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Hackers Beware – The Cautionary Story of Gary McKinnon

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19/12/2008

Introduction

Gary McKinnon stands to be imminently extradited from the United Kingdom to the United States. He has been charged there with crimes relating to his gaining access to NASA and Pentagon computer systems.¹ McKinnon faces the possibility of a lengthy prison sentence, estimated between 8-10² and 70³ years in a United States high security prison. To add to the severity of this possible fate it has been stated that he has been threatened with rape in jail in the United States if imprisoned there.⁴ McKinnon faces this fate in spite of not setting foot in the United States in pursuance of his alleged crimes. All his acts were committed from the relative comfort of his then girlfriend's flat in Wood Green, North London. The only direct link between his acts and the United States are bytes of data electronically transferred over the internet from London to the United States. As a result of his actions he is sought by United States authorities. In response has fought a long legal battle against extradition starting in 2004. The judicial opposition began in Bow Street Magistrates' Court. After losing his arguments there his case was passed to the Secretary of State who then ordered his extradition. McKinnon then lost appeals in the High Court⁵ and the House of Lords,⁶ and his recent petition to the European Court of Human Rights seeking an injunction against extradition has also been refused.⁷ This article firstly describes the facts and applicable criminal and extradition law in McKinnon's case. It then examines his judicial battle against extradition. Analysis of salient facts and criticisms of the case then follow. It concludes by suggesting that, as the law stands, the long arm of United States criminal law is such that those active in cyberspace in the United Kingdom must tread very carefully indeed.

The Facts⁸

McKinnon, 42, was born in Maryhill, Glasgow and is an avid UFO conspiracy theorist, going by the codename "Solo". From London between February 2001 and March 2002 he gained access to 97 computers belonging to the United States government over the internet. He did so through extracting the identities of certain accounts and associated passwords. He then installed software called "Remotely Anywhere". This enabled further access and the ability to alter data without detection. He also installed further "hacking tools" that allowed him to scan over 73,000 United States Government computers. Amongst them were 53 Army computers

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¹ See generally Arnell, P., The Long Arm of United States Law, (2007) 37 SLT (News) 267, McArdle, D., Computer crime: computers - hacking - extradition - abuse of process, [2008] SCOLAG 130, and Singleton, S., Hacking case and extradition, *IT Law Today*, 2 September 2007.

² As estimated by McKinnon's lawyer in the House of Lords judgement, *McKinnon v Government of the USA*, [2008] UKHL 59, at para 28.

³ See *The Herald*, 7 September 2008, p 22.

⁴ *Ibid* at p 23.

⁵ *McKinnon v. Government of the USA*, [2007] EWHC 762 (Admin).

⁶ *Supra* note 2.

⁷ See Press Release 601, 28 August 2008, noted at <<http://news.bbc.co.uk/1/hi/uk/7585861.stm>>. Exceptionally, at the time of writing, the legal proceedings in McKinnon's case are set to continue. January 20 has been set as a date for a judicial review of the decision to proceed with his extradition, see *The Guardian*, 2 December 2008, cited at <http://www.guardian.co.uk/technology/2008/dec/02/mckinnon-extradition-hacker>.

⁸ The facts are narrated in the House of Lords judgement, *supra* note 2, at paras 11-16.

that controlled its Military District of Washington network and 26 Navy computers, including United States Naval Weapons Station Earle, New Jersey. He also saved data onto his own computers, including files containing account names and passwords. His actions affected the “integrity, availability and operation of programmes, systems, information and data on the computers, rendering them unreliable”.⁹ The cost of repair was said to total over \$700,000. In 2002 authorities in the United States traced McKinnon to London, and on 19 March 2002, pursuant to a request for mutual legal assistance, his computers were seized. Forensic analysis confirmed that McKinnon had indeed hacked into the United States computer systems, installed software, scanned a large number of computers and affected their integrity. Again pursuant to a request for mutual legal assistance, McKinnon was interviewed twice. He admitted carrying out a number of acts, including saving onto one United States Army computer the statement:

US foreign policy is akin to Government-sponsored terrorism these days... It was not a mistake that there was a huge security stand down on September 11 last year... I am SOLO. I will continue to disrupt at the highest levels.¹⁰

Following the investigation two United States Grand Juries issued indictments charging McKinnon with criminal offences in respect of these acts. These indictments, of the District of New Jersey 31 October 2002 and the Eastern District of Virginia, 12 November 2002, detailed the allegations and offences in American law that McKinnon was said to have committed.

