THE RHODESIAN LAW JOURNAL

Editor: R. H. CHRISTIE, Q.C.

April, 1970 1970 *R.L.J.* Vol. 10, Part 1

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DEPARTMENT OF LAW
UNIVERSITY OF RHODESIA

The journal is published twice yearly, in April and October.

Editorial, circulation and advertising correspondence should be addressed to the Editor, at Department of Law, University of Rhodesia, P.O. Box M.P. 167, Mount Pleasant, Salisbury, Rhodesia.

Printed by Sebri Printers, Salisbury, Rhodesia.

THE BEIRA BLOCKADE

BY

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This is the third in Mr. Wharam's series of articles on the legal implications of U.D.I. (*See* [1967] C.L.J. 189 *and* 1969 R.L.J. 21.) *In this article Mr. Wharam examines the possible defences that might be available to members of the Royal Navy if they were prosecuted for causing loss of life or damage to property in pursuance of the blockade.*

His conclusion is that no defence recognized by English law would be available, but the Crown would presumably not prosecute, and if a private prosecution were instituted one may suppose that the Attorney-General would issue a nolle prosequi. *A foreign country whose subjects were the victims might or might not demand extradition, in which event the Crown would no doubt refuse to surrender its servants on the ground that the alleged crime was of a political nature.*

On 6th April 1966, the Security Council of the United Nations called upon the Government of the United Kingdom to blockade Beira and if necessary to use force against any ship believed to be carrying oil to Rhodesia: the relevant part of the resolution reads as follows:

> "The Security Council calls upon the Government of the United Kingdom . . . to prevent, by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia."

It is not known what orders were given by the Crown to those of its servants[1] who were appointed to carry out this resolution, but there are really only two methods by which a blockade can be made effective, namely by sending a boarding party on a suspected ship, or by firing at, and in the last resort sinking it. It is clear that if either of these courses were to be adopted, men might be injured or killed and property would be damaged or destroyed. Conduct of this nature, committed on the high seas in time of peace, would normally be regarded as a monstrous out-

[1] In *A. G. v. Nissan* (1969) 2 W.L.R. 926, it was held by the House of Lords, *inter alia*, that a member of the armed services of the Crown does not cease to be a Crown servant even if acting directly under U.N. command.

rage, and in all jurisdictions would no doubt be treated as criminal. The purpose of this article is to consider what defences, if any, would be available to members of the Royal Navy if, in carrying out their orders, they caused loss of life or damage to property, and were subsequently prosecuted on criminal charges.

The problems involved, especially from the point of view of those whose experience is limited to practising in our own criminal courts, are difficult and unusual. There can be no statute governing the situation: of binding authorities there are none; even persuasive precedents are virtually non-existent. Furthermore, as the situation has so far remained purely hypothetical, there are many uncertain factors: one cannot foresee the nationality of a potential blockade-runner or its crew and therefore one cannot know the details of its jurisprudence;[2] and some countries would possibly ignore the episode and refrain from enforcing their rights. However, some guidance may be obtained from considering the following questions.

1. **In what circumstances may British subjects be killed with impunity?**

It seems logical to suppose that the Crown has no greater right to kill aliens while they are assisting British subjects than it has to kill British subjects themselves: and conversely, where it can put British subjects to death, it can do the same to anyone who aids them.

The law relating to the circumstances in which a British subject may be killed with impunity, usually referred to as justifiable homicide, is summarised in *Blackstone's Commentaries*.[3] Some of the situations listed by Blackstone (e.g., the death of a champion in trial by "battel") are obsolete: others (e.g., the death of an escaping prisoner) are totally irrelevant. The learned author noted, however, that homicide was justifiable when committed for the advancement of public justice, as when an officer, attempting lawfully to arrest a criminal, is assaulted by the criminal, or when officers are endeavouring to disperse a riot or a rebellious assembly; but only where there is an absolute necessity on the officer's side, namely that the criminal could not be arrested or the riot suppressed unless such homicide were committed. Homicide is also justifiable if committed to prevent any forcible and atrocious crime. The uniform principle that seemed, to Blackstone, to run through our own and other laws is this: that where a criminal is endeavouring to commit by force a crime which is itself capital, it is lawful to repel that force by the death of the person committing the crime.

