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The 2003 Extradition Treaty: Should U.S.-U.K.'s extradition relationship be overhauled?
By R. Brant Forrest

I. Introduction

This paper addresses the current controversy surrounding extradition between the United States (“U.S.”) and the United Kingdom (“U.K.”) and how the 2003 Extradition Treaty between the two countries has been criticized but these criticisms lack merit. To begin, on July 2, 1776, the U.S. gained its independence from U.K. and would later adopt the Declaration of Independence on July 4, 1776, making the U.S. an independent country. Relations since the separation between the two countries have evolved into what one may call a mutual friendship. One aspect of this relationship has been the extradition of individuals between the two countries for certain crimes. The extradition relationship has roots back to the Jay Treaty of 1794, but has recently been solidified by the 2003 Extradition Treaty (“2003 Treaty”) between the U.S. and the U.K..

On March 31, 2003, the Attorney General of the U.S. and the U.K. Home Secretary announced the signing of a new extradition treaty between the two countries.¹ This treaty, however, has caused controversy and frustration, especially among politicians and citizens of the U.K..² Keith Vaz, chairman of parliament's Home Affairs Committee, said, "The treaty is unbalanced, making it easier to extradite a British citizen to the USA than vice versa....Evidence to the committee has shown that the current arrangements do not protect the rights of British citizens. The government must remedy this immediately."³ What has sparked the criticisms are numerous high-profile extradition requests by the U.S. of individuals from the U.K. on charges

¹ See generally State Watch, *Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America*, www.statewatch.org/news/2007/jun/uk-usa-extradition-treaty.pdf (2007)

² Michael Holden, *U.S. Extradition Treaty Needs Overhaul – MPs*, Reuters, <http://uk.reuters.com/article/2012/03/30/uk-britain-usa-extradition-idUKBRE82T00220120330> (2012)

³ *Ibid.*

that do not deal with terrorism, specifically the cases of Gary McKinnon, an alleged computer hacker suffering from Asperger Syndrome and NatWest Bankers, who were indicted on accounts of fraud dealing with the famous Enron collapse.⁴

There are three main criticisms that have become associated with the 2003 Extradition Treaty. The first is that the treaty is heavily in favor of the U.S. because the threshold that must be satisfied by U.K. to extradite someone from the U.S. is higher than the one that must be satisfied by the U.S. to extradite from the U.K..⁵ The second is that the 2003 Treaty is not being properly employed because the purpose of the treaty was to ease the process for extradition of terrorists, but instead, the countries are extraditing individuals who are not terrorists for crimes that do not relate to terrorism. This is problematic because critics believe that by doing this, the U.S. is abusing its power to extradite someone and reaching beyond the scope of what the 2003 Treaty was intended to encompass. The final criticism is that the U.S. is an improper forum to try British citizens, and these citizens should be tried in their home country. The rationale behind this is that British citizens should be tried by a court of law in their home country and not by another country that they may have never stepped foot in or their crime did not take part in entirely or at all. Many crimes in today's world are able to be committed from a distance and from a different country through the internet and electronics and thus, a country should not be able to have jurisdiction over an individual that was never present or his acts were never committed in the extraditing country. For this reason, there is a plea for a forum bar to be

⁴ Robert Winnett, *US Wrecks David Cameron's Extradition Pledge*, The Telegraph, <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7894687/US-wrecks-David-Camersons-extradition-pledge.html> (2010)

⁵ Theodore R. Bromund and Andrew Robert James Southam, *The U.S.–U.K. Extradition Treaty: Fair, Balanced, and Worth Defending*, The Heritage Foundation, <http://www.heritage.org/research/reports/2012/09/the-us-uk-extradition-treaty-fair-balanced-and-worth-defending> (2012)

introduced so that British citizens can be tried in their home country where any penalty being given would be most justified.

However, these complaints are unsupported and lack merit. The treaty may seem superficially in favor of the U.S. because the U.S. has to prove the lower standard of reasonable suspicion, whereas the U.K. must show probable cause. In its application, these two standards are applied identically and generate the same results, so there is no discrepancy in practice.⁶ The underlying purpose of the treaty was to make extradition of terrorist easier, but the overarching and explicit purpose was to clarify and update extradition between the two countries and strengthen cooperation the policy in place had become archaic.⁷ Finally, the U.S. is a proper forum to try British citizens for their charges because their conduct directly affects or is related to the security and protection of the U.S. and its citizens.⁸ Regardless of whether an individual was or was not present in the United States or his conduct was or was not committed in the United States, any conduct that affects the United States should give them the ability to extradite that individual to the United States. The United States is the appropriate forum to try individuals whose conduct poses a threat or affects the security of the citizens of the U.S.. For these reasons, the 2003 Treaty is a valid treaty that does not need to be repealed and the associated criticisms lack merit.

In this paper, I will discuss the history of the extradition relationship between the U.S. and U.K. and then analyze the criticisms that have followed the most recent extradition agreement between the U.S. and the U.K. In particular, I will examine the criticisms that the 2003 Treaty is unbalanced and in favor of the U.S. because of the differing evidentiary

⁶ See Sir Scott Baker, *A Review of the United Kingdom's Extradition Arrangements*, 14 (2011)

⁷ See Joanne Foakes, *The US/UK Extradition Agreement*, Chatham House, <http://www.chathamhouse.org/publications/papers/view/108032> (2005)

⁸ See generally Bromund and Southam, *supra*.

standards; the purpose of the treaty is not being followed and now the U.S. is reaching beyond the scope of the treaty to extradite individuals from the U.K.; and finally, a demand for a forum bar.

II. Beginnings of Extradition Policy between the U.S. and the U.K.

In this section, I will discuss the early history of extradition between the U.S. and the U.K.. I will focus particularly on the 1870 Extradition Act and the safeguards that's the 1870 Extradition Act gave to individuals being requested for extradition.

A. The Early History of Extradition Between the U.S. and the U.K.

Extradition between the U.S. and U.K. started in 1794 with the Jay Treaty, which lapsed in 1807 and was replaced in 1842 by the Webster-Ashburton Treaty.⁹ The Webster-Ashburton Treaty dealt with the extradition of individuals alleged to have committed murder, assault, piracy, arson, robbery and forgery.¹⁰ In 1860, the U.S. became uneasy with the Webster-Ashburton Treaty because they felt the enumerated offenses were too narrow and was causing problems in extraditing individuals.¹¹ From the time the Webster-Ashburton Treaty was signed to the time the U.S. called for renegotiation, the U.S. was only able to make 53 requests for extradition.¹² The complaints by the U.S. led to the U.K. adopting the Extradition Act of 1870.¹³

The first modern extradition statute was the Extradition Act of 1870 ("1870 Act"), which allowed extradition from the U.K. to a foreign state if a criminal was classified in one of two categories.¹⁴ The first category were those individuals that have been accused, but not yet convicted of an extraditable crime and the second category were those individuals that were

⁹ See Baker, *supra*, 231.

¹⁰ See Yale Law School, *Treaties and Other International Acts of the United States of America*, Volume 4, Lillian Goldman Law Library, avalon.law.yale.edu/.

¹¹ See Baker, *supra*, 27.

¹² *Id.* at 28.

¹³ *Id.* at 29.

