'practical deficiencies and inconveniences' a-plenty soon arose. In February 1844 the American Minister complained that the Act implementing Article 10 was rather ambiguous.²⁸ More serious was the French complaint that whilst a fugitive had recently been extradited to Britain under the Anglo-French treaty, thus far not one French criminal had been sent the other way. As Aberdeen saw it, such a situation was "obviously contrary to justice and reason" and constituted a "hazard" to good Anglo-French relations: he feared that unless something was done, the French would "release themselves from engagements which produce benefit to Great Britain alone".²⁹

The essential reason for this imbalance was that while in France the granting of extradition was largely an executive function, in Britain the powers of the executive were limited to securing the issuance of warrants for the arrest of fugitives whose extradition was desired.

Thereafter it was up to France to bring the case before a magistrate. One problem was that in no case had the French supplied sufficient prima facie evidence to the satisfaction

27. Aberdeen to Gersdorff (FO. 7 November 1843): FO 68/53.

28. Everett to Aberdeen (20 February 1844): FO 5/416, ff.28-31. It was not pressed further.

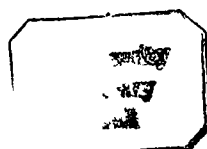
29. cf. FO 27/708 & 712. The complaint was first made on 25 June 1844, and repeated on 16 July and 4 December; Addington to Home Office (FO. 22 July 1844 and 14 March 1845): HO 45/398, /5 & /13. During 1843-4, France made twenty unsuccessful requests for extradition.

of a British magistrate. Another was the difference between the definition of offences in English and French law. For example, fraudulent bankruptcy was made extraditable by the treaty, and was a definite crime in French law, but there was "no offence which is expressly provided against" by English law "under the name of Fraudulent Bankruptcy".³⁰ Whilst some of the acts which constituted this offence under French law were also criminal offences in Britain, not all were. Therefore, not every French criminal accused of fraudulent bankruptcy was guilty of an offence under English law, and so not all could be extradited, for extraditable acts have to be criminal under the laws of both countries.

Such differences between French and English law were unavoidable, but other difficulties could be remedied. For one thing, the French could improve the nature of their requests for extradition: they were sometimes "vague", and sometimes the French even failed to provide a description of the accused. In other respects, matters could be improved by changes in British law and practice. For example, the foreign authorities were responsible for finding and arresting the fugitive, and this, not unnaturally, was the source of some difficulty. Whilst improvements in procedure in Britain were considered, Aberdeen assured Jarnac that: "no efforts will be wanting on the part of Her Majesty's Government strictly to carry out their engagements under the Treaty".³¹ In July 1845, a bill 'for facilitating Execution

30. Law Officers' Opinion by Thesiger and Waddington (24 January 1845) (Copy): FO 27/739.

31. cf. FO 27/741 & 743; and Aberdeen to Jarnac (FO. 31 July 1844): FO 27/708.



of the Treaties with France and the United States for the Apprehension of certain Offenders' was introduced, and it passed into law in August.³² The Act provided that when a request for extradition was received, a secretary of state would require a London magistrate to issue a warrant for the arrest of the fugitive, no matter where he was in England. Such warrant was to be executed by the relevant local police force; the fugitive would then be brought before the London magistrates, who would either grant or refuse extradition. Prior to the Act, cases could be heard by any magistrate: now they would be heard by the Chief London Magistrate, or, in his absence, one of his colleagues, who, "in any case of difficulty" could be advised by the Crown Law Officers. It was hoped that "by these means uniformity of Practice will be maintained, and some security taken for the prevention of failures of justice"; but should it prove otherwise, Aberdeen promised that he would be "willing to adopt any other mode which may be consistent with the principle and practice of English law for securing the attainment of the desired end".³³

Aberdeen's promise was soon put to the test: in January 1846 Jarnac again expressed his government's dissatisfaction with the operation of the treaty.³⁴ Tinkering with it had

32. 8 & 9 Vict. c.120. It passed without debate. In introducing it, Aberdeen emphasised its purely procedural nature: 3H, (L), 82, c.617, (17 July 1845).

33. Phillips to Foreign Office (HO. 18 March 1845); and Aberdeen to St. Aulaire (FO. 7 April 1845): FO 27/739.

34. Jarnac to Aberdeen (9 January 1846): FO 27/763.

failed to provide a remedy. The Chief London Magistrate, J.J. Hall, suggested the negotiation of a new treaty and the enactment of a new Act in which extradition procedure would be altered radically. Instead of requiring the production of prima facie evidence that would justify committal if the offence had been committed in Britain, Hall recommended that fugitives be surrendered on the production of a French arrest warrant which was certified by the French Minister of Justice or a person of similar rank to be a right and proper document.³⁵ Hall's suggestion was adopted as the basis for action, and in March 1846 Aberdeen proposed that such a scheme should be incorporated in a new treaty.³⁶ By June a draft treaty was ready for submission to France.

The number of crimes made extraditable remained unchanged. France would surrender criminals on the authority of the Minister of Justice, upon the production of an arrest warrant issued by a competent British judge or magistrate. The procedure under which Britain would make surrenders was as follows. The French would present an arrest warrant, issued by a competent authority, which clearly laid down the nature of the charge, together with certified copies of the depositions upon which the warrant was granted. After authentication by the signature of a secretary of state,

35. J.J. Hall to Home Office (Bow Street. 5 February 1846): HO 45/398, /17. Extradition on the production of an arrest warrant was normal practice on the continent: cf. Memorandum by Waddington (Printed for the Cabinet)(HO. 15 January 1861): HO 45/7238.

36. Aberdeen to St. Aulaire (FO. 6 March 1846): FO 27/763.

these documents would be considered:

sufficient proof that the party named therein is charged with an offence under the provisions of the present Convention, and liable to be arrested and delivered up in pursuance thereof.

They would then be produced before a magistrate, who, after receiving sworn evidence as to the identity of the accused, would make an order for extradition. On 22 June 1846, Aberdeen offered this draft to the French authorities.³⁷

Before any reply was received from France, there was a change of government in Britain, with Russell forming his first Cabinet in July 1846.³⁸ The new Foreign Secretary, Palmerston, was as much in favour of extradition as Aberdeen had been, and suggested signing treaties with Holland and Belgium, for he had recently heard of a case in which a fugitive reached Belgium and so escaped punishment. Home Secretary Grey agreed, and indeed the Home Office view was that robbery and embezzlement should be added to those crimes which were the subject of extradition.³⁹ In December 1846 a draft treaty was prepared for submission to the Dutch and Belgians, which repeated the procedure proposed to France in

37. A copy of the draft may be found in ibid.

38. F.A. Dreyer, 'The Russell Administration', Unpublished Ph.D. Thesis, University of St. Andrews (1962), contains no reference to extradition.

39. cf. Stanley to Home Office (FO. 11 November 1846) and minute thereon by Grey (HO. n.d.): HO 45/1622; and Phillips to Foreign Office (HO. 27 November 1846): FO 37/266.

June.⁴⁰

However, unlike the draft Anglo-French treaty, this draft was submitted to the Law Officers. In March 1847 they reported that "the scope and terms" of the treaty "require the most serious consideration since it may be abused and applied to political offenders". The cause of their misgivings was the new extradition procedure, which placed great faith in the trustworthiness of foreign governments and legal systems: a degree of faith that might not always be justified.⁴¹ With this opinion, the Law Officers effectively killed the proposal to negotiate treaties with Holland and Belgium, but the treaty had already been offered to France, and could not be withdrawn without causing serious complications.

In April 1847 the French government finally responded to the treaty offered it. Generally speaking, they were pleased to find "removed from the new project the dispositions which had, contrarily to the wishes so manifest of the two Courts, principally hindered the operation of the primitive convention". However, the French were unhappy with the requirement for sworn evidence as proof of identity, and believed it would make the new treaty as useless as the old one. Furthermore, in France, the arrest warrant was often issued before any evidence was collected: if no demand for

40. Copy in HO 45/398, /18.

41. Law Officers' Opinion by Dundas and Jervis (4 March 1847): HO 48/39, No.8.

extradition could be made until depositions were ready, fugitives would be given additional time in which to escape. To avoid these difficulties, it was suggested that Britain should extradite upon the production of a French "sentence of condemnation" or "decree of indictment", which clearly showed the nature of the crime charged, together with a description of the accused and any other documents which might serve to prove identity. After authentication by a secretary of state, these documents would be sufficient to justify extradition. It was also proposed that the list of extraditable offences should be augmented.⁴²

Before the French counter-proposal could be given any detailed consideration, attention was diverted by the private request of the Neapolitan Minister for an extradition treaty with Britain. This approach led Samuel March Phillips (Home Office permanent under secretary) to minute as follows:

The expediency of entertaining this proposition seems very questionable. With France and America we have made Treaties... for many good reasons: having confidence in the Governments of those Countries that they would not use the powers of the Treaty covertly for political purposes... But could we have the same confidence in the Neapolitan Government?... such a Convention might be perverted to political purposes. It was perhaps significant that the approach came only a few days after a Neapolitan request for action against political refugees in Malta and

42. Jarnac to Palmerston, enclosing French counter-draft (29 April 1847) (Translation) (Copy): HO 45/398, /19.

the Ionian Islands. In addition, there was no real need for such a treaty: English criminals "never" went to Naples, and even if they did, it would be difficult to secure their return "on account of the irregularities or looseness which would probably be found to exist in their Criminal proceedings".⁴³ Furthermore, those "Neapolitan delinquents" who came to England were "understood generally" to be political offenders. The Neapolitan Minister was therefore politely informed that his request had been refused.⁴⁴

This was the first occasion upon which Britain had rejected a foreign approach for an extradition treaty out of hand. The cause of this sudden change of attitude was that the acceptability of such treaties very largely depended upon the nature of the state with which it was proposed to conclude one. The Neapolitan government simply could not be trusted to abstain from attempting to extradite political refugees from Britain, whether overtly or covertly. Furthermore, there existed widespread distrust of her judicial processes generally: even a common criminal who was surrendered might not get a fair trial. Apart from their own personal qualms about concluding an extradition treaty with

43. Addington to Home Office (FO. 23 August 1847) and minute thereon by Phillips (HO. n.d.): HO 45/1967; and Castalcicala to Palmerston (18 August 1847): FO 70/218. cf. D.F. Smith, 'Sir George Grey', Unpublished Ph.D. Thesis, Toronto University (1972), p.118. W.E. Gladstone's Letter to the Earl of Aberdeen, on the State Prosecutions of the Neapolitan Government (1851) later made Neapolitan ill-treatment of political offenders notorious.

44. Du Marchant to Foreign Office (HO. 2 September 1847): HO 34/8, p.28; and Addington to Castalcicala (FO. 11 September 1847): FO 70/218.

such a regime, Ministers also had to consider the likely political and public reaction to a scheme such as this. The 'liberal' British Parliament and people were hardly likely to accept such a proposal. Any government which sponsored it was almost certain to run into severe difficulties in a House of Commons where the absence of close party ties made support for governments a very fluid affair, and where the support of even the strongest Cabinet could evaporate overnight if it chose to sponsor the wrong measure.

British Governments had to face this dilemma because as yet not all countries possessed an 'acceptable' legal system or had accepted the principle that 'politicos' should be exempt from extradition. During the 1840s the marked differences in state and society between 'liberal' Britain and very many of the continental European regimes were perhaps at their greatest ever.⁴⁵ In this situation, the conclusion of extradition treaties with very many nations simply could not be contemplated, and it was perhaps fortunate for Britain that none of the more powerful 'despots of Europe' (such as Russia or Austria) sought an extradition treaty. A refusal to negotiate with another sovereign state clearly implied a lack of confidence in its legal system and general trustworthiness, and was quite an insult on a nation's character. The consequences of such a refusal if directed at one of the great powers of Europe would certainly have been far more serious than refusing to negotiate a treaty with insignificant powers such as Naples.

45. cf. B. Porter, Britain, Europe and the World chapter 1; and 'Bureau and Barrack', Victorian Studies volume 27 (1984), pp.407-33.

This episode illustrates one of the basic reasons why extradition was so often a source of difficulty for British governments. Extradition was an issue within both domestic politics and foreign relations, and the requirements of foreign and domestic policy were not always the same: indeed they were frequently in direct opposition. Foreign policy aims might dictate a need to conclude an extradition treaty with a certain power as a means of cementing good relations (or at least to avoid causing offence), whilst the domestic need to avoid placing before Parliament a treaty with an 'unacceptable' power was a force pushing just as strongly in the opposite direction.

Meanwhile, Chevalier Bunsen had proposed the conclusion of an Anglo-Prussian extradition treaty.⁴⁶ The government was not indisposed to consider the idea favourably, but the Home Office feared that if an Anglo-Prussian treaty was signed along the lines of the treaties of 1842-43, it would be similarly inefficient, and "be the subject of fresh complaints". It was therefore decided that Bunsen's proposal should remain until the terms of the new Anglo-French treaty were settled.⁴⁷ However, the French counter-proposal was causing the Home Office "considerable difficulties of a legal description",⁴⁸ so much so that it

46. Bunsen to Palmerston (26 March 1847): FO 64/280.

47. Phillips to Foreign Office (HO. 10 February 1848): HO 34/8, pp.171-172. cf. Palmerston to Bunsen (FO. 15 February 1848): FO 64/292.

48. Phillips to Foreign Office (HO. 10 February 1848): HO 34/8, pp.171-172.

was not until February 1848 that the Home Office informed the Foreign Office of its view. Although Home Secretary Grey was prepared to accept the French proposal in so far as it concerned the nature of the documentary evidence that would justify extradition, he could not agree to the removal of the need for sworn evidence of identity.⁴⁹

Then, however, negotiations were interrupted by the outbreak of revolution in Europe. It is not for nothing that 1848 is known as the 'Year of Revolutions', for in many parts of the continent there was a "massive breakdown of social coherence and government".⁵⁰ The revolutions began in several Italian states in January; in February Louis Phillippe of France fell, and by the spring, many major cities were affected, including Rome, Vienna, Milan, Prague, Berlin and Munich. However, by mid-1849, the counter-revolution was victorious, and the revolutionaries ousted from power. Despite all the trouble, very little actually changed permanently: only Louis Phillippe lost power for good.

Nevertheless, 1848 was important in other ways. Most important to this study is the fact that the revolutions and their aftermath confirmed Britain's position as the asylum of Europe. Whilst the revolutions raged, Louis Phillippe, Guizot, Princess Lieven and Metternich, to name but a few,

49. Waddington to Foreign Office (HO. 25 February 1848): ibid. pp.183-190. cf. D.F. Smith, op.cit. p.119.

50. J.A.S. Grenville, Europe Reshaped (1976) p.9.

found safety in Britain. When the revolutionaries lost, many eventually turned up in Britain: among their number were Karl Marx, Louis Blanc, Alexandre Ledru-Rollin, Victor Hugo, Louis Kossuth, Alexander Herzen and Felice Orsini.⁵¹ Made apprehensive by the revolutions, in May 1848 Parliament had passed an Alien Act "to authorise for one year, and to the end of the then next session of parliament, the removal of aliens from the realm".⁵² However, the Act was never used against anyone: aliens continued to come and go as they pleased. This was the only time during the Victorian era that an alien's right of entry could be in any way legally restricted, but in practice it was not.⁵³

In the mid-nineteenth century, Britons were positively proud of their policy of granting asylum to political refugees of all creeds: it was a policy that was fully accepted and justified right across the political spectrum. In a sense, the asylum policy was a symbol of mid-Victorian liberalism. The Chartist Red Republican asserted that to

51. Perhaps surprisingly, there was no spate of requests for the extradition of the refugees. In July 1850 Frankfurt sought the extradition of two men implicated in the murders of Prince Lucknowsky and General Anerswald in 1848 - it was refused, as it had to be, since there was no extradition treaty with Frankfurt: cf. HO 45/3275; and FO 30/145. I can find no evidence of other similar requests. Continental regimes were perhaps deterred by the well known fact that Britain would not extradite in the absence of a treaty. They were perhaps also glad to be rid of them for the time being.

52. 11 & 12 Vict. c.20. Even in the worrying times of 1848, not all had supported the bill: for example, Mowatt (Liberal MP for Penryn and Falmouth) called it a "silly and useless Bill": 3H, (C), 98, c.853, (11 May 1848).

53. cf. Memorandum by W.W.L. (10 July 1894): CAB 37/36, No.21; Memorandum by Digby (HO. 17 October 1899): HO 45/10063/B2840, /8; and B. Porter, Refugee Question passim. D.F. Smith, op.cit. p.122, is wrong to state that the Act was "rarely enforced".

take action against political refugees, "would not be merely a crime against humanity, but also an act of treason to England herself". The Times confidently asserted that:

We should be most unfaithful to our Constitution, most untrue to our political faith.... if we consented to the exclusion or other ill-treatment of political refugees... There is no point whatever on which we are prouder.

The Spectator (Liberal) felt that granting asylum was a policy that was "honourable to England".⁵⁴

Parliament felt much the same. Sir George Grey asserted that "it has long been the boast of England" that she was the asylum of Europe, "and a just cause of boast it is." Lord Lyndhurst believed the asylum policy was "in perfect accordance with the character of an enlightened, a generous, and a powerful country". Derby bluntly stated that "God forbid that we should ever cease to be!" an asylum. Richard Monckton Milnes (Tory MP for Pontefract) regarded the "right of asylum" as "agreeable to the laws, the customs, and the feelings of the people of Great Britain", while Sir John Walsh (Liberal MP for Radnorshire) was confident that Britons would defend the policy to the last, "even though it involved the great alternative of war". The asylum policy was "writ in characters of fire on the tablets of our Constitution".

54. Red Republican volume 1 (29 June 1850); The Times 19 September 1850, p.4 and 28 February 1853, p.4; and Anon, 'The Refugees', Spectator volume 26 (1853), p.439.

The supply of such quotations is almost inexhaustible.⁵⁵

In a way, it was ideologically necessary for Britons to support the asylum policy. For many Britons, the main lesson of 1848, when many autocratic states had suffered revolution, but liberal Britain had remained immune, was to confirm the belief that liberalism was superior to autocracy. (This did not necessarily follow, for the most autocratic state, Russia, was also immune from revolution.)⁵⁶ Liberalism, or the satisfaction of legitimate grievances by constitutional, peaceful means, was held up as the only way to prevent revolution. In contrast, autocracy bred discontent, for legitimate grievances went unsatisfied: the only way to have them rectified was through violent uprisings. Liberal Britain was held to be unsubvertable, because there were no serious legitimate grievances around which to foment discontent. Britain therefore could not be threatened by a few conspiring refugees. (Hume thought the idea that she could be was "about as rational as to suppose that a bevy of ourang-outangs should visit the country on a like mission;")⁵⁷ in contrast, the continentals did feel threatened by the refugees who, safe in England, continued

55. 3H, (C), 98, c. 560, (1 May 1848); 3H, (L), 115, c. 662, (27 March 1851); 3H, (L), 119, c. 896, (27 February 1852); 3H, (C), 120, cc. 483 & 518, (1 April 1852); and N.W. Sibley and A. Elias, op.cit. p. 125.

56. cf. David N. Petler, 'British Policy towards the French Republic in 1848', Unpublished Ph.D. Thesis, Hull University (1984), pp. 167-70.

57. 3H, (C), 98, c. 582, (1 May 1848). cf. David N. Petler, op.cit. pp. 168-9.

to plan the downfall of the autocrats. The way for the autocrats to prevent revolution was to concede legitimate reform, not by persecuting opponents abroad. Thus, Britain could not participate in this persecution, for it was not in the best interests of the autocrats for her to do so. To admit that Britain did need to give aid against the refugees would be to undermine the very basis of her own political stability. It also suited Britain to believe she could not be threatened by small numbers of refugees. If people thought themselves free, discontent was less likely to arise on a scale that would require overt repression. "Toleration of foreign political refugees bolstered this mechanism, by highlighting the openness, freedom and stability of Britain's society by direct and stark contrast with her European neighbours".⁵⁸ The asylum policy was therefore in a sense an aspect of a complicated system of social control. On a more basic level, the refugees were in any case rather sympathised with, while the autocratic continental regimes were rather disapproved of. There were therefore very sound reasons why Britain maintained an inviolable asylum.

In the aftermath of the revolutions, apart from giving shelter to the defeated, Britain was given an opportunity to demonstrate her commitment to the twin principles of asylum and the non-extradition of 'politicos'. After the defeat of the Hungarian revolt by combined Austro-Russian forces in

58 B. Porter, 'British Government and Political Refugees' Immigrants and Minorities volume 2 (1983), p.27. On the general background to Britain's asylum policy, cf. B. Porter, Refugee Question *passim*.

August 1849, the Hungarian leader, Kossuth, and many of his comrades, took refuge in Ottoman territory. Almost immediately, Russia and Austria demanded their extradition under the terms of the treaties of Passarowitz (1718), Belgrade (1739), Kutchuk Kainardji (1774) and Sistowa (1791). However, on the advice of the French and British ambassadors (Aupick and Canning), and armed with promises of Anglo-French support, the Sultan refused extradition.⁵⁹ On 2 October the Cabinet met, and agreed to give the Ottomans "moral and material" help.⁶⁰ Palmerston secured further French co-operation, and in November an Anglo-French fleet arrived in the Dardenelles as a clear demonstration of support for the Sultan. Faced with this show of strength, Russia and Austria withdrew their demands for extradition.

In taking up the cause of Louis Kossuth and his fellow refugees, Palmerston was pursuing a dual purpose. He was partly motivated by a desire to prevent Austro-Russian domination of the Ottoman Empire (which was necessary if British, mainly imperial and economic, interests in the area were to be secured), but he was also anxious to ensure that the refugees did not become yet further victims of the retribution exacted by Russia and Austria upon captured

59. cf. Canning to Palmerston (No.267) (Therapia. 3 September 1849): FO 424/5, No.6; Palmerston to Canning (Private. 19 October 1848): Canning Papers, FO 352/32A/1; Palmerston to Russell (Private. 14 & 28 September 1849): Russ.PP. PRO 30/22/8a, ff.167-B & 272-3.

60. R.W. Seton-Watson, Britain in Europe (Cambridge 1937) p.267.

rebels.⁶¹

There was also perhaps a third factor behind Palmerston's policy. Given the lack of party discipline in Parliament and the fluidity of support for governments, the personal popularity of leading ministers was perhaps the easiest way to ensure that a Cabinet stayed in office, and during the mid-nineteenth century, Palmerston, more than any other minister, deliberately sought and cultivated general popularity. The simple fact was that helping Kossuth and his fellow refugees was a popular policy among a very wide cross-section of the populace.⁶² As Palmerston himself put it, "there never was such unanimity in England upon a question not directly affecting the immediate interests of England".⁶³

However, the most important aspect of this episode came with a dispatch from Palmerston to his ambassadors at Vienna and St. Petersburg. After stating that he did not believe Turkey to be absolutely bound by treaty obligations to surrender the refugees, Palmerston continued: -

61. cf. Palmerston to Canning (Private. 28 October 1849), quoted in C. Sproston, Palmerston (1919) p.134; and in S. Lane-Poole, Stratford Canning (1888) volume 2, p.202. cf. Canning to Palmerston (Therapia. 16 September 1849): PP (1851) LVIII: 'Correspondence respecting Refugees from Hungary', p.421; and Palmerston to Russell (Private. 9 October 1849): Russ.PP. PRO 30/22/88, ff.20-1.

62. cf. 3H, (C), 108, cc.480-518, (7 February 1850); The Times 3 October 1849, p.6; and Red Republican volume 59 (10 August 1850). During 1849-50, Palmerston's popularity saved him from dismissal on a couple of occasions. His policy was not universally popular: characteristically, the Queen "could not understand why a British Government need be exercised about the fate of a few Hungarian rebels": B. Connell, Regina V. Palmerston (1962) p.111.

63. Palmerston to Canning (FO. 6 October 1849), quoted in S. Lane-Poole, op.cit. volume 2, p.199.

If there is one rule which, more than another, has been observed in modern times by all independent States, both great and small, of the civilised world, it is the rule not to deliver up political refugees, unless the State is bound to do so by the positive obligations of a treaty... The laws of hospitality, the dictates of humanity, the general feelings of mankind forbid such surrenders; and any independent Government, which of its own free will were to make such surrender, would be deservedly and universally stigmatised as degraded and dishonoured.⁶⁴

No-one could have given a clearer expression of the political offence exemption to extradition, and as such, the dispatch deserves a central place in the early history of the British extradition experience.

This episode is also of importance in view of the pronouncements which it drew out of all sections of the British press. The Times was perhaps the clearest: "The Hungarian refugees may have violated laws, but that does not justify a grosser violation of law in order to punish their offence. This demand for their surrender is... a wanton outrage." The Morning Herald asserted that their surrender would have been "a monstrous perversion of all international law, justice, and hospitality", while the Standard thought

64. Palmerston to Ponsonby; and same to Bloomfield (FO. 6 October 1849): PP (1851) LVIII: 'Correspondence respecting Refugees from Hungary', pp.464-7. On this episode generally; cf. E.F. Malcolm-Smith, Canning (1933) pp.216-21; and S. Lane-Poole, op.cit. volume 2, pp.188-205.

the demand for extradition "utterly preposterous... wholly ridiculous".⁶⁵

Of course, the autocratic continental regimes were not at all favourably disposed toward British policy. For them, liberalism was little better than socialism, and just as dangerous. Furthermore, the autocrats did worry about the activities of small groups of conspirators, who plotted in the safety of their British asylum: British policy was regarded as unfriendly at the least, not to say threatening. She was part of the grand conspiracy: she harboured, armed, and trained revolutionaries, perhaps using them to accomplish what could not be done by her own relatively small army. Britain was free from revolution in 1848 because the revolutionaries were unlikely to attack their greatest ally.

In the aftermath of the revolutions, the autocrats busily went about re-establishing their power, and because they felt insecure (no-one knew how permanent their recovery was) they tended to be more repressive than ever. This in turn led them to view Britain's asylum policy even more unfavourably. Normally, the continentals (however much they resented it) were prepared to accept British policy as a fact of life, but at this time of heightened fear for their own security, their resentment grew and took on a more dangerous form.

65. The Times 8 October 1849, p.4; Morning Herald 2 October 1849, p.4; and Standard 1 October 1849, p.2. cf. The Times 1 October 1849, p.4; 3 October 1849, p.6; and 23 January 1850, p.6; Morning Post 3 October 1849, p.4; Daily News 5 October 1849, p.4; Lloyd's Weekly 7 October 1849, p.7; Morning Advertiser 2 October 1849, p.2; and Northern Star 6 October 1849, p.4.

Between October 1851 and January 1852, Britain received diplomatic representations from France, Austria, the Kingdom of the Two Sicilies, Prussia, and several other German states complaining of the activities of refugees resident in Britain and calling for action. All this represented a concerted, co-ordinated effort against Britain, and seemed very ominous. With her (comparatively) weak European military power, Britain's worst fear was always that she would be the victim of a European alliance that left her isolated. Such a fear was perhaps not very far from realisation, but still Britain did not abandon her asylum policy, Rather, Foreign Secretary Granville replied with a spirited defence of the right of asylum. He assured the continentals that if any refugees abused the asylum so generously granted to them, then punitive action would be taken, but this proved to be something of an empty promise. In time, the crisis passed: as the autocrats became more firmly established and less insecure, so their resentment towards Britain abated. Nevertheless, at the time, the situation looked very gloomy indeed, but the asylum policy had passed this acid test of real pressure to put an end to it, and it was never to face quite such a challenge again.↵↵

To return to the Anglo-French negotiations that had been suspended with the outbreak of revolution in France, they were resumed late in July 1848, when the French government was considered to be "sufficiently constituted for this purpose". In September, the Foreign Office replied to the French counter-draft of April 1847 in line with the Home

Office's views as expressed in February 1848.⁶⁷ Nothing could now happen until France responded, which (no doubt as a result of her disturbed internal condition) she did not do until April 1850. When it finally came, the response was much the same as the counter-draft. Once again the expansion of the list of extraditable offences was advocated, together with a simple method of extradition coupled with the removal of the need to give evidence on oath as to identity. Both the Home Office and Law Officers were reasonably happy with the proposal, but had reservations on the question of proving identity.⁶⁸

Prior to April 1850, Palmerston had not taken a very close interest in the negotiations, but the fact that their end was in sight seems to have spurred him into taking a deeper interest. In that same month he noted that he presumed that the "fundamental Principle" of extradition was that "the formal safety of a foreigner in England should be substantially as secure as that of a British subject", and

66. On the crisis of 1851-2: cf. E. Hertslet, 'Memorandum on the Remonstrances which have been addressed to this Country by Foreign Governments against Incitements in England to Assassination' (FO. 4 May 1883) (Printed for the Cabinet): CAB 37/10; FO 27/914; FO 64/336; Earl of Malmesbury, Memoirs (1885 edition) p.235; B. Porter, Refugee Question chapter 3; and C. Parry (ed.), op.cit. pp.50-5. There were other isolated, less serious representations: cf. FO 70/218, CO 158/151-64; FO 68/75; HO 45/3263; HO 45/3272; and HO 45/3720.

67. Minute by Palmerston (FO. 19 July 1848): FO 27/826; and Palmerston to de Beaumont (FO. 16 September 1848): FO 27/825. David N. Petler, op.cit. does not mention the extradition negotiations.

68. Drouyn de Lhuys to Palmerston (5 April 1850): FO 27/954. cf. Minute by Waddington (HO. n.d.); and Law Officers' Opinion by Romilly (24 August 1850): HO 45/398, /22 & /23.

that no-one should be extradited "except for such an offence and upon such proofs as would justify a magistrate in committing a British subject and sending him to trial." The Home Office maintained that the new method of extradition could be accepted provided identity was proved by evidence on oath, but Palmerston was clearly beginning to have his doubts.⁶⁹

In September Palmerston asked his officials if "there would be any danger that a Political Refugee might be claimed" under the extradition procedure proposed to be included in the new treaty? John B. Bergne (Superintendent of the Foreign Office Treaty Department) had to admit that there was "no absolute security" against such an occurrence, and that the only guarantee against it seemed "to rest upon the good faith of the requesting party". Nevertheless, the new method seemed to be the only way to make the treaty work efficiently in Britain, and, in any case, Aberdeen had already (in June 1846) agreed to it.⁷⁰

Presumably Palmerston had forgotten about Aberdeen's undertaking of June 1846, or was never aware of its existence. Further, he believed the new procedure had been proposed by France, whereas in fact Hall had first suggested it. In any event, Palmerston remained unconvinced, and gave instructions for a letter to be written stating that there

69. Memorandum by Palmerston (FO. 28. April 1850): FO 27/954; and Waddington to Foreign Office (HO. 29 August 1850): HO 34/9, pp.357-361. cf. D.F. Smith, op.cit. p. 119.

70. Memoranda by Palmerston (FO. 14 September 1850); and Bergne, (FO. 5 & 9 October 1850): FO 27/954.

were "obvious objections to the French Proposal [sic]". He recognised that the new method would make extradition treaties very efficient, and that "in the majority of cases it might inflict no injustice". However, he believed it to be "objectionable in principle that a British Magistrate should become the blind instrument for carrying into effect in this country the decrees of a Foreign Magistrate". Furthermore,

this arrangement might in cases of political disturbance be liable to abuse, and a Refugee whom a Foreign Government wished to get possession of in order to prosecute him for political offences might be claimed in this manner upon some ill founded criminal charge.

As for Aberdeen's promise of 1846, no treaty had yet been signed, so "Her Majesty's Government are of course at full liberty to alter their mind".⁷¹

In laying down his views, Palmerston articulated a problem that was to confront successive governments: how far were the procedures of extradition to be subordinated to the need to safeguard political refugees? This was a fundamental issue and conflict within the British extradition experience. In this instance, it is clear that Palmerston believed the first priority to be to safeguard the position of

71. Minute by Palmerston (FO. 6 October 1850): FO 27/954; and Addington to Home Office (FO. 26 October 1850): HO 45/398, /24. Palmerston of course could not be blamed for being unaware of all the details of the negotiation with France; one could hardly expect him to be intimately acquainted with all Foreign Office business.

'politicos', and uphold to the utmost Britain's traditional asylum policy, despite the fact that as a result extradition would be ineffective and inefficient, leading to foreign dissatisfaction and resentment.

The Home Office did not, however, share Palmerston's views. Permanent under-secretary Horatio Waddington believed that if Aberdeen's promise was to be retracted, negotiations might as well be abandoned, for it would be "a mere affront to the French Govt. to propose to extend the Treaty (as it now stands) to other crimes". The Foreign Office was therefore informed that although Secretary Grey acknowledged that "great caution" was needed when negotiating extradition treaties, which could be abused, he believed that Palmerston's objections were objections to any treaty at all, rather than "an objection to the particular provisions which are considered by the French Government absolutely necessary". In negotiating any treaty it had to be assumed that it would be used "honestly and fairly": Grey therefore could see "no sufficient ground for retracting" Aberdeen's promise.⁷² Perhaps surprisingly, Palmerston agreed to be bound by the Home Office view: faced with the fact of Aberdeen's promise, the likely diplomatic problems that would be caused by its withdrawal, and the strong line adopted by the Home Office, Palmerston perhaps had no real choice. The important fact is that on 5 December 1850 France was informed that Britain would keep to Aberdeen's undertaking of 1846;

72. (Minute by Waddington (HO. n.d.): HO 45/398, /24; and same to Foreign Office (HO. 15 November 1850): FO 27/954. Underlining in original.

France accepted the proposal, and in July 1851 de Faucherès arrived in London to settle the actual terms of the treaty.⁷³

They were settled without any great difficulty, with both sides compromising. More than 20 crimes were made extraditable (an enormous increase), and the treaty was to apply to convicted as well as accused persons. In order to extradite fugitives from Britain, the French Embassy was to present

either a sentence of conviction (arret de condamnation) or a warrant for apprehension (mandat d'arret) clearly setting forth the nature of the crime... charged. Such document shall be accompanied by the description of the person convicted or accused, and by any other particulars which may serve to identify him.

These documents were to be authenticated by the Home Secretary, who would then direct a magistrate to have the fugitive arrested by the police. All the magistrate then had to do was satisfy himself

as to the identity of the individual... either by the confession or acquiescence of such individual, or by other sufficient proof, which may be either direct, or presumptive and circumstantial.

The fugitive would then be handed over. If the magistrate was not satisfied as to identity, he was to notify the French

73. Palmerston to de Lhuys (FO. 5 December 1850): FO 27/954. cf. Addington to Home Office (FO. 30 July 1851): HO 45/398, /25.

Ambassador, and then detain the prisoner for a "sufficient time", so as to enable the French authorities to gather additional evidence of identity.

A further novel provision was Article VII, which ran as follows:

No accused or convicted person who may be surrendered, shall, in any case, be proceeded against or punished on account of any political offence committed prior to his being surrendered, nor for any crime or offence not described in the present Convention which he may have committed previously to his being surrendered; and proof of having been so surrendered under this Convention shall be a good and valid defence against any proceeding on account of any political offence previously committed, and shall entitle the party to an immediate acquittal.

The wording of this article had been decided upon by Derby (Prime Minister), Malmesbury (Foreign Secretary) and Walpole (Home Secretary), and was introduced because the nature of the treaty increased the potential for abuse.⁷⁴ This was the first time that an extradition treaty signed by Britain contained a formal embodiment of the political offence exemption: Britain certainly adhered to the principle in

74. cf. Derby to Malmesbury (Private, 5 May 1852): FO 27/954; Addington to Home Office (FO, 7 May 1852) and minute thereon by Waddington (HO, n.d.): HO 45/398, /31; Derby to Malmesbury (Private, 13 May 1852); and minute thereon by Malmesbury (FO n.d.): FO 27/954. Copy of the treaty in: HO 45/398, /32. The Derby ministry was formed in February 1852.

1842-43, but it was not made explicit in the treaties of those years.⁷⁵

Meanwhile, Belgium (December 1849), Prussia (May 1850, Holland (June 1851), and Sardinia (October 1851) had sought extradition treaties. Drafts were offered to Belgium, Prussia and Holland, but nothing was signed: talks were suspended pending the completion of the new French treaty. After it was ratified, similar treaties would be offered to these other powers. The ratification of the French treaty therefore came to be seen as something of a test case for the progress of extradition in Britain.⁷⁶

All depended on whether Parliament would accept a treaty which, although specifically exempting political refugees, laid down a relatively simple extradition procedure. The government was certainly fully aware that it might be objected to. Waddington feared that the Treaty might be "opposed by the ultra liberals", and noted that it was "not unlikely" (originally he had written "very probable") that

75. The fact that the crimes for which extradition could be granted were listed in the treaties of 1842-43 was intended to exclude political offences. cf. for example, Ashburton to Aberdeen (No.5) (Washington. 28 April 1842): FO 5/379, ff. 52-7; The Times 13 April 1865, p.10; Anon, 'Emperor of the French', Saturday Review volume 4 (1857), p.98. The "principle that political offenders should not be subject to extradition was felt to be so basic that it needed no formal recognition": J.G. Castel and M. Edward, 'Political Offences', Ossoode Hall Law Journal volume 13 (1975), p.90.

76. On these negotiations: cf. FO 10/146,161,162; HO 45/3829G; and HO 34/10B, p.35 for Belgium; FO 64/324,325,326,337; HO 45/3829F; HO 34/9, p.269; and HO 34/10B, pp.33 & 48-50 for Prussia; FO 37/302; HO 45/3829I; and HO 34/10B, p.93 for Holland; and FO 67/181; and HO 45/3829H for Sardinia.

the "national feeling of hospitality towards foreigners may... make Parliament very careful and guarded" when it came to ratifying the treaty. Addington noted that it contained "deviations from rigorous English law... which would be likely to excite hostility". As another official put it, "The Question now is Will Parliament sanction such a departure from the protecting jealousy of British law? And will the present ministry choose to submit the question to Parliament?"⁷⁷

The Cabinet did proceed with treaty, but with some hesitation. Derby even suggested delaying the introduction of the necessary bill for a while, presumably because the furore over the foreign representations of 1851-52 had barely subsided; in this atmosphere any measure which could be represented as a threat to the right of asylum might be in for a very stormy passage indeed.⁷⁸ Nonetheless, on 3 June 1852 Malmesbury introduced the ratifying bill in the House of Lords.

On second reading (8 June), Malmesbury began by stating that the only reason for the new treaty was that that of 1843

77. Minute by Waddington (HO. n.d.); Waddington to Faucheret (n.d.): HO 45/398, /23 & /26; and Addington to Bergne (Private. 20 April 1852): FO 27/954. cf. Waddington to Foreign Office (HO. 29 August 1850); HO 34/9, pp.357-61; unattributable minute (FO. 5 May 1852): FO 27/954; minute by Waddington (HO. n.d.): HO 45/398, /30; and D.F. Smith, op.cit. p.119.

78. His view was reported in Addington to Home Office (FO. 7 May 1852): HO 45/398, /31. cf. PP (1852) LIV: 'Foreign Refugees in London', pp.47-80; ibid. 'Further Correspondence', pp.81-102; and 3H, (L),119,cc.895-7, (27 February 1852); 3H, (C),120,cc.28-30 & 477-526, (23 March & 1 April 1852); and 3H, (L),120, cc.659-82, (5 April 1852).

was inefficient; he then emphasised the secure position of 'politicos', and reinforced the point by stating that the French had agreed that "it was for their Lordships to consider... whether they could... add to the provisions proposed by the Bill for the security of political offenders." The government was clearly very anxious to avoid the Convention being portrayed as a measure which threatened the right of asylum, and all its efforts in this, and subsequent, debates, were directed towards this end. Unfortunately, their Lordships were far from convinced. Even though the treaty was substantially the same as that he had agreed to in 1846, Aberdeen had his qualms, as did Lord Brougham. Lord Campbell regarded the new extradition procedure as a "very dangerous mode of proceeding" which was "very liable to be abused", and feared that if the bill passed "England would lose its distinctive character as affording a safe asylum for political refugees of all nations".⁷⁹

It is a moot point whether France did want to attempt to extradite 'politicos': before the 1850s she made no attempt to do so. In 1855 she sought the surrender of Deron and Vandomme for complicity in an attempt to assassinate Napoleon III at Lille. Arrest warrants were issued, but neither fugitive could be found.⁸⁰ The interesting question as to whether attempted assassination was a political offence under

79. 3H, (L).122, cc.193-4, 197-9 & 204, (8 June 1852). Argyll, Cranworth and Grey all felt likewise: *ibid.* cc. 205-7, 207-8 & 211-2. The opposition to the bill crossed party-lines: it was not the result of any party-political intrigue.

80. cf. FO 27/1092.

extradition law was therefore not tested.

More interesting was Galliard's case: in October 1852 France requested his extradition from Malta on a charge of involvement in a plot to blow up Napoleon III at Marseilles. Officials were convinced that the case was not one for extradition, since the crime amounted to conspiracy (which was non-extraditable) rather than attempted murder, as France alleged. Nevertheless, they let the case go on:

I think at present in the existing state of affairs its importance can scarcely be overestimated... It is of great importance to avoid any reasonable ground of complaint on the part of France - as long as we can consistently with a rigid observance of our own laws.⁸¹

In the atmosphere created by the representations of 1851-52 it was clearly wise to avoid annoying France unnecessarily.

The case therefore went to court, where Galliard was soon freed. The question of the political nature of his offence was not touched on, but at least one official thought his offence was one "affecting public interest and the internal safety of the State" - that is, a political offence. Still, in a further attempt to avoid antagonising France, Galliard was expelled to Liverpool. However, his passage was paid, he was given £3 for personal use, and presumably Britain would serve just as well as a base for his plotting

81. Unattributable minute (CO. 16 November 1852): CO 158/163.

as Malta had. Furthermore, in expelling Galliard, "special care" was taken for "his personal safety, so as to preclude any chance of his falling into the hands of the French". This case therefore did not signal any great change in British policy. It does not seem to have come to public notice in Britain, so one can only speculate idly as to how Briton would have reacted to their government's actions.⁸²

To return to the proceedings in Parliament, not one speaker, other than members of the Cabinet, spoke in support of the bill, but it was nevertheless allowed to pass onto the committee stage, on the understanding that on that occasion, the government would not oppose any amendments their Lordships deemed necessary to make the bill acceptable. Malmesbury would then attempt to persuade the French to agree to any amendments to the treaty that were necessary.⁸³

In committee, Malmesbury undertook to alter the treaty to require that France presented rather more evidence than was provided for in the treaty: his proposal did not have a definite shape, but was more a declaration of intent. Furthermore, he announced that France was quite willing to enact a law embodying the terms of Article VII, so as to guarantee the protection it afforded to political refugees.

82. Crown Advocate of Malta to Lushington (17 November 1852) (Copy): FO 27/953; and minute by Addington (FO, 20 January 1853): FO 27/990. The Times (1 October 1852, p.4) reported that Galliard had "avowed his share in the fabrication of the infernal machine", but never referred to his extradition or expulsion.

83. 3H, (L), 122, c.210, (8 June 1852). Malmesbury then sought an interview with Walewski to see what concessions France would make. An account of it may be found in: Unsigned memorandum (FO, October 1852); FO 881/399, p.8.

Though many remained unconvinced, the debate was adjourned, to give time for amendments to be framed and the bill reprinted in amended form.⁸⁴ The precise nature of these amendments will, however, never be known. When the question was returned to (14 June), Malmesbury was faced with calls for the immediate withdrawal of the bill. He then announced that he had not come to the House to present a new bill: rather he had come to announce the abandonment of the old one.⁸⁵

This dramatic turn of events came about as a result of events in France. Napoleon III had sponsored significant changes in the 5th, 6th and 7th Articles of the French Criminal Code. The essential thrust of the Projet du Loi was the extension of French jurisdiction: French criminals and non-Frenchmen who committed crimes against Frenchmen or the French state outside France, were to be subject to trial and punishment in France.⁸⁶ The law had a direct bearing on extradition, for fugitives were extradited for crimes committed within the jurisdiction of the state seeking extradition: if France extended her jurisdiction, then crimes committed within this expanded jurisdiction would be extraditable. Thus, France might seek the extradition of a Frenchman who had committed murder in England. This was enough of an insult to English law and sovereignty: what was perhaps worse was the provision extending jurisdiction to

84. 3H, (L), 122, cc. 498-508, (11 June 1852).

85. 3H, (L), 122, cc. 561-2, (14 June 1852).

86. Copy of the law in FO 881/399, p.8. cf. Cowley to Malmesbury (Private. 1 & 13 June 1852): Malmesbury Papers 9M73/3, ff.72 & 81.

crimes committed outside France against the French state, for what was a crime against the French state if not a political offence. As the Home Office saw it, any attempt to carry out such a law would lead to "a serious breach between the two countries".⁸⁷

In Parliament, Brougham stated that he had reacted with "extreme astonishment" on hearing news of this "extraordinary" law. Malmesbury himself admitted that it made that passage of the bill "impossible, for it had aroused universal indignation".⁸⁸ He had no option but to withdraw the bill. It would not have passed in its original form anyway: now it could not pass in any form whatsoever. The Lords was hostile enough to it; imagine what would have happened had it been submitted to the more radical, liberal House of Commons.

As The Times saw it, the government had placed itself "in a position of considerable embarrassment" by introducing a bill which it should have foreseen would be unacceptable.⁸⁹ However, Ministers had been aware of the possible objections, but had decided to press on regardless. Their determination to continue was perhaps as closely linked to the events of 1851-52 as was the opposition to the bill. In the summer of

87. Waddington to Foreign Office (HO. 11 June 1852): HO 34/10B, p.241. cf. Stanley to Home Office (FO. 4 June 1852), Addington to Home Office (FO. 8 June 1852); and minutes by Waddington and Walpole (HO. n.d.): HO 45/4476; and Malmesbury to Cowley (Private. 18 June 1852): Malmesbury Papers 9M73/50, f.74.

88. 3H, (L), 122, c.199, (8 June 1852); and Malmesbury to Cowley (Private. 15 June 1852): Malmesbury Papers 9M73/50, f.73.

89. The Times 14 June 1852, p.4.

1852, Britain was still extremely unpopular on the continent, and the crisis had not yet passed. In such a situation, ministers perhaps hoped that an efficient treaty which, although it did not touch political refugees, was at least a sign of genuine goodwill, would pacify France somewhat.

The press reaction to the new French treaty generally mirrored that of the House of Lords. The Daily News (Liberal) did not "undervalue the importance" of efficient extradition, but felt that it

would be purchased too dearly by the slightest risk of compromising the character of England as the inviolable asylum of political exiles. There is nothing of which we have a greater right to be proud of than our power to protect the hapless champion of liberty and progress from their proud oppressors.

The Globe (Liberal) asserted that the bill's extradition procedure was "revolting to our most cherished notions of justice and liberty", while the Leader (Radical) thought the whole thing "monstrous".⁹⁰ Both the Daily News and The Times drew a distinction between the climate in 1852, and that which had existed in 1843, when the original French treaty passed without objection. Back in 1843, The Times asserted, there was every reason to "treat the criminal laws and

90. Daily News 29 May 1852, p.5; Globe 11 June 1852, p.2; and Leader 12 June 1852, p.549. cf. The Times 14 June 1852, p.4; Morning Chronicle 10 June 1852, p.4; and Lloyd's Weekly 13 June 1852, p.7. The Morning Herald (12 June 1852, p.4) and Standard (10 June 1852, p.4) were virtually alone in supporting the bill/treaty.

criminal Judges of France with the same deference" as was accorded to those of Britain. However, since Napoleon III's seizure of power December 1851, all this had changed:

of what French officer can it now be affirmed that he is independent of the Executive?... we have seen criminal justice made the instrument of political persecution... every form of law violated... As France is now governed ... it would be safer to make a convention.. with Russia or Turkey.⁹¹

Under the new treaty, the risk of political persecution being facilitated was simply too great.

By withdrawing the bill, the government had avoided trouble on the domestic front, but here remained the unhappy task of explaining the withdrawal to France. In a carefully worded dispatch, Malmesbury explained that the Cabinet had "found it expedient to withdraw the Bill", and added that the French government had "a sufficient knowledge of this country to understand and appreciate the Parliamentary difficulties which Her Majesty's Government have had to encounter in carrying out this important object." In the circumstances, the Cabinet had done all it could to get the bill passed, and had no real choice but to abandon it. Still, this did not comfort the French. From Paris, Lord Cowley reported that the French Foreign Minister, Turgot, had spoken "with some

91. The Times 14 June 1852, p.4. cf. Daily News 29 May 1852, p.5. The significance of the coup was mentioned in Parliament: cf. 3H, (L), 122, c.206, (8 June 1852); speech of Argyll. After the coup, Napoleon persecuted his opponents, driving or sending many abroad: cf. A.M. Lehning. 'International Association', International Review for Social History volume 3 (1938), p.201.

bitterness at the Extradition Bill having been thrown out", and was "evidently very sore as to the doubts which have been cast on the purity of the administration of French justice."⁹²

Despite the problems of June, Malmesbury remained keen on doing something to satisfy French complaints over extradition.

The renewal of the Extradition Bill is certainly most desirable and if we are strong enough to remain in office after the Elections it would undoubtedly be our duty and wish to carry out a convention which would act fairly for both countries.⁹³

In Parliament there were calls for something to be done to prevent Britain and France becoming asylums for common criminals; a sentiment that was repeated in The Times.⁹⁴ However, the problem of the "odious Projet du Loi" remained, and Malmesbury did not conceal this fact from the French. It must therefore have come as something of a relief when, late in June, Napoleon III decided not to implement the law.⁹⁵ It was too soon to bring extradition before Parliament again,

92. Malmesbury to Walewski (FO. 18 June 1852); and Cowley to Malmesbury (Paris. 17 June 1852); FO 27/954

93. Malmesbury to Cowley (Private. 18 June 1852): Malmesbury Papers 9M73/50, f.74. cf. Cowley to Malmesbury (Private. 17 June 1852): ibid. /3, f.84; and Malmesbury to Cowley (Private. 28 June 1852): ibid. /50, ff.78-9.

94. 3H, (L), 122, cc.1282-3, (25 June 1852): speech of Normanby; and The Times 14 July 1852, p.5.

95. Malmesbury to Cowley (Private. 28 June 1852); cf. same to same (Private. 18 June 1852): PP. FO 519/196, ff.125-B & 119-22.

but his did not prevent the Foreign Office from considering how best to proceed when it was deemed expedient to do so.

A long memorandum was compiled,⁹⁶ setting out the options, which were twofold: either to continue as before (concluding a treaty and then seeking Parliamentary sanction) or to enact a statute enabling the government to conclude extradition treaties, which would then be put into operation by Order in Council. It would of course be difficult to frame such a general Act in a form that would pass, but "it would, on the whole, be the most convenient course, as it would avoid the necessity of bringing each separate Convention before Parliament, and the risk of Parliament refusing to pass an Act to carry it into execution". The old difficulty of what evidence was to be acceptable in Britain was solved in the draft bill appended to the memorandum by stating that accused fugitives were to be surrendered on the production of whatever evidence or document was considered necessary to establish "a reasonable presumption of guilt".⁹⁷ The document that was acceptable in Britain would vary depending on which country was seeking extradition, and according to the nature of the judicial process in such country.

No specific written comment seems to have survived regarding these proposals. However, even before they were

96. Memorandum on the Negotiations with France for the Conclusion of a new Convention for the Mutual Surrender of Criminals (Unsigned. FO. October 1852): FO 881/399, pp.1-12. Copy in Malmesbury Papers 9M73/24, No.7.

97. 'An Act to enable Her Majesty to make and carry into effect arrangements... for the mutual Surrender of Criminals': *ibid.* pp.51-60.

formulated, one official noted that the events of June 1852 had "put a stop to Extradition Questions". The only comment we do have is that written by J.B. Bergne sometime in March 1853, when he noted that "no formal decision" was ever made.⁹⁸ In any case, Malmesbury fell from power in December 1852, and so had no time to do any thing, even had he wanted to. He was succeeded as Foreign Secretary first by Russell, and then, in February 1853, by Clarendon. When the subject of extradition was subsequently raised in March 1853, Clarendon "expressed his disinclination to raise the question".⁹⁹

As was mentioned above, the ratifying of the French Convention had been regarded as something of a test case: when it was rejected all thoughts of treaties with Belgium, Holland, Prussia, and Sardinia were shelved. In fact, memories of the rejection of the bill of 1852 acted as a block to the extension of extradition for several years to come. In February 1854, Sir Richard Pakenham, Minister to Portugal, asked whether it would not be expedient to conclude an Anglo-Portuguese extradition treaty.¹⁰⁰ Now back in government at the Home Office, Palmerston was in favour of the idea, for such a treaty could be used "as a model for others".¹⁰¹ In contrast the Foreign Office felt that having

98. Murray to Blackwood (Private. 21 July 1852): CO 42/581; and minute by Bergne (FO. n.d.): FO 5/556.

99. Reported in memorandum by Bergne (FO. 21 March 1854): FO 63/788. The matter was raised by Malet; cf. FO 208/58.

100. Pakenham to Clarendon (No.32) (Lisbon. 28 February 1854): FO 63/780.

101. Minute by Palmerston (HO. 17 March 1854): HO 45/5741. D. Roberts, 'Lord Palmerston at the Home Office', The Historian volume 21 (1958-59), pp.63-81, makes no reference to extradition.

come so close to concluding a new treaty with France in 1852, "they could scarcely now in fairness enter into negotiations... with another Power, without in the first place resuming the negotiation with France". In these circumstances, "the difficulty there might not improbably be in obtaining authority for carrying out such Treaty stipulations as would be really effectual in their operation in this Country" had to be considered.¹⁰²

In the light of this, Palmerston reviewed his position. Since the defects in the Anglo-French Treaty only really worked against France, and could not be overcome except by "the concession of conditions at variance with the judicial practice of this Country and liable to some political objections", it therefore seemed wise "not to reopen the discussion with France unless much pressed by the French Government to do so".¹⁰³ Since the government was very anxious to avoid re-opening that can of worms,¹⁰⁴ Pakenham was informed that his proposal could not be accepted.¹⁰⁵ Ministers were no doubt fortified in their desire to avoid

102. Wodehouse to Home Office (FO. 30 March 1854): HO 45/5741.

103. Minute by Palmerston (HO. 12 April 1854): ibid.

104. This was despite the fact that it was clearly recognised to be a most unsatisfactory treaty: Waddington (22 September 1859) described it as "the most absurd Convention that ever was entered into": HO 45/6852.

105. Clarendon to Pakenham (No.28) (FO. 12 April 1854): FO 63/779. A proposal made in June 1854 for a treaty that would establish extradition between British Guiana and the Dutch West Indies was similarly blocked in an effort to avoid bringing extradition before Parliament: cf. FO 37/609.

bringing extradition before Parliament by constant reminders of public devotion to the right of asylum. In February 1853 The Times stated that Austria was to demand the extradition of Kossuth, Mazzini and others. If it was refused, Austria, Prussia and France would remonstrate, so recreating in substance the dangerous situation of 1851-2. The Times took the offensive:

Every civilised people... must be fully aware that this country is the asylum of nations, and that it will defend the asylum to the last ounce of its treasure... the last drop of its blood. There is no point whatever on which we are prouder and more resolute... we shall listen to no such demands... the statesman who lent an ear to them would henceforth be doomed to political disgrace.¹⁰⁶

In fact, there could be no question of Austria demanding extradition, for there was no Anglo-Austrian extradition treaty, but that was not the point. Neither the British press nor the people would stand for the extradition of political refugees, or any treaty which threatened their position, and this fact Ministers always had to keep in mind.¹⁰⁷

106. The Times 28 February 1853, p.4; cf. 3H, (C), 124, c.805, (1 March 1853); 3H, (L), 124, cc.1050-9, (4 March 1853); 3H, (C), 147, c.1972, (21 August 1857); Anon, 'The Refugees and the Government', Spectator volume 26 (1853), pp.439-40; Anon 'Emperor fo the French', Saturday Review volume 4 (1857), pp.98-99; The Times 1 January 1861, p.10; and Morning Star 11 March 1861, p.4.

