

U.S. Department of State

**Fact Sheet**

Bureau of European and Eurasian Affairs  
Washington, DC  
August 3, 2004

## **U.S.-U.K. Extradition Treaty**

The U.S.-U.K. Extradition Treaty (Treaty No. 108-23) was transmitted by the President to the U.S. Senate Committee on Foreign Relations in April 2004. Once ratified, the Treaty will replace the 1972 Extradition Treaty and the 1985 Supplementary Treaty. This new Treaty seeks to modernize and streamline the extradition relationship between the two States Parties. The new Treaty's provisions are summarized below. These summaries also provide responses to concerns that have been expressed about the new Treaty. This paper concludes with a discussion of how the Treaty relates to other international obligations of each State Party.

### **Treaty Provisions**

#### Article 1

*Obligation to Extradite.* Obligates each State to extradite to the other, pursuant to the provisions of the Treaty, persons sought by the authorities in the Requesting State for trial or punishment for extraditable offenses.

#### Article 2

*Extraditable Offenses.* Article 2(1) defines an offense as an extraditable offense if the conduct on which the offense is based is punishable under the laws in both States by deprivation of liberty for a period of one year or more or by a more severe penalty. Use of a pure "dual criminality" clause, rather than categories of offenses listed in the Treaty plus other offenses that are listed in relevant U.K. extradition law and are considered felonies under U.S. law, as in the 1972 Extradition Treaty, obviates the need to renegotiate or supplement the Treaty as additional offenses become punishable under the laws in both States. Under the 1972 Extradition Treaty, extradition is to be granted for offenses contained in an annex to the Treaty. In addition, an offense is an extraditable offense if the offense is defined as extraditable under U.K. law and as a felony under U.S. law, and if the offense is punishable by imprisonment or other form of detention for more than one year or by the death penalty. As the old Treaty does, Article 2(2) of the new Treaty further defines an extraditable offense as including 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 described in paragraph 1 of Article 2.

Regarding extraditable offenses, additional flexibility is provided by Article 2(3), which provides that an offense shall be an extraditable offense (a) whether or not the laws in the Requesting and Requested States place the offense within the same category of offenses or describe the offense by the same terminology; or (b) 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. Regarding offenses committed outside the territory of the Requesting State, Article 2(4) provides that 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 other requirements of the Treaty are met.

Finally, Article 2(5) provides that if extradition is granted for an extraditable offense, it may also be granted for any other offense specified in the request if the latter offense is punishable by less than one year's deprivation of liberty, provided that all other requirements for extradition are met.

Some critics have argued that the Treaty could interfere with the ability of Americans to exercise their First Amendment constitutional rights. In fact, a suspect can only be extradited if the offense for which he is sought by the United Kingdom is an offense punishable by one year or more (or by a more severe penalty) under United States law. Assuming the hypothetical activity is protected by the First Amendment, the U.S. would be unable to extradite a fugitive sought by the U.K. because the dual criminality requirement of the Treaty would not be met.

### Article 3

*Nationality.* Article 3 provides that extradition shall not be refused based on the nationality of the person sought.

### Article 4

*Political and Military Offenses.* This article sets forth bases for the denial of extradition. As is customary in extradition treaties, paragraph 1 provides that extradition shall not be granted if the offense for which extradition is requested constitutes a political offense.

Article 4(2) specifies seven categories of offenses that shall not be considered to be political offenses: (a) an offense for which both Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; (b) a murder or other violent crime against the person of a Head of State of one of the Parties, or of a member of the Head of State's family; (c) murder, manslaughter, malicious wounding, or inflicting grievous bodily harm; (d) an offense involving kidnapping, abduction, or any form of unlawful detention, including the taking of a hostage; (e) placing or using, or threatening the placement or use of, an explosive, incendiary, or destructive device or firearm capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage; (f) possession of an explosive, incendiary, or destructive device capable of endangering life, of causing grievous bodily harm, or of causing substantial property damage; and (g) 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 of the foregoing offenses.