¹⁴ *Id.* at 32.

already convicted of an extraditable crime.¹⁵ The definition of what constituted an extraditable crime was detailed in Section 26 of the 1870 Act. Extradition crime means “a crime which, if committed in England or within England jurisdiction, would be one of the crimes described in the first schedule of this act.”¹⁶ The first schedule included the crimes of murder, attempted murder, conspiracy to murder, manslaughter, forgery, embezzlement, larceny, obtaining property by false pretenses, fraud, rape, abduction, child stealing, burglary, arson, robbery, threats, piracy, sinking or destroying a vessel at sea, assault on board a ship, and revolt or conspiracy to revolt, however, any treaty made with the foreign state limited this act.¹⁷ A treaty was a condition precedent in order for an individual to be extradited, thus, in order to be extradited from the U.K., not only did the offense have to fall within the 1870 Act, but also had to fall within a treaty entered into by the U.K. and the foreign state. This act set the path for extradition policy in years to come.

In the years following the passage of the 1870 Act, numerous amendments were made. In 1873, the act was amended to deal with the extradition of those that were accessories to extraditable crimes (i.e. aiders and abettors).¹⁸ In 1895, the act was amended to permit arrested fugitives to be brought initially to courts in the U.K. other than Bow Street Magistrates’ Court and then in 1906 and 1932, the crimes of bribery and offenses relating to dangerous drugs were added to the list of extraditable crimes.¹⁹ In 1935, the crimes of forgery and counterfeiting were also added to the list of crimes that one may be extradited for.²⁰

B. The Safeguards Provided for by the 1870 Act

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Id.* at 34.

¹⁹ *Ibid.*

²⁰ *Ibid.*

In its finality and after the numerous amendments, the 1870 Act provided for a broad span of crimes, but in addition contained safeguards for those being requested for extradition. These safeguards prevented improper extradition and protected from a violation of human rights. The first safeguard was the rule of dual criminality. The rule of dual criminality states that extradition is proper only when the individual has violated a law that is codified in the U.K. and the foreign state.²¹ There are two principal reasons for employing dual criminality. First is the principle of reciprocity, meaning when the U.K. cooperates with a requesting state, it expects the requesting state to cooperate when the U.K. makes a request, and vice versa.²² The second principle is based on the idea that it is improper to assist in the enforcement of laws of a foreign state when the laws are not recognized in your own state.²³ Thus, based on these two principles, the facts of a case must demonstrate that the conduct amounts to a criminal offense in both the foreign state and the U.K., in addition to the offense having to fall under the 1870 Act.

The second safeguard was the rule of specialty. This means that a person who has been extradited will only be prosecuted for the offense to which he has been extradited for and not additional offenses committed prior to extradition.²⁴ This safeguard originated out of the fear that foreign states may try to extradite individuals for offenses within the 1870 Act, but then criminally charge individuals for political offenses.²⁵ Many political offenses led to long-term imprisonment and in some foreign states death. Thus, this safeguard under the 1870 Act provided that to extradite someone, the foreign state would prosecute the individual for the offense or offenses that were the basis of the extradition and no other crime.

²¹ *Id.* at 35.

²² *Ibid.*

²³ *Id.* at 36.

²⁴ *Id.* at 37.

²⁵ *Ibid.*

Following the rule of specialty was the rule against the surrender of persons wanted in connection with the commission of offenses of a political character. As previously mentioned, those individuals requested for extradition may not be extradited for offenses of a political character or where the basis for extradition is to punish for an offense of political character.²⁶ The reason for this safeguard is that extradition is being requested for reasons that do not relate to the enforcement of criminal law, but to those at odds with a foreign state.²⁷ The prosecution of this crime leads to grave sentences in some countries, and in the most extreme cases, death.

The fourth safeguard was the prima facie case requirement. This safeguard made it mandatory that a prima facie case be made before a magistrate by the requesting state in order to support the application for extradition.²⁸ By establishing a prima facie case, a magistrate would be able to decide whether extradition is proper and make sure that no decisions are made prematurely.²⁹ It also was a confirmation that the dual criminality safeguard was satisfied, as the foreign state would show that the conduct was a criminal offense in the foreign state and the U.K..³⁰

Next was the ability to challenge the magistrates' order for committal by application for a writ of habeas corpus. A magistrate was to notify the individual being requested for extradition of their right to apply for a writ of habeas corpus.³¹ There was also a fifteen-day window before the individual may be surrendered, giving them the opportunity to make any last efforts to

²⁶ *Ibid.*

²⁷ *Id.* at 38.

²⁸ *Id.* at 39.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Id.* at 40.

challenge extradition.³² Thus, the court in the U.K. had the responsibility “to review the legality of the committal order.”³³

The sixth was the Secretary of State’s discretion to decline an order for the surrender of an individual to a foreign state. This safeguard exemplified the superiority of the executive officer of the U.K. and how extradition was an act of sovereignty.³⁴ When deciding whether to decline an order for extradition, the Secretary of State was to look at the surrounding circumstances.³⁵ As a result, this gave the individual being requested for extradition not only an opportunity to contest their extradition in the courts, but also with the Secretary of State.

These safeguards and the 1870 Act with its amendments were the foundation for extradition policy between the U.K. and the U.S. for the late 19th and most of the 20th century until 1972 when the two countries decided to open up negotiations and implement the Extradition Treaty of 1972. The Extradition Treaty of 1972 continued many of the same safeguards and the list system for extraditable offenses as the 1870 Act had. This structure in extradition policy caused problems and loopholes, which led the two countries to the signing of the 2003 Extradition Treaty. However, it is the safeguards of the 1870 Extradition Act that are at the heart the criticisms over the current extradition arrangement between the U.S. and the U.K. as the 2003 Extradition Treaty is seen as an overhaul of extradition policy.

III. Agreement Between U.K. and U.S. Regarding Extradition

In this section, I will explore more recent extradition arrangements between the U.S. and the U.K., focusing on the 1972 Extradition Treaty and the 2003 Extradition Treaty.

A. The 1972 Extradition Treaty

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

After the 1870 Act went through numerous amendments, negotiations for a new extradition policy between the U.S. and U.K. began again in 1972. The U.K. and U.S. agreed on the U.K.-U.S. Extradition Treaty of 1972 (“1972 Treaty”).³⁶ Similar to the 1870 Act, the 1972 Treaty listed crimes for which someone may be extradited.³⁷ The list was longer than the 1870 Act list in an effort to try and catch all crimes that may be extraditable. The crimes included murder, attempt to murder, assault with intent to murder, manslaughter, maliciously wounding or inflicting grievous bodily harm, unlawful throwing, or application of any corrosive or injurious substance upon the person of another, rape, gross indecency, procuring a woman or young person for immoral purposes, unlawfully administering drugs, bigamy, kidnapping, abduction, false imprisonment, abuse of a child, numerous narcotic offenses, theft, larceny, embezzlement, robbery, burglary, false accounting, fraud, arson, perjury, malicious damage to property, piracy, unlawful seizure of aircraft, counterfeiting, bribery, and malicious act done with intent to endanger the safety of person traveling by railway.³⁸

In addition, the safeguards from the 1870 Act continued. For example, an individual could only be extradited from the U.K. to the U.S. if the conduct was a crime in both countries and was a part of a list of crimes in the treaty.³⁹ Also, a prima facie case must be proven to justify extradition.⁴⁰ However, the issue with the 1972 Treaty was that it was designed in a way that it could not keep up with technology, especially the internet.⁴¹ Criminal laws evolved as technology evolved. There was the introduction of cybercrimes, where individuals could commit

³⁶ The 1972 Treaty was not ratified in the United States until 1976.

³⁷ See Lindsay Connal, *US/UK Extradition: Where do we go from here?*, Ashurst, http://www.ashurst.com/doc.aspx?id_Content=2479, 1 (2006)

³⁸ See *Treaty, protocol of signature and exchange of notes signed at London June 8, 1972*, 1977 WL 181653 (1977).

