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Testimony on Ratification of the Proposed Extradition Treaty Between the United States and the United Kingdom (31 March 2003) Treaty Doc 108-23

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Mr. Chairman, Ranking Member Biden, and other members of the Committee:

In the brief time that we have, I would like to address two concerns that have been voiced with respect to the lawfulness of the proposed US-UK Extradition Treaty.[1]

It has been suggested: first, that the treaty violates rights that are protected under the International Covenant on Civil and Political Rights ("ICCPR");[2] and second, that the treaty violates the prohibition against the retroactive application of criminal laws.[3]

It is suggested that the treaty is unlawful under the International Covenant on Civil and Political Rights. For example, Professor Boyle's March 4, 2004 letter to Senators Lugar and Biden states that the proposed extradition treaty would violate nineteen specified provisions of the ICCPR.[4] How or in what ways the new treaty would violate those provisions is not addressed in the letter.

The May 4, 2004 letter does not raise the complex threshold question of which ICCPR provisions obligate which state or states in the course of an international extradition. That question, obviously, would need to be answered before determining whether the treaty would violate any US obligations under the ICCPR. For today, I will only note that critical issue in passing. In order to address fully the substantive concerns that have been raised, I will proceed *as if* each of the nineteen ICCPR provisions cited were in fact relevant to US obligations under the ICCPR in the context of international extradition. It appears to me that, even if we were to assume *arguendo* that the nineteen cited provisions do apply, the treaty would not be unlawful under the ICCPR. My analysis is as follows.

Five of the nineteen ICCPR provisions purportedly violated by the treaty concern the freedoms of religion, opinion, expression, assembly, and association[5] – rights also

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[1] Extradition Treaty Between the United States and the United Kingdom , 31 March 2003 (Treaty Doc 108-23).
[2] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI) of 16 Dec. 1966 (hereinafter "ICCPR").
[3] *See, e.g.*, ICCPR, *supra* note 2, art. 15; U.S. Constitution, art. 1, sec. 9 (ex post facto clause).
[4] Letter from Prof. Francis Boyle to Senators Lugar and Biden, 3/4/04 (on file with author).
[5] ICCPR, *supra* note 2, arts. 18, 19, 21, 22.

protected under the First Amendment to the U.S. Constitution. Nothing in the proposed treaty threatens or impinges upon the peaceful exercise of those civil and political rights. To the contrary, the treaty provides explicit protection of those rights in the context of extradition. Article 4 states that "[e]xtradition shall not be granted if the offense for which extradition is requested is a political offense." The treaty thereby prohibits extradition for political crimes such as treason or sedition. Article 5 of the treaty provides further protection of those rights by requiring that "extradition shall not be granted if the competent authority of the requested state determines that the result was politically motivated."

Even while providing those protections for the peaceful exercise of civil and political rights, the treaty explicitly excludes from the definition of "political crimes" grave violent crimes and weapons offenses. Under the treaty, those crimes are recognized for their violent nature regardless of whether that violence was driven by political beliefs or otherwise. Fully in accordance with the ICCPR and other multilateral conventions, the US-UK Extradition Treaty does not accord to alleged perpetrators of serious violent crimes the protections afforded to those accused of political crimes that are a peaceful, if forceful, exercise of civil and political rights. As the ICCPR states: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein. . . ."[6] Similarly, under the multilateral conventions on hijacking and other crimes on aircraft,[7] hostage-taking,[8] and other violent crimes that typically are committed for political purposes, the covered crimes are subject to prosecution "without exception whatsoever" and are not considered political offenses. In the same vein, the UN General Assembly in its 1986 resolution asks states to "cooperate in combating terrorism through the apprehension and prosecution or extradition of terrorists, and the conclusion of treaties regarding the extradition or prosecution of

[6] ICCPR, *supra* note 2, art. 5.
[7] Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974, U.N.T.S. 177.
[8] International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11, 081, 1316 U.N.T.S. 205.

terrorists."[9] The treaty before you thus does not violate protected civil or political rights by excluding crimes of the gravest violence from the political offense classification.

Also among the nineteen ICCPR provisions that this treaty purportedly would violate are the provisions articulating a set of rights protecting criminal suspects and defendants.[10] Extradition proceedings, of course, are not criminal proceedings. So the rights applicable to criminal proceedings do not apply to this extradition treaty.

If we were, nevertheless, to entertain an analogy between extradition proceedings and criminal proceedings, it is not apparent how the treaty would violate the rights to a speedy, fair, and public trial hearing, to a presumption of innocence, or to freedom from arbitrary arrest.[11] The treaty and the U.S. law governing extradition[12] provide multiple safeguards going to due process, sufficiency of the evidence, authentic documentation, and the like. To foster the efficacy of those safeguards, habeas corpus review is available to detainees pending extradition.[13] For these reasons, if the rights applicable to criminal proceedings *were* applicable to this treaty – which they are not – the treaty would satisfy them.

The availability of habeas review satisfies another of the nineteen ICCPR provisions cited as being violated by the treaty. This provision articulates the right "to take proceedings before a court [to] decide without delay the lawfulness of [one's] detention . . . ."[14] Habeas review, clearly, is precisely what is required.

The list of nineteen also includes an ICCPR provision that recommends a "general rule" permitting pre-trial release "subject to guarantees to appear for trial."[15] Again, an extradition is not a criminal trial and so this ICCPR provision is, in fact, inapplicable.