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[2] Even as near home as Jersey there was, as recently as 1936, no clear distinction between murder, manslaughter and death in a chance medley: see *Renouf v. A.G. for Jersey* [1936] A.C. 445.

[3] Vol. 4 (1809 ed.), 178-181: I have condensed and paraphrased the original text.

As far as I am aware there has been no addition to the list of justifiable homicides in the last two hundred years;[4] and on the face of it none could possibly apply to the Rhodesian situation. However, in view of the repeated allegations of rebellion made against the Rhodesians, this particular point requires examination.

According to the law dictionaries, the term rebellion means "the taking up of arms traitorously against the Crown, whether by natural subjects or others when once subdued"; and throughout the State Trials the term was invariably used as a synonym for levying war contrary to the Treason Act, 1351: save that, whereas in order to constitute treason under the Act, the war had to be levied within the realm, a rebellion could occur anywhere.

The question was considered in *Phillips v. Eyre*:[5] in that case, there had been a conspiracy in Jamaica to overthrow the government, and in pursuance of the conspiracy great numbers of the inhabitants had broken out into open rebellion, and had committed many burglaries, robberies, arsons, murders and other felonies: the civil power had been overthrown by the rebels, but the Governor, with the assistance of the armed forces, had arrested the rebellion. In considering this situation, Willes J., delivering the judgment of the Court of Exchequer Chamber, quoted a long passage from Tindal C.J.'s direction to the jury in the Bristol riots case.[6] He then went on:[7]

> "And if such duty exist as to [suppressing] tumultuous assemblies of a dangerous character, the duty and responsibility in case of open rebellion are heightened by the consideration that the existence of law itself is threatened by force of arms and a state of war against the Crown established for the time. To act under such circumstances within the precise limits of the law of ordinary peace is a difficult and may be an impossible task and to hesitate or temporize may entail disastrous consequences. . . . It is manifest . . . that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk. . . . The governor may have . . . to arm loyal subjects, to seize or secure arms, to intercept munitions of war, to cut off communication with the disaffected, to detain suspected persons and even to meet armed force by armed force in the open field."

During the present century, the situation was again considered at the

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4 See the current edition of *Archbold*, para. 2550.

5 (1870) L.R.6 Q.B.1.

6 (1832) 5 C. & P. at 262, in which Tindal C. J. had referred to the *Case of Arms* (1597) Pop. 121 and *R. v. Inhabitants of Wigan* (1749) 1 W.Bl. 47.

7 (1870) L.R.6. Q.B. at 16.

time of the Irish civil war in *R. v. Allen*:[8] after listing some of the better known rebellions in English and Irish history, Molony C.J. said:[9]

> "Unlike the armed insurrections of the past, where the insurgents met the Crown forces in actual battle, the present insurrection consists exclusively of warfare of a guerilla character, the nature of which is explained by Sir Nevil Macready in the following words: 'The scheme of the said warfare does not entail fighting in distinctive uniforms, or in accordance with the laws of war, but under a system of guerilla attacks, in which inhabitants, apparently pursuing peaceful avocations, constantly come together and carry out guerilla operations, which often result in the death of or serious injuries to members of His Majesty's forces and police at the hands of the people who are posing as peaceful citizens.' During the continuance of such a state of affairs . . . the Government is entitled and, indeed, bound to repel force by force, and thereby to put down the insurrection and restore public order."

The state of affairs in Rhodesia has never borne the slightest resemblance to the insurrection in Jamaica or the civil war in Ireland: there is nothing in the judgments in either of these cases, or, as far as I am aware, anywhere else in the reports, which suggests that force can be used except in the type of situation described there. In short, there has been no rebellion in Rhodesia and the Crown could not justify the use of force by pretending that there has.[10] It would appear to follow, therefore, that force cannot be used against the nationals of any other state who befriend them.

2. Could an attack upon a blockade runner be treated as an act of war?

There is a dearth of recent English authority[11] on the law relating to the outbreak of war, but the summary by Lord Wrenbury in *British and*

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8 (1921) 2 I.R. 241.