³⁹ *Ibid.*

⁴⁰ Theodore R. Bromund, *The U.S.-U.K. Extradition Treaty: In The Interest of Both Nations*, Heritage Foundation, <http://www.heritage.org/research/reports/2010/08/the-us-uk-extradition-treaty-in-the-interest-of-both-nations> (2010).

⁴¹ *Ibid.*

heinous acts through the internet. The 1972 Treaty did not account for such crimes and individuals were unable to be extradited because their grave acts. Some examples of atrocious crimes that went unpunished because they were not mandated within the 1972 Treaty or were newly developed crimes include computer hacking, child pornography, cyber terrorism, and copyright infringement. Therefore, when the 21st century came around, the 1972 Treaty became archaic.

B. The 2003 Extradition Treaty

In response to an outdated treaty, the 2003 Extradition Treaty (“2003 Treaty”) was signed between the U.S. and the U.K.. The 2003 Extradition Treaty did not become enforced until signed by George W. Bush in 2006.⁴² British politicians were frustrated with the delay by the U.S. in ratifying the 2003 Treaty, but were happy that eventually it was ratified.⁴³ This unease by British politicians has been forgotten and replaced with British criticisms of the 2003 Treaty, but these criticisms are misplaced.

In general, the 2003 Treaty is similar in ways to the 1870 Act and 1972 Treaty, but allowed for flexibility in the evolution of the law and technology. The 2003 Treaty defined what an extraditable offense is, but does not do this by setting forth a list as did the 1870 Act and the 1972 Treaty.⁴⁴ Instead, there are five factors for an offense to be extraditable:

1. The conduct is punishable under the laws in both states for a period of one year or more;
2. The offense consists of an attempt or a conspiracy to commit, participation in the commission of, aiding or abetting, counseling or procuring the commission of, or being an accessory before or after the fact to any offense in Part 1;

⁴² See Bromund and Southam, *supra*.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

3. An offense shall be extraditable whether or not the two countries use the same terminology for the offense and whether or not the offense is one for which the United States law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being jurisdictional only;
4. If the offense was committed outside the territory of the Requesting State, extradition shall be permitted if the laws of the Requesting State provide for the punishment of such conduct committed outside its territory in similar circumstances;
5. If extradition has been granted, extradition may also be granted for other offenses specified in the request if the latter offense is punishable for less than one year, provided all other requirements for extradition are met.⁴⁵

By allowing extraditable offenses to be defined by these factors rather than a narrow list as the 1870 Act and 1972 Treaty did, the 2003 Treaty will be able to change over time as the laws of the U.S. and the U.K. change as well.⁴⁶ Also the one year or more requirement makes it impossible to extradite someone for a minor offense, thus only allowing grave crimes to be classified as extraditable, and continues to allow the safeguard of dual criminality.⁴⁷ Retained in the 2003 Treaty was the safeguard for politically motivated offenses, but in the U.S., the executive branch and not the courts have the responsibility for determining whether to invoke the exception.⁴⁸ In addition, the previous standard of having to establish prima facie evidence for extradition requests is no longer the standard. The U.S. must now provide information that would justify the issue of a warrant, or in other words, reasonable suspicion, and the U.K. must prove probable cause.⁴⁹ Furthermore, the requested state has the right to require additional information from the requesting state to help them make a decision on the request for extradition.⁵⁰

⁴⁵ See State Watch, *supra*.

⁴⁶ See Bromund and Southam, *supra*.

⁴⁷ *Ibid.*

⁴⁸ See State Watch, *supra*.

⁴⁹ See Bromund and Southam, *supra*.

⁵⁰ See State Watch, *supra*.

Overall, the 2003 Treaty does not use the list system to define what an extraditable crime is, but defines it as being any crime that is punishable under the laws in both states for a year or more. This gives flexibility to both countries and allows the treaty to adapt to the changing landscape of the law. The 2003 Treaty also incorporates the safeguards from previous arrangement. Particularly, the safeguards included are dual criminality, rule of specialty, political offenses, and Secretary of States power to reject an order. In addition, the 2003 Treaty included a safeguard of double jeopardy where an individual may not be extradited for an offense he has already been tried for in the requesting or non-requesting country. Thus, the 2003 Treaty has created an extradition agreement that is able to maintain pace with the evolution of the law in both the U.K. and the U.S., while keeping a fair balance between the two countries and affording protection to those being requested for extradition..

IV. The Criticisms of the 2003 Treaty Are Invalid

In this section I will examine the three common criticisms of the 2003 Treaty and demonstrate how these criticisms lack merit. The three criticisms are that the treaty is unbalanced and in favor of the United States because of differing evidentiary standards; the purpose is not being properly followed as it was meant for terrorists; and the United States is an improper forum for crimes that are perpetrated in the United Kingdom.

A. Critics argue the treaty is unbalanced and in favor of the U.S. because of differing evidentiary standards

The criticism that the 2003 Treaty is unfair and in favor of the U.S. centers on the standards the treaty requires the U.S. to show in comparison to the standard the U.K. When negotiating the 2003 Treaty, the two countries looked to uphold their constitutions with respect

to any matters involving extradition of individuals from their country to the requesting country.⁵¹ To do this, they decided the evidentiary standard that each country must satisfy is what would be required for an arrest warrant and not a prosecution in the requested state.⁵² In the U.S., the standard for an arrest warrant is probable cause under the Fourth Amendment of the U.S. Constitution, whereas in the U.K., the standard is reasonable suspicion.⁵³ As a result, the U.S. is required to show reasonable suspicion for extradition to be granted while the U.K. must show probable cause under the 2003 Treaty. The U.S. defines probable cause as being satisfied if a reasonably prudent man would have the belief that under similar circumstances an individual has committed a crime.⁵⁴ The U.K. defines reasonable suspicion as reasonable grounds to suspect that the individual has committed, is committing or is about to commit an offense.⁵⁵

1. U.K.'s Review and Determinations of The Evidentiary Standards

There is no denying that superficially the standards are different. Politicians have called for review and reform of this difference. Dominic Raab, a member of Parliament has said, “an American citizen who is subject to an extradition warrant in the U.S. has the constitutional safeguard that a judge must examine the evidence. In this country [United Kingdom], a short recitation of the allegations suffices. That is a very real and important imbalance.”⁵⁶ The British Parliamentary Human Rights Joint Committee said the government “should increase the proof required for the extradition of British citizens.”⁵⁷ Some have pointed to the numbers to show the imbalance. Since 2003, there were 130 requests by the U.S. compared to 54 requests made by the

⁵¹ Bromund, *supra*.

⁵² See Baker, *supra*, 237.

⁵³ *Ibid*.

⁵⁴ *Terry v. Ohio*, 392 U.S. 1, 27, (1968).

⁵⁵ *Dumbell v. Roberts*, 1 All ER 326, 328 (1944).

⁵⁶ See Dominic Raab, opening statement, in U.K. House of Commons, *UK Extradition Arrangements*, column 82 (2011).

⁵⁷ See U.K. Parliament, *The Human Rights Implications of UK Extradition Policy*, para. 192., <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2010/uk-extradition-policy/> (2011).

U.K. and only 10 U.S. requests were refused by the U.K. compared to none of the U.K.'s requests being denied by the U.S..⁵⁸ In addition, a member of the Parliament, Michael Crockart, has called for the prima facie safeguard to be installed in the 2003 Treaty to make up for the lopsided extradition arrangement.⁵⁹ In essence, these claims come down to the difference between reasonable suspicion and probable cause and whether there is such a discrepancy that the 2003 Treaty must be renegotiated or amended.