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[9] G.A. Res. 61, 40 U.N. GAOR Supp. No. 53 (1986).
[10] ICCPR, *supra* note 2, arts. 9, 10, 14, 15.
[11] These rights appear in ICCPR, *supra* note 2, arts. 9, 14.
[12] *See* 18 U.S.C. Sec. 3181 et seq.
[13] *See* RESTATEMENT OF THE LAW 3d, THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Sec. 478, Comment C; i*d.* at Reporters' Note 2 (1987).
[14] ICCPR, *supra* note 2, art. 9(4).
[15] ICCPR, *supra* note 2, art. 9(3).

Nevertheless, it is worth noting that U.S. courts can and sometimes do grant release on bail pending extradition hearings. Indeed, the U.S. Supreme Court has specifically upheld the courts' authority to do so.[16]

It also has been asserted that, in violation of the ICCPR, this treaty would criminalize conduct retroactively. This brings me to the second issue that I will address: retroactive criminalization. It is claimed that the treaty would violate the rule against retroactive criminalization in three separate ways.

The ICCPR provision on retroactivity states that, "[n]o one shall be held guilty of any criminal offense . . . which did not constitute a crime at the time when it was committed."[17] The principal is well known and is embodied, of course, in the ex post facto clause of the U.S. Constitution.[18]

It is claimed that articles 2, 6 and 22 of the proposed treaty each violate this rule against retroactivity in criminal law. In fact, I believe, none of those provisions violates the retroactivity rule.

Article 2(4) of the treaty governs cases in which the substantive elements of a crime meet the dual criminality standard but the jurisdictional elements differ in that the law of the requesting state provides for extraterritorial jurisdiction over that crime while the law of the requested state does not. Article 2(4) provides that, under these circumstances, the requested state may, at its discretion, grant extradition.

It is asserted that this provision permits retroactive criminalization. The assertion is not accompanied by a fully articulated argument. It seems, though, that the outlines of the argument are as follows.

[16] Wright v. Henkel, 190 U.S. 40, 63 (1903).
[17] ICCPR, *supra* note 2, art. 15.
[18] U.S. Constitution, *supra* note 3, art. 1, sec. 9.

First, the argument is necessarily premised on the proposition that jurisdictional differences defeat dual criminality. That premise is inaccurate in many or most cases. States vary in their treatment of jurisdictional differences in evaluating dual criminality. The practice of the United States has tended to consider the dual-criminality requirement satisfied notwithstanding differences in the scope of jurisdiction exercised over the crime by the respective states. The paragraph preceding article 2(4) (article 2(3)) is typical of U.S. treaties on this issue. Article 2(3)(b) provides that an offense shall be extraditable "whether or not the offense is one for which United States federal 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."

In the domestic context as well, U.S. law typically treats jurisdictional provisions very differently from the other elements of a crime. Mens rea requirements provide a good example. U.S. courts have frequently held that the mens rea (mental state) requirement for conviction of a given crime (i.e., negligence, recklessness, knowledge or purpose) applies to all of the elements of a crime except the jurisdictional elements. Those are frequently described as "jurisdictional only."[19]

Notwithstanding its flawed premise, the retroactivity argument concerning art. 2(4) goes on from here. It appears to reason, implicitly, that if, because of jurisdictional differences in the two states' statutes on the crime, the requested state would not have jurisdiction to prosecute but the requesting state would, then extradition for that crime retroactively creates criminal liability for that crime in the requested state.

That reasoning is flawed. It conflates the dual-criminality requirement with the non-retroactivity requirement. It does so by, first, assuming that dual-criminality is not met if there are jurisdictional differences in the two states' provisions and then by further assuming that, if dual-criminality is not met, then extradition constitutes retroactive

[19] *See* Wayne R. LaFave, Vol. 1 SUBSTANTIVE CRIMINAL LAW, Sec. 4.1(b); *id.*at Sec. 5.1(b) n. 13 (2d ed. 2003).

criminalization in the requested state. .Neither assumption is correct. Regardless of differing jurisdictional scope, and regardless of whether dual criminality is met or not, under article 2(4) of the treaty, the alleged perpetrator is held liable only if he committed the conduct while in the jurisdiction in which that conduct constituted the crime at that time. As long as that is so in the requesting state, extradition by the requested state does not retroactively criminalize the conduct. The requested state is not prosecuting and has, therefore, not imposed any criminal liability at all. The requesting state is prosecuting based on criminal provisions that were in place at the time of the conduct. Neither state violates the retroactivity rule.

It is claimed that article 6 of the treaty constitutes yet another violation of the rule against retroactive criminalization. Article 6 reads: "The decision by the requested state whether to grant the request for extradition shall be made without regard to any statute of limitations in either State." Article 6 criminalizes nothing, retroactively or prospectively. As a matter of fact, Article 6 does not abolish the operation of the applicable statutes of limitations; it merely leaves to the prosecuting state the application of the statute of limitations required under its own laws. But even if article 6 did abolish a statute of limitations, it still would not violate the prohibition against criminalizing conduct that did not constitute a criminal offense at the time the conducted occurred.

Article 22 of the treaty states: "This Treaty shall apply to offenses committed before as well as after the date it enters into force." This article too is asserted to violate the rule against retroactive criminalization. But Article 22, like Article 6, criminalizes nothing, retrospectively or prospectively. Article 22 concerns the framework governing extradition for crimes that constituted crimes at the time of their commission. Article 22 in no way conflicts with the rule against retroactive criminalization.

In sum, no article of the new treaty violates the rule against retroactive criminalization articulated in the ICCPR and in the U.S. Constitution. And no article of the treaty violates the other rights protected by the ICCPR that have come under scrutiny in this context.

I thank for the opportunity to address these matters and welcome your questions.