CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Colin Warbrick

I. RECENT DEVELOPMENTS IN UK EXTRADITION LAW

A. The 'Natwest Three'

In July 2006, three bankers, all UK nationals, were extradited to the United States on charges of conspiracy to defraud their one-time employers, a British bank, a subsidiary of Natwest. The conduct took place under the shadow of the 'Enron' affair. The defendants were said to have conspired with senior officials of Enron. Enron was the subject of the largest corporate bankruptcy in US history. In comparison the sums involved in the Enron collapse, those at stake in what the papers called the 'Natwest Three' case were small, but the involvement of persons implicated in the Enron affair made the defendants of interest to US prosecutors. The cases enjoyed an unusual public profile, partly because the extraditions took place under the unique legal regime which governs US-UK extradition,[1] partly because this case was simply one of several cases in which persons charged with what one might loosely call economic crimes were sought by US prosecutors[2] and partly because the defendants argued that their offences (which they denied) were allegations of what were 'really' English crimes which should have been proceeded with here. Although the extradition aspects have loomed largest, this last matter, possible conflicts of criminal jurisdiction, is the most interesting.

B. UK Extradition Law

After more than a century of relative stability, UK extradition law has been in a state of almost permanent revolution since the Extradition Act 1989. A principal objective of the 1989 Act was to allow the UK to implement its obligations when it became a party to the European Convention on Extradition (ECE).[3] During the 1990s, the EU took initiatives in the field of criminal cooperation which required domestic implementation.[4] Then, following the events of 11 September 2001, the EU took a major step to establish a wholly new regime for the transfer of fugitives between members of the EU with the introduction of the European Arrest Warrant (EAW) in 2001.[5] The

[1] United Kingdom-United States Extradition Treaty, Cm 5821 (not in force). The US Senate approved the treaty on 25 September 2006 but the end of October 2006, ratifications had still not been exchanged. For the facts of the cases, see *Bermingham* (n 16) paras 19–56.

[2] See 'Business News' *The Observer* (23 Oct 2006) (Ian Norris).

[3] European Convention on Extradition Order 1990, SI 1990/1507.

[4] See M Mackarel and S Nash, 'Extradition and the EU' (1997) 46 ICLQ 948.

[5] Framework Decision 2002/584/JHA on the European Arrest Warrant and surrender procedures between Member States.

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EAW system was set up by a Framework Directive and its implementation into UK law was behind another substantial rewriting of extradition law through the Extradition Act 2003 and the subsidiary legislation based upon it. There were, however, wider concerns about existing extradition procedures, in particular that it took a very long time for other States to obtain from the UK the return of fugitives, which were independent of these initiatives.[6]

As under the ECE, extradition under the EAW did not require the requesting State to demonstrate a prima facie case against the fugitive, an obligation which had caused difficulties earlier between the UK and some of its extradition partners.[7] The scheme of the Extradition Act 2003 is to divide States into 'Part 1' and 'Part 2' States, in the first category those which are members of the EU and apply the EAW procedure and in the other, those States with which the UK has general extradition arrangements. It is envisaged in Part 2 that in some cases a State might be absolved from showing a prima facie case as a condition for obtaining extradition and should merely have to provide 'information' about the alleged conduct which constituted a crime in its jurisdiction.[8] When the Extradition Bill 2003 was going through its parliamentary stages, there had not been any suggestion that immediate use of this provision was contemplated.

C. UK–US extradition

The Act came into force in 1 January 2004, having completed its parliamentary stages at the end of 2003. By March 2003, the UK had negotiated a new treaty with the US, designed to replace existing arrangements, mainly under a treaty between them of 1972.[9] One feature of the new arrangement was that the US would be required only to present 'information' about the conduct on which its extradition requests were made to the UK, for which it would be necessary for it to be designated such a State within the Part 2 scheme of the 2003 Act. For the UK, the position would remain as it was, it would have to produce evidence of 'probable cause' to obtain extradition, a constitutional necessity in the US.