Article 4(3) requires that, notwithstanding the terms of paragraph 2, extradition shall not be granted if the competent authority of the Requested State determines that the request is politically motivated. In the United States, the executive branch is the competent authority for the purposes of the Article. Under the 1985 Supplementary Treaty, the judicial branch has the authority to consider whether an extradition request is motivated by a desire to punish the person sought on account of race, religion, nationality, or political opinions, or if the person sought would be subject to unfair treatment in U.K. courts or prisons after extradition. Like all other modern extradition treaties, the new Treaty grants the executive branch rather than the judiciary the authority to determine whether a request is politically motivated.

Article 4(4) provides that the competent authority of the Requested State may also refuse extradition for offenses under military law that are not offenses under ordinary criminal law (e.g., desertion). In the United States, the executive branch is the competent authority for the purposes of the Article.

Critics have claimed the new Treaty threatens the due process rights of Americans by eliminating the role of the courts in reviewing whether extradition should be denied because the offense for which the fugitive is sought is a political offense. This criticism confuses the "political offense" and "political motivation" provisions in that Treaty. Under the new Treaty, as under the existing treaty, U.S. courts will continue to assess whether an offense for which extradition has been requested is a *political offense*. This inquiry is undertaken when determining whether the offense for which a Requesting State has sought a fugitive's extradition is an extraditable offense. In contrast, under the new Treaty, the Executive Branch would determine whether an extradition request is *politically motivated*.

This change makes the new treaty consistent with U.S. practice with every other country around the world with which we have an extradition treaty.

#### Article 5

*Prior Prosecution.* Article 5(1) provides that extradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which extradition is requested. Additionally, under paragraph 2, the Requested State may refuse extradition when the person sought has been convicted or acquitted in a third state in respect of the conduct for which extradition is sought. Article 5(3) provides that extradition shall not be precluded by the fact that the competent authorities of the Requested State: (a) have decided not to prosecute the person sought for the acts for which extradition is requested; (b) have decided to discontinue any criminal proceedings that have been instituted against the person sought for those acts; or (c) are still investigating the person sought for the same acts for which extradition is sought.

#### Article 6

*Statute of Limitations.* Article 6 provides that 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.

Some critics have suggested that the language of this provision effectively eliminates any statute of limitations. This is untrue; the new Treaty does *not* eliminate the application of the statute of limitations, for either the U.S. or the U.K. It does reserve determination on the issue of the statute of limitations to the courts of the country where the criminal charges are pending. There is nothing novel about this provision, which is found in several of our other modern treaties: it states that the decision by the Requested State whether to grant the request shall be made without regard to the statute of limitations in either State. See, for example, U.S. extradition treaties with Sri Lanka (Article 6); Cyprus (Article 7); and the Eastern Caribbean States (Article 8).

A person extradited from the U.S. to the U.K. or to any of our other treaty partners can always seek to have his or her prosecution dismissed on the basis that it is time-barred in the state in which he or she is being tried. The treaty does not change this right in any respect.

This kind of statute of limitations provision makes good sense for U.S. law enforcement officials. The U.S. has experienced difficulties with a provision in certain of our other extradition treaties that permits the Requested State's courts to consider the Requesting State's law regarding statutes of limitations. It generally is very difficult for foreign courts to accurately analyze and apply another country's statutes of limitations.

#### Article 7

*Capital Punishment.* Under Article 7, when an offense for which extradition is sought is punishable by death under the laws in the Requesting State but not under the laws in the Requested State, the executive authority in the Requested State may refuse extradition unless the Requesting State provides an assurance that the death penalty will not be imposed or, if imposed, will not be carried out. The United States has agreed to similar formulations in other modern extradition treaties (e.g., those with France, Poland, Argentina, the Republic of Korea, India, and Peru) as well as in the current Treaty.

#### Article 8

*Extradition Procedures and Required Documents.* Article 8 establishes the procedures and describes the documents that are required to support a request for extradition. All requests for extradition shall be submitted through the diplomatic channel. Among other requirements, Article 8(3) provides that a request for the extradition of a person sought for prosecution must be supported by: (a) a copy of the warrant or order of arrest issued by a judge or other competent authority; (b) a copy of the charging document, if any; and (c) for requests to the United States, such information as would provide a reasonable basis to believe that the person sought committed the offense for which extradition is sought. The Treaty will not change the evidentiary burden required for extradition requests to the United States. However, under the new Treaty, the evidentiary requirements for extradition from the United Kingdom are lowered from a "prima facie" standard to what in practice will constitute a U.S. probable cause standard.