The Law – Applicable Criminal Law

McKinnon has been charged with a number of offences against section 1030 of title 18 of the United States Code, entitled “Fraud and related activity in connection with computers”. Specifically, McKinnon was charged with seven counts of violating subsections (a)(5)(A)(i), (a)(5)(B)(i) and (a)(5)(B)(v) of section 1030. Under the first provision, it is an offence to knowingly cause electronic transmissions¹¹ which intentionally cause unauthorised damage to a ‘protected’ computer.¹² The second and third provisions state that it is a separate offence to knowingly cause such a transmission, intentionally access a protected computer without authorisation and thereby recklessly or otherwise cause damage which either causes a financial loss greater than \$5000 or which causes damage to governmental computer systems used for national defence, national security or administration of justice purposes. Conviction under section (a)(5)(A)(i) carries with it the risk of a fine and a period of imprisonment of up to 10 years.¹³ In the case of further charges under this section being proved the term of imprisonment increases to 20 years. In such a case, the sentences can run cumulatively.

Extradition law, as will be seen below, requires that not only are the acts criminal in the requesting state but also within a jurisdiction of the United Kingdom. This is called the double criminality requirement. In McKinnon’s case the equivalent United Kingdom offences are primarily found in the Computer Misuse Act 1990, with the additional possibility of liability arising under the Aviation and Maritime Security Act 1990. At the relevant time, the Computer Misuse Act 1990 provided for three principal offences “unauthorised access”,¹⁴ “unauthorised access with intent”¹⁵ and “unauthorised modification”.¹⁶ As of 1 October 2008,

⁹ Ibid at para 15.

¹⁰ Ibid at para 16.

¹¹ The provision refers to the transmission of a program, information, code or command.

¹² A ‘protected computer’ is defined as one used exclusively by the United States Government, by subsection (e)(2) of section 1030.

¹³ Section 1030(c)(4)(A).

¹⁴ Section 1. Colloquially known as the hacking offence.

¹⁵ Section 2.

the maximum prison sentences in England and Wales¹⁷ for these offences has been increased and the unauthorised modification offence is now known as the “unauthorised acts” offence.¹⁸ The Police and Justice Act 2006 raised the punishments in the 1990 Act such that the unauthorised access offence attracts a maximum 12 month sentence, with the other two offences attracting a maximum jail term of 10 years. The Aviation and Maritime Security Act 1990 created the offence of endangering ship navigation. This offence can be committed by a person if they seriously interfere with the operation of apparatus or equipment used for maritime navigation.¹⁹ The offence of endangering ship navigation attracts a life sentence. The double criminality requirement appears, therefore, to be satisfied in respect of all the crimes McKinnon has been charged with in the United States.

The Law – Extradition

Extradition arrangements with the United States are governed by regulation at two levels, international and national. The international instrument is the Extradition Treaty between the Government of the United Kingdom and the Government of the United States 2003 (hereinafter the Treaty).²⁰ The Treaty has only been in force between the two states since April 2007, even though the UK has been acting in accordance with its terms since the 2003 Act entered into force, 1 January 2004.²¹ It is comprised of 24 articles that stipulate the basis upon which persons are extradited between the two countries, several articles of which are of particular relevance here. Article 1 provides that both parties are under a general obligation to extradite between themselves where the terms of the agreement are met. Article 2 defines “extraditable offences”. This generally includes those offences criminal within both states and punishable by more than one year imprisonment upon conviction. Article 2(4) is of particular note, it provides that extraterritorial offences are extraditable. It states:

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 other requirements of this Treaty are met.²²

¹⁶ Section 3. The Police and Justice Act 2006 also created the new ancillary offence under section 3A of making, adapting, supplying or obtaining articles used to commit offences under the 1990 Act. Note that the section 3 offence is due to be amended once the relevant provisions of the 2006 Act come into force. The new offence will be entitled ‘Unauthorised acts with intent to impair, or with recklessness as to impairing, operation of computer, etc.’

¹⁷ By article 2(a) of the Police and Justice Act 2006 (Commencement No. 9) Order 2008 (SI 2008/2503).