The Home Office Minister responsible for seeing the Extradition Bill through its Commons stages, Mr Denham (now Chairman of the Home Affairs Select Committee), recently explained to the House what had gone on.[10] The Home Affairs Committee had reported on the Bill in December 2002.[11] The treaty with the US was agreed by the end of March 2003. The delegated legislation to give effect to it in the UK was made in December 2003. The treaty was not approved by the US Senate until late September 2006 (and at the time of writing—end of October 2006—the Senate Bill had not been signed by the President). The Home Office had told the Home Affairs Committee that there were no current plans to negotiate any new extradition treaties. Denham concluded that the negotiation of the treaty must have taken three months or less. He thought that the haste might well account for the numerous controversial issues which had now arisen. The treaty was negotiated between the two administrations without any publicity and, although it had not come into force in international law, such was the

[6] HL Hansard, Vol 673, cs 406–8 (30 June 2005) (Baroness Scotland).
[7] eg Spain, see C Warbrick, 'New Treaty with Spain' (1986) 35 ICLQ 428.
[8] Extradition Act 2003, s 71(4).
[9] Cmnd 6723, TS 16/1977.
[10] HC Hansard, Vol 450, c 1408–10.
[11] Home Affairs Committee, 'Extradition Bill' HC 138 (2002).

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provision in the 2003 Act, the British Government could give the treaty domestic effect in UK law simply by bringing the Order to the Parliament.[12]

Although it stretches far beyond terrorist offences, the EAW scheme was negotiated after 11 September 2001 and the political imperative of improving criminal cooperation in counter-terrorism measures was undoubtedly a factor in the project being brought to a conclusion.[13] Furthermore, the British Government has always insisted that revision of the extradition arrangements with the US had been envisaged before 11 September 2001.[14] The new treaty which was eventually agreed was not restricted to terrorist offences: it was to be the ordinary and general basis for extradition between the two States and so would apply to the charges against the 'Natwest Three' defendants. The elimination of the 'prima facie' case requirement was not unusual, indeed it was the basis for return to all the parties to the European Convention on Extradition. There was a precedent for extending a 'European' scheme to the UK–US relations: the 1972 treaty had been amended in 1985 to incorporate provisions similar to those in the European Convention on the Suppression of Terrorism, which modified the notion of the political offence as a ground precluding return in terrorist cases.[15] What distinguished the present position was the process by which the amendment came about and the covert and sudden way in which the new treaty of 2003 was arrived at. Furthermore, the scheme appeared to be open to the objection that it lacked reciprocity because of the different obligations on the US and the UK. The fact that at the date of the Natwest Three case, requests from the UK to the US were made under the 1972 Treaty (which remained in force), whereas requests from the US to the UK were made under the Order under 2003 Act (the 2003 treaty not being in force) only added to the sense of asymmetry.

D. The 'Natwest Three' case in the courts

The defendants in the Natwest Three case sought to resist their removal to the US but, it having been approved by the (extradition) District Judge, their appeals were then rejected by the High Court (QB Divisional Court).[16] The judgment confirmed that the balance between the cooperative function of extradition law (which favours the return of fugitives) and its protective role (which seeks to ensure that inappropriate, unfounded or unfair applications for extradition are rejected) has shifted in favour of the former. This clearly has been the Government's intention with the proposals it has brought to Parliament. The Divisional Court was faithful to them (with the result that a good deal of the effort of the defendants to avoid removal was made in the political rather than the judicial arena, see below).

[12] Extradition Act 2003, s 223(6), (affirmative procedure). The Order is the Extradition Act 2003 (Designation of Part 2 Territories) Order, SI 2003/3334. The text of the US–UK Treaty was not available on the FCO Treaty site for several months after it was listed and the two attached letters referred to in the explanatory note are still not available from sources in the UK.

[13] R Belkxtoon, 'Introduction' in R Belkxtoon and W van Ballegooij, *Handbook on the European Arrest Warrant* (TMC Asser Press, The Hague, 2005) 5.