#### Article 9

*Authentication of Documents.* Article 9 establishes the procedures under which documents submitted to support an extradition request shall be deemed to be authentic and shall be received in evidence without further proof.

#### Article 10

*Additional Information.* Under this Article, if the Requested State requires additional information to enable a decision to be taken on the request for extradition, the Requesting State shall respond to the request within such time as the Requested State requires.

#### Article 11

*Translation.* Article 11 provides that all documents submitted under the Treaty by the Requesting State shall be in English or accompanied by a translation into English.

#### Article 12

*Provisional Arrest.* Article 12 sets forth procedures and describes the information that is required for the provisional arrest and detention of the person sought, in an urgent situation, pending presentation of the formal request for extradition. In particular, Article 12(4) provides that if the Requested State's executive authority has not received the extradition request and supporting documents required by Article 8 within sixty (60) days from the date of provisional arrest, the person may be discharged from custody. Article 12(5) explicitly provides that such a discharge from custody shall not prejudice the subsequent re-arrest and extradition of that person if the extradition request and supporting documents are delivered at a later date.

Some individuals have expressed concern about this article. However, provisional arrest under the new Treaty is no different than the analogous provision in the existing Treaty or in any of our

other extradition treaties; all contemplate the use of "provisional arrest" for no longer than 60 days, so that the Requesting State can prepare a full extradition package.

Further, this provision is consistent with the U.S. Constitution. A foreign country seeking a fugitive's arrest must, through its documentation, demonstrate probable cause that the fugitive has committed the offense for which he is sought before a U.S. court may issue an arrest warrant for that fugitive.

#### Article 13

*Decision and Surrender.* Article 13 specifies the procedures governing a decision on the extradition request and the surrender of the person sought. It requires the Requested State to promptly notify the Requesting State of its decision regarding a request. Such notification should be transmitted through the diplomatic channel directly to the competent authority designated by the Requesting State to receive such notification. If the request is denied in whole or in part, the Requested State must provide reasons for the denial and, upon request, copies of pertinent judicial decisions. If extradition is granted, the States shall agree on the time and place for the surrender of the person sought. If the person sought is not removed from the territory of the Requested State within the time period prescribed by the law of that State, the person may be discharged from custody, and the Requested State, in its discretion, may subsequently refuse extradition for the same offense(s).

#### Article 14

*Temporary and Deferred Surrender.* Article 14(1) provides that if a person whose extradition is sought is being proceeded against or is serving a sentence in the Requested State, the Requested State may temporarily surrender the person to the Requesting State for the purpose of prosecution. If the Requested State requests, the Requesting State shall keep the person so surrendered in custody and shall return that person to the Requested State after the conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement of the States. Alternatively, under Article 14(2), the Requested State may postpone extradition proceedings against a person who is being prosecuted or who is serving a sentence in that State. The postponement may continue until the prosecution of the person sought has been concluded or until such person has served any sentence imposed.

#### Article 15

*Requests for Extradition Made by Several States.* Article 15 provides a non-exclusive list of factors to be considered by the executive authority of the Requested State in determining to which State, if any, to surrender a person whose extradition is sought by more than one State.

#### Article 16

*Seizure and Surrender of Property.* Article 16 provides that the Requested State may, to the extent permitted under its law, seize and surrender to the Requesting State all items and assets, including proceeds, that are connected with the offense in respect of which extradition is granted. Such items and assets may be surrendered even if the extradition cannot be carried out due to the death, disappearance, or escape of the person sought. The Requested State may condition the surrender of the items upon satisfactory assurances that the property will be returned to the Requested State as soon as practicable. The Requested State may also defer the surrender of such items if they are needed as evidence in the Requested State.

Critics have suggested this article would permit the unconstitutional seizure and transfer of assets to the United Kingdom. In fact, there is nothing novel about this provision; it refers to the

Requested State's ability to seize items and assets that are connected with the offense for which the fugitive is sought and transfer them to the Requesting State. This same concept is contained in the existing Treaty and virtually all U.S. extradition treaties. It is useful to law enforcement officials in some cases in securing evidence related to the offense for which the fugitive is sought.