¹⁸ These amendments have been in force in Scotland since 1 October 2007, by virtue of the Police and Justice Act 2006 (Commencement) (Scotland) Order 2007 (SSI 2007/434). The unauthorised acts offence is a wider offence than the preceding incarnation of the offence and is principally designed to attack activities impairing the operation of computer systems.

¹⁹ See section 12 of the 1990 Act, particularly subsections 1(b) and 2.

²⁰ 2003, No. 1, Cmnd 5821, cited at <http://www.fco.gov.uk/Files/kfile/USExtradition_210503.pdf>.

²¹ The United States Senate did not ratify the Treaty until 29 September 2006. The unequal application of the treaty was one of the main criticisms that had been levied against United Kingdom extraditions to the United States. The Treaty is now in force between the two countries with instruments of Ratification being exchanged by Home Office Minister Baroness Scotland and United States Ambassador to the United Kingdom Robert Tuttle 26 April 2007, see <<http://london.usembassy.gov/ukpapress48.html>>.

²² It is notable that only in the original hearing at Bow Street Magistrates Court was it argued that the locus of the offences, arguably being outside the United States, had an affect on the case. Subsequently it appears to have been accepted that the offences were committed within the United States.

The requisite documents to be provided and necessary procedures to be followed are specified in article 8. As will be seen below, these have engendered some criticism in that the requirements on the United States when making requests are less than upon the United Kingdom when it is seeking an individual through extradition.

Within the United Kingdom extradition is governed by the Extradition Act 2003 (the 2003 Act) which, amongst other things, gives force to the Treaty. The 2003 Act establishes two main sets of arrangements. The first, in Part 1, relates to extradition within the 27 Category 1 territories which have implemented the Council Framework Decision 13 June 2002 on the European Arrest Warrant (EAW) and surrender procedure between EU Member States.²³ Part 2 generally covers all other states, called Category 2 states, with which the United Kingdom has regular extradition dealings including the United States. Where an individual is sought from the United Kingdom, as in McKinnon's case, the requesting state must intimate this to the nominated United Kingdom "designated authority". The precise procedure and required documentation is contingent upon whether the request comes from a Category 1 or Category 2 state. Generally, the procedure is more onerous in regard to Category 2 states. It is assumed that the legal systems in those states are less akin to that of the United Kingdom than those party to the EAW scheme. Category 2 states requesting extradition are required to include with the request particulars of both the accused or convicted person and the particulars of the offence specified. Additionally, the request must normally be accompanied by *prima facie* evidence of guilt. Section 84 of the 2003 Act *inter alia* provides

If the judge is required to proceed under this section he must decide whether there is evidence which would be sufficient to make a case requiring an answer by the person if the proceedings were ... summary proceedings in respect of an offence alleged to have been committed by the person (except that for this purpose evidence from a single source shall be sufficient).

Significantly, this condition has been withdrawn in regard to extradition requests from the United States, amongst other countries.²⁴ Subsequent to a Category 2 request meeting the required formalities, and where that state is exempted from providing evidence, Bow Street Magistrates' Court in England and Wales or the Sheriff Court of Lothian and the Borders in Scotland must consider, according to the 2003 Act, whether the extradition is barred on the basis the rule against double jeopardy, the passage of time, hostage taking considerations, political motivations and human rights grounds. If no bar is held to exist the case is passed to the Secretary of State or the Scottish Ministers to make the final extradition decision.²⁵ The Secretary of State or Scottish Ministers are then obliged to consider a number of factors which, if satisfied, prevent the extradition going ahead including the death penalty and speciality.²⁶ If none are met the extradition must proceed. As noted above, a double criminality requirement applies to Category 2 extraditions with the definition of "extradition offence" stipulating that the act alleged by the requesting state is also criminal in the United Kingdom.²⁷ Therefore all extraditions from the United Kingdom must be made in relation to activities that would also be criminal in at least one of the jurisdictions within it.

²³ As per, the Extradition Act 2003 (Designation of Part 1 Territories) Order 2003 (SI 2003/3333). Note that the list now also includes Gibraltar, by virtue of the Extradition Act 2003 (Amendment to Designations) Order 2007 (SI 2007/2238).

²⁴ Under s 84(7) of the 2003 Act. This has been done by s 3(2) of SI 2003/3334. The Russian Federation, Serbia and Turkey are amongst those states treated similarly.

²⁵ By ss 79 and 87 of the 2003 Act.