107. cf. Addington to Colonial Office (FO. 8 March 1853) (Confidential): FO 5/576: memoranda by Bergne (FO. 12 March 1857): FO 5/684, f.191; and by Waddington (HO. 19 December 1857) (Copy): Clar.PP. c.70, ff.70-1.

The most important demonstration of British adherence to the right of asylum came in 1858, and arose out of Orsini's attempt to assassinate Napoleon III in Paris on 14 January. Since the plot had been hatched in Britain, the bombs used in the attentat had been manufactured in Birmingham, and British subjects were among the conspirators, Britain received most of the blame for it. In an attempt to pacify French opinion, the Conspiracy to Murder bill was introduced, which made conspiracy to murder a felony rather than a misdemeanour (so increasing the maximum penalty from two years to life imprisonment) and made it clear that the law covered conspiracies to commit offences abroad as well as in Britain. The bill was unobjectionable in itself, but complications were caused by French complaints as to British policy and threats of dire consequences if Britain failed to take action against the refugees. Foreign Secretary Clarendon avoided disputing French complaints and allegations, for to have done so would simply have worsened matters, but his policy played into the hands of the government's opponents.

The Cabinet was accused of subserviency to France, of abandoning the right of asylum, and a motion was passed in the Commons criticising the failure to meet French allegations. Palmerston's ministry resigned. The new ministry (under Derby) did not persevere with the Conspiracy Bill which had not actually been rejected by Parliament, but it did sanction the prosecution of Simon Bernard, one of Orsini's accomplices, on a charge of accessory to murder. Bernard was quite clearly guilty, but was acquitted by a jury that was determined to uphold the right of asylum and

accepted the arguments of Bernard's counsel that the very survival of the glorious asylum policy depended upon the prisoner's acquittal.¹⁰⁸

The importance of the Orsini/Bernard episode to this study lies in its consequences. The "events of 1858 stood as an example and a warning to all governments, British and foreign, who came after": to attempt to do anything that did (objectively) limit the right of asylum, or (subjectively) could be portrayed as such, "was just not worth the candle". The memory of 1858 acted as a significant factor in policy making for years to come.¹⁰⁹

In March 1859, there came the first direct demonstration of Britain's policy of the non-extradition of political refugees. Venezuela sought the extradition of Jose Gregorio Monagas (son of Jose Gregorio Monagas, a former president of Venezuela) from Trinidad on various charges of murder. Government Keate referred the evidence to his law officers,

108. For fuller details of the events of 1858: cf. especially B. Porter, Refugee Question pp.170-199. On the Bernard trial: cf. DPP 4/4. Almost every edition of memoirs or diaries for the period covers the episode, as do contemporary journals and newspapers. cf. the bibliography in ibid. Extradition was not an important issue in the episode: on its minor role: cf. ibid.; Hon. F.A. Wellesley (ed.), The Paris Embassy (1928) p.154; H.C. Payne and H. Grosshans, 'The Exiled Revolutionaries', American Historical Review volume 68 (1962-63), p.969; Earl of Malmesbury, op.cit. pp.428-9; Law Officers' Opinion by Bethell and Keating (15 & 16 February 1858): HO 48/45; HO 45/6512B; HO 45/6521C and FO 67/238-9. The Home Office criminal paper on the case (1470A) has not survived.

109. B. Porter, Refugee Question pp.199 & 206-11.

who advised against even arresting Monagas. They found that most of the evidence was "mere hearsay", and furthermore the only murder charge that did seem convincing was a political crime. Monagas was responsible for the death of one Vasquez, but at the time of death (around 1854) the victim was under the military authority of the accused, and therefore the crime was not a true murder such as should give rise to extradition. No suggestion had been made at the time of any improprieties, and steps had only been taken against Monagas once his father's regime had been overthrown. The clear inference was that Monagas' extradition was being sought only for political reasons.¹¹⁰

Having duly refused the demand for extradition, Keate forwarded the relevant papers to London, explaining that the "provisions of the Ordinance were never intended to apply to political offenders... if I had [granted extradition]... I should have laid myself open to the accusation of having favoured a particular political party... in its projects of

110. Y. Lovera to Keate (3 March 1859) (Translation) (Copy); and Keate to Lytton (No. 90) (Port of Spain. 23 May 1859): CO 295/204, ff. 277-80 & 262-4. Extradition was claimed under a purely local arrangement, concluded by Trinidad and Venezuela on 17 April 1848, authorising extradition between Venezuela and Trinidad only. A copy may be found in CO 295/159, ff. 88-90-. It applied to murder, arson, poisoning, counterfeiting, and fraudulent bankruptcy: the procedure mirrored that of the treaties of 1842-3. Other such purely local arrangements were: Hong Kong and China (1842), St. Lucia and Venezuela (June 1848), Grenada and Venezuela (April 1849), Virgin Islands and Venezuela (December 1849), Antigua and Venezuela (January 1850), Labuan and Borneo (February 1857), Hong Kong and China (1860), and Hong Kong and Macao (September 1870). Each had to be approved by the Colonial Office before it could come into operation.

vengeance against the former holders of power."¹¹¹ The Colonial Office was quite happy with Keate's actions, and, indeed, permanent under-secretary Merivale believed it to be "quite clear that the Venezuelan Government were endeavouring to get hold of Monagas upon false grounds, and that the charge of murder was trumped up for the purpose of bringing the extradition law into operation."¹¹²

The Venezuelans addressed a strongly worded complaint to the Foreign Office. In reply, Russell (who had only recently taken over) did not mince his words: "the Convention... was never intended to be used for the purpose of arresting foreigners residing on British soil who are politically obnoxious to Foreign Powers, and it is clear that the acts of which the person in question was accused were done in his political capacity." This ended discussion of the case.¹¹³

The Monagas case highlighted certain problems which could be caused by future extradition cases. It was easy to refuse Venezuela's demands and contemptuously dismiss her complaints, but would it be so easy to do so if a powerful state sought extradition on political grounds? For example, a refusal to extradite a French political refugee would be popular in Britain, but how would France react? If the refugee was, for example, accused of assassinating a member

111. Keate to Lytton (No.90) (Port of Spain, 23 May 1859): CO 295/204, ff.262-4.

112. Minute by Merivale (CO, 27 June 1859): ibid. ff.264-5.

113. Rodriguez to Malmesbury (8 June 1859) (Translation); and Russell to Rodriguez (FO, 25 July 1859): FO 80/141, ff.58-62.

of the French imperial family, France might well enter upon a diplomatic offensive against Britain: an offensive that could conceivably receive widespread support elsewhere in Europe. It was precisely this sort of uncertainty and potential for trouble which made extradition such a problematical and even dangerous question.

Such was the rather difficult experience of successive British governments with extradition during the 1840s and 1850s. The most important principle of extradition law and practice had been laid down: political refugees were to be exempt. As yet this was rather ill-defined policy: the bald facts of it had been stated, but, for example, no real effort had as yet been made to define what exactly was to be considered a political offence under extradition law, although, to be fair, no real need for such a definition had arisen. During the 1840s and 1850s, what may be termed the main battle lines of extradition had been drawn. The essential conflict was, how far, if at all, would the position of political refugees be compromised in the search for efficient extradition. Thus far the advocates of absolute security for 'politicos' had won (and as a result Britain had a pathetically small number of extradition treaties), but all they had won were the first few skirmishes of what was to be a long, drawn out campaign. In future decades, events brought the question of the position of political offenders within extradition sharply back into focus.

CHAPTER TWO:

TEETHING TROUBLES (THE EARLY 1860's)

Chapter Two: Teething Troubles (The early 1860s)

During the first half of the 1860s, much of Britain's practical extradition experience focused upon Canada and the American Civil war. In October 1860, the United States sought the extradition of a slave named John Anderson on a charge of murder. Anderson had escaped in September 1853; during his fight he killed Seneca Digges, who was attempting to recapture him.¹ Anderson was arrested, and then brought before the Canadian Court of Queen's Bench. On 15 December, by a majority decision, the court found in favour of extradition.² Faced with the prospect of certain execution if extradited (probably by being burnt alive), Anderson appealed. During the time that elapsed before the hearing, the case was fully discussed. "Reactions in Canada to the court decision were almost entirely critical".³ In Britain, opinion was unanimously against surrender. It might be justified legally, but The Times saw it as "an obvious impossibility as a fact... rather than give up that man

1. cf. Irvine to Russell (No.41) (Washington. 8 October 1860): FO 881/1083, No.1; and H. Twelvetrees (ed.), Life of John Anderson (1863).

2. cf. CO 42/626 for a copy of the judgement and other documents on the case; and PP (1861) LXIV: 'Correspondence respecting the case of the Fugitive Slave, Anderson', pp.293-346; R.C. Reinders, 'Anderson Case', CHR volume 56 (1975), pp.493-515; and H. Catterall (ed.), Judicial Cases (Washington 1937) volume 5, pp.345-6.

3. R.C. Reinders, op.cit. p.398. cf. J.E. Farwell, 'Anderson Case', Canadian Law Times volume 32 (1912), p.257; F. Landon, 'Anderson Fugitive Case', Journal of Negro History volume 7 (1922), pp.233-42; W.R. Riddell, 'Slave in Canada', p.356; R.W. Winks, op.cit. p.175. The case has been cited as an important factor behind Canadian anti-slavery feeling at the start of the American Civil War: cf. F. Landon, 'Southern Secession', CHR volume 1 (1920), pp.255-6.

England would go to war".⁴ The Saturday Review declared that if Article 10 authorised the extradition, it was "a disgrace to the diplomacy that could have sanctioned so horrible a compact".⁵ Parliamentary opinion was equally solid. Collier (Liberal MP for Plymouth) spoke for many when asserting that "the decision of the Canadian Court was wrong... He killed his pursuer in defence of his liberty ... that was not murder according to the law of any civilised country".⁶ Louis Chamerovzow (secretary of the British and Foreign Anti-Slavery Society) took out a writ of habeus corpus in the London Queen's Bench;⁷ even if he lost his appeal in Canada, Anderson would be sent to London for his case to be finally decided.

4. The Times 5 January 1861, p.8; and 11 February 1861, p.8

5. Anon, 'The Extradition Case', Saturday Review volume 11 (1861), p.56. Several pages could be filled with references to publications opposing Anderson's surrender. A selection are: Morning Post 3 January 1861, p.4; Morning Star 3 January 1861, p.4; Anon, 'Canadian Extraditions' Spectator volume 34 (1861), p.12; Daily News 5 January 1861, p.4; Reynolds's 20 January 1861, p.12; Daily Telegraph 7 January 1861, p.4; Anon, 'The Extradition Case in Canada' The Economist volume 19 (1861), pp. 32-3; and Free Press 6 February 1861, pp.20-1. The case was well covered in legal journals: cf. Law Times, Journal of Jurisprudence and Solicitor's Journal and Reporter.

6. 3H, (C), 161, c.219, (8 February 1861). cf. ibid cc.218-24; ibid. cc.339-42, (12 February 1861); ibid. cc.821-8, (22 February 1861); and 3H, (C), 162, cc.252-9, (22 March 1861). Not one speaker advocated Anderson's surrender.

7. Not unnaturally, many Canadians (supposedly citizens of self-governing colony) resented this interference with their courts' jurisdiction. cf. R.C. Reinders, op.cit. pp.403-13; J.E. Farwell, op.cit. p.261; Anon, 'The Case of Anderson', Law Magazine volume 11 (1861), pp.42-73; and CO 42/626, f.259. From 1862, 25 & 26 Vict. c.20 prevented further such interference.

What of Her Majesty's Government? Its response has been characterised as "indecisive, or at least ambivalent",⁹ but this hardly seems justified. As Head (the Governor of Canada, temporarily in London) saw it, Anderson's only crime was "having killed another in defence of his own liberty". Bethell (Attorney General) thought the judgement "erroneous". Waddington viewed the Canadian decision with "much surprise and regret", and noted that "the sooner instructions are sent out not to deliver him up the better". Palmerston believed that "no English lawyer" would hold Anderson to be guilty of murder. Similarly, the Law Officers advised against surrender.⁷

On 9 January, Head's deputy was instructed to bear in mind that the court's decision was not binding: the government had to issue the final surrender warrant. He was also informed that the London authorities were "not satisfied that the decision... [was] in conformity with the view of the Treaty which has hitherto guided the authorities in this country".¹⁰ Newcastle wished "to avoid

8. R.C. Reinders, op.cit. p.401. His inaccuracy may be the result of the fact that he only uses published sources, and not the records of the Colonial, Home and Foreign Offices, or relevant private papers.

9. Head to Newcastle (No.150) (London, 7 January 1861) (Copy): HO 45/7232; Bethell to Newcastle (Private, 15 January 1861): CO 42/630, ff.3-4; memorandum by Waddington (Confidential, HO, 15 January 1861) (Printed for the Cabinet): HO 45/7238; minute by Waddington (HO, 17 January 1861): HO 45/7232. Underlining in original; 3H, (C), 161, c.224, (8 February 1861); and Law Officers' Opinion by Bethell and Atherton (20 March 1861): HO 45/7232. The opinion came after the case was settled: it had been sought in January.

10. Newcastle to Williams (CO, 9 January 1861) (Copy): FO 881/1083, No.5.

appearing to influence the Canadian Tribunals"¹¹ (and indeed could not afford to be seen to do so), but, working within these parameters, he had made it as clear as he could that he did not want Anderson to be surrendered.

Ultimately, on 16 February, Anderson won his appeal in the Canadian Court of Common Pleas "on the ground of a technical informality in the earlier stage of the process before the committing Magistrates".¹² However, the substance of the ruling masks the motives behind it: after giving judgement, Chief Justice Draper stated that he was "not afraid to avow that I rejoice at it".¹³ Anti-slavery sentiment was the motive, and the 'technical informality' was but the vehicle used to give it practical expression: in its absence, some other means would have been found of protecting Anderson. Yet again British territory had proved to be a secure haven for fugitive slaves.

The role played by the American government was minimal: after seeking extradition, it did nothing. Looking at the papers printed for Congress, it seems clear they never expected Anderson to be surrendered.¹⁴ Conscious of the strong anti-slavery feeling which prevailed in Britain and Canada, the government perhaps only sought extradition to

11. Newcastle to Russell (Private. 14 January 1861): Russ.PP. PRO 30/22/25, ff.344-6.

12. Newcastle to Head (CO. 19 March 1861)(Copy): FO 881/1083, No.19.

13. Quoted in R.C. Reinders, op.cit. p.411.

14. A copy of the papers may be found in FO 881/1083: cf. especially Dallas to Black (16 January 1861).

satisfy the Missouri (Digges' home state) authorities and Digges' family. Furthermore, the American domestic situation militated against a hard line being taken. When Anderson was liberated, Lincoln was in power, the secession crisis had begun, and although as yet Lincoln was not committed to abolitionism, he was far less likely to protest over the case than a president from the deep-South. All this added up to a fortunate escape for Britain, and the avoidance of what, in other circumstances, might have been a very prickly diplomatic dispute indeed.¹⁵

During the American Civil War, Anglo-Union relations were "strained by Confederate use of Canada as a sanctuary from which to attack the Union,"¹⁶ and to return to thereafter. The most notable of the Canada-based actions were the 'Chesapeake' and 'Philo Parsons' affairs, and the St. Albans raid.¹⁷ The Union authorities sought the

15. This was the last 'slave extradition case': the subsequent abolition of American slavery removed an important source of Anglo-American friction.

16. M.R. Fallows, Irish American (Englewood Cliffs 1979) p.121.

17. In December 1863, 16 Confederates seized the 'Chesapeake' (a fast steamer on the New York-Portland route) with the intention of using her to prey on Union shipping, but the vessel was soon recaptured by a Union gunboat. However, since the recapture was affected in British territorial waters, the 'Chesapeake' and the conspirators were handed over to the Canadian Authorities. In September 1864 Confederates seized the 'Philo Parsons' (a Lake Erie steamer) on the American side of the lake, sailed her into Canadian waters, and scuttled her. In October 1864, 25 Confederates raided St. Albans, Vermont, having set out from a Canadian base. They robbed the town's banks, killed one, and wounded several other townspeople, and put the town to the torch. For further details: cf. R.W. Winks, Canada and the United States (Baltimore 1960) pp.246-62 & 288-335; and L.B. Shipee, Canadian-American Relations (New York 1939) Chapter 7.

extradition of those responsible, but they were almost uniformly unsuccessful.

Several factors contributed to this failure, the most significant being the claim made by the St. Albans raiders that theirs was a legitimate act of war, and therefore not a crime - even a political one - and non-extraditable. After much argument, Judge Smith accepted that the raiders were properly commissioned: the robbery for which their extradition was sought was therefore not a crime in the sense meant by the 1842 treaty.¹⁸ On 29 March they were freed.

Naturally enough, the Union authorities and people were far from happy. In November 1864, Secretary of State Seward warned that "spontaneous hasty popular proceedings of self-defence and retaliation" could be expected if Confederate operations from Canada were not stopped. Lyons reported that "there can be no doubt that considerable irritation exists in the minds of the American people on the general subject of these repeated raids from Canada, and I am afraid that [if they continue]... we may expect a very serious outburst of feeling against Her Majesty's Government". It has been said that Canada was "dangerously exposed to being forced into the position of territory added to the general conflict".¹⁹

18. (For an exhaustive account of the court proceedings: cf. L.N. Benjamin, St. Albans Raid (Montreal 1865) passim.; and C. Parry (ed.), op.cit. pp.657-8.

19. Seward to Lyons (3 November 1864): FO 881/1344; Lyons to Russell (No. 680) (Washington. 21 November 1864): FO 5/963; and G.P. de T. Glazebrook, Canadian External Relations (Toronto 1966) p.66. cf. J.M. Callahan, op.cit. pp.276-7; and P.J. Parish, American Civil War (1975) p.450.

However, the danger of war was far more apparent than real: only the Confederacy wanted war.²⁰ As her position worsened, war, or at least the diversion of Union forces to guard the Canadian border, was regarded as one sure way of relieving "the crushing pressure on the South".²¹

Although he did not want war, Seward did require the "outward appearance of crisis - tension that he is reality could control",²² for he could then persuade the authorities to take more effective anti-Confederate action. Seward fully achieved his objective. After evading extradition, the St. Albans raiders were prosecuted (although unsuccessfully) for breaching Canadian neutrality, as were (in January 1865) some of those involved in the 'Chesapeake affair'. In the face of strict surveillance, Thompson (sent to Canada by Davis to coordinate operations) became unwilling to go on, and in March 1865 was recalled and operations from Canada abandoned.²³ Most importantly, in February 1865, Canada enacted a severe neutrality law, which "effectively ended any further Confederate efforts to embroil Great Britain in the American war through her colonies".²⁴ Still, the danger must have

20. Both Seward and Russell recognised this : cf. Seward to Burnley (21 October 1864); Adams to Russell (23 November 1864); and Russell to Lyons (No.528) (FO. 26 November 1864): FO 881/1344.

21. E.W. McInnis, Unguarded Frontier (New York 1942) p.255.

22. R.W. Winks, Canada and the United States p.335.

23. cf. J.M. Callahan, op.cit. pp.281-6. On his activities generally: cf. W. Bovey, 'Confederate Agents', CHR volume 2 (1921), pp.46-57; and E.W. McInnis, op.cit. pp.226-30.

24. R.W. Winks, Canada and the United States p.335. cf. CO 42/646; FO 51056; FO 881/1344; and Russ.PP. PRO 30/22/97, ff.109-10

seemed very real. Canada's seeming inability to counteract the machinations of the Confederacy could have been used by the Union as a pretext for war or a punitive expedition. This Britain wanted to avoid at all costs: perhaps as much by good fortune as by good policy she did so. The only Confederate to be extradited from Canada was Bennett Burley, and in the long run this case was to have a significance which transcended the controversy of the civil war years. Burley's was the first British case to raise what is known as the speciality principle, although as yet the principle had not taken on its modern form. The modern version of the principle states that an extradited fugitive is to be tried only for the crime or crimes for which he was surrendered, unless he is first given an opportunity to return to the state from which he was surrendered.²⁵

25. Speciality was not specifically mentioned in either of the treaties of 1842-3. In British circles it was first discussed in a theoretical context in 1851. Then, the Home Office had successfully opposed its inclusion in the treaties being prepared for submission to Belgium and Prussia because few crimes were made extraditable, and so its inclusion would have given unwarranted protection to criminals (cf. Waddington to Foreign Office (HO. 30 April 1851): FO 64/337). The Anglo-French draft of November 1851 provided that fugitives were not to be tried for non-extraditable crimes committed prior to extradition (copy in HO 45/398, /26). The Law Officers objected: the clause gave "too large an indemnity" to criminals, and suggested a clause under which a fugitive would be given a opportunity to return to the country from which he was surrendered before being tried for additional offences (Law Officers' Opinion by Cockburn and Ward (9 December 1851): HO 48/42, No.13). In January 1852 the Home Office changed its position, for the treaty was extended to cover many crimes: the clause would now be no great hindrance to the course of justice (Waddington to Foreign Office (19 January 1852): HO 34/10B, pp.170-2). The treaty as signed stated that extradited fugitives could not be tried for any crime committed prior to surrender that was non-extraditable (copy in HO 45/398, /32). Neither the Danish treaty of 1862 nor the Prussian treaty of 1864 contained any article embodying speciality, but they applied to few crimes: cf. below. The Burley case was therefore the first occasion on which Britain displayed any real commitment to a version of the speciality principle.

Burley was extradited in February 1865 on a charge of robbery arising out of the 'Philo Parsons' affair: he had stolen (for personal gain) property belonging to its passengers.²⁶ However, it was subsequently alleged that the Americans intended to try him for piracy.²⁷

The immediate government reaction was that if Burley was tried for piracy (for which extradition might not have been granted if sought) rather than robbery, "this would be a breach of faith against which H.M. Government might justly remonstrate". However, if he was tried for robbery, "it would be difficult to question the right" to try him for "any other offence". Seward was informed of this, but refused to "admit the principle... that the offender could not be lawfully tried for... piracy under the circumstances of the case. Nevertheless the question raised... has become an abstraction", for at that time it was intended to try Burnley only for the crime for which he was extradited.²⁸ The Law Officers agreed with the Foreign Office view, but emphasised Britain's "limited power of interference" if Burley was first properly tried for robbery.²⁹ All this became rather irrelevant in practice, as Burley escaped: at the time he was being tried for robbery, but it is unclear whether any

26. Copies of documents relating to the case may be found in CO 42/647-B. cf. L.N. Benjamin, *op.cit.* pp.301-6; PP (1876) LXXXII: 'Extradition of Bennett G. Burley', pp.174-6; and C.S. Blue, 'Case of Bennett Burley', Canadian Magazine volume 45 (1915).

27. Dalglish (MP) to Russell (24 February 1865): FO 5/1101.

28. Russell to Burnley (No.72) (FO. 25 February 1865); and Seward to Burnley (20 March 1865) (Copy): ibid.

29. Law Officers' Opinion by Palmer, Collier and Phillimore (4 May 1865): CO 885/10, No.334.

other charge would have been pressed.

No practical matter remained therefore, and correspondence on the matter ceased. Given the somewhat precarious state of Anglo-American relation arising out of the civil war, there was nothing to be gained by pursuing an abstract principle. However, the basis of this important principle - speciality - had been raised for the first time in a British case, and, as will be seen, during the 1870s and 1880s, it once more became an issue, only to a far more serious degree.

Back in Britain, in January 1860 Denmark had sought an extradition treaty, proposing the Danish-Belgian treaty of 1850 as a model: it covered more crimes than did British treaties, applied to convicted as well as accused persons, used the method of extradition included in the abortive Anglo-French treaty of 1852, and contained an article exempting political offenders from its operation.³⁰ Waddington believed it to be a "very good Convention", but predicted that Britain would "insist upon spoiling it" by requiring the production of prima facie evidence. Home Secretary Lewis disagreed: "its perversion to political offences" was "carefully guarded against", and although Parliament would probably object to the extradition procedure, he thought it "quite right", and advised that "it should be adopted".³¹ As Bergne saw it, this was "rather a

30. Falbe to Russell (27 January 1860): FO 22/282, ff.22-3.

31. Minutes by Waddington and Lewis (HO.n.d.): HO 45/7064, /1.

delicate matter"; Lord Wodehouse (Foreign Office Parliamentary under-secretary) emphasised that "we shall have to be very careful as regards Parliament"; while Russell was unwilling to do anything before seeking the views of the Lord Chancellor (Campbell), who had opposed the 1852 treaty in the Lords.³²

Campbell found the proposed treaty "very objectionable". Although "there would be little danger of it being abused by Denmark, yet it would be a precedent for sanctioning a similar Treaty with France which would certainly be abused". The Foreign Office therefore proposed offering Denmark a treaty similar to those of 1842-43.³³ Lewis protested that such a treaty would be "nugatory", and Waddington believed that the Danes would not accept it, but Russell nevertheless went ahead and made the offer.³⁴

Simultaneously, France had proposed the extension of the 1843 treaty to convicts, particularly those who escaped from Cayenne to British Guiana. The Government opposed the scheme: the necessary reference to Parliament "might give rise to discussions and remarks which would be better avoided", and as an alternative, suggested the enactment of a purely local law in British Guiana, which did not require Parliamentary sanction. Even this plan involved some

32. Memorandum by Bergne (FO. 22 February 1860): and minute by Wodehouse (FO. 22 February 1860). cf. minute by Russell (FO. n.d.): FO 22/282, ff.305-7.

33. Wodehouse to Home Office (FO. 3 May 1860): HO 45/7064,/2. The Lord Chancellor's views were reported here.

34. Minutes by Lewis and Waddington (HO. n.d.): HO 45/7064, /2. cf. Russell to de Bille (FO. 15 April 1860): FO 22/282, ff.85-8.

difficulties: it was feared that the British Guiana Legislature might not sanction such a measure, for it was well known that Cayenne was used as "a place of confinement for political offenders".³⁵ Nonetheless, provision was duly made for the surrender of convicts to Cayenne and French Guiana: to prevent the surrender of political prisoners, the Governor retained a discretionary power to refuse extradition.³⁶ France continued to seek a formal treaty on the subject, but the Foreign Office maintained its objections.³⁷

Contrary to Waddington expectations, Denmark accepted the offer, with slight modifications: the only one of any significance was that the treaty should be extended to convicts.³⁸ Although slightly unsure whether Parliament would accept such an extension of extradition (which would proceed simply upon the production of an authenticated copy of the conviction and proof of identity) the government accepted the Danish proposal, and the treaty was signed on 15 April 1862.³⁹

35. Hammond to Colonial Office (FO. 3 April 1860); and same to same (FO. 11 May 1860): FO 27/1649.

36. British Guiana Ordinance No.2 of 1861: copy in ibid.

37. cf. Cowley to Russell (No.1248) (Paris. 18 October 1861); and Russell to Cowley (No.1269) (FO. 23 November 1861): ibid.

38. cf. de Bille to Russell (19 September 1860): FO 22/282, ff.186-92. Translation in HO 45/7064, /3.

39. cf. Wodehouse to Home Office (FO. 28 September 1860): HO 45/7064, /3; minutes by Bergne (FO. 19 October 1860): FO 22/282, ff.445-6; Hammond to Home Office (FO. 23 October 1860); and minutes thereon by Lewis (HO. n.d.): HO 45/7064, /4. A copy of the treaty may be found in FO 22/297, ff.208-11. It applied to four crimes only: murder, attempted murder, forgery and fraudulent bankruptcy. D.F. Smith, op.cit. p.122n wrongly dates the treaty as 1865.

The necessary bill was introduced on 10 July and received the royal assent on 29 July. There was no debate whatsoever. Similarly, the measure received no press attention.⁴⁰ How is one to explain this complete contrast to 1852? Hammond wrote that it "slipped through Parliament, probably because of the insignificance of the country".⁴¹ This may be true, but the historian is bound to wonder whether Parliament had suddenly lost all interest in extradition vis-à-vis political refugees and the right of asylum?

The answer to this question is emphatically in the negative. During the early 1860s, discussion of extradition centred upon the position of 'politicos'. The British Guiana ordinance came to Derby's attention, and he enquired as to the fate of political offenders under it: Newcastle assured him that they were quite safe. A similar question was asked by Patrick McMahon (Liberal MP for Wexford) in the Commons: for the government, Chichester Fortesque answered that no ministry would ever "sanction... any Bill having for its object the rendition of political prisoners". Similar questions were asked in 1863 regarding a proposed ordinance authorising extradition between Malta and Italy.⁴²

40. cf. 3H volume 168. The Times (5 June 1862, p.7) printed the terms of the treaty, but made no comments. The bill became 25 & 26 Vict. c.70.

41. Hammond to Cowley (Private. 17 January 1866): Cowl. PP. FO 519/192.

42. 3H, (L), 161, cc.1526-7, (7 March 1861); 3H, (C), 161, c.211, (22 March 1861); cf. 3H, (C), 169, c.727, (24 February 1863). Foreign surrenders of 'politicos' attracted much adverse comment: cf. for example, the extradition of Teleki from Saxony to Austria: cf. The Times 1 January 1861, p.10; 8 March 1861, p.12; Morning Star 11 March 1861, p.4; and PP (1861) LXV: 'Papers Relating to the Arrest and Extradition of Count Teleki', pp.1-11.

If Parliament had not relaxed its vigilance over extradition, how is one to account for the events of 1862? It was perhaps significant that the method of extradition for accused persons returned to that of 1842-43, but the extension of extradition to convicts was novel, and the procedure for their surrender was very simple. One would have expected Parliament to at least have queried that provision, but it did not. The reason for all this acquiescence was that the Danish treaty posed no threat whatever to political refugees or the right of asylum: so far as I am aware there were no Danish political refugees to threaten. It was not the principle of extradition that was opposed in 1852: it was the risk that this worthy judicial process might be abused against politicians that was unacceptable. When no such risk existed, there was no need or desire for opposition.

During the Danish negotiations, Portugal, Bavaria and Prussia had sought extradition treaties.⁴³ All the proposals were accepted in principle, but each power was advised that Britain preferred not to open negotiations until the Danish treaty had been ratified.⁴⁴ Shortly after its ratification, the Netherlands asked for a similar treaty.⁴⁵ Again there

43. cf. Lavradio to Russell (22 November 1860): FO 63/866; Wodehouse to Colonial Office (FO. 12 August 1861): FO 22/290; and Brandenburg to Russell (26 June 1862): FO 97/454.

44. cf. Russell to Lavradio (FO. 8 December 1860): FO 63/866; Russell to Cetto (FO. 19 June 1862): FO 9/155; and Russell to Brandenburg (FO. 30 June 1862): FO 97/454.

45. cf. Bentinck to Russell (4 September 1862): FO 37/609.

were no objections in principle: the Home Office even hoped that such a treaty might be made to cover rather more crimes than previous ones, and that "further facilities in effecting the Extradition" might be given.⁴⁶

There ensued a detailed discussion of what crimes and what procedure should be included in the pending treaties. The Home Office thought that burglary, robbery with violence, and larceny or embezzlement by clerks or servants, at the least, should be added to the list of extraditable crimes. As for procedure, all that should be necessary was the production of an arrest warrant or certificate of conviction: all the British magistrate should have to do was satisfy himself as to identity. Such a procedure was "undoubtedly... in accordance with the true principle of Conventions of this nature". As for the fear that it would endanger 'politicos':

This fear, whether at all well founded or not, was a sufficient ground for refusing to sanction such a change, at all events at that moment [in 1852], when France had only just emerged from a state of revolution. It does not appear probable that the same apprehensions will be felt at the present moment.

However, it would be necessary to make special provision for security of fugitive slaves.⁴⁷

46. Waddington to Foreign Office (HO. 19 September 1862): ibid.

47. Waddington to Foreign Office (HO. 16 January 1863): HO 45/7386, /2. cf. D.F. Smith, op.cit. p.121.

In contrast, Layard (Foreign Office Parliamentary under-secretary) noted that:

When the Judges and the Magistracy are entirely under the control of the Government and not disinclined to do what they may be told to do, we cannot be too careful in not including offences... under which political offenders might be given up... the Home Office goes too far... it would be safer to leave matters as they are.

Russell was happy to augment the list of crimes, but not to simplify extradition procedure, and expressed his:

sense of the danger of giving up assumed criminals who may give offence to despotic Governments, and be accused under warrant of servile or corrupt tribunals. In this respect things must be left as they are.

Palmerston (now Prime Minister) agreed. The new procedure "would open the Door to abuses of the most serious kind in Europe, and in america [sic] we could hardly refuse similar conditions and should have to give up every Runaway Slave".⁴⁸

Two of the fundamental practical manifestations of mid-Victorian liberalism were the protection of political refugees and of escaped slaves: Russell, Palmerston and Layard simply were not prepared to run the risk of offending the susceptibilities of those devoted to these principles, and indeed probably counted themselves among their number.

48. Minutes by Layard (FO. 17 January 1863); Russell (FO. n.d.); and Palmerston (31 January 1863): FO 37/412. cf. Layard to Home Office (FO. 2 February 1863): HO 45/7386, /3.

One cannot help feeling that Home Secretary Grey and his officials were rather frustrated by all this. Waddington noted that:

The answer to this is that you ought not to enter into such Treaties with despotic governments, whose Tribunals are servile and corrupt. The very basis of such Treaties is mutual confidence - but the matter may as well drop here.⁴⁹

Home office objections were ignored, and in February 1863 the decision was taken to offer treaties to Prussia, Portugal, the Netherlands and Bavaria.⁵⁰ The same treaty was offered to each power: it was essentially the same as the French treaty of 1843, with the addition of burglary, robbery with violence, and larceny or embezzlement by clerks or servants, to the list of crimes. Extradition was extended to convicts, under the procedure used in the Anglo-Danish treaty.⁵¹

Portugal acknowledged receipt of the draft, but never replied.⁵² The Netherlands insisted upon extradition being granted upon the production of an arrest warrant and

49. Minutes by Waddington (HO. n.d): HO 45/7386, /3. Underlining in original. cf. minutes by Grey (HO. n.d.): ibid.; Waddington to Foreign Office (HO. 9 February 1863): HO 34/16, p.317; and D.F. Smith, op.cit. p.118.

50. cf. Minutes by Bergne and Russell (FO. 12 February 1863): FO 37/412.

51. A copy of the draft may be found in FO 97/454.

52. Russell to Lavradio (FO. June 1863): FO 63/904. Neither the Foreign Office files, registers nor indexes make any mention of a reply.

evidence of identity, so negotiations fell through.⁵³ Similarly, negotiations with Bavaria floundered because Britain was unwilling to adopt a simple method of extradition.⁵⁴

Only Prussia responded favourably to the draft, and a treaty was signed on 5 March 1864.⁵⁵ All that remained was for it to be sanctioned by Parliament. Presumably this would be a formality: the procedure for extraditing accused persons repeated that used in the unobjectionable French treaty of 1843; the extension of extradition to convicts had been sanctioned in the Danish treaty; and who could object to a modest enlargement of the list of crimes? The bill was introduced in the Lords on 15 July, and passed that House on 21 July. All the debate consisted of was a speech by Brougham in which he expressed his approval of the treaty and his hope that the:

time would soon come when we should have similar conventions with all other countries, and when all countries would have similar conventions with each other.⁵⁶

53. cf. Waddington to Foreign Office (HO. 10 June 1863); Layard to Home Office (FO. 9 December 1863); and Russell to Bentinck (FO. 8 July 1864): FO 37/609.

54. cf. Russell to de Cetto (FO. 8 June 1863): FO 9/161; Waddington to Foreign Office (HO. 27 May 1864): HO 34/17, pp.276-9; and Russell to de Cetto (FO 9 June 1864): FO 9/166.

55. cf. FO 97/45, which contains copies of the treaty and ratifying bill.

56. 3H, (L), 176, cc.1700-01, (19 July 1864).

However, when the bill went into committee in the Commons it ran into heavy opposition. James White (Liberal MP for Brighton) "looked upon the measure as one aimed against political exiles... it was intended to prevent us affording an asylum to patriots who fled here for refuge from the persecution inflicted upon them in their own country". He pointed out that in Prussia (and elsewhere on the continent), fugitives (and especially political refugees) were often convicted par contumace (that is, in their absence): thus, a political refugee so convicted might be extradited simply upon the production of proof of his conviction and identity. This was nothing less than "a flagrant and atrocious violation of the right of asylum which was the boast of this country".⁵⁷ Lord Robert Cecil (the Tory MP for Stamford, who was certainly no 'liberal') was not "satisfied that the political element was excluded from the treaty", and felt that the bill "was not drawn with that caution and circumspection that was necessary, considering the particular country with which we were dealing".⁵⁸ Government spokesmen attempted to reassure the House, but failed, and Palmerston agreed to an adjournment: no vote was taken.⁵⁹

Press reaction generally mirrored that of the Commons.

57. 3H, (C), 176, cc.2057 & 2067, (25 July 1864).

58. *ibid.* cc.2058-9. cf. speeches of Hennessy, Ayrton, Goldsmid, Seymour, Fitzgerald, Locke and Ferrand: *ibid.* c.2061-7. The Liberals, Radicals and Tories were represented in this group.

59. cf. *ibid.* cc.2058, 2059-62 & 2063-4.

The Times noted that MPs' "jealous watchfulness" had "undoubtedly discovered a grave fault" in the treaty. "A mere political offender... engaged in a fatal affray with the police, and escaping, might, in his absence, be convicted of murder, and there would be no answer to a demand for his extradition".⁶⁰ The Saturday Review (independent) believed the bill had been "incautiously framed", for Prussia was well known for "habitually" seeking and granting the extradition of political refugees. Only months earlier The Times had publicised the Prussian surrender of Polish political refugees to Russia.⁶¹

The day after the adjournment, Palmerston wrote (regarding the extradition of convicts upon the production of proof of their conviction):

nothing would be more easy or more likely, than that a Prussian Court of law... would condemn a man even unheard, for an alleged offence within the Category of the Treaty, his real offence having been a political one. If the Treaty is not clear and satisfactory on this Point, it would be better to drop the Bill, and to amend the treaty.⁶²

True enough, there was nothing in the treaty to prevent such a proceeding, for it contained no clause protecting political

60. The Times 28 July 1864, p.10.

61. Anon, 'The Prussian Extradition Treaty', Saturday Review volume 18 (1864), p.135; and The Times 2 April 1863.

62. Palmerston to Layard (Private. 26 July 1864): Layard Papers, BL Add. MS 38990, ff.295-7.

refugees. The government had failed to appreciate the treaty's possible ramifications: the bill was withdrawn.⁶³

Thereafter, the government attempted to avoid raising extradition with Prussia, and did so until January 1865, when Bernstorff complained that his government had heard nothing official (of course, 'unofficially', Prussia would have noticed reports of the events in Parliament) about the treaty since its signature. Russell initially stated that he and his colleagues were still considering the matter,⁶⁴ but on 13 January, a more detailed reply was sent. Russell proposed deleting that part of the treaty which referred to the extradition of convicts; providing that oral evidence on oath from actual witnesses was to be required in the case of persons accused; and including an article expressly forbidding the extradition of political offenders. The proposal for the production of oral evidence went further than the requirements of the 1843 treaty: in the Act implementing that treaty, it had been clearly provided that authenticated copies of depositions could be used as evidence. Now only oral evidence would be acceptable.⁶⁵

Unsurprisingly, Prussia was not best pleased. The article on political offences was regarded as "unnecessary",

63. cf. 3H, (C), 176, c. 2130, (27 July 1864). The Prussian reaction to the withdrawal is not recorded in surviving British papers.

64. cf. Bernstorff to Russell (5 January 1865); and Russell to Bernstorff (FO. 7 January 1865): FO 97/454. I can find no evidence of such consideration.

65. Russell to Bernstorff (FO. 13 January 1865): ibid. cf. 6 & 7 Vict. c. 75.

but not objectionable; the removal of convicts from the treaty could "hardly of principle be justified", but would be accepted "if necessary". However, the stipulation requiring oral evidence to be given before the British court was "entirely inadmissible". It was "obvious" that the difficulties involved in getting actual witnesses to go to Britain, together with the expense, could make it "almost always nearly impossible" to extradite fugitives. Rather than conclude a treaty that would be "necessarily illusory in its practical operation", Prussia would prefer to abandon it. Since the government saw no prospect of Parliament approving an Anglo-Prussian treaty which did not require oral evidence, the negotiations were indeed abandoned.⁶⁶

Fears for the security of political offenders had once again scuppered British efforts to conclude an extradition treaty, but a memorandum of January 1866 suggests an interesting variation to this theme: "no doubt the successful opposition... was in a great measure owing to the ill feeling existing at the time against the Prussian Government on account of the war in the Duchies of

66. Bernstorff to Russell (14 February 1865) (Translation); and Russell to Bernstorff (FO, 24 March 1865): *ibid.* Similarly, negotiations with the Hanse Towns (initiated by them in July 1864), for which Britain never showed any great enthusiasm, came to nothing because of British insistence on the need for oral evidence: cf. FO 33/186, 189&198; and HO 45/7777. In December 1865 the Prussians approached Layard privately, proposing a draft which excluded convicts and provided for extradition upon the production of "depositions on oath". However, because of the events of December 1865 and after (on which, see below, Chapter 3), the proposal was not accepted: Memorandum by Layard (22 December 1865): Layard Papers, BL Add. MS 38992, ff.109-10.

Schleswig-Holstein".⁶⁷ At the time, the Saturday Review had picked up on this theme, asserting that "it was in truth Schleswig" which lay behind the Commons reaction to the treaty.⁶⁸ Prussia had recently humiliated Britain over Schleswig-Holstein, and so MPs were hardly favourably disposed towards her. It cannot be doubted that such feelings of ill-will arising out of general foreign policy considerations played their part in arousing opposition to the bill, thus emphasising the need to take all extraneous factors into consideration when examining the British extradition experience.

Nevertheless, it would be wrong to over-emphasise the importance of the 'Schleswig factor'. The security of political offenders remained the essential concern of MPs in relation to extradition, and support for political refugees and the right of asylum remained very strong. This was clearly demonstrated by the reception accorded to Garibaldi in 1864: H.M. Hyndman wrote that, "No such spontaneous or enthusiastic reception was given by Londoners to any foreigner either before or since".⁶⁹ The government of the day certainly saw the question of the position of 'politicos' as the main obstacle to the extension of Britain's extradition

67. Unsigned memorandum (FO. 25 January 1866): FO 27/1972.

68. Anon, 'The Prussian Extradition Treaty', Saturday Review volume 18 (1864), p.135.

69. Quoted in J.A. Davis, 'Garibaldi and England', History Today volume 32 (1982), p.23. cf. 3H, (L), 174, c.1278, (19 April 1864); and 3H, (C), 174, cc. 1290-1, (19 April 1864). Garibaldi was, of course, not strictly a refugee, but the point holds good nevertheless.

experience. Waddington noted that "the English are extremely anxious to get their own delinquents back, but object extremely" to making it easy for foreign governments to recover criminals, while Bergne wrote that the "parliamentary difficulties in the way of carrying out such arrangements for extradition as would be effectual for their professed object, are, as [the Cabinet]... are well aware, very great".⁷⁰

It has been asserted that, "very rarely can public opinion be shown to have positively diverted policy away from paths which the foreign-policy-making elite was intent on following otherwise".⁷¹ This is no doubt true, but extradition was one subject where public opinion certainly diverted the path of policy. Had it not been for public sensitiveness over the right of asylum, by the end of 1864, Britain would certainly have been able to reap the benefits of more than three extradition treaties.

Such was the position: some scheme had to be devised under which extradition treaties could be made to work effectively without arousing fears for the position of political refugees. Such a scheme had not yet been devised, and so not much could as yet be done to increase the number of extradition treaties concluded by Britain. However, as shall see, in the future, such a scheme was formulated.

70. Minute by Waddington (HO. n.d.): HO 45/7781, /2; and memorandum by Bergne (FO. 16 August 1865): FO 83/631.

71. B. Porter, Britain, Europe and the World pp.11-12.

CHAPTER THREE:

PROGRESS (1865-1870)

Chapter Three: Progress (1865-1870)

On 4 December 1865 France announced her intention to terminate the 1843 treaty in six months time because it was ineffective, and Britain refused to extend extradition to convicts.¹ In fact, since 1852, the treaty had been wholly inoperative in Britain: France had tried to extradite 23 fugitives, but, for a variety of reasons (not all Britain's fault) in no case had extradition been granted. However, the deficiencies of extradition were not one-sided: since 1852, only two British requests for extradition had been successful.²

1. Auvergne to Clarendon (4 December 1865): PP (1866) LXXVI: 'The Extradition Treaty with France', p.374. Less than a month earlier, Bergne had stated that he did not "attach too much weight" to Schleiden's (minister for Hamburg) belief that France was about to take this step: Memorandum by Bergne (FO. 9 November 1865): FO 33/191. Waddington, however, was "not at all surprised": Minute by Waddington (HO. n.d.): HO 45/7784, /1.

2. cf. Unsigned memorandum (FO. December 1865): FO 27/1972; and minute by Waddington (HO. n.d.): HO 45/7784, /6. Of the 23 French requests for extradition, 15 are listed under the heading 'Result not shown in correspondence', which generally means that the fugitives concerned could not be found. In one case the application was withdrawn, while in the remaining seven, extradition was refused. In three cases the crime involved was non-extraditable; in two cases the evidence was judged insufficient; in one there were difficulties in identifying the fugitive; and in the other case there was a technical difficulty of an unspecified nature. In HO 45/7784 it is stated that Britain made a total of nine requests for extradition, but this is inaccurate. Eighteen requests were actually made, but the figure of two successes was accurate. Of the sixteen unsuccessful requests, in five cases the reason for failure is not shown; in three cases the crime involved was non-extraditable; in three cases the fugitive could not be found; in two cases extradition was granted but then the fugitive could not be found (this was the normal French way of proceeding); one application was withdrawn; in one case France made no reply to Britain's request; and in the final case, extradition was refused because the fugitive was a French subject, and France never surrendered Frenchmen.

Nevertheless, the government believed that "malefactors and criminals not being aware of the difficulties attending the execution of its stipulations were deterred from seeking a shelter in the two countries... The probable and immediate consequence of the cessation of the... Treaty... will be to inundate the two countries with criminals".³ This could not easily be proved, but the government was sufficiently convinced of the value of the treaty to state that the disadvantages of ending it were "too evident not to make it incumbent on both [countries] to give their best attention to maintaining it for their mutual advantage".⁴

The Times mirrored the governmental reaction to the news, bemoaning the prospect of the two nations becoming the "inviolable asylum for the criminals of the other". The Saturday Review was not surprised by the French decision: it was surprising that it "was not taken long ago, for the complaints of France against the treaty, as one-sided and totally ineffectual for the protection of French interests, have never ceased since it was made".⁵

The Pall Mall Gazette (Liberal), Reynolds's (working class) and the Daily News (Liberal) believed French policy

3. Cowley to Clarendon (No.18) (Paris. 4 January 1866): FO 27/1972; and Clarendon to Cowley (FO. 10 January 1866): PP (1866) LXXVI: 'The Extradition Treaty with France', p.375. cf. The Times 15 June 1866, p.9.

4. Clarendon to Cowley (FO. 19 January 1866): PP (1866) LXXVI: 'The Extradition Treaty with France', pp.377-8.

5. The Times 25 December 1865, p.6; and Anon, 'The Extradition Treaty with France', Saturday Review volume 20 (1865), p.798. cf. Daily Telegraph 3 January 1866, p.4.

was "dictated by a hope... of obtaining from us a new Convention extending to political offences". Lloyd's Weekly (working class) suspected "a plot to overthrow the asylum for political refugees".⁶ The Times, The Economist (Liberal) and Saturday Review disagreed. The latter speculated that Napoleon III had revived the question because he could now:

provoke a fair discussion of... extradition, without fearing that the reproach may be cast on him of trying in a circuitous way, to secure the surrender... of political adversaries of whom he is afraid. He is, to all appearance, so firmly seated on his throne that... he can now assert that he has no more reason to fear political refugees than the Queen has.⁷

The Pall Mall Gazette made it clear that extradition could not proceed simply upon the production of a French arrest warrant. The Times, The Economist, and Saturday Review thought likewise, but believed procedure could be improved.⁸ The Times was "quite certain that any demand which the French... may make, which is consistent with

6. Pall Mall Gazette 28 December 1865, p.5; and Lloyd's Weekly 14 January 1866, p.6. cf. Reynolds's 7 January 1866, p.1; and Daily News 2 January 1866, p.4.

7. cf. The Times 25 December 1865, p.6; Anon, 'The French Request', The Economist volume 24 (1866), p.121; and Anon, 'The Extradition Treaty with France', Saturday Review volume 20 (1865), p.798.

8. Pall Mall Gazette 1 January 1866, p.1; The Times 29 December 1865, p.6; Anon, 'The French Request', The Economist volume 24 (1866), p.122; and Anon, 'The Extradition Treaty with France' Saturday Review volume 20 (1865), p.798.

those ideas of liberty the least of which no Parliament or Government in this Country dare surrender, would be very cheerfully complied with".⁹

The French expected "concessions to be made to them", and it was recognised that "something must be done", but what could be conceded?¹⁰ Whilst this was discussed, France was assured that Britain would give her "best consideration" to the matter, and in Paris, Cowley conducted some private diplomacy. He drew an admission that had it been known that Britain was prepared to do what it could to improve matters, the denunciation would not have been made.¹¹ Hammond saw this as yet another demonstration of the "inconvenient" French habit of "asking us to help them out of difficulties of their own creation". Clarendon regarded the denunciation (without any fresh attempt first having been made to improve the treaty by diplomacy) as "an unneighbourly not to say unfriendly proceeding".¹² Hammond feared that if the treaty was terminated, "there can never be another. Parliament will not pass an Act to give validity to one".¹³ However, by

9. The Times 25 December 1865, p.6. The Times advocated making more crimes extraditable: ibid., as did the Morning Post 30 December 1865, p.4.

10. Cowley to Clarendon (No.18) (Paris. 4 January 1866): FO 27/1972; and Clarendon to Cowley (Private. 4 January 1866): Clar. PP. c.144, ff.26-8. Underlining in original.

11. Clarendon to Cowley (No.40) (FO. 10 January 1866): FO 881/1446, No.2. cf. Cowley to Clarendon (Private 5, 6, 12 & 16 January 1866): Clar. PP. c.95, ff.88-93 & 117-25.

12. Hammond to Cowley (Private. 27 January 1866): Cowl. PP. FO 519/192; and Clarendon to Cowley (Private. 4 & 15 January 1866): Clar.PP. c.144, ff.26-8, 42-5 & 133-9.

13. Hammond to Cowley (Private. 13 February 1866): Clar. PP. c.95.

February, Cowley persuaded the French not to press for the extension of extradition to convicts, and, later, not to enforce the denunciation, so as to give Britain time to try to make it operative.¹⁴

Cowley had bought time, but what was to be done? The main problem was that "people are convinced that there is some political object at the bottom of the denunciation and that we shall be called upon to deliver up Louis Blanc, Victor Hugo or Mazzini". The manner of the French denunciation had raised suspicions which would be "very difficult to allay".¹⁵ Clarendon emphasised that:

Parliament will be inflexible as to any loophole through which political refugees might be dragged... it is at all times a delicate matter to ask for a change in our law to meet foreign requirements... We must not mention a desire to meet the wishes of the French Govt.

(Here he clearly had in mind the events of 1858).

Parliament is so sensitive upon the subject that we must take care never to have a word in writing that will not bear hostile criticism in the H of C, but on the other hand we must only give up having a treaty when upon a careful comparison of our respective legislative and

14. cf. Cowley to Clarendon (Private. 13 February 1866): Clar.PP. c.95, ff.206-10; and Auvergne to Clarendon (11 May 1866): FO 27/1973. The treaty was due to expire on 5 June: the French suspended termination for a further six months, to December 1866.

15. Layard to Cowley (Private. 6 January 1866): Cowl.PP. FO 519/195, ff.626-7; and Hammond to Cowley (Private. 3 January 1866): Cowl.PP. FO 519/192.

other requirements it is found they are like two parallel lines and cannot be made meet.

Clarendon regarded Parliamentary sensitivity as "to a certain extent unreasonable but it is so strong that it must be respected".¹⁶

From numerous ideas, two possibilities were isolated: to improve the 1843 treaty, or negotiate a new one, which would apply to more crimes and encompass convicts.¹⁷ The latter option was, however, ruled out, for it would necessitate seeking from Parliament "a new power altogether, and therefore the whole question in regard to extradition under any shape or under any circumstances would have to be submitted to Parliament, which would for various reasons be undesirable". It was certain that France would again insist that extradition should proceed simply upon the production of an arrest warrant. Waddington thought it "useless to hold out any hope" that Parliament would agree to such a treaty,

16. Clarendon to Cowley (Private. 13, 15, & 17 January 1866): Clar.PP. c.144, ff.40-1 & 42-7. Underlining in original.

17. Waddington recommended that any new treaty "should expressly stipulate that the extradition of a political offender should in no case be asked for, even though he may be accused of the crimes mentioned in the Treaty": Minute by Waddington (HO. n.d.): HO 45/7784, /3.

while Hammond viewed any such idea as "perfectly absurd".¹⁸

It was therefore decided to try to adapt the 1843 treaty. Initially it was intended to do so "without... fresh legislation", thus avoiding "the intervention of parliament".¹⁹ However, it became clear that this would not be possible. The sticking point was the "mistrust of the French Magistracy" which France felt was "implied by

18. Unsigned memorandum (FO. 9 February 1866): FO 27/1972; minute by Waddington (HO. n.d.): HO 45/7784, /1; and Hammond to Cowley (Private. 23 January 1866): Cowl.PP. FO 519/192. Layard (Foreign Office Parliamentary under-secretary) proposed a more far-reaching scheme, similar to that which had been outlined in 1852. A general Act should define British extradition policy and enable governments to conclude treaties without the need for further Parliamentary sanction. When a draft bill was settled, it could be submitted to a Commons Select Committee, before which the matter would be "thoroughly ventilated": Layard to Palmer (Private. 7 February 1866): Layard Papers, BL Add. MS 39118, ff.252-7. Both Russell and Clarendon thought the idea "well worthy of consideration" (*ibid.*), and Cowley and the Law Officers supported it: Cowley to Layard (Private. 23 February 1866): *ibid.* ff.413-4; and Layard to Cowley (Private. 3 March 1866): Layard Papers, BL Add. MS 39119, ff.28-34. cf. Cowley to Clarendon (No.445)(Confidential)(Paris. 9 April 1866): FO 27/1973. A letter to The Times (7 March 1866, p.10) also supported a scheme such as this. Layard preferred to begin "de novo" rather than attempt to "patch up" the French treaty, and thought the time was "altogether opportune for passing a good measure": Layard to Cowley (Private. 3 March 1866): Layard Papers, BL Add. MS 39119, ff.28-34. Others did not agree, particularly Hammond, who insisted on getting "the French Treaty into shape before doing anything else", and presumably persuaded Clarendon to his way of thinking, for Layard's plan was rejected: *ibid.* The plan was perhaps also opposed by Grey (Home Secretary), who was "so afraid of trouble and opposition that he is always inclined to resist anything new": Clarendon to Cowley (Private. 24 January 1866): Clar.PP. c.144, ff.52-5. W.N. Bruce (ed.), Sir A. Henry Layard 2 volumes (1903) makes no reference to Layard's important plans.