9 At 268.

10 In an article published in the *Yorkshire Post* on 30th December, 1967, I expressed the view that if force were used against Rhodesia and Rhodesian citizens were killed in the process, those responsible would have no defence to a charge of murder: if I fell into error, no one has enlightened me.

This is not the first occasion on which the ministers of the Crown have adopted this policy. In the reign of Henry V, Sir John Oldcastle, Lord Cobham, the Lollard, was hanged and burnt to death as a heretic: Tennyson, whose standards as a poet were not consistent, but who had a firm grasp of the legal implications, commented on this episode as follows:

> But the king—*nor voice*
> *Nor finger raised against him*—took and hanged,
> Took, hanged and burnt—how many—thirty-nine—
> *Called it rebellion*—hanged poor friends as rebels
> And burnt as heretics! *For your Priest*
> *Labels—to take the king along with him—*
> *All heresy treason: but to call men traitors*
> *May make men traitors.*

(My italics). And see further my article "Treason in Rhodesia" at (1967) *Cam. L.J.* 189.

11 The whole matter was exhaustively reviewed 300 years ago by Hale, 1 *H.P.C.*, ch. 15.

Foreign Marine Insurance Co., Ltd. v. Samuel Sanday & Co.[12] seems unobjectionable:

> "A declaration of war by the Sovereign is a political or executive act, done by virtue of his prerogative, which creates a state of war. A state of war is a lawful state, and is one in which every subject of His Majesty becomes an enemy of the nation against which war is declared. The declaration of war amounts to an order to every subject of the Crown to conduct himself in such way as he is bound to conduct himself in a state of war. It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy."

It is quite inconceivable that the Crown should delegate to its naval commanders the power to bring about the situation here described by attacking some ship, of whose activities its parent government would in all probability know nothing.

It is true that the Geneva Convention applies to:

> "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them"[13]

but it is hard to see how even this definition could cover an attack upon an individual ship, and if that is correct Royal Naval personnel could not, if captured, take advantage of the protection afforded to prisoners of war.

3. Could a blockade runner be treated as a pirate?

It is on the face of it absurd to suppose that a merchant ship, albeit carrying contraband cargo, could be regarded as a pirate, and this question can therefore be disposed of briefly. Although the correct definition of the term piracy for purposes of international law is open to doubt, the general conception is clear enough, namely that there must be some use of violence or force, or an attempt to use violence or force, in order to despoil merchants of their goods: it is quite clear that this matter is totally irrelevant.[14]

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12 [1916] 1 A.C. 650 at 671.

13 Geneva Conventions Act, 1957, sch. 2, art. 2.

14 The whole question was reviewed by the Judicial Committee of the Privy Council in *In re Piracy Jure Gentium* [1934] A.C. 586.

It may be noted in passing that, by the Piracy Act, 1721, which applies to anyone within the jurisdiction of our courts (and therefore to officers and men of the Royal Navy), if any persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship on the high seas, shall forcibly board or enter it, and shall throw overboard or destroy any of the goods or merchandise, they shall be treated as pirates, and, by the Piracy Act, 1837, the Penal Servitude Act, 1857, and the Criminal Justice Act, 1948, shall be liable to life imprisonment. Although piracy can normally be committed only by someone who is not authorised by the state of which he is a national, the exemption does not apparently apply here.

4. Can the Crown blockade a dissident colony?

Undoubtedly colonies, or recessionist states, have been blockaded in the past, although it is not clear on what basis or to what extent this may be done. It is well established that, under our law, the Crown may create harbours and ports under the royal prerogative;[15] whether they can be closed again by the Crown[16] or only by statute is open to question, but there can be little doubt that ports can be closed[17] by one means or the other. It may be supposed that other nations have similar powers to close their ports, and the blockade of colonies, etc., may have been founded upon this right.[18] Beira, however, is not a British port.

Alternatively it seems clear that a mother-state may blockade an insurgent dependency in order to suppress it. This was certainly the course adopted by the U.S.A. during the Civil War. The time-table of events here must be carefully noted.