²⁶ S 93 of the 2003 Act. Speciality generally provides that an extraditee is tried for the offence stipulated in the extradition request and that alone.

²⁷ Ss 137 and 138 of the 2003 Act. The former chief executive officer of Morgan Crucible, Ian Norris, successfully objected to extradition to the United States on this point (obstruction of justice charges remain outstanding), Norris v Government of the United States and others, [2008] UKHL 16.

The Case

McKinnon's fight against extradition is long and complex. It formally commenced with a request for his extradition from the United States dated 7 October 2004. Informally, but importantly, the extradition request was preceded by three things, United Kingdom assistance with the United States investigation, the returning of two indictments by American Grand Juries and detailed plea bargaining negotiations.²⁸ Whilst all these are relevant, the latter is of particular significance – forming the basis of the appeal to the House of Lords – and will be discussed below. The first judicial decision in McKinnon's case was made on 10 May 2006 in Bow Street Magistrates' Court where District Judge Nicholas Evans held that the extradition process should continue and the United States request be passed to the Secretary of State. There were six distinct arguments made on behalf of McKinnon in front of the Divisional Court.²⁹ These were that the designation of the United States as a territory that need not provide *prima facie* evidence was unlawful and *ultra vires*, that McKinnon's conduct did not meet the definition of an extradition offence on account of the locus of his acts, that his extradition was barred because he was being prosecuted on account of his political beliefs, that his extradition was in breach of human rights, that his extradition entailed an abuse of process and that the United States practice disregarded the speciality principle of extradition. All these arguments were rejected.³⁰ The District Judge then, pursuant to the 2003 Act, sent the case to the Secretary of State for decision who, on 4 July 2006, granted McKinnon's extradition.

The next stage in McKinnon's legal battle entailed an unsuccessful appeal to the High Court of the Divisional Court and Secretary of State decisions.³¹ Four separate arguments were made by McKinnon before the High Court. It was averred that his extradition was barred because he was being prosecuted on account of his nationality or political opinions or that if extradited he might be prejudiced at his trial or punished for these reasons.³² The passage of time between the commission of the alleged offences and first extradition hearing and certain human rights grounds were the bases of the third and fourth arguments. Finally, and this was the issue that the House of Lords later considered, it was argued that his extradition would result in an abuse of process in that *inter alia* McKinnon had declined a plea bargain. The High Court dismissed each argument in turn. In regard to the first the Court held that the suggestion that McKinnon would suffer prejudice on account of his political opinions by an American judge or jury was entirely without merit. The particular facts surrounding the case led the Court to hold that the passage of time did not bar extradition. The period of five years and three months was not excessive, the Court held, on account of the complexity of the case. In regard to human rights, McKinnon argued that his article 8 Convention rights would be unlawfully infringed. The Court held that there were not the "exceptional" circumstances necessary in his case to hold human rights grounds as a bar to the extradition. Finally, the Court failed to find an abuse of process in the circumstances of the offer of a plea bargain. Like in the House of Lords decision a Canadian precedent where an abuse of process was found in a plea bargaining case, *USA v Cobb*³³, was distinguished on its facts.

The last stage of McKinnon's United Kingdom-based judicial fight against extradition was his appeal to the House of Lords. One question formed the basis of the appeal, whether:

²⁸ As noted in the House of Lords decision, *supra* note 2 at para 5.

²⁹ These are summarised in the High Court decision, *supra* note 5 at para 10.

³⁰ As will be seen, most of these arguments were made again later in one or other stage of the judicial process, and as such will be discussed below.

³¹ *Supra* note 25.

³² Under ss 79(1) (b), 81(a) and 81(b) of the 2003 Act.

³³ [2001] 1 Supreme Court Reports 587.