19. Hammond to Cowley (Private. 24 January 1866): Hammond Papers FO 391/6; and same to same (Private. 11 & 15 January 1866): Cowl.PP. FO 519/192.

the requirement of the production of depositions, the further necessity, even when those depositions are given, of having the Magistrate's signature to the authenticity certified by an agent subordinate to the Magistrate himself and finally the obligation of sending over a French police Agent to identify the accused party".²⁰ It had already been decided that extradition upon the production of an arrest warrant was unacceptable: equally, the need for sworn evidence of identity could not be dispensed with. However, something could be done regarding the authentication of depositions. The dignity of French Magistrates was 'affronted' by the need to have depositions (certified by them to be authentic) certified once more (and by a subordinate official) in the British court, and consequently they often failed to send them when seeking extradition.²¹ The French Minister of Justice (Baroche) suggested that depositions might be "certified diplomatically": in France by himself and the Foreign Minister, and in Britain by a secretary of state. Depositions would thus be verified by a "superior and not by an inferior authority".²²

20. Cowley to Clarendon (No.183) (Confidential) (Paris. 20 February 1866): FO 27/1973. This second authentication, on oath, was required by 6 & 7 Vict. c.75, 2: it was not required in other proceedings which involved foreign judicial documents: cf. 1843 'Foreign Tribunals Evidence Act'; 3H, (L), 184, c.1056, (19 July 1866); *ibid.* cc.1367-8, (24 July 1866); and 3H, (C), 184, cc.2017 & 2021, (3 August 1866): speeches of the Lord Chancellor, Collier and the Attorney General.

21. cf. The Times 4 August 1866, p.8.

22. Cowley to Clarendon (No.183) (Confidential) (Paris. 20 February 1866): FO 27/1973. cf. same to same (No.445) (Confidential) (Paris. 9 April 1866): *ibid.*

Although Waddington feared Parliament would "very probably object to the diplomatic mode of verification", it was decided to proceed,²³ and in April 1866 a short bill was drafted. It provided that arrest warrants and copies of depositions signed by or taken before or by a competent foreign magistrate were to be accepted as evidence if authenticated by the Minister of Justice.²⁴ No longer would oral testimony as to their accuracy be required. This was quite a concession: Clarendon clearly saw it as such, and wrote that if the treaty still remained inoperative, he would ensure "the blame shall be saddled on the right horse".²⁵

Even though the bill was purely procedural (it was "nothing in itself"²⁶), some were by no means confident of its prospects. Hammond did not think there was "much chance" of it passing "in the present temper of the House", but nevertheless thought it should be introduced. If Parliament would not agree to it, it would "certainly agree to nothing" more: "if they do we may next year try them with a supplemented enumeration of crimes".²⁷

23. Minute by Waddington (HO. n.d.): HO 45/7784, /17.

24. A copy of the first draft may be found in FO 27/1973. The final version was ready by June; cf. *ibid.* Also in June, the government changed, with Stanley becoming Foreign Secretary, but the measure was continued with K. Bourne 'Foreign Secretaryship of Lord Stanley'. Unpublished Ph.D. Thesis, London University (1955), makes no reference to extradition.

25. Clarendon to Cowley (Private. 26 March 1866): Clar.PP. c.144, ff.130-3.

26. Hammond to Cowley (Private. 4 August 1866): Cowl.PP. FO 519/192.

27. Same to same (Private. 18 April 1866): *ibid.*; and minute by Hammond (FO. 20 April 1866): FO 27/1973.

The 'Extradition Treaties Act Amendment Bill' was first sent to the Lords. The Lord Chancellor (Chelmsford) emphasised that it did not threaten political refugees, and indicated that in the future the government intended to try and augment the number of crimes for which extradition could be sought and granted.²⁸ For the opposition, Clarendon welcomed the bill, and hoped that the list of extraditable crimes would be expanded. The only opposition to the bill came on third reading, when Lord Teynham asserted that its effect would be that instead of no-one being surrendered, hereafter, every fugitive whose extradition was sought would be. However, as Chelmsford pointed out, Teynham did not "understand in the least the object of the Bill": it was a purely procedural measure, and did not alter the nature of the evidence required to justify extradition.²⁹ No further objections were raised, and the bill passed on to the Commons.

On second reading in the Commons, Stanley emphasised that the bill was "a matter of legal procedure". Notice had been given that in committee, a clause would be proposed to "exclude all offences which are considered to be of a political character". Stanley had no objection in principle, provided "you define" political offences. This could be done in "a rough and popular way": for example, if someone was killed during a "popular insurrection, that probably would

28. 3H, (L), 184, cc.1056-8, (19 July 1866).

29. *ibid.* cc.1058-9; and 3H, (L), 184, cc.1366-8, (24 July 1866).

be regarded as a political offence". However, difficulties would arise:

in cases where you have to deal with attempts at assassination... we desire to retain inviolate the right of exemption from arrest for political offences [but] it is monstrous to say, on the other hand, that if any private person is assassinated in... Paris... and the murderer escapes to England, he may be punished; but if the person so assassinated is invested with any political character then the offence becomes a political offence, and the law of England declares that he shall not be given up to justice. This position appears to me to be utterly untenable.

Stanley preferred to rely upon the discretionary power held by the Home Secretary (he had to issue the final warrant of surrender), but if any MP could "succeed in establishing a distinction between the case of a purely political offence and an offence against morality", he would consider accepting such a clause. Nevertheless, he thought it would be "difficult to draw such a distinction".³⁰

William Torrens (Liberal MP for Finsbury) alleged that the new procedure amounted to extradition simply upon the production of a French warrant, and was an attack on the right of asylum, but as Robert Collier (Liberal MP for Plymouth) pointed out, he was under a "great misapprehension as to the object of the Bill". The established principles

30. 3H, (C), 184, cc. 2004-8, (3 August 1866).

of extradition law and practice were not affected in any way: it was "perfectly well understood" that political offenders were not to be extradited, and "he did not think it would be possible to make that understanding more clear by any language they could introduce into the Bill". Collier hoped MPs "would not be deterred by imaginary evils from reaping the substantial benefits" of efficient extradition.³¹

Sir Francis Goldsmith (Liberal MP for Reading) asserted that these benefits would be "purchased very dearly" if they "seriously impaired" or "practically destroyed" the right of asylum. The bill should only pass if it contained an "express declaration" that 'politicos' were exempt from extradition. If it was impossible to frame a definition of political offences, "that was a strong argument against passing the Bill". The Attorney General replied that it was understood that political offences were not subject to extradition, and defining them "would involve great difficulties".³²

In committee, Goldsmid emphasised that while all agreed political offences were exempt from extradition, the existing treaties contained no such provision. Their definition was "clear enough to the ordinary intelligence", and he suggested the following clause:

nothing in this Act, nor in any previous Act relating to Treaties of Extradition, shall be construed to

31. ibid. cc.2008-18.

32. ibid. cc.2019-20.

authorise the extradition of any person in whose case there shall be reasonable grounds for belief that his offence, if any, had for its motive purpose the promotion or prevention of any political object, nor to authorise the extradition of any person the requisition for the delivery of whom shall not contain an undertaking on the part of the sovereign or Government making such requisition, that such person shall not be proceeded against or punished on account of any offence which he shall have committed before he shall be delivered up, other than the offence specified in the requisition.³³

Charles Newdegate (Tory MP for North Warwickshire) "sympathised" with Goldsmid, but felt "to require the courts to define political offences was to require them to undertake a duty beyond their competency". Charles Neate (Liberal MP for Oxford) feared the clause would give undeserved protection to assassins like Orsini: it was important to distinguish between "political offences generally and political assassination. The one was an offence against the Government of a country; the other an offence against the universal morality of all nations". He also felt the time had come for a revision of "the whole subject of Extradition". Acton Ayrton (Radical MP for Tower Hamlets) feared that if the clause was accepted, "any one holding a public office might be murdered with impunity".³⁴

33. 3H, (C), 184, cc. 2108-12, (6 August 1866).

34. ibid. cc. 2112-3 & 2123.

Stanley was unhappy with the clause: it would "include every political assassination whatever, and would prevent the extradition of such men as... Booth, the assassin of President Lincoln". J.S. Mill "did not think it impossible to define political offences", and defined them as "any offence committed in the course of or in furtherance of any civil war, insurrection, or political movement. That he thought would not include political assassination". He wanted political offences to be specifically exempted, but came up with a compromise solution. Since the bill was an "experiment... Would the noble Lord limit the duration of the Act to twelve months?" They would then be in a better position to judge its merits. Mill's proposal was supported by Kinglake, and accepted by Stanley: "In the course of the next Session the House would have an opportunity of carefully and deliberately considering the subject". Goldsmid withdrew his clause and the bill passed as introduced,³⁵ with its duration limited until 1 September 1867.³⁶

Stanley felt he "might perhaps" have carried the bill without the time limit, but "with difficulty". Hammond was "not sure" whether he would "not have withdrawn it rather than let it come up for debate again". It was of course

35. ibid. cc.2114-7 & 2124. Mill (to Christie; 20 April 1868) later defined political offences as acts which "formed part of an armed insurrection, or an attempt to excite an armed insurrection for the purpose of effecting changes in the Government"; F.E. Mineka and D.N. Lindley (eds.), Collected Works (Toronto 1972) volume 16, p.1387.

36. It became 29 & 30 Vict. c.121: 'An Act for the Amendment of the Law relating to Treaties of Extradition'. Mill regarded the time limit as a victory: cf. J.S. Mill, op.cit. p.177.

"out of the question" to try for an extension of the list of extraditable crimes, and he thought it unwise to "moot that question" until after the Act had been renewed.³⁷

What of the reaction to the bill outside Parliament? The Times reported that the modifications it enacted were "reasonable enough", and hoped it would not encounter "serious opposition". Similarly, the Morning Post (Tory) had not expected it to be opposed, for it had "every principle of justice and fairness in its favour". That it was opposed furnished an "extravagant and warning illustration of the ridiculous lengths of perversity to which principles venerable in themselves may lead". There was nothing wrong with protecting the right of asylum, but the bill did not even make an "appreciable difference" to procedure. "There are few Englishmen, we imagine, who desire that the right of asylum should prostituted for the protection of murderers and forgers". The Standard (also Tory) felt that a bill which had been "framed by the Liberals and adopted by the Conservative Ministry can by no rational man be suspected of a secret tendency to... facilitate the designs of despotism". On the other hand, the Working Man remarked that MPs would have to ensure that it "in no way invalidates the proper security we naturally pride ourselves on affording to exiles". The Morning Star (Liberal) preferred to have no treaty at all rather than "deny, even by accident, that right of asylum which it has always been our pride to hold sacred".

37. Stanley to Cowley (Private, 7 August 1866): Cowl.PP. FO 519/182, ff.59-62; and Hammond to Cowley (Private, 7 August 1866): Cowl.PP. FO 519/92.

The Daily News reported that Louis Blanc considered the bill "mischievous and dangerous", but was pleased that the debates had demonstrated that "the national jealousy of any sideways approaches to an infringement of the right of asylum... is not yet lulled into indifference".³⁸

So much for the press reaction to the bill itself. What of the other question that was raised: the definition of political offences? As Saturday Review saw it, the:

real danger is that, in avoiding too great vagueness of expression we might easily err on the side of over-preciseness. It is certainly not desirable in the interest of political refugees to have a too rigid definition of... political crime.

The Daily News thought it difficult to "draw the exact line between simple homicide, and homicide committed in furtherance of a political movement". The Standard believed the matter was "perfectly intelligible between men of honour and common sense", but:

incapable of that preciseness of expression which is required when... made a matter of legal obligation... it is all but impossible to frame any definition of political offences... which shall not either fail of its purpose altogether or endure for the benefit of all political assassins.

38. The Times 21 July 1866, p.9 & 4 August 1866, p.8; Morning Post 2 August 1866, p.4 & 4 August 1866, p.4; Standard 4 August 1866, p.4; Working Man 4 August 1866, p.54; Morning Star 4 August 1866, p.4; and Daily News 4 August 1866, p.4. cf. Morning Herald 4 August 1866, p.4.

The Pall Mall Gazette suggested the following definition:

acts of homicide committed in the prosecution of organised resistance on a large scale to the Government... and which if they had taken place in a public war would have been considered lawful according to the practice of civilised belligerents. Isolated political assassinations no one would wish to protect.

However, it later admitted that it was "practically impossible to draw the line between political and common offences. There is hardly any offence which... may not take a political colour".³⁹

There were of course sound objections to all the definitions offered. However, their non-inclusion should not be taken as an indication that Britain had suddenly abandoned political refugees. There was absolutely no chance of public, Parliamentary or governmental opinion standing for their extradition. This was perhaps best expressed by Reynolds's:

Not until the character of this nation has been completely revolutionised—not until from being the most courageous and liberty-loving people on the face of the earth, we shall have become the most craven, contemptible and despot-loving people under the sun,

39. Anon, 'The Extradition Treaty Bill', Saturday Review volume 22 (1866), p.161; Daily News 7 August 1866, p.4; Standard 7 August 1866, p.4; Pall Mall Gazette 6 August 1866, p.2 & 19 August 1867, p.1. cf. The Times 26 September 1866, p.8.

will we agree to part with that which is the noblest boast and proudest tradition of our sea-girt isle—that of being an inviolable sanctuary for political exiles and refugees of every description.⁴⁰

The events of the summer of 1866 highlight the extreme difficulty of defining political offences.⁴¹ This was the first occasion upon which such definition had been attempted, and therefore this episode is of some importance.⁴² No solution was found, but that is no surprise. What constitutes a political offence can only be judged on a case by case basis, when and if such cases arise. Only then can all the infinite variables be taken into account. Thus far, no-one had attempted to extradite a political refugee, so even a partial case-based definition had not emerged. In later years, such cases would arise, but for the moment, the government had achieved its immediate objective of improving the French treaty. However, the debates had made "so unfavourable an impression" in France that Cowley did not

40. Reynolds's 7 January 1866, p.1. cf. The Times 28 December 1865, p.7; Anon, 'The Extradition Treaty with France', Saturday Review volume 20 (1865), p.799; Morning Post 30 December 1865, p.4; Daily News 2 January 1866, p.4; Standard 4 August 1866, p.4; Pall Mall Gazette 6 August 1866, p.1; and Anon, 'The Extradition Treaty with France', Spectator volume 39 (1866), pp.852-3.

41. cf. PP (1867-68) VII: 'Minutes of Evidence', pp.165 & 181; and Stanley to Cowley (Private, 26 October 1866): Cowl.PP. FO 519/182, ff.137-8.

42. The question of what was a political offence had been discussed and remarked on before, but not specifically in the context of defining what acts were to be exempt from extradition: cf. 3H, (C), 176, c.2063, (25 July 1864); and 3H, (L), 122, c.504, (11 June 1852): speeches of Palmerston and Cranworth.

press the French to withdraw their threat to terminate the treaty, but sought a further suspension of its implementation, which was given.⁴³

There did not appear to be any insuperable obstacles to securing the renewal of the 1866 Act when necessary. Further, convicts might be made liable to extradition, and more crimes might be made extraditable. All that MPs worried about was the abuse of extradition: provided no such abuse occurred, there should be no problems. However, very soon after the bill became law, events occurred which led ministers to gravely doubt their chances of success.

On 22 August 1866, in Canada, one Lamirande was committed to gaol on a charge of forgery. He sought a writ of habeus corpus, the judge indicated that he intended to release the prisoner next day, but that night, he was (under a warrant issued by the Governor) placed on a boat for France. It was bad enough that the provisions of habeus corpus had been flouted: what was worse was the fact that the Canadian judges would not have granted extradition anyway.⁴⁴

43. Cowley to Stanley (No.402) (Paris. 9 November 1866): FO 881/1529, No.1. The suspension was periodically renewed until a new Anglo-French treaty was signed in 1876. W.W. Fifield, op.cit. p.32 erroneously states that the treaty was actually terminated.

44. cf. The Times 17 September 1866, p.10. On the matter generally: cf. PP (1867) XLVIII, 'Correspondence respecting... M. Lamirande', pp.633-726.

From the first it was feared that the case would have dire consequences for extradition policy. Cowley felt that "this affair... will knock the extradition treaty on the head". Stanley even considered abandoning the treaty forthwith:

In matters of police, France and England never will understand one another: and the risk of diplomatic difficulties is a worse evil than the occasional escape of an assassin... there is no moment at which the refugee question may not become troublesome.

He did, however, decide against such a step: it should only be done at Parliament's behest, and in any case, "to drop it now would look like haste and temper, which does not become a great nation".⁴⁵

In 1852 a Foreign Office official had warned that, "so much clamour might be raised if any person were surrendered... without every condition imposed by the Convention and Acts of Parliament having been... fulfilled", and he was proved right. The case was soon "exciting such attention" in Britain.⁴⁶ The Pall Mall Gazette observed that it could hardly be said that "the legal formalities were observed by a prisoner being carried off while an application for habeus corpus was in course of hearing". The Spectator

45. Cowley to Hammond (Private. 30 October 1866): Hammond Papers, FO 391/6; Stanley to Cowley (Private. 26 October & 21 November 1866): Cowl.PP. FO 519/182, ff.137-8 & 177-9. cf. Hammond to Cowley (Private. 21 October 1866): Cowl.PP. FO 519/192.

46. Unsigned memorandum (FO. 4 November 1852): FO 881/399, p.45; and Carnarvon to Monck (Private. 28 September 1866): Carnarvon Papers, PRO 30/6/151, ff.100-1.

asserted that the incident was "scandalous... Had the story been told in a work of fiction by a novelist of the sensational school all the critics would have characterised it as improbable, and would have laughed at the ignorance of the author". The Daily News thought the proceedings "monstrous": if they happened in Britain, public opinion "would soon put an end to extradition... altogether". The Times saw the case as a "flagrant abuse", but hoped it would not "bring the policy of Extradition into discredit".⁴⁷

Lamirande demanded British intercession on his behalf, but Britain could not demand his release as "of right". Lamirande had been surrendered under the authority of the Governor and it was not France's fault that the Canadian officials had made a mess of things, but everything possible was done on his behalf.⁴⁸ The government saw no hope that Lamirande would be freed, but had to be able to "show that we have done our best". Stanley felt that the only hope of success lay in the French "unwillingness to lose the treaty", and although Cowley made it clear that the case threatened the treaty's survival, Stanley refrained from using that argument by way of "menace", as it would "only put their

47. Pall Mall Gazette 1 October 1866, p.9; Anon, 'How to Work an Extradition Treaty', Spectator volume 39 (1866), p.1046; Daily News 25 September 1866, p.4; and The Times 26 September 1866, p.8.

48. The Times 18 September 1866, p.8; and Stanley to Cowley (No.319) (FO. 21 November 1866): FO 881/1491, No.4. The Canadian authorities were (rightly) blamed: cf. Carnarvon Papers, PRO 30/6/138, /139, /151, /154, /158; CowI.PP. FO 519/182; and FO 27/1647.

backs up".⁴⁹

In December 1866, Lamirande was convicted. Britain still worked on his behalf, but in February 1867 there came a surprising end to the matter. Lamirande withdrew his request for aid. The government had no option but to cease its efforts on his behalf, and did so, whilst stating that Britain did not accept the validity of Lamirande's extradition. The Times welcomed the end of a "troublesome" Anglo-French dispute, but "in any other light" it could "hardly be regarded... as quite satisfactory".⁵⁰

This was perhaps as good an outcome as ministers could reasonably have hoped for. They had done all they could for Lamirande, there was no permanent damage to Anglo-French relations, and they could not be blamed for what had happened. Nevertheless, the incident had occurred at a very inconvenient time: before 1 September, the 1866 Act would have to be renewed, and ministers were very concerned as to what impact the case might have. Stanley feared the Commons might not only "refuse to renew" the Act, but even "require the Government to put an end... to the Treaty of 1843, if not to all Extradition Treaties whatever".⁵¹

49. Stanley to Cowley (Private. 13 & 19 November 1866: Cowl.PP. FO 519/182, ff.165-6 & 175-6; Cowley to Stanley (No.409) (Paris. 13 November 1866): FO 881/1491, No.9; and Stanley to Cowley (Private. 15 November 1866): Cowl.PP. FO 519/182, ff.169-70.

50. Fane to Stanley (No.216) (Paris. 25 February 1867); FO 881/1491; Stanley to Cowley (FO. 20 March 1867): ibid. No.42; and The Times 26 March 1867, p.7. Surviving British papers do not explain the reason for Lamirande's change of heart.

51. Stanley to Fane (No.23) (FO. 9 January 1867): FO 881/1491, No.29.

However, MPs took "the matter more quietly than one might have expected". Stanley had cause to be pleased that he had not "forced" the Act "by a small majority through a reluctant House", for if the "Lamirande case had occurred when there was a strong feeling of dissatisfaction in consequence, where would have been now our chances of getting the treaty continued?"⁵²

William Torrens (Liberal)) drew attention to the Lamirande case, but, rather than demanding an end of extradition, advocated the enactment of a wide-ranging statute on the subject: he had not come "to make mischief out of the past; but to draw good out of evil for the future". He recommended providing that in extradition, the accused should have a definite time (perhaps three months) after committal for extradition, in which he would be allowed to seek a writ of habeus corpus. Further, when the appeal was heard, he should have the right to ask the court to judge "the bona fide of the whole proceeding, and specially to inquire, if the prisoner desire it, whether he has ever made himself obnoxious to the Government that claims him by acts of a political nature". Torrens did not think Parliament should lay down any definition of political crimes, but trusted the courts to deal with the matter when it arose. He had hoped that there would have been time for a fuller discussion of extradition than was now possible (again it was late in the session), but as an alternative, Torrens called

52. Stanley to Cowley (Private, 13 October & 14 December 1866): Cowl.PP. FO 519/182, ff.145-7 & 221-2.

for the establishment of a Royal Commission or Select Committee, which would fully consider the subject.⁵³

A.H. Layard (Liberal MP for Southwark) supported Torrens' call (this was the sort of thing he had advocated in the past, when in office), as did Neate (also Liberal). Mill did not dispute the value of extradition, but questioned whether it was possible to trust all nations. Lamirande's case had shown that extradition could be abused, "but at the same time everyone was aware that Lamirande was a scoundrel, and probably the consciousness of that fact went far to prevent any prolonged discussion upon the subject of the treaty, such as would have taken place had it been the case of the extradition of a political offender". Still, he would prefer that principles should be laid down which would "apply to all extradition treaties". Stanley agreed: "to appoint a Committee to investigate the whole matter would be the most satisfactory mode of proceeding".⁵⁴

In December 1867 the Foreign Office instructed its representatives abroad to gather information on foreign extradition law and practice, which could be submitted to the forthcoming committee.⁵⁵ When, in January 1868, Belgium sought an extradition treaty, she was informed that Britain could do nothing until the committee had met and

53. 3H, (C), 189, cc. 961-76, (6 August 1866).

54. 3H, (C), 189, cc. 976-9 & 984-9, (6 August 1866). The Daily News (7 August 1867, p.4) thought likewise. Layard developed his ideas in a letter to The Times: 10 August 1867, p.8.

55. Foreign Office Circular (28 December 1867): FO 27/1973.

reported.⁵⁶ Finally, on 20 March 1868 a motion was made to appoint a Commons Select Committee to "inquire into the state of our Treaty relations with Foreign Governments regarding Extradition, with a view to the adoption of a more uniform and permanent policy on the subject".⁵⁷ Its Report was submitted on 6 July.

The Report of the Select Committee is of vital importance to the history of British extradition policy. It was the first comprehensive British statement on the issue, and was the essential precursor of the statute which in all its essentials survives today to govern Britain's extradition relations. Briefly stated, the recommendations were as follows.

The Committee found that it was "desirable that greater facilities [for extradition] should be given than now exist", and the number of extraditable crimes could be increased "with advantage to the public interests". A "general Act" should be passed, "enabling Her Majesty, by Order in Council, to declare that persons accused, upon proper and duly authenticated prime facie evidence, of the

56. cf. FO 10/283-4.

57. 3H, (C), 190, c.1954, (20 March 1868). The Select Committee consisted of: W.M. Torrens (Liberal), Spencer Walpole (a former Home Secretary), A.H. Layard (a former Foreign Office parliamentary under-secretary), William Edward Forster (a former Colonial Office parliamentary under-secretary), Sir R. Baggallay (the Solicitor General), Sir Francis Goldsmid (Liberal), Sir J.E. Gorst (Tory), J.S. Mill (Liberal), Bouverie (Liberal), Charles Neate (Liberal), Robert Collier (Liberal), Thomas Baring (Tory), Percy Wyndham (Tory), Egerton (Tory), Samuel Graves (Tory), Baxter (Liberal), and Schreiber (Tory).

commission of any of the crimes to be enumerated in such Act, should be surrendered" to the foreign government in whose jurisdiction the crime had been committed, and with which an extradition treaty had been concluded, "provided that the evidence should... be such as would justify the committal of the offender for trial, if the crime had been committed in England".

Every treaty made under the Act should "expressly" exempt fugitives accused of crimes which are "deemed" by the surrendering country "to be of a political character", provided that anyone "accused of a crime which is deemed", by the surrendering country "to constitute assassination, or an attempt to assassinate, shall not be included in this exception". Every treaty was also to contain a full embodiment of the speciality principle.

Every fugitive committed for extradition was to be allowed to seek a writ of habeus corpus. Upon its hearing, "it shall be open to the accused, to question the bona fides of the demand for his extradition, upon the ground that his surrender has, in fact, been sought for political reasons". All extradition proceedings were to originate "before the principal metropolitan police court".⁵⁸

The Report was well received. The Foreign Office believed that "the principle on which those recommendations were based is... well calculated to place the matter on a satisfactory footing".⁵⁹ The Saturday Review (independent) thought the Report "highly competent" and remarked that nations were unlikely to sign treaties unless the "Government

has previously obtained full powers to conclude the necessary stipulations". The Economist (Liberal) viewed it as "clear and explicit": its adoption would bring "uniformity in policy" and the difficulty as to political offences was overcome "in a very simple way". The Spectator (Liberal) felt the recommendations would "put matters on a right footing".⁶⁰

Plans were soon laid for the Report's implementation: a draft bill was completed by February 1869.⁶¹ All the suggested restrictions upon extradition were included, the most important being the political offence exemption:

A fugitive criminal shall not be surrendered who is accused or convicted of any offence which is one of a political character; but a murder or an attempt or conspiracy to murder shall not, by reason only that if the like offence had been committed in England it might be tried as treason, be deemed to be an offence of a political character.

More than 20 crimes were specified as extraditable.

58. PP (1867-68) VII: 'Report of the Select Committee on Extradition', pp.131-2; reprinted in C. Parry (ed.), op.cit. pp.804-5.

59. Hammond to Home Office (FO. 26 September 1868): HO 45/8166, /1.

60. Anon, 'Extradition', Saturday Review volume 26 (1868), p.379; Anon, 'The Select Committee', The Economist volume 26 (1868), pp.1077-8; and Anon, 'The Proposed Law', Spectator volume 41 (1868), p.1068. Anon. 'Laws of Extradition', Law Times volume 45 (1868), p.361, reprinted the Report.

61. A copy of the bill may be found in FO 27/1973.

Hammond feared the bill was "after all rather longer than will find favour", and noted that: "According to my view... the point we need to provide for is what will be accepted by Parliament, rather than what will be accepted by a foreign Government". Clarendon (Foreign Secretary once more) worried that the extension of the list of crimes would be felt "objectionable", and doubted "whether all the old objections will not be produced in the H of C against this mode of legislation".⁶²

Before the terms of the bill were finally settled, it was altered in one very significant respect. The Law Officers advised that "section 4 subsection 1 should stop at 'character' as we do not see our way to any definition of 'offences of a political character' which is not open to grave objection; we are disposed to think it better not to attempt to define them". This "left it to the Courts to determine whether the murder of Sovereign is a crime of a political character in all cases". The bill was therefore not to incorporate a version of the 'Belgian attentat clause', which was routinely inserted in continental

62. Hammond to Jenkyns (Private. 11 March 1869): HO 45/8166, /14; and minute by Clarendon (FO. 17 April 1869): FO 27/1973. Hammond was always rather pessimistic (or "trembly" as he put it: Hammond to Cowley (Private. 4 August 1866): Cowl.PP. FO 519/192), which may have been a result of the fact that he got himself into "a great fidget" about the matter: Layard to Cowley (Private. 17 January 1866): Cowl.PP. FO 519/195, ff.644-7.

extradition treaties.⁶³

The bill was more or less settled by June 1869, but "over whelming" pressure on Parliamentary time meant that its introduction was "unavoidably postponed" until 1870. Like "many another Bill", it fell "victim of the slowness of Parliamentary Procedure, and the time occupied in a session... by such monsters as the Irish Church and Bankruptcy Bills". Furthermore, its introduction had to await a gap in the Commons timetable, as it was "considered inexpedient to introduce the... Bill in the Lords—for fear of exciting prematurely the jealous alarm of the Commons".⁶⁴

63. Law Officers' Opinion by Collier, Coleridge and Twiss (12 April 1869); and memorandum by Thring (n.d.): HO 45/8166, /8 & /9. The 'Belgian attentat caluse' arose out of the Jacquin case. In 1854, Célestin and Jules Jacquin attempted to blow up a train carrying Napoleon III of France. The attempt failed, Célestin fled to Belgium, and France sought his extradition, which was refused in court because the offence was political. To placate France, Belgium enacted a law which stated: an "attempt against the person of a foreign head of state or against the person of his family members, whether... by means of murder, assassination or poisoning" would not be treated as a political offence: C. Van den Wijngaert, *op.cit.* pp.14-15. Britain was perhaps the only nation not to include such a provision in her extradition treaties. Copies of foreign treaties incorporating it may be found in: FO 6/491; FO 7/1014; FO 10/700; FO 64/1058; FO 72/2129; The Times 23 October 1856, p.9; Anon, 'Political Offence in Extradition Treaties', American Journal of International Law Supplement to volume 3 (1909), pp.144-52; and Harvard Research, *op.cit.* p.260.

64. Clarendon to Lyons (Private. 20 July 1869): Clar.PP. FO 361/1, ff.187-8; Bruce (Home Secretary) to Clarendon (Private. 20 July 1869): Clar.PP. c.499, f.95. cf. 3H, (L), 198, c.558, (23 July 1869): speech of Clarendon. The delay was not caused by lack of enthusiasm: cf. Spring-Rice to Home Office (FO. 15 January 1870), and Knatchbull Huggessen to Foreign Office (HO. 18 January 1870): FO 27/1973. Gladstone (Prime Minister) had "no objection" to the bill: Bruce to Clarendon (Private. 16 May 1870): Clar.PP. c.499, f.72. Torrens and Lord Chelmsford encouraged the government to implement the Select Committee's Report: cf. 3H, (C), 194, c.1462, (16 March 1869); and 3H, (L), 198, cc.554-8, (23 July 1869). H.A. Bruce, Letters 2 volumes (Oxford 1902) makes no reference to the bill.

It was introduced on 23 May 1870, and discussed in June on second reading in the Commons. The Attorney General (Collier) asserted that the advantages of extradition were "obvious", that the bill closely followed the Select Committee's Report, and emphasised that political offenders were more than adequately protected. They had found it impossible to define political offences, and "had left the matter to the Courts". No-one spoke against the bill; Wheelhouse (Tory MP for Leeds) welcomed it as a "step in the right direction", while Edward Bouverie (Liberal MP for Kilmarnock) believed it would "remove a defect" in "criminal jurisprudence which was a disgrace to... a civilised country".⁶⁵ The bill passed unopposed: it had "escaped the shoals of the House of Commons", and Bruce hoped it would not "be wrecked on the Bar of the Lords".⁶⁶ In the Lords, however, here was no debate.⁶⁷ On 9 August 1870, the 'Extradition Act' received the Royal Assent.⁶⁸ A problem that haunted governments for more than twenty years was thus solved. The easy passage of the 1870 bill indicates a major shift in Parliamentary opinion (which to an extent reflected public opinion) vis-a-vis extradition, and such a shift must be closely analysed.

65. 3H, (C), 202, cc.300-5, (16 June 1870).

66. Bruce to Granville (Private. 29 July 1870: Granv.PP. PRO 30/29/65.

67. On second reading the Lord Chancellor outlined its provisions, but no-one else spoke: cf. 3H, (L), 203, c.1268, (1 August 1870).

68. 33 & 34 Vict. c.52. The Act was amended in 1873 (36 & 37 Vict. c.60), 1895 (58 & 59 Vict. c.33) and 1906 (6 Edw.7 c.15): these Acts added further crimes and made minor changes in procedure. Also, the 1873 Slave Trade Act (36 & 37 Vict. c.88, S.27) made slave trade offences extraditable.

It is difficult to analyse shifts in Victorian opinion, but several factors may be suggested. In the first place, one must look to the Act itself. Never before had 'politicos' enjoyed such a privileged, protected position in statute law. The "Act... rests on the importance of preserving... the right of political asylum"⁶⁹

Section 3(1) provided that:

A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the court before whom he is brought on habeus corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

As Piggott noted, this gave " a great actuality to the right of asylum".⁷⁰

Section 3(2) stated that a:

fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement that the fugitive

69. Lord Radcliffe in, 'Zacharia v. Republic of Cyprus' (House of Lords, 17 April 1962), All England Law Reports (1962) volume 2, p.447.

70. F. Piggott, Extradition (1910) p.50.

criminal shall not, until he has been restored or had an opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded.

Such a provision was vital: otherwise, a political refugee might be extradited for non-political crimes but tried for political offences.⁷¹ This was the embodiment of the speciality principle.

Sections 3(4) and 11 provided that a fugitive "shall not be surrendered until the expiration of fifteen days from the date of his being committed... to await his surrender", thus giving the accused an opportunity to appeal against extradition on political offence grounds. Section 7 gave the Secretary of State the power to prevent extradition at any stage during the process if he thought the offence was political. Section 26 provided that persons convicted par contumace were not to be regarded as convicts: they were to be treated as an "accused person". Section 9 provided that at any time, the courts were obliged to receive evidence tending to show that the offence at issue was in fact political.

Sections 10, 14 and 15 laid down the procedure for extradition. Accused persons were to be surrendered upon the

71. Such things had happened in the past, although not in cases involving Britain: for example, in 1829 Galotti was surrendered by France to Naples for common crimes but tried for his part in the revolt of 1820.

production of evidence that would justify their committal if the offence had been committed in Britain. Convicted persons were to be surrendered upon the production of evidence that would "according to the law of England, prove that the prisoner was convicted" of an extraditable crime. Such evidence was to be tendered in the form of: "Depositions or statements on oath, taken in a foreign state, and copies of such... and foreign certificates of or judicial documents stating the fact of conviction... duly authenticated". These documents were to be authenticated either on oath by a witness, or by the seal of a foreign minister of justice or other minister of state. To round everything off, Section 4(2) affirmed that all treaties had to be in conformity with the provisions of the Act, "and in particular with the restrictions on the surrender of fugitive criminals".

There is, therefore, absolutely no justification for asserting, as does Austin Stevens, that:

the Extradition Act of 1870 gave the government power to deport criminals wanted by other countries. It was hedged around with exceptions which were supposed to keep the right of asylum alive... The given target of this legislation was the anarchist, but the net was really set to catch someone much more vulnerable; the Jewish immigrant from Russia and Eastern Europe.⁷²

This really can only be described as complete and utter nonsense. Alien immigration was not an issue in 1870, and

72. A. Stevens, The Dispossessed (1975) p.46.

there were not any anarchists about in 1870. The "term anarchist... did not come to be deliberately adopted until 1876 and not on any scale until... 1877".⁷³ In Britain, there was no consciousness of an 'anarchist problem' until the 1890s.

The Extradition Act was not directed against political refugees generally, or any class of political refugees in particular: Parliament would not have stood for it if it had been. Furthermore, there is evidence that the bill passed precisely because it gave more than adequate protection to 'politicos'. Mill's view of the safeguards inserted in the Act was that with them, "the cause of European freedom [was]... saved from a serious misfortune, and our country from a great iniquity".⁷⁴ The easy passage of the Act may also have been partly the result of a recognition that the existing situation was unsatisfactory. Within government circles, such dissatisfaction had always been implicit. On occasion, this was made more explicit. As Hammond told the Select Committee, "it was no use signing a treaty if Parliament was to throw out the Bill enabling it to be brought into operation".⁷⁵ As the years passed, it does seem that this feeling came to be rather more widespread.

73. M. Fleming, The Anarchist Way to Socialism (1979) p.119. cf.pp.6-16.

74. J.S. Mill, Autobiography (1971 edition) p.177. It was later asserted that the Act was "passed to protect political offenders": Anon, 'Winslow Extradition Case', Spectator volume 49 (1876), p.581.

75. PP (1867-68) VII: 'Minutes of Evidence', p.151. cf. ibid. p.150; and Layard to Palmer (Private. 7 February 1866): Layard Papers, BL Add. MS 39118, ff.252-7.

In his important work of 1868, Frederick Gibbs (a well known legal writer) was quite clear upon this point:

At present the Foreign Office has to feel its way, uncertain as to the policy likely to be approved of by Parliament. It prepares a Convention... [which] is exposed to rejection, not so much on the ground of actual faults, as because... the subject is imperfectly understood; because the Foreign Minister of the day does not command confidence, or because Parliament entertains at the moment a suspicion of the country with which the Convention has been made... The labour of the Foreign Power is thus thrown away, as well as as our labour... the... Government... is placed in the helpless condition of having held out expectations which it is forbidden to fulfil. Discredit is throw on our policy, and the influence of our Foreign Office is weakened.⁷⁶

Fear of Parliamentary opinion was the main reason why Britain had so few extradition treaties. In 1870 she had just three: most European countries had more, the United States had 13, while France had more than 50.⁷⁷ Britain's relationship with extradition was undoubtedly more democratic than that of France (where extradition was more of an executive function) but led to unsatisfactory results. Surviving government records contain more than 25 examples of British criminals fleeing abroad and escaping prosecution, and several foreign criminal doing likewise by going to

76. F.W. Gibbs, Extradition Treaties (1868) pp.63-4.

77. Copies of many of these treaties may be found in: HO 45/1968, 3829C, 4453, 4730, 4732, 4733, 5723, 5728, 5781 & 5828.

Britain. These were no doubt just the tip of the iceberg.⁷⁸
Such a situation could not be tolerated indefinitely.

Furthermore, the situation was worsening: extradition was becoming more of a necessity than a luxury. Mid-nineteenth century advances in transportation made fleeing from justice a far simpler affair. "In our day... when communications constantly become more rapid, and facilities for escape proportionately increase, this question assumes a far more serious importance". Extradition "has acquired a very different importance since steam has been applied to locomotion, and men can pass from one country to another with more ease and celerity than they could pass from one parish to another, a hundred years ago".⁷⁹ In earlier times, it was difficult for criminals to escape, and "equally troublesome"⁸⁰ to bring them back. Similarly, with the changes in social fabric wrought by the industrial

78. cf. for example, FO 27/685; FO 5/443; HO 45/1263, 1621, 2389 & 5739. British criminals usually went to Belgium, Holland or Germany.

79. 3H, (C), 184, c. 2005, (3 August 1866): speech of Stanley; and P.B. Maxwell, 'Extradition', Westminster Review volume 89 (1868), p. 120. cf. Thornton to Stanley (No. 330) (Washington. 9 November 1868) (Copy): HO 45/8166, /3; Addington to Home Office (FO. 1 April 1847): FO 64/281; The Times 15 June 1866, p. 9 & 29 June 1870, p. 12; Daily Telegraph 3 January 1866, p. 4; Anon, 'Extradition', Saturday Review volume 29 (1870), p. 594; 3H, (C), 184, cc. 2018 & 2030, (3 August 1866): speeches of Collier and Bowyer; and PP (1867-68) VII: 'Minutes of Evidence', p. 207. The importance of improved transportation to the development of extradition has always been recognised; reference is made to it in most of the general works listed in the bibliography, cf. for example: J.B. Moore, Treatise on Extradition and Interstate Rendition (Boston 1891) volume 1, pp. 5-6; and Captain W.L.M. Lee, History of Police in England (1901) pp. 363-4.

80. Harvard Research, op.cit. p. 108.

revolution and the new ease of travel, great cosmopolitan cities sprang up all over Europe: fugitives fleeing abroad were now quite likely to be able to find small pockets of their own countrymen wherever they went, so making exile from home a less daunting prospect.

The commercial and business community in particular seems to have suffered because of Britain's meagre collection of treaties, and pressured government to take action. For example, in 1865, the Leeds Chamber of Commerce approached the government, "calling attention to the evil to which the Mercantile Community are subjected in consequence of the great facility with which unprincipled Tradesmen can evade their Creditors by quitting this Country, and taking refuge in Foreign States, and suggesting the propriety of her Majesty's Government taking measures for providing a remedy for the evil in question."⁸¹ Clarendon later noted that "the subject has taken such a hold on the Mercantile Mind", while Sir Thomas Henry thought that, "on commercial grounds", it was "very important for us to obtain back persons who abscond from this country". Extradition treaties were "in the

81. Hammond to Home Office (FO. 14 July 1865): HO 45/7781, /1. A similar approach from the Glasgow and West of Scotland Society for the Protection of Trade may be found in *ibid.* /2. In 1852 Canadian bank "Presidents, Cashiers and Managers" had petitioned the government regarding the poor state of British provision for extradition: Elgin to Pakington (No.28) (Quebec. 31 March 1852): CO 42/581, f.266. Chambers of Commerce continued to press for more efficient extradition throughout the 1870s: cf. HO 45/9497/6953, /32. In later years, when experience of particular extradition treaties showed up defects which worked to the disadvantage of the commercial community, bodies such as the Incorporated Trade Protection Society of Liverpool pressed for their amendment: cf. FO 5/2478.

nature of Mercantile Treaties, and are intended to afford protection chiefly against dishonest Clerks and Fraudulent Bankrupts". An analysis of extradition cases shows a strong bias towards 'commercial offences', such as fraudulent bankruptcy. The value of extradition to British economic life therefore cannot be doubted.⁸²

It was also perhaps significant that at the same time as transport was revolutionised, the 'commercial classes' were becoming more important in the political life of nations. This "brought definite changes in the outlook of people on the very concept of crime".⁸³ In previous times, when political power was held exclusively by monarchs and their feudal magnates, the only crimes that really mattered to governments were political crimes and crimes against the person, such as murder. However, merchants and traders viewed crime from a different perspective: what concerned them were crimes against bankruptcy laws, frauds by bankers and the like. As the traders came to hold political power, they brought their new ideas on crime into government, and so governments became more concerned with the suppression of ordinary crime.

82. Clarendon to Cowley (Private, 15 January 1866): Clar.PP. c.144, ff.42-5; PP (1867-68) VII: 'Minutes of Evidence', p.167; and Henry to Home Office (Bow St. 4 January 1876): HO 45/9379/42220, /46. cf. minute by Merivale (CO. 16 February 1852): CO 42/581, ff.269-70; Fane to Stanley (No.117) (Paris. 28 January 1867; E.S. Roscoe, 'Extradition', Fraser's Magazine volume 94 (1876), pp.164-5; 3H, (L), 122, c.1283, (25 June 1852); 3H, (L), 184, cc.1055-7, (19 July 1866); and 3H, (C), 184, c.2030, (3 August 1866): speeches of Normanby, Chelmsford and Taylor. It was no doubt significant that one of the experts examined by the Select Committee was Richard Mullens, Solicitor to the Association of Bankers.

83. S.D. Bedi, Extradition (Rotterdam 1966) p.17.

Extradition was perhaps more important to Britain than to other nations. Throughout the Victorian era immigration into Britain was unrestricted, and governments had no power to expel aliens. This lack of power markedly distinguished Britain from almost all other nations, which, if they could not get rid of criminals through extradition, could always expel them. Extradition was the only means by which Britain could rid herself of foreign criminals: in its absence, she might well become an asylum for many foreign criminals.⁸⁴

So highly did government value extradition, that it was decided not to make reciprocity a condition of concluding treaties:

in this and similar cases (e.g. reduction of duties) we do what we do for our own sakes as well as for that of France—and ask France to do what is good for her as well as for us. What good will it do us to keep in England the filth which France sends us because France refuses to give us the filth we sent to her? The point seems to me to be of considerable importance in principle.

The Law Officers noted that "the extradition of foreign

84. cf. 3H, (L), 198, c.558, (23 July 1869): speech of Clarendon. There was the question of expelling aliens under the royal prerogative, but the matter was "so uncertain and undefined, that no Government could attempt to call it into action, even in extreme circumstances": G.C. Lewis, Foreign Jurisdiction (1859) p.74, cf. W.F. Craies, 'Right of Aliens', Law Quarterly Review volume 6 (1890), pp.27-41; and T. Haycraft, 'Alien Legislation', ibid. volume 13 (1897), pp.165-86.

criminals is of itself a benefit to us, whether or not foreign states agree to surrender to us our criminals", and advised that "the Bill should not... insist on reciprocity as a sine qua non of any extradition Treaty being concluded".⁸⁵

It does seem that by the late 1860s the principle of extradition was fully accepted in Britain. In 1842 the Morning Herald asserted that, "If a nation cannot punish those by whom it is not aggrieved, far less can a state seize the subjects of another state to deliver them up for punishment", and in 1857, A.V. Kirwan referred to extradition as "a foreign and un-English word... an un-English thing", but these are the only examples I have come across of opposition to extradition per se.⁸⁶ More common was Clarke's assertion that although it could not be "scientifically described as a duty of perfect obligation", it was "certainly a duty of political morality".⁸⁷ Of course, there was much distrust of, and opposition to, extradition with particular states, but this was very far from opposition to extradition itself. Those who had opposed previous extradition bills had not opposed the principle itself.⁸⁸

85. Farrer to Jenkyns (Private, 10 March 1869); and Law Officers' Opinion by Collier, Coleridge and Twiss (12 April 1869): HO 45/8166, /5 & /8. Underlining in original. This was echoed by Anon, 'Extradition of Criminals', The Economist volume 30 (1872), p.1281.

86. Morning Herald 24 September 1842, p.4; and A.V. Kirwan, 'A Few Words on France', Fraser's Magazine volume 56 (1857), p.161.

87. E. Clarke, Treatise upon the Law of Extradition (1867) pp.106-7. cf. P.B. Maxwell, op.cit. passim.; and Working Man 18 August 1866, p.78.

88. Torrens "did not know any man" who opposed the principle: 3H, (C), 184, c.2014, (3 August 1866). cf. Lloyd's Weekly 14 January 1866, p.6; and Morning Star 4 August 1866, p.4.

To a degree, the passing of the Act may have been a consequence of the tightening up of party discipline in Parliament. As party ties strengthened from the mid-1860s onwards, notable 'independents' such as J.S. Mill, became ever more absent from the Commons; governmental support became a far less fluid affair. This led to the emergence of "a new phenomenon, which was to weaken Parliament's already limited powers in relation to the making of treaties... the introduction of the practice of passing legislation to enable governments to make treaties of a certain specified type in future without further reference to Parliament".⁸⁹ The Extradition Act was perhaps the most important illustration of this trend: other legislation of a similar type enabled governments to make agreements concerning seamen deserters, postal conventions and industrial property. The new procedure was less democratic than its predecessor, and further weakened MPs control of foreign policy, but as such was part of a wider trend: "It is literally true to say that as Parliament became more democratic its control over foreign policy declined".⁹⁰

On a more intangible level, it is possible to detect a shift in opinion in favour of extradition. "With the gradual realisation of the interdependence of States and of the

89. V. Cromwell, 'Private Member', Liber Memorialis Sir Maurice Powicke (Dublin 1963) p.209, cf. Anon, 'Proposed Law on Extradition', Spectator volume 41 (1868), p.1068, which felt this new phenomenon was a sign of "strong rule" which should be "largely extended".

90. H. Temperley and L.M. Penson, A Century of Diplomatic Blue Books (Cambridge 1938) p.ix.

existence of an international community"⁹¹ there was a growing awareness of the value of extradition in more general terms. A "communion of feeling in the main elements of social existence teaches all nations that they have the same essential interests and must aid each other in supporting the elementary laws of society".⁹²

This shift in opinion among the political-educated classes (from the mid-1860s) was perhaps best expressed by The Times:

Our Extradition Treaties have been passed discontentedly and suspiciously, and with a sort of sulky acquiescence. Most good Englishmen thought them very dangerous experiments. Nothing but the flagrant and yearly increasing evils of the old state of things induced them to acquiesce in the demand of jurists that nations should abandon their isolation and combine for the repression of the worst forms of crime.⁹³

By the late 1860s it could be confidently asserted that "the principle of Extradition is sound, humane, and just...

91. Harvard Research, op.cit. p.109.

92. The Times 9 September 1872, p.7.

93. The Times 4 August 1866, p.8. cf. Lloyd's Weekly 14 January 1866, p.6; Morning Star 4 August 1866, p.4; Morning Herald 4 August 1866, p.4; Daily News 7 August 1866, p.4; Anon, 'Extradition', Saturday Review volume 26 (1868), p.380; Anon, 'Extradition', The Economist volume 30 (1872), p.1281; Morning Post 23 November 1872, p.4. By the mid-1870s, popular reference works included small sections on extradition: e.g. B. Vincent, Haydn's Dictionary of Dates (15th edition, 1876) p.272; and C.E.H. Vincent, Police Code and Manual of the Criminal Law (5th Edition, 1886) pp.68-70.

its extension and establishment on a firm basis is one of those tasks which civilisation imperiously demands should be accomplished".⁹⁴ As the mid and late 1860s passed, fewer and fewer people would have disagreed.

It may be that the passing of the Extradition Act signalled the beginning of a convergence of ideals between liberal-capitalist Britain and an increasingly liberal and capitalist continent. This could perhaps be called that start of the "Europeanisation of the British".⁹⁵ There was nothing sinister in it: the right of asylum still remained more than secure, and British extradition policy was markedly more 'liberal' than that of her neighbours, but Britain and Europe were beginning to come together.

One might suggest that 1870 was a convenient time for a wide-ranging extradition law to be passed. American slavery had been abolished, and it was a few years since the continent had experienced the upheavals which sent political refugees flooding into Britain. Refugees were therefore not a particularly visible phenomenon in 1870, which made it easier to pass legislation which, although it in no way threatened them, might have been (mis)represented as such, had it been introduced at a time when foreign regimes were keen to persecute political offenders who had taken refuge in Britain. Just prior to 1870, therefore, the things which made MPs sensitive about extradition were less prominent.

94. Times 9 August 1867 p.9.

95. B. Porter, Britain, Europe and the World p.51.

Had the bill been introduced later, things might have been very different, for, as we shall see, in 1871-72, British protection of 'politicos' refugees once more became an issue.

Finally, it is possible to see the passing of the 1870 Act as part of Britain's gradual return to fuller participation in European affairs under Gladstone's first administration (1868-74). After the humiliations suffered over the Polish revolt and Schleswig-Holstein in 1863-4, Britain almost completely abstained from participation in European affairs. However, Gladstone favoured playing a more positive role, and under his leadership, Britain became more actively involved in foreign affairs.

In 1870, then, the time was ripe for the introduction and easy passage of the Extradition Act. The time had come when British extradition policy needed to be put on a sound footing, and the confusion and hesitancy of the 1850s and 1860s left behind. The Act did not mark the end of Britain's adherence to her right of asylum: rather, it marked Britain's assumption of her responsibilities in the punishment of crime. By 1880 Britain had 20 extradition treaties, and 42 by 1900. Similarly, the numbers of fugitives extradited to and from Britain increased rapidly.⁹⁶ Within a relatively short time after 1870, criminals had to try quite hard to escape the extended arm of the law, and no longer was Britain an asylum for common criminals.

96. cf. Appendices 1 and 2. .pa

CHAPTER 4

CHALLENGES TO THE RIGHT OF ASYLUM (THE 1870s)

Chapter Four: Challenges to the Right of Asylum (The 1870s)

Despite the Extradition Act, Britain's extradition experience after 1870 was perhaps just as difficult as ever. Problems arose almost at once. After the defeat of the Paris Commune in 1871, thousands of Communards fled abroad: perhaps 3,500 men, women and children eventually arrived in Britain.¹ The question was, would extradition be sought, or granted?

In fact, ministers decided against extradition before the fighting ended,² even though this would cause "very great... irritation" (even an "outburst of anger and indignation") in France, and bring Britain "into ill repute" with "most" European governments.³ However, in Britain the decision was popular. The Economist (Liberal) thought it could "hardly be questioned for a moment" that the Communards were political offenders. The Reformer (Radical) believed the government's "business" was to "maintain inviolate our laws of sanctuary", while Reynolds's asserted that any Communard extradition "would be an eternal blot, an indelible

1. P.K Martinez, 'Paris Commune Refugees in Britain', Unpublished Ph.D. Thesis, Sussex University (1981), p.54.

2. The negotiation of an expanded treaty was shelved because "persons implicated" in the Commune were likely to go to Britain: Lyons to Granville (No.678) (Versailles. 29 May 1871): FO 27/1973.

3. Lyons to Granville (No.678) (Versailles. 29 May 1871): FO 27/1865; and same to same (Private. 2 & 30 May 1871): Granv.PP. PRO 30/29/85. cf. Granville to Lyons (Private. 4 June 1871): Granv.PP. FO 362/4, ff.221-2; and Lyons to Hammond (Private. 5 June 1871): Hammond Papers, FO 391/13.

stigma upon the English character".⁴

Opinion was not, however, unanimous. The Tory Standard was especially strident: "To give up such men... is our duty... To extend to creatures like these... shelter... is to pollute the name of liberty". Lord Elcho stigmatised Communards as "authors of... the greatest crime on record", and called for them to be treated as "ordinary criminals".⁵ Privately, Bruce "distinguished himself from his colleagues by his violent dislike of the refugees": he regarded Pyat as a "scélérat, no more and no less".⁶

Opposition to the extradition of Communards was not generally due to any sympathy for their political beliefs or aspirations. (The welcome they received "was characterised, in the main, by hostility, reservation and indifference".⁷) Rather, it was based upon three factors.

4. Anon, 'The Extradition Question', The Economist volume 29 (1871), p.656; Reformer 3 June 1871, p.4; and Reynolds's 4 June 1871, pp.4-5. cf. Morning Post 1 June 1871, p.4; Eastern Post 3 June 1871, p.4; Pall Mall Gazette 31 May 1871, p.2; The Times 1 June 1871, p.9; Bee Hive 3 & 10 June 1871, pp.10 & 12; and Institute of Marxism-Leninism, Documents of the First International (Moscow 1964) volume 4, p.471.

5. Standard 29 & 30 May 1871, p.4; and 3H, (C), 206, c.1327, (26 May 1871).

6. P.K. Martinez, op.cit. p.426; and C. Gavard, Une Diplomate à Londres Lettres et notes (Paris. 1895) p.44, quoted in ibid. p.426. cf. E. Clarke, letter in The Times 31 May 1871, p.6; Daily Telegraph 30 May 1871, pp.4-5; and Anon, 'The Commune', Saturday Review volume 31 (1871), p.683.