The problem with this criticism can be said to be one of procedure and definitions. Britain abandoned the prima facie standard with trusted democracies when it adhered to the 1990 European Convention on Extradition (ECE), which was created by the Council of Europe in 1957, and the European Arrest Warrant (EAW).⁶⁰ Because of Britain's acceptance of these two agreements amongst European countries, Britain decided extradition requests without applying the prima facie requirement for years prior to the 2003 Treaty, so this was not a new practice. In fact, the U.S. is one of many countries that the U.K. imposes a standard of reasonable suspicion and does not require any prima facie case to be made. Therefore, if the U.K. wanted to revert back to the prima facie test in determining extradition, in order to maintain consistency, the U.K. may have to renegotiate not just the 2003 Treaty, but also extradition treaties with many other countries.⁶¹

Furthermore, the definitions of reasonable suspicion and probable cause may be different, but are the same in practice. Under the U.S. law, the standards of probable cause and reasonable suspicion are clearly distinct as stated in *Terry v. Ohio*, 392 U.S. 1, (1968); however, the U.K. decided to take up their own review to determine what the difference is between the U.S.

⁵⁸ See Embassy of the United States, *FAQ on the US-UK Extradition Relationship*, london.usembassy.gov/gb176.html (2012).

⁵⁹ See Bromund and Southam, *supra*.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

standard of probable cause and the U.K. standard of reasonable suspicion. Officials of the U.K. asked Sir Scott Baker, a renowned judge in the U.K., to review the 2003 Treaty and determine whether the U.S. standard of probable cause and the U.K. standard of reasonable suspicion are of such a different level that the 2003 Treaty must be renegotiated. The Baker Review, consisting of 488 pages, made the determination that the standards of probable cause and reasonable suspicion are equivalent and those involved in the negotiations understood them to be nearly identical.⁶² There is no practical difference between these two objective standards and for this reason, the 2003 Treaty is not unfair or imbalanced. “In the case of extradition requests submitted by the U.S. to the U.K., the information within the request will satisfy both the probable cause and reasonable suspicion tests.”⁶³

“We believe that any difference between the two tests is semantic rather than substantive, and the challenge to those who suggest that the tests are in some way different is to articulate precisely what the difference is and how the difference would apply in any particular case.

In our opinion it is significant to note that:

- (i) Both tests are based on reasonableness;
- (ii) Both tests are supported by the same documentations
- (iii) Both tests represent the standard of proof that police officers in the United States and the United Kingdom must satisfy domestically before a judge in order to arrest a suspect.”⁶⁴

In addition to this, the Baker Review pointed out that any disparity in the number of requests being accepted or denied is a correlation to the population’s being of apparent different sizes. The U.S. population is about five times the size of the U.K.’s population.⁶⁵ Really, this claim involving a difference in the number of requests being made is irrelevant. It does not matter who makes more requests, but whether the 2003 Treaty is being fairly operated. And, as

⁶² See Baker, *supra*, 242.

⁶³ *Id.* at 331.

⁶⁴ *Id.* at 242.

⁶⁵ *Id.* at 254.

said before, the U.S. has yet to deny a request made by the U.K., so from a percentage standpoint, the U.K. is more successful in extraditing individuals to their country than the U.S.. As a result, no reform of the evidential standards is needed in the 2003 Treaty. “For these reasons we have concluded that there is no basis for seeking to renegotiate the 2003 Treaty.”⁶⁶

The conclusions set forth in the Baker Review have caused mixed responses. Human rights groups have rejected the report claiming the report is simply inexplicable and unsupported.⁶⁷ Shami Chakrabart, director of one of the groups has said, “We don't just disagree with this review but are completely baffled by it.... It's time we stopped parceling people off around the world like excess baggage and remembered the duty of all governments to protect their people and treat them fairly.”⁶⁸ Others have seemed to change their opinions. Dominic Raab, who prior to the Baker Review criticized the two standards instead conceded that the standards really were not that much different after all.⁶⁹ The 2012 Parliamentary Home Affairs Committee report alluded to the acknowledgement and acceptance of Baker’s review in saying “a body of respectable legal opinion which suggests that there is little or no distinction in practice” is one to be recognized.⁷⁰

Most recently, Prime Minister David Cameron, who many believe was unhappy with the Baker Review, ordered further review by Home Secretary Theresa May.⁷¹ Home Secretary Theresa May made a statement in front of the Parliament regarding extradition. When speaking about the 2003 Treaty, she stated that a prima facie evidence standard should not be introduced

⁶⁶ *Id.* at 255.

⁶⁷ Jonathan Rayner, *Liberty attacks ‘baffling’ review of extradition law*, *The Law Society Gazette*, <http://www.lawgazette.co.uk/news/liberty-attacks-baffling-review-extradition-law> (2011).

⁶⁸ *Ibid.*

⁶⁹ See Bromund and Southam, *supra*.

⁷⁰ See Sally Broadbridge, *The UK/US Extradition Treaty*, U.K. House of Commons Library, Standard Note SN/HA/2204, p. 7, <http://www.parliament.uk/> (2009).

⁷¹ See Bromund and Southam, *supra*.

because such a standard would likely lead to delays in the proceedings.⁷² May also acknowledged Sir Scott Baker's finding that there is no significant difference between probable cause and reasonable suspicion and to change this agreement would be inappropriate.⁷³

“it is absurd to propose that we should require prima facie evidence from countries such as the United States... when we do not require such evidence of other countries with far less mature judicial systems.”⁷⁴

Thus, the Home Secretary concluded that to revert to the 1870 Act requirement that a prima facie case must be satisfied for extradition to be ordered would be an unsuitable arrangement for the two countries because the U.K. does not require such a high standard of other countries with less advanced judicial systems. In addition Home Secretary May accepted the Baker Review's conclusion that the differences between probable cause and reasonable suspicion are minimal and of no significance to warrant a renegotiation.⁷⁵

2. U.S. Definitions of Probable Cause and Reasonable Suspicion

In the U.S., the definition of reasonable suspicion and probable cause are near mirrors of each other. The starting point for their definitions is in the Supreme Court's decision in *Terry v. Ohio*. When we talk about probable cause we are dealing with the law of probabilities.⁷⁶ The probabilities are the “factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”⁷⁷ Probable cause was defined by the Supreme Court as “reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is

⁷² See Home Office, *Statement by Home Secretary on Extradition*, <http://www.homeoffice.gov.uk/media-centre/news/gary-mckinnon-extradition> (2012).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Terry, supra*, 392 U.S. at 38.

⁷⁷ *Brinegar v. United States*, 338 U.S. 160, 175 (1949).

charged.⁷⁸ In other words, if a reasonably prudent man would have been led to believe based on the information at hand that the suspect committed a crime.⁷⁹ To determine whether probable cause exists, the focus is on whether the affiant had reasonable grounds for the belief that the law was being violated.⁸⁰ If the facts of the matter set forth that a reasonable discreet and prudent man would have believed that there was a commission of the offense then probable cause exists.⁸¹ This standard, however, does not require the amount or type of evidence necessary in order to set forth a prima facie case for a conviction.⁸² Rather, the court will look at probabilities and the circumstances at the time to decide if there is probable cause.⁸³

As with probable cause, reasonable suspicion is a fact-based test.⁸⁴ The court in *Terry* made clear that reasonable suspicion is a lesser standard than probable cause and determined that reasonable suspicion is based on “specific articulable facts which, taken together with rational inferences from those facts,” warrant an intrusion or arrest.⁸⁵ There are two elements to this standard. The first is that the suspicion must be based upon all of the circumstances, making reasonable suspicion a totality of the circumstances standard.⁸⁶ Like probable cause, reasonable suspicion deals not with certainties but with probabilities.⁸⁷ The second element is “that an assessment of the whole picture must yield a particularized suspicion” that the individual is engaged in wrongdoing.⁸⁸ Anything more than a purely subjective suspicion is typically enough

⁷⁸ *Stacey v. Emery*, 97 U.S. 642, 645 (1878).