It was an abuse of process of extradition proceedings, such that the proceedings be stayed, and/or an unjustified interference with the defendants human rights, for the requesting state to engage in plea bargaining, including a threat to the defendant that, unless he agrees to be extradited, reparation to the United Kingdom to serve any sentence imposed, in the requesting state will not be supported by the prosecuting authorities in the requesting state.³⁴

On 30 July 2008 the House of Lords unanimously dismissed McKinnon's appeal. It firstly held that his reference to the human rights protected by articles 5 and 6 of the European Convention added nothing to the abuse of process claim. The Court then focused on McKinnon's core argument which was that the plea bargain offer by the United States authorities entailed such a disparity in possible sentence (3-4 years with only 6 months to be served in a low security United States prison as against 8-10 years in a United States high security prison) that "disproportionate" and "impermissible pressure" to surrender his legal rights was placed upon him.³⁵ In support of this argument McKinnon relied on *Cobb*.³⁶ In that case the Supreme Court of Canada upheld an abuse of process argument where a United States trial judge had said if those concerned do not co-operate with, and surrender to, Pennsylvanian authorities then "... as far as I am concerned they are going to get the absolute maximum jail sentence that the law permits me to give".³⁷ Further, a prosecuting attorney had stated that those who do not co-operate could "... wind up serving a great deal longer sentence under much more stringent conditions" which he said to mean that the accused is "... going to be the boyfriend of a very bad man if you wait out your extradition".³⁸ McKinnon's reliance on *Cobb* was to no avail, as the case was distinguished by the House of Lords. It held the differences between his circumstances and those in *Cobb* were "striking".³⁹ Interestingly, Lord Brown in the leading judgment noted that the difference between the United States and English system in regard to pre-trial negotiations and guilty pleas is "... not perhaps so stark as the appellant's argument suggests".⁴⁰ He then notes that in England there is a clearly recognised discount for a plea of guilty and that it is "accepted practice... for the parties to hold off-the-record discussions whereby the prosecutor will accept pleas of guilty to lesser charges... in return for a defendant's timely guilty plea".⁴¹

The final judicial stage of McKinnon's opposition to extradition took place in Strasbourg at the European Court of Human Rights (ECtHR). Interestingly the substantive arguments put forward were not akin to those made in the House of Lords to the effect that the plea bargaining system entailed a breach of his human rights. Instead novel arguments were made that he would suffer torture or inhuman or degrading treatment or punishment due to the conditions in which he would be detained if convicted in the United States. This argument, at least in part, seems to be based on suffering from a form of autism, Aspergers Syndrome. At the ECtHR McKinnon's lawyers firstly requested and were granted under article 39 of the European Convention of Human Rights interim relief to the effect that McKinnon not be extradited until the ECtHR heard the arguments. The ECtHR then considered his request for interim measures on 28 August and refused them.⁴² McKinnon's judicial options came to an end with this decision. He has, however, started a last ditched effort by way of a plea to the Home Secretary, Jacqui Smith. This is not a further attempt to block his extradition. As noted

³⁴ Supra note 2 at para 7.

³⁵ Ibid at para 28.

³⁶ Supra note 33.

³⁷ Ibid at 593, cited in *US v McKinnon*, supra note 2 at para 30.

³⁸ Ibid.

³⁹ Supra note 2 at para 39.

⁴⁰ Ibid at para 34.

⁴¹ Ibid.

⁴² Supra note 7.

above, political intervention in the extradition process is now not possible.⁴³ It is instead an attempt to ensure that McKinnon is either tried in the United Kingdom, or alternatively that he will be repatriated back to the United Kingdom to serve any sentence if convicted. These pleas appear to be based on McKinnon's particular medical condition.⁴⁴

Analysis

Analysis of McKinnon's case history, present predicament and likely future gives rise to a number of facts, or "lessons", that deserve emphasis. They also reinforce a number of criticisms that can and have been made of extradition law and practice. The first main and obvious lesson is that being physically remote from the United States is almost immaterial when it comes to being charged there with a criminal offence. Indeed, McKinnon's case is, in this regard, just the latest instance of such a "long-arm" prosecution. Other recent cases include that of David Calder⁴⁵, Brian and Kerry-Anne Howes⁴⁶ and the NatWest Three.⁴⁷ In each of these cases the accused (or in the case of the NatWest Three convicted) person(s) acted in the United Kingdom yet "committed" their offences in the United States. The extension or extraterritorial application of United States criminal law, it seems, has never been so pronounced and in regard to the United Kingdom, effective. In regard to the former, the more marked operation of American law, there has been a heightened degree of prosecutorial vigour in the United States in the recent past. This can in part be understood by the relatively politicised role of certain criminal prosecutors there. As it has been noted "A US federal prosecutor is a political appointment; it's about how many scalps they can claim".⁴⁸ Certainly in high profile cases, such as the NatWest Three - being connected with the demise of Enron, and McKinnon - with the integrity of seemingly vital computer systems being breached, the apprehension and conviction of a person or persons involved or responsible could result in the prosecutor responsible gaining not inconsiderable political kudos. Regardless of the particular motive behind United States prosecution it is clear that the locus of an accused and his physical acts provides no barrier to future American prosecution. The increased effectiveness of United States "long-arm" prosecutions can be largely attributed to the 2003 Act. As seen above, the possibility of political factors affecting United Kingdom extradition decisions has been removed - the residual discretion once held by the Home Secretary exists no longer. This, along with the removal of the requirement that a *prima facie* case be made out by United States requesting authorities has, to some extent, streamlined and expedited extradition proceedings. However, again as noted above, McKinnon's judicial saga, commencing with the formal extradition request, has persisted for over four years.