Lincoln won the presidential election in the autumn of 1860: on 20th December 1860, by the Secession Ordinance, South Carolina declared herself independent,[19] followed shortly afterwards by six other southern states: the Confederacy was formed at Memphis on 8th February 1861, and Jefferson Davis was elected president on 10th February. By the beginning of March, all the U.S. forts and dockyards in the south, except Fort Pickens (Alabama) and Fort Sumter (South Carolina) had been occupied without resistance. On 12th April, however, the secessionists bombarded Fort Sumter and the U.S. troops surrendered on the following day; on 17th April President Davis invited applications for letters of marque,[20] a clear demonstration of an intention to wage war; and on 19th April President Lincoln proclaimed a blockade of southern ports. Thereafter military and naval operations were conducted on a considerable scale: no one could question that the Confederacy was levying war against the United States. It was not until November that the British steamer *Trent* was boarded from U.S.S. *San Jacinto*, and two Confederate agents were forcibly removed. Once this had been accepted, the blockade

15 See particular *Blackstone's Commentaries* (1809 ed.), vol. I, p. 264, and Hatherley L.C.'s remarks in *Foreman v. Free Fishers and Dredgers of Whitstable* (1869) L.R.4 H.L.266 at 281.

16 *Case of Impositions* (*Bates' Case*) (1610) 3 St. Tr. 371.

17 The reason in peacetime would be to regulate imports and customs.

18 One of the complaints contained in the American Declaration of Independence (the full text of which is to be found in the *Encyclopaedia Britannica*) is that the Crown was interfering with colonial trade: the reference, however, is not clear and almost impossible to verify.

19 Whether she was lawfully entitled to do this is, I understand, still a matter of dispute among American lawyers.

20 Letters of marque were issued to private citizens to enable them to attack foreigners at sea without the risk of being treated as robbers or pirates: *Blackstone*, vol. I pp. 258-9. They had in fact already been banned for the purposes of international law by the Treaty of Paris, 1856.

of southern ports by the U.S. Government continued until the end of the war.[21]

From these facts it is quite clear that the U.S.A. did not impose a blockade until the Confederate states were in a state of rebellion as the term was understood in contemporary English law;[22] it was imposed for the express purpose of suppressing the rebellion;[23] and it was not enforced until after the war had been in progress for some months to the common knowledge of the world. The Rhodesian situation, on the other hand, although analogous to that of South Carolina during the first three months of 1860, has been of a totally different nature. Any attempt to compare the British blockade of Beira with the U.S. blockade of the Confederacy would be totally false.

5. What is the effect of the U.N. resolutions?

Whichever way one approaches this problem, one is driven to the same conclusion: that the blockade of Beira is totally unjustifiable and could not be lawfully enforced. This is, of course, subject to the possibility that the United Nations can change the law and render lawful what would otherwise be unlawful.

When the United Nations Organisation was founded, its original members subscribed to the Charter. It is stated in article 2 (1) that the Organisation is based on the principle of the sovereign equality of its members, but by article 2 (2) they agree to fulfil the obligation assumed by them in accordance with the Charter: to this extent, therefore, member nations can be said to be bound by resolutions passed by the Security Council as a representative body of the Organisation. There is nothing in the Charter—presumably it never occurred to the draftsmen that it might be necessary to say so in express terms—which requires members to obey resolutions which are not passed in accordance with the procedure laid down; still less are members required to obey resolutions which are expressly forbidden by the Charter. It is very difficult to avoid the conclusion that the Security Council resolutions relating to Rhodesia fell into the latter category.

If Rhodesia was at the material times a dependency or dominion of the Crown, as the Crown has always maintained, then the whole matter

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21 Morison and Commager, *Growth of the American Republic*, *passim*.

22 Levying war against the U.S. constitutes treason for the purposes of Article III(3) of the Constitution.

23 If the view of the southern lawyers was correct and the Confederate states were legally independent, the blockade was still lawfully imposed as an act of war comparable to that imposed by Great Britain upon France half a century earlier and Germany half a century later.

was outside the jurisdiction of the U.N. by virtue of article 2 (7):[24] and this is not affected by the proviso, for a measure can obviously not be lawfully enforced if the measure itself was unlawfully imposed in the first place. If, on the other hand, Rhodesia has become an independent state at any stage, then article 32[25] comes into operation; not only was Rhodesia not invited to participate but her repeated requests to be allowed to do so were either ignored or rejected. Quite apart from the terms of the Charter, this was a flagrant violation of the rule of natural justice as it has been understood in both common law and civil law jurisprudence for centuries:[26] the decision of any inferior tribunal in England, had it adopted the procedure followed by the Security Council, would without a shadow of doubt have been quashed by the High Court by order of *certiorari*.