[14] HL Hansard Vol 684, c 640 (Baroness Scotland, Minister of State, Home Office).

[15] Supplementary Treaty on Extradition and Exchange of Notes, Cmnd 9565; See C Warbrick, 'Extradition' (1986) 35 ICLQ 439; (1987) 36 ICLQ 404.

[16] *Bermingham and others (R on the application of) v Director of the Serious Fraud Office and the Home Secretary* [2006] EWHC (Admin) 200.

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There were several procedural complexities to the *Bermingham* decision which need not be considered here. However, certain aspects of the judgment in the High Court are of importance in assessing the balance struck between the protective and cooperative elements of extradition law under the 2003 Act. The substance of the defendants claim had positive (ie reasons why the trial should be here) and negative (ie why they should not be sent to the US) aspects to it. Positively, they argued that the allegations against them were of an 'English' crime and that the English courts were the *forum conveniens* for its trial. So, the 'Englishness' of the offence was sought to be shown by reason of the defendants' UK nationality, of the locus of much of the conduct, of the nationality of the victim (their [UK] employer). The fact that the case could have been proceeded with before the English courts but that the prosecutor (the Serious Fraud Office—SFO) had decided not do so was said to be decision to relinquish jurisdiction to a less suitable forum. The *conveniens* of the English jurisdiction was to be established by the presence of the defendants here, as well as that of most witnesses and evidence. It was said that the balance of where witnesses were to be found favoured the video-taping of witnesses in the US for use in UK proceedings, rather than vice versa. The negative arguments against their being sent to the US included concerns about the fairness of the trial procedure and the likelihood of the defendants being afforded bail, especially on terms which would allow them to return to the UK during a trial process which, it was asserted, could take up to two years to begin.

These various considerations, it was claimed, required that the SFO commence prosecutions here, as the consequence of the defendants' right to be tried before the most appropriate court. Finding remedies to achieve this result was not without its difficulties, whether by judicial review of the decision of the SFO not to proceed or by appeal against the decision of the District Judge to allow extradition to proceed. The obstacle was that the Extradition Act 2003 did not appear to leave any room for decisions about *forum non-conveniens* to the Home Secretary (though extradition had to be postponed where a person was charged with an offence in the UK).[17] Accordingly, attention shifted to the decision not to investigate the charges here and, if necessary, to prosecute the men in England. While conceding the possibility in principle of review of the prosecutorial decision, Laws LJ was sceptical about the prospects in practice for a review of a decision not to investigate the charges.[18]

On the matter of the appeal from the decision of the extradition judge, first, Laws LJ attached great weight to the importance of cooperation in the extradition process. He gave extensive consideration to the defendants' assertions that a decision to send them to the US would be in violation of their Convention rights, protected now by specific reference to the Human Rights Act in ss 21, 87 Extradition Act 2003. The defendants encountered several difficulties. The first was that the ECHR gave very little protection against extradition decisions—Article 5(1)(f), the only provision to mention extradition, applying only to decisions about detention for the purposes of extradition. While there is established authority that removal which faces a person with a real risk of a flagrant breach of his fair trial rights would constitute a violation of Article 6(1),[19] Laws LJ noted how circumscribed this protection was, especially on the

[17] Extradition Act 2003, ss 88, 97. *Bermingham* (n 16) paras 58 and 59.
[18] ibid paras 63–5.
[19] *Soering v UK* ECtHRs, A161, para 113.