A second "lesson" to be taken or learnt from McKinnon's case is in regard to the disparity of likely prison sentences in the United States and the United Kingdom for those convicted of similar offences. Here sentencing practice indicates that the United States imposes sentences of a considerably longer duration than those for similar offences in the United Kingdom. That noted, the stated terms of the individual statutory offences relevant in McKinnon's case in the United Kingdom and the United States are of equivalent duration. The difference between the two states appears to be in regard to the cumulative nature of the sentences. As was seen

⁴³ Under the previous regime, governed in large part by the Extradition Act 1989, political discretion existed at the end of the process. This was infamously exercised in favour of Augusto Pinochet by Jack Straw in January 2000, see <http://news.bbc.co.uk/1/hi/uk_politics/599681.stm>.

⁴⁴ See Hacker Loses Extradition Appeal, 28 August 2008, at <<http://news.bbc.co.uk/1/hi/uk/7585861.stm>>.

⁴⁵ See *Calder v HMA*, [2006] SCCR 609, and generally Arnell, *supra* note 1.

⁴⁶ See *Re. Howes*, 2008 WL 2033440

⁴⁷ See *Birmingham and others (R on the application of) v Director of the Serious Fraud Office and the Home Secretary* [2006] EWHC (Admin) 200, and generally Bamford, N., Extradition and the Commercial World, 2007 (28) *Company Lawyer* 97.

⁴⁸ Extradited at a moment's notice: is it time to be afraid of doing business in America, *The Independent*, 2 December 2007.

above, the upper limit among the various estimations of McKinnon's prison sentence if convicted in the United States is 70 years. This figure is achieved by adding the maximum sentence of 10 years for each separate offence. A sentence of this duration is certainly in excess of that McKinnon might receive if tried and convicted in the United Kingdom for similar offences. By way of illustration is the decision in *R. v Vallor*.⁴⁹ Here Vallor pleaded guilty to three counts of breaching s 3 of the Computer Misuse Act 1990 and was sentenced to two years' imprisonment. On appeal the Court held that four years was the appropriate sentence, but that certain mitigating circumstances in the case led to two years being imposed. Admittedly, this decision related to the previous tariffs and the offences were not directed at the United Kingdom security services. It is clear, though, that in general terms the sentencing policy in the United States is markedly more severe in the sense of longer prison sentences than in the United Kingdom.⁵⁰ Ironically, the recent increases in sentencing powers introduced into the Computer Misuse Act 1990 may minimise the likelihood of a McKinnon-esque extradition process from becoming commonplace. The increased sentencing powers under the 1990 Act may have two consequences. Firstly, Category 2 States may be more amenable to consenting to a prosecution in the United Kingdom for computer-related activity if the mis-match between sentencing powers of the requesting state and the United Kingdom is significantly reduced. Indeed, the prosecutorial zeal of the American authorities may be assuaged if they come to appreciate that the United Kingdom treats computer-related crime as a priority. The second, related consequence of the increased sentencing powers available, is that, over time, United Kingdom citizens will come to appreciate that their online activities, undertaken in the comfortable confines of their personal space, may have serious and dramatic consequences for their liberty. Thus, the deterrent effect of an increased sentence may minimise the number of people tempted to 'hack' and 'crack' computer systems.