7. P.K. Martinez, op.cit. p.39. cf. Anon, 'The Commune', Saturday Review volume 31 (1871), p.682; Reformer 3 June 1871, p.4; and Pall Mall Gazette 29 May 1871, p.1.

Firstly, they were political refugees, entitled to asylum.⁸ Secondly, a certain sympathy for them arose, engendered by the atrocities committed by the Versailles authorities. Perhaps 30,000 men, women and children were killed, and this had a considerable impact: "wholesale executions... sicken the soul... [They] seem inclined to outdo the Communists in their lavishness of human blood".⁹ Thirdly, ministers displayed a "sympathetic concern" for the fate of some of the more prominent individual Communards.¹⁰

In all official statements, ministers emphasised they had "no power to go beyond the laws which have been passed to enable us to fulfil our obligations with respect to extradition."¹¹ Granville thought the government position "impregnable, whether as regards French complaints, or Tory

8. cf. Liddell to Foreign Office (HO. 19 March 1872): HO 45/9303/11335, /1.

9. The Times 31 May & 1 June 1871, p.9. cf. P.K. Martinez, op.cit. pp.13 & 53; and Editorial comments, 'Paris Commune', Marxism Today volume 15 (1971), p.69. Most publications remarked on this: cf. for example, Pall Mall Gazette 26 & 29 May 1871, p.1; and Eastern Post 3 June 1871, p.4.

10. P.K. Martinez, op.cit. p.6. Gladstone wrote of his concern for Rochefort and Grousset: Gladstone to Garibaldi (Private. 23 June 1871): Glad.PP. BL Add. MS 44431, f.49; copy in H. Matthew (ed.), Gladstone Diaries (Oxford 1982) volume 7, p.513. cf. Lord Newton, Lord Lyons (1913) volume 1, p.383; Lyons to Granville (Private. 9 & 12 June 1871): Granv. PP. PRO 30/29/86; same to same (No.1015) (Paris. 19 August 1871): FO 27/1870; and Lyons to Hammond (Private. 15 September 1871): Hammond Papers, FO 391/13.

11. Gladstone to Granville (Private. 2 June 1871): Granv. PP. PRO 30/29/60. cf. Lyons to Granville (No.692) (Versailles. 3 June 1871): FO 27/1865; Hammond to Granville (Private. 5 June 1871): Granv.PP. PRO 30/29/104; Granville to Paget (No.99) (FO. 28 May 1871): FO 146/1520; and 3H, (C), 206, cc.1327-8, (26 May 1871): speech of Bruce.

objections".¹² In fact, "No claim was made by the French Government against any person for having taken part in the affairs of the Commune".¹³ France did issue a circular instructing its representatives to seek extradition and call on governments to take action against the refugees, but never communicated it to Britain.¹⁴ "Barely a week" after the Commune's defeat, France abandoned all hope of extraditing its leaders, let alone the refugees generally. Such was "imposing determination of Gladstone's Cabinet and British opinion, the French embassy could not summon up the courage to ask for the surrender of the refugees". Gavard "recorded his bitterness" at British policy, but nothing could be done.¹⁵

France was not the only power to have her designs against

12. Granville to Gladstone (Private. 3 June 1871): Glad.PP. BL Add. MS 44168, ff.107-12.

13. Liddell to Foreign Office (HO. 17 March 1876): HO 134/2, pp.29-30. This was prompted by an Austrian enquiry as to what policy Britain had adopted towards the Communards. The Home Office file on the matter (53797) is "no longer extant": D.J. Blackwood (HO Departmental Record Officer) to myself (31 October 1986). Y. Kapp, Eleanor Marx (1972) volume 1, p.157, wrongly states that France sought the extradition of Lissagaray and others. P.K. Martinez, op.cit. pp.6-7, erroneously states that France did not seek extradition because the sympathies of British juries for 'politicos' would make it difficult to secure it: juries had no role in extradition!

14. cf. P.K. Martinez, op.cit. p.55, giving its location in the Paris archives. Details of the circular may be found in The Times 29 May 1871, p.5; and Pall Mall Gazette 29 May 1871, p.7. Most nations responded favourably: cf. The Times 26-31 May 1871; Pall Mall Gazette 29 May-3 June 1871; W. McClellan, Revolutionary Exiles (1979) p.180; and S. Bernstein, 'The First International', Science and Society volume 16 (1952), pp.253-67.

15. P.K. Martinez, op.cit. pp.7 & 55.

Communards and the 'International' frustrated. Russia, Austria and Germany in particular advocated repression. For example, in 1871, Bismarck sought "common defence against common the danger", but Britain would have none of it.¹⁶ Gladstone thought the case made against the 'International' was "nil".¹⁷ In 1872, Spain called for joint action against the 'International', which "menaced" society "in its deepest foundations", and advocated making membership of it an extraditable offence. Britain replied with a spirited defence of the right of asylum: she rejected what she regarded as the paranoid continental fear of the 'International'. Existing British laws were sufficient to meet the case, and "this opinion" was "shared both by the Parliament and Public of this Country".¹⁸ The Saturday Review thought it "wholly out of the question" to amend extradition law "in the manner... suggested". Britain was "not in the habit of driving away anyone who chooses to come here", and there was no need "to be in the least afraid of

16. Memorandum communicated by Bernstorff (1 July 1871): FO 64/731. cf. Liddell to Foreign Office (HO. 12 July 1871): FO 64/735.

17. Minute by Gladstone (29 April 1870): FO 27/1844. cf. Bruce to Granville (Private. 12 July 1871): Granv.PP. PRO 30/29/65; W. Taffs, 'Unprinted Documents', Slavonic and East European Review volume 8 (1929-30), pp.702 & 705; A.F. Meyendorff, 'Unprinted Documents', Slavonic and East European Review volume 8 (1929-30), p.405; S. Bernstein, op.cit. pp.269-70; and J. Braunthal, History of the International (1966 edition) p.159.

18. De Blas to Villanueva (9 February 1872), communicated on 24 February: PP (1872) LXX: 'Correspondence... respecting the International', pp.715-22; and Granville to Layard (No.22) (FO. 8 March 1872): FO 72/1308. "Never before had a workingman's association been the focus of so much attention and... hysteria": S. Bernstein, op.cit. p.247.

the Communists".¹⁹ The reply gave Spain a "rude shock", and "incurred the strong displeasure of Bismarck",²⁰ but what else could have been expected?

In 1872-73 (during the course of treaty negotiations), Italy and France proposed articles to cover the case of fugitives extradited to them by American nations. It was to be possible (without formalities) to bring them to, say, Liverpool, go on to a Channel port, and then the continent.²¹ Such a provision was important if continental-American treaties were to be truly effective. As most trans-atlantic shipping docked in Britain, it was convenient to send fugitives from the Americas to Europe via Britain.

The 1870 Act did not authorise transit: a fugitive brought to Britain in pursuance of a foreign treaty would (if he disputed the foreign authorities' power to detain him) have to be released, or extradited in the normal way, necessitating the trouble and expense of a second proceeding. New legislation was needed, and the Law Officers, the Foreign

19. Anon, 'Legislation against the International', Saturday Review volume 33 (1872), pp.327-8; and Anon, 'Banished Communists', ibid. volume 33 (1872), p.651. cf. The Times 15 April 1872, p.11. In contrast, Baillie Cochrane (Tory MP for the Isle of Wight) called for the suppression of "this monstrous and detestable Association": 3H, (C), 210, cc.1183-98, (12 April 1872).

20. Layard to Granville (Private, 21 April 1872): Granv. PP. PRO 30/29/100; and J. Braunthal, op.cit. p.163.

21. Copy of Italian counter-draft in HO 45/9292/7003, /11; and cf. Lyons to Granville (No.941) (Paris, 18 November 1873): FO 83/631.

Office, and Henry (chief magistrate) advocated its enactment without delay.²²

Home Secretary Lowe, however, saw "insuperable objections" to the plan, but their nature was not made explicit.²³ His successor, Cross, thought likewise, and made his objections quite explicit: "I have had no scheme laid before me... which effectively... secures the right of asylum": a political refugee might arrive in Britain, and she would be powerless to prevent him being sent off to Europe. Unless some such scheme was found, Cross refused to agree to a bill providing for safe transit.²⁴ The Foreign Office asked him to change his mind and schemes were proposed which attempted to protect 'politicos',²⁵ but their authors admitted they gave "no guarantee", as states might try to "conceal" the "real nature of the offence" in question.²⁶ In addition, the schemes "would not answer the purpose", for in attempting to protect 'politicos', they failed to

22. Law Officers' Opinion by Coleridge, Jessel and Archibald (4 October 1872): HO 45/9292/7003, /12; Tenterden to Home Office (FO. 5 June 1874): HO 45/9324/17828A, /3; and Henry to Home Office (Bow St. 26 December 1872): HO 45/9510/17179, /6. The problem was known about before 1872: cf. HO 45/8163.

23. Reported in Liddell to Foreign Office (HO. 16 July 1873): FO 83/631.

24. Minute by Cross (HO. n.d.): HO 45/9324/17828A, /3. cf. Memorandum by Lushington (HO. 24 June 1874): ibid. /4a.

25. cf. Tenterden to Home Office (FO. 5 June 1874); memorandum by Lushington (HO. 24 June 1874) and Jenkyns (4 July 1874); Law Officers' Opinion by Baggallay and Holker (3 December 1874): ibid. /3, /4a & /6; and memorandum by Jenkyns (14 July 1874): HO 45/9740/A55548B, /3.

26. Memoranda by Lushington (HO. 24 June 1874) and Jenkyns (4 July 1874): HO 45/9324/1782A, /4a.

provide for easy, quick transit.²⁷ They were therefore abandoned. Once more they needs of efficient criminal justice clashed with the need to protect 'politicos', and again the latter were given first priority.

It was perhaps of no great concern to Britain that the failure to provide for transit meant that foreign fugitives were rarely sent via her, and had to go by less direct routes,²⁸ but in retaliation, foreign countries declined to allow criminals extradited to Britain to pass through their territories. Criminals surrendered by land-locked countries such as Switzerland could only be sent home via some other European country, and if her neighbours refused to allow transit through to Britain, the Swiss treaty would be quite valueless. Even with countries that did have ports, it was easier and cheaper to return them by way of land to either Hamburg or a Channel port, and then home by sea. This fact had clearly been in the minds of those who advocated providing for transit.²⁹

In 1876, Britain abandoned Kusel's extradition (after it was granted) because Switzerland's neighbours refused to allow his transit.³⁰ It was feared that when it became

27. Henry to Home Office (Bow St. 8 July 1874): ibid. /6.

28. Few cases are mentioned in Home Office papers: cf. HO 45/9378/41682.

29. cf. Henry to Home Office (Bow St. 8 July 1874): HO 45/9324/17828A, /6; and memorandum by March (FO. 14 May 1874): FO 83/631.

30. cf. FO 100/213-4 & 219; and HO 45/9423/59730. The British authorities clearly believed that Switzerland's neighbours refused to allow Kusel's transit as a measure of retaliation for British policy: cf. Tenterden to Home Office (FO. 19 January 1877): ibid. /14.

known that criminals could take refuge in Switzerland "with impunity the encouragement to crime may have very serious results", but Cross held that "the same difficulties remain that existed... before".³¹ Again his view prevailed. Cross was clearly thoroughly devoted to the right of asylum, and it was perhaps the fact that his position as Home Secretary involved him in such matters which led him to write: "I think the work here very interesting and like it very much".³²

In September 1870 the Foreign Office had circularised the Extradition Act, and followed up with a model treaty in March 1871. It was emphasised that Britain could not dispense with or alter the provisions included in the Act regarding the security of political offenders,³³ but not all governments were willing to accept them without question. In 1873, Russia proposed to qualify the political offence exemption by the insertion of an 'attentat clause'. Backed by the opinions of Henry and the Law Officers, the government

31. Tenterden to Home Office (FO. 19 January 1877); and minute by Cross (HO. n.d.): ibid. /14. In 1880 it was noted that difficulties over transit made it "almost impossible" to extradite from Switzerland: Minute by Liddell (HO. 14 May 1880): HO 45/9511/17179, /56. On transit generally, cf. S.D. Bedi, op.cit. p.158. The problem has now been solved by air-travel.

32. Cross to Salisbury (Private. 22 June 1878): 3M/E. F.J. Dwyer, 'Rise of R.A. Cross', Unpublished B.Litt. Thesis, Oxford University, (1955), makes no reference to his strong views on extradition.

33. cf. for example, FO 100/242.

refused to accept the proposal,³⁴ both because it was contrary to the terms of the Act and because they did not wish to do so. It would appear that this was all Russia was after, for here negotiations ceased.

In 1871, Belgium suggested that fugitives be allowed to waive their right not to be tried for additional offences: the Foreign Office replied that the proposal was inadmissible.³⁵ Incidentally, one other Belgian proposal was accepted: that extradition was not to be granted for 'acts connected with political offences'. Such a provision was "quite in accordance with the spirit of our law", which was "to make the exception for Political Offences as wide as possible".³⁶

Belgium accepted Britain's position with good heart, and the matter went no further. However, in the mid-1870s more serious difficulties arose over speciality, concerning Bourdiol and Anglo-American extradition.

Bourdiol was extradited to Belgium in 1874, and in March 1875 (in response to a Belgian enquiry), the Foreign Office (on the Law Officers' advice) stated that Britain had no

34. cf. Henry to Home Office (Bow St. 14 October 1873); Law Officers' Opinion by Coleridge, James and Bowen (6 November 1873): HO 45/9523/26329, /2 & /3; and Granville to Loftus (FO. 27 December 1873): FO 65/1325. For a discussion of the 'attentat clause', see above, chapter three.

35. cf. copy of the Belgian counter-draft; and Granville to Lumley (No.5) (FO. 21 February 1872): HO 45/9500/8589, /2 & /5. In 1873 Germany asked British consent to trying Theilkuhl for additional offences: it was refused, and the further trial did not take place: cf. FO 64/790 & 794.

36. Copy of counter-draft; and Henry to Home Office (Bow St. 8 December 1871): HO 45/95000/8589, /2 & /3.

objection to his re-extradition to France on fraud charges at the end of his sentence (in 1878).³⁷ However, in May 1876, Bourdiol's lawyer protested against the prospective re-extradition. Surprised, the Foreign Office turned to the Home Office for advice.³⁸

The Home Office (which, strangely, had not been asked its opinion before) in turn consulted Henry, who held re-extradition "would be contrary to the recognised principle of Extradition". In July the Law Officers reconsidered, and now advised against re-extradition unless Bourdiol was first given an opportunity to return to Britain.³⁹

Cross agreed, so placing the Foreign Office in a very "awkward" position. Anderson thought the second opinion "right but what must we do?".⁴⁰ The opinion of the Lord Chancellor (Cairns) was sought: re-extradition would be "contrary to the spirit and letter" of the law, but a difficulty was caused by the wording of the Belgian treaty, which did not quite match that of the Act. The former held that fugitives were not to be tried for additional offences "committed in the other country, that is to say, in

37. cf. Solvyns to Derby (15 March 1875): FO 10/365; Law Officers' Opinion by Baggallay, Holker and Deane (24 March 1875): FO 881/4370, No.9; and Derby to Solvyns (FO. 31 March 1875): FO 10/365.

38. cf. Tenterden to Home Office (FO. 12 May 1876):FO 10/374.

39. Henry to Home Office (Bow St. 19 May 1876); and Law Officers Opinion by Giffard, Holker and Deane (10 July 1876): HO 45/9372/38729, /16 & /18.

40. cf. Lushington to Foreign Office (HO. 22 July 1876); and memorandum by Anderson (FO. 23 July 1876): FO 10/374. 41. Memorandum by Cairns (15 August 1876): FO 881/4028, No.12.

Belgium". This did not prohibit re-extradition for an offence committed in France: "by departing from the words of the Act", the Treaty "left a loophole by which the obvious purpose of the Act... is frustrated". If re-extradition were allowed, 'politicos' were placed in a vulnerable position: France might extradite a fugitive for a criminal offence, but then re-extradite him to Russia for a political offence. However, because of the treaty's wording, Cairns did not see how Britain could interfere.⁴¹

Bourdiol's lawyer was informed that Britain could do nothing, but it was also stated that in 1875 (so the Foreign Office believed) the Brussels Court of Appeal had ruled against the re-extradition to France of a fugitive extradited from Holland to Belgium. It should therefore have been possible to prevent re-extradition in Belgian courts. Here the correspondence ended, with no definite indication as to Bourdiol's ultimate fate: speculation would be somewhat idle.⁴²

Britain tried to sign a new Anglo-American treaty on the basis of the 1870 Act,⁴³ but various factors inhibited progress. Most significantly, a difference of opinion arose over speciality. Secretary of State Fish wanted a less restrictive provision than that inserted in the Act, but it would have to be amended to allow this, and "it would be in vain to ask the... Commons to dispense with any of the safeguards".⁴⁴ The 1842 treaty therefore continued, and under it, the different approaches to speciality received practical expression. One Caldwell was extradited for

forgery and uttering forged paper, but tried for bribery also. As they had in 1865, the Law Officers advised there was nothing in the treaty to prevent such trial, and the government did not intervene.⁴⁵ However, differing perspectives on speciality later turned into a practical disagreement which embittered Anglo-American relations.

Lawrence was extradited in 1875 for forgery, but it was later learned he was likely to be tried for other offences.⁴⁶ The Home Office wanted to protest at once: such trial would be "contrary to the implied understanding on which he was surrendered", and had the magistrate known of American intentions, he would have refused extradition: to have granted it would have been contrary to the terms of the 1870 Act. Foreign Office officials were less sure. The treaty contained no stipulation on speciality, and it was "difficult to see" what relevance the Act could have to the treaty. The Law Officers considered the legal aspects of the matter, but were unable to agree with one another:

42. Derby to Cornelius (FO. 19 September 1876): FO 10/374. However, in 1881 Belgium sought to amend the Anglo-Belgian treaty so as to allow re-extradition, seemingly indicating that she felt it was not authorised: cf. HO 45/9501/8589, /80-81.

43. cf. Thornton to Fish (22 September 1870): HO 45/9324/17828, /1.

44. Thornton to Granville (No.403) (Washington. 10 October 1870): ibid. /1; and Henry to Home Office (Bow St. 16 February 1874): HO 45/9497/6953, /22.

45. cf. Law Officers' Opinion by Collier, Coleridge and Twiss (14 April 1871): CO 885/11, No.699; Kimberly to Young (CO. 16 May 1871): PP (1876) LXXXII: 'Extradition of Caldwell', p. 197; and J. George, 'The Principle of Speciality', Cornell International Law Journal volume 12 (1979), p. 314n.

46. Thornton to Derby (Telegraphic. Washington. 28 August 1875); and same to same (Telegraphic. Washington. 4 September 1875): HO 459370/4220, /24 & /27.

Henry gave a further different opinion.⁴⁷

Lister felt it was time "to take a more general and extra-legal view". Lawrence was a "scoundrel", but "we must... be careful not to establish a precedent which might be used to the prejudice of some more estimable member of society". Bourke thought it "better to denounce the treaty altogether than to give up the principle": Derby agreed.⁴⁸ The Home Office concurred, stating the "Cross feels.. this question of the right of asylum is one above all others upon which public opinion would with justice be highly sensitive", and that "it has always hitherto been assumed" that America accepted the speciality principle. The Burley and Caldwell cases showed that this was nonsense, but no-one seems to have recognised their importance. Ministers and officials were perhaps unaware of their existence: none of those involved in the decisions of 1875 had been involved in them.⁴⁹

47. Memorandum by Liddell (HO. n.d.): HO 45/9379/42220, /24; Unattributable memorandum (FO. 22 September 1875): FO 5/1708; Law Officers Opinion by Baggallay, Holker and Deane (25 October 1875): HO 45/9401/52942, /15; and Henry to Home Office (Bow St. 22 November 1875): HO45/9379/42220, /33. cf. 3H, (L),230,cc. 171-4, (24 July 1876): speech of Granville.

48. Memorandum by Lister (FO.27 October 1875)); Memorandum by Bourke (FO. n.d.); and minute thereon by Derby (FO. 2 November 1875): FO 5/1780.

49. Liddell to Foreign Office (HO. 25 November 1875): FO 414/35, No.62. Critics of government policy later seized on this point: "we knew at least 10 years ago that the U.S. disputed the view of the treaty now contended for": Harcourt to Granville (Private. 19 July 1876): Granv.PP. PRO 30//29/29. cf. Granville to Hammond (Private. 25 May 1876): Hammond Papers, FO 391/27; 3H, (L),230,cc. 1779.1803 & 1805, (23 July 1876): speeches of Granville, Hammond and Coleridge; and 3H, (L),231,c.398, (3 August 1876): speech of Selborne. When forced to recognise past policy, the government merely answered that it had been wrong: cf. 3H, (L),230,c.1790, (24 July 1876); and 3H, (L),231, c.386, (3 August 1876); speeches of Derby and Cairns.

Thornton was instructed to discover whether Lawrence was to be tried for additional offences, and if so, to protest. Fish stated that the treaty made no reference to speciality, and claimed the right to try Lawrence for additional offences, but could not "yet say whether he will be". He would be tried for forgery: a decision would then be taken as to other charges.⁵⁰

The Foreign Office faced conflicting pressures: on the one hand there was the importance of good American relations and extradition itself, while on the other, Cross continued to press for vigorous action, "as he himself entirely shares the sensitiveness of the country as to the question of the right of asylum". Thornton was instructed to protest "as strongly as possible" if Lawrence was tried for additional offences,⁵¹ but indications began to appear that he would not be. It seemed likely that he would be convicted of forgery, in which case he would not be tried for other crimes. Thornton had heard that the Attorney General was opposed to any further trial, and that Fish and the President were "being converted".⁵²

50. Derby to Thornton (Telegraphic. FO. 26 November 1875: FO 414/35; and Thornton to Derby (Telegraphic. Washington. 27 November 1875: HO 45/9379/42220, /35. It would perhaps have been wiser not to have approached Fish until Lawrence had been tried for additional offences: cf. 3H, (L), 230, cc. 1779 & 1796, (24 July 1876): speeches of Granville and Kimberley.

51. Ibbetson to Foreign Office (HO. 7 December 1875): FO 414/35, No.74; and Derby to Thornton (Telegraphic. FO. 7 December 1875) HO 45/9379/42220, /41.

52. Thornton to Derby (No.319) (Washington. 6 December 1875): FO 414/35, No.81; cf. same to same (Telegraphic. Washington. 11 January 1876): HO 45/9379/42220, /48; and (Private. 18 January 1876): Thornton Papers, FO 933/99, ff.1-6.

However, Lawrence's fate was now not the only issue. Fish's claim rendered it "impossible for the English Government to surrender another fugitive until a new treaty or engagement shall have been entered into".⁵³ The 1870 Act stipulated that fugitives were not to be surrendered "unless provision is made by the law of the state, or by arrangement" that speciality would be observed.⁵⁴ In the meantime, America sought the extradition of another fugitive, Winslow, for forgery, and Fish was informed that before he could be surrendered (extradition was granted), an undertaking would be required as to speciality. Fish refused ("pride alone" would prevent him from making the concession), and regarded its requirement and the non-surrender as violations of the treaty. Thornton was "inclined to think that even without the condition no attempt would be made to try" Winslow for additional offences,⁵⁵ and Fish stated he would not be, but Cross refused to accept "a mere verbal statement" as the 'arrangement' required by the Act.⁵⁶

A question of principle was at issue:

53. Henry to Home Office (Bow St. 4 January 1876): HO 45/9379/42220, /46.

54. The government was almost severely embarrassed when a magistrate stated that a fugitive before him, Carr (extradited from Germany), could be tried for any offence. Cross acted quickly to prevent trial for any but the extradition offence. cf. Liddell to Hadley (HO. 28 February 1876): HO 134/1, p.718; and The Times 25 February & 14 March 1876, p.12.

55. Thornton to Derby (Telegraphic. Washington. 18 February 1876) (Copy): HO 45/9401/52942, /2.

56. Same to same (Telegraphic. Washington. 5 March 1876); and Liddell to Foreign Office (HO. 7 March 1876): HO 45/9401/52942, /10. The surrender of two further prisoners (Brent and Grey) was granted but delayed.

Britain did not think America would desire or seek the surrender of political refugees, but the construction of Treaties of this kind must be general... the same words cannot have different meanings when applied to different countries... [the] surrendering country... must be the judge of whether the offence is, or is not, political... if a prisoner is surrendered on the one charge and tried on the other, the political ingredient is withdrawn from the judgement of the surrendering country.

The "only safeguard" of "the right of asylum" was "the maintenance" of the speciality principle.⁵⁷ The government did not view the issue in the narrow context of Anglo-American extradition. If the point was conceded to America, it could hardly be refused to less trustworthy regimes.

By this time, the dispute had become public knowledge: there was some support for the government. If speciality was abandoned, "what would there to be prevent a prisoner being tried for a political offence" after extradition on a criminal charge, and the same policy had to be applied to all nations.⁵⁸ Still, The Times could not give "unreserved approval" to the actions of either government. The Saturday Review (independent) thought criminals should be tried for

57. Derby to Hoffman (FO. 30 June 1876): LXXXII: 'Further Correspondence', p.145; and Liddell to Foreign Office (HO. 29 April 1876) FO 414/35, No.185. cf. Henry to Home Office (Bow St. 14 March 1876): HO 45/9401/52942, /13.

58. Pall Mall Gazette 25 February 1876, p.4. cf. Anon, 'Inside... the Extradition Difficulty', Nation (New York) volume 23 (1876), p.101; Anon, 'Winslow's Case', American Law Review volume 10 (1876), pp.617-25; and The Times 5 & 17 April 1876, pp.9 & 10.

every offence they had committed, while the Spectator (Liberal) doubted the "legal skills" of those responsible for British policy: they were "wrong" in their interpretation of the law and the treaty. Furthermore, the dispute was "wholly unnecessary", for America was as devoted to the right of asylum as Britain.⁵⁹

Although it looked increasingly unlikely that anyone was to be tried for additional offences,⁶⁰ a cast iron guarantee as to speciality was insisted upon. It was also asserted that Britain has "always" maintained the principle, and that the 1870 Act was not relevant, for simply under the treaty and the "general law of extradition", Britain would have upheld speciality:⁶¹ again this was at variance with past practice.

However, since the Americans were unlikely to give way, and the consequences of ending extradition would be disastrous (especially for Canada), Derby suggested

59. The Times 16 June 1876, p.9; Anon, 'Extradition Dispute' Saturday Review volume 41 (1876, p.507; Anon 'Winslow... Case', Spectator volume 49 (1876), pp.5680-2. cf. Anon, 'Extradition Treaty', Nation (New York) volume 22 (1876), p332. The Saturday Review thought it "impossible to dispute Fish's interpretation of the treaty: Anon, 'Extradition Difficulty', The Economist volume 34 (1876), p.535, agreed.

60. It seemed that Lawrence was not to be tried at all: the prosecution was considering allowing him to turn States' evidence. He later pleaded guilty to forgery, no sentence was imposed, and he was released on bail. In June, Fish unofficially stated that Lawrence was only to be tried for forgery. cf. Thornton to Derby (Private, 23 May & 6 June 1876); Thornton Papers, FO 933/99. ff.83-91 & 100-6; and same to same (Telegraphic. Washington 26 May 1876) (Copy): HO 45/9379/42220, /60.

61. Derby to Hoffman (FO. 30 June 1876): PP (1876) LXXXII: 'Further Correspondence respecting Extradition', p.144; and Derby to Hoffman (FO. 4 May 1876): FO 414/35, No.204.

resuming negotiations. Fish agreed, but "would not venture to submit a Treaty to the Senate" whilst Britain continued to refuse to surrender fugitives whose extradition had been properly granted. A compromise was needed, and Derby had undertaken to try and find one.⁶²

After some debate, a plan put forward by Tenterden⁶³ was adopted. As a "temporary measure", until a new treaty was signed, Britain would resume "without asking for any engagement" on speciality. Fish was, however, reminded that Britain had the power to terminate the treaty whenever she wished: the implication being (it was made explicit elsewhere) that it would be if the speciality principle was actually infringed.⁶⁴

To facilitate the conclusion of a treaty, the government would amend the law so as to allow a fugitive to be tried for any crime "covered by the facts proved" when extradition was demanded, or for any extraditable offence, provided British consent was "asked and given", and evidence was furnished that would have justified extradition for the additional

62. Derby to Hoffman (FO. 11 April 1876): Thornton to Derby (Telegraphic. Washington. 8 June 1876): HO 45/9401/52942, /18 & /64; and 3H, (L), 230, c.1794. (24 July 1876). cf. Thornton to Tenterden (Private. 2 May 1876): Tenterden Papers, FO 363/4, ff.248-9; Carnarvon to Derby (Private. 13 August 1876): *ibid.* /6, ff.72-3. Granville called for some means to be found of resuming extradition: 3H, (L), 230, cc.1781-2, (24 July 1876).

63. cf. Memorandum by Tenterden (FO. 7 August 1876): FO 5/1675, f.125.

64. Derby to Thornton (No.267) (FO. 14 October 1876). cf. same to same (No.236) (FO. 19 August 1876): FO 881/3069, Nos. 27 & 67; and 3H, (L), 232, c.252, (13 February 1877): speech of Derby.

offences.⁶⁵ This would give "the widest possible facilities" for the punishment of criminals "consistent with the strict maintenance of the right of asylum".⁶⁶

Fish agreed to the temporary arrangement, and extradition resumed, as did negotiations.⁶⁷ He proposed that fugitives be liable to trial for any extraditable offence, but made no provision for consent. This did not "so effectually guarantee the... right of asylum" as the British proposals. Fugitives surrendered for crimes might be tried for political offences, and the only remedy would be to denounce the Treaty: "it would be undesirable to frame a Treaty with so palpable a blot in it". Furthermore, acceptance of Fish's proposal would lead to "great additional difficulty" in Parliament, and render the success of the measure "very doubtful".⁶⁸ It was rejected.

The idea of amending the 1870 Act in some way was popular. The Spectator felt the "policy of the Act" was

65. Same to same (No.237) (FO. 19 August 1876): FO 881/3069, No.28.

66. Liddell to Foreign Office (HO. 3/1/77): HO 45/9498/6953, /65A.

67. cf. Thornton to Derby (Telegraphic. Philadelphia. 1 November 1876): FO 881/3069, No.75; and Thornton to Tenterden (Private. 10 October 1876): Tenterden Papers, FO 363/4, ff.262-4. This departure was generally welcomed in Britain: cf. Pall Mall Gazette 29 December 1876 p.4; The Times 26 December 1876, p.7; and 3H, (L), 232, c.250, (13 February 1877): speech of Granville.

68. cf. Thornton to Derby (Telegraphic. Washington. 13 December 1876): FO 881/3069, No.103; Tenterden to Home Office (FO. 18 December 1876): HO 45/9498/6953, /68; Liddell to Foreign Office (HO. 3 January 1877): ibid. /65A. cf. Minute by Liddell (HO.20/2/76): ibid. /62.

"by no means so clearly beyond doubt, that it should be treated as if it were part of the Constitution... A proviso forbidding extradition without a pledge" that there would be no prosecution for political offences "would be amply sufficient". The Economist thought the Act's provision on speciality "a mistake, and that we should do well to dispense with it". There "should clearly be a limit to the sacrifice this country is willing to make for the sake of protecting the asylum for political refugees". The Saturday Review hoped it would not be "beyond the scope of legislative ingenuity" to find a way of protecting 'politicos' and not criminals, but noted "public opinion would condemn with irresistible force" any measure which "seemed to infringe" on the right of asylum. It suggested the government should retain a discretionary power to refuse extradition in cases involving "a confusion between ordinary... and political offences". In Parliament, Staveley Hill (Tory) proposed amending the Act to allow fugitives to be tried for any extraditable offence, and other speakers supported him, or at least wanted the idea to be debated.⁶⁹

The Times felt insuperable problems were caused by the fact that any concession made to the United States could not be refused to other nations. Whilst the Act could be

69. Anon, 'Winslow... Case', Spectator volume 49 (1876), p.581; 'Extradition Difficulty', The Economist, volume 34 (1876), p.535; 'Extradition Quarrel', The Economist volume 34 (1876), p.735; 'Extradition Controversy', Saturday Review volume 41 (1876), volume 41 p.607; and 'Extradition Deadlock', Saturday Review volume 41 (1876), p.667. 3H, (C), 230, c.500, (27 June 1876). cf. 3H, (L), 230, cc.1782, 1794, 1798 & 1807, (24 July 1876).

"criticised in some particulars", its "main lines cannot be altered in the present temper of the English people... the right of asylum is as dear to the citizens of this country as it was... twenty years ago": any trial for additional offences should depend upon the consent of the government. Even this change might have to wait "a couple of Sessions" before it could be passed. The right of asylum had to be maintained "whether the ordinary criminal benefits... or not", but whether such protection or ordinary criminals was unavoidable had not yet "received half enough consideration".⁷⁰

Attempts to frame a treaty were made more urgent by the occurrence of a case in which it seemed likely that Britain would have to act on her threat to terminate the 1842 treaty.⁷¹ Cairns suggested a "special treaty" with America: "I dare say Parliament would not agree to alter the general Act: but as far as I can judge... there would be no objection to a concession to the extent proposed to the United States". However, the Cabinet decided on "no concession to the Yankee and no special Legislation".⁷²

70. The Times 25 July 1877, p.9; 4 August 1876, p.10; 16 February 1877, p.9; and Pall Mall Gazette 17 July 1876 p.1; and 26 July 1876, p.2.

71. Hawes was surrendered for forgery but it was feared that he would also be tried for embezzlement. In the event, he was acquitted of forgery and a local American court refused to allow his trial for embezzlement. The court was not however, of sufficient standing for its judgement to be used as a precedent in other cases: cf. HO 45/9434/63510; and FO 5/1713.

72. Cairns to Tenterden (Private. 22 February 1877): FO 5/1677, ff.217-9; and Liddell to Tenterden (Private. 9 March 1877): FO 5/1677, ff.238-9. cf. Carnarvon to Cross (Private. 2 March 1877): Cross Papers. BL Add. MS 51268; Cross to Carnarvon (Private. 2 March 1877): Carnarvon Papers, PRO 30/6/9, f.64; and Liddell to Foreign Office (HO. 31 March 1877): FO 881/3456, No.56.

In April, Evarts (Fish's successor) proposed that fugitives should be liable to trial for any extraditable offence, provided that at least 60 days notice was given to the surrendering country of the intention to prosecute for additional offences. British consent would not be required, but the 60 days' notice would "give time for representation and remonstrance".⁷³ The proposal met with varying reactions. It would be a sufficient security as regards America, but; "There might obviously be a danger with a European power". Cross agreed. Tenterden did not think this "would really be of any good". Only Governments instituted political prosecutions, and they "would not be scrupulous in concealing... facts... a man surrendered... to Cuba... would no doubt have been shot long before the Spanish gave an intimation of the trial of the second offence".⁷⁴ Carnarvon thought it could "safely be accepted", and Blake (Canadian Justice Minister) could see "no good reason why" Britain should prevent the trial of fugitives for "any non-political crimes", but they were in a minority, and Evarts' proposal was rejected.⁷⁵ Thornton feared Evarts would "never" agree that consent should be required for a trial for additional

73. Thornton to Derby (Telegraphic. Washington. 24 April 1877): FO 881/3456, No.69. cf. Plunkett to Tenterden (Private. 10 July 1877): Tenterden Papers, FO 363/3.

74. Memoranda by Cairns (27 April 1877): FO 5/1677, ff.72-4; by Lushington (HO. n.d): HO 45/9498/6953, /92, reporting Cross' view: and by Tenterden (FO. 2 July 1877): ibid. /104.

75. Herbert to Foreign Office (CO. 1 May 1877): FO 881/3456, No.73, reporting Carnarvon's view: and Blake to Carnarvon (7 August 1876): HO 45/9497/6953, /46. cf. Derby to Thornton (Telegraphic. FO. 5 May 1877): FO 881/3456, No.76.

offences: Britain regarded this stipulation as essential.⁷⁶
Complete deadlock had been reached.

The matter was "drifting into a very awkward position", and again it was Tenterden who came up with a possible solution. The 1870 Act was passed on the recommendation of a Select Committee, and it would be "very difficult" for ministers to "override that... and propose a new Act" of their "own notion". However, if a Royal Commission considered the issue, ministers "would then be in a position either to amend the Act... in the sense advocated by the Americans (if the Commission adopted that view), or to tell the Americans point blank that having again examined the whole question we could only do what the Commission advised". Whilst it sat, the 1842 treaty could be kept in force.⁷⁷

The Royal Commission was established on 18 August 1877,⁷⁸ and met in closed session between 11 November and 1 May 1878. In a report issued in June, the Commissioners held that extradition was "founded on a twofold motive": that it was in everyone's interest for criminals to be punished, and that states' had no interest in sheltering foreign

76. Thornton Derby (Private. 1 May 1877): Thornton Papers, FO 933/101, ff.515-20; and Liddell to Foreign Office (HO. 29 June 1877): HO 45/9498/6953, /99.

77. Minutes by Tenterden (FO. 27 & 30 June & 7 July 1877); Tenterden to Liddell (Private. 28 June 1877); and minute by Derby (FO. n.d.): FO 83/580.

78. The commission under which it was established was reprinted in the Morning Post 22 August 1877; copy in Papers Relating to the Foreign Relations of the United States for 1877 (Washington 1877) pp.288-9.

criminals. In outlining what may be termed the 'philosophy of extradition', the Report made explicit the assumptions and premises which had implicitly lain behind the support found in government circles for extradition since the 1840s.

Extradition should cover all offences "which it is the common interest of all nations to suppress", but a country:

can scarcely be said to have... an interest in the particular form of government, or in the particular ruling dynasty, of another, as that it should be called upon to make common cause with it

against 'politicos'. Civil war and rebellion cause death and destruction:

yet both from history and our own experience we know that there are exceptional instances in which resistance to usurpation or tyranny may be inspired by the noblest motives, and ...command sympathy... the general sentiment of mankind is against the surrender of the political exile.

However, the Commissioners were unwilling to leave the political offence exemption as it stood. There were "forms of revolting crime" which lost "none of their atrocity from their connection with political motive". It should be enacted that the authors of acts which would be regarded as criminal were it not for the existence of a political motive, should not be exempt from extradition "unless the act, to which a political character was sought to be ascribed, occurred during a time of civil war or open insurrection".

Since genuine political crimes might be committed outside such a situation, the government should retain a discretionary power to refuse extradition for such acts.

To illustrate their conception of 'forms of revolting crime', the Commissioners cited the examples of the assassination of a reigning sovereign, and the destruction of a prison or the murder of police in an attempt to rescue political prisoners. They were clearly influenced by Britain's experience of Fenian 'outrages'. In September 1867, a leading Fenian named Kelly was arrested at Manchester, but the police van taking him to prison was attacked, Kelly rescued, and one of the guards killed. In December 1867, in an attempt to rescue Burke (one of the organisers of the Manchester rescue), Fenians blew up an outer wall of Clerkenwell prison, London. The rescue bid failed, but the bomb was hopelessly overstrength: houses were flattened, and men, women and children killed and maimed.⁷⁹ This demonstrates the arbitrariness of the definition of political offences: had these events not occurred, it is most unlikely that the Commission would have singled them out as being outside the political offence exemption. The definition of political offences is very personal, dependent upon experiences and perceptions, rather than being any hard

79. cf. HO 45/7799; Gathorne-Hardy Papers, BL Add. MS 62537, ff.16-20; W. D'Arcy, Fenian Movement (New York 1947) pp.268-9 & 276; F.L. Crilly, The Fenian Movement: The Story of the Manchester Martyrs (1908); J. Devoy, Recollections (Shannon 1969 edition) p.244; T.E. Hachey, 'Political Terrorism', in Y. Alexander (ed.), International Terrorism (New York 1976) p.101; N.E. Johnson (ed.), Diary of Gathorne Hardy (Oxford 1981) pp.49-57; N. McCord, 'Fenians and Public Opinion', in M. Harmon (ed.), Fenians and Fenianism (Dublin 1970) pp.46-54; and L. O'Broin, Fenian Fever (1971) pp.193-202 & 210-12.

and fast legal maxim.

As for speciality, "Political offences... excepted", there was "no reason" why fugitives should not be tried for any offences whatever. To prevent trial for political offences, it could be stipulated that fugitives were only to be tried for offences of "an extradition should be refused unless a "binding engagement" was obtained from the state seeking extradition that he would only be tried for non-political crimes.

However, it is significant that this was the only issue on which the Commissioners were not unanimous: Torrens submitted a minority report. The recommendation - he wrote - if implemented, "might be misunderstood as an invitation to a foreign Government to deprive its subjects of the right of asylum". Political refugees could be persecuted without being tried for political crimes: persecution could take the form of prosecution for any number of bogus common crimes. Maintaining the speciality principle as it stood was the only means of guaranteeing the right of asylum.

One other recommendation deserves mention. The lack of provision for safe transit constituted "a defect, by which extradition is liable to be frustrated ", and should be dealt with. Justices of the Peace (on the application of the Consul of the state to which the fugitive had been surrendered, and upon the production of proof that the fugitive had been duly extradited for an extraditable offence), should be empowered to issue a warrant authorising

the fugitive's detention and conveyance through Britain.⁸⁰

The government reaction to the Report was detailed in a memorandum prepared for submission to the Cabinet. The implementation of the recommendation on transit would be "most useful", but Liddell (perhaps mindful of Cross' previously expressed views) hesitated from advising its immediate adoption, noting that this would be "very desirable... if possible".

Liddell believed the Commission's views on political offences to be "substantially in accordance with the view the Government has always taken as to the relative gravity of the offences committed by the Fenian convicts... It would therefore seem desirable that some declaration should be made in any new Act that such offences... should not be considered as political". However, defining political offences as those committed 'during a time of civil war or open insurrection' required:

graver consideration. Those are wide terms. For instance: Supposing a landing of American Fenians in a remote part of Ireland, and an arming of 200 or 300 peasants, an attack on a police-barrack, and some constables murdered. Would that be civil war or open insurrection? Would it not be more like the Manchester case?

Even when people wished to exclude the same offences they

80. Copies of the Report may be found in: PP (1878) XXIV, pp.903-17; CO 323/362, ff.32-9; and C. Parry (ed.), op. cit. pp.805-19. On the selection of its members, cf. Cross Papers, BL Add. MS 51271, f.189.

could not agree on a definition.⁸¹ Liddell noted that the Commission's recommendations on speciality were "very important", but made no comment. He did, however, note that, "Attention is particularly drawn to the protest of Mr. Torrens". It is significant that this was the only recommendation to receive ministerial comment: Cross foresaw "the gravest political difficulties" in carrying it out.⁸²

Unfortunately, no record survives of the Cabinet reaction to the Report. The Americans thought the Commission was established "for the purpose of producing a change in the act of 1870",⁸³ but it appears that the Report, in so far as it referred to speciality, was not to the government's liking. The scheme advocated bore no relation to that which the government advocated, and did not correspond to what it was believed Parliament would accept. Torrens' minority report was probably significant: had the Commissioners been

81. His example related to a planned Fenian rising of 1865, in which "a body of 200 men was to attack every police barrack, slaughter the police and seize their arms": L. O'Broin, op. cit. p.12. The majority of Britons never regarded Fenian criminals as 'political' in the sense of deserving protection: "The recent atrocities... have... outraged the moral sense of the whole community, and drawn upon the perpetrators an amount of disgust seldom bestowed in this or any other country upon political offenders": Anon, 'Fenianism', Blackwood's Edinburgh Magazine volume 103 (1868), p.222.

82. Memorandum on the Report of the Royal Commission on Extradition. Printed for the use of the Cabinet. (21 February 1879): HO 45/9498/6953, /114. What press reaction there was was generally favourable to the Report: cf. Anon, 'Extradition', Saturday Review volume 45 (1878), pp.774-5.

83. Pierrepont to Evarts (London. 22 August 1877): Papers Relating to the Foreign Relations of the United States for 1877 (Washington 1877) p.288. Thornton assumed the Report would be implemented: cf. Thornton to Tenterden (Private. 11 November 1879): Tenterden Papers, FO 363/4, ff.296-7.

unanimous it would have been easier to persuade Parliament to amend the Extradition Act. Anglo-American extradition therefore remained in the same unsatisfactory position, even though the Americans would have happily signed a treaty based upon the Report.⁸⁴

The conduct of the government from 1875 onwards could hardly be described as wise. It acted with a lack of political judgement and without a full appreciation of all the relevant facts: the 1870 Act could have no relevance to a treaty signed in 1842, and the American view of speciality had been known about for years. Furthermore, neither Lawrence nor Winslow was actually tried for additional offences. Had Britain avoided approaching Fish until a fugitive was actually tried for an additional offence, the controversy might never have arisen. By approaching Fish when they did, ministers gave the appearance of attempting to interfere in American affairs: this was resented bitterly by Fish, and made an amicable solution of the matter all the more difficult. Britain would certainly have resented, and not tolerated, a similar approach had the roles been reversed.⁸⁵ Nevertheless, it has to be admitted that ministers acted from the best and noblest of

84. cf. Welsh to Evarts (London. 22 June 1878): Papers Relating to the Foreign Relations of the United States for 1878 (Washington 1878) p.268.

85. In addition, after the establishment of a Commission had been decided on, it was found that the favoured British proposal (British consent to trial for additional offences), was unworkable: "the delay would be fatal to justice—the witnesses could not be detained, great expense etc.": memorandum by Tenterden (FO. 2 July 1877): HO 45/9498/6953, /104. It was then suggested that fugitives should be given the right to show they would be tried for political offences after trial for the extradition offence, but nothing was done: ibid.

motives: the maintenance of the right of asylum.⁸⁶ As a result, despite strong pressures to the contrary, the absolute protection accorded to political refugees in the Act remained undiluted.

As a postscript to this chapter, here (in view of the mention made by the Royal Commission of Fenian crimes) it is appropriate to discuss the attitude adopted by Britain towards her own political offenders (principally Fenians) in extradition law and practice. By and large, Britain avoided attempting to extradite such men, and as a result, before the 1880s, the extradition of fugitives to Britain was not an issue of historical or political importance. However, that is not to say that the potential for such importance had not existed, or that there were no British political offenders around.

In 1837 Canada sought the extradition of Mackenzie (one of the leaders of the Canadian rebellion) from New York for complicity in murder. Governor March refused to surrender him on the grounds that he was a political refugee.⁸⁷ The

86. Not all contemporaries were so charitable. Hammond (now retired) wrote that the only way to account for the controversy was "accumulated misinterpretation, misunderstanding and obstinacy on the part of our Home Office and their legal advisers... and blind submission without reflection on the part of the Foreign Office": Hammond to Thornton (Private. 12 December 1876); Thornton Papers, FO 933/100, ff.29-40.

87. cf. I.D. Spencer, 'William L. Marcy', Mississippi Valley Historical Review volume 31 (1944), p.217. L.N. Benjamin, op. cit. pp.182-3; and C.C. Hyde, 'Notes on the Extradition treaties of the United States', American Journal of International Law volume 8 (1914), p.491.

case, however, did not become an issue between Britain and the United States.

There were, of course, plenty of Irish fugitives around before the 1880s. After the abortive rising of 1848, the Fenian leader, Stephens, fled to France but no attempt was made to extradite him.⁸⁸ In 1852, Thomas Meagher (a "convicted Irish rebel") escaped from Van Diemen's Land and arrived at New York, but again there was no attempt at extradition.⁸⁹

In 1852 Thomas Kaine's extradition was sought from America for attempted murder (in Ireland), but it was refused on a technicality. Surviving British papers do not detail the nature or circumstances of the crime, but it seems clear there was something political in it. When discussing the case, Crampton asserted that:

"public sympathy... attaches to Irish Fugitives, who are invariably represented to be the victims of political persecution, or, if Criminal, to have been driven to the commission of crime by want or oppression".

The Times reported there was "much excitement... among a portion of the Irish population, and a strong feeling was exhibited adverse to Kaine being surrendered... large gatherings took place".⁹⁰ After extradition was refused,

88. cf. M. Davitt, Fall of Feudalism (1904) p.73.

89. Addington to Home Office (FO. 15 June 1852); FO 5/557.

90. Crampton to Clarendon (No.77) (Washington. 3 April 1853): FO 5/564; and The Times 13 July 1852, p.8.

Britain took the matter no further.

In 1865 Stephens was arrested in Ireland, but escaped and eventually returned to Paris. There he was put under surveillance, and the French police even offered to arrest him, but yet again extradition was not sought.⁹¹ Similarly, after the Fenian raids into Canada of 1866 and 1870, no attempt was made to extradite those responsible.⁹²

In 1868 the government gave very serious consideration to seeking the extradition of Captain Murphy from France for the part he had played in organising the Clerkenwell bomb of 1867. The statements of Patrick Mullany and Nicholas English disclosed that he had taken a leading role in the affair, and Giffard advised that the evidence was quite sufficient to justify extradition.⁹³

However, despite the fact that Home Secretary Hardy noted that "much blood will be shed unless some of the [Fenian] leaders are taken", and Murphy's extradition would have been "a great shock to the party of violence",⁹⁴ extradition was not sought. The reason for this decision is

91. cf. Hammond to Cowley (Private. 7 & 11 April and 23 May 1866): Cowl.PP. FO 519/192; and L. O'Broin, op. cit. pp.116 & 122.

92. On the raids: cf. E.R.R. Green, 'Fenians Abroad', in, T. Desmond Williams (ed.), Secret Societies (Dublin 1973) pp.85-7.

93. The evidence may be found in HO 12/179/8170A; and Law Officers' Opinion by Giffard (17 February 1868): HO 48/53, No.176.

94. N.E. Johnson (ed.), op. cit. p.53: Hardy's Diary for 8 November 1867; and Memorandum to the Law Officers (n.d.): HO 48/53, No.176. A.E. Gathorne-Hardy (ed.), Gathorne Hardy (1910) has nothing on this.

not made explicit, but some indications are given. Giffard asserted that "in view of future applications by the French... I should have thought it a serious question whether extradition should be asked". If Britain started seeking the extradition of 'political offenders', France would do likewise, and expect results, especially if Murphy was surrendered. Hammond told Liddell that "on no account whatever would he ask for the extradition",⁹⁵ presumably for the same reasons.

More generally, there was a disinclination on the part of ministers to take action against Fenians abroad. They avoided asking America to prevent Fenian plotting on the grounds that to do so would make the movement seem more important than it was and unite the Fenians and Irish-American opinion against Britain.⁹⁶ It also seemed to be generally acknowledged that Fenians would "never" be extradited: if the Manchester murderers had escaped abroad "they would certainly not have been practically liable to extradition".⁹⁷

95. Law Officers' Opinion by Giffard (17 February 1868); and memorandum by Liddell (HO. n.d.): HO 48/53, No.176.

96. cf. L. O'Broin, op. cit. p.55.

97. Anon, 'The Extradition Debate', Saturday Review volume 42 (1876), p.190; and Anon, 'The Extradition Controversy', ibid. volume 41 (1876), p.606.

CHAPTER 5

'NIHILISTS' AND FENIANS (THE 1880s)

Chapter Five: 'Nihilists' and Fenians (The 1880s)

When Gladstone returned to power in 1880, his choice as Home Secretary was William Harcourt, and for the next five years the government attitude to extradition was to be very much dictated by him. One of his earliest decisions was that the recommendations of the Royal Commission (on which he sat) should be implemented, and Granville agreed.¹

Before anything was done, attention was diverted by Czar Alexander II's death (13 March 1881) at the hands of 'nihilist' assassins, and the news that Russia intended to propose some form of international cooperation against nihilism.² Despite the fact that Germany, Austria and Queen Victoria supported the Russian move,³ ministers unanimously decided to have nothing to do with it, even before its terms were known.⁴ Several factors led to this decision.

In dealing with any question which touched so sensitive a subject as the right of asylum, no government could afford to ignore Parliamentary and public opinion. Despite "every care", any proposal "would be regarded with suspicion by people who, without the slightest sympathy for assassins

1. Minute by Harcourt (HO. 24 November 1880); and Tenterden to Home Office (FO. 11 December 1880): HO 45/9498/6953, /117a & /118.

2. Dufferin to Granville (Private. 7 April 1881): Granv.PP. PRO 30/29/185.

3. cf. Elliot to Granville (No.224) (Vienna. 26 April 1881): FO 7/1014; Granville to Harcourt (Private. 1 April 1881); and Ponsonby to Granville (Private. 11 April 1881): Granv.PP. PRO 30/29/130 & /38.

4. cf. Gladstone to Queen Victoria (Private. 4 May 1881): CAB 41/16/25.

were intensely jealous of their country's right of asylum and prone to resent any appearance of an attempt to interfere with it". Ministers could only accept if they "could reckon upon a general concurrence of opinion... as to its necessity or propriety",⁵ and while horror at the Czar's assassination was a fairly general feeling, British opinion was in more general terms firmly Russophobic, both on national and liberal grounds.

Although refusal might produce dangerous anti-British feeling on the continent (it would be "unintelligible in Russia"⁶), she did not stand alone. It was known that France would reject any proposal, as would Italy and Switzerland.⁷ The diplomatic repercussions of refusal could therefore be lived with, but not discounted: Bismarck was "dreadfully upset".⁸

5. Elliot to Granville (No.224) (Vienna. 26 April 1881): FO 7/1014; and Selborne to Granville (Private. 10 April 1881): Granv.PP. PRO 30/29/141. Granville later stated he was "convinced" acceptance "would not have been approved by Parliament or by the nation": 3H, (L), 261, c.789, (19 May 1881).

6. Granville to Dufferin (Telegraphic. FO. 11 April 1881): FO 181/644.

7. cf. Lyons to Granville (No.377) (Paris. 25 April 1881): FO 27/2492; Granville to Ampthill (No.186) (FO. 16 April 1881): FO 181/644; Minute by Pauncefoot (FO. 22 April 1881): FO 27/2484; Dufferin to Granville (Private. 23 April 1881): Granv.PP. PRO 30/29/185; Ampthill to Granville (Private. 7 May 1881): *ibid.* /177; Wyndham to Granville (Private. 12 May 1881): *ibid.* /186; Dilke Diary, 9 April 1881: Dilke Papers, BL Add. MS 43924, f.46; and D.W.R. Bahlman (ed.), Diary of Sir Edward Walter Hamilton (Oxford 1972) volume 1, p.136.

8. Ampthill to Granville (Private. 14 April 1881): Granv.PP. PRO 30/29/177.

No-one seems to have held out any hope of any Russian proposal doing any good: "It has now become practically impossible to prevent these dreadful acts". There was "no possible method of preventing a repetition of such a crime... The bowling has permanently beaten the batting". Indeed, it was believed that it would be counter-productive. If ministers thought the law needed amending, "they would be far more likely to carry any measure... if it were spontaneously proposed by them, than if it were the result of any concert and agreement with Foreign Powers". Any proposal "would create a reaction against the Excellent feeling which now exists", and "refusal would be a great encouragement to those whom it is desired to put down".⁹

However, it would be wrong to regard ministers as wholly motivated by expediency. Granville, Gladstone and Dilke, and perhaps others, were disposed on principle to refuse any Russian approach. Granville noted that acceptance was "impossible in the face of all the traditions" of the country, and Gladstone agreed.¹⁰

Initially Granville tried to prevent the Russian proposal being made at all, but to no avail: on 28 April

9. Lewis Harcourt Diary, 15 March 1881, WVH.PP. Box 348, f.7; Anon, 'Precautions Against Assassination', Spectator volume 54 (1881), p.374; Selborne to Granville (Private. 10 April 1881): Granv.PP. PRO 30/29/141; and Granville to Dufferin (Telegraphic. FO. 11 April 1881): FO 181/644.