#### Article 17

*Waiver of Extradition.* Article 17 permits surrender as expeditiously as possible and without further proceedings if the person sought waives extradition and agrees to be surrendered to the Requesting State.

#### Article 18

*Rule of Specialty.* Paragraph 1 provides, subject to specific exceptions set forth in paragraph 3, that a person extradited under the Treaty may not be detained, tried, or punished in the Requesting State except for: (a) Any offense for which extradition was granted, or a differently denominated offense based on the same facts as the offense for which extradition was granted, provided such offense is extraditable, or is a lesser included offense; (b) any offense committed after the extradition of the person; or (c) any offense for which the executive authority of the Requested State waives the rule of specialty and thereby consents to the person's detention, trial, or punishment. The treaty currently in force does not contain such a provision for waiver of the rule of specialty, and the preferred practice of States is not to waive the rule of specialty unless there is a treaty provision authorizing them to do so.

Article 18(2) provides that a person extradited under the Treaty may not be the subject of onward extradition or surrender for any offense committed prior to the extradition to the Requesting State unless the Requested State consents. The Treaty's use of the term "surrender" (the operable term in the Rome Statute of the International Criminal Court) makes explicit that the United Kingdom will not surrender to the ICC any person extradited by the United States. The United Kingdom has recorded in a separate letter its understanding that the Treaty continues the protection implicit in the current treaty against surrender to the ICC of fugitives extradited by the United States and states in its letter that it will contest any request from the ICC for such surrender as being inconsistent with Article 98(2) of the Rome Statute.

Under Article 18(3), these restrictions shall not prevent the detention, trial, or punishment of an extradited person, or the extradition of a person to a third State, if the extradited person leaves the territory of the Requesting State after extradition and voluntarily returns to it or fails to leave the territory of the Requesting State within twenty (20) days of being free to do so.

Some critics have suggested that this article eliminates, in all but name, the rule of specialty. In fact, the new Treaty's rule of specialty provisions are substantially the same as the parallel provision in all of our modern extradition treaties. Fugitives can only be tried for the charges for which they were extradited, absent specific consent by the State that has extradited the fugitive. See, for example, the United States's extradition treaties with Korea (Article 15); India (Article 17); and Poland (Article 19).

#### Article 19

*Transit.* Article 19 governs the transit through the territory of one State of a person being surrendered to the other State by a third State or from the other State to a third State.

#### Article 20

*Representation and Expenses.* Article 20 contains provisions on representation and expenses that are similar to those found in other modern U.S. extradition treaties. Specifically, the Requested State is required to advise, assist, and appear in court on behalf of the Requesting State in any proceedings in the courts of the Requested State arising out of a request for extradition or make all necessary arrangements for the same. The Requested State also bears all expenses incurred in that State in connection with the extradition proceedings, except that the Requesting State pays expenses related to the translation of extradition documents and the transportation of the person surrendered. Article 20(3) specifies that neither State shall make any pecuniary claim against the other State arising out of the arrest, detention, examination, or surrender of persons under the Treaty.

#### Article 21

*Consultation.* Article 21 provides that the Parties may consult with each other in connection with the processing of individual cases and in furtherance of efficient implementation of the Treaty.

#### Article 22

*Application.* Paragraph 1 makes the Treaty applicable to offenses committed before as well as after the date of entry into force. Under Article 22(2), the Treaty shall apply to the United States of America and, in relation to the United Kingdom, to Great Britain and Northern Ireland, the Channel Islands, the Isle of Man, and to any territory for whose international relations the United Kingdom is responsible and to which the Treaty has been extended by agreement of the Parties. Article 22(3) provides that the application of the Treaty to any territory in respect of which extension has been made in accordance with paragraph 2 may be terminated by either State giving six months' written notice to the other through the diplomatic channel.

Pursuant to Article 22(4), a request by the United States for the extradition of an offender who is found in any of the territories to which this Treaty applies in accordance with paragraph 2 of the Article may be made to the Governor or other competent authority of that territory. A request on the part of any of the territories to which this Treaty applies in accordance with paragraph 2 of the Article for the extradition of an offender who is found in the United States of America may be made to the Government of the United States by the Governor or other competent authority of that territory. This paragraph streamlines the extradition procedures regarding requests to and from U.K. territories, as such requests currently must go through the United Kingdom's central authority in London.