⁷⁹ *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

⁸⁰ *Dumbra v. U.S.*, 268 U.S. 435, 441 (1925).

⁸¹ *Ibid.*

⁸² *Adams v. Williams*, 407 U.S. 143, 149 (1972).

⁸³ *Ibid.*

⁸⁴ *E.g. U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985).

⁸⁵ *Id.* at 21.

⁸⁶ *United States v. Cortez*, 449 U.S. 411, 418 (1981).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

to satisfy this requirement.⁸⁹ However, an anonymous tip on its own may not be enough necessary to meet the reasonable suspicion standard.⁹⁰

In comparison, the U.S. definitions of both probable cause and reasonable suspicion are very similar. Both are objective fact-based standards that rely not on certainties of the circumstances, but rather on probabilities. In addition, the common theme is reasonableness. The standards are both satisfied upon a reasonable belief based upon circumstantial considerations. Thus, under U.S. law, probable cause and reasonable suspicion are near identical standards.

3. Abu Hamza Case

In the context of the 2003 Treaty, one prominent case demonstrating how the standard of reasonable suspicion has been applied in the U.K. is the extradition of Abu Hamza al-Masri (“Hamza”). He is an Egyptian-born Muslim who lived in the U.K..⁹¹ Hamza was suspected of aiding and abetting the kidnapping of American tourists in Yemen in 1998; attempting to establish a terrorist training camp in Oregon between 1999 and 2000; and assisting the Taliban by providing them money and weapons in furtherance of terroristic acts.⁹² In addition to these charges, Hamza is believed to have mentored 9/11 conspirator Zacharias Moussaoui and the famed “shoe bomber”, Richard Reid.⁹³ Hamza has proclaimed his support Osama bin Laden and said bin Laden is a good guy and a hero.⁹⁴

⁸⁹ Warrantless Search Law Deskbook, § 8:4 Reasonable Suspicion (November 2012)

⁹⁰ *Ibid.*

⁹¹ See Sebastian Smith, *Abu Hamza pleads not guilty in US to terrorism*, Yahoo News, sg.news.yahoo.com/abu-hamza-pleads-not-guilty-us-terror-charges-155719493.html (2012).

⁹² See Militant Islam Monitor, *Hooked at Last: Abu Hamza Al Masri arrested in London -U.S. requests his extradition -Full list of charges*, www.militantislammonitor.org/article/id/93 (2004).

⁹³ See Phil Hirschorn, *Terror suspects appear in court after extradition*, CBS News, http://www.cbsnews.com/8301-202_162-57527323/terror-suspects-appear-in-court-after-extradition/ (2012).

⁹⁴ See Daily Mail, *Muslim militants celebrate attacks*, Mail Online, <http://www.dailymail.co.uk/news/article-137907/Muslim-militants-celebrate-attacks.html> (2012).

Hamza has argued that he has deteriorating mental health and being extradited to the United States would breach his human rights.⁹⁵ He claims that solitary confinement in the United States supermax prisons is the equivalent of torture to someone at his age and with his health.⁹⁶ The court found Hamza extradition appropriate and sent his extradition order to the home secretary.⁹⁷ At the time, Home Secretary Jacqui Smith signed the order, but Hamza appealed to the European Court of Human Rights (“ECHR”).⁹⁸ The ECHR rules extradition was not appropriate until the High Court thoroughly examined his case.⁹⁹ The High Court examined the matter and ordered extradition then the ECHR found the extradition to be lawful and there was no breach of Hamzas’ human rights.¹⁰⁰

The United Kingdom High Court decided that extradition of Hamza was appropriate because there was reasonable suspicion. Under the 2003 Treaty, the U.S. was required to show reasonable suspicion of the allegations to the U.K.. British High Court Judges John Thomas and Duncan Ouseley determined the U.S. met this burden of proof and extradition was proper.¹⁰¹ Evidence to satisfy this burden included call records made from the home of Hamza to the Yemen kidnappers’ satellite phone.¹⁰² The U.S. showed Hamza provided a satellite phone and 500 hours of airtime to the Yemen kidnappers; had 8,500 documents, four hard drives and twenty-four DVDs supporting the allegation; and information from a witness.¹⁰³ Under the U.S.

⁹⁵ Terri Judd, *UN advisor says sending Muslim cleric Abu Hamza to US would equal torture*, The Independent, <http://www.independent.co.uk/news/uk/home-news/un-advisor-says-sending-muslim-cleric-abu-hamza-to-us-would-equal-torture-8194857.html> (2012).

⁹⁶ *Ibid.*

⁹⁷ BBC, *Abu Hamza: High Court judge halts extradition to the US*, <http://www.bbc.co.uk/news/uk-19730438> (2012).

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ See Aljazeera, *UK court to rule on Abu Hamza's extradition*, www.aljazeera.com/news/europe/2012/10/201210511159370553.html (2012).

¹⁰² See Brian Whitaker, *Satellite phone gives US vital evidence*, The Guardian, <http://www.guardian.co.uk/uk/2004/may/28/usa.terrorism> (2004).

¹⁰³ See AP, *America claims for extradition of radical Islamic cleric*, english.pravda.ru/news/world/17-05-2007/91646-abu_hamza-0/ (2007).

definition of reasonable suspicion, the prosecution has provided specific articulable facts, which combined with rational inferences, warrant detention of Hamza. For instance, a witness's admission or tip of a particular fact is enough to satisfy the reasonable suspicion standard and warrant an arrest. Alternatively, applying the U.S. definition of probable cause, we should still see the same outcome. A reasonable and prudent man would determine that the evidence presented by the U.S. warrants Hamza's arrest. For example, the phone calls Hamza made to the kidnapers, during the kidnapping, and the fact that Hamza provided the kidnapers with a phone would provide a reasonable and prudent man with enough information to warrant an arrest. Under either standard Hamza would have been extradited.

Although, had the U.S. have to make out a prima facie case for each charge, as was required under the original 1870 Act, it is possible that U.S. may have failed to be able to extradite someone with such involvement in terrorism against the U.S.. For example, phone call records, documents, and testimony may not be enough to establish a prima facie case for the charges, especially since each piece of evidence relates to a separate crime. Prime Minister David Cameron is quite happy this is not the case, "I'm absolutely delighted that Abu Hamza is not out of this country.... I'm delighted on this occasion we've managed to send this person off to a country where he will face justice."¹⁰⁴ Then again, the prima facie requirement is not relevant to the 2003 Treaty as the United Kingdom has not used the prima facie requirement since 1990.

In the end, probable cause and reasonable suspicion are nearly the same. Their applicability produce similar results, and any gap between the two is one of semantics. Both standards are based on reasonableness and require similar amounts of evidence in order to be

¹⁰⁴ See Gregg Re, *Suspected terrorist ringleader demands return of prosthetic hooks in federal court*, dailycaller.com/2012/10/06/british-pm-were-delighted-terror-suspect-will-face-justice-in-the-united-states/ (2012).

satisfied. The only difference is their meaning on paper, not their applicability in practice. Therefore, claims of the 2003 Treaty being in favor of the U.S. because of the differing evidentiary standards have no valid support.