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facts of these removals for trial in the US.[20] Anyway, the evidence put before the District Judge on this matter about how the trial would be conducted and the defendants would be treated, Laws described as 'parti pris' and concluded that it would be 'frankly grotesque' to find that there was the appropriate level of risk of the appropriate standard of violation of fair trial in the US.[21] Any other arguments available were ones of several possibilities under Article 8 of the ECHR—alleging unjustifiable interferences with the right to respect for their private and/or family lives. In finding that none of the defendants made out any of their cases, Laws LJ began with Lord Bingham's remark on *Ullah*[22]—the strong grounds for interference which a State would have to justify interference with Article 8(1) rights in cases like these, 'the great desirability of honouring extradition treaties made with other States'.[23] Then, relying on *Launder*,[24] Laws LJ went on:

> [This strong public interest] rests in the value of international co-operation pursuant to formal agreed arrangements entered into by sovereign States for the promotion of the administration of criminal justice. Where a proposed extradition is properly constituted according to the domestic law of the sending State *and the relevant bilateral treaty* (emphasis added) and its execution is resisted on Article 8 grounds, a wholly exceptional case would in my judgment have to be shown to justify a finding that extradition would on the particular facts be disproportionate to the legitimate aim.[25]

That the removals in these cases would not have been 'according to the relevant bilateral treaty' does not seem to have disturbed Laws LJ's conclusion. Nor was he moved by the complaints that the District Judge had simply assumed that the prosecution would go on in the US and had given no weight to the facts that all three defendants were UK nationals. That prosecutions might have been commenced in England did not make the case an exceptional one.[26] Equally, he was unpersuaded by the fact that the US prosecutor was not obliged to demonstrate a prima facie case against the defendants, which in any event, the judge said was 'shown on the documents accompanying the request'.[27] Of course, it was not so shown—there was information which might have been enough to show a prima facie case if it had been able to be tested as evidence—but it had not been. The Government has attached great significance to the fact that the 2003 Act contains specific reference to the human rights protections under the Human Rights Act 1998. The *Bermingham* judgment demonstrates that the level of protection should not be exaggerated.[28] It has been suggested that British businesses should exercise increased diligence about their overseas practices after *Bermingham* because the cooperative elements of the new law will take priority over any remaining protective parts.[29] Whatever it resolves conclusively about UK–US extradition, it would be optimistic to assume that the question of *forum conveniens* in criminal cases will not come before the courts again.

[20] ibid paras 106–33. An application by the defendants to the ECtHRs was rejected, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/business/5120650.stm>.

[21] ibid para 110.

[22] [2004] UKHL 26, para 24.

[23] *Bermingham* (n 16) para 116.

[24] *Launder v UK* (1997) 25 EHRR CD 67.

[25] *Bermingham* (n 16) para 118; later, para 128, he referred to the observations of Hale LJ in *R (Warren) v Home Secretary* [2003] EWHC 1177, though she also talked about the importance of giving effect to treaty obligations, para 40.

[26] ibid para 129.

[27] ibid para 124.

[28] See also Joint Committee on Human Rights, Draft Extradition Bill HL158/HC1140 (2002) 9–16.

[29] G Davies and R Burger 'Extradition post the NatWest Three' (13 October 2006) New Law Journal 1542–3.

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E. The 'Natwest Three' case in Parliament

There had already been concern about the operation of the revised US–UK extradition agreement in Parliament before the *Bermingham* judgment was handed down.[30] It reached new heights afterwards and continued after the men had been sent to the US. The Government rejected all criticisms made in the House of Lords through 2005 and early 2006. Typical was the answer of the Minister of State at the Home Office (Baroness Scotland), answering a question in the House of Lords, she said:

> Extradition to the United States is governed by Statutory Instrument 2003, no.3334, which designates the US as a territory not required to provide prima facie evidence in support of extradition requests made to the UK. The Government have no intention of removing the US from this order. The decision to remove the prima facie case requirement from the US addressed a previous imbalance in that the UK required a higher standard of evidence than the US. The US was required to present a prima facie evidential case in support of extradition requests made to the UK, whereas the UK only had to demonstrate 'probable cause'. Probable cause is a requirement of the US Bill of Rights, which it cannot amend. The Government are happy to respect that requirement. Total reciprocity in extradition relations is not possible because of the differences between legal systems, rules of evidence and case law. However, the new treaty and the Extradition Act 2003 have improved the balance in extradition relations between the UK and the US. The 'probable cause' test is broadly comparable to the requirement under Section 71 of the Extradition Act 2003 for,'information that would justify the issue of a warrant for the arrest of a person accused (or convicted) of the offence within the judge's jurisdiction', that the UK requires of the US. To reintroduce the prima facie test would be to create an unequal relationship.[31]