A third "lesson" to be learnt from McKinnon's case is that it is on occasion perhaps not too difficult, technically, to breach governmental computer systems or otherwise commit an offence deemed serious by prosecuting authorities.⁵¹ Indeed McKinnon's lawyer suggested in the High Court that the United States prosecution was political because "... the US Government has been embarrassed at the ease with which Mr McKinnon obtained access to supposedly secure computers".⁵² McKinnon himself has been noted as commenting that "... he used a very basic tool which scanned networks for blank passwords and found some very poor security".⁵³ Indeed, it has further been written that he was tracked down relatively easily, demonstrating his lack of technical savvy. This has been reported as being through the use of his girlfriend's email account.⁵⁴ Clearly the point that it may not be too difficult to commit a serious offence should weigh strongly in support of the view that one should not engage in attempts to do so on a frivolous or fleeting basis. Indeed, together with the geographic remoteness from the United States and, perhaps, resultant failure to appreciate the degree of seriousness in which the acts were taken, these facts facilitate a greater degree of comprehension of how one could come to commit an offence. Of course this is not to suggest that McKinnon is not culpable of breaking the law, but rather that the circumstances of the

⁴⁹ [2003] EWCA Crim 2288.

⁵⁰ In the High Court decision, *supra* note 5, Lord Justice Kay discounted an argument made on the basis of the disparity in possible sentences between the United States and United Kingdom, "... if convicted, Mr McKinnon would be facing sentence for very serious offences and the fact that any sentence would be longer than an English court might impose for similar offences does not by itself avail Mr McKinnon", at p 8. See generally in regard to current debates over sentencing King, A., Keeping a Safe Distance: Individualism and a Less Punitive Public, (2008) 48(2) *British Journal of Criminology* 190.

⁵¹ Mention of the relative ease in which McKinnon hacked into United States governmental computer systems in no way exculpates his behaviour. Rather, it is intended to forewarn others that this may be the case.

⁵² *Supra* note 26 at p 5.

⁵³ Singleton, S., *IT Law Today*, (2007) 15(8) page 2

⁵⁴ See *The Times*, 29 August 2008 p 5.

offences are surely such to provide a stern warning to anyone considering testing out their technical savvy against the security of United States governmental computer systems.

In addition to bringing to the fore notable facts surrounding United States criminal law and practice and the apparent ease in which a serious offence can be committed, McKinnon's case also highlights several specific features of extradition law and practice that deserve criticism. The first centres upon the inequity in evidential requirement upon the United States and the United Kingdom. As seen above, no evidence against McKinnon was required by the United Kingdom in conjunction with the United States extradition request. In the opposite case, where the United Kingdom seeks an individual from the United States, evidence is required. Here the United Kingdom requesting authorities must provide evidence that satisfies an American court that there is "probable cause" that the individual committed the offence, as stipulated in the treaty between the two states.⁵⁵ A second criticism relates to United States plea bargaining. As was argued in the House of Lords, the pressure to co-operate with United States authorities because of the large disparity in possible sentence and the issue of when repatriation may be permitted may amount to an abuse of process. Whilst the House of Lords dismissed this argument in McKinnon's case, it is submitted that plea bargaining, *in extremis*, whether in the United States, England or Scotland, is an abuse of process. Further, again in McKinnon's specific case, there is an unfortunate parallel with the Canadian Supreme Court decision of *US v Cobb*, referred to above, in that suggestions of possible male rape have been made. Admittedly, in *Cobb*, this was alluded to by a possible future prosecutor, and in McKinnon's case the threat is said to have come from US Army personnel and posted on the "Free Gary" website.⁵⁶ A third criticism is based on a possible breach of McKinnon's human rights. As he argued in the High Court there is a concern that McKinnon's right to privacy and family life under article 8 of the Convention will be disproportionately infringed if extradited. Clearly it will be infringed; he will be separated from his family and friends. The question is whether this is proportionate. The High Court held that the circumstances of his case were not "exceptional" so as to result in human rights being a bar to his extradition. Whilst the sentencing outcome of the United States proceedings cannot be foreseen, it is submitted that the maximum mooted sentence of 70 years imprisonment in a United States high security prison - with the added threat of sexual assault - is indeed exceptional.