B. Critics argue that the 2003 Treaty is not being properly employed since its purpose was to ease the process of extraditing terrorists

Critics contend that the purpose of the 2003 Treaty was to fight the global war on terror that was agreed upon by U.S. President George W. Bush and U.K. Prime Minister Tony Blair after the attacks of 9/11 but this is a mistaken perception. Prior to 9/11, the U.K. had reviewed their extradition policy in early 2001 and the conclusion of this review was to renegotiate their extradition arrangement with the U.S. Also before 9/11, the U.K. and U.S. drafted a proposal for a new extradition arrangement, however, it was not until almost two years later after the two countries teamed against terrorism that the countries negotiated the 2003 Treaty. While the 2003 Treaty has made the extraditing of terrorists easier, the purpose of the 2003 Treaty was not that.

Still, Charlie Elphicke, a member of Parliament, said about the purpose of the 2003 Treaty that “the original arrangements with the U.S. were entered into under the cloud of the history of 9/11 and terrorism, and now we are hearing cybercrime as the latest excuse.”¹⁰⁵ Prime Minister David Cameron has supported this sentiment. He has stated that the 2003 Treaty was negotiated “to ensure terrorists didn’t escape justice. It was never intended to deal with a case like Gary’s [McKinnon].” McKinnon hacked 97 U.S. Government computers from his home in England.¹⁰⁶ The U.S. requested extradition of McKinnon, but was blocked by Home Secretary Theresa May over the concern about McKinnon having Asperger syndrome combine with

¹⁰⁵ See Charlie Elphicke, statement, in U.K. House of Commons, column 122, December 5, 2011.

¹⁰⁶ Press Association, *Gary McKinnon timeline: events leading up to extradition decision*, The Guardian, <http://www.guardian.co.uk/world/2012/oct/16/gary-mckinnon-timeline-extradition> (2012).

depression possibly leading to a high risk of suicide if extradition were granted.¹⁰⁷ Like Prime Minister David Cameron, many United Kingdom citizens were happy about the McKinnon result and believed the purpose of the 2003 Treaty was to bring terrorists to justice, not criminals like McKinnon.

Nevertheless, these critics have been blinded by publicity because the media focuses its extradition coverage on non-terrorist cases. The media embellishes cases in an attempt to show flaws of the 2003 Treaty such as Gary McKinnon, Richard O'Dwyer, who was requested for extradition because of copyright infringement, and Chris Tappin, who was extradited for alleged arms dealing. What the media fails to mention is that the extradition of these individuals are aligned with the purpose of the 2003 Treaty. For example, in the case of Christopher Tappin, the Home Secretary and court both agreed that the request by the United States for his extradition was proper because it fell within the purpose of the 2003 Treaty.¹⁰⁸ Tappin, a U.K. citizen, was accused of conspiring to export batteries to Iran that were to be used for surface-to-air missiles.¹⁰⁹ Tappin was not a terrorist nor did he have any terrorist intention, but the U.K. Government felt his extradition was necessary and proper because he was accused of extraditable offenses and there was nothing to point to barring his extradition.¹¹⁰ His extradition fell directly in line with the purpose that the U.S. and the U.K. set out to do when adopting the 2003 Treaty.

Furthermore, nowhere in the 2003 Treaty does it say the purpose is to fight terrorism. Nowhere can it be found that the 2003 Treaty had anything to do with terrorism. The words

¹⁰⁷ Laura Smith-Spark, *UK blocks hacker McKinnon's extradition to U.S.*, CNN, <http://www.cnn.com/2012/10/16/world/europe/uk-us-mckinnon-extradition/index.html> (2012).

¹⁰⁸ Alexis Akwagyiram, *Christopher Tappin: Why was a retired Briton extradited to US?*, BBC News, <http://www.onlinenews.net/christopher-tappin-why-was-a-retired-briton-extradited-to-us/> (2012).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

terror, terrorist, terroristic, or terrorism are not included in the treaty. Instead we are left with the purpose being:

“Desiring to provide for more effective cooperation between the two States in the suppression of crime, and, for that purpose, to conclude a new treaty for the extradition of offenders.”¹¹¹

In fact, the initial proposal for extradition reform was drafted before the 9/11.¹¹² While terrorism may be a backdrop to the acceleration of negotiations, it was not the purpose. The 2003 Treaty was intended by the countries to be a comprehensive agreement of extradition in general terms.¹¹³ Reform of extradition in the U.K. had been in the works prior to the 2003 Treaty and the 9/11 attacks.¹¹⁴ Six months before the 9/11 attacks, in March 2001, a review of the extradition law in the U.K. was published and presented by the Home Office to Parliament.¹¹⁵ The review pointed to a few problems with the current state of extradition in the U.K.. These were:

- (i) The complexity of existing extradition arrangements;
- (ii) Duplication in decision-making with an overlap of functions between the Secretary of State and the courts;
- (iii) Delay caused by the complexity of the extradition process and the number of appeal routes available;
- (iv) The prima facie requirement which it was said had come adrift from operational needs or a realistic assessment of the standards of criminal justice in the requesting state;
- (v) The inflexibility of the definition of extradition crime based on the list of crimes in cases under Schedule 1 to the 1989 Act;
- (vi) The increase in and complexity of representations made to the Secretary of State;

¹¹¹ See State Watch, *supra*.

¹¹² See Bromund and Southam, *supra*.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

- (vii) The authentication requirements governing the admission in evidence of documents submitted in support of the extradition request;
- (viii) The cost proceedings and the cost of detention in the case of wanted persons not admitted to bail.¹¹⁶

Based on these issues, the review recommended that if there be new extradition procedure, it must be simplified and the prima facie requirement should be abandoned.¹¹⁷ This review would in turn help form part of the background to the signing of the 2003 Treaty. The U.K.'s action to review their own extradition policy and recommend reform prior to the 9/11 attacks proves that the 2003 Treaty was not an American initiative against the war on terror, but a U.K. initiative in an overhaul of extradition policy in the country. The real reason for the 2003 Treaty between the U.S. and the U.K. was not to create a policy for extradition of terrorists. Both countries negotiated the 2003 Treaty in an effort to update an outdated extradition policy. The prior arrangement was poorly designed and only made minor changes to the 1870 Extradition Act. The appeals system was also flawed in the previous arrangement, allowing abuse and multiple appeals, thus significantly delaying extraditions.¹¹⁸ Definitions and the list system of crimes supplied by the 1972 Treaty had become inadequate because of the evolution of technology.¹¹⁹ The list system created loopholes since some individuals' crimes were not within the listed crimes but may be considered as grave if not more than those listed. Also extradition procedure had to be updated to match extradition practice by removing the prima facie requirement.¹²⁰ The U.K. had abandoned the requirement in practice since 1990, but had no law

¹¹⁶ See Baker, *supra*, 69-70.

¹¹⁷ *Id.* at 70.

¹¹⁸ See Andrew Southam, *FPC Briefing: Do we need to rethink UK-US extradition arrangements?*, The Foreign Policy Centre, <http://fpc.org.uk/articles/508> (2012).

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

explicitly saying they no longer used the prima facie requirement.¹²¹ Thus, the 2003 Treaty was needed to put the abandonment of the prima facie requirement in writing.

For the reasons stated above, the purpose of the 2003 Treaty was not to ease the extradition of terrorists, which it did have the effect of doing, but rather the purpose of the 2003 Treaty was to modify the U.S. and U.K. extradition relationship and update the policy, while taking into account modern day crimes and technology.

C. Critics argue that the U.S. is an improper forum for the prosecution of crimes committed within the U.K.

With the purpose of the 2003 Treaty being to modify the extradition relationship so that it would represent current law, critics believe that the U.S. poses an improper forum for some crimes. Specifically, crimes that do not take place in the U.S. or for which the perpetrator is a British national the critics believe there should be a forum bar. This criticism is unreasonable given that the 2003 Treaty speaks directly to nationalism not being a bar and the fact that in today's world many crimes are able to be committed without being present at the moment where the injury or wrong has taken place.