The next day, the Minister said:

> The extradition treaty with the US of 2003 is not yet in force. However, certain elements of the treaty, which also apply to many extradition partners, were given effect by the Extradition Act 2003 and secondary legislation under it. Inclusion of the US in this way was done in advance of the coming into force of the 2003 treaty because the Government considered it right to treat the US in the same way as other trusted extradition partners. To change the designation of the US under secondary legislation would be a retrograde step.[32]

Of course, the US was not an 'other partner' for extradition purposes—all the other partners had arrangements with the UK which established the partnership status. It might have been thought that the power under the 2003 Act to designate States under Part 2 was intended only to apply to actual partners. Although the draft treaty with the US gave an indication of the terms on which the US would become a partner, there was no guarantee that it would ever do so and, since, as the Government maintained, the treaty had costs for the US, there was no longer any incentive on the US to ratify the treaty if the benefits had already been conceded unilaterally by the UK. Certain authorities called in aid in the *Bermingham* judgment are premised on the existence of a binding agreement between the US and the UK but, given the way the Extradition Act 2003 is drafted, the fact this is not the case does not seem to have legal consequences in the UK.

The House of Lords had not been persuaded by the Minister and amendments to the Police and Justice Bill had been approved which would have modified the position in several ways—the quotations above were made immediately after the Government's

[30] eg Lord Hodgson of Astley Abbotts, HL Hansard, Vol 673, c 399 (30 June 2005).
[31] HL Hansard, Vol 684, c WA123 (12 July 2006).
[32] ibid c WA139 (13 July 2006).

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defeats.[33] The amendments were considered by the House of Commons on 24 October 2006.[34] The amendments were intended to meet some of the criticisms of the existing position which largely reflected the debate about the return of the 'Natwest Three' and took account of the arguments that they had made to no effect before the Divisional Court. The amendments were aimed at restoring the old position by reintroducing a requirement that a prima facie case be shown against a fugitive as a condition of his return to the US, of requiring the withdrawal of the designation of the US under the 2003 Order and of requiring a judicial determination that it would be in the interests of justice that a UK national be extradited rather than tried here, where part of the offence had been committed in the UK. In the course of the debate to consider these proposals, the various strands of the objections to the UK–US extradition arrangements were spelled out. The Government opposed all the amendments (and ultimately carried the day). The points of contention were:

(a) that the treaty was not in force but its terms were being given effect in the UK (but not in the US);
(b) that the treaty was not based on exact reciprocity of obligations on the matter of what must be shown about the alleged offence in order to secure the return of a fugitive;
(c) that the treaty did not achieve approximate reciprocity on the matter;
(d) that the treaty (or UK law) did not have appropriate standards or procedures to decide on extradition where either part of the offence which was alleged to have been committed by a UK 'citizen' had occurred in the UK or where the UK prosecutor had decided that there was no reason to proceed against the defendant here;
(e) that the treaty had been influenced but considerations to do with offences committed in Northern Ireland in connection with the IRA activities and that this had had too great an influence on an arrangement for the whole of the UK.[35]

On (a), by the time of the debate the US Senate had given its consent (subject to a non-binding statement about Northern Ireland fugitives) but the final stages of the US process were still not complete and the Treaty had not been ratified. The Government relied on the formal position under the Extradition Act (which had been endorsed by the courts). It had simply used the power under statute to designate the US as a Part 2 State, the Extradition Act making no requirement that such a State be a party to an extradition agreement with the UK, binding in international law.