A final, and more general, criticism that can be made of the law relates to the lack of sufficient response to the increased degree and nature of extraterritorial jurisdiction being assumed, by the United States in particular. One such response could be a clear and attendant system of allocation of jurisdiction between states. There is at present no such system and the provision in the area that does exist is devised to minimise prosecutorial conflict not protect accused persons. In regard to extraterritoriality generally it is firstly clear that the criminal law increasingly applies to acts committed outwith a state's borders. From historical examples of murder and counterfeiting to recent incarnations of commercial fraud and computer misuse – the range of acts covered by extraterritorial prescription has grown considerably. This in itself is understandable and indeed desirable in light of the growing internationality of criminal behaviour. However, at the same time, it is not unreasonable for limits or conditions to be placed on this phenomenon. The development of a proper law of the crime approach, for example, with binding force, would be welcome.⁵⁷ What has happened instead has been the continuation of unilaterally assumed extraterritorial jurisdiction and, relatively recently, prosecutorial moves to enhance co-operation between the United Kingdom and United States. This is found in the Attorney General and Lord Advocate's Guidance for Handling Criminal

⁵⁵ This is said to have its origins in, and be required by, the Fourth Amendment to the United States Constitution, see Reese Thomas, K., *The New Extradition Regime – How Unjust Is It?*, (2006) 8 *Journal of International Banking and Financial Law* 331.

⁵⁶ Found at < <http://freegary.org.uk/>>.

⁵⁷ See generally Arnell, P., *The Proper Law of the Crime in International Law Revisited*, (2000) 9(1) *Nottingham Law Journal* 39.

Cases with Concurrent Jurisdiction between the United Kingdom and the United States of America.⁵⁸ The Guidance, as its name implies, is non-binding and is intended to promote close prosecutorial cooperation between the two countries and reduce the risk of proceedings being brought in the two jurisdictions simultaneously.⁵⁹ Whilst it has some value in that regard, it does not address arguably egregious instances of extraterritorial jurisdiction.

A further development that would affect the increasing degree of extraterritorial jurisdiction is the entry into force of the “forum bar” amendment within the Police and Justice Act 2006. That Act inserted a new section 83A into the Extradition Act 2003. It provides:

(1) A person’s extradition to a category 2 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.⁶⁰

This provision would empower judges to refuse an extradition request on the ground of *forum non conveniens* and could usefully address certain of the contentious issues arising from the assumption of extraterritorial jurisdiction. Of course it is debatable whether in McKinnon’s case a court within the United Kingdom would hold that it was “not in the interests of justice” for McKinnon to be extradited. In light of the primary and sole “victim” being United States computer systems it is not unreasonable to hold that a court would not uphold the forum bar in his case. As the law stands, however, a court will not have to make such a determination. This is unfortunate. The amendment has not been brought into force, and it appears unlikely at the present time that it ever will.⁶¹

Conclusion

Gary McKinnon clearly faces an unenviable fate. An extradition system designed and implemented to address international terrorism shortly after the September 11 2001 terrorist attacks in the United States has been widened to cover, *inter alia*, computer misuse. In light of recent United States prosecutorial practice – and no statements from politicians or judicial decisions within the United Kingdom to the contrary - it is likely that the use of extradition law in this way will happen again. Whilst it appears McKinnon is guilty of causing criminal damage and, perhaps, endangering United States security temporarily, his likely fate seems out of proportion to these acts. Clearly, the case adds weight to the arguments in favour of bringing the forum bar to extradition into force and otherwise mitigating the unrestricted application of United States extraterritorial jurisdiction. It is clear that at present the long arm of United States law has at its end, to borrow a phrase used in another context by Tony Blair, a big clunking fist.⁶²

⁵⁸ The Guidance is available online at: http://www.attorneygeneral.gov.uk/attachments/AG_Guidance-Criminal_Cases_with_the_USA_2007.pdf. The guidance is comprehensively judicially discussed in *Ahsan v DPP* [2008] EWHC 666 (Admin).

⁵⁹ See generally Brookson-Morris, K., *Conflicts of Criminal Jurisdiction*, (2007) (56) ICLQ 659.

⁶⁰ By s 5(2) of Schedule 14. A new section 19B provides similarly in regard to Category 1 states.

⁶¹ As recently as January 2008 the Home Secretary announced that they would not be brought into force, see Binning, P., and Campbell, D., *No Forum for Debate on Extradition*, (2008) Law Society’s Gazette, 10 Jan p 27.

⁶² Blair used the words to describe the Labour heavyweight, presumably Gordon Brown, who was going to deliver a “knockout blow” to “flyweight” David Cameron, see <http://news.bbc.co.uk/1/hi/uk_politics/6147766.stm>.