Under article 39, the Security Council "shall determine the existence of any threat to the peace" and shall make recommendations or decide what measures shall be taken to maintain or restore peace and security: somewhat surprisingly no criteria are laid down as to what constitutes a threat to the peace so the Security Council may apparently (although it is difficult to believe that the founding members intended this) determine that some purely fictional threat to the peace exists.[27] However, the whole of Chapter VII (articles 39 to 51) is governed by article 33 (1)[28] which requires the parties to a dispute to attempt to settle it first of all by negotiation. When the Security Council passed its resolution on 6th April 1966, it was obvious that most of the recommended methods of negotiation had not even been attempted, and it is a matter of common knowledge that negotiations continued intermittently for at least two years afterwards. It is submitted that the total disregard of article 33 (1) invalidates the Security Council's recommendations entirely: probably,

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24 "Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

25 "Any member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute."

26 *Blackstone*, vol. 4, p. 283.

27 By article 34, the Security Council may investigate a situation in order to determine whether a threat to peace exists: but the article is not mandatory and a failure to carry out its provisions, however reprehensible, would not affect the validity of the ensuing determination.

28 "The parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

In addition, by article 36(3) the Security Council should take into account that legal disputes should as a general rule be referred by the parties to the International Court: this article is not mandatory, but was completely ignored.

indeed, they had no jurisdiction to consider the matter at all.

Finally, article 27 (3)[29] requires the unanimous vote of all the permanent members of the Council: this was not achieved.[30] It is true that on various previous occasions the abstention of a permanent member has been treated as not amounting to a veto, but the wording of the article is quite clear. In any event, one would have supposed that H.M.'s ministers, when putting at risk the lives of their own and foreign seamen, would have been well advised to abide by the strict letter of the law.

If the Security Council had deliberately set out to violate as many of the provisions of the Charter as it could, it is difficult to see how it could have been more successful: and this was done with the collusion, if not the connivance, of the British Government.[31] The views of other nations vary widely: some have done their best to enforce sanctions; some have paid lip service to them; some have disregarded them; some nations are not members of the U.N. There is some precedent for saying that one nation, by entering into a treaty with another, may delegate to the latter the power to stop and search its ships;[32] presumably, therefore, members of the U.N. would by analogy be bound to observe the provisions of a valid resolution of the Security Council: how many governments would seek to uphold the validity of any of the resolutions relating to Rhodesia, especially in the face of the uproar which would inevitably arise if any of their nationals were killed or their ships sunk on the high seas, can only be a matter for speculation.

6. What steps could be taken if offences were committed?

It seems to me that the most likely, and the most dangerous situation which might arise would be for a boarding-party to board a foreign ship, for a member of the defending crew to be killed or injured in the ensuing scuffle and for the ship then to sail to some place from where the boarding-party could not be rescued. In this situation, the British Government would lose control over the situation (except in so far as diplomatic pressure could be exerted) and, if any crimes had been committed, the

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29 "Decisions of the Security Council (except on procedural matters) shall be made by an affirmative vote of nine members including the concurring votes of the permanent members." The French text is even more emphatic on this point, requiring "*les voix de tous les membres permanent.*"

30 Russia and France both abstained on 6th April 1966 and again when mandatory sanctions were imposed on 16th December, 1966.

31 Mr. Dean Acheson, in his address to the American Bar Association on 24th May 1968, described what had occurred as an international conspiracy, instigated by Britain and blessed by the United Nations: as barefaced aggression unjustified by a single legal or moral principle. As Mr. Acheson helped to draft the Charter, his views may be regarded as carrying some weight.

32 The examples given in the text-books are the anti-slave-trading treaties of the 19th century, which were to a large extent enforced by Great Britain.

prisoners would have to stand on trial in the country in which the ship was registered.