The argument about reciprocity, even assuming the treaty were in force, was more detailed. The Minister insisted that there was 'rough parity',[36] though that was a change in the Government's position.[37] It was, though, an exaggeration to claim that 'rough

[33] See HL Hansard, Vol 684, c 635 et seq (11 July 2006).
[34] HC Hansard, Vol 450, c 1389 et seq (24 Oct 2006).
[35] The reason for the delay in endorsement of the 2003 Treaty by the Senate was said to be the concern of Irish-American groups that the treaty made the return of Republican fugitives too easy. If it is true, it is without much substance. The Government has repeatedly made it clear that there are no distinctions between the criminal offences covered by the 2003 Treaty, eg HC Hansard, Vol 450, c 1392 (Ms Ryan).
[36] HC Hansard, Vol 450, c 1389 (24 Oct 2006) (Parliamentary Under Secretary at the Home Office, Ms Ryan).
[37] HL Hansard, Vol 655, c 1063 (16 Dec 2003) (Baroness Scotland).

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parity' was 'the highest level of reciprocity that is possible between two legal systems'.[38] She said that there was no exact reciprocity in the 1972 Treaty—the UK being required to show 'probable cause' to obtain a fugitive from the US, the US being required to show a prima facie case in reverse circumstances. Then, there was a greater burden on the US. Under the new dispensation, the UK still had to show probable cause but the US had to provide 'information'. Again, the burdens were different but this time the US was favoured with the lesser obligation, nonetheless, not a derisory one, as far as the Government was concerned, one equivalent to persuading a magistrate to issue an arrest warrant. Those who disputed that this was 'rough parity' distinguished between the situations then (ie under the 1972 Treaty)—both sides had the duty to provide evidence, which could be challenged or other evidence brought to contradict it[39] (the *Raisi* case[40] showed the potency of this possibility). 'Information', though, was precisely that—a statement provided by the prosecutor of the requesting State, whatever local processes had preceded it. While one might doubt the Government's extreme claim that exact reciprocity can never be achieved (take the requirements of the European Arrest Warrant, for instance), both the dispute about whether or not rough reciprocity had been achieved and, whether it had or not, whether anything turned on the conclusion, belong to the realm of the political, not the legal. Depending only on constitutional limitations, States may make what arrangements they please to govern their extradition relations with other States. Where it is perceived that there is not 'rough reciprocity', there may be political trouble for a government—that was the perception about the different notions of the political offence which bedevilled UK—Ireland extradition relations throughout the 1970s and 1980s—but that is all.[41]

From a legal perspective, the arguments about the appropriate court to try an offender who might be properly proceeded against in more than one jurisdiction are a lot more interesting and are beginning to be a matter of broader concern than just UK–US extradition relations.[42] As States make increasingly broad claims to extraterritorial legislative jurisdiction (and where those claims enjoy a degree of acceptance), of necessity it becomes more likely that more than one State will have potential judicial jurisdiction to try an offender. Extradition treaties sometimes have made a provision to deal with these situations, though more often than not, only to determine priorities between extradition requests. It can be the case that defendants in cases covered by an *aut dedere, aut iudicare* obligation might be tried in either State.[43] General rules to resolve any conflicts appear to be lacking. The Lords amendment which addressed this question sought first to make it one for judicial determination. Then, it fixed the standard in favour of trial in the UK where the defendant was a UK 'citizen' and part of his offence had been committed here. Only if the interests of justice required his removal for trial in the US was extradition to go ahead. Reference was made to the US–Ireland

[38] HC Hansard, Vol 450, c 1396 (24 Oct 2006) (Ms Ryan).
[39] HC Hansard, Vol 450, c 1391 (24 Oct 2006) (Mr Howarth).
[40] *Raisi* (2002) (unreported).
[41] The House of Lords finally accepted the position of the House of Commons on the Police and Justice Bill, HL Hansard, Vol 686, cs 649–84 (7 Nov 2006).
[42] Address by the Attorney-General to the International Bar Association, Prague 28 Sept 2006, 'How far can laws reach? The Problem of extraterritorial jurisdiction'. Available at <www.lslo.gov.uk/speeches.htm>.
[43] Recall the difficulties which arose in the 'Lockerbie' incident about the proper forum to try the accused, see A Aust 'Lockerbie: The Other Case' (2000) 49 ICLQ 278.

