The Foreign Policy Centre
Progressive Thinking for a Global Age

FPC Briefing: Do we need to rethink UK-US extradition arrangements?

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What is the problem?

The UK and the US replaced the 1972 UK-US Extradition Treaty (as amended in 1985) with different arrangements in the 2003 UK-US Extradition Treaty, which entered into force in 2007 following US Senate ratification in 2006. (Its main effects were however enacted earlier through an order made under the 2003 Extradition Act). Commentators claim that this 2003 Extradition Treaty is unbalanced and unfair by no longer requiring US extradition requests to prove a prime facie case, an English common law test to decide whether there is sufficient initial evidence - perhaps an eye witness statement, fingerprint evidence and/or other relevant facts presented by the prosecuting authority - to establish that there is a case to answer and that the case should proceed to trial, but still requiring Britain to prove a 'probable cause' standard in its extradition requests to America.

The inference behind these criticisms is that the UK was manipulated into or badly negotiated new treaty arrangements in the wake of the changed security situation in September 2001. Indeed, one remit of Sir Scott Baker's review of the 2003 Extradition Act commissioned in September 2010 by Home Secretary Theresa May is whether 'the US-UK Extradition Treaty is unbalanced' (the others are to review the European Arrest Warrant, the Home Secretary's powers, use of the forum bar and whether to re-instate the prima facie test). Former Home Secretary David Blunkett who negotiated the treaty told the Commons Home Affairs Committee in November 2010 that '...the theory of what we signed could have been improved'.

Why were changes required?

This answer lies not in the nature of UK-US extradition relations but in why all Britain's extradition arrangements had to change. It is, after all, the Extradition Act 2003, introducing four tiers of extradition countries dispensing with the prima facie test for a group of tier two countries (alongside the introduction of fast track arrangements for tier one), which has created controversy and introduced changes to the UK's treaties.

Firstly, the 1989 Extradition Act was badly designed and largely an attempt to assemble incremental changes made since the 1870 Extradition Act without amending the nature of this Victorian legislation.

Secondly, the appeals system was cumbersome and subject to abuse, allowing multiple appeals on the same points. Ministers decided to whether to proceed with an extradition request, then the courts decided on the sufficiency of the request, then Ministers decided on final surrender. Each stage was open to legal challenge in the High Court, which if unsuccessful, could be followed by a further leave to appeal to the House of Lords. There were no limits to the number of points used for an appeal in each stage. Also, since the Home Secretary had a 'general' discretion to decide on surrender together with an obligation to consider 'representations', it was easy to submit voluminous material for reasons against

extradition, all requiring review - and each point capable of further legal challenge. Other technical problems included cumbersome authentication requirements for a requesting country's documentation, which, if incomplete, caused a request to fail - regardless of the seriousness of the crime; and an overlap between the functions of the Home Secretary and the courts, which led the Home Secretary to consider matters already decided on. Consequently the average extradition case lifecycle was 18 months, three to five years was not unusual.

Thirdly, old definitions of extradition offences were inadequate for dealing with modern crime, particularly international and technology related crime. This was a particular problem with treaties such as the 1972 UK-US treaty with its old fashioned list system, where the alleged offence had to map on to one in a pre-defined list and be punishable by at least 12 months' imprisonment. Britain had problems with this list system in seeking the return from America of persons accused of internet related child pornography crimes. (The list system of the European Arrest Warrant has inbuilt flexibility by allowing for the application of the dual criminality rule if the offence falls outside a defined list).

Fourthly, wider European Union developments had to be incorporated. In October 1997 the Treaty of Amsterdam established the principle of a *single area* of freedom, security and justice within the European Union. On the back of this, the Tampere Special Council decided in October 1999 that extradition should be decided on the basis of *mutual recognition* of criminal and civil decisions by judicial authorities, eliminating the involvement of governments. Then, the EU Council Framework Decision of 13th June 2002 replaced all existing extradition arrangements between member states with European Arrest Warrant procedures, theoretically requiring automatic extradition on the basis of any warrant issued in the 27 member countries. Legislation was consequently required by EU countries to transpose this Decision into national law. Some countries, including Germany, Poland and Cyprus, amended their constitutions to allow for the extradition of their own nationals within the EU, as required by the Decision.

Fifthly, extradition procedure had to be made consistent with modern practice by removing the prima facie standard for 'trusted' countries. This was not a new or radical development. Britain had already established the principle of disapplying this test when in 1990 it joined the Council of Europe European Convention on Extradition 1957 (ECE), open to any country on the European land mass. Article 12.2 of that convention requires that a copy of the arrest warrant, a statement about the offences, a copy of the relevant law and identification information be submitted in any extradition request, in place of prima facie evidence. In other words, Britain has been extraditing to European countries, whose justice system its trusts, under this convention without the prima facie test for nearly twenty years. There have been no significant abuses or failings reported since its operation in this period.