10. Granville to Gladstone and Gladstone to Granville (Private. 11 April 1881): Granv.PP. PRO 30/29/124. On Dilke, see below.

Britain was invited to an anti-nihilist conference.¹¹ Her refusal to attend was very carefully worded, emphasising that she shared continental horror of the assassination, that her existing laws were more than adequate, and that of course she had no sympathy for terrorists.¹² In order to supplement these assurances with something more practical, the British government pursued certain policies and made certain statements which were designed to conciliate Russia.

The prosecution of Johann Most for incitement to assassination was partly intended as an attempt to show that it was unnecessary for Britain to attend the conference. The "credit which would accrue from" the prosecution "to the government abroad" was "one of the chief motives" for it, and it produced the "desired result". Most's conviction was "considered equal" to attending the conference.¹³

Of more direct concern to this study is the discussion prompted by Woronzoff telling the Queen that one of the

11. cf. Granville to Dufferin (Telegraphic. FO. 11 April 1881): FO 181/644: Giers to Lobanoff, communicated on 28 April 1881: FO 65/1126; and Granville to Wyndham (No.176A) (FO. 29 April 1881): FO 65/1108. Dilke was not lying when he said no approach had been made to Britain: 3H, (C), 260, c.1312, (28 April 1881). The invitation arrived after he made his statement.

12. Granville to Wyndham (No.188) (FO. 10 May 1881): FO 181/644. cf. B. Porter, Vigilant State (1987) p.40. Since any measures against political refugees were pointless if Britain (their main asylum) did not participate, the proposal ended here. Informal approaches on the same subject were made by Bismarck in 1883-4, but rebutted: cf. Ampthill to Granville (Private. 14 April 1883): Granv.PP. PRO 30/29/178; and Granville to Harcourt (Private. 4 September 1884): WVH. PP. Box 721, f.378.

13. B. Porter, 'Freiheit Prosecutions', Historical Journal volume 23 (1980), pp.846-8.

assassins had claimed they would have been safe if they had reached Britain, as:

although the murder of any individual would come under extradition law, yet the murderer of a sovereign was a political criminal and therefore excluded from the provisions of that law.

The Queen was horrified at this, and asked "what is the real state of the law".¹⁴ (In fact, any conspirator who reached Britain would have been quite safe, for no Anglo-Russian extradition treaty had yet been signed, and nothing could be done in the absence of such a treaty.)

Selborne believed there was:

nothing in our Extradition Laws or Treaties, or in the principles on which we administer them, to take the murder of a sovereign out of their operation, only because it is a sovereign who is murdered... it is reasonable to believe, that so atrocious an act as the assassination of the late Emperor of Russia, would be regarded as a simple murder.

However, the issue would have to be decided by the courts, and could not be pre-judged by the executive. Gladstone noted: "How could the ridiculous idea be entertained for a moment in this country that in the case of a Sovereign killing would be no murder", while Harcourt later wrote that murder was "not dispunishable because it is directed

14. Ponsonby to Granville (Private. 9 April 1881): Granv. PP. PRO 30/29/38.

against a Sovereign".¹⁵ Granville informed the Queen that in extradition law, "the murderer of a sovereign would stand under the same rule as the murderer of an individual". She no doubt passed this on, but to make certain, Granville made the continentals aware of Selborne's views.¹⁶

It is easy to see why ministers fell upon their interpretation so readily. They may have believed what they wrote, but they also wanted to show that existing laws were sufficient to deal with nihilism, and so held assassination to be extraditable. This interpretation was very much intended for foreign (and royal) consumption, and must be viewed in connection with the Most prosecution and other assurances given by Britain that her laws needed no amendment.

The clear implication was that ministers were certain that had any of the assassins come under a British treaty, they would have been extradited. However, with good reason, they held back from saying this directly. The views of ministers were irrelevant: it was the courts opinion that

15. Selborne to Granville (Private. 10 April 1881); Gladstone to Granville (Private. 12 April 1881): *ibid.* /141 & /124; and Harcourt to Granville (Private. 21 July 1881): WVH.PP. Box 721, f.201. The press generally agreed: cf. The Times 8 March 1880, p.11. In 1879, the then Foreign Secretary, Salisbury, had expressed the opinion that "an accomplice in an attempt at murder of a Sovereign or any one else would be surrendered... but... Conspirators to murder would not be so surrendered in the absence of complicity in... that act", and Cross had agreed: Salisbury to Cross (Private. 1 January 1879): Cross Papers, BL Add. MS 51263, ff.20-21; and Cross to Salisbury (Private. 4 January 1879): 3M/E, f.71.

16. Granville to Queen Victoria (Private. 13 April 1881): Granv.PP. PRO 30/29/38. cf. Granville to Ampthill (No.187)(FO. 18 April 1881): FO 65/977.

mattered, and their views had never been tested. The only even remotely relevant case was the Bernard trial of 1858, in which, despite being guilty of complicity in Orsini's attempt to assassinate Louis Napoleon, the prisoner was acquitted by a jury that was determined to uphold the right of asylum. It has been asserted that this "cannot in any sense justify the conclusion" that assassins would be exempt from extradition, but elsewhere it was held that if Orsini had come to Britain and been extradited, the government would have been "exposed to troublesome clamour". The case of course gave no clear precedent against the extradition of assassins, but showed there was room to doubt whether British opinion would in all cases tolerate it.¹⁷

Selborne later added that if the Royal Commission's Report was implemented the point would be "more clear".¹⁸ Furthermore, a proposal to qualify the political offence exemption in a manner which would have excluded regicide was removed from the first draft of the 1870 Act. If it was so self evident that assassins were not political offenders, why had this been done? "It would no doubt be possible to put extreme cases" when the "justice" of an assassination "would hardly be questioned". In the right set of circumstances, a magistrate, court, or even the Home Secretary might well judge an assassin to be a political offender worthy of protection. The executions of Charles I and Louis XVI

17. N.W. Sibley and A. Elias, op.cit. p.136; and Anon, 'The Extradition Dead-Lock', Saturday Review volume 41 (1876), p.668.

18. Minute by Selborne (30 April 1881): Granv.PP. PRO 30/29/143.

amounted to assassination, "Yet who can deny that these acts helped the cause of liberty in the countries in which they were perpetrated?"¹⁹ Russia was often regarded as a special case. There was "always a considerable fund of popular hostility" towards her government, no doubt partly because she was the chief threat to British imperial interests, "but strengthened too by a purer liberal distaste for autocracy". If Russians advocated reform, "the reply of the Government is Siberia, and the rejoinder of the people is dynamite".²⁰

Russia had sought an extradition treaty in January 1881. The idea had been accepted in principle,²¹ and was now returned to, partly as a means of further conciliating her. The Queen urged its conclusion, and Gladstone was "sorry to hear" one did not exist.²² At the same time,

19. W. Dillon, 'Assassination', Fortnightly Review volume 41 (1884), p.513; and S. Stepniak, 'Terrorism', Contemporary Review volume 45 (1884), p.327.

20. B. Porter, 'British Government and Political Refugees', pp.25-6; and Reynolds's 29 February 1880, p.4. cf. Quida, 'Legislation of Fear', Fortnightly Review volume 56 (1894), p.553. In 1889, at a breakfast party held in Spencer's honour at the Gateshead home of Robert Spence Watson, a leading north-east Liberal, "there was some little defence for assassination on the ground that it was the only weapon left to the Russian people, and that unless they could intimidate the powers there was nothing else they could do. They had tried reason and appeals to justice and the like in vain": A.B. Cooke and J.R. Vincent, 'Lord Spencer on the Phoenix Park Murders', Irish Historical Studies volume 18 (1972-73), p.588. In 1973, a British Law Lord asserted that the 1870 Act could be regarded as "positively encouraging the political assassinations of oppressive despots": J.K. Bentil, 'Extradition Law', Solicitor's Journal volume 117 (1973), p.825.

21. cf. Pauncefote to Tenterden (Private. 3 January 1881): FO 65/1325; and Liddell to Foreign Office (HO. 7 February 1881): FO 181/644.

22. Ponsonby to Granville (Private. 11 April 1881); and Gladstone to Granville (Private. 12 April 1881): Granv.PP. PRO 30/29/38 & /124.

Harcourt repeated his desire to introduce a bill to implement the Royal Commission's Report.²³ Dilke thought it "clear that it would be foolish to introduce it now", while Kimberley and Chamberlain "fought against the whole thing".²⁴ Dilke opposed offering Russia a treaty at all, for "in this present state of things, a vote of censure will be carried in the H of C... I would stick to the promise to do it some day".²⁵

However, Granville thought it "a great anomaly" that there was no treaty between "two great European countries". The decision to conclude a treaty with Russia was confirmed, and Lobanoff was informed that it would be better to delay conclusion until the law had been

23. cf. Minute by Harcourt (HO. 11 April 1881): HO 45/9498/6953, /118. Harcourt wanted to "legislate on extradition to please the Russians": Dilke Diary, 3 May 1881, Dilke Papers, BL Add. MS 43924, f.49. This was perhaps true, but he had expressed his desire to implement the Report before the matter was raised. The Russian desire for a treaty was not sparked off by the Czar's death: it was perhaps prompted by the Hartmann affair. Implicated in an attempt to assassinate the Czar (1879), he escaped to France, and Russia sought extradition, which was refused for lack of evidence. Hartmann then went to London, and Russia asked whether, if they produced sufficient evidence, he could be extradited. The government replied that nothing could be done as there was no extradition treaty: cf. Dufferin to Salisbury (No.136) (St. Petersburg, 16 March 1880): FO 65/1079: and Salisbury to Dufferin (No.126) (FO. 31 March 1880): FO 65/1076.

24. Dilke Diary, 4 May 1881: Dilke Papers, BL Add. MS 43924, ff.49-50. cf. Cabinet minutes for 4 May 1881: Glad.PP. BL Add. MS 44642, f.178.

25. Dilke to Granville (Private, 23 September 1881); and same to same (Private, 26 September 1881): Granv.PP. PRO 30/29/121, ff.193-4 & 202-3. Although a treaty would not need ratification by Parliament, a copy of it had to be published, and Parliament could debate it if it wished.

reformed.²⁶ How Parliament and the public would have reacted to either the treaty or bill is unclear, for no bill was drafted, and no treaty signed. Pressure of business meant that there was no time for the bill, so Russia was offered a treaty on the basis of the 1870 Act.²⁷ However, Russia now expressed her desire to "await the passing of the proposed amendments", and so the idea was dropped for the time being.²⁸

One 'extradition' law that did pass in 1881 was the Fugitive Offenders Act (44 & 45 Vict. c.69), which regulated extradition within the empire, and replaced the outmoded 1843 'Act for the better Apprehension of certain Offenders' (6 & 7 Vict. c.34). It was quite unlike the Extradition Act: it contained no political offence exemption (indeed, treason was one of the specified offences), no embodiment of the speciality principle, and so on.²⁹ The Act moved

26. Granville to Dilke (Private. 25 September 1881): ibid. ff.195-6. cf. Granville to Wyndham (No.185) (FO. 4 May 1881): FO 65/1325.

27. Granville to Wyndham (No.185) (FO. 4 May 1881): and Liddell to Foreign Office (HO. 24 May 1881): ibid. cf. Minute by Harcourt (HO. 22 May 1881): HO 45/9523/26329, /7.

28. Wyndham to Granville (No.289) (St. Petersburg. 8 June 1881): FO 65/1112. cf. Thornton to Granville (Private. 20 October 1881): Granv.PP. PRO 30/29/185. In April 1882, the Russians changed their minds once more and asked for a treaty based on the 1870 Act. Signature was delayed by Russian requests for amendments to the safeguards provided for political refugees. Britain rejected them, but in 1886 a treaty was finally signed: cf. CAB 41/16/25; FO 65/1325; and HO 45/9523/26329.

29. cf. CO 323/315; and HO 45/9324/17828A, /1 & /2. Fugitives were frequently tried for additional offences: cf. HO 144/84/A7289; HO 144/540/A51139; HO 144/669/X86278; and R.E. Clute 'Commonwealth Extradition', American Journal of Comparative Law volume 8 (1959), p.23.

through Parliament quickly, but in the Commons Arthur O'Connor (an Irish Nationalist MP) tried to take treason out of its operation:

It was altogether contrary to the usual practice for fugitives to be extradited for political crimes... Why should a different practice be introduced in their relations with Colonial Governments to that which obtained in their relations with Foreign Nations?

Ministers "could not possibly agree to this": if they did, "a person in this country might pass over to a Colony and yet not be made answerable to a law general to both the Colony and the Mother Country". The amendment was defeated without a division.³⁰

The government could hardly have adopted any other attitude. "It would have been absurdity itself for a politically disaffected Indian to have escaped the just maternal wrath of the Queen-Emperor by embarking at Madras and disembarking at Tilbury".³¹ Say the Queen was assassinated in London: why should the killer be safe simply because he had fled to another part of the empire? Treason was treason throughout.

There was, perhaps, a less tangible factor behind the absence of any safeguards for 'politicos'. There existed

30. 3H, (C), 265, cc. 598-9, (20 August 1881). The reply came from Collier.

31. C. Thornberry, 'Armah v. Government of Ghana', Modern Law Review volume 30 (1967), p.197.

the widespread belief that people were driven to political offences by just causes. Foreign regimes suffered from political crime because they were illiberal, it was their own fault: "autocratic Government is an incentive to sedition, to rebellion, to conspiracy, to plot, and to murder".³² The logical corollary of such beliefs was that as a liberal nation, ever on the march of liberal progress, Britain had no political crimes, and no political prisoners in her goals. Such a belief, and the foundations upon which it rested, appear smug and self-satisfied to the modern eye (a sign of "the usual hypocrisy of the English in not giving anyone political treatment and then being able to say that alone among the Empires she had no political prisoners"³³), but to view them as such is rather unfair. Victorians believed the British system was the best available: they may have been wrong, but that is no reason not to respect their beliefs. In a curious sort of way, therefore, the absence of any safeguards within the Fugitive Offenders Act may be viewed as a reflection and embodiment of the dominant liberal ethos of the time.

The Anglo-American dispute remained unresolved in 1880, and constituted the most serious practical problem vis-à-vis extradition. The policies adopted on speciality generally, and American cases specifically, may seem inconsistent, but in fact had a certain logic behind them.

32. Reynolds's 3 April 1881, p.5. cf. A.V. Kirwan, op.cit. p.160; and B. Porter, 'Freiheit Prosecutions', p.838.

33. B. Behan, Borstal Boy (1958) p.271.

With respect to post-1870 treaties, speciality was fully upheld,³⁴ but a similar policy was not adopted in American cases.³⁵ The inexpedient policy adopted by the previous government was abandoned. Granville and Harcourt always rejected the argument that speciality could be insisted upon under the 1842 treaty,³⁶ and simply returned to the policy adopted before 1875. It was "undesirable that any official communication should be made... which would tend to revive the controversy".³⁷ Only criminals could have welcomed that, and ministers planned to implement the Commission's recommendation on speciality anyway. There was nothing to be gained by causing trouble over a principle which they were convinced ought to be made less strict.

During Harcourt's Home Secretaryship two interesting re-extradition cases cropped up. Hamel was surrendered to Germany, but in 1882 France applied for re-extradition. Maconochie and Liddell thought it illegal, but the Law Officers disagreed, and held that British consent was not required. No-one seems to have remembered Bourdiol, and Germany was informed of the Law Officers' views.³⁸

34. See the cases of: Payen (HO 144/54/90515; and FO 27/2525); Charlot (HO 144/83/A6535); and Janck (HO 144/117/A27191; and FO 100/254 & 256).

35. See the cases of: Miller (HO 144/96/A15388); Watts (HO 144/98/A16462; and HO 144/109/A23384); and Vanderpool and Jones (FO 5/1842).

36. cf. Harcourt to Liddell (Private. n.d.): HO 144/117/A27191, /11a.

37. Minute by Harcourt (HO. 4 January 1883): HO 144/96/A15388, /3.

38. Minutes by Maconochie and Liddell (HO. 4 August 1882): HO 144/83/A6417B, /1; Law Officers' Opinion by James and Herschell (11 August 1882): *ibid.* /2; and Granville to Stumm (FO. 17 August 1882): HO 144/666/X81244, /25.

In conclusion, the Law Officers had added:

Circumstances may occur such as the obtaining of the extradition of a prisoner in order to deliver him over to a third Country to be tried for a political offence which might give this Country a right to complain.³⁹

However, if British consent to re-extradition was unnecessary, how could she protect a political refugee? Complaints would be of little use after the event. The opinion given really raised more questions than it answered, and the confusion over re-extradition remained, and was even magnified.

In 1883, a re-extradition case occurred which may well have involved a political refugee. Ganz was surrendered to the Netherlands on fraud charges, and Germany applied for re-extradition. Bergne noted that "however unworthy an object he may be", it should not be allowed, but Maconochie minuted: "He is a socialist and a writer in the Freiheit [Most's journal] and wishes to keep out of the hands of the German authorities. He has no claim I think to the interference of the British Government".⁴⁰ It was quite likely that Ganz was a political refugee (he was "formerly connected with the Socialistic Party and their Propaganda in Germany"⁴¹), but the Home Office took no account of this. No attempt was made

39. Law Officers' Opinion by James and Herschell (11 August 1882): HO 144/83/A6417B, /2.

40. Memorandum by Bergne (FO. 13 March 1883): FO 37/629; and minute by Maconochie (HO. 20 March 1883): HO 144/90/A11390, /28 cf. Minutes by Lushington (HO. 21 March 1883); and Harcourt (HO. 22 March 1883): ibid.

41. Petition by Ganz (n.d.): FO 37/629.

to discover for what offence Germany sought extradition, and no indication is given in surviving papers.⁴² However, in April 1883 came the news that the Netherlands had refused extradition on the grounds that it would have been contrary to the terms of the Anglo-Dutch treaty. The nature of Dutch objections to the re-extradition are also unclear, but in any event, the manner in which the Home Office dealt with the case was hardly worthy of a nation which had such a long tradition of protecting 'politicos'.

Thus far, we have dealt almost exclusively with extradition from Britain or her colonies, but in 1882-3, for the first time, extradition to Britain became an issue of political and historical importance. This new departure arose from British efforts to extradite persons implicated in the 'Phoenix Park Murders'.⁴³

On 6 May 1882, Cavendish and Burke (the Chief Secretary of Ireland and his secretary) were murdered in Phoenix Park, Dublin. Early in 1883,⁴⁴ those directly responsible

42. The nature of the offence is clearly crucial: it might be discovered from German or Dutch archives.

43. On pre-1882 cases involving British 'political' offenders, cf. Chapter four.

44. Between June and December 1882, attention centred on the extradition of Westgate (who had confessed to being one of the murderers) from Venezuela. However, even before he arrived back in Britain, it was clear that his confession was bogus. cf. FO 80/281-3; HO 144/98/A16380; WVH.PP. Boxes 39-40; Althorp Papers, K17 & K39; 3H, (L), 272, c.1904, (27 July 1882); 3H, (C), 272, c.1974, (27 July 1882); 3H, (C), 274, c.940, (7 November 1882); The Times 19 December 1882, p.4; and T.H. Corfe, Phoenix Park Murders (1968) p.228.

were convicted, chiefly on the evidence of James Carey, a conspirator turned informer. His evidence also implicated four men (Byrne, Tynan, Sheridan and Walsh) as the organisers of the crime, and their extradition was duly sought from France and the United States. However, for two basic reasons, none were surrendered.⁴⁵

Firstly, the necessary evidence was entirely lacking. The authorities only had Carey's evidence, and it could not be hoped that foreign courts would accept "the evidence of an informer... as sufficient". Reynolds's asserted that "an honest jury would not hang a dog upon his testimony" and the Irish authorities later admitted they would not have been able to convict the men if extradited.⁴⁶

Furthermore, there was the political nature of the crime. Mexico questioned whether Tynan was accused of "actual Director of the French Foreign Ministry) went further: it was "the first time England has ever asked for the Extradition of a man for a political offence".⁴⁷ There

45. On the cases generally, cf. HO 144/113/A25252; HO 144/113/A25071; HO 144/113/A25070; HO 144/113/A25251; HO 144/98/A16380C; 3H, (C), 276, c.1417, (5 March 1883); 3H, (C), 278, c.435, (17 April 1883); ibid. c.621, (19 April 1883); 3H, (C), 282, c.1336, (2 August 1883); P.J.P. Tynan, Irish National Invincibles (1894) pp.548-59; and T.H. Corfe, op. cit. pp. 248-53. They are exhaustively covered in the private papers of Granville, Harcourt and Spencer.

46. Edwards to Granville (No.4 Treaty) (New York. 23 March 1883): FO 5/1849; Reynolds's 4 March 1883, p.4; and Hamilton to Home Office (Dublin Castle. 19 June 1883): HO 144/113/A25252. /19. cf. Granville to Spencer (Private. 6 March 1883): Althorp Papers, K16. crime" or "a mere political offence". Billot (Political

47. Currie to Home Office (FO. 28 April 1883): HO 144/113/A25252, /11; and Plunkett to Lyons (Paris. 24 February 1883): HO 144/113/A25071, /2b.

was a "strong feeling" in America that the fugitives were political offenders, and the same opinion seems to have prevailed in France.⁴⁸ As a result of Irish terrorism, Britain was placed in the same position as that routinely faced by continentals, who perhaps looked upon British failure with some ironic pleasure. In France, there was "an evident tendency to rejoice", while elsewhere, foreigners viewed the episode "with a certain malicious satisfaction".⁴⁹

Almost from the first, the authorities had been aware that extradition was unlikely to be granted.⁵⁰ Notwithstanding repeated advice that attempts at extradition were pointless (Edwards reported that he had no means of identifying Sheridan nor evidence which could be produced in court: "I more than ever believe that to attempt an Arrest... would be impolitic, precipitate, and futile"⁵¹), Harcourt pressed on. It is perhaps unfair to criticise unduly his dogged determination. Carey's evidence was given in open court, so ministers had to do everything they could to get hold of the four men. To have done otherwise would have laid them open to the charge of being 'soft' on Irish terrorism, and they had already had to suffer more than enough criticism of that kind. Making foreign governments

48. The Times 1 & 3 March 1883, pp.5 & 9. cf. West to Granville (Private. 13 March 1883): Granv.PP. PRO 30/29/154. British opinion disagreed, except for Reynolds's (15 April 1883, p.4): they were political because the assassins held no private grudge against the victims.

49. The Times 3 March 1883, p.9. cf. 12 April 1883, p.5.

50. cf. Spencer to Harcourt (Private. 26 February 1883): WVH.PP. Box 353, f.82.

51. Edwards to Granville (New York. 27 February 1883): HO 144/A25070, /10.

responsible for non-extradition made it easier to counter criticism of the failure: "it is not our fault. We have done all we could". The Times commented that ministers were trying to "show the public that they are not idle or asleep, but still working with vigilance and zeal in the pursuit of their object".⁵²

It was suggested that after extradition failed, certain extra-legal means were tried: there were reports of various attempts to trick the fugitives into returning to Britain.⁵³ The Daily News thought they might have been practical jokes, the authors of which were simply "humorists bent on a little bit of fun",⁵⁴ and no evidence exists to substantiate the claims. However, one would not expect to find it. They must be left as open questions, but possibilities, for it was by no means certain that agents involved in anti-Fenian work always worked strictly within the law.⁵⁵

As an interesting postscript to the Phoenix Park affair, two notable cases (involving Michael O'Donnell and 'Red Jim' McDermott) occurred under the Fugitive Offenders Act: one public, one secret; one success, one failure.

52. Harcourt to Granville (Private. 11 March 1883): WVH. PP. Box 721, ff.318-9; and The Times 26 February 1883, p.6.

53. cf. The Times 26 March 1883, p.3; Daily News 27 March 1883, p.5; and F.M. Bussy, Irish Conspiracies (1910) pp.114-6.

54. Daily News 27 March 1883, p.5.

55. cf. HO 144/478/X27302; B. Porter, Vigilant State pp.94 & 135-6; 'British Government and Political Refugees', p.37; Origins of Britain's Political Police (Warwick 1985) passim. and 'Early Special Branch', Intelligence and National Security volume 1 (1986), pp.382-4.

Once the trials in Dublin were over, it was important that Carey be protected, and it was decided to send him to Africa, there to start a new life. However, a Fenian named Michael O'Donnell was on the ship carrying Carey, and on 29 July 1883 (off Cape Colony) he killed him.⁵⁶

Since the crime had been committed on the 'high seas', O'Donnell could either be tried in Cape Colony, or sent back to Britain under the Fugitive Offenders Act. Without hesitation, the authorities plumped for trial in Britain, which was "important in the interests of justice".⁵⁷ It was "feared he would not be convicted in the Colony... Irish and Dutch elements, which might affect the jury", sympathised with O'Donnell.⁵⁸ There may be some truth in this: Spencer wrote that if he was "likely to be acquitted" he should be brought back.⁵⁹ However, to return O'Donnell to Britain was quite proper. There was no question of legal procedure being perverted to political ends. (He was later executed).

The case demonstrated the usefulness of the Fugitive Offenders Act. Had O'Donnell murdered Carey within the jurisdiction of a foreign country, he would no doubt have contested extradition on political offence grounds. It is

56. Tynan claimed he was sent to implement the verdict of "the revolutionary court-martial that sentenced him to death": P.J.P. Tynan, op.cit. p.332. On the case generally, cf. HO 144/122/A30424; HO 144/122/A30424B; M. Davitt, op.cit. pp.454-5; and F.E. Gibson, Attitudes of the New York Irish (New York 1951) pp.360-2; and J.P. O'Grady, Irish Americans (New York 1976) pp.190-4.

57. Wingfield to Home Office (CO. 18 August 1883): HO 144/122/A30424, /7.

58. P.J.P. Tynan, op.cit. p.335.

59. Spencer to Jenkinson (Private. 11 August 1883): Althorp Papers, K39.

a matter of conjecture whether such a plea would have been accepted, but at the least, one has to say that it was by no means certain that O'Donnell would have been surrendered.

The McDermott case was an altogether curious affair.⁶⁰ In June 1883, Jenkinson (who led anti-Fenian operations) asked Harcourt to instruct the Canadian authorities to arrest him. The ostensible reason for the arrest, and subsequent return to Britain under the Fugitive Offenders Act, was his involvement in Fenian bombing campaigns. Although Jenkinson had "plenty of proof" that McDermott was "mixed up in the Dynamite business" it was "not for the purpose of getting him convicted" that he wanted him arrested.⁶¹

McDermott was one of Jenkinson's many informers, but had "brought... suspicion on himself" by "indiscreet conduct", and had been "sentenced... to death".⁶² Jenkinson hoped that having McDermott arrested might remove this suspicion, for it was important that he was not 'executed'. The anti-Fenian campaign largely depended upon informers, and the "flow of information" would stop if potential informers felt they were likely to be discovered and murdered. There must be no repetition of Carey's fate.⁶³

60. On the episode generally, cf. K.R.M. Short, Dynamite War (Dublin 1979) pp.156-8; and B.Porter, Vigilant State pp.57-8.

61. Jenkinson to Harcourt (Private. 17 & 18 June 1883): WVH. PP. Box 103, ff. 82-7.

62. Jenkinson to Harcourt (Private. 17 June 1883): ibid. ff.82-4. On his career as an informer, cf. L. O'Broin, Fenian Fever (1971) p.62; W. D'Arcy, op.cit. pp.41, 140, 153; and M. Davitt, op. cit. pp.428-35.

63. Spencer to Harcourt (Private. 8 September 1883): Althorp Papers, K18. cf. Jenkinson to Spencer (Private. 4 August 1883): ibid. K39; Jenkinson to Harcourt (Private. 18 June 1883): WVH.PP. Box 103, ff.86-7.

Harcourt approached the Colonial Office, which initially agreed to order the arrest, but then refused. Proceedings under the Fugitive Offenders Act were ruled out, but the problem remained of dealing with McDermott.⁶⁴ However, in August, he unexpectedly arrived at Liverpool, and was charged. It is clear the prosecution was not bona fide: he was "legally freed after he had doubtless been suborned", and "there is nothing to suggest that he met his end in retributive violence".⁶⁵

Jenkinson solved his problem, but the real importance of the McDermott case lies in that it demonstrated that although the Fugitive Offenders Act did not contain the safeguards of the Extradition Act, regular, legal procedures had to be complied with. Jenkinson realised that the bogus extradition could not have been attempted from a foreign state, but had thought "it could be managed" as McDermott was in Canada. He was wrong, and Harcourt acknowledged that "the processes of the law ought not to be employed for prosecutions which are not bona fide".⁶⁶ The Fugitive Offenders Act should not

64. cf. Harcourt to Jenkinson (Private. 18, 19, 20 & 21 June 1883); and Jenkinson to Harcourt (Private. 19 June 1883): ibid. ff.85-92.

65. K.R.M. Short, op.cit. pp.157-8. In 1886 a strange case occurred which involved another of Jenkinson's agents: Winter. His extradition from France was sought for perjury and bigamy: if prosecuted, he threatened to set up a defence that the prosecution was maliciously brought by the Metropolitan Police as part of its struggle with Jenkinson for control of anti-Fenian operations, to call ministers and officials as witnesses to prove his case, and to reveal details of anti-Fenian measures. However, extradition was refused because it was more than 3 years since the offence was committed. cf. HO 144/470/X10996; Iddesleigh Diary, 6 August 1886: BL Add. MS 50044, f.1; and B. Porter, Vigilant State p.60.

66. Jenkinson to Harcourt (Private. 18 June 1883); and Harcourt to Spencer (Private. 10 September 1883): WVH.PP. Box 103, ff.86-7 and Box 42, f.122.

be regarded as an oppressive instrument of British rule. It perhaps enabled Britain to recover criminals from colonies whom she might not have been able to extradite from foreign countries, but the Act was by no means a universal cure all. The necessary legal forms could not be evaded or abused even in so urgent and important a case as that of 'Red Jim' McDermott.

In November 1882 the American government expressed its desire to resume negotiations to replace the limited arrangement of 1842. As the Americans maintained their objections to the Extradition Act's provision on speciality, Harcourt returned to his plans to implement the Report of the Royal Commission, which was also desirable "on general grounds".⁶⁷

On 20 October 1883, Thring was instructed to prepare the bill,⁶⁸ and it was ready by April 1884. Harcourt's bill was designed to put British extradition policy on an entirely new footing. Section 2(b) stated that a fugitive should not be surrendered if accused of a political offence which was committed by him during a time of (and in furtherance of) civil war or open insurrection. Speciality was abolished in Section 2(a). Fugitives were to be liable to trial for any offence, but were not to be surrendered if there was "good ground for suspecting" they might be tried for a political offence.

67. Currie to Home Office (FO. 22 December 1882); West to Granville (No.57 Treaty)(Washington. 16 April 1883); and minutes by Harcourt (HO. 31 December 1882 & 11 May 1883): HO 144/109/A23384, /1 & /10.

68. cf. ibid. /17.

Section 2(e) maintained the fifteen day interval between committal and surrender, but gave the fugitive the right to waive this delay. Section 24 provided for the transit through Britain of Fugitives surrendered by foreign states to one another, under a very simple procedure in which the fugitive was not given an opportunity to seek liberation on the grounds that he was a political offender. The only significant addition to the schedule of crimes was of offences under the 1883 Explosives Act⁶⁹. The ensuing discussion of the bill revealed significant divergences of opinion.

Thring was unhappy with the political offence clause he had drafted, and suggested his own new version. Political offences were not to include assassination or attempted assassination, or:

any other crime of violence committed otherwise than in furtherance of existing civil war, or existing open insurrection, and shall not include any crime of violence... as would not be justifiable in open war, according to the laws of war as understood by civilised nations.⁷⁰

Pauncefote thought Thring's own definition "excellent", as did Granville, and Ingham (chief magistrate at Bow Street) advocated its adoption.⁷¹

69. Copy of the bill in HO 45/9606/A2566, /17. The bill left extradition procedure and the nature of the evidence required to justify extradition unaltered.

70. Memorandum by Thring (1 April 1884): ibid. /17.

71. Memoranda by Pauncefote (FO. 7 June 1884); and Bergne (FO. 12 August 1884): FO 5/1896. cf. FO 5/2042.

In contrast, Harcourt was "not satisfied", and suggested:

No crime of violence... shall be deemed... Political merely by reason of the motive from which it is alleged to have been committed if such crime be in itself punishable by law, unless... connected with an existing condition of open warfare or insurrection.⁷²

The 1880s were in fact a time when the definition of political offences "attracted considerable attention". De Hart asserted that those who resorted to terrorism should be treated like "other murderers": offences "directed against, or endangering human life" should not be considered political unless they occurred "in the actual course of an insurrection or political disturbance".⁷³ At its September 1880 meeting at Oxford, the Institute of International Law resolved that crimes committed with a political motive should not be exempted simply because of that motivation, while in dealing with acts done during a rebellion, it was "necessary to inquire whether they are excused by the customs of war".⁷⁴ However, more common than attempts at definition were assertions like that of the Daily News that it was unlikely the matter could ever be "authoritatively decided".⁷⁵

72. Harcourt to Selborne (Private. 22 February 1885): HO 45/9606/A2566, /17a.

73. E.L. de Hart, 'Extradition of Political Offenders', Law Quarterly Review volume 2 (1886), pp.177-87.

74. The resolutions are reprinted in Harvard Research, op.cit. epp.300-1.

75. Daily News 3 March 1883, p.4. cf. Pall Mall Gazette 1 March 1883, p.1; Anon, 'The Extradition Treaty', Saturday Review volume 62 (1886), p.110; and Reynolds's 4 March 1883, p.4

To return to the bill, Thring had abolished the restrictions on trial for additional offences as recommended by the Commission, but argued they should be retained. Since the definition of political offences was a:

matter of opinion... I cannot see any other means by which any security can be obtained that a man surrendered for a non-political offence will not be tried for a political offence.

The Law Officers reported that while agreeing "with the view of the Commissioners generally", they thought "the person surrendered should not be tried for any additional offence other than an extradition offence".⁷⁶

Selborne thought clause 2(a) was "sufficient security", and Granville agreed. Harcourt regarded Thring as "too timid in these matters". There should be no restriction: the "real security is the power of diplomatic remonstrance against the abuse of the Treaty".⁷⁷

On transit, Thring again disapproved of the clause he had been instructed to draft. The "proposition involved" was that a political refugee surrendered to Russia might be taken through Britain "to be executed in Russia" without having a chance to show that his crime was political. "Such a proposition seems to be contrary alike to the law of England and to the traditions of English legislation". He suggested

76. Note (a) on p.2 of the bill; and memorandum on the Draft Extradition Bill (n.d.): HO 45/9606/A2566, /17 & /24.

77. Memorandum by Selborne (3 May 1884): FO 5/1896; and Harcourt to Selborne (Private, 22 February 1885): HO 45/9606/A2566, /17a. cf. FO 5/2042.

an alternative scheme, under which a transit warrant would not be issued unless the fugitive was given an opportunity to show he was a political offender. If this was established, he should be released immediately. Selborne agreed with Thring, Granville concurred, but Harcourt did not.⁷⁸

Gladstone's ministry came to an end in June 1885 without Harcourt's bill coming before Parliament, but it is nevertheless important to examine his attitudes, and why they were not translated into legislation. It was quite natural for him to want to implement the Report of a Commission on which he had served, and the need to enact fresh legislation as a precursor to a new American treaty was also a quite logical factor pushing him in this direction, but other factors may also have influenced his thinking.

There was royal pressure regarding political offences. The Queen "did not see why sovereigns should be less taken care of or more exposed to assassination than other people", and thought it would be wise "to include sovereigns, as well as their more fortunate fellow creatures, among those whose murder is considered a crime". Prince Albert Edward asserted that the law did not give sufficient "Protection to the

78. Note (a) on p.12 of the draft bill: copy in HO 45/9606 /A2566, /17; Memorandum by Selborne (3 May 1884): FO 5/1896; and Harcourt to Selborne (Private, 22 February 1885): HO 45/9606/A2566, /17a. cf. FO 5/2042. Selborne later agreed to the provision, provided it was "limited to countries... which have the same principles of criminal jurisprudence" as Britain: reported in Mackenzie to Home Office (Lord Chancellor's Office, 27 May 1884): HO 144/109/A23384, /27. This was hardly any use: the whole bill had to be applied to all nations. Discrimination would only cause diplomatic offence.

Sovereign's Person"⁷⁹. Royal influence can never be discounted.

In any case, it is clear that from a personal standpoint, Harcourt believed the political offence exemption included in the 1870 Act to be too wide. He advocated the adoption of the 'attentat' clause, and "never allowed... [himself] to be the dupe of the mischievous fallacy that assassination plots by secret societies are... to be tolerated or extenuated as political offences"⁸⁰.

Harcourt's attitudes were perhaps conditioned by the circumstances of the time. The first half of the 1880s were generally unhappy times for many Britons. Irish terrorism was particularly worrying for a people that was not accustomed to such things.⁸¹ In addition, for the first time, Britain faced serious challenges to her near monopoly in both European and colonial markets, social unrest grew throughout the decade, and forceful native socialism re-emerged. Things just did not seem to be going along quite as well as they had in the past: the "old liberal equations no longer worked out as they had used to".⁸² Liberal values

79. Lewis Harcourt Diary, 2 April 1881: WVH.PP. Box 348, f.30; Ponsonby to Granville (Private, 11 April 1881): Granv.PP. PRO 30/29/38; and memorandum by Prince Albert Edward (n.d.): WVH.PP. Box 2, ff.22-6.

80. Minute by Harcourt (HO, 2 May 1881): HO 45/9339/21820, /3; and 3H, (C), 260, c.1841, (5 May 1881).

81. cf. K.R.M Short, op.cit. pp.259-60 and passim.; J.P. O'Grady, op.cit. pp.170-202; and B. Porter, Vigilant State chapters 3 & 4.

82. B. Porter, Origins of Britain's Political Police p.5.

were questioned in a way that had been considered heretical for years.

However, it is significant that though liberal values were questioned, they were not thrown overboard. Concrete signs of illiberalism are elusive. The only illiberal legislation was the Explosives Act (which in some cases shifted the burden of proof from the prosecution to the defence, and required the accused to prove his innocence), but it was rather mild when compared with laws passed elsewhere. It is more significant that Britain did not pass other illiberal laws. British liberalism was not so weak as to be overturned by a few bombs and some competition. Nevertheless, Irish terrorism was the most serious practical problem faced by Harcourt: it would have been astonishing had he not been influenced by it. The decision to make explosives offences extraditable was the clearest indication of this. It was obviously desirable that in any new treaty with the United States (the main Fenian sanctuary) explosives offences should be extraditable.⁸³

It is an open question whether the American courts would have viewed the bombers as political offenders, but Harcourt had no doubts. Dynamite offences "ought to be clearly

83. Britain could have sought extradition for murder or attempted murder, but did not. Bombers "had to be caught in the act or recognised immediately, for there was no possibility of convicting them [in Britain] otherwise. If they escaped... there was insufficient evidence to support a case for extradition": K.R.M. Short *op.cit.* p.189. After the Mansion House bombing (March 1881) the police failed to arrest Coleman and he escaped to America. No request for extradition was made: it was "thought best to let them see that they are known and then they will not attempt to come back": Lewis Harcourt Diary, 26 March 1881: WVH.PP. Box 348, f.22.

distinguished from the category of political crimes". Indeed, he was sure that none of the activities of Fenians and their sympathisers should be considered political. To do so would be "an abuse of terms... Whatever may be the motive by which they are inspired they amount to private crimes of the most flagrant description".⁸⁴

It is less easy to account for Harcourt's general disposition to enact a bill which was so very far removed from the spirit of the 1870 Act. However, one can say that in general terms, Harcourt was a rather illiberal Liberal, and far less liberal than others of his generation or party. He had no sympathy with the sort of radical, xenophobic, patriotic liberalism which dictated Britain's earlier attitude towards extradition. Dilke noted that Harcourt "was wrongheaded about the right of asylum"⁸⁵.

Turning to the question of why no bill was introduced, the reason given was pressure of business.⁸⁶ However, even had there been time, it is unlikely that the bill would have been introduced. Its terms were far from agreed upon, and although Harcourt was quite willing to ignore the views of

84. Harcourt to Granville (Private. 8 September 1884): Granv.PP. PRO 30/29/29; and same to same (Private. 17 June 1881): WVH.PP. Box 721, f.188. The British press agreed, and the view found some sympathy in America: cf. for example: Morning Post 15 December 1884, p.4; Daily News 26 January 1885, p.5; and J.B. Angell et al. 'Extradition of Dynamite Criminals', North American Review volume 141 (1885), pp.47-59.

85. S. Gywnn and G.M. Tuckwell, Life of Dilke (1917) volume 1, p.387.

86. cf. Harcourt to Selborne (Private. 22 January 1884): HO 144/109/A23384, /24; and Harcourt to Gladstone (Private. 9 July 1884): WVH.PP. Box 696, ff.224-5.

colleagues and advisers, it seems very doubtful that he would have been allowed to proceed under such circumstances. Furthermore, whilst Harcourt thought Parliament was "in a very favourable condition for passing a good strong Bill", others were not so sure. Bergne believed it to be "at least doubtful" that any bill containing the limited provision on specially advocated by Harcourt would be passed, while Selborne was sure the bill would not pass "without much discussion, or without some altering"⁸⁷.

As the bill was not introduced, one cannot be sure how it would have been received, but some indications exist. Sir John Rose (a retired Canadian official) regretted that the Royal Commission's Report had not been implemented, but wondered whether a time when the government was "open to the imputation of panic" (it was the height of the Fenian bombing campaign) was right for doing so. The Times though the Report an example of "the wisdom which lies buried in Blue-books", but "society would only be playing into the hands" of the terrorists if it allowed them to be the means of overthrowing public liberties and of checking the legitimate political enterprises of persons who are in no manner associated with them". Any attempt to "interfere" with the right of asylum for bona fide political refugees would "most justly call forth a storm of indignation, and meet with determined opposition".⁸⁸ Harcourt's bill would have worked

87. Harcourt to Selborne (Private, 22 February 1885): HO 45/9606/A2566, /17a; minute by Bergne (FO, 15 May 1883): FO 5/1865, f.80; and Selborne to Harcourt (Private, 20 September 1884): FO 5/1896.

88. Letter to the The Times 20 April 1883, p.4; The Times 20 April 1883, p.9; and 7 February 1885, p.9; and Anon, 'Freiheit Prosecution', Saturday Review volume 51 (1881), p.418.

to the disadvantage of 'legitimate' political offenders as well as terrorists, so perhaps even The Times might have opposed it.

What is quite clear is that although old liberal values were being questioned, there were plenty of people left who were prepared to defend the traditional asylum policy to the last, and who might well have opposed Harcourt's bill. The continued strength of this feeling was most clearly demonstrated by the Maceo case. In 1882, a Cuban rebel named Maceo escaped from Spanish custody, reached Gibraltar, but was handed back illegally by local officials, despite his protests that he was a political refugee.⁸⁹

Such were the bare facts of the case. Its importance is that the storm of protest which was aroused demonstrated that the right of asylum was still:

without the least doubt, the one chord in the heart of the British nation which was most quickly set vibrating, which vibrated the most powerfully, and which continued vibrating the longest... It was a deep and profound passion, coextensive with that love of political liberty which dominated an Englishman's entire life from the cradle to the grave.⁹⁰

89. cf. The Parliamentary Papers listed in bibliography; FO 881/4761, 5152, 4813, 4974; FO 72/1701-3; CO 885/12; CO 91/360-5; and CO 883/2.

90. Morier to Granville (No.148) (Madrid. 12 November 1882): FO 881/4761, No.36. cf. especially: The Times 4 December 1882, p.9; Standard 6 November 1882, p.4; and Anon, 'Cuban Refugees', Saturday Review volume 54 (1882), p.623. The matter was referred to extensively in Parliament, cf. especially, 3H, (C), 279, cc.535-61, (11 May 1883).

Nevertheless, Harcourt's bill did not have to die there. Extradition was not a party issue, and Victorians did not share the addiction of modern politicians to doing the exact opposite to their predecessors. The need for a new American treaty remained, so the new Home Secretary (Cross again) resumed discussions.

There was even less agreement than under Harcourt,⁹¹ but the debate was rendered irrelevant by Cross's decision to abandon a general bill. The Commission's recommendations were "useful... but not indispensable, and any Bill which embodies them will... give rise to long discussion in Parliament". A new American treaty was "most urgently" needed, and for this purpose the law only had to be altered with respect to speciality. Therefore, Cross decided to introduce a short bill, authorising extradition if it was provided that fugitives would not be tried "for any prior non-extradition offence", unless given an opportunity to return to Britain, "or under any circumstances for any political offence". The other recommendations made by the Commission were to be "dealt with at some subsequent period".⁹²

However, a new treaty had been needed for decades; the extra wait for a new general Act would hardly have made a

91. cf. Memorandum of points which remain for consideration and settlement (n.d): FO 5/2042; Law Officers' Opinion by Webster and Clarke (28 January 1886): HO 45/9606/A2566, /22; and Hamilton to Home Office (Dublin Castle. 30 November 1885): ibid. /24.

92. Memorandum by Cross (HO. 12 January 1886) (Printed for the Cabinet): ibid. /24. Copy of the bill in /25.

difference. One has to look rather deeper for Cross's motivation. He adhered very strongly to that brand of mid-Victorian liberalism which held up Britain's protection of political refugees as the embodiment of national greatness: this was clearly shown by his attitude towards extradition during the 1870s and the part he played in the Maceo agitation. Harcourt may have been a Liberal, and Cross a Conservative (in party terms), but such labels are meaningless. On most issues, Cross was far more liberal than Harcourt, and for purely personal reasons, he could never have agreed to a bill along the lines wanted by the latter.

As in 1885, the government changed before the bill was introduced, but Childers - Cross's successor - was happy to press on.⁹³ However, on 23 February 1886, the Americans proposed a treaty which, surprisingly, contained a full embodiment of speciality. The bill was dropped: there might have been "some difficulty" in passing it anyway.⁹⁴ On 25 June the new treaty was signed.⁹⁵

93. cf. Lushington to Childers (Private. 19 February 1886); Lushington to Murdoch (Private. 20 February 1886): HO 45/9606/A2566, /26; and Lushington to Foreign Office (HO. 24 February 1886): FO 5/2042.

94. Copy of draft in FO 5/1973; Lushington to Childers (Private. 29 March 1886): HO 144/109/A23384, /64.

95. Copy in FO 5/1973. Any remaining doubts over the American attitude were removed by the Supreme Court decision in the Rauscher case (1886), in which the speciality principle was fully upheld: the decision was repeated in the Hibbs case (1886): cf. HO 144/146/A38041; FO 5/1907; F. Kopelman, *op.cit.* p.608; and J.George, *op.cit.* p.314n. Although it was some time before the new treaty came into operation, British courts accepted the Rauscher decision as proof that American law respected speciality. Therefore, when in 1888, Alice Woodhall attempted to avoid extradition on the plea that American law made no provision for speciality, her appeal was refused: cf. HO 144/475/X18533; and Law Times volume 59 (1888), pp.549-54.

The sudden reversal of American policy appears curious to say the least. The Americans may have despaired of the 1870 Act ever being amended, but there is evidence that their change of heart was the result of more positive considerations. Phelps urged the inclusion of speciality in any forthcoming treaty: cases involving political offenders were "not unlikely to arise hereafter", and a fugitive surrendered to Britain might be tried for an additional offence which America considered political.⁹⁶ (Here he was no doubt thinking on Irish offenders). In addition, the American business and banking community pressured its government to frame a new treaty in order to prevent criminals finding easy immunity in Canada.⁹⁷

In Britain the treaty could be implemented without reference to Parliament, but the necessary ratification by the American Senate was not forthcoming: after much delay, the treaty was rejected in February 1889. Several factors led to this turn of events. Most conspicuous was the claim that the treaty was directed against Irish political offenders. The Irish World asserted that if it was ratified, "the United

96. Phelps to Bayard (No.143) (London. 23 November 1885): Papers Relating to the Foreign Relations of the United States for 1888 (Washington 1889) pp.1730-40.

97. cf. New York Times 6 June 1885: extract in HO 144/109/A23384, /43; A.G. Sedgwick, 'Extradition', North American Review volume 36 (1883), pp.497-505; Anon, 'The Extradition Treaty', Nation (New York), volume 43 (1886), p.130; G.H. Adams, 'Our State Department and Extradition', American Law Review volume 20 (1886), pp.540-52; and J.P. O'Grady, op.cit. pp.209-14. There were also calls in Britain for the unsatisfactory state of Anglo-American extradition to be rectified on commercial grounds: cf. Reynolds's 25 July 1886, p.4; 3H, (C),306,c.307, (28 May 1886); and 3H, (C),310,cc.1405-6, (14 February 1887).

States will be rendered merely an outpost of British despotism"; a claim that was alarmist and had little basis in fact. The treaty contained full protection for political refugees, and there was no reason to suppose that American courts would be found wanting when it came to protecting Irish offenders. Still, those who made the claim were aided by the language of the British press, which thought the treaty "ought to become a potent engine for putting down the cowardly crimes of the dynamite party".⁹⁸

However, despite the loudness of the Irish-American campaign, it alone was not strong enough to defeat the treaty. Some opposed it because its provisions to combat banking crimes were not deemed stringent enough; others doubtless did so in an effort to avoid alienating the Irish vote. However, perhaps the most significant factor was a strong, general, (but temporary) anti-British feeling, aroused by serious fisheries disputes. Nevertheless, one cannot help noting, with some irony, the parallels between this and the situation in Britain before 1870. Then, treaties with France and Prussia had been rejected because of fears for the security of political offenders: now, the Anglo-American treaty had been rejected partly because Senators did not trust Britain vis-à-vis Irish political refugees.

The American government, however, remained keen on a new treaty, and in July 1889 a second treaty that conformed to

98. Quoted by The Times 24 July 1886, p.7; and The Times 20 July 1886, p.9. cf. Anon. 'The Extradition Treaty', Saturday Review volume 62 (1886), p.109.

British law was signed.⁹⁹ In February 1890 it was duly ratified: at last, Anglo-American extradition was placed upon a satisfactory footing.¹⁰⁰

The 1880s were an important phase in British extradition history. The most important practical difficulty remaining from the 1870s (the dispute with the United States) was settled, and no new disputes arose. Under Harcourt's auspices, several definitions of political offences were suggested, but none had been acted upon. No case had occurred in which the courts had been called upon to give a judgement as to what constituted a political offence, so the matter remained unsettled. However, during the 1890s, a number of cases occurred in which the courts were so called upon. It is in the resolution of these cases that the crucial importance of the 1890s to British extradition history lies.

99. Copy in FO 5/2104.

100. On the progress of the treaties in Congress: cf. J.P. O'Grady, op.cit. pp.220-83; R.J. Dangerfield, In Defence of the Senate (Oklahoma 1933) p.240; F.E. Gibson, op.cit. pp.401-3 & 420-6; R. McElroy, Grover Cleveland (New York 1923) volume 1, p.294; W.S. Holt Treaties defeated by the Senate (Baltimore 1933) pp.142-3; and J.M. Callahan op.cit. p.413.

CHAPTER 6

POLITICAL OFFENCES AND TERRORISTS (1890-1903)

Chapter Six: Political Offences and Terrorists (1890-1903)

In 1890 an abortive revolt occurred in Bellizona in the canton of Ticino, Switzerland, during which a state councillor named Rossi was killed. It was believed that Angelo Castioni fired the fatal shot, and when it became known he was in London, the Swiss requested his extradition.

On 24 October, Castioni was committed for extradition, the magistrate finding the murder was unnecessary, and accepting some rather doubtful evidence that it was inspired by non-political motives. The Swiss alleged that Castioni held Rossi responsible for the death of his brother, and had killed him as an act of private revenge¹.

However, Castioni appealed to the Queen's Bench, which released him on 10 November. In doing so, Chief Justice Denman held that it was not "necessary or desirable" to give an "exhaustive definition" of political offences: "to exclude extradition for such an act as murder... it must at least be shown that the act is done in furtherance of... with the intention of assisting" a revolt. Denman rejected the suggestion that Castioni had killed Rossi for private reasons. Justice Hawkins agreed, pointing out that although not every act committed during an insurrection would be considered political, everyone knew that "men hot in their political excitement" did things "which may be deplored and lamented... by those who can calmly reflect upon it after the battle is over", but which nevertheless remained political

1. F. Lushington to Home Office (Bow St. 24 October 1890): HO 144/479/X29665, 78.

offences. Rossi's murder was such an act.²

The Saturday Review welcomed the nature of the judgement, but doubted the wisdom of its being applied to Castioni: he had "an extremely lucky escape".³ The Spectator (now Unionist) accepted the test used but noted that cases might arise in which it would be difficult to apply. These would "have to be argued out on their merits"⁴. The Pall Mall Gazette (now Tory) had criticised Castioni's committal and welcomed his liberation, as did Reynolds's, the Star, the Echo, the Daily Graphic and the Daily Chronicle⁵. Justice, Freedom and Commonweal (socialist and anarchist respectively) regarded it as "a triumph" for the right of asylum.⁶ As the The Times saw it, it was "the intention of Parliament and is "the desire of the English people" that rebels "should not be surrendered to their victorious opponents". The Daily News asserted that Castioni's offence was "political or nothing, and a clearer case never came

2. The judgement is reprinted in British International Law Cases volume 5 (1967), pp.556-66.

3. Anon, 'Political Offenders', Saturday Review volume 70 (1890), pp.548-9. cf. Morning Advertiser 12 November 1890, p.4; St. James's Gazette 12 November 1890; and Globe 12 November 1890, extracts in HO 144/479/X29665, /14.

4. Anon, 'Political Offences', Spectator volume 65 (1890), p.678.

5. Pall Mall Gazette 25 October 1890, p.2; and 12 November 1890, p.2; Reynolds's 16 November 1890, p.5; Star 12 November 1890; Echo 12 November 1890, p.2; Daily Graphic 12 November 1890; Daily Chronicle 12 November 1890, extracts in HO 144/479/X29665, /14. The latter five represented the Radical/Liberal wing of the press.

6. Justice 22 November 1890, p.1. cf. Freedom December 1890, p.58; and Commonweal 22 November 1890, p.371.

before a Court of Justice"⁷.

Modern legal authorities have generally approved of the Castioni decision. However, one modern authority, Valerie Epps, claims that it is difficult to understand:

what possible interest Britain thought it was serving in offering refuge to Castioni... [There is] no evidence to suggest... [that] Britain supported Castioni's group, nor that the canton government was regarded as unduly repressive or otherwise unacceptable.⁸

Such a comment reveals a complete lack of understanding of the situation in Britain in 1890. The Queen's Bench was not trying to serve any 'interest': that was not the point of political offence exemption. It was an unselfish policy, intended to protect the individual liberties of political refugees, even if it may have suited British interests to do otherwise. The political offence exemption was the embodiment of mid-Victorian liberalism, and such liberalism was not selfish or interest serving.