Contrary to the suggestion of some critics, there is nothing novel about this retroactivity provision. Both the existing Treaty (at Article XVI) and the new Treaty (at Article 22) permit extradition for offenses committed prior to the date of entry into force of the treaty. Indeed, this provision is contained in virtually all of our extradition treaties and is needed by the U.S. law enforcement community. See, for example, the United States's extradition treaties with Belgium (Article 20); Argentina (Article 22); and France (Article 24).

It should be noted that this provision does not in any way create criminal liability where none previously existed before and therefore raises no *ex post facto* problems. Extradition is made possible only for conduct that was criminalized at the time it was committed.

#### Article 23

*Ratification and Entry into Force.* Paragraphs 1 and 2 provide that the Treaty is subject to ratification and will enter into force upon the exchange of instruments of ratification, which is to take place as soon as possible. Article 23(3) provides that, upon entry into force of the Treaty, the Extradition Treaty signed at London on June 8, 1972, and the Supplementary Treaty signed at

Washington on June 25, 1985 (together "the prior Treaty") shall cease to have any effect as between the United States and the United Kingdom, subject to certain exceptions. The prior Treaty shall apply to any extradition proceedings in which the extradition documents have already been submitted to the courts of the Requested State at the time the Treaty enters into force, except that Article 18 of this Treaty relating to the rule of specialty shall apply to persons found extraditable under the prior Treaty. The prior Treaty shall also apply to any territory to which it has been extended in accordance with Article II of that Treaty, until such time as the provisions of this Treaty have been extended to such a territory under Article 22(2).

#### Article 24

*Termination.* Article 24 provides that either State may terminate the Treaty at any time by giving written notice to the other State through the diplomatic channel. Such termination shall be effective six months after the date of receipt of such notice.

#### **Relationship of the New U.S.-U.K. Extradition Treaty to Other International Obligations of the United States**

Certain groups have raised questions about whether the new U.S.-U.K. Extradition Treaty will place the United States in conflict with certain other of its international obligations: specifically, its obligations under the International Convention on Civil and Political Rights (the "ICCPR") and the 1967 UN Refugees Protocol.

The ICCPR entered into force in late March 1976; both the U.S. and the U.K. are parties to the Convention. Some critics have suggested that, since the U.K. has derogated from its obligations under Article 9 of the ICCPR, the U.S. would not be in compliance with its ICCPR obligations if it extradited a fugitive to the U.K. This is incorrect. Article 4 of the ICCPR specifically contemplates derogation from obligations contained in the Treaty, with the exception of certain Articles from which a State cannot derogate; Article 9 of the ICCPR is *not* one of the Articles from which no derogation is permitted.

In 1988, the U.K. formally notified other States Parties to the ICCPR that, in accordance with Article 4(3), it found it necessary to take and continue measures derogating in certain respects from the U.K.'s obligations under Article 9(3) of the ICCPR. Further, following September 11, 2001, the U.K. enacted new legislation entitled the "Anti-Terrorism, Crime, and Security Act 2001," which addresses, among other issues, detentions. This new U.K. law permits the Home Secretary to authorize the indefinite detention without charge of suspected international terrorists. In short, U.K. law regarding the detention of those suspected of involvement in international terrorism has nothing to do with extradition or the treatment of a fugitive who might be returned from the U.S. to the U.K. to face trial or sentencing or to serve a sentence in the U.K. By definition, if the U.K. is seeking extradition of a fugitive, that person already has been charged with an offense in the U.K.

A second criticism that has been made regarding the new Treaty is that it allegedly violates the asylum and non-refoulement provisions of the 1967 UN Refugees Protocol, to which the U.S. is a party. This, too, is incorrect. U.S. courts have long recognized that asylum proceedings and extradition proceedings are two distinct proceedings; in fact, U.S. courts often suspend asylum proceedings until extradition proceedings are complete. The 1951 Convention Relating to the Status of Refugees (the "UN Refugee Convention"), as well as U.S. law, provide that an individual may be excluded when there is reason to believe that the individual has committed a serious, non-political offense. Therefore, if the United States has decided to extradite to the U.K. a fugitive for whom the U.K. has made an extradition request, that individual will, by definition, be an individual reasonably suspected to have committed a serious, non-political offense.