A forum is the most appropriate place for a legal proceeding to take place. Under the 1870 Act and the 1989 Act, the Secretary of State in the U.K. had discretion to decide whether the U.K. was a proper forum, which was subject to judicial review.¹²² Currently, the 2003 Treaty does not include a forum bar to extradition. Critics believe that the U.K. should modify the 2003 Treaty so that there is a forum bar. Specifically, they say there should be a limitation on extradition of British subjects when the individual is a national of the U.K. and being requested for extradition to the U.S.; the U.K. should have a right of first refusal; and crimes that did not

¹²¹ *Ibid.*

¹²² *See Baker, supra*, 41.

take place in the requesting state should not be punished in the requesting state.¹²³ Politicians have suggested an automatic refusal of extradition if the offense is committed in whole or in part in the U.K. because then it can be prosecuted in the U.K..¹²⁴ Former Prime Minister David Cameron and many members of Parliament including Michael Crockart, David Davis and Stephen Phillips, have voiced their support for this.¹²⁵ In addition, a report done by the Parliamentary Home Affairs Committee recommended that the U.K. introduce a forum bar to the 2003 Treaty with the U.S..¹²⁶

“The fundamental principles of human rights, democracy and the rule of law require that justice is seen to be done in public. The Committee believes that it would be in the interests of justice for decisions about forum in cases where there is concurrent jurisdiction to be taken by a judge in open court, where the defendant will have the opportunity to put his case, rather than in private by prosecutors. Indeed, Parliament has already legislated for that to happen. The Committee therefore recommends that the Government introduce a "forum bar" as soon as possible.”¹²⁷

The first forum related criticism of the 2003 Treaty, that U.K. citizens should be tried in the U.K., is simply flawed. There may be some countries that prefer not to extradite their own citizens, but the U.K. and the U.S. are not one of them. In fact, the 2003 Treaty directly addresses this issue. Article 3 of the 2003 Treaty deals with nationality when extraditing someone. “Extradition shall not be refused based on the nationality of the person sought.”¹²⁸ Individuals who have committed crimes that effect the protection and security of the U.K. or the U.S. are to be tried in the country that is affected by their actions. Letting individuals stay in their home country may instead have the effect of them never being tried because their crimes were

¹²³ See Bromund and Southam, *supra*.

¹²⁴ See Southam, *supra*.

¹²⁵ See David Davis, statement, in U.K. House of Commons, column 92; Crockart, column 97; and Stephen Phillips, column 102, (2011).

¹²⁶ See The US-UK Extradition Treaty - Home Affairs Committee Report, para. 33, <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/644/64403.htm> (2010).

¹²⁷ *Ibid*.

¹²⁸ See State Watch, *supra*.

not perpetrated in their home country, so that home country may not be able to prosecute the individual. Thus, this argument simply lacks merit.

With regard to the right of first refusal argument, critics are mistaken. The U.K. already has the right of first refusal in the extradition process under the 2003 Treaty.¹²⁹ There is no limitation for the U.K. in charging the individual and prosecuting him in their own country instead of extraditing him for prosecution in the U.S.. U.K. authorities have the ability to interrupt extradition proceedings to initiate prosecution in the U.K.. The U.K. may charge the individual with the same crime he is being extradited for or something else. If the individual is found guilty in the U.K. courts, he may not be extradited to the U.S. if extradition would mean double jeopardy.¹³⁰ Hence, any argument that the U.K. should have a right of first refusal is inaccurate because such refusal already exists.

When a crime does not take place in the requesting state, critics believe it should not be prosecuted in the requesting state, and extradition of that individual should be denied. In theory, a state should not have jurisdiction over an individual who committed a crime outside of their borders. However, when that crime affects that state or is a violation of a law in that state, they may request extradition. In the 2003 Treaty, Article 2 Section 4 deals with this issue.

“If the offense has been committed outside the territory of the Requesting State, extradition shall be granted in accordance with the provisions of the Treaty if the laws in the Requested State provide for the punishment of such conduct committed outside its territory in similar circumstances. If the laws in the Requested State do not provide for the punishment of such conduct committed outside of its territory in similar circumstances, the executive authority of the Requested State, in its discretion, may grant extradition provided that all requirements of this Treaty are met.”¹³¹

¹²⁹ See Bromund and Southam, *supra*.

¹³⁰ *Ibid*.

¹³¹ See State Watch, *supra*.

This section is there to account for the evolution of technology. As previously said the purpose of the 2003 Treaty was to update and modify extradition. Old treaties had not accounted for new crimes that emerged as a result of new technology. The law was unable to keep up with the evolving crimes and as a result the 2003 Treaty was needed and signed. Particularly, this provision in the 2003 Treaty aims at cybercrimes. Crimes that are done through the internet would not be extraditable offenses if this provision were not in the 2003 Treaty. For example, an individual aiding and abetting a terrorist group by electronically transferring funds through the internet is a crime in the U.S.. Another example would be someone in the U.K. with possession of child pornography that was obtained through the internet from an American supplier. Before the 2003 Treaty, the example offenses would not be enough to extradite someone to the U.K. or the U.S.. Officials decided that in the 2003 Treaty, there should be something in the treaty to account for these crimes so they would not go unpunished since they were not done in the requesting state. Article 2 Section 4 was the solution. Critics stating that crimes not committed physically in the requesting state are forgetting that crimes have evolved because of technology so that many offenses are able to be committed extraterritorially.

Furthermore, the Baker Review concluded that a forum bar should not be implemented under the 2003 Treaty.¹³² The reasoning was there was no evidence to indicate that there was an injustice without a forum bar.¹³³ Extradition judges in the U.K. could not think of any case decided since the 2003 Treaty in which “it would have been in the interests of justice for it to have been tried in the U.K. rather than in the requesting territory.”¹³⁴ In fact, if the U.K. were to introduce a forum bar to the 2003 Treaty, it would cause problems. Mainly, a forum bar would

¹³² See Baker, *supra*, at 13.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

cause delay in litigation and potentially have the effect of causing satellite litigation in which law suits from other jurisdictions may be tried in the U.K..¹³⁵ As a result, the cost of litigation would sky rocket and there would be no benefit except the ability to be tried in the U.K..¹³⁶ The Baker Review concludes that the 2003 Treaty, regarding forum, should stay as is, but formal guidance should be drawn up on the factors taken into account by the prosecutors who decide whether or not to initiate extradition.¹³⁷

“Prosecutors are far better equipped to deal with the factors that go into making a decision on forum than the courts. Their decision making should, however, take place as early as possible, be more open and transparent and the factors that they take into account should be incorporated into formal guidance which should specifically address the significant to be accorded to the nationality or residence of a suspect.”¹³⁸

Aside from the Baker Review, the Extradition Act of 2003 (“2003 Act”), which is the legislation passed by the U.K. to deal with all countries requesting extradition and implements the 2003 Treaty, does touch on forum. In Part 1 Section 19B it states:

(1)A person's extradition to a category 1 territory (“the requesting territory”) is barred by reason of forum if (and only if) it appears that—

- (a)a significant part of the conduct alleged to constitute the extradition offence is conduct in the United Kingdom, and
- (b)in view of that and all the other circumstances, it would not be in the interests of justice for the person to be tried for the offence in the requesting territory.

(2)For the purposes of subsection (1)(b) the judge must take into account whether the relevant prosecution authorities in the United Kingdom have decided not to take proceedings against the person in respect of the conduct in question.

(3)This section does not apply if the person is alleged to be unlawfully at large after conviction of the extradition offence.¹³⁹

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Id.* at 13-14.

¹³⁸ *Id.* at 231.