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Extradition Treaty which has such a provision. There was no proposal that the UK adopt the common European rule that it may not extradite its nationals (a rule, of course, coming under increasing critical pressure and one which could not be retained by those States in the EAW scheme). There was some sympathy for the 'Natwest Three' (and other white collar crime defendants), however circumspectly expressed, which was partly associated with suggestions that double criminality was not being respected in the recent US–UK extradition cases.[44] The concern was that certain, specific, US financial offences were being repackaged (usually as conspiracies) to avoid double criminality. If this were so, the charge would be a serious one, for the effect would be to subject persons to the possibility of criminal liability in circumstances in which they could properly have thought themselves to have been acting lawfully. The Government's answer to these concerns was to point to the role of independent prosecutors to determine where cases should be proceeded with, a mechanism which the Government was trying to improve in relations with the US. The Attorney-General had already had general discussions in the US and it was anticipated that there would be contacts on a case by case basis by prosecutors in the future.[45] Precious little was revealed about how any disputes were to be resolved. A particularly taxing problem arises where the prosecutor in the custody State decides that there is not enough evidence against a person to proceed against him, whereas the authorities in another jurisdiction reach the opposite conclusion and are keen to go ahead. Although what has been revealed so far is of limited content, the problem identified by the extradition cases is a serious one for transnational criminal law, which merits wider consideration. Because of the serious consequences for those who might be extradited as a result of prosecutors' decisions, there ought to be a place for representations by them before final decisions are made.

Now that the treaty has been sent to the President for ratification, it appears that the objection of abusive use of the powers of designation under the Extradition Act 2003 will lose its force. The other complaints made against the UK–US arrangements belong more to the realm of politics than law, though it is true that the persuasive weight of some of the claims depends upon an evaluation of their correctness in terms of law. Subject to any constitutional constraints upon them (as the 'probable cause' criterion is for the US), States are free to make whatever extradition arrangements appear useful to them. Certainly, the British Government's position that the 1972 Treaty did not embody identical reciprocity is correct, as is its concession that the 2003 does not achieve it either. However, the measure of the difference does not correspond to the Government's account of it. Under the 1972 Treaty, there were different *evidential* standards applicable to extradition decisions in one direction or the other. The difference now is between legal categories—evidence still for UK requests under the 1972 Treaty but 'information' for US requests under the 2003 Treaty. The Government allows that this has improved the position of the US (which, in the Government's eyes, was at a disadvantage vis-à-vis the UK under the 1972 Treaty). Defendants are bound to see the issue as far less favourable to them because 'information' is not subject to the same challenge or contradiction in UK courts—the *Raisi* case, the last significant decision under the old dispensation, is a salutary demonstration about what the difference can mean.

[44] See P Binning, 'Shouldn't justice begin at home?' (27 Oct 2006) New Law Journal 1625.

[45] HC Hansard, Vol 450, c 1393 (24 Oct 2006) (Ms Ryan).

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The complaints that the treaty was intended to deal with suspected terrorists only is misconceived. Indeed, it might be said that it is precisely in terrorist cases that concerns are greatest. 'Ordinary, decent criminals' will go before the ordinary US criminal courts and benefit from the constitutional protections available to defendants in the criminal process—claims that these are the equivalent of the protections afforded by the ECHR for those peremptorily returned within Europe are not far from the mark. However, for terrorist suspects, there is the shadow of Guantánamo over all such persons.[46] The constitutional protections found by the Supreme Court are not all-embracing and the US has introduced new rules to dilute protection against confinement and ill-treatment and lack of process found by the courts to exist under legislation or treaties.

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[46] The Minister said that if anyone extradited to the US was sent to Guanténamo, it would be in breach of the defendant's human rights (and possibly any assurances obtained from the US government as a condition for return) and British courts would refuse further extraditions, HC Hansard, Vol 450, c 1396–7 (24 Oct 2006) (Ms Ryan).

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