What of the government reaction? Bergne (superintendent of the Treaty Department at the Foreign Office) asserted: "To many it may seem regrettable that we are obliged to shelter and shield" a murderer, "whatever motives may have impelled him to the deed". Godfrey Lushington (Home Office permanent under-secretary) thought "the whole question"

7. The Times 12 November 1890, p.9; and Daily News 12 November 1890, extract in HO 144/469/X29665, /14. For comment in legal journals: cf. E.L. de Hart, 'Notes', Law Quarterly Review volume 7 (1891), pp.1-2.

8. V. Epps, op.cit. pp.64-5.

required "much more consideration". Troup (senior clerk at the Home Office) observed that "not much harm has been done. The case itself is not very important, as compared with other 'political' cases that may hereafter arise". Still, he "regretted that considered judgements were not given. The law is still incompletely settled"⁹. Sir F. Lushington (the committing magistrate) regarded the Court's views on political offences as "ambiguous", and looked forward "to a better eventual solution of the difficulty". The chief magistrate, Sir John Bridge, pointed out that the judgement was "not strictly a definition, but merely a description of some of the crimes which are of a political character". Any definition was "good for a particular case but not for all possible cases"¹⁰.

In reality, then, the Castioni decision solved nothing. A partial definition of political offences had been given, but it only applied to Castioni's case (and perhaps similar cases), and should not be regarded (as it often is) as embracing a 'definition' of political offences. The decision could be used as a precedent in future cases, but, given its

9. Memorandum by Bergne (FO. 15 November 1890); minute by G. Lushington (HO. 20 November 1890); and memorandum by Troup (HO. 5 December 1890): HO 144/479/X29665, /14 & /16.

10. Memorandum by F. Lushington; and Bridge to Home Office (Bow Street. 18 & 21 July 1891): ibid. /21. Underlining in original.

somewhat limited scope, it did not have to be adopted¹¹.

For Bergne, the importance of the case was that it highlighted the magisterial power to discharge 'political offenders'. It was "entirely wrong that the final decision on such a very important point, involving possibly grave international or political issues, should under any circumstances be left without review to the decision of the police magistrate". He thought the magistrate should be stripped of this power, and the question left to the Queen's Bench and ministers.¹² Troup suggested the plan be borne in mind if legislation was contemplated, while Godfrey Lushington though it "important".¹³ The magistrates themselves objected. Lushington was "not convinced... it would be advantageous having regard to the rights of the prisoner or to public policy", and Bridge agreed. Such a plan would be "inexpedient", and would "so alter the scheme of the Act that there would be no probability of its being

11. Although this was the first case in which political offences were seriously discussed and considered, it was not the first occasion upon which the political offence exemption had been raised. Huguet (1873) and Berson (1878) had made unsubstantiated (and unjustified) claims that their extradition was sought for political reasons, and both were surrendered: cf. FO 27/2032 & 2033; The Times 12 June 1873, p.9; HO 45/9344/23725; and The Times 5 August 1878, p.4. The Home Office file on the former case (20549) has not survived. In 1882 a curious case occurred. Britain extradited Novitsky from Germany for theft as quickly as possible "as another state [was]... seeking his surrender on political grounds". No other details survive: cf. HO 144/103/A20842.

12. Memorandum by Bergne (FO. 15 November 1890): HO 144/479/X29665, /14. A similar scheme had been discussed in 1884-5, but was not included in Harcourt's bill: cf. FO 5/1896 & 2042; and HO 45/9606/A2566.

13. Memorandum by Troup (HO. 5 December (1890); and minute by G. Lushington (HO. 9 July 1891): HO 144/479/X29665, /14 & /14a.

adopted by Parliament". The idea was shelved.¹⁴

The dust had hardly settled on the Castioni case when France sought the extradition of Jean-Pierre Francois for complicity in the April 1892 bombing of a Paris café.¹⁵ (Its owner, Very, had assisted in the capture of Ravochol - perhaps the most notorious anarchist terrorist - and was killed as revenge). Hertslet (Foreign Office Librarian) thought the case promised to be "interesting", while Troup had to doubt the crime was non-political.¹⁶

On 16 November 1892, Bridge committed Francois for extradition, even though the evidence was rather circumstantial, and he claimed to have an alibi.¹⁷ As for

14. Memorandum by F. Lushington (Bow Street. 18 July 1891); and Bridge to Home Office (Bow St. 21 July 1891): ibid. /21. cf. G. Lushington to Foreign Office (HO. 29 July 1891); and minute by Bergne (FO. n.d.): FO 100/310.

15. The investigation leading to his arrest by the Special Branch is detailed in: The Times 15 October 1892, p.10; and P. McIntyre, 'Scotland Yard. Its Mysteries and Methods', Reynolds's 21 April 1895, p.5.

16. Minutes by Hertslet (FO. 22 October 1892): FO 27/3101; and Troup (HO. 25 October 1892): HO 144/485/X37842A, /4. This file had been missing for several years, but the author found it at the Public Record Office, Kew, in July 1987, bundled together with one on a different case.

17. Francois was later acquitted (E.A. Vizetelly, Anarchist (1911) p.123), indicating the evidence was unsatisfactory. However, magistrates were not supposed to judge a fugitive's guilt: simply whether there was enough evidence to justify committal for trial. There was "abundant evidence to go before a jury": St. James Gazette 2 December 1892, p.4. It was by no means unheard of for extradited fugitives to be acquitted: cf. Karlson (1897: HO 144/514/X66691); Thomas (1898: HO 144/514/X67389); Gries (1899: HO 144/525/X77430); Witjas (1899: HO 144/525/X77163); and Lee (1909: HO 144/1033/175623).

his claim to be a political refugee, Bridge was "sure" the offence was not political, rather it was an offence "of a diabolical character. The motive of the offence is not political, but to revenge something done to Ravochol". To call that political "would, to my mind, be an absolute abuse of language".¹⁸

Francois appealed on grounds of insufficient evidence and that his only real offence was being an anarchist. The judges considered the arguments only "for a moment", and dismissed the appeal.¹⁹ The case did little as far as the clarification of the political offence exemption was concerned since Francois did not claim the bombing was a political offence (he denied involvement). However, Bridge's comments, and the fact that the Queen's Bench so easily passed by the claim that the extradition was being sought for political reasons carried the clear implication that anarchists did not come within the exemption.

This implication was made explicit just two years later in the case of Théodule Meunier, who was accused of complicity in the same café bombing, and the bombing of the Lobau barracks in Paris.²⁰ From the first, officials were

18. The Times 17 November 1892. p.11.

19. The Times 2 December 1892, reprinted in British International Law Cases (1967) volume 5, pp.566-70.

20. On his arrest (again by the Special Branch): cf. The Times 45 April 1894, p.10; and 6 April 1894, p.14; and B. Porter, 'Early Special Branch', p.385. Commonweal (13 April 1894 (no page numbers)) thought it strange that Melville was alone when he arrested Meunier, and suggested he had engineered this to ensure he would not have to share the £2,000 reward rumoured to have been offered by France: "how mean... to cheat some of his pals of their share! But what can one expect from a pig but a grunt!" Special Branch officers were generally rather illiberal and especially anti-anarchist: cf. R.J. Johnson, 'Okhrana Abroad', Unpublished Ph.D. Thesis, Columbia University (1970) p.71; and B. Porter, Origins of Britain's Political Police pp.14-15.

convinced that "This cannot be regarded as... political crime".²¹ Meunier denied all the charges, but the real defence offered was that the barracks bombing was a political offence. He was "simply making war upon the French Government... It was an atrocious act... but... it was a political act". Bridge rejected the plea ("an enmity to all Governments could not be called" political), found the evidence sufficient, and committed Meunier.²²

Meunier lost his appeal: Justice Cave held that for an offence to be political, there had to be:

two distinct parties, each seeking to impose the Government of its choice upon the other... offences incidentally committed in the course of an attempt by one party to impose the Government of its choice on the other, are to be regarded as so connected with the political contest as to amount to political offences.

Anarchists did not advocate a form of government which they sought to impose. Anarchism was "the enemy apparently of all Governments, and its operations are directed... primarily against... the citizens, and apparently only casually against the Government or governing body".²³ This interpretation of

21. Minute by Troup (HO. 16 August 1892): HO 144/485/X37842, /2.

22. The Times 5 May 1894, p.19; 7 May 1894, p.3; and 12 May 1894, p.16; and Reynolds's 6 May 1894, p.5

23. The Queen's Bench hearing of 11 June is reprinted in Law Times volume 71 (1894-5), pp.403-6. Meunier was convicted in France and sentenced to "perpetual forced labour in Cayenne": H. Oliver International Anarchist Movement (1983) p.82.

political offences was "obviously" directed against anarchists, and constituted "the first judicial rejection of... terrorism as a legitimate international political method of protest".²⁴ The decision established "a new and very important canon" in international law, and the notion that anarchist crimes were non-political soon became a commonplace in books and reference works.²⁵

The extraditions were, predictably, resented by anarchists: they showed how "bias against unpopular opinions influence[d]... legal functionaries"²⁶. Some were rumoured to be plotting to give their resentment practical effect: it was reported that a group calling themselves 'Individual Initiative' planned to bomb "the residences of English judges and magistrates".²⁷ Freedom (perhaps the leading anarchist journal) feared the cases might have ramifications beyond the

24. L.L. Deere, 'Political Offences', American Journal of International Law volume 27 (1933), p.268; and C.L. Cantrell, 'Political Offence Exemption', Marquette Law Review volume 60, (1977), p.786.

25. Law Times 16 June 1894: extract in HO 144/485/X378424, /15. cf. H.E. Boyle, 'Extradition', Twentieth Century volume 1 (1895), p.218; H.C. Biron and K.E. Chalmers, Law and Practice of Extradition (1903) p.12; J.E.P Wallis, 'Extradition', in, Encyclopaedia Britannica (19th edition, 1902) volume 28, p.367; N.W. Silbey and A. Elias, op.cit. p.136; J.R. Clark et.al. 'Nature and Definition of Political Offences', Proceedings of the American Society of International Law (April 1909) pp.131-3; Editorial Comment, 'Political Offence in Extradition Treaties', American Journal of International Law volume 3 (1909), p.460; 'A Solicitor', op.cit. p.631; and Hon. Sir A. Muddiman, Law of Extradition (2nd edition. Calcutta 1927) p.27.

26. Freedom June 1894, p.33; and July 1894, p.41; and Anarchist (London) 3 June 1894 (no page numbers). cf. Liberty June 1894, p.44.

27. Globe 5 December 1892: extract in HO 144/485/X37842B, /1.

security of anarchists: "once violated" the right of asylum "very soon becomes a mere fiction: it simply ceases to exist". Persecution always began "with the numerically weakest party", but would soon extend to the extradition of other left wingers. There were "plenty of people who will not fail to say; 'They are only Anarchists'". But every intelligent person in the land must understand that the Anarchist Meunier is simply used as a precedent for abolishing 'de facto' the right of asylum."²⁸ The 'Committee for the Defence of the Right of Asylum' issued a pamphlet entitled An Appeal on Behalf of the Right of Asylum, calling for the maintenance of one of Britain's "chief glories". A fund was raised to finance Meunier's appeal, to which William Morris contributed £2.²⁹

The Law Times, quite reasonably, thought the Meunier decision could be "criticised as to the accuracy of its findings of fact", for not all anarchist 'outrages' were directed against private citizens, and anarchists wished to establish a new society, which amounted to a form of government even if that was not what they called it. J.E.P. Wallis thought the Castioni test "more satisfactory" than

28. Freedom June 1894, p.33. In the event, they need not have worried, for Meunier was the last anarchist or left-winger of any description whose extradition was sought. In 1897, Britain extradited George Potts from Spain; the Foreign Office thought he might "very possibly be an anarchist", but the Home Office thought the notion "absurd". He was "a prudential insurance agent and a dishonest one"; HO 144/514/X67474.

29. Copy of the pamphlet in HO 144/485/X37842A,/8; and Liberty June 1894, p.44. The committee consisted of anarchists.

that adopted in Meunier's case, and M.J. Farrelly thought it "at least arguable that to describe Anarchist outrages as non-political is to apply to the term an unusual and forced construction... It would be simpler to say that although political they are extraditable".³⁰

On the other hand, The Times thought the idea that Francois was a political offender "quite untenable", and even the liberal Daily News asserted that anarchists deserved "the utmost rigour of the law, and should be treated... like the wild beasts they really are".³¹ Asquith (Home Secretary) asserted he had not had "a moment's hesitation" before authorising Francois' extradition: anarchists were "outside the pale of political offenders". Designating anarchist crimes as non-political was also in accordance with the resolutions of the 1892 meeting of the Institute of International Law.³² Anarchists were the only group to be discriminated against in British extradition law and practice, and it is necessary and important to analyse the reasons for it.

30. Law Times 16 June 1894: extract in HO 144/485/X37842, /15; J.E.P. Wallis, op.cit. p.367; and M.J. Farrelly, 'Anarchists and Asylum', Law Quarterly Review volume 10 (1894), p.270.

31. The Times 2 December 1892, p.9; and Daily News 2 December 1892, p.4. cf. Daily Chronicle 2 December 1892, p.4.

32. 4H, (C), 8, cc.954-5, (9 February 1893); the resolutions are reprinted in G. Tosti, 'Anarchistic Crimes', Political Science Quarterly volume 14 (1899), p.415. cf. minute by Lushington (HO. 8 December 1893): HO 45/10254/X36450, /8; and G. Diena, Les Délits Anarchistes et L'Extradition (Paris 1895).

Anarchists were not the sort of revolutionaries most Britons would wish to protect. The refugees who had been revered and sheltered earlier in the century (such as Kossuth and Mazzini) had been 'respectable'. They fought to free their nations from the chains of 'despotism', generally used acceptable methods, and their cause was as 'liberal' as it was justifiable and popular. Britons could sympathise with nations struggling to be free: much of what these rebels sought was the kind of political liberty which Britons took for granted: free speech, representative government, and the like. It was with such men in mind that the political offence exemption had been framed: "To compare the Anarchists and other villains of the same type to men like Kossuth and Mazzini is the merest claptrap".³³

While the respectable revolutionaries of the middle decades of the nineteenth century had been loved and respected, anarchists were widely despised. Public speakers found "abuse of anarchists... an unfailing passport to popular favour". Anarchism "came to represent for many the fearsome evil forces which menaced the peace and security of mankind... The dominant image of the anarchist as it emerged in the press and even in works of reference provided a simple schematic drawing of a mischievous and mad criminal".³⁴ Furthermore, while Britons had long looked in horror at anarchist outrages abroad, the phenomenon seemed to be

33. The Times 18 July 1894, p.10.

34. E. Reclus, 'Anarchy', Contemporary Review volume 45 (1884), p.627; and H. Shpayer, 'British Anarchism', Unpublished Ph.D. Thesis, London University (1981), pp.5 & 9.

spreading to their own doorstep. In 1892 a bomb factory was discovered at Walsall: in 1894 a bomb went off in Greenwich Park, London, and a plot to bomb the Stock Exchange was nipped in the bud. There was quite a panic over anarchist terrorism: Tit-Bits feared they would soon turn to biological warfare.³⁵ Freedom remarked that the "increase of Anarchism in England" was "chiefly responsible" for Francois' extradition, while the Anarchist thought Meunier's fate was "simply the illustration of the way in which the police are using the dynamite scare... as a means of handing political refugees into the hands of the despotic Governments of the Continent".³⁶

It was perhaps the indiscriminateness of anarchist terrorism which did most to engender anti-anarchist feeling, which had a certain element of morality in it. It was one thing to assassinate kings and emperors (which was bad enough), but much worse to kill and maim 'innocent' civilians. Although anarchists assassinated particular personages (such as President Carnot of France in 1894), many of their 'outrages' seemed to be directed simply at society in general. In 1886 several policemen were killed at Chicago and a bottle of vitriol was dropped from the galleries of the Paris Stock Exchange; in 1894 a Parisian café was bombed and the Liceo theatre in Barcelona was attacked. Bombs went off all over Paris and in other parts of France.

35. B. Porter, Origins of Britain's Political Police p.7.

36. Freedom January-February 1893, p.2; and Anarchist (London) 3 June 1894.

No-one seemed safe. "The secret murder of unsuspecting individuals, the reckless slaughter of any number of neighbours or bystanders... are crimes against the universal conscience... they do not cease to be criminal because they may be political... political offences... are distinguished by a wide and clear line from the misdeeds of the anarchist".³⁷ Furthermore, such terrorism was distinctly unsporting and un-British. Should the English decide that revolution was necessary, they would not resort to terrorism: they "would come out into the open and fight like Englishmen".³⁸

The perceived nature of anarchism³⁹ seemed to threaten Britain in a way that the 'politicos' of former years had against unjust rulers. Britain had had nothing to fear from this type of revolutionary because her liberalism made her unsubvertable: "the glory of this country [is] that we can rectify.. evils by the force of argument

37. The Times 21 March 1892, p.9. cf. Daily Telegraph 13 November 1893, p.4; Daily News 11 December 1893, p.4; St. James's Gazette 11 December 1893, p.3; Observer 18 February 1894, p.4; 4H, (C),22,c.232, (13 March 1894); and R.B. Jensen, 'International Anti-Anarchist Conference', Journal of Contemporary History volume 16 (1981), pp.324-5.

38. Clarion 8 June 1906, p.6. cf. 4H, (C),8,cc.954-5, (9 February 1893).

39. Perceived, because not all anarchists indulged in terrorism, indeed, the majority did not. However, few were prepared to condemn them, so all were tarred with the same brush: cf. G.D.H. Cole, History of Socialist Thought volume 2 (1969) pp.317 & 415; and H. Oliver, op.cit pp.85-6. Not everyone succumbed to this view of anarchism: cf. H. Chisholm, editorial note on 'Anarchism', in, Encyclopaedia Britannica (11th edition. New York 1910) p.916; W. Donisthorpe, 'In Defence of Anarchy', New Review volume 11 (1894), p.283; and B. Porter, Vigilant State pp.105-7.

not. Men like Kossuth had rebelled with good reason steadily applied... without invoking the destructive aid of popular passions or urban revolutions".⁴⁰ In contrast, anarchists did not seem to be protesting against any particular legitimate or illegitimate grievance. They committed outrages in both liberal and illiberal states, and seemed to attack and seek to destroy everything and anything that was established and accepted. How could one satisfy irrational grievances, pursued by unholy means? Victorians believed that "men, being rational, would see that the system worked to everyone's advantage", but anarchists were not rational. Continentals surrendered political offenders because they were a "source of terror": perhaps Britons came to share this 'terror', although not to the extent that was so prevalent elsewhere.⁴¹

Although Britain's anarchist 'outrages' were "very tame stuff" compared with those experienced abroad,⁴² she was not immune. Anarchists could not be ignored. In the same way as the Fenian menace bred an illiberal tendency in Britain, so too did the 'anarchist threat' (although more marginally),

40. A. Alison, 'Continental Revolutions', Blackwood's Edinburgh Magazine volume 64 (1848), p.492. cf. A. Alison, 'Year of Revolutions', Blackwood's Edinburgh Magazine volume 65 (1849), p.9; and 3H, (L), 119, cc.895-6, (27 February 1852): speech of Derby.

41. B. Porter, Britain, Europe and the world p.43; and 'A Solicitor', op.cit. p.631

42. B. Porter, 'British Government and Political Refugees', p.26. The only casualty of anarchist violence was the Greenwich Park bomber himself (Bourdin). His fingers were scattered as the balls "fly off at cricket": M. McNaghten, Days of my Years (1914) p.80, quoted in F.G. Clarke, Will-O'-the-Wisp (Melbourne 1983) p.23.

even though it was far less real or immediate: "Men do not need to be threatened in order to feel threatened". The 'anarchist threat' combined with other factors (economic depression, the revival of socialism and militant trade unionism at home, and so on), to make Victorians feel less self-confident and self-assured than in former years. More generally, these factors contributed to a "movement of political reaction which seized Britain during the 1890's".⁴³

However, the impact of anarchism can be exaggerated. Officially, British anarchist 'outrages' were treated as ordinary crimes, not anarchist crimes. This may have been because ministers wanted to treat them as such rather than admit that 'political crimes' could be committed in Britain, but nonetheless the distinction remains important. In more concrete terms, Britain passed no anti-anarchist laws, which distinguished her sharply from France, Spain, Italy, Germany, Switzerland, America, Austria, Belgium and Denmark. Anti-anarchist provisions were also inserted in foreign extradition treaties, such as that between the United States and sixteen Latin American nations of 1902.⁴⁴

Victorian liberalism retained a great resilience: as '007' might have put it had Ian Fleming ever written a

43. B. Porter, 'British Government and Political Refugees', p.27; and Origins of Britain's Political Police p.7.

44. cf. Harvard Research, op.cit. pp.278-81; J. Quail, Slow Burning Fuse (1978) p.157; and R.B. Jensen, op.cit. p.325
The Spain-Venezuela treaty of 1894 also contained such provisions: copy in FO 72/2129.

history of Britain, it was 'shaken, but not stirred' into strong repressive action. Throughout the 1890s and succeeding decades, Britain remained an asylum for anarchists, socialists and others: many leading revolutionaries (including Kropotkin, Malatesta, Reclus, Most and Stepniak) spent time safe in the British haven. Indeed, as the 1890s passed, she became more or less their only asylum, for others were increasingly closed to them. Furthermore, on three occasions governments deliberately turned down suggested anti-anarchist measures. In 1893 Britain rejected a Spanish scheme for anti-anarchist international cooperation;⁴⁵ in 1894 the government opposed Salisbury's anti-anarchist alien bill;⁴⁶ and in 1897 an Italian proposal to specify anarchist crimes as non-political was rejected.⁴⁷

Despite the perceived nature of anarchism, Britain was not prepared to take exceptional measures; claiming that her existing laws were sufficient.⁴⁸ The right of asylum remained substantially secure. Anarchist terrorists were

45. cf. FO 72/1927 & 1938; FO 881/6427; HO 45/10254/X36450; CAB 41/22/51; J. McCabe, Life and Letters of Holyoake (1908) volume 2, p.170; and G.J. Holyoake, 'Anarchism', Nineteenth Century volume 50 (1901), p.686, on his conversations with Gladstone on this subject; and B. Porter, Vigilant State pp.108-115.

46. 4H, (L), 26, cc.1047-59, (6 July 1894); and 4H, (L), 27, cc.117-156, (17 July 1894). cf. G.E. Buckle (ed.), Letters of Queen Victoria (1931) 3rd Series, volume 2, pp.414-5; and B. Gainer, Alien Invasion (1972) pp.104 & 155-7. Asquith and Grey had previously stated they opposed anti-anarchist alien laws: cf. 4H, (C), 19, c.1370, (14 December 1893); 4H, (C), 21, c.205, (22 December 1893); and ibid. c.722, (19 February 1894).

47. cf. HO 45/19169/A55312, /17.

48. cf. 4H, (C), 28, c.1246, (16 August 1894).

not safe, but even they could only be extradited upon the production of evidence of actual crime. Anarchist opinions were not made illegal and anarchists were still free to seek refuge in Britain. That is not to say that Britain took no part in the fight against anarchism. There were a couple of prosecutions for seditious libel (Burtsev in 1898 and Antonelli in 1905⁴⁹), "but these represent only a tiny fraction of the seditious labels that were actually published".⁵⁰ Away from the public eye, measures were adopted (such as the exchange of police information, and the surveillance of suspects at the request of foreign governments) which would have been unthinkable in the 1850s or 1860s, but all this was very far short of what was wanted by Britons such as Salisbury, and foreign governments more at the 'sharp end' of anarchist terrorism.⁵¹

The vague political offence exemption inserted in the Extradition Act was slightly clarified on one further occasion during the 1890s. In 1895 Emile Arton was

49. cf. CRIM 1/49/5; DPP 4/32; HO 144/272/A59222B; HO 144/795/131464; A. Kimball, 'Harassment of Russian Revolutionaries', Oxford Slavonic Papers volume 6 (1973), pp.48-65; D. Saunders, 'Vladimir Burtsev', European Studies Review volume 13 (1983), p.40; and B. Porter, Vigilant State pp.116-7.

50. B. Porter, 'British Government and Political Refugees', p.25.

51. cf. 4H, (C), 18, c.889, (14 November 1893); and B. Porter, Origins of Britain's Political Police pp.8-26; 'British Government and Political Refugees', pp.33-8; and Vigilant State chapters 7 & 8. In a way, the prosecutions and the secret measures were undertaken so that Britain could avoid any more formal, far-reaching engagements.

committed for extradition to France on numerous charges of fraud, larceny and embezzlement. He then appealed on the grounds that the request for his extradition "was not made in good faith": it was made for "political purposes". At his trial he would be "asked to disclose political secrets": if he refused he would be punished for contempt of court, which in this case would amount to punishment for political offence.

The appeal was dismissed. If Arton had shown that the crimes for which extradition was sought were political, the court could have intervened, but he had not attempted to do so. Similarly, Arton had failed to show that if surrendered he would be tried for a political offence. Contempt of court was not a political offence, and the allegation that political motives might lead to punishment for this offence could not be entertained by the court; that was the government's province. To escape extradition, a fugitive had to do more than simply allege that it was sought for political purposes.⁵²

The case was taken to the Home Secretary, before whom the basis of the charge of bad faith became clearer. Arton claimed that he was suspected of possessing information on the Panama Canal scandal (which caused "a great outcry" in 1892) that would enable the French government to embarrass its political opponents. It was to force this information

52. Times Law Reports volume 12 (1895-6), pp.131-3. cf. Anon, 'Extradition of Arton', Law Times volume 100 (1896), p.12.

out of Arton that extradition was sought.⁵³ However, Ridley was not convinced.

It is difficult to tell how much truth there was in the allegations: the circumstances surrounding Arton's extradition were at least peculiar. In the Chamber of Deputies, the French Premier, Bourgeois, asked members not to discuss the case in a manner "which might prevent extradition".⁵⁴ It does seem that Arton was questioned as to his political knowledge, and that he gave certain information, but it was perhaps less significant than he tried to make out, for no prosecutions resulted.⁵⁵ Insufficient evidence is available in Britain to enable the historian to sustain the allegation that extradition was sought merely for political reasons.

That, however, was not the end of the case. In 1896, France announced that Arton had agreed to be tried for additional offences, but did not request British consent to such trial.⁵⁶ Such a course was illegal under the treaty of 1876. As a "matter of principle", individuals could not waive the terms of a treaty. That could only be done with the agreement of Britain, France and the prisoner, but if British consent was sought, it might be given, "on the

53. Transcript of notes taken at the meeting: HO 144/486/X38150, /20a.

54. The Times 13 December 1895, p.5.

55. cf. The Times 26 March 1897, p.5; and 26 April 1897, p.6

56. cf. Unattributable minute (FO. 14 November 1896): FO 97/560.

grounds that Arton himself desires to be tried".⁵⁷ France was duly informed of British views, but refused to accept their validity. An impasse was reached.⁵⁸ Surviving British papers do not mention Arton's fate. The Times and the Standard followed the case quite closely but made no mention of Arton being punished for offences other than those for which he was extradited.⁵⁹

Whatever was Arton's fate, the important point was that Britain upheld speciality, not in a pedantic, rigid manner, but on grounds of principle.⁶⁰ Britain wanted to control what extra offences a fugitive was tried for. In this way she could prevent any injustice being done, or any trial for political offences. It was "obvious" that if unrestricted trials for additional offences were allowed, these offences "might be of a political character".⁶¹ Ministers were entitled to waive speciality if the accused so wished: if he did not, they were "morally bound to enforce it for his benefit". The consent of the prisoner alone could not be

57. cf. Minute by Davidson (FO. n.d.); and Law Officers' Opinion by Webster and Finlay (25 November 1896): FO 97/560.

58. Salisbury to Geoffray (FO. 2 December 1896): HO 144/486/X38150, /29; Geoffray to Salisbury (24 December 1896): FO 97/560; and Salisbury to de Courcel (FO. 24 February 1897): HO 144/486/X38150, /33.

59. cf. The Times 26 June 1896, p.5; 8 July 1896, p.7; 26 March 1897, p.5; and 26 April 1897, p.6; and Standard 26 February 1897, extract in HO 144/486/X38150, /33.

60. France sought British consent in future cases: cf. Berger (1901: HO 144/526/X79440); and Houpliere (1909: HO 144/1040/182339).

61. J.H.G. Bergne, op.cit. p. 182.

sufficient, for this was "obviously capable of the gravest abuse".⁶²

The attitude adopted in the Arton case sums up that taken by successive governments to speciality during the 1890s and after. It was not enforced absolutely: rather, a certain degree of latitude (consistent with the interests of justice) was allowed. However, in no case did the government act in manner which subjected the fugitive to any substantial injustice, and in no case were political offences involved. The letter of the law was not rigidly adhered to, but the spirit of the 1870 Act lived on, and that was probably more important.⁶³

In 1896, Britain once again attempted to extradite Irish terrorists. On 12 and 13 September, a conspiracy to perpetrate bombings in Britain was broken up by the arrest of Bell at Glasgow, Wallace and Haines at Rotterdam, and P.J.P. Tynan at Boulogne. Bell was safely in custody in Britain, and as for the others, Ridley thought Tynan's extradition should be sought both on the grounds of his involvement in

62. Law Officers' Opinion by Webster and Finlay (8 February 1897): FO 97/560.

63. cf. The cases of Harfeld (1890: HO 144/478/X27124); Underwood (1897-1901: FO 5/2156); Sinzheimer (1898: HO 144/511/X64250); Lindemann (1901: HO 144/665/X77744); Frohlich (1902: HO 134/30); McIntire (1906: FO 372/35); Kampmann (1907: FO 372/56); and Friberg (1910: 372/234). Britain was generally very scrupulous in observing speciality regarding fugitives surrendered to her: cf. Pooley (1880: HO 144/61/93718); Davies (1885: HO 144/469/X6650); Lamontagne (1891: FO 881/6267); Daintrey (1894: HO 144/496/X42447); Bosch (1898: HO 144/265/A57391); and Ramsay (1904: HO 134/32).

the 'Phoenix Park Murders' and for explosives offences, and that of Wallace and Haines for the latter only. Extradition for explosives offences was not sanctioned by any British treaty, for explosives offences were non-extraditable under British law, but Ridley hoped the "exceptional circumstances of the case" might nevertheless prompt Holland and France to surrender the men.⁶⁴

Salisbury was ready to "make any application the Home Secretary likes" but would "not answer for their being accepted".⁶⁵ Evidence against Tynan had been lacking in 1883, and it was no better now. As Dublin informed the Home Office, if he was extradited, available evidence was "altogether insufficient to secure his conviction".⁶⁶ In the event, extradition for explosives offences was not requested (it would have been "useless" to have done so⁶⁷), and Wallace and Haines went free. Tynan's extradition was sought on the Phoenix Park murder charge only, but was refused as there was "no proof" that he "took a direct part" in the murders, and the charge was "covered by ten years prescription according to French law".⁶⁸

64. Digby to Villiers (Private. 17 September 1896), enclosing a draft which expressed Ridley's views: FO 5/2348. Ridley's private papers contain nothing on this episode, or any of the other matters of interest which arose during his Home Secretaryship.

65. Minute by Salisbury (FO. n.d.): FO 5/2348.

66. Dougherty to Home Office (Dublin Castle. 18 September 1896): HO 144/533/A58213, /4. cf. Pall Mall Gazette 1 October 1896, p.3; and The Times 15 September 1896, p.7.

67. Digby to Foreign Office (HO. 23 September 1896): FO 5/2348.

68. Howard to Salisbury (Telegraphic. Paris. 14 October 1896): ibid.

Why did ministers press on? From the first, the arrests were public knowledge: the press and public knew Tynan's extradition had been sought in 1883, and expected it to be sought once more.⁶⁹ Pressure on the government was increased by the Pall Mall Gazette's revelation that the manuscript (in Tynan's own hand) of the chapter of his book which dealt with the murders, and his part in them, was held "under lock and key in London, should the need for it arise".⁷⁰ Ridley thought the appearance of the article, "which may mean the production of evidence to aid conviction... supplies... a strong additional reason, for going on: and renders it I would almost say impossible not to do so. Failure may result, and probably will: but at all events we shall have done all we can".⁷¹

As a result of the failure to extradite the 'dynamitards', detailed consideration (by the Foreign Office, Home Office and the Law Officers) began of what could be done under existing laws to prevent the preparation in Britain of dynamite plots to be executed abroad, and what might be

69. cf. The Times 14 September 1896, p.3 and 15 September 1896, p.7; and Pall Mall Gazette 16 September 1896, p.7

70. Pall Mall Gazette 19 September 1896, pp.1-2. Anderson (head of C.I.D. at Scotland Yard) pressured the Home Office not to abandon the claim for extradition. cf. memorandum by McDonnell (6 October 1896): 3M/E, f.9. The government did get hold of the manuscript, but not until November, and so too late to be of any practical use. It is preserved in the Anderson papers, HO 144/1537, No.3. The means by which it came into his possession may be traced in ibid.; Anderson to McDonnell (Private. 30 September - 12 December 1896): 3M/E, ff.7-20; and Balfour Papers, PRO 30/60/13/3.

71. Ridley to Digby (Private. 20 September 1896): HO 144/533/A58213, /16. Underlining in original.

done to make them more effective "if foreign states would make similar enactments". By persuading foreign governments to do so, an international arrangement for the "suppression and punishment... of dynamite plots" would be arrived at. The Law Officers were in favour of the idea and suggested that explosives offences be made extraditable and "included in supplemental extradition treaties".⁷² Before instructions were given to prepare a bill, Ridley placed the proposals before the Cabinet.⁷³ However, all discussion seems to have ended here: the proposals were quietly dropped. Surviving papers give no definite reason for this, but several likely reasons may be suggested.

Ridley noted it might be "thought expedient" to delay enactment of the scheme. Bell's prosecution had recently been abandoned because it was not clear whether or not the agent who informed on the plotters had not acted as an agent provocateur. Introducing any 'dynamite legislation' would only draw attention to the matter and might lead to unwelcome debates about the legality of police anti-Fenian measures.⁷⁴

The proposal that Britain should organise international cooperation against 'political terrorism' was

72. Sanderson to Home Office (FO. 29 October 1896); Digby to Murdoch (Private. 29 October 1896); and Law Officers' Opinion by Webster and Finlay (23 December 1896): HO 144/270/A58394.

73. cf. Ridley to Salisbury (Private. 5 February 1897): 3M/E; and Memorandum for the Cabinet (20 February 1897): CAB 37/44, No.9.

74. ibid. cf. Sir R. Anderson, Sidelights on the Home Rule Movement (1906) pp.127-131; and 4H, (C), 45, cc.152-3, (20 January 1897). On the Bell case generally, cf. CRIM 1/46/5; HO 144/507/X60692; and HO 144/508/X60692.

revolutionary. Britain had always refused to take part in any such schemes, and the Cabinet may have been reluctant to abandon this traditional stance: it was perhaps significant that Cross (as Lord Privy Seal) was still a member. Furthermore, approaching foreign countries with the scheme would have been a 'tricky' business to say the least. Continentals had always resented Britain's attitude to such things, and might not have been exactly well disposed to accept an initiative proposed by her. If she could not be bothered to help them in the past, why should they help Britain now that she felt threatened by terrorism?

There was also the question of British opinion. In 1892 Sanderson had noted that "public opinion will not sanction" such a scheme except "under the immediate pressure of alarm and indignation at the perpetration of [outrages]... here". Furthermore, there was the "difficulty as to the exemption of Political Offences from the Extradition Act".⁷⁵ The authorities may have feared that the plot of 1896 was a sign that the 'dynamite war' of 1880-1885 was about to resume, but it seems to have been an isolated incident. Revelation of the plot may have panicked ministers into considering un-British actions, but when she was not hit by any new wave of bombings, their panic perhaps subsided, and caused them to question whether un-British, and potentially controversial, legislation was necessary.

It seems doubtful whether the proposal would have been

75. Sanderson to Salisbury (Private. 31 March 1892): FO 27/3102; and minute by G. Lushington (HO. 23 March 1892): HO 45/10254/X36450, /1.

accepted in the absence of any pressing domestic need. It could easily be represented by critics as an attack upon the right of asylum. In addition, the fact that the police had broken up the plot before it came to fruition could be taken as a sign that Britain at least had no reason to join any international scheme against dynamitards. Her police were quite equal to the task.⁷⁶ Clearly, it would have been easier to 'sell' the scheme if a few bombs had gone off and killed some innocent bystanders.

On 10 September 1898, an Italian anarchist named Lucheni assassinated Empress Elizabeth of Austria by Lake Geneva. It was not the first time that an Italian had been responsible for an anarchist atrocity, and Italy assumed responsibility for trying to ensure there were no more. At first she proposed a collective approach to require Switzerland to take effective action against the anarchists who found an asylum there,⁷⁷ but before precise details were formulated, this proposal was transformed (as a result of Austro-German pressure⁷⁸) into something more. On 6 October, Britain was invited to attend an anti-Anarchist conference at

76. cf. The Times 16 September 1896, p.7; Anon, 'Dynamite Plot', Spectator volume 77 (1896), p.358; and Fall Mall Gazette 16 September 1896, p.7.

77. cf. Bonham to Salisbury (Rome. 17 September 1898): FO 45/783; memoranda by Sanderson (FO. 19, 21 & 24 September 1898): FO 45/793; Salisbury to Costa (FO. 29 September 1898): FO 45/791; and Salisbury to Bonham (FO. 3 October 1898): FO 45/781.

78. cf. Bonham to Salisbury (No.206) (Rome. 18 October 1898): FO 45/784.

Rome.⁷⁹ By mid-October, most European nations had agreed to send delegates to the Conference, as did Britain on 27 October.⁸⁰ In the light of her past attitude towards such proposals, this decision appears at least surprising. Correspondence does not deal in any detail with the reasons behind it, but a number of factors may be suggested.

General foreign policy considerations no doubt played their part. The Anglo-French Fashoda crisis remained unsettled, and Britain could not afford to be dangerously isolated by refusing to attend.⁸¹ The list of participants was impressive: Italy, Russia, Germany, Austria-Hungary, France, Belgium, Bulgaria, Denmark, Spain, Luxemburg, Monaco, Montenegro, Serbia, Netherlands, Portugal, Romania, Sweden and Norway, Switzerland, and Turkey. As the other great powers agreed to attend, Britain "could not refuse to take part".⁸²

It was known that Britain was likely to have to "meet a determined attack" over the freedoms she allowed political refugees. It would be easier to deflect such an attack if she attended the conference. In her absence, there was no telling to what level anger at British policy might rise. As Queen Victoria put it, non-participation would "have a bad

79. Canevaro to Costa (29 September 1898), communicated to Salisbury on 6 October 1898: FO 45/791.

80. cf. Salisbury to Currie (27 October 1898): HO 45/10254/X36450, /40.

81. cf. R.B. Jensen, op.cit. p.326; and P. Hayes, The Twentieth Century (1978) pp.74-8.

82. Salisbury to St. John (FO. 12 October 1898): HO 45/10254/X36450, /31.

effect and look as if we were indifferent" to anarchist outrages.⁸³ On a more positive level, Anglo-Italian relations were in a very healthy state. Britain felt certain of Italian support in the Fashoda crisis, and such support had not been forthcoming from elsewhere. "Salisbury was inclined to do Italy a favour, attending the conference if only as a simple act of courtesy".⁸⁴

It is perhaps significant that the Tories, under Salisbury, were in power in 1898. Previous proposals had been made to Liberal governments which were more sensitive over the right of asylum and other traditional policies than Salisbury. He was thoroughly anti-anarchist, and the government's favourable disposition towards international cooperation against terrorism had already been demonstrated in 1896-1897. (Whether a Liberal government would have attended is an open question).

There was at least one topic due for discussion which intimately concerned Britain: the expulsion of anarchists. If the conference agreed on sterner measures for expelling anarchists, many would be likely to turn up in Britain (no other country would let them in) and she had no power to get rid of them. If she attended the conference, Britain might be able to limit the unwelcome consequences of any agreed policy on expulsion.⁸⁵ Lastly, there were the

83. Plunkett to Salisbury (Brussels. 17 November 1898): *ibid.* /58; and Queen Victoria to Salisbury (Private. 23 October 1898): 3M/E.

84. R.B. Jensen, *op.cit.* p.326.

85. cf. Report by Vincent (17 December 1898); and memorandum by Anderson (15 December 1898): *ibid.* /92 & /77.

wishes of the Queen to be considered. She "urged the Prime Minister to take action... and pressed for acceptance of the Italian invitation". Cross informed Salisbury that she was "very anxious that something should be done". For the first time, Her Majesty was "really nervous": she was afraid to go abroad, wanted to avoid London, and was even apprehensive about "driving about" at Balmoral.⁸⁶

The conference met from 24 November to 21 December.⁸⁷ Britain was represented by Sir Phillip Currie (ambassador to Italy), Sir Godfrey Lushington (former head of the Home Office), and Sir Howard Vincent (former head of C.I.D. at Scotland Yard). They were generally acknowledged to be well-suited to the task, but Keir Hardie's Labour Leader begged to differ. Of these "capitalistic Knights", Lushington was "an old Johnnie of sixty-seven", Currie was 65 and "not a genius", while Vincent was "comparatively a youngster" at 50, but "somewhat muddleheaded" and "as fit to pronounce an opinion on Anarchism as I am to enter the Kingdom of Heaven".⁸⁸

Several matters were discussed with a view to repressing anarchism, but here we will concentrate upon discussion of extradition law and practice. Various resolutions were

86. R.B. Jensen, op.cit. p.326; and Cross to Salisbury (Private. 23 September 1898): 3M/E, ff.718-9. cf. Queen Victoria to Salisbury (Private. 13 September 1898): 3M/E; and Salisbury to Queen Victoria (Private. 27 October 1898): CAB 41/24/43.

87. On it generally, cf. J. Quail, op.cit. p.216; E.A. Vizetelly, op.cit. pp.238-9; and R.B. Jensen, op.cit. passim.

88. Labour Leader 10 December 1898, p.401.

passed, the object of which was to exclude "anarchical crimes" and every attack on a sovereign, head of state, or member of their families from the political offence exemption.⁸⁷ Britain was unable to support such resolutions, but as an alternative, Currie suggested "something might be done" to counter a widely-held continental "misconception" that under British law assassination was necessarily political. He asked permission to state that the law would be amended so as to provide that assassins would not necessarily be exempted from extradition.⁸⁸

The Home Office thought legislation was unnecessary to establish that point. The fact that a sovereign was the victim might be "an element" in proving a crime's political character, but if it were the sole evidence of that character, extradition would probably be granted. It was "impossible to suppose" that the Empress of Austria's assassin would have been exempted, but the Czar's killers might have been. Still, if they had, that would not have been done simply because their victim was an Emperor, but because the assassination was committed "with a political object, and as part of a political movement". Deciding what was a political offence depended on "considering such matters as the object and motive of the combination of which the accused, the extent and character of the rising, movement or

89. Currie to Salisbury (Rome, 30 November 1898): HO 45/10254/X36450, /73; and same to same (No.244) (Rome, 13 December 1898): FO 45/784; and same to same (Telegraphic, Rome, 14 December 1898): HO 45/10254/X36450, /97.

90. Currie to Salisbury (Telegraphic, Rome, 5 December 1898): ibid. /72.

crime is the outcome, and all the other circumstances of the case".⁹¹

The proposal that every assassination was to be regarded as non-political could not be agreed to. Assassins could already be extradited, but only if "the circumstances of the offence were not such as to give it a bona fide political character... it would be impossible to exclude from consideration the circumstances in which the offence was committed".⁹²

In order to clarify the British position on extradition, and other matters, Currie addressed the conference on 18 December. He emphasised that Britain sympathised with the aims of the other powers, but that she could not accept measures which punished opinions rather than actual crime, and the political offence exemption had to be maintained. Although British laws were believed to be sufficient to deal with the criminal aspects of anarchism, the government was prepared to amend them in certain respects. Explosives laws were to be extended to cover conspiracies to bomb foreign targets, explosives offences were to be made extraditable,

91. Memorandum by Digby (HO. 7 December 1898): ibid. /72. Underlining in original. In 1893, Lushington had also not been sure whether the Czar's killers would have been exempt from extradition: Minute by Lushington (HO. 8 December 1893): ibid. /8. J.H.G. Bergne (op.cit. p.183) thought they would have been extradited. In 1900, Maycock thought it "extremely improbable" that the assassin of the King of Italy would be considered a political offender by "any Civilised Court": Minute by Maycock (FO. 20 October 1900): FO 45/826. cf. FO 65/1695, f.327; HO 45/9734/A53955, /7; FO 5/2190; FO 65/1449, ff.81-7; and HO 45/18080/681045, /15.

92. Digby to Foreign Office (HO. 15 December 1898): HO 151/6, pp.249-51.

and consideration would be given to whether anything could be done about publications which incited violence. Extradition law was to be amended "by the addition of words making it clear" that the political offence exemption "should not apply (as in point of fact there has never been any intention of applying it) to the crime of wilful murder, whether of a Sovereign, a Chief of a State, or of any other individual".⁹³

This statement of intent was very much intended for foreign ears. Britain could not bring herself to agree to the conference's conclusions, and to sweeten such a bitter pill, she promised to amend her laws. It "made a very good impression... The Russian, German and Austrian Ambassadors acknowledged... it was the most important result" of the Conference.⁹⁴

On 4 January 1899, Ridley gave instructions for the necessary bill to be prepared.⁹⁵ Three versions of the political offence exemption were suggested, but all were rather unclear.⁹⁶ The problem was that "assassination has not in England any precise legal meaning". A clause similar to those suggested by the Royal Commission and Thring in 1878 and 1884 could be adopted, but they were unsatisfactory. Their insistence on political offences being committed during

93. *Precis of the Proceedings of the Conference*: HO 144/757/118516, /15.

94. Currie to Salisbury (Telegraphic. Rome. 21 December 1898): FO 881/7179; and same to same (Rome. 22 December 1898): HO 45/10254/X36450, /92.

95. cf. Minute by Ridley (HO. 4 January 1899): *ibid.* /91.

96. Copy of bill in HO 45/9758/A62185.

a time of 'civil war or open insurrection' would exclude offences committed in preparation for an insurrection, and cases where people met to discuss "a legitimate attempt to remedy oppression", were "dispersed by the police and used violence in their own defence".⁹⁷

In April 1899 the bill was revised: it stipulated, "Assassination or an attempt or conspiracy to assassinate shall not be deemed to be an offence of a political character". 'Assassination' was to be interpreted by the courts, in the same way that they interpreted 'offence of a political character'.⁹⁸ In the Queen's Speech of February 1899 it was announced that as a result of the Rome Conference "some amendments" of the law "appear to be required", but for reasons that are unclear, that was the last heard of the matter.⁹⁹ Sanderson noted that he thought the bill failed "in consequence of the block in legislation", but he was unsure, and the explanation hardly seems sufficient.¹⁰⁰

It was by no means certain that Parliament and the public would accept the bills. Horror at the Empress of Austria's death was widespread, but calls for international

97. Memorandum appended to the bill (12 January 1899): ibid.

98. Copies of the bills and accompanying memoranda in ibid.

99. 4H, (L), 66, cc. 3-4, (7 February 1899). Jensen (op. cit.) gives no real explanation for the failure to legislate.

100. Memorandum by Sanderson (FO. 6 December 1901): FO 83/1970. The general factors previously mentioned with regard to the non-enactment of special anti-anarchist laws and the failure to legislate in 1896-7 are equally applicable here.

cooperation against anarchism, although made,¹⁰¹ were by no means unanimous. The Times thought the idea "impractical".¹⁰² When discussing the measures believed to be under consideration at the conference (closer police cooperation and other police measures) The Times asserted they had "one good feature": there was "no question of any fresh legislation", the implication being that legislating would be difficult.¹⁰³ The Labour Leader (exhibiting an adherence to the old mid-Victorian liberal position) thought governments should concentrate on removing "the causes which produce the assassin".¹⁰⁴ The Economist was prepared to cooperate to put down actual crime, but would brook no interference with the political offence exemption. The Metropolitan Radical Federation called on the government to "safeguard the liberties of political refugees", and Reynolds's believed the right of asylum had to be maintained "at all costs".¹⁰⁵

Calls for anti-anarchist action were far less widespread than earlier in the 1890s, when it seemed Britain might

101. cf. Pall Mall Gazette 12 September 1898, p.1.

102. The Times 13 September 1898, p.3. cf. Clarion 15 October 1898, p.330; Reynolds's 23 October 1898, p.4; Freedom March 1899, p.21; and Labour Leader 19 November 1898, p.379.

103. The Times 30 November 1898, p.5. cf. The Times 19 December 1898, p.5; Evening News 15 October 1898, p.2; and Anon, 'Murder of the Empress of Austria', Spectator volume 81 (1898), p.363.

104. Labour Leader 19 November 1898, p.379.

105. Anon, 'International Movement Against Anarchism', The Economist volume 61 (1898), p.1515; Wade to Salisbury (19 December 1898): FO 45/793; and Reynolds's 18 September 1898, p.4. cf. Justice 8 October 1898, p.1.

fall victim to anarchist terrorism. Then, calls for such action had been common.¹⁰⁶ After 1894, anarchist 'outrages' in Britain subsided: by 1899 it was almost impossible to argue any real British need for anti-anarchist measures. The identity of interest with continentals given to Britons by the 'outrages' of 1892-4 had all but disappeared, as, perhaps, had support for anti-anarchist measures. In political terms, Britain had most in common with the United States, which enacted severe anti-anarchist laws. However, it did so in the wake of serious anarchist outrages: a bombing in Chicago and the assassination of President McKinley.¹⁰⁷ Britain had no such experiences.¹⁰⁸

Earlier in the 1890s, proposals for extradition legislation had been abandoned for fear that they would arouse controversy over the right of asylum. In 1891 a bill that would have allowed fugitives to waive the 15 day

106. cf. Anon, 'Anarchist Wave', Spectator volume 71 (1893), p.425; Anon, 'Aliens and Anarchists', Saturday Review volume 78 (1894), pp.63-5; The Times 28 December 1893, p.7; Pall Mall Gazette 7 July 1894, p.1; and I, 'Anarchists', New Review volume 10 (1894), pp.1-9. Opinion was still not unanimous, and some believed there were limits as to how far Britain could go: cf. for example, Anon, 'The proposed Outlawry of Anarchism', The Economist volume 50 (1892), pp. 374-5; Justice 21 July 1892, pp.4; and Anon 'Lord Salisbury's Aliens Bill', Spectator volume 73 (1894), pp.37-8. This difference between the mid and late 1890s is mirrored in Hansard. The main references are listed in B. Porter, Origins of Britain's Political Police pp.32-3n.

107. cf. H. David, History of the Haymarket Affair (2nd edition. New York 1958); J.P. Clark, Deportation of Aliens (New York 1931) pp.216-7; and W.C. Van Vleck, Administrative Control of Aliens (New York 1932) p.9.

108. When an anarchist attempted to kill the Prince of Wales in 1900, calls for anti-anarchist action temporarily revived: cf. Anon, 'Musings without Method', Blackwood's Edinburgh Magazine volume 168 (1900), pp.402-4.

interval between committal and actual surrender was abandoned because it was feared introduction might provoke discussion of more controversial matters, and there was a chance that a 'politico', ignorant of the law and the English language, might agree to be surrendered at once before more knowledgeable people could appeal.¹⁰⁹ During 1894-7, making provision for transit and implementing the Royal Commission's Report was discussed once more. Again, nothing was done. Making provision for transit might endanger political refugees, and amendment of any of the significant provisions of the Extradition Act would be "highly ontroversial", and "obviously bristle with difficulties".¹¹⁰ The right of asylum was a "very delicate" matter, and ministers who interfered with it "would have a very serious question on their hands and evoke an outburst of public opinion which would probably considerably shorten their existence".¹¹¹ Traditional factors therefore blocked extradition legislation right into the 1890s, even when it did not directly affect

109. cf. HO 45/9501/8589; HO 45/9836/B10270; FO 83/1429; and especially Law Officers' Opinion by Clarke (15 July 1891): FO 83/1429.

110. Memorandum by Simpson (HO. 12 February 1897): HO 45/9740/A55548B, /16. More generally, cf. FO 83/2189; and HO 45/9740/A55548B.

111. O'Conn to Lansdowne (Constantinople. 10 February 1902): HO 144/608/B32482, /16. In 1901, negotiations for an extradition treaty with Venezuela were abandoned because Venezuelan political refugees frequently sought refuge in Britain's West Indian colonies and Venezuela was likely to attempt to abuse extradition to get hold of them: cf. FO 881/8071, No.25. The 1906 Extradition Act simply made bribery an extraditable offence: the only fear in laying the bill before Parliament had been that objections might be raised to it on the grounds that bribery at elections was a political offence, but such fears proved groundless: cf. FO 5/2602; and FO 372/35.

political refugees. What chance was there that legislation which did directly affect them would be introduced or accepted?

Salisbury had hoped to persuade the Cabinet to "consent to some form of Alien Bill", but feared causing "difficulty with some of our Liberal Unionist friends, who still cling to what is, in my judgement, an exaggerated view of the right of asylum". Cross "reminded [the Queen]... that we were powerless without an act of Parliament and that there would be probably great difficulties in getting such an act passed". The "sole question" in the Lord Chancellor's mind was "how far will the House of Commons go, and how far is it safe to produce proposals to which they would object".¹¹² The views of other ministers are unclear, but it is clear that some officials would have been unhappy with the extradition bill. In December 1898 the Home Office had expressed the view that the provision included in the April bill, that assassination was extraditable irrespective of circumstances, could not be agreed to. One can only guess as to why the bill was so drafted in spite of this, but it perhaps indicates that there was disagreement as to how the bill should be drawn: disagreement that was perhaps strong enough to prevent submission to Parliament.

112. Salisbury to Cross (Private. 25 September 1898): Cross Papers, BL Add. MS 51264; Cross to Salisbury (Private. 23 September 1898): 3M/E, ff.718-9; and Mackenzie to Digby (Private. 13 March 1899), reporting the Lord Chancellor's views: HO 45/10254/X36450, /102. The Queen asked Salisbury for his views on the conference and the proposed legislation (Queen Victoria to Salisbury [Private. 14 January 1899]: 3M/E), but the latter's private papers do not contain a copy of his reply. The original is presumably in the Royal Archives at Windsor, and might give specific reasons for the failure to legislate, but I have been refused access to that archive.

Before the conference had begun, not much had been expected to come of it. Salisbury did "not anticipate that Parlt will be willing to make any legislative changes".¹¹³ Lushington was told that the British system would be "much attacked", and that his "main duty" would be "to give good reasons for refusing to change it in any essential points".¹¹⁴

Legislation was not strictly necessary to give effect to Currie's promise on extradition. 'Wilful murder' was by implication, even by definition, non-political: the extradition of a sovereign's assassin was quite possible under existing laws. There was also some opposition to changing the law, and doubts as to the efficacy of the proposed changes. Simpson did not believe "the law as now interpreted requires further definition by statute". As Anderson saw it, since assassins were usually prepared to die, "making them clearly extraditable will have but little effect... the intended legislation will have no practical value".¹¹⁵

Finally, in subsequent discussion of anti-anarchist

113. Minute by Salisbury (FO. 27 October 1898): FO 45/781. cf. Currie to Salisbury (Private, 19 October 1898): 3M/A/125/21; same to same (Private, 2 November 1898): ibid. A/125/22; Salisbury to Currie (FO. 27 October 1898): HO 45/10254/X36450, /40; and Salisbury to St. John (FO. 12 October 1898): ibid. /31.