In March 2000 Home Secretary Jack Straw commissioned an all round review of the UK's extradition arrangements which reported in March 2001, six months before the World Trade centre bombings. (The review had in fact started in 1998 but was closed to take account of developments in the General Augusto Pinochet case, the former Chilean Head of State, sought by Chile for human rights offences). The resulting overhaul of extradition arrangements through the 2003 Extradition Act was therefore a

British initiative - and *not* an American one, pre-dating the Al Qaeda terrorist outrages and resulting in changes for a range of the UK's extradition partners, not only the US.

Does it make sense to retain the prima facie test?

As the Home Secretary's 2001 review makes clear, there is neither an international legal obligation nor any particular logic for this test. Australia does not require it as a matter of principle for trusted extradition countries; Ireland, another common law country, does not require it of Britain or the US; and Australia and New Zealand have between them a backing of warrants system. This position is mirrored in advanced civil law systems with, for instance, France having no equivalent evidential requirement in its extradition relations with America. In signing the ECE, the UK is in any event obliged to remove the prima facie requirement for all countries that are now party to that convention, who include the Russian Federation, Georgia, Azerbaijan and Armenia. (The practical safeguards of the Extradition Act which incorporate the Human Rights Act 1998 protect against actual extradition to these countries if one off requests were made to the UK, until such time as there is confidence in their justice systems). There is no reason why not to extend the prima facie disapplication, already granted to 27 European Union single justice area countries, including Bulgaria and Rumania, to trusted non-EU countries such as the US, Australia, Canada and New Zealand.

A key point here is not that Britain is relinquishing a fundamental English legal tradition, for it has been practicing this non-application for twenty years, but that, in certain cases, it has confidence in the justice system of the requesting state to provide safeguards that would generally be available in the UK. Leading non-European extradition partners - the United States, Australia, Canada, New Zealand and South Africa, all have advanced legal systems, proper court procedures requiring the proving of crimes beyond reasonable doubt, full rights of defence, and full and transparent appeals system.

Criticisms that persons may be removed to these countries without both reasonable grounds and protection are unfounded. No-one can be returned in the absence of the minimum required 'information' which in the UK is to demonstrate *reasonable suspicion* that the concerned person committed the alleged offence(s). The alleged offence must also be extraditable under the dual criminality rule. Moreover, there are safeguards in the Extradition Act and the Human Rights Act both of which allow for legal challenges. The Extradition Act also precludes extradition if there is any prospect of a death sentence unless the relevant requesting country provides an assurance it will not be imposed. America is fully aware of the UK and EU position on the death penalty and complies with it by providing the required assurances in extradition requests (as happened before 2003). Although it is early, no US extradition case (nor any Australian, Canadian, New Zealand or South African case) has to-date exposed any failings as a result of the removal of the prima facie standard.

Why didn't the US reciprocate fully with the British arrangement?

Under article 8.3.c of the 2003 treaty, the UK must 'for requests to the United States…' submit '… such information as would provide a *reasonable basis* to believe that the person sought committed the offense for which extradition is requested'. As this probable cause (reasonable basis) test is set by the

US constitution as the lowest threshold for the detention of a person in the US's jurisdiction, it is therefore the lowest evidential standard the US Government, whether or not it wanted to, could apply to the treaty. Changing the constitution of a modern European country is one thing, changing the 1787 constitution of the United States of America for an extradition treaty for one country with widespread political and legal consequences is improbable. (And although a point of much legal argument, the test of 'reasonable suspicion' is not that dissimilar from 'probable cause' or 'reasonable basis').

Why then didn't Britain insist on reciprocity when faced with the US constitutional obstacle?

Australia does not under its 1988 Extradition Act require a requesting country to prove a prima facie case but did retain a certain form of reciprocity with the US in its 1990 'Protocol amending the treaty on extradition between Australia and the United States of America of May 14, 1974'. Under article 7.3.c of that Protocol *both sides* are required to provide supporting documentation including a description of the facts, by way of affidavit, statement, or declaration, setting forth reasonable grounds for believing that an offence has been committed and that the person sought committed it.

Britain has however a longstanding practice that full reciprocity is not the singular basis for extradition relations but that the wider considerations of justice - including that individuals allegedly committing crimes should not escape justice simply by crossing borders - should be taken into account. It is not alone, for France and Ireland have not applied any form of reciprocity with the US. And it has not suffered disadvantage from the new rules, as extradition traffic continues to flow in both directions.

What are the options if the government's review remains dissatisfied?

If change is required, it will need to come through the Extradition Act 2003 which provides the underlying framework for the UK's extradition treaties.