Alternatively, the Royal Navy might attack a ship with gunfire, damaging or destroying it or causing casualties on board.[33] The personnel would not, presumably, be prosecuted by the Crown in England, and if a private prosecution were instituted one may suppose that the Attorney-General would issue a *nolle prosequi*. It remains to consider the possibility of extradition.

By the Extradition Act, 1870, schedule 1, the list of extraditable offences includes, *inter alia*:

> murder and attempt and conspiracy to murder;
>
> manslaughter;
>
> sinking or destroying a vessel at sea, or attempting or conspiring to do so;
>
> assaults on board a ship on the high seas with intent to destroy life or to do grievous bodily harm.

However, in order that an offence may be extraditable, it must be of such a nature that it would have been an offence if committed in English territory;[34] murder, manslaughter and assaults cause no difficulty in this respect, but if an attack upon a ship were to be relied on it would be necessary to bring it within the Malicious Damage Act, 1861, s. 42 (unlawfully and maliciously setting fire to or in anywise destroying a ship), s. 45 (unlawfully and maliciously placing or throwing in, into, upon, against, or near any ship any gunpowder or other explosive substance, with intent to destroy or damage any ship), or s. 46 (unlawfully and maliciously damaging, otherwise than by fire, gunpowder or other explosive substance any ship with intent to destroy the same or render the same useless). Rather remarkably, an attack upon a ship by gunfire does not appear to be a separate crime under English law, but it is submitted that such action would certainly fall within s. 45. The offence in question must also be covered by the extradition treaty with the individual country concerned:[35] and one may suppose that the relevant crimes are

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33 The situation envisaged must be carefully distinguished from that which occurred in *R. v. Keyn* (1876) 2 Ex.D.63 (in the Court for Crown Cases Reserved): in that case the defendant was the commanding officer of the *Franconia*, a German vessel: owing to his negligent navigation, the *Franconia* collided with and sank the British ship *Strathclyde*, killing a passenger on board: he was convicted in England of manslaughter. On appeal, it was held that the English court had no jurisdiction to try him as the offence had been committed wholly on German territory, but several members of the court explained that if he had deliberately rammed, or fired missiles at the *Strathclyde*, the offence would have been committed on the English ship: see the remarks of Sir R. Phillimore at 66, Denman J. at 101-2, Grove J. at 115-6 and Cockburn C. J. at 232-8 and the earlier authoritiees cited.

34 *R. v. Dix* (1902) 18 T.L.R. 231.

35 *In re Arton (No. 2)* [1896] 1 Q.B. 509.

included in extradition treaties with most maritime nations.

As far as I am aware no immunity is afforded by the Extradition Acts to Crown servants, and there only remains the question as to whether the sort of crime envisaged would be "one of a political character" for the purpose of s. 3 of the Act of 1870. There can be little doubt that Parliament in passing this provision was inspired by the mid-Victorian attitude which regarded insurgents against continental tyrannies as heroes who ought to have asylum here even though they had destroyed life or property in their struggles,[36] and as far as I am aware the protection has only been granted in cases of this or a rather similar nature;[37] it is difficult to believe that the provision was ever designed to protect Crown servants or anyone else if they committed an act of aggression upon foreign merchants on the high seas.

The conduct of foreign affairs is ultimately a matter for the Royal Prerogative, and no doubt the Crown would refuse to surrender its servants if extradition proceedings were brought against them: no doubt the excuse given by the Home Secretary would be that the alleged crime was one of a political nature. It is submitted that such an attitude would be wholly unjustifiable on any basis except as an act of state towards a foreign power.[38]

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36 See the remarks of Lord Reid in *R. v. Governor of Brixton Prison, ex parte Schtraks* [1968] A.C. 566 at 583.

37 *Re Castioni* [1891] 1 Q.B. 149 (murder and other outrages committed by Swiss citizens in the course of an insurrection against their government: extradition refused); *Re Meunier* [1894] 1 Q.B. 415 (outrages by anarchists in France: extradition allowed): *Re Kolczynski* [1955] 1 Q.B. 440 (seizure of Polish trawler by crew to escape from Communism: extradition refused).

38 I am greatly indebted to Walter Henderson, LL.D., of Gray's Inn, barrister-at-law, for his assistance in matters relating to international law.