114. Salisbury to Lushington (Private, 23 November 1898): 3M/A/99/87. cf. Vincent to Ridley (Private, 10 November 1898) (Copy): 3M/E.

115. Minute by Simpson (HO. n.d.); and memorandum by Anderson (14 January 1899): HO 45/10254/X36450, /72 & /92.

cooperation,¹¹⁶ mention is made of the general difficulties raised by such proposals. In 1900 it was noted that Parliament and the public were "excessively suspicious" of any measure which might appear to threaten the right of asylum. It was easy to agree that measures against anarchism were desirable: "the difficulty is to carry such measures into practical effect, especially in this country". In 1901 Lansdowne wrote that "our failure to give effect even to our modest proposals" of 1899 "is not encouraging".¹¹⁷ Britain did cooperate against anarchism to a certain extent (surveillance of suspects and the like), but generally away from the public eye, even secretly.¹¹⁸ It was feared that Parliamentary and public opinion would not have approved of such a policy, let alone anything more far reaching, and public, such as stringent new extradition and explosives laws.

The adoption of any of the clauses proposed in 1898-99 would have amounted to a severe delimitation of the political offence exemption, but it remained intact. It is worth mentioning that the implication that an assassin might be considered exempt from extradition was made explicit in

116. On these, which did not directly concern extradition, cf. FO 83/1970; FO 371/364; FO 412/68; FO 881/7711; HO 45/10254/X36450; R.B. Jensen, op.cit. pp.337-8; and B. Porter, Vigilant State chapters 8, 9 and 10.

117. Salisbury to Hatzfeldt (FO. 9 August 1900): FO 64/1507; minute by Murdoch (HO. 4 December 1901): HO 45/10254/X36450, /120; and minute by Lansdowne (FO. n.d.): FO 83/1970. cf. his undated minute on a memorandum of 26 November 1901 in ibid.

118. cf. B. Porter, 'British Government and Political Refugees', pp.33-8; Origins of Britain's Political Police passim; and Vigilant State passim.

the Anglo-Dutch treaty of 1898. The murder of a sovereign or a member of his family was made extraditable, "provided that the crime is not of a political character".¹¹⁹

In concluding our discussion of political offences around the turn of the century, we come to the Lynchehaun case, in which one last attempt was made to extradite an Irish 'political offender'. In 1902 James Lynchehaun escaped from prison in Ireland, having been sentenced in 1895 to life imprisonment for the attempted murder of his landlady (Mrs. Macdonald) and for arson.¹²⁰ In August 1903 he was arrested at Indianapolis.

Almost immediately, "considerable feeling" was "manifested by the Irish party in Indianapolis" over the case. In court, Lynchehaun claimed that the crime of which he had been convicted was political.¹²¹ Maycock minuted that the claim that "tearing out a woman's eyes and setting her on fire is a political offence, ought not to succeed if there is any justice in Indiana", while Sanderson thought there was "nothing in the evidence which would tend in the least to establish such a contention".¹²² In court, Britain asserted that extradition was not sought for any offence at

119. Copy in FO 881/7286, p.135.

120. cf. The Times 18 July 1895, p.9.

121. Bayley to Raikes (New York. 18 September 1903); and Sanderson to Lansdowne (No.101 Treaty) (New York. 9 October 1903): FO 5/2568. cf. Bayley to Lansdowne (New York. 28 September 1903): ibid.

122. Minute by Maycock (FO. 8 October 1903); and Sanderson to Lansdowne (New York. 16 October 1903): ibid.

all: Lynchehaun was a convict and was not convicted of a political offence, therefore "no further inquiry can be had". In any case, the attack on Mrs. Macdonald was "purely personal... A much more cowardly, dastardly and despicable crime than the assault upon this helpless old woman cannot be imagined". The claim for political offender status was "ludicrous".¹²³

On 1 November Commissioner Moores gave his judgement. He held that "the disturbances which existed in Ireland at the time when the prisoner's offence was committed were of a political nature... Disgraceful though an assault on a woman must always be, I am convinced that this was a political offence, for which, under the terms of the treaty, the prisoner can not be surrendered. Let him be discharged".¹²⁴ Sanderson thought the judgement was "contrary to law and unsupported by evidence", while Simpson viewed it as a "most interesting disquisition" on the nature of political offences.¹²⁵ The Times reported that in Ireland, both the Nationalist and Unionist press expressed "astonishment and regret at the decision".¹²⁶

It seems clear enough that Moores had some sympathy for the Irish cause: he compared it to the French and American

123. Memorandum by Fox (n.d.): ibid.

124. Indianapolis News 31 October 1903, extract in ibid.

125. Sanderson to Lansdowne (New York. 4 November 1903): FO 5/2568; and minute by Simpson (HO. 17 November 1903): HO 144/977/100676, /135. This file had been missing since 1965, but the author found it at the Public Record Office, Kew, in July 1987, bound together with an unrelated file.

126. Times 3 November 1903, p.4.

revolutions. How far these were Moores' personal convictions, or how far he was influenced by the 'Irish lobby' is unclear, but the Irish factor played a considerable part in American politics and society, and its influence can never be discounted in such cases. In Indianapolis in 1903, there was much pro-Irish and anti-British feeling: such feelings could not be left out of the equation, and were perhaps more important than the circumstances of the crime itself.¹²⁷

Irish-Americans regarded the matter as a test case, and made much use of the British contention that since Lynchehaun was a convict the court had no need to examine the nature of his crime. If it were accepted, a "precedent would be established, which would... deprive many a soldier of liberty from securing shelter". Since it was difficult to defend Lynchehaun's crime, it was emphasised that "this battle was fought out on principle to establish a sacred right, the right of asylum for political offenders... [the] only motive was to guard the high principles of American liberty established by the fathers, who held that America should never surrender political offenders to tyrannical governments".¹²⁸ Lynchehaun's release was certainly a triumph for Irish influence, and a long pamphlet entitled An Irish-American Victory Over Great Britain was published.

127. One could imagine a British magistrate giving a similar decision with respect to a continental political refugee in the 1850s.

128. Anon, An Irish-American Victory Over Great Britain (Indianapolis 1903).

The Irish government believed that "the case should be pursued to the fullest possible extent not only in the immediate interests of justice but also because omission to have the matter rectified now may prejudice future cases".¹²⁹ The question of making a renewed effort at extradition was considered, but dropped. The case would be heard where Lynchehaun was arrested: as he stayed in Indianapolis, Moores would again hear the case, and there was little prospect of his reversing his decision. Sanderson attempted to have Lynchehaun deported as an undesirable alien, and in December reported he was to be expelled, but all this came to nothing.¹³⁰ Maycock noted with some bitterness that, "every one, whether judicial or Immigration officer, are afraid of the Irish".¹³¹

All proceedings against Lynchehaun were abandoned. For all their exertions (and expenses of over £1,000¹³²), the British authorities had got nowhere. Once again, the attempted extradition of a fugitive connected with the 'Irish problem' had failed. It would appear that the authorities despaired of ever extraditing 'Fenians', for, before 1914, no further attempt was made. In 1907 Lynchehaun left Indianapolis, so raising the possibility of bringing him before a more sympathetic judge, but the Irish

129. Macdonnell to Home Office (Dublin Castle. 7 November 1903): FO 5/2568.

130. Sanderson to Lansdowne (No.135 Treaty) (New York. 17 December 1903): ibid. cf. same to same (No.4 Treaty) (New York. 12 January 1904): FO 5/2569. On the practice of deportation in lieu of extradition, cf. chapter 8.

131. Minute by Maycock (FO. 22 January 1904): FO 5/2569.

132. cf. FO 5/2469.

authorities informed the Home Office that it was "not considered expedient" to attempt extradition.¹³³ The embarrassment caused by such cases, together with the encouragement given to the 'Fenians' by their failure, meant that they were simply not worth the trouble which they caused.¹³⁴

133. Howard to Grey (No.143) (Washington. 20 June 1907); and Troup to Foreign Office (HO. 13 July 1907): FO 372/86. In 1918, Lynchehaun turned up in Ireland to visit friends after having given good service in the Canadian army. His fate is unclear: cf. HO 144/977/100676, /197-/198.

134. In 1917 the extradition of Michael O'Callaghan was sought from the United States for killing a boy and two policemen when resisting arrest. Predictably, the attempt failed. He claimed political offender status, but that was not the reason for non-extradition. The evidence sent by Britain was authenticated incorrectly by the American embassy in London, quite possibly by design rather than accident. The case was abandoned: cf. FO 372/1063. The Home Office file on the case (351101) has not survived.

CHAPTER 7

THE COLONIAL DIMENSION

Chapter Seven: The Colonial Dimension

Thus far, Britain's colonies have been referred to almost incidentally and only sporadically, essentially because they did not deserve any fuller consideration than they have received. However, from the 1890s colonial extradition¹ becomes both more interesting historically and more important intrinsically. Before we move on to this, however, it is necessary to give a few words of explanation of colonial extradition law.

By Section 17 of the Extradition Act of 1870, when an Order in Council was made implementing an extradition treaty between Britain and a foreign country, that treaty extended "to every British possession in the same manner as if throughout this Act the British possession were substituted for the United Kingdom or England". The procedure for, and restrictions on, extradition from a British colony to a foreign country, or the colony of a foreign country, were thus exactly the same as those governing extradition from Britain herself, with, of course, some inevitable modifications². Requests for extradition were to be made to the governor of the British colony by a competent foreign authority, who might be the consul general or vice-consul of a foreign country, or the governor of a foreign colony. When

1. Colonial extradition did not involve any special problems: simply the same ones as were experienced vis-à-vis extradition to and from Britain.

2. Extradition to Britain from a British colony, and to a British colony from Britain was of course governed by the Fugitive Offenders Act of 1881.

the request for extradition had been made:

all powers vested in or acts authorised or required to be done under this Act by the police magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the governor of the British possession alone.

The usual course of events was therefore for the 1870 Extradition Act to apply within colonies as it did in Britain. However, Section 18 of the 1870 Act provided that:

If by any law or ordinance, made before or after the passing of this Act by the Legislature of any British possession, provision is made for carrying into effect within such possession the surrender of fugitive criminals...Her Majesty may, by... Order in Council suspend the operation of the 1870 Act in that colony, or provide that the colonial law be regarded as a part of the 1870 Act in that colony.

Local conditions in a colony sometimes dictated a need to vary certain of the procedural provisions of the 1870 Extradition Act, and several colonies did so: Australia (1904), Barbados (1878), Bermuda (1879), British Guiana (1886), Ceylon (1878), Gibraltar (1877), Grenada (1880), Hong Kong (1877), India (1895), Jamaica (1877), Malaya (1877), Malta (1878), Mauritius (1877), New Foundland (1900), North Borneo (1877), St. Lucia (1878), St. Vincent (1880), Sierra Leone (1878), Singapore (1877), South Africa (1913), Tobago (1880), and Trinidad (1877).

Far less common was the enactment in a colony of a comprehensive extradition law which necessitated the suspension of the 1870 Act in that colony. In fact, Canada was the only one to do so. In 1877 Canada passed an Act (40 Vict., c.25) "providing a procedure for the surrender of fugitives to any country with which Her Majesty had entered or would subsequently enter a treaty for the purpose". The Canadian Act was "modelled largely" on the 1870 Act, "with such changes as were necessary to adapt it to local requirements". In 1882 the British Act was suspended in Canada³.

One further provision of the Extradition Act of 1870 should be mentioned. Section 23 stipulated that:

Nothing in this Act shall affect the lawful powers of Her Majesty or of the Governor-General of India... to make treaties for the extradition of criminals with Indian native states, or with other Asiatic states conterminous with British India... or to carry into execution the provisions of any such treaties made either before or after the passing of this Act.

In 1890, Natal drafted a bill which was to be enacted as a prelude to signing an extradition agreement with the Transvaal. The bill did not contain any safeguards for political offenders: Natal wanted to avoid offences committed during "native troubles" being designated

3. G.V. LaForest, op.cit. pp.6-7.

political. If natives killed a Transvaal Boer, refusing extradition on political offence grounds "would probably endanger the peace of this Colony". However, London insisted the bill contain the usual safeguards, and the final legislation duly did so⁴.

In 1896 the Governor of Hong Kong (Robinson), the British minister at Peking (Macdonald), and the consul at Canton (Fraser) proposed making sedition extraditable between Hong Kong and China. The Chinese generally, and the Canton authorities particularly, regarded sedition as "the most heinous of crimes against the Emperor", and the protection of those guilty of it as "proof of unfriendly feeling... no measure would more conciliate [them]... than the inclusion of sedition amongst extraditable offences". It might persuade them to grant further territory to Hong Kong⁵.

The reaction to the proposal is interesting. Officials thought it "objectionable", and were "surprised" it should have been made, but Salisbury had "no scruples in the matter". It would be "a capital bargain" to get rid of "a few of the scoundrelly leaders of Secret Societies" in return for territory. However, the scheme "might raise a Parliamentary row or foreign complications, and should therefore be considered from the point of view of expediency

4. Mitchell to Knutsford (No.63) (Natal. 4 April 1892): FO 83/1188. cf. Fairfield to Foreign Office (CO. 14 May 1892): ibid. Copies of the bills in ibid. and FO 83/1102.

5. Macdonald to Robinson (Peking. 25 April 1896); Fraser to Macdonald (Canton. 9 April 1896); and Robinson to Macdonald (Hong Kong. 1 June 1896); CO 129/272, ff. 303-9.

alone". Chamberlain (Colonial Secretary) disagreed. Hong Kong needed more territory, "but I would rather go to war with China for it than agree to such a bargain". It was wrong to surrender political offenders to anyone, but "most of all to the Chinese who would crucify them or cut them in pieces". The proposal was negatived⁶.

In 1903, Senegal sought Mousa Mollah's extradition from Gambia for "numerous acts of violence". Governor Denton thought the French had "failed to make any charge... that would take the offences committed by Musa [sic] out of the political purview". The Colonial Office agreed with Denton's assessment, and Mousa was not surrendered⁷.

In 1910, Russia attempted to extradite Fedorenko from Canada for murder. In October he was committed for extradition, the judge holding that although he was a political refugee, the murder was not committed in furtherance of a political object.⁸ "An agitation in the man's favour immediately arose throughout Canada... Great

6. Minutes by Lucas and Wingfield (CO. 14 August 1896); Salisbury (15 August 1896); and Chamberlain (CO. 18 August 1896): ibid. f.300. cf. Wingfield to Foreign Office (CO. 20 August 1896): ibid. ff.312-3. In 1896, China sought Sun Yat Sen's extradition from Hong Kong, which was refused on political offence grounds, but he had already left the colony. He arrived in London and was kidnapped by the Chinese Legation, but the Foreign Office intervened to force his release: cf. T.H. Sanderson Papers, FO 800/1, ff.206-11; FO 881/6918, No.13; FO 881/6854; and HO 144/935/A58272.

7. Antrobus to Foreign Office (CO. 23 May 1903); and Denton to Chamberlain (Bathurst. 8 August 1903): FO 27/3649. cf. Minute by H.J.R. (CO. 4 September 1903): CO 87/169. .pa

8. cf. J. Castel and M. Edwardh, op. cit. pp.98-9; N. Mackenzie and L. Laing, Canada and the Law of Nations (Toronto 1938) pp.311-3; and G.V. LaForest, op.cit. pp.44-6.

meetings" opposed his extradition.⁹ In December, Justice Robinson discharged Federenko on appeal on a technicality, but it seems that his motive was to protect a political refugee from persecution in Russia¹⁰.

In 1912 the Philippines requested Vicente Sotto's extradition from Hong Kong for abduction; it too was refused on a technicality, but more interesting was his claim that it was sought with the intention of punishing him for a political offence. He had faced numerous prosecutions for sedition and libelling government officials and claimed that if surrendered, he would again be tried for a political libel. The court recognised that he was a political refugee, but since extradition was to be refused anyway, did not deal in any detail with the allegations. However, it did hold "mere suggestions" of a political motive would be insufficient¹¹. Finally, in 1913 Mexico attempted to extradite Brito from British Honduras on a charge of robbery with violence, committed during a rising against the Mexican government. Governor Collet refused to entertain the request. The offence was committed "during an organised rebellion", Brito's only crime was political, and his extradition "should never have been asked for."¹²

9. The Times 4 January 1911, p.10.

10. cf. Report of the Committee of the Canadian Privy Council (22 May 1911); and minute by Davidson (FO. 20 June 1911): FO 372/303, ff.440-8.

11. Copy of the report of the court hearing in CO 129/390, ff.5-9.

12. Collet to Harcourt (British Honduras. 31 July 1913): FO 371/1675.

In so far as the political offence exemption was addressed in these cases, the decisions given in the Castioni and Arton cases were confirmed. All this, while worthy of mention, had no great importance. However, the same could not be said for the controversy which arose over extradition between Cape Colony and German South West Africa during 1904-8. During the first decade of the twentieth century, the indigenous peoples of German South West Africa were almost permanently in rebellion, and rebels frequently passed from one colony to the other. As a result, extradition became an issue.

The controversy began in March 1904 with the German request for the extradition of twelve Bondelzwarts for murder, arson, attempted murder, burglary and robbery with violence. Governor Hutchinson noted they were "implicated in the recent rising of the Bondelzwarts", but referred the case to his advisers, who found the crimes were "perpetrated in furtherance of the revolt", and therefore political. "To murder German males liable to, or expected to render military service, and the breaking into houses and obtaining supplies or arms are... crimes of this nature".¹³ Hutchinson informed London that unless otherwise instructed, he would refuse to arrest the fugitives, and the Colonial Office accepted his decision.¹⁴ At the Foreign Office, Maycock thought it wrong

13. Hutchinson to Lyttelton (No.95) (Cape Town. 16 March 1904); and Report by Sampson (17 March 1904): CO 48/575. Hutchinson left no private papers of any value.

14. Hutchinson to Lyttelton (Cape Town. 30 March 1904). cf. Lucas to Foreign Office (CO. 6 April 1904): FO 64/1611.

for the Cape government to "decide off hand" that the offences were political: a court should have considered the matter. The course adopted was, however, quite lawful, although in Britain the usual practice was to let the courts decide¹⁵.

Before the Foreign Office expressed its official view of the case, Hutchinson reported that as he had received no instructions, extradition had been refused on political offence grounds.¹⁶ With Foreign Office agreement, Lyttelton approved the course adopted, if the Cape government was satisfied that the offences were political.¹⁷ On this, Davidson noted they could "hardly be brought within the category of political offences... How the Ministers of the Cape Colony arrived at such a conclusion I cannot conjecture". Furthermore, the Germans would "contest the view of the Cape Ministers" and "make a row about it"¹⁸.

Shortly after the Bondelzwarts case, the Germans sought David Juli's extradition for murder, and on the advice of his ministers (but without consulting London) Hutchinson refused to order his arrest as it was a "crime committed in

15. Minute by Maycock (FO. 7 April 1904). cf. minute by Davidson (FO. 12 April 1904): ibid.

16. cf. Hutchinson to Lyttelton (Telegraphic. Cape Town. 13 April 1904): FO 64/1645.

17. Lyttelton to Hutchinson (Telegraphic. CO. 21 April 1904). cf. Villers to Colonial Office (FO. 14 April 1904): FO 64/1611.

18. Minutes by Davidson (FO. 12 & 22 April & 16 July 1904): FO 64/1611 & 1645; and Maycock to Davidson (Private. 2 April 1904): FO 64/1611.

connection with, and in furtherance of a revolt against German sovereignty, and therefore in reality a political offence".¹⁹ Davidson thought the decision "in all probability quite wrong" and the German semi-official National-Zeitung viewed it as "more than incomprehensible"²⁰.

Since German protests were expected, the Foreign Office asked for a fuller explanation²¹. At present, it had "practically nothing to say" in defence of the decision except that it was legal: Germany would "hardly rest satisfied" with that.²² The Cape explained that the evidence was insufficient, and had it been sufficient, the murder was committed by a party of rebellious Hereros, of which Juli was a member: therefore the crime was political²³.

Foreign Office officials were still dissatisfied²⁴. At their request (and because the case had been "taken up by the German press") the Cape authorities were asked to bring

19. Hutchinson to Lyttelton (Cape Town. 13 June 1904): FO 64/1645

20. Minute by Davidson (FO. 30 December 1904): ibid. Others agreed: cf. Unsigned minute (FO. 15 July 1904); minute by D.W. (FO. 28 December 1904); ibid.; and National-Zeitung 8 December 1904, extract in ibid.

21. cf. Villers to Colonial Office (FO. 21 December 1904): ibid.

22. Minute by Davidson (FO. 30 December 1904): FO 64/1645; and Villers to Colonial Office (FO. 11 January 1905): CO 879/86/766, No.2.

23. Ministers to Governor (Prime Minister's Office. 27 March 1905): FO 64/1646.

24. cf. Minutes by D.W. (FO. 5 April 1905) and Davidson (FO. 8 & 11 April 1905): ibid.

Juli before a court, and to do likewise in future cases.²⁵ They replied with a strong defence of their practice. It was authorised by the Extradition Act, and was necessary. Juli was at Walfish Bay, where no lawyer lived: it would therefore have been impossible for him ("an illiterate bastard native") to get legal advice or to defend himself adequately. The Resident Magistrate would probably have granted extradition, and the Governor would have had the "invidious" duty of overruling him. It was better to refuse arrest in the first place. The idea of establishing a central extradition court at Cape Town to hear all cases was considered but rejected because of "the circumstances of the Colony". There was a dearth of magistrates or judges who knew anything of extradition law, and transporting prisoners hundreds of miles from the extremities of the colony to Cape Town would be expensive and hardly fair on them.²⁶

Hutchinson answered London's scarcely concealed doubts as to the validity of his adviser's findings. If the fugitives were "civilised white men", he would have agreed, but natives "cannot be expected to distinguish between the soldiers and other Germans. They are fighting the Germans, and their idea is, to kill any Germans who resist them". Furthermore, the natives had been "driven into rebellion by cruel treatment". Cape arguments were accepted in London,

25. Villers to Colonial Office (FO. 18 April 1905): CO 48/582, ff.192-3; minute by E.J.H. (CO. April 1905); *ibid.* f.191; and Lyttelton to Hutchinson (No.61) (CO. 27 April 1905): CO 879/86/766, No.37.

26. Reports by Sampson and Graham (Attorney General's Office. 7 & 24 June 1905): CO 48/580, ff.301-7; and Ministers to Governor (Prime Minister's Office. 13 September 1905): CO 48/581, ff.53-4.

although the Foreign Office perhaps only did so because Germany had not made the much expected protest.²⁷

That was not the end of the matter. In 1907 yet more rebels took refuge in the Cape. When the Germans (who expected London to "interfere with the Cape Government in favour" of surrender) sought extradition, it was "most desirable" that the matter be judged in court, for they would then have no cause for complaint.²⁸ Cape ministers replied that their practice had been accepted in August-September 1905. The authorities had presumably changed their minds because they hoped leaving matters to the courts would "avoid possible diplomatic complications", but these were likely to arise "in still more acute form" if the courts dealt with extradition. Fugitives might be committed for offences which ministers thought political, so putting them in a position of "extreme difficulty": they would either have to overrule the courts or allow the surrender of a political offender.²⁹

In the meantime, Germany requested the extradition of a native leader named Morenga. Again, ministers advised

27. Hutchinson to Lyttelton (Private. 9 July 1905): CO 48/580, ff.295-7. cf. Minutes by Pearson, Cox and Lyttelton (CO. 8 & 12 August 1905): CO 48/580, ff.293-4; Cox to Foreign Office (CO. 16 August 1905): ibid. f.308; Minutes by Hurst (FO. 23 August 1905): FO 64/1646; and Villers to Colonial Office (FO. 6 September 1905); CO 879/86/766, No.102.

28. Minute by Cox (CO. 26 January 1907): CO 48/594, f.197. cf. Minute by Maycock (FO. 7 February 1907); memorandum communicated by von Stumm (17 April 1907): FO 367/63; and Elgin to Hutchinson (CO. 2 February 1907): CO 879/94/868, No.29. R. Hyam, Elgin and Churchill at the Colonial Office (1968) contains no reference to this matter.

29. Ministers to Governor (Prime Minister's Office. 30 April 1907): CO 48/592, f.323.

against extradition on political offence grounds: he also had "no means to defend himself" if taken before a court, and they were not prepared to "risk" him being committed. Hutchinson decided to confer with the Prime Minister, but if he too advised against extradition, he would be "constitutionally bound" to refuse it.³⁰

The Colonial Office reaction was mixed. In "ordinary cases" Cape procedure did not matter, but Morenga's case was of a "far more important character". Grindle acknowledged the fear that "incompetent magistrates will hand over political offenders", but Morenga could be brought before the Cape Town magistrates: however, if this was done, the Germans would complain if subsequent cases were not decided in court. It would therefore perhaps be better to let ministers have their way: "the worst course of all" would be for ministers to overturn the decision of a court in favour of extradition. Lambert did not see how the Cape could be forced to change a procedure that was fully sanctioned by law. If the Prime Minister advised against extradition, "it would be difficult to press the Cape Government in the matter".³¹ Foreign Office officials were far from happy. They had assured Germany that Morenga's extradition would be dealt with in the 'normal way', and had thought this meant

30. Von Humboldt to Hutchinson (10 April 1907): CO 48/592, ff.325-6; and Hutchinson to Elgin (Cape Town. 29 May 1907): CO 879/94/868, No.162.

31. Minutes by Pearson (CO. 30 May 1907); Grindle (CO. 30 May 1907); and Lambert (CO. 30 May 1907): CO 48/592, ff. 389-90; and Just to Foreign Office (CO. 7 June 1907): CO 879/94/868, No.151.

before a court.³²

The Cape Prime Minister advised against extradition, Hutchinson was asked to delay replying to the Germans, but the reply had already been sent.³³ Pearson observed it was "perfectly obvious that there is no case for Morenga's extradition", while Winston Churchill (Colonial Office Parliamentary under-secretary) thought "the surrender of Morenga to suffer death would be unworthy of a Government under the British flag". H.B. Cox (assistant under-secretary) noted that the "mischief is done and it only remains for the F.O. to deal with the Germans as best they can. I wish them joy of their job".³⁴

The Foreign Office could not see "anything political" in Morenga's crimes, and expected Germany to register serious complaints.³⁵ The Cape procedure was "to be strongly deprecated": executive administration of extradition law was "undesirable on constitutional grounds". It exposed the Cape government to "adverse foreign criticism, and to misconstructions being placed upon its actions". The procedure was "inexpedient as a matter of policy, even

32. Minute by Clarke (FO. 12 June 1907); FO 367/63. cf. minute by Hurst (FO. 13 June 1907): ibid.; and Barrington to Colonial Office (FO. 25 June 1907): CO 879/94/868, No.165.

33. cf. Hutchinson to Elgin (Cape Town. 4 June 1907): CO 48/592, ff.422-3; Elgin to Hutchinson (Telegraphic. CO. 26 June 1907): CO 879/94/868, No.166; and Cameron to Von Humboldt (Cape Town. 6 June 1907); CO 48/592, ff.476-7.

34. Minutes by Pearson (CO. 25 June 1907); Churchill (CO. 4 July 1907); and Cox (CO. 28 June 1907); CO 48/592, ff.421, 592 & 595.

35. Minute by Warner (FO. 2 July 1907): FO 367/63. cf. Minutes by Kenrick (FO. 11 July 1907); and Clarke and Langley (FO. 8 July 1907): ibid.

though it may be legally justifiable". In any colony where there was "an organised judicature", extradition should be dealt with by the courts, and the Cape should therefore be asked to change a procedure that had "already proved a source of considerable embarrassment to the Imperial Government and may on some future occasion involve them in difficulties even greater than those which have attended Morenga's case". The best solution would be the establishment of an extradition court at Cape Town.³⁶

Hutchinson was asked to put the idea to his ministers,³⁷ but meanwhile, Germany had sought Baird's extradition, which had been refused on political offence grounds.³⁸ At the same time, the request for Juli's extradition was renewed. As new evidence was submitted which threw doubt on the political nature of his offence, he was sent before the Cape Town magistrate, who then discharged Juli on political offence grounds.³⁹

On the general question of procedure, Hutchinson pressed his ministers to accept London's view, but to no effect.

36. Langley to Colonial Office (FO. 2 August 1907): CO 48/594, ff.477-85.

37. Elgin to Hutchinson (CO. 10 January 1908): CO 879/97/896, p.9.

38. cf. Hutchinson to Elgin (No.6) (Cape Town. 20 January 1908); and Fife to Von Humboldt (Cape Town. 20 January 1908): CO 48/596, f.20. The Germans had enquired as to Baird's extradition in 1906: ministers were sure he was a political offender, but at the time he was in gaol in Cape Colony, so no communication in that sense was made: cf. co 48/587/592.

39. cf. Hutchinson to Elgin (No.4) (Cape Town. 8 January 1908); and same to same (No.58) (Cape Town. 24 March 1908): CO 48/596, ff.4-8 & 357-60.

While recognising the "force" of Foreign Office views, "in the peculiar circumstances" of Cape Colony it was "impracticable to establish a system of special tribunals" to deal with extradition.⁴⁰ The Foreign Office maintained its position: it was "obvious" that in the absence of a judicial enquiry, refusal to extradite "will be liable to be treated as an act of policy and not of justice", and any surrender "will be attributed to weakness". However, nothing could be done.⁴¹

In subsequent cases (both 'political' and 'non-political') the Cape authorities acted as follows. If extradition was justified, fugitives were sent before a court: if not, ministers refused to arrest them. They never granted extradition: that was left to the courts.⁴² It is hard to see how their motives could be challenged throughout the episode. All they were trying to do was protect political offenders and that had always been the mainspring of British extradition policy, although their refusal to appreciate the need to conciliate Germany was perhaps rather naive. The Foreign Office's main concern throughout was to conciliate, even appease, Germany, and such an attitude was consistent with that adopted in other colonial

40. Hutchinson to Crewe (No.112) (Cape Town. 1 June 1908); and Ministers to Governor (Prime Minister's Office. 1 June 1908): CO 48/597, ff.4-8.

41. Campbell to Colonial Office (FO. 14 July 1908): and Antrobus to Foreign Office (CO. 25 July 1908): CO 879/97/898, pp.132-3 & 149.

42. cf. The following cases: Bondelzwarts natives (1908: CO 48/597-8); Rolf (1909: CO 48/601-4); Antiata (1911: CO 551/32); Rodat (1911: CO 551/10); Kapsopoulos (1912: CO 551/26); and Ribeiro (1913: CO 551/43).

questions.⁴³

That Foreign Office views were dictated purely by expediency is confirmed by the fact that in 1909 it adopted the 'objectionable' Cape procedure. In December 1908, the Haitian President, Nord Alexis, resigned and fled the country, and in January 1909 the new government sought his extradition from Jamaica for the murder of persons involved in an abortive coup of March 1908.⁴⁴ The Colonial Office felt that in a case where the offence was "so obviously political", it might "be proper to depart from the usual practice" and to refuse to bring the matter before the courts.⁴⁵ Foreign Office Officials agreed: Maycock even cited Cape practice as a precedent for the decision.⁴⁶ Nord Alexis was not taken before a court. It would perhaps be going too far to accuse the Foreign Office of naked hypocrisy, but it was hardly consistent.

It was perhaps inevitable that controversy over political offences in extradition should focus upon the colonies rather than Europe in the early years of the twentieth century. By and large, Europe was in a fairly

43. cf. B. Porter, Britain, Europe and the World p.78.

44. cf. Murray to Grey (No.4) (Port-au-Prince. 21 January 1909): FO 372/165; and same to same (No.5) (Port-au-Prince. 31 January 1909): FO 371/680.

45. Antrobus to Foreign Office (CO. 12 March 1909): FO 372/165.

46. cf. Minutes by Maycock (FO. 13 March 1909); Campbell (FO. 13 March 1909); Mallet (FO. 15 March 1909); Davidson (FO. 17 March 1909); and Campbell to Colonial Office (FO. 20 March 1909): FO 372/165. No-one had complained when ministers and governors other than those of Cape Colony decided an offence was political: cf. above for the cases of Mousa Mollah and Brito.

stable condition, with few revolutionaries (except anarchists) needing or seeking asylum. In contrast, Europe's colonial possessions and nations that would now be termed members of the 'third world' were frequently disturbed by rebellions and political disorder. Similarly, British colonies had to deal with their own 'political offenders'.

In 1889 the (British) Gambia sought the extradition of Sheikh Momodoo Low from Senegal for murder. The authorities thought the offence "cold blooded",⁴⁷ but the French disagreed and refused extradition on political offence grounds.⁴⁸ The Governor of the Gambia was "unable to see than controversy, Britain accepted the decision, whilst making how this conclusion could have been arrived at", but rather it clear to the French that she did not agree.⁴⁹ In 1908 a political offender (Charu Chandra Roy) was extradited from Chandernagore (a French enclave in north-eastern India) to British India, but, at France's request, 'political' charges were dropped and he was prosecuted for criminal offences only.⁵⁰

More important was the Savarkar case, in which the Fugitive Offenders Act again proved its worth. During the late 1900s and 1910s, Britain faced serious unrest in India itself and among Indians living in London: in 1909 Sir

47. Minute by A.W.H. (CO. 27 December 1889): CO 87/136. cf. minute by Bergne (FO. n.d.): FO 27/3026.

48. Pellegrin to Carter (14 February 1890): ibid.

49. Carter to Knutsford (No.5) (Bathurst. 14 February 1890): ibid.; and Sanderson to Lytton (No.28 Treaty) (FO. 31 March 1890): FO 27/3008.

50. cf. FO 372/106.

Curzon Wyllie was assassinated in London and Collector Jackson at Nasik.⁵¹ One of the leading Indian nationalists was Vinayak Damodar Savarkar, and in 1910 a warrant was issued for his extradition to British India from Britain under the Fugitive Offenders Act on various charges of waging war on the King, conspiring to do so, collecting arms with the intention to do so, sedition and abetment of murder. Savarkar appealed to the King's Bench and the Court of Appeal on the grounds that to return him to India would be "unjust and oppressive", but to no avail.⁵²

When the ship carrying Savarkar back to India docked at Marseilles, he managed to slip out of a porthole and swim ashore. However, he was caught by a French policeman, restored to the ship, and the journey to India was completed. In the meantime, the French government protested. Savarkar was a political offender and when he landed on French soil he was entitled to claim asylum: he should not have been handed back to the British authorities without first being formally extradited. The French therefore asked for Savarkar's return to France: they would then consider any British application

51. cf. Sir Valentine Chirol, Indian Unrest (1910) pp.57-60 & 146-9; D. Garnett, The Golden Echo (1954) pp.143-62; S.R. Wasti, Lord Minto and the Indian Nationalist Movement (Oxford 1964) p.92; and S.A. Wolpert, Tilak and Gokhale (Berkeley 1962) pp.123 & 168-9.

52. cf. Rutzen to Home Office (Bow St. 12 May 1910): HO 144/1063/189349, /4; The Times 25 May 1910, p.4; British International Law Cases (1967) volume 5, pp.598-9 & 614-26; Times Law Reports volume 26 (1909-10), pp.512-6 & 516-4. There was some support for Savarkar: cf. Justice 25 June 1910, p.1; Anon. 'The Right of Asylum', Nation (London) volume 7 (1910), p.661; and volume 8 (1910), pp.43-4; and 5H, (C), 16, c.444, (6 April 1910).

for extradition. Since the government felt it was under no obligation to return Savarkar (for a French official had handed him over), and it was most unlikely that extradition from France would be granted, Britain refused. However, general foreign policy considerations dictated that a damaging controversy with France must be avoided at all costs, and so Britain agreed to arbitration by the Hague Tribunal. In February 1911 the arbitrators decided in Britain's favour, and the controversy came to an end.⁵³ As for Savarkar, he was sentenced to transportation for life, and remained in prison or internment until 1937.

53. cf. HO 144/1063/189349; FO 372/210,211 & 278; Grey Papers, FO 800/52, /89, /93/98/99, /107; Bertie Papers, BL Add. MS.63025; The Times 20 July & 7 October 1910, pp.5 & 9; Anon, 'Savarkar Case', American Journal of International Law volume 5 (1911), pp.208-10; Anon, 'Savarkar Case', Law Magazine and Review, volume 36 (1911), pp.326-30; SH, (C), 19, c.844, (18 July 1910); ibid. c.1417, (21 July 1910); SH, (C), 63, c.503, (11 June 1914); and ibid. cc.909 & 1628, (16 June 1914); D. Keer, Veer Savarkar (2nd edition. Bombay 1966); C. Gupta, Barrister Savarkar (Madras 1926); P. O'Higgins, 'Unlawful Seizure', British Yearbook of International Law volume 36 (1961), pp.286 & 315-6.

CHAPTER 8

THE ALIEN ACT AND THE RIGHT OF ASYLUM (1905-14)

Chapter Eight: The Alien Act and the Right of Asylum
(1905-14)

During the 1890s, calls for the limitation of alien immigration became increasingly common, and in the early 1900s the Tory government adopted the idea, ostensibly on account of its supposedly harmful socio-economic impact.¹ It was claimed that aliens competed unfairly with the British worker, but by this time, labour organisations, such as the T.U.C. and the London Trades Council, which had previously (in 1891-4) called for alien legislation, had changed their minds.² In 1903 a Royal Commission found there was no real socio-economic necessity for restricting immigration, but nevertheless recommended "stringent measures of restriction".³ The Tories hoped legislation "would not only silence Tory pressure groups", but also "demonstrate sympathy with the workers without angering the employers", and perhaps even "recapture some working class votes".⁴

1. cf. W.T.W. Quin, 'Invasion of Destitute Aliens', Nineteenth Century volume 31 (1892), pp.985-1000; C.E. Howard Vincent, 'Alien Immigration', Blackwood's Edinburgh Magazine volume 173 (1903), pp.132-41. In 1898 Lord Hardwicke unsuccessfully revived that part of Salisbury's bill of 1894 which restricted pauper immigration: cf. Anon, 'The Aliens Bill', Spectator volume 80 (1898), pp.901-2; and B. Gainer, op.cit. p.157.

2. cf. B. Gainer, op.cit. pp.96-7. The biographers of one of the leaders of the anti-alien campaign noted: "it was a remarkable thing that the British Working-man did not appear to welcome the Aliens Bill so heartily as might have been expected": S. Jeyes and F. How, Life of Vincent (1912) p.339.

3. B. Gainer, op.cit. p.159. Its recommendations are reprinted in: Liberal Publication Department, Ten Years of Tory Government (1905) pp.182-3.

4. B. Gainer, op.cit. (p.190. The Government knew legislation was not strictly necessary: cf. CAB 37/59, No.146; and HO 45/10241/B37811.

A bill introduced in 1904 ran out of time, but a similar measure was re-introduced a few months later, and the Aliens Act (5 Edw.VII.cap.13) passed into law on 11 August, 1905.⁵ Aliens were not to be admitted if they were poor, mad, diseased, or criminal, or if they had previously been expelled under the provisions of the Act. In addition, the Home Secretary was empowered, on the recommendation of a court (including a court of summary jurisdiction), to expel any alien who was: convicted of serious crime, or poverty-stricken, or had been "living under unsanitary conditions due to overcrowding", or had been convicted abroad for an extraditable offence.⁶

The Act passed despite vigorous Liberal and Labour opposition. Dilke (Liberal MP for the Forest of Dean) feared it would "have cruel results for some hundreds of unfortunate people who are at this time flying from persecution in the East of Europe", while Spencer thought there was "considerable danger in the Bill of wrecking that right of asylum... which has existed for so many years in this country, and under which those who suffer from political or religious persecution abroad have always found safety in this country". Trevelyan (Liberal MP for Elland, Yorkshire) asserted that the principle of the legislation

5. On this question generally see B. Gainer, op.cit. passim.; and HO 45/10303/117267. There were private members' aliens bill in 1903 and 1904: cf. HO 45/10283/106464; HO 45/10307/120474; and HO 45/10293/113513.

6. T. Bunyan, (History and Practice of the Political Police [1983 edition] p.110) incorrectly states that the Home Secretary was empowered to deport "on the advice of the police, magistrates and the Special Branch".

"involved a wide breach of national traditions".⁷ There was no "proved necessity" for the Act, which "smirches those ancient traditions of freedom and hospitality for which Britain has been so long renowned".⁸

Large Tory majorities in both Houses of Parliament ensured the measure's passage, but the opposition was able to force one important change: the strengthening of that part of the bill which embodied a sort of political offence exemption. The final version read as follows:

in the case of an immigrant who proves that he is seeking admission to this country solely to avoid prosecution or punishment on religious or political grounds or for an offence of a political character, or persecution, involving danger of imprisonment or danger to life or limb, on account of religious belief, leave to land shall not be refused on the ground merely of want of means, or the probability of his becoming a charge on the rates.

Initially, aliens seeking admission under this clause

7. 4H, (C), 145, cc. 703-5, (2 May 1905); 4H, (L), 150, c. 755, (28 July 1905); and 4H, (C), 135, c. 1085, (8 June 1904). cf. 4H, (C), 132, cc. 991-4, (29 March 1904); 4H, (C), 133, cc. 1062-1160, (25 April 1904); 4H, (C), 145, c. 472, (18 April 1905); ibid. cc. 696-801, (2 May 1905); 4H, (C), 148, cc. 865-7, (3 July 1905); ibid. cc. 1186-8, (5 July 1905); 4H, (C), 149, cc. 151-74, (10 July 1905); ibid. cc. 943-8, (17 July 1905); ibid. cc. 1258-72, (19 July 1905); and 4H, (L), 150, cc. 754-72, (28 July 1905).

8. Churchill to Laski (30 May 1904): R. Churchill, Winston S. Churchill (1966) Companion volume to volume 2, pp. 354-6. cf. G. Drage, 'Alien Immigration', Fortnightly Review volume 57 (1895), pp. 37-46; Reynolds's 1 May 1904, p. 6; Justice 22 April & 6 May 1905, p. 1; Clarion 5 May 1905, p. 4; Socialist Standard 3 June 1905, p. 6.

were required to prove their case, and there were allegations that genuine political refugees were being refused entry. While some of the claims were blatantly false, others may have had more than a grain of truth in them, although none was actually proved.⁹ Herbert Gladstone, the Home Secretary in the new Liberal government (formed in December 1905), shared MPs' fears as to the Act's effects: it raised "many vexatious points" and gave him "much trouble".¹⁰ The Home Office permanent secretary thought there was "a real difficulty" over political-religious refugees, and suggested something might be done to lift the burden of proof from them. Russian political and religious repression was "so notorious" that it was "a matter of common sense that if a man proves that he comes from Russia and alleges that he is a refugee there is a presumption of fact that his statement is correct".¹¹ Therefore, on 9 March 1906, Gladstone issued his famous 'benefit of doubt' order.¹²

While recognising "the extreme difficulty" of assessing the validity of claims for political-religious refugee status, Gladstone reminded the Immigration Boards which administered the Act that it had been passed to check "the immigration of undesirable aliens". Parliament "never

9. cf. 4H, (C), 153, cc. 88-9, 140, 135-60, (5 March 1906); and ibid. cc. 565-8, (7 March 1906).

10. Gladstone to Grey (Private. 13 February 1906): Grey Papers, FO 800/97, f.13.

11. Chalmers to Gladstone (Private. 6 March 1906): H. Glad.PP. BL Add. MS 45993, ff.17-18.

12. C.F. Fraser, Control of Aliens (1940) p.41, dates it 9 March 1905: before the Act was passed!

intended" the Act to be applied with absolute "rigidity": the statements of those claiming religious-political refugee status might be "insufficient or inaccurate" but nevertheless true. Therefore, a certain latitude should be allowed:

In all cases in which immigrants coming from the parts of the Continent which are at present in a disturbed condition allege that they are flying from political or religious persecution, the benefit of the doubt, where any doubt exists, as to the truth of the allegation will be allowed, and leave to land will given.¹³

Even before 9 March, at least one immigrant was admitted on the grounds that he was a political refugee: Moische Smolenski. In January 1906 the Port of London Immigration Board requested guidance on the case, the facts of which were as follows. Smolenski, a Russian Jew, was a private in the army at Krementschug, and there was an anti-Jewish riot in the town. "Smolenski went out to protect a friend of his, also a Jew, who was in danger from the mob". By doing so, "he became liable to punishment (it is understood two years hard labour) and deserted to avoid it".

More generally, the Board asked whether "having regard to the present condition of Russia and the present treatment of the Jews in that country, the following came within the exception... (a) Leaving the country to avoid military service (b) Desertion from the Army to avoid punishment for refusing to fire on the mob, whether Jewish or otherwise, and

13. Home Office circular to the Immigration Boards; and instructions to Immigration Officers (9 March 1906): HO 158/13, pp.103-6.

whether the disturbance is of a revolutionary or religious character, or due merely to an ordinary strike of workmen". Officials thought the case was "rather on the line", but were "of the opinion on the whole that Smolenski's offence was of a political character. Martial law was proclaimed and actual political disturbances were taking place".¹⁴ He was therefore admitted to Britain.

On the wider questions raised, Peddar advised that every case would have to be decided "with strict regard to the particular circumstances: (a) there may well be many cases in which desertion from the Army has no political character; (b) there is more possibility that in the circumstances indicated in this paragraph political or religious considerations would have weight, but no general rule can be laid down".¹⁵ The attitude adopted by the Home Office therefore mirrored that adopted towards political offences in extradition cases: judgement on a case by case basis. Immigrants were thus given the widest possible latitude for proving they were entitled to asylum. There is some evidence that unscrupulous aliens may have abused Gladstone's generosity. On 7 November 1906, Mr. Parker (MP for Halifax) called attention to the arrest of one Zelig Zingar (at Russia's request) on an extradition warrant. Since he was a political refugee, he expected Gladstone to "see that the

14. Memorandum by Clerks to the Immigration Board (Port of London. 9 January 1906): and minute by Waller (HO. 9 January 1906): HO 45/10327/132181. cf. Chalmers to Gladstone (Private. 10 January 1906): H.Glad. PP. BL Add. MS 45993, ff.10-11.

15. Memorandum by Peddar (HO. n.d.): HO 45/10327/132181.

protection afforded by our law to such was not violated".¹⁶ Zingar was accused of throwing a bomb into a barracks at Warsaw and killing several policeman, and had confessed to the crime before the immigration authorities at Grimsby. However, he now retracted his confession, claiming he "stated that he was fleeing from justice in Russia for the purpose of inducing the authorities at Grimsby to permit him to land in this country as a political refugee. It is apparent from his description that the man in custody is not the man wanted".¹⁷ It was also apparent that Zingar had pulled the proverbial 'wool over the eyes' of the Immigration Board, and lied his way into Britain. However, what concerned the Home Office most was that it was "very desirable that it should be made plain to the public that it was Zingar's own fault that he was arrested".¹⁸ The government wanted to avoid at all costs the charge that it was conspiring with Russia to prosecute a 'politico'.

The Zingar case gave some credence to the arguments of those who denounced the 'benefit of doubt order'. Evans Gordon (Tory MP for Tower Hamlets) had expressed his "amazement" at its terms. "The onus of proof had thereby been removed entirely from the immigrant... the whole Act became null and void under those conditions". Lord Newton

16. 4H, (C), 164, c.453, (7 November 1906).

17. MacNaghten to Home Office (Scotland Yard. 9 November 1906): HO 45/10348/146018, /8.

18. Minute by Troup (HO. 10 November 1906): *ibid.* /8. cf. FO 372/28.

claimed the Act had become "little better than a farce",¹⁹ and others thought the Act was not being administered in the manner "anticipated by those who passed it".²⁰ Gladstone defended himself, asserting that all he had done was to "remedy certain grievances and... prevent great hardship being inflicted". He was "confident that the whole Country would have resented it if I had not done so if it were in my power to do so".²¹

The Aliens Act of course had great implications for the right of asylum, even though it was not specifically directed against political refugees generally or any group in particular. Granting them absolute protection in extradition was of no value if they could not get into Britain in the first place. It is difficult to determine how much of a difference Gladstone's order made: allegations that genuine 'politicos' were being excluded did not cease until August,²² but they seem to have had less basis in fact than earlier claims. It was, however, nonsense to claim that the order made the Act 'null and void'. Large numbers of immigrants were still refused entry, and few were admitted as political or religious refugees. There were 505 such admissions in

19. 4H, (C), 153, cc. 1312-3, (14 March 1906); and 4H, (L), 154, c. 549, (22 March 1906).

20. Buckle to Gladstone (Private. 1 February 1909): H. Glad. PP. BL Add. MS 46066, f. 233. cf. The Times 17 March 1906, p. 8; and 5 June 1906, p. 7; and W. Evans Gordon, 'The Attack on the Aliens Act', National Review volume 48 (1906), pp. 460-71.

21. 4H, (C), 153, c. 1322, (14 March 1906).

22. cf. 4H, (C), 154, c. 79, (19 March 1906); ibid. cc. 731-2, (23 March 1906); 4H, (C), 162, cc. 431-2, (30 July 1906); and ibid. c. 1358, (2 August 1906).

1906, 43 in 1907, 20 in 1908, 30 in 1909, and 5 in 1910.²³

The Act was rather inefficient anyway: it was "a patchwork of half measures".²⁴ Ports where aliens were allowed to land were specified, but no provision was made for dealing with aliens who attempted to land elsewhere. The tests imposed for proving an ability to support oneself were evaded relatively easily. First class and cabin-class passengers were exempt from the Act's provisions, and on some ships steerage passengers were passed off as first and cabin-class. The Act only applied to ships carrying more than 20 alien steerage passengers: aliens arriving on vessels with less than 20 could land quite freely. Similarly it did not apply to aliens who were visiting Britain 'temporarily', or who were simply passing through on the way to their final destination, or who held return tickets. Of the 534,805 aliens who sought admission in 1909, only 11,930 had to face the tests imposed by the Act.²⁵ Any political refugee with money, common-sense, or a bit of ingenuity could still secure asylum in Britain with relative ease.

Compared with the legislation and practice of the continent and the United States, the Alien Act was

23. 5H, (C), 21, c.662, (10 February 1911): speech of Home Secretary Churchill. These figures are of course no measure of how many political and religious refugees entered Britain during these years. Many hundreds, perhaps thousands, entered every year without ever having to appeal to this part of the Act.

24. C. Rogers, Battle of Stepney (1981) p.123.

25. ibid. p.123n. cf. HO 45/10326/131787, /93; 5H, (C), 1, c.967, (28 February 1909); and T.W.E. Roche, The Key in the Lock (1969) pp.70-4.

exceedingly mild. Nevertheless, the right of asylum was no longer absolute: knowledge of the Act may have deterred political refugees from trying to seek asylum in the first place. However, they were still far more likely to be admitted to Britain than anywhere else, and far safer in Britain than elsewhere.

Immigration laws do not only deal with keeping aliens out: in addition, they invariably provide for the deportation of 'undesirable aliens'. Deportation has a direct relevance to extradition, for it can be substituted for it. During the second half of the 1900s a new practice arose within Anglo-American extradition: that of 'disguised extradition'. During 1906-1914, 'disguised extradition' (the deportation of criminals at the request of the country where the fugitive was wanted) superceded extradition as the means by which Britain secured the return of fugitives from the United States: 20 were deported, and 19 extradited.²⁶ The immigration authorities at New York were "extremely obliging", to say the least: the practice became so commonplace that code words were devised for use in cipher telegrams relating to it.²⁷

26. These are my own figures, collected during examination of Home and Foreign Office documents. cf. P. O'Higgins, 'Disguised Extradition', Modern Law Review volume 27 (1964), p.523. Before 1906, 'disguised extradition', had taken place, but not on any scale. There seem to have been only two cases: Barfield (1896: HO 144/507/X60223); and Symmons (1899: HO 144/523/X74241).

27. Bennett to Grey (New York. 21 November 1908): HO 45/10391/172119, /5. cf. Blackwell to Foreign Office (HO. 30 May 1908): FO 372/136

There were certain advantages to having fugitives deported rather than extradited. Extradition from the United States was a particularly expensive business, and deportation involved hardly any expense at all.²⁸ The nature of the offence charged was irrelevant: fugitives accused of non-extraditable could be recovered.²⁹ Similarly, the return of a fugitive under immigration laws was unconditional.

The development of the phenomenon of 'disguised extradition' was therefore very useful for Britain: it was a "delightfully summary substitute for extradition". However, the authorities were aware that the procedure had certain drawbacks. It was "technically improper", and "might be represented as an attempt to evade the provisions of the Extradition Acts".³⁰ Such considerations were particularly important in the case of Irish fugitives: imagine the outcry if Britain sought the deportation of a Fenian.³¹

One cannot blame Britain for taking advantage of foreign laws,³² but for the purposes of this study it is more

28. cf. the cases of Burke (FO 372/35); Amphlett (FO 372/85); and Dernbach (FO 372/317); and Blackwell to Foreign Office (HO. 5 January 1909): FO 372/185.

29. cf. the Moloney (HO 45/10394/175113); and Amphlett (FO 372/85) cases.

30. Minutes by Simpson (HO. 31 August 1896): HO 144/507/60223, /7; and Eagleston (HO. 27 February 1909): HO 45/10391/172119, /9; and Blackwell to Dublin Castle (HO. 8 December 1908): FO 372/185.

31. Any attempt to deport Lynchhaun would have aroused great controversy.

32. Maycock minuted: "In one or two cases lately criminals have been got back from foreign countries under the Immigration Laws of those countries for non-extradition crimes", (Minute by Maycock (FO. 28 March 1907): FO 372/85) his use of 'countries' indicating that it was not just the United States which permitted 'disguised extradition'.

important to discover whether Britain herself granted 'disguised extradition'. The procedure could be used in a sinister way: against political refugees for example.³³ In more general terms "it is clearly an abuse of the powers vested in immigration officials", and constitutes "an evasion" of extradition law. While extradition is a judicial function, "the deportation procedure is lacking in such safeguards and smacks of star chamber".³⁴ It was therefore crucial for the maintenance of the right of asylum that Britain did not grant 'disguised extradition', and all the available evidence indicates that she did not do so.

In 1896, the New Zealand authorities wished to deport one Thomas Kenny to the South African Republic, for there was no extradition treaty, but the Foreign Office objected that such a course would be illegal and the deportation was blocked.³⁵ Peddar noted that the substitution of deportation for extradition would be grounds for objecting to alien legislation, and in 1908 Blackwell minuted that "applications addressed to us to use the Aliens Act for the purpose of dispensing with extradition proceedings would certainly be

33. At the Rome conference, Russia had proposed coming to an arrangement for the 'disguised extradition' of anarchists: cf. R.B. Jensen, op.cit. p.133.

34. J. Castel and M. Edwardh, op.cit. 133; P. O'Higgins, 'Disguised Extradition', p.521; and H.G. Reuschlein, 'Provisional Arrest', Georgetown Law Journal volume 23 (1934), p.77-8. cf. J.P. Clark, op.cit. p.405. Even the Americans were aware that the procedure was rather improper: cf. Straus to Root (22 September 1908), quoted in A.E. Evans, 'Acquisition of Custody', British Yearbook of International Law volume 40 (1964) p.84.