However, it is not possible to single out a country or group of countries (for this issue applies equally to Canada, Australia, New Zealand and South Africa as much as America) without undermining the carefully devised balance of the four extradition tiers. Part 1 of the Act is for EU countries, Part 2 for bilateral countries and Commonwealth countries under the London Extradition Scheme (just about most countries), with a sub category of Part 2 enjoying further designation to disapply the prima facie test – this sub-group includes the non-EU ECE countries, the US and leading commonwealth partners (Australia, New Zealand, Canada and South Africa). Part 3 captures any remaining countries where extradition rules are in place (effectively none), and Part 4 is to cover one off arrangements when no formal extradition procedures are in place. The US (or a leading Commonwealth partner) cannot be re-designated without creating distortion and discrimination in this system: a situation would result where the most trusted extradition partner(s) with a mature and advanced justice system will have to meet higher evidential standards than the Russian Federation, Georgia, Azerbaijan and Armenia!

And to re-impose an evidential standard simply because of a perceived imbalance or lack of absolute reciprocity in one treaty is punitive - and does not address the broader issues around the prima facie disapplication which affect a range of countries. It should incidentally be remembered that from 1972

to 2003, UK-US extradition was unbalanced significantly against the US when it had to prove a prima facie case (which is a much higher standard than probable cause).

The only viable way forward appears to be another complete rethink of the UK's extradition strategy with new legislation to apply a new evidential standard. The available options could be, for example, to re-impose the prima facie rule; implement a standard similar to probable cause; or introduce another standard, perhaps similar to the model used in Canada, which retains the prima facie test but which for extradition cases permits the use of hearsay and other evidence not otherwise admissible in Canadian courts – or a procedure to examine parts of the requesting country's detailed evidence or a description of that material, what is called a 'record of the case'.

Since part of the radical redesign of the 2003 Act was brought in by EU developments, the UK must remain compliant with the EU's mutual recognition principle and the procedures of the European Arrest Warrant (unless of course there is a radical rethink to the UK's participation in the single justice area). Practically, therefore any new legislation will have to protect EU countries from changes while applying either a universal rule or a series of graduated tests for other countries. There will then be the anomaly of requiring more stringent tests for trusted justice systems (the US, Australia, New Zealand, Canada and South Africa) than Bulgaria and Romania, but perhaps this is defensible by arguing Britain has wider obligations in the single justice area. This will not though solve the conundrum of the ECE, whose obligations led Britain under the 2003 Act to disapply the prima facie test for countries with unproven justice systems.

There are other practical measures that can be otherwise taken to improve extradition procedures.

First, Britain could lead in working with senior extradition partners (the EU, the US, Australia, New Zealand and Canada - doubtless having to work through the Council of Ministers) to review the complex area of locally committed crimes which have effects in another country which subsequently requests extradition for the purpose of prosecuting under its laws. Although there is no immediate bearing on the Act's prima-facie disapplication, this issue is a prominent source of criticism in US extradition cases (though strangely silent for other extradition partners) and has been prevalent in two high profile US cases (that of the Natwest Three and Gary McKinnon). Campaigners and some politicians have called for a forum bar, an automatic refusal of extradition if the offence was committed in whole or in part in the UK where it can be prosecuted (for example internet crime carried out here). Indeed, a passive power to invoke a forum bar was actually introduced under the Police and Criminal Justice Act 2006.

These cross border and multi-jurisdictional crimes are bound to increase in number as cyber crime whether criminal or terrorist in nature becomes more sophisticated. The problem is not taxing where a crime is committed against one country's laws from inside another. And British arrangements are flexible in providing discretion though not compulsion for British authorities to prosecute instead of a requesting country. Complexity is however introduced when serious crimes are committed either in sequence or at the same time against several countries' laws from inside another country or countries. There is no clear provision or response in these circumstances. Most country extradition arrangements

(including those of Britain and the EU Framework Decision) allow for the relevant requested country authority to decide on competing requests based on the circumstances and seriousness of the crime(s). But these arrangements are loose and the potential for international disagreement and disputes arising from multiple requests is clear. It is an area where an international review and agreement is needed (and international consensus will mute demands for any automatic application of the forum bar).

Second, Britain with the EU could arrange for an ongoing monitoring process of international developments to observe any relevant best practice. Extradition practice has developed considerably in the last 15 years with a new set of rules for many countries across three continents and reviews and changes in progress. Aside from the EU's ongoing changes, Australia has issued a discussion paper on its extradition practices with a publication consultation exercise completing in March 2011, and the US Congress was issued with a review of extradition processes last year, 2010.

Finally, the issue of public confidence should be addressed. The 2003 Extradition Act introducing the new rules for the US as well as for the other Part 2 subset of countries, suffered from timing, introduced at the same time as the European Arrest Warrant which has problems to be resolved, and coming in the shadow of 9/11, allowing regular critics of the US to exploit general concerns about America, whatever the merits. High profile cases have built on these fears. And Labour Ministers were not forceful in their promotion of the new arrangements when they were implemented. If the Baker review finds that the underlying principles of the Act, and therefore the treaty with the US, are sound, it needs to set out ways for a public information campaign using the Government Central Office of Information (COI) to argue and promote the benefits to Britain of these new rules generally and in relation to the US (removal of the list system, removal of time bar), demonstrating that America does extradite to the UK, that safeguards exist and that these rules are in the wider cause of justice.