¹³⁹ See U.K. Parliament, *Improving the protection of Human Rights in the Extradition Act 2003*, www.publications.parliament.uk (2011).

In other words, the 2003 Act may bar extradition if a person commits an offense and that offense has largely or partly taken place in the U.K.. In these circumstances the 2003 Act states a judge can determine whether extradition is proper and if the offender should be prosecuted in the U.K. rather than the requesting state. However, in order for a judge to deny extradition, authorities in the U.K. must have already decided to charge the offender and prosecute them in the U.K.. If those authorities have not decided to prosecute the offender, then a judge may not deny extradition because it would not be in the interest of justice. Thus, whenever the 2003 Treaty does not cover an aspect, the 2003 Act may make up for the gap such as the forum bar, which is included in the 2003 Act.

1. Application of the Forum Bar of the 2003 Act in Extradition Cases

We can then assume that a decision not to prosecute in the U.K. assists in leading to a decision to extradite the offender. In practice, this forum limitation has been applied in cases in which the U.S. has requested extradition. Two cases cited as critiques of the 2003 Treaty and applicable to the 2003 Act as well are *Ahsan v. Government of the United States of America* and *Bary v. The Secretary of State for the Home Department*. In *Ahsan v. Government of the United States of America*, the U.S. sought extradition of Ahsan for his involvement in conspiring to materially support terrorists, knowing that such support was in an effort to kill, kidnap, maim or injure U.S. nationals abroad.¹⁴⁰ The U.K. decided not to investigate or prosecute Ahsan and instead let the U.S. handle the matter.¹⁴¹ Ahsan sought judicial review of this decision by the U.K. in a last effort to deny his extradition. The court dismissed this claim because authorities

¹⁴⁰ *Ahsan, R (on the application of) v Government of the United States of America & Anor*, Court of Appeal - Administrative Court, April 10, 2008, [2008] EWHC 666, high-court-justice.vlex.co.uk/vid/-52629832.

¹⁴¹ *Ibid.*

U.K. made no attempt to investigate or look into the matter, so there was no basis for a claim that Ahsan should be tried in the U.K..¹⁴²

Furthermore, in *Bary v. The Secretary of State for the Home Department*, the United States requested extradition of Adel Abdul Bary (“Bary”) and Khalid Al Fawwaz (“Fawwaz”). The two individuals were accused of conspiring to murder U.S. citizens, diplomats and other internationally protected persons.¹⁴³ Two overt acts of the conspiracy were the bombings of the U.S. embassies in Nairobi and Dar Es Salaam on August 7, 1998. On that day, 213 people died in the Nairobi bombing and 4,500 people were injured.¹⁴⁴ In Dar Es Salaam, 11 people died as a result of the bombing.¹⁴⁵ The Secretary of State for the U.K. decided it would be better that Bary and Fawwaz be tried for their offenses in the U.S. and not the U.K..¹⁴⁶ Bary and Fawwaz sought judicial review of this decision in order to be tried in the U.K. and not be extradited to the U.S.. Their argument was that the U.K. was where the preponderance of the evidence against them occurred and the Secretary of State made no consideration about the U.K. being the natural forum for trial.¹⁴⁷ Even though Bary and Fawwaz’s extradition was sought under the 1989 Act, the court made no distinction from the 2003 Act.¹⁴⁸ The court decided the U.K. was neither a viable or appropriate forum.¹⁴⁹ The connection of the crimes with the U.K. was slight. These are offenses that were targeted at American Embassies in which American citizens, not British

¹⁴² *Ibid.*

¹⁴³ *The Queen (On The Application of Adel Abdul Bary and Khalid Al Fawwaz) and the Secretary of State for the Home Department*, para. 1, July 20, 2009, [2009] EWHC 2068.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Id.* at para. 4.

¹⁴⁷ *Id.* at para. 71.

¹⁴⁸ *Id.* at para. 51.

¹⁴⁹ *Id.* at 76.

citizens, were injured. Thus, the natural forum for this proceeding was the U.S., who has a significant interest in the protection and security of their citizens in the U.S. and abroad.¹⁵⁰

Therefore, criticisms in the U.K. regarding forum are erroneous. U.K. citizens being tried in the U.K. is flawed. Not only does the treaty directly address this issue, but also an objective of the 2003 Treaty was to update extradition policy so they can extradite individuals that have committed crimes affecting the requesting country, regardless of nationality. If we were to employ a nationality bar then some individuals may never be tried. Also the argument that the U.K. should have right of refusal is invalid because they do have a right of refusal. Authorities of the U.K. have the right to refuse extradition by charging the individual in the U.K. of the same crime or another crime. If they charge the individual of the same crime, then extradition for that crime is completely barred by the principle of double jeopardy. Finally, any argument that extradition should be denied when the crime did not take place in the requesting state is misguided. Technology has progressed so much that new crimes, primarily done through the internet, have emerged, enabling perpetrators to escape extradition if we were to accept the critics notion that extraditable crimes are only those crimes that were perpetrated while the individual was physically present in the requesting country. The U.S. and the U.K. have decided not to accept this notion for good reason as it would allow many to escape from punishment, allowing an injustice. These directly affect the protection and security of the requesting state to the degree that they are heinous crimes worth being classified as extraditable. Because of these reasons, the 2003 Treaty is justified and necessary to allow individuals to be extradited for offenses not committed in the territory of the requesting state but that are punishable in the requesting state.

¹⁵⁰ *Id.* at para. 77.

V. Conclusion

This paper has discussed the criticisms of the 2003 Treaty between the U.K. and the U.S. regarding extradition of individuals between the two countries. There have been three main criticisms regarding the 2003 Treaty. These criticisms are that the 2003 Treaty is imbalanced because of a difference in standards to prove for extradition; the purpose of the 2003 Treaty not being properly employed because the U.S. is extraditing non-terrorist criminals; and the U.S. is an improper forum for British nationals and criminals whose crimes took place in the U.K.. In spite of these arguments, the reasons given are deficient.

Leaders from both countries must realize that these criticisms are without merit and should not give in and renegotiate or repeal the 2003 Treaty until the time has come that the 2003 Treaty is outdated. It is a reality that the standards within the treaty are applied nearly identical. They may not be the same on their face, but in practice they produce the same results in the realm of extradition. The Baker Review has confirmed this as have cases already decided under the 2003 Treaty. The purpose of the 2003 Treaty was not to target extradition of terrorists, but rather, extradition reform had started before the 2003 Treaty in an effort to bring up-to-date extradition policy.

Also the call for a forum bar is misplaced. Having a forum bar may cause more injustices than not having a forum bar. If there is a bar for nationality, some individuals that are nationals of one country, but commit a crime in the other, may never be tried for their crime. Critics have supported a forum bar for right of first refusal, but they are ill informed because there is already a right of first refusal. This right is in the countries power to prosecute for the same crime that the individual is being extradited for by the requesting country or another crime. This initiation of prosecution interrupts the extradition process and enables a non-requesting the country to

conduct their investigation and trial proceedings. A forum bar that an individual should not be extradited unless their crime was committed within the territory of the requesting country is completely flawed. Technology has made it possible for individuals to commit offenses outside the territory of the requesting state. In addition, crimes such as conspiracy, aiding, assisting, or abetting are crimes that may never be committed in the territory of the requesting country, but are still extraditable because they are punishable acts against the protection and security of the requesting country.

It is clear that members of Parliament are uneasy with the 2003 Treaty. Conceding to these concerns may be disastrous for the U.K. and the U.S. and have diplomatic costs. Therefore, it is in the best interest of both countries to maintain their current arrangement as the 2003 Treaty is fair and has been set up to adapt to the changing atmosphere of the law.