35. cf. FO 83/1439

refused".³⁶ Later, it was asserted that deportation "cannot properly be used as a substitute for extradition", and that "the principle that deportation should not be used where extradition is the proper remedy is one to which considerable importance is attached".³⁷

In more practical terms, in no case did Britain knowingly grant 'disguised extradition'. In 1907, William Strongford was due for deportation, and since he was a German subject, normal practice would be to send him to Germany. However, he was wanted in Germany,³⁸ and it would be wrong to send him there: "It would, in effect, amount to extraditing him, without the necessary formalities laid down by the extradition Acts being complied with".³⁹ In 1911 a Russian named Solomon Zausmer was convicted of larceny as a bailee, and recommended for deportation. He appealed, stating that he had been in England for ten years and had a British wife and three children, and alleging that if he went back to Russia, he would be shot for having deserted from the army. The court found that although it had "been ascertained that the appellant would not be shot if he were deported to Russia", it was "probable that he would be punished for

36. Minutes by Peddar (HO. 13 February 1905): HO 45/10303 /117267, /27; and Blackwell (HO. 28 November 1908): HO 45/10391/172119, /4.

37. Locke to Foreign Office (HO. 8 April 1926): FO 372/2199, f.59; and Memorandum by Godwin (FO. 3 December 1934): FO 371/18553, ff. 210-221. cf. Unsigned memorandum (HO. November 1934): HO 45/18080/681045, /64.

38. Chalmers to Foreign Office (HO. 9 February 1907): FO 372/85.

39. Minutes by Maycock (FO. 11 & 13 February 1907): ibid. The Home Office file (142077) has not survived.

desertion. Having regard to all the circumstances, we think that it is not a case in which it is advisable to inflict the penalty of expulsion".⁴⁰ British judges clearly would have no truck with 'disguised extradition'.

During the later 1900s, re-extradition once again aroused controversy. Kuhliger was extradited to Belgium and in 1908 Germany informed the Foreign Office that Belgium had refused re-extradition for forgery. Through her minister at Brussels, Britain informed Belgium that she would have no objections to the re-extradition, but in response Belgium proposed amending the Anglo-Belgian treaty to prohibit re-extradition.⁴¹

Foreign Office officials wanted nothing to do with the proposal (Belgium was "very tiresome about this academical question"⁴²), but those of the Home Office were rather more sympathetic to the Belgian view. Eagleston thought it was "perfectly right", while Simpson and Blackwell wondered how

40. C. Parry (ed.), op.cit. p.102. The Zausmer file (214717) has not survived.

41. Metternich to Grey (21 November 1908): FO 372/111; Campbell to Hardinge (No.19 Treaty) (FO. 29 December 1908): ibid.; and Campbell to Home Office (FO. 27 April 1909); FO 372/147. In other cases, Britain similarly raised no objections to re-extradition: de Valmore (1901: FO 7/1318; and HO 144/666/X81244) was extradited to Austria and re-extradited to Germany with British blessing; Gruenfeld and Sameitky (1902: HO 144/666/X81531) were extradited to Britain from Germany and then re-extradited to Russia; de Meulemeester (1910: FO 372/214) was extradited to Britain from Germany and then re-extradited to France. None of these cases had any hint of political offences in them.

42. Minutes by Maycock (FO. 29 June 1909): FO 372/147.

Britain was supposed to protect 'politicos' if re-extradition was allowed.⁴³ The Home Office therefore decided to consult the Law Officers,⁴⁴ and in the meantime, the papers on the case were shown to Hurst (Foreign Office assistant legal adviser) for the first time. He agreed with the Home Office. If re-extradition was allowed, this must "weaken the safeguards against the extradition of political offenders". Britain might refuse to surrender a political refugee to Russia, but surrender the same man to Germany for theft. Russia could then extradite him from Germany for what Britain considered a political offence.⁴⁵ The Law Officers advised that treaties should not allow re-extradition,⁴⁶ and the Anglo-Belgian treaty was duly revised to clearly prohibit re-extradition.⁴⁷ Protecting political offenders remained a high priority in British extradition law and practice.

In October 1912, a curious case arose with the Russian demand for the extradition of one J. Gummerus.⁴⁸ It was an "extraordinary request": he had been sentenced to a years' imprisonment for publishing "articles containing speeches at Socialist meetings in Trafalgar Square and elsewhere by Mr.

43. Minute by Eagleston (HO. 7 July 1909): HO 144/18862/155389, /14. cf. minutes by Simpson and Blackwell (HO. 13 & 19 July 1909: ibid. /14.

44. cf. Blackwell to Foreign Office (HO. 12 August 1909): FO 372/147.

45. Minute by Hurst (FO. 16 August 1909): ibid.

46. Law Officers' Opinion by Robson and Isaacs (2 May 1910): FO 881/9830.

47. Copy in FO 881/9891X.

48. cf. Benckendorff to Grey (11 October 1912): FO 372/383.

Bernard Shaw, Mr. Keir Hardie and others, and also in France insulting the Czar". The offence was clearly political, and it was "surprising that the request is put forward". Maycock suggested Russia be asked to state which extraditable offence Gummerus was accused of, but she never replied, no doubt realising that Gummerus would be judged a political offender.⁴⁹

Although the Political offence exemption did not come before a British court during 1904-1914, the activities of the suffragettes caused widespread discussion of the treatment of 'political offenders' in British goals, and this in turn stimulated discussion of what was a political offence. Sir J.D. Rees (Unionist MP for Nottingham) satirically defined a political offender "as an offender with whom the person using that expression is in sympathy", but of course this was "not a satisfactory legal definition, however accurate it may be". Atherley-Jones thought political offences should be defined by testing the "end which is in view. When people aim at a change in the Constitution, be it beneficent or otherwise, and pursue any unlawful means... it is... a political offence", while Keir Hardie asserted that "the case law" which had been produced by the Extradition Act

49. Minutes by Wetherall and Maycock (FO. 12 October 1912): ibid. cf. Dixon to Foreign Office (HO. 4 December 1912): ibid. The Home Office file (229277) has not survived. This was the only occasion upon which Russia sought the extradition of a political refugee. This perhaps indicates that the safeguards for political offenders included in the Extradition Act, coupled with Britain's traditional regard for the right of asylum, persuaded Russia that attempts to extradite 'politicos' were not worth the trouble and public outcry that they would have caused. J.H.G. Bergne (op.cit. p.183) put forward this explanation.

"leaves no doubt as to what is meant by the term political offender".⁵⁰ Herbert Gladstone was nearer the mark when he asserted that their definition was "a matter of extreme difficulty... which has puzzled generations, and is still puzzling me", while Simpson thought extradition cases threw "little or no light on the question".⁵¹

The government never admitted that suffragettes were 'political offenders' in the sense of deserving special treatment in prison. Subjects were protected against "an arbitrary or oppressive use of the criminal law"⁵² by the institution of trial by jury. However, the suffragettes were recognised to be political offenders in the sense of exemption from extradition. On 5 March 1912 a warrant was issued for Christabel Pankhurst's arrest on a charge of conspiracy to cause malicious damage to property, but she managed to elude the police. The authorities had no idea where she was, but on 19 March Bennett reported she was at New York. Extradition was not sought, as it "would doubtlessly be refused" on political offence grounds.⁵³ Christabel was in Paris anyway, and in September made her whereabouts known in Votes for Women. Before doing so, she had "sought legal advice, and had been assured by French

50. 5H, (C), 19, cc. 1338-9, (20 July 1910); 5H, (C), 40, c. 675, (28 June 1912); and 5H, (C), 38, c. 978, (14 May 1912).

51. 5H, (C), 11, c. 2183, (7 October 1909); and minute by Simpson (HO. 3 May 1905): HO 45/10303/117267, /49.

52. Unsigned memorandum (HO. 1908): HO 45/10559/168140.

53. Bennett to Grey (Telegraphic. New York. 19 March 1912); and minute by Maycock (FO. 20 March 1912): FO 372/405.

officials that she would not be extradited".⁵⁴ Recognising that offenders were political with respect to extradition was, however, "no lesson for singling them out for special treatment under municipal law".⁵⁵

Further discussion was caused by the Belgian enquiry (of March 1912) as to whether Britain would support the summoning of a conference to discuss the adoption of uniform rules on extradition, particularly with reference to procedural matters and the definition of political crimes.⁵⁶ Crowe noted that "in view of the difference between our legislation... and that of Foreign States, I doubt any 'unification' being arrived at".⁵⁷ Davidson had "never personally felt much difficulty" in defining political offences, "except what was created by the judgements in *R v Castioni* which have always appeared to me to contain some very unsound doctrines". More generally:

These international conferences are becoming a perfect nuisance: they afford moreover too much temptation and opportunity to any petty State to bring herself into temporary prominence by proposing a conference on this, that or the other matter. We got on - in my humble opinion - very much better without them and 'kept our end up' better also.⁵⁸

54. A. Rosen, Rise Up, Women! (1974) p.172. cf. CRIM 1/131; Sylvia Pankhurst, The Suffragette Movement (1977 edition) pp.374-5; SH, (C), 53, c.329, (29 May 1913); and FO 372/432.

55. Minute by W.B. (HO. 28 August 1908): HO 45/10559/168140.

56. Lalaing to Grey (29 March 1912): FO 372/342.

57. Minute by Crowe (FO. 1 April 1912): ibid.

58. Minutes by Davidson (FO. n.d. & 2 April 1912): ibid.

The Home Office recognised that "any measure of uniformity in extradition procedure which could be attained would be of considerable advantage" but the differences between English and foreign systems were "so great and so fundamental that anything like complete uniformity" was impossible. Furthermore:

there are great difficulties and disadvantages in the way of attempting to define 'political crime' too strictly. There has not hitherto been sufficient experience of cases... to permit of a statutory definition being framed which would not be either too narrow or too loose.

However, the Home Office would not object to sending a delegate if the conference met.⁵⁹ Home Office arguments were adopted in the reply to Belgium,⁶⁰ and in May 1913 Count Lalaing announced that his government had abandoned their proposal.⁶¹ Foreign Office officials were jubilant: Maycock minuted, "Blessed good job too! Quite enough to do as it is" while Davidson's only comment was, "Hear! Hear!"⁶²

It is fitting that this study should conclude with the

59. Byrne to Foreign Office (HO. 9 May 1912): ibid. The Home Office file on the matter (222168) has not survived.

60. Grey to Lalaing (FO. 17 May 1912): ibid.

61. Lalaing to Grey (12 May 1913): FO 372/419.

62. Minutes by Maycock and Davidson (FO. 14 May 1913): ibid.

last great political refugee case of the pre-1914 period. In May 1912, Errico Malatesta (who, along with Reclus, Bakunin and Kropotkin, was "one of the principal exponents of anarchist doctrines"⁶³) was convicted of libel. He and a fellow Italian named Bellelli had quarrelled over the Italo-Turkish war, and Bellelli spread the rumour that Malatesta was a Turkish spy. In response, he issued a circular to the Italian community in London. Malatesta denied the allegation, and went on to say: "Bellelli calls himself (or used to) an anarchist, but most persons consider him an obtuse and mysterious type of man, and many look upon him as an Italian police spy". It was this circular which had formed the basis of the libel charge.⁶⁴

Before passing sentence, the judge allowed Powell of the Special Branch to make a statement. He asserted that "the defendant had been known to the police as an Anarchist of a very dangerous type for a great number of years... wherever he went there was a great deal of trouble. He was known as the leader of militant Anarchists in this city... in fact, all the world over". Powell also implied that Malatesta had been involved in the notorious 'Houndsditch Murders',⁶⁵ although when challenged he admitted there was no evidence to

63. Anonymous biographical note to E. Malatesta, Anarchy (7th edition. 1942) p.i. On him generally: cf. M. Nettlau, Errico Malatesta (New York 1924); Emma Goldman, Living My Life (1932) volume 1, p.166; Rudolf Rocker, London Years (1956) pp.75-6; and H .Oliver, op.cit. pp.11 & 49.

64. The circular is reprinted in The Times 11 June 1912, p.3.

65. On which, see below.

support his contention.⁶⁶ All in all, Malatesta was the victim of a vicious character assassination, and it is a fair assumption that it influenced the nature of the sentence passed, which was three months imprisonment, with costs, coupled with a recommendation for expulsion.⁶⁷

Malatesta appealed on the grounds that the "verdict was unreasonable", and the sentence:

too severe... The police evidence as to his character was most unfair... The police had no grounds for saying that he was a dangerous type, or for hinting that he was concerned in the Houndsditch murders... In view of his opinion of the war it will be dangerous for him to return to Italy.

However, the Court of Appeal found there was "no sufficient reason" to set aside any part of the sentence.⁶⁸

The short term of imprisonment would have been no great hardship for Malatesta: he had been in prison before, but never in Britain, and only for political crimes. The recommendation for expulsion, however, if carried out, would

66. In fact, Malatesta had condemned those responsible as "savages": Justice 13 January 1911, p.4, and "gave evidence for the prosecution": CRIM 10/102, p.214. Powell's service record has survived (MEPO 3/2892) but it contains no reference to this episode. An indication of his character is given by the fact that he was once recommended as a likely candidate for the leadership of the Russian secret police's English operations: cf. R.J. Johnson, op.cit. p.84; and B. Porter, Vigilant State pp.129 & 158

67. CRIM 10/102, pp.209-214; and The Times 21 May 1912, p.4. There is a copy of the certificate of conviction and recommendation for expulsion in CRIM 8/7, p.125.

68. cf. The Times 11 June 1912, p.3; and H. Cohen (ed.), Criminal Appeal Reports volume 7 (1912), pp.273-5.

have placed him in very real danger. He was wanted in several European countries for 'crimes' connected with his anarchist beliefs: the best he could expect was a very long term of imprisonment, and execution was a definite possibility. With the failure of his appeal, Malatesta's only hope lay with Home Secretary McKenna, whose duty it was to decide whether the expulsion order was to be carried out.

On 17 June, McKenna announced that, "After careful consideration of all the circumstances, I have decided not to make an expulsion Order against Malatesta, but I see no reason for advising remission of his sentence of imprisonment".⁶⁹ It is important to analyse the reasons behind this decision, although doing so is somewhat complicated by the fact that the Home Office file on the case has not survived.⁷⁰

McKenna's decision was perhaps quite a surprise, as Malatesta was the kind of man one would expect most governments to be glad to be rid of. In 1882 a police report described him as one of the "dangerous socialists" living in London. Later, he was often under police surveillance, and

69. 5H, (C), 39, c.1315, (17 June 1912). S. McKenna, Reginald McKenna (1948) contains no reference to the case. In what has been described as "the most unreliable history book ever written by anyone who has not deliberately set out to deceive" (B. Porter, 'Early Special Branch', p.389), Rupert Allason (The Branch [1983] p.20) asserts that he was "deported back to Italy".

70. D.J. Blackwood (Home Office Departmental Record Officer) to author (31 October 1986). This file (223787) is perhaps one of the most important to have been destroyed. Two other files containing references to Malatesta (X14495 & X41142) are also not extant.

was variously described as a "desperado", a "notorious Anarchist", one "of the Anarchist leaders", and "a leading man here".⁷¹ The Times thought him "the most dangerous of Anarchist leaders", and Blackwood's Edinburgh Magazine informed its readers that it was "commonly rumoured that his brain directs the murderer's hand... Europe would sleep more calmly were this dangerous madman under lock and key".⁷²

Similarly, Malatesta's philosophy and activities were not such as would exactly endear him to any government. Although he was no bomb-thrower, Malatesta, "had fingers in every revolutionary pie that disturbed the digestion of the frightened bourgeois world".⁷³ Although he did not incite violence, neither did he condemn it:

he who struggles, well or badly, against the common

71. Report on 'Socialists in London' by Chief Superintendent Williamson (8 May 1882): WVH.PP. Box 106, ff.65-8; Report by Inspector Melville (27 April 1891): FO 45/677; Anderson to Home Office (New Scotland Yard. 19 May 1892): HO 144/587/B2840C, /7; same to same (New Scotland Yard. 7 March 1895): ibid. /56b; Bradford to Foreign Office (New Scotland Yard. 12 May 1898): FO45/793. cf. Waddington to Rosebery (22 April 1893): FO 27/3147; Pemberton to Foreign Office (HO. 29 April 1891): FO 45/677; same to same (HO. 9 May 1893): HO 134/14, p.625; Rosebery to d'Estournelles (FO. 10 May 1893): FO 27/3147; Constant to Kimberley (22 September 1894): HO 144/587/B2840C, /48; Minutes by H.C. (HO. 25 September 1894): ibid. /48; Minutes by Anderson (27 September 1894): ibid. /48; Murdoch to Foreign Office (HO. 4 January 1895): HO 151/5, p.559; Hatzfeldt to Bertie (Private. 5 August 1900): FO 64/1507, f.2; Murdoch to Foreign Office (HO. 5 August 1900): FO 64/1512, ff.69-70; and Note handed to Lansdowne by the Italian ambassador (23 April 1902): FO 83/1970

72. The Times 4 January 1911, p.10; and Anon, 'Musings without Method', Blackwood's Edinburgh Magazine volume 168 (1900), p.404. cf. The Times 6 April 1892, p.5; and 25 June 1914, p.9; F.S. Nitti, 'Italian Anarchists', North American Review volume 167 (1898), pp.602-4; and Anon, 'Foreign Undesirables', Blackwood's Edinburgh Magazine volume 169 (1901), p.288.

73. M. Nomad, Rebels and Renegades (New York 1932) p.23.

enemy and towards the same goal as us, is our friend and has a right to expect our warm sympathy even if we cannot accord him our unconditional approval.⁷⁴

Looking at the press of 1911, one would have expected Malatesta to be deported as a matter of course. Anarchists had never been very popular in Britain, but in 1911 their unpopularity reached unprecedented heights as a result of the 'Houndsditch murders' and the 'Sidney Street Siege'. In December 1910, three policemen were fatally injured when they came across a gang of burglars in the Houndsditch area of London: in January 1911 the gang were traced to a house in Sidney Street, and in the ensuing protracted siege, the army were called out, shots exchanged, and the members of the gang killed.⁷⁵

There was an "orgy of anti-alien sentiment".⁷⁶ Those responsible were condemned as 'alien anarchists' (they were aliens, and may have been anarchists, but that fact had little relevance to the crime⁷⁷) and many newspapers "started an agitation against the Anarchists, against the political refugees, and against the aliens generally... There was talk of sending all aliens back to where they

74. L'Agitazione 22 September 1901, quoted in V. Richards (ed.), Errico Malatesta (1965) p.62. cf. E. Malatesta, Anarchy (7th edition. 1942); and his 'Anarchy and Violence' in Liberty September 1894, pp.70-1.

75. cf. C. Rogers, op.cit. passim.

76. F.G. Clarke, op.cit. p.47.

77. cf. B. Porter, Vigilant State p.162.

came from".⁷⁸ Two severe Alien bills were introduced (one private, one government sponsored), which failed to pass only because of a lack of Parliamentary time, and which concentrated upon expelling more aliens who were convicted of crime.⁷⁹

However, calls for severer alien laws were by no means unanimous,⁸⁰ and Winston Churchill (who was responsible for the government bill) noted that none of its provisions was intended to affect the right of asylum.⁸¹ By 1912 "the nightmare period"⁸² had come to an end: there was no reason why the alien bills should not have been re-introduced, but they were not, and this is important. As Rudolf Rocker remarked, "in any other country the consequences [of Sidney Street] would have been more serious".⁸³ The anti-alien,

78. R. Rocker, London Years (1956) pp.206-7. cf. R. Anderson, 'The Problem of the Criminal Alien', Nineteenth Century volume 69 (1911), pp.217-224; J. Kemmis, 'Our Immigration Laws', Fortnightly Review volume 96 (1911), pp.146-59; E. Vizetelly, op.cit. p.297; Daily Mail 4 January 1911, p.4; The Times 23 July 1910, p.12; and 4 January 1911, p.10; Reynolds's 15 January 1911, p.1.

79. cf. SH, (C), 24, cc.624-6, (18 April 1911); and ibid. cc.2106-2161, (28 April 1911); Memorandum by Churchill (HO. 19 January 1911): CAB 37/105, No.2; HO 45/10643/207426; HO 45/10641/206332; C. Rogers, op.cit. pp.146-52; and B. Porter, 'British Government and Political Refugees', p.32. The King pressed for the Alien Act to be strengthened: cf. R. Churchill, op.cit. pp.410 & pp.1239-40.

80. cf. Daily News 4 January 1911, p.4; Clarion 6 & 13 January 1911, p.4; Justice 14 January 1911, p.6; Anon, 'The Outcry against Anarchists', Nation (London) volume 8 (1911), pp.671-2; and R. Churchill, op.cit. p.1239.

81. Memorandum by Churchill (HO. 19 January 1911): CAB 37/105, No.2.

82. R. Rocker, op.cit. p.218.

83. ibid. p.213.

anti-right of asylum campaign was only a temporary phenomenon. Its sensationalist and vociferous nature masked enduring attachment to the right of asylum, which remained quite a force to be reckoned with when roused. For example, it was certain that any Russian attempt to extradite political refugees would produce a "violent uproar".⁸⁴

There was certainly still enough liberal adherence to the asylum policy around for a forceful campaign to be mounted against Malatesta's expulsion. In the Commons, Harvey and Thorne (both Labour MPs) called attention to the case, urged McKenna not to expel him, and alleged that "a representative of the police had a private interview with the jury after they had retired from Court and before they gave their verdict".⁸⁵ Ramsay McDonald asserted that he "happened to know Malatesta", and if Powell's statement was accurate, "I am the most deceived man in the whole world... The whole of the man's life in this country has been the life of a citizen". McKenna should uphold "the old traditions of Liberal administration and Liberal law", and refuse to deport him.⁸⁶

Outside Parliament, the recommendation for Malatesta's expulsion "met with massive opposition", and it has been asserted that he was saved "thanks to widespread demonstrations and protests which... made clear in what

84. The Times 4 January 1911, p.10.

85. 5H, (C), 38, cc.1931-2, (22 May 1912).

86. 5H, (C), 38, cc.2012-4, (22 May 1912). Parliamentary opinion was not unanimous. Rees called for the expulsion order to be enforced: 5H, (C), 38, c.2004, (22 May 1912).

high esteem Malatesta was held by a wide public".⁸⁷ On 9 June, a demonstration was held in Trafalgar Square, which the Glasgow Anarchist claimed was attended by 15,000, and even The Times admitted was "largely attended".⁸⁸ The Home Office was inundated with calls for the expulsion order to be quashed. It received more than 11,500 postcards in support of Malatesta and more than 120 resolutions, petitions and letters. Among the bodies which sent them were 13 branches of the Independent Labour Party, 18 Branches of the British Socialist Party, 30 trade union branches, and other organisations, including the Huddersfield and Glasgow Socialist Sunday Schools, and the Grange Moor Co-operative Society.⁸⁹

Justice asserted that Malatesta's deportation "would have constituted a serious blow at the right of asylum, as well as an outrageous attack upon a man for his political opinions".⁹⁰ The Glasgow Anarchist thought the sentence was "savage", and "influenced" by his anarchist beliefs. It was a "ridiculous outrage", and if it stood, "every political refugee in this country will be placed at the mercy of partisan judges and magistrates". Freedom noted that

87. J. Quail, op.cit. p. 268; and V. Richards (ed.), op.cit. p.223.

88. Anarchist (Glasgow) 14 June 1912, p, 6; and The Times 10 June 1912, p.6. The Islington Daily Gazette (11 June 1912, p.5) reported that it was attended by a "goodly crowd"; the Daily News (10 June 1912, p.3) gave a figure of 5,000. On 30 June a second meeting was held at Trafalgar Square to celebrate the quashing of the recommendation for deportation, which was almost as well attended as that of 9 June: Freedom July 1912, p.55.

89. cf. HO 46/169.

90. Justice 22 June 1912, p.1.

"if Jesus Christ came to London... he would by the same ruling be immediately recommended for deportation. For he would soon become known to the police as a dangerous agitator".⁹¹

The campaign was not exclusively working class or anarchist-socialist based.⁹² Josiah Wedgwood (Liberal MP for Newcastle-under-Lyme) joined it, and Robert Cunninghame Graham (former Liberal-Labour MP for Lanarkshire) asserted that the recommendation for expulsion was a "disgrace to our English justice and a stigma upon the fair name of our beloved country".⁹³ The liberal Daily News thought it "monstrous". Malatesta was being punished "because he professes Anarchist principles". It was "unjust" and "cruel", and marked "the initiation of a new public policy from the Bench": an attack on the right of asylum.⁹⁴ The Star asserted that the recommendation for deportation called for "the strongest protest". The Radical Nation thought the sentence "harsh", asserted that Powell's testimony deserved "no weight at all", and welcomed McKenna's decision as a sign that Britain was "fortified afresh against a serious breach of the right of asylum".⁹⁵

91. Anarchist (Glasgow) 21 June 1912, p.1; and Freedom June 1912, p.44. cf. P. Kropotkin, 'The Case of Malatesta', Nation (London) volume 11 (1912), pp.366-8; Labour Leader 7 June 1912, p.374; and Reynolds's 26 May 1912, p.4.

92. Indeed, the Socialist Standard (July 1912, p.85) refused to join it on the grounds that the campaigners included "working-class enemies".

93. The Times 10 June 1912, p 6.

94. Daily News 10 & 18 June 1912, p.6.

95. Star 10 June 1912, p.2; and Anon, 'Diary of the Week', Nation (London) volume 11 (1912), pp.270 & 422.

The anti-expulsion campaign was therefore quite strong, but perhaps not strong enough to force McKenna's hand. He had a choice, and although the fact that the Liberal government largely depended on Labour support to stay in office was no doubt a consideration, other more positive factors must have been involved.

When his attention was called to the case, McKenna answered that if what Macdonald said was accurate, no Home Secretary would expel Malatesta.⁹⁶ He no doubt found on further investigation that Macdonald was right. Malatesta (born in 1853) was by now an old man, and hardly the threat that he was in younger days. Furthermore, the only connection he had with the Houndsditch murderers was a wholly innocent one: he had sold some equipment to them.⁹⁷ Malatesta had been in Britain for 12 years, but this was the first time he had been prosecuted for, or suspected of, actual crime: he "never disturbed the peace and security of the British state".⁹⁸ When he was attacked by Rees for refusing to expel Malatesta, McKenna replied that the prison sentence and the payment of costs were "sufficient punishment... and having regard to the nature of the

96. 5H, (C), 38, cc.2029-30, (22 May 1912).

97. cf. R. Rocker, op.cit. pp.205-6; M. Nomad, op.cit. pp.31-2; C. Rogers, op.cit. pp.76-7; D. Rumbelow, Houndsditch Murders (1973) pp.71-73; and F.G. Clarke, op.cit. p.40. The equipment in question consisted of a cylinder of oxygen, rubber tubing and other miscellaneous articles.

98. R. Rocker, op.cit. p.76. In court, Powell stated that Malatesta was "on one occasion fined for assaulting a school teacher who chastised his son at school": CRIM 10/102, p.214. However, the Calendar of Prisoners for the Central Criminal Court listed Malatesta's dependents as "none", and his previous convictions as "none": CRIM 9/58, p.15.

offence and to the reports which I obtained as to his character and antecedents, I did not think that an expulsion order was required in the public interest". Malatesta's crime was hardly very serious. Had he been involved in some crime of violence or robbery it would perhaps have been more difficult for McKenna to arrive at the decision that he did.⁹⁹

Home Office registers of correspondence reveal that letters were received (none of which has survived) on the case from the Colonial and Foreign Offices, and the Metropolitan Police.¹⁰⁰ According to Home Office registers and other sources, the Foreign Office letter merely enclosed a copy of a note from the Swiss Minister, who had asked for information on the case.¹⁰¹ The contents of the Colonial Office letters can be discovered from registers: in 1899 Malatesta had escaped from prison to Malta, and the government had paid his passage to Britain.¹⁰² This is interesting, but unlikely to have influenced McKenna's decision.

The police letters were doubtless more important. Two simply dealt with meetings and leaflets relative to the case, while two others (dated 14 and 26 June) contained the

99. 5H, (C), 39, cc. 1834-5, (20 June 1912). I am informed by Dr. Bernard Porter that McKenna's private papers (held at Churchill College, Cambridge) contain nothing on the Malatesta case.

100. cf. HO 46/169.

101. *ibid.*; and Blackwell to Foreign Office (HO. 11 July 1912): HO 162/21, p.716.

102. cf. CO 355/16; and Blackwell to Colonial Office (HO. 1 June 1912): HO 162/21, pp.343-4.

observations of the Commissioner, and a report from an Assistant Commissioner (presumably the one in charge of the Special Branch). One might speculate that the police letters dealt with the allegations of improper police behaviour (which McKenna had said would influence him if found to be true¹⁰³), or perhaps contained an up to date report of surveillance, which may have showed that Malatesta was not particularly dangerous anymore. These may well have been the major factors behind McKenna's decision, but without knowing their contents, it is impossible to be sure. There exists an indirect indication. In explaining his decision to the judge who had recommended Malatesta be expelled, McKenna asserted that after "consultation" with the police, he had found it was "not necessary" to enforce the expulsion. On "further investigation", the police had found that the "impression" given by Powell was inaccurate.¹⁰⁴

Had Malatesta been expelled, it would have been a flagrant case of 'disguised extradition'. Britain avoided granting the 'disguised extradition' of ordinary criminals: to have granted it when the 'criminal' involved was a bona fide political refugee would have been unthinkable. McKenna may well have shared the traditional liberal sympathy for political refugees espoused by the organisers and members of the campaign mounted against expulsion: it may have been the case that McKenna simply could not bring himself to expel a political refugee whose fate abroad would certainly be a

103. 5H, (C), 38, c.1932, (22 May 1912).

104. cf. Blackwell to Bosanquet (HO. 17 June 1912): HO 162/21, p.462.

long term of imprisonment, and perhaps even death. Whatever his reasons, the important fact is that McKenna refused to expel Malatesta: once again, Britain protected a political refugee, despite his being an anarchist.¹⁰⁵

In 1916, Simpson predicted that "the whole question of extradition will no doubt stand on a very different footing in the next generation",¹⁰⁶ and so it did, but that is another story. When the war had begun, extradition had come to an almost complete halt. A few fugitives were extradited here and there, but on nothing like the scale of the pre-war period. The legal position was not altered by the outbreak of war, but since most fugitives had been extradited to France and Germany, the conflict had a severe impact: the one was now hardly likely to be bothered with extradition, the other Britain's mortal enemy.¹⁰⁷

105. In fact, no political refugee was deported from Britain before 1914.

106. Minute by Simpson (HO. 25 May 1916): HO 45/10670/218103, /23.

107. A couple of interesting cases occurred, those of Ignatius T.T. Lincoln, an ex-Liberal MP turned forger and German agent and propagandist, and Louis Lavigne. The former unsuccessfully attempted to avoid extradition from the United States on the ground that it was only being sought for political reasons. cf. FO 372/741 & 900; HO 144/20968/172630; HO 144/20969/172630; 5H, (C), 76, c.1556, (9 December 1915); 5H, (C), 80, c.410, (21 February 1916); 5H, (C), 83, c.715, (27 June 1916); *ibid.* c.1030, (29 June 1916); The Times 6 August 1915, p.6; 11 September 1915, p.6; 19 January 1916, 1916, p.8; 21 February 1916, p.8; and 5 July 1916, p.5; B. Wasserstein, The Secret Lives of Trebitsch Lincoln (1988); C.C. Hyde, International Law (2nd edition. Boston 1951) volume 2, p.1026; and P. Jacob, 'International Extradition', Yale Law Journal volume 59 (1949-50), p.632. Lavigne was wanted in France for desertion and spying, and in 1916 was handed over by the Gibraltar authorities: cf. FO 371/2675, ff.199-209.

Strangely, when peace returned, extradition did not recover: even in 1927 it was "in a somewhat precarious state".¹⁰⁸ It dwindled away almost into insignificance in numerical terms, and today has become increasingly rare. So much so that every case seems to merit media attention.

108. Simpson to Home Office (Private. 16 August 1927): HO 45/13380/474839, /2.

CONCLUSIONS

Conclusions

Such was the British extradition experience during the Victorian and Edwardian eras. It can scarcely be said to have been an enjoyable one, and was occasionally thoroughly disagreeable. The discomfort it caused might be likened to suffering from arthritis - a permanent annoyance coupled with occasional flare-ups. It will have been noticed that the latter stages of this thesis have dealt with alien laws (which of course have a direct relevance to extradition) rather than extradition specifically. This was where the public interest and controversy arose then. Extradition was less of an issue in the early years of the twentieth century, but only because very many of the interesting and potentially controversial issues arose, and were discussed, away from the public eye. The campaign aroused by the Malatesta case showed that the British public were still sensitive over the right of asylum. Had it been believed that any change in extradition law or practice would have threatened political refugees, extradition would once again have become a central issue. A fear of provoking a public reaction was quite clearly in the minds of ministers and officials whenever extradition was being considered. Extradition remained potentially very controversial indeed, and was an important policy matter.

During the course of this study, certain important and recurring themes have been discussed and illustrated. Here it is appropriate both to re-emphasise and to re-direct attention to them. In extradition law and practice, the most important 'theoretical' issue was the definition of political

offences. The vague exemption included in the 1870 Act was delimited, interpreted, and clarified to a certain extent before 1914, but still remained rather unclear. The question provided "inexhaustible matter for... controversy", for it was "almost impossible to define satisfactorily the phrase 'offence of a political character'"¹. This was perhaps inevitable, for the definition of political offences is inherently circumstantial: indeed it is doubly so. Any definition is influenced not only by the circumstances surrounding the crime itself, but also by the circumstances prevailing in the country where the issue is judged. The Meunier decision illustrates "the degree to which the concept of a political offence is intimately tied to the existing social and political conditions of a country as well as to the prevailing beliefs of acceptable forms of political opposition and struggle."²

In any case, it was in Britain's interests for the definition of political offences to be somewhat ambiguous, and she probably preferred it that way. The worst of all worlds would have been for Britain to have committed herself to one line on political offences, only to find that a case arose in which she wished to diverge from it. For example, had Britain declared that the assassination of a head of state was in every case to be an extraditable crime,

1. Minutes by Wellesley (FO. 30 August 1913); and Hurst (FO. 3 September 1913): FO 371/1675, f.358.

2. J.G. Castel and M. Edwardh, op.cit. p.97. cf. J.H.G. Bergne, op.cit. p.186; J.E.P. Wallis, op.cit. p.367; and Editorial Comment, 'Political Offence in Extradition Treaties', American Journal of International Law volume 3 (1909), p.460.

what would she have done if a case occurred in which she wished to protect an assassin: a scenario that was by no means inconceivable. Thus, political offences were left wholly undefined in British statute law, and it was left to the courts to define them on a case by case basis in the first instance. Just in case the courts failed to protect a political offender, the safety-valve of the Home Secretary's discretionary power to refuse extradition was established.

This was the best of all worlds. Political refugees were given the widest possible latitude to prove that they should be exempt from extradition, and the government was committed to nothing. It was unlikely that a fugitive considered by the government to be a political refugee would be committed for extradition by the courts, and therefore the government could avoid direct responsibility for refusing extradition on political offence grounds. Foreign governments were unlikely to be best pleased when extradition was refused on those grounds: if this was done in court, the British government could meet their protests with the reply that the courts were outside government control. Had the responsibility for judging what was a political offence been left solely with ministers, endless difficulties would have been caused. Foreign regimes would have exerted immense pressure upon ministers to regard genuine political crimes as non-political. Any decision in favour of a political refugee would have been regarded abroad as an unfriendly act, perhaps to the hazard of friendly relations between Britain and the state concerned.

To this day, the definition of political offences remains very much a 'grey area' of international law. Almost every publication dealing with the subject concludes that it is virtually a practical impossibility. The term 'political offence':

can be viewed as a spectrum, with at one extreme purely passive offences such as political dissidence and on the other active offences of opposition against prevailing social order or against the ruling group in power. It is a continuum of offences in which the political and common elements are more or less represented, rather than a distinct category of crimes which could be distinguished from the common offence.³

As long as differences of political opinion exist, there will always be disagreement over the definition of political offences for the purpose of the political offence exemption to extradition.

The most fundamental practical problem within the British extradition experience was balancing the need to punish crime against the need to protect the position of political refugees. Before 1870, the need to punish crime was not the first priority. Even the Extradition Act (wrote a retired civil servant in 1927) "reeks of the jealousy of the Executive Government, the nervous dread of any interference with the liberty of the subject and the deep-rooted distrust of most, if not all, European powers, which

3. C. Van den Wijngaert, op. cit. p.95.

marked the Legislation of the middle of last century".⁴ Britain might perhaps be criticised for being rather excessive in her devotion to giving political refugees absolute protection within extradition law. It resulted in measures that were desirable in the interests of the efficient punishment of common crimes being abandoned on more than one occasion, on the grounds that a particular amendment of the law might just possibly, in an extreme case, work to the disadvantage of a political refugee. One would have thought that Britain's diplomatic standing, and the threat of sanctions, would have been enough to prevent the abuse of extradition against 'politicos', without the need for legal guarantees which hampered the extradition of ordinary criminals. After all, the very basis of extradition was mutual trust.

In defence of those responsible for British policy, one could suggest that a government that was prepared to abuse extradition (and not all governments, that of Naples for example, could be trusted, or were not trusted, not to, if given the chance) was unlikely to listen to diplomatic argument. Knowing the likely British reaction to an abuse of extradition, a foreign government would be unlikely to take such a step in the first place unless it was prepared to accept the consequences. Furthermore, when what Britain regarded as abuses of extradition occurred (for example, in the Lamirande and Lawrence cases), diplomatic pressure had little effect. Trying to protect a political refugee after

4. Simpson to Home Office (Private. 16 August 1927): HO 45/13380/474839, /2.

he had suffered through the abuse of extradition or foreign trickery would be rather like trying to close the stable door not just after the horse had bolted, but after it had run a few miles away. Britain preferred to ensure that the stable door was firmly closed in the first place, and it is difficult to criticise her motives for doing so.

Nevertheless, the passing of the Extradition Act of 1870 marked the beginning of a trend in which extradition came to serve the needs of the law rather more efficiently. By the 1910s, extradition from Britain was a fairly uncomplicated business as far as ordinary criminals were concerned. The needs of justice were well served, but 'politicos' still retained a very privileged position under British law. Very few common criminals brought before an extradition court were not surrendered.⁵ Of course, there were still some difficulties. For example, in 1902 a surrender warrant was issued wrongly on account of the "raging toothache" of the responsible Home Office official⁶.

Perhaps the most important factor behind the value Britain attached to extradition was her position as the leading economic power of the developed world. It was clearly important for such a power that offenders who harmed her economic life - fraudulent bankrupts, embezzlers, and the like - should not escape punishment, and that potential offenders should be deterred from

5. cf. Appendices 3 and 4.

6. Dryhurst to Wetherall (Private, 27 September 1902): FO 45/868.

committing such crimes. Extradition had this dual function. In contrast (and particularly during the early decades of the period covered by this thesis), continental European nations seem to have been more interested in the extradition of political offenders. This points to a fundamental difference between the British and continental approaches to extradition.

Such a divergence of approaches was perhaps inevitable. Until perhaps the late 1870s and early 1880s, the economies of continental Europe were nothing like so developed as that of Britain. Hence, the continentals were less likely to appreciate the economic value of extradition. Further, in Britain, as early as the 1840s the holders of economic power also, by and large, wielded political power, and were in a position to have their needs translated into policy. Continental merchants and industrialists were not in a similar position until later in the nineteenth century. Continental governments tended to be more dynastic, less constitutional, and less 'liberal-capitalist': as a result, they were perhaps primarily interested in the preservation of the dynasty and the position of the ruling elite. In this situation, the most important crimes were political crimes which threatened this preservation.

We have seen that from the 1880s, extradition became less of a burning issue in Britain's foreign relations. In part, this might be attributed to a certain coming together of British and continental perspectives and attitudes. From the 1880s, the continent experienced rapid economic

development, and began to catch up, even overtake in some areas, the British economy. Thus, continentals were becoming more likely to appreciate extradition's economic function. Similarly, much of continental Europe experienced a process of political development, whereby political power came to be less the exclusive preserve of a political elite. As political power came to be more widely held, so the narrow interest in the preservation of the political status quo was, if not perhaps replaced, forced to accommodate other interests, such as the suppression and punishment of ordinary crime, and especially 'commercial' crime.

This coming together of Britain and Europe was not simply a one way process. Britain also moved closer to the continent. The rise of political violence, and especially indiscriminate terrorism, was perhaps one of the central factors behind this, particularly with reference to extradition. After the mid-1870s, the character of the political refugees who had caused so much trouble between Britain and her neighbours altered radically. Gone were the predominantly respectable, liberal revolutionaries of the 1840s and 1850s, with whom Britons had sympathised so much. In their place came more extreme, left-wing and anarchist revolutionaries, some of whom indulged in ever more terrible terrorist tactics. The rise of terrorism led to a change in notions of legitimate forms of political protest. The old, acceptable method of mass popular risings was replaced by attacks on innocent bystanders in Parisian cafés, Spanish theatres, and the like.

It was significant that this change in revolutionary

tactics came at a time when continental regimes were becoming more liberal. It had been easy for Britons to justify and approve of liberal revolutionaries rising up against despotic regimes, but how could terrorism be justified? Bad, despotic government had caused, and deserved, liberal revolutions, but now the roles had been reversed. Increasingly liberal regimes were being attacked by illiberal, anarchist terrorists, who represented a minority interest in just the same way as the despotic regimes had done in the past. Furthermore, Britain was not immune from terrorism. Anarchism was never a serious problem in Britain, but she did have her own Fenian bombers and assassins. For the first time, Britain came to have a certain identity of interest with the continent, which led to a new community of interest.

However, it would be wrong to exaggerate the degree to which Britain and Europe came together. The process was far from complete, and significant differences remained. Britain was never prepared to participate in the wholesale repression of anarchism, and refused to take action except where actual crime had been committed or was in preparation. The continuing divergence between British and continental attitudes was perhaps most clearly illustrated in their respective approaches to assassination. Continentals regarded the assassination of a sovereign or head of state as

7. Much the same reasons account for the fact that after the 1880s, conflict over political offenders in extradition law and practice was most common in colonies. There, political dissidence still tended to take the form of mass popular risings against illiberal governments (and this was especially true in German South West Africa). The situation in the colonies was rather like that in Britain and Europe in the mid-nineteenth century.

the most serious of crimes, to be visited in every case with heavy punishment. In no way could such an offence be extenuated or justified by political motivation, and the almost universal adoption of the 'attentat clause' ensured that assassins could not find an asylum in continental Europe. In contrast, Britain never adopted the 'attentat clause', and refused to accept that in every case assassins were to be subject to extradition: the circumstances in which such a crime was committed could not be left out of the equation. In 99% of cases, Britain would not doubt have surrendered assassins, but the fact that she refused to commit herself to do so in every case was of great significance. It was not just a matter of words: it revealed a deep divergence between British and continental thought.

There was perhaps a degree of hypocrisy in the British attitude towards political offences and offenders. Britain refused to surrender political offenders to other nations, and erected substantial guarantees for political refugees within extradition law, but she expected foreign nations to surrender to her men like the Phoenix Park murderers. Of course, all nations regard their 'political offenders' as common criminals in the sense of not deserving immunity from extradition, and so all are open to the charge of hypocrisy and double-standards. However, not all nations made such a point as Britain did of being the asylum for political refugees of all nations: indeed, many nations showed no scruples about both seeking and granting the extradition of 'political' offenders. Therefore, although no nation can be absolved from the charge of hypocrisy, Britain was perhaps

most guilty in this respect.

Contrasting attitudes to political offences generally, and assassination specifically, were not the only differences between Britain and Europe brought into sharp relief by extradition. The contrast between the respective approaches to the extradition of ordinary criminals illustrated a fundamental difference in attitudes towards police and legal matters. In Britain, extradition was a judicial function, granted or refused in open court. In Europe, it was much more of an administrative, police, function. Britain required prima facie evidence of the guilt of the accused that would be sufficient to justify the accused's committal for trial if the offence had been committed in Britain. In contrast, most European countries were prepared to surrender a fugitive simply on the production of an arrest warrant, and courts often had absolutely no role in the matter. This was perhaps a result of the fact that in Britain there was generally a greater presumption in favour of the innocence of an accused person: he was 'innocent until proven guilty'. Abroad, it was more a question of 'guilty until proven innocent'. Such a notion was alien to all the basic instincts of Britons, brought up on the basics of freedom from arbitrary arrest, habeus corpus, a fair trial before a jury of one's peers, and so on. This explains why the continental wish that Britain grant extradition simply upon the production of an arrest warrant always caused so much trouble.

Throughout this study, a common theme has been the clash

between British domestic and foreign policy aims, which arose from extradition's almost unique bridging position between the two. Before the 1870s, in domestic terms, it would have been easier for governments if they could have ignored extradition totally. Whenever extradition came before Parliament, they were subjected to embarrassing and unwelcome debates (especially those over the French and Prussian treaties of 1852 and 1864), which caused problems on the wider foreign policy front. However, extradition could not be ignored. Point blank refusal to negotiate a treaty caused offence, which could be discounted in the case of insignificant powers such as Naples, but not in the case of great powers such as France and Prussia. Even after 1870, problems did not cease. Reforms in British extradition law and practice which were desired by the continentals (and which in some cases were intrinsically desirable) were not implemented, or even put to the test of Parliamentary opinion, partly because governments were unsure whether Parliamentary and public opinion would sanction them.

Although there was a clash between domestic and foreign policy aims over extradition, it would be wrong to give the impression that there was a 'Foreign Office position' on extradition which clashed with the 'Home Office position'. Things were not so simple as that. Although the two departments sometimes wanted different, and mutually exclusive, things, such differences arose as a result of the personalities and views of the ministers who headed them at any one time. For example, when Palmerston was at the Foreign Office, the 'Foreign Office position' was

Palmerston's position, and vice versa when he was at the Home Office.

Similarly, extradition was not a matter of party political conflict. As was the case regarding so many political matters before 1914, there was a broad consensus of opinion between the Liberal and Tory parties. When a change of government brought a change of policy, it was not the result of differing party political ideologies. Again, it was more of a personal matter. For example, Cross (a Tory) abandoned the extradition bill prepared by Harcourt (a Liberal), because it was too illiberal for his tastes. The relative lack of absolute distinction between the two great parties produced the somewhat curious position in which a Liberal Home Secretary was far less liberal than his Tory counter-part.

Finally, in general terms, the progress of extradition policy was often intimately tied to factors which in themselves were not closely related to it. General foreign policy aims and issues played their part. For example, the government's desire to conciliate France in 1852 contributed to the decision to submit the treaty to Parliament, even though the prevailing conditions were far from ideal. Later, in the latter 1880s, general anti-British feeling in the United States Senate resulted in the rejection of the Anglo-American treaty.

The right of asylum and the liberal policies associated with it remained substantially secure before 1914. It is of

great significance that despite the very real Fenian threat and the perceived anarchist threat, Britain did not enact repressive legislation. Of course, the Meunier decision was anti-anarchist, but did not have the force of law except for that particular case. In "different circumstances it seems inevitable that another test would have to be applied"⁸. Elsewhere, some extradition treaties abandoned the exemption of political offences entirely.⁹ Of course, the passage of the Alien Act meant that the right of asylum was no longer absolute, but it remained far more secure in Britain than in any other country. Britain was Malatesta's "place of exile, because no other country in Europe would let him stay there... [she] was the only country where political refugees really enjoyed the right of asylum, where they did not live with the constant dread of expulsion hanging over their heads"¹⁰.

It was not the Alien Act of 1905 which put an end to Britain's proud history as the asylum of the oppressed of all nations. Rather, it was the Great War coupled with the Russian Revolution that was responsible for this. The extremely severe Aliens Restriction Act of 1914 (4 & 5 Geo.5 c.12) was passed unopposed in a single day ("without a murmur

8. Minute by Simpson (HO 3 May 1905): HO 45/10303/117267, /49.

9. cf. Russia's treaties with Germany and Spain of 1885 and 1888: The Times 24 January 1885, p.5; and F. Snow, Cases and Opinions (Boston 1893) p.171n.

10. R. Rocker, op. cit. pp.77 & 204. cf. E Goldman, op. cit. volume 1, p.165.

from the champions of asylum"¹¹), but it was only a war measure, a temporary expedient passed in a time of national emergency.¹² Furthermore, Britain still refused to expel political refugees.¹³

However, the horrors of the war years were such that when peace came, pre-war attitudes were thoroughly revised: Britain's asylum policy was lost amid fears for national security and prosperity. Her economy was in crisis, and the Bolshevik threat appeared very real. Britain had tolerated political refugees partly because they were believed to pose no threat to her, but the perceived Bolshevik threat was used as a justification for severe anti-alien measures. It is a moot point whether Britain was truly threatened, but the important fact is that the confidence which had allowed her

11. B. Gainer, op. cit. p.207. cf. 5H, (C), 65, cc.1986-9, (5 August 1914).

12. cf. Minute by Peddar (HO. 1 October 1914): HO 45/10515/135080, /35.

13. There is a list of 40 such cases in HO 45/10886/349367. cf. Drummond to Harris (Private. 5 August 1915): HO 45/10767/272533, /10; minute by Grey (FO. n.d.): FO 371/2360; minute by Troup (HO. 24 March 1917): HO 45/10820/318095, /235; and minutes by Moylan and Henderson (HO. 2 March 14 April 1917): HO 45/10767/272533. /61 & 71; 5H, (C), 83, c.1085, (29 June 1916); 5H, (C), 85, cc.177-8, (1 August 1916); 5H, (C), 91, c.739, (12 March 1917); and HO 144/1582/332650 on the Remondin case. Two men who claimed to be political refugees (Sarno and Thierry) were expelled, but their claims were not especially strong, and in Sarno's case, one of those who had led the fight against expulsion admitted he was not a bona fide political refugee: cf. 5H, (C), 84, c.2073, (31 July 1916); and 5H, (C), 85, cc.247-8, (1 August 1916). On Sarno: cf. Law Reports of the King's Bench Division (1916) volume 2, pp.742-53; and on Thierry: cf. Law Reports of the King's Bench Division (1916) volume 1, pp.552-7; Law Times volume 116 (1917), pp.226-37; and P. O'Higgins, 'Disguised Extradition', pp.525-8. The Home Office files on these cases (316622 & 317963) have not survived.

to ignore the politics of the past had evaporated. Britain now felt threatened, and that is more important than whether she actually was or not.

The severity of the Alien Act of 1919 (9 & 10 Geo.5 c.92) was unprecedented in peacetime, but it was opposed by only a very small minority.¹⁴ The time for being worried about unfortunate foreigners had passed as far as most Britons were concerned. It was time to worry about Britain herself: the traditional asylum policy would now only be maintained "in so far as under modern conditions its maintenance is not inconsistent with the security of this country".¹⁵ Refugees were denied asylum and deported simply because of their Bolshevik views.¹⁶ It was a sad day for Britain, but perhaps almost inevitable in the light of her war experience and the situation in which she found herself after 1918. The national self-confidence and self-assurance which had underpinned and sustained Victorian liberal attitudes and policies had gone, and seems most unlikely ever to return.

14. cf. 5H, (C), 114, cc.2746-2802, (15 April 1919); and 5H, (C), 121, cc.827-42, (18 November 1919).

15. Report of the Aliens Committee (25 January 1918): CAB 1/26/7.

16. cf. Minutes by Peddar (HO. 15 & 27 February 1919): HO 45/10823/318095, /682; 5H, (C), 112, cc.969-70, (19 February 1919); and 5H, (C), 121, c.495, (13 November 1919).

APPENDICES

Appendix 1

Numbers of Fugitives Extradited from Britain to various countries:

Years	Total	US	Fr	Den	Ger	Bel	Aus	Rus	Ita	Mis
1840s	2	0	2	-	-	-	-	-	-	-
1850s	13	13	0	-	-	-	-	-	-	-
1860s	34	21	12	1	-	-	-	-	-	-
1870s	178	15	25	1	56	46	7	-	10	18
1880s	289	12	90	6	107	35	5	5	7	22
1890s	385	24	127	3	108	35	16	25	14	33
1900s	395	35	96	5	146	32	25	14	6	36
1910-14	195	20	41	7	80	6	17	4	6	14
1915-18	9	0	6	0	0	0	0	0	0	3
1919-21	16	4	5	0	2	2	0	0	1	2

Miscellaneous consists of fugitives extradited to:

Netherlands: 42. Sweden/Norway: 28. Switzerland: 52. Spain: 6.

Key

US: United States. Fr: France. Den: Denmark. Ger: Germany.

Bel: Belgium. Aus: Austria. Rus: Russia. Ita: Italy.

Mis: Miscellaneous.

Appendix 2

Numbers of Fugitives Extradited to Britain from various countries:

These figures are less easy to collect than those for fugitives surrendered by Britain, and are therefore less complete. However, it is unlikely that further research would significantly alter the general picture described here:

Years	Total	US	Fr	Den	Ger	Bel	Aus	Rus	Ita	Mis
1840s	3	1	2	-	-	-	-	-	-	-
1850s	4	1	3	-	-	-	-	-	-	-
1860s	9	4	5	0	-	-	-	-	-	-
1870s	22	8	0	0	3	8	0	0	0	3
1880s	57	18	15	0	10	4	0	0	1	9
1890s	64	15	20	0	4	12	2	0	6	5
1900s	66	31	18	0	6	3	1	0	1	6
1910-13	20	8	9	0	0	1	0	0	0	2

Miscellaneous consists of fugitives extradited from:

Netherlands: 3. Switzerland: 3. Spain: 15. Portugal: 2.

Uruguay: 1. Argentina: 1.

Key

US: United States. Fr: France. Den: Denmark. Ger: Germany.

Bel: Belgium. Aus: Austria. Rus: Russia. Ita: Italy.

Mis: Miscellaneous.

Appendix 3

Reasons why extradition from Britain was refused

Large numbers of fugitives whose extradition was sought were never arrested, or the applications were withdrawn when they were found elsewhere: such cases are not included in these statistics:

(Appendix 3 Cont'd.)

Years	Total	A	B	C	D	E	F
1870s	12	6	1	4	0	0	1
1880s	42	14	5	13	2	0	8
1890s	56	36	3	2	1	1	3
1900s	46	31	0	1	7	0	7
1910-13	18	14	0	1	2	0	1

Key:

A: Insufficient evidence.

B: Nationality.

C: Not an extraditable offence.

D: Procedural reasons.

E: Political offence.

F: In prison in Britain.

Appendix 4

Failures to extradite from Britain expressed as a percentage of total cases

1870s : 6.3%

1880s : 12.7%

1890s : 12.7%

1900s : 10.4%

1910-13 : 8.5%

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Director of Public Prosecutions

Private Papers:

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Sir Robert Anderson.
Arthur J. Balfour.
Sir Francis Bertie.
Hugh McCalmont Cairns, 1st Earl Cairns.
Stratford Canning, Viscount de Redcliffe.
Edward Cardwell, Viscount Cardwell.

Hugh C.E. Childers.

Sir Edward Grey, Viscount Grey of Fallodon.

Edmund Hammond. *

Henry Herbert, 4th Earl of Carnarvon. *

Sir Walter Langley.

Granville Leveson-Gower, 2nd Earl Granville. *

Henry Petty-Fitzmaurice, 5th Marquess of Lansdowne.

F.S. Reilly.

Lord John Russell.

Lord Odo Russell, 1st Baron Amphill.

Sir Percy Sanderson.

Thomas H. Sanderson.

Sir Edward Thornton. *

George Villiers, 4th Earl of Clarendon.

Henry Wellesley, 1st Earl Cowley. *

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Arthur J. Balfour.

Sir Francis Bertie.

Richard Assheton Cross, 1st Viscount Cross. *

Sir Charles W. Dilke. *

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