Joint observations on the human rights implications of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019

1. These are the joint observations of:

- The Bar Human Rights Committee of England & Wales;[1]
- The Human Rights Committee of the Law Society of England & Wales;[2]
- The International Bar Association's Human Rights Institute';[3]
- The Defence Extradition Lawyer's Forum;[4]
- The International Forum of Extradition Specialists;[5] and
- Fair Trials.[6]

Executive Summary

2. These joint observations are made owing to the very significant concerns which arise in the context of changes that have been proposed to Hong Kong's extradition laws. In particular, comparison is being made in the public debate surrounding these proposals between the degree of protection they afford and that found in extradition law internationally, including in the United Kingdom. Owing to the urgency and nature of the public debate surrounding these proposals, the signatories wish to clarify any misunderstanding over that comparison and to detail their reasons for expressing concern.

3. We consider that there are already serious shortcomings in Hong Kong's existing extradition legislation which expose inadequate protection for human rights and consequently, neither the present nor the proposed amendments are sufficiently robust to carry the burden of introducing extradition arrangements with any state where serious human rights issues arise. In particular, (a) the present scheme vests no power in a Hong Kong court to refuse extradition on the grounds that extradition exposes the person to violation of the ICCPR or the Hong Kong Bill of Rights and (b) insofar as the proposals would introduce any human rights examination at all, they are vested in Hong Kong's Chief Executive whom, in view of her function and the nature of her appointment, would lack or appear to lack the necessary impartiality and independence to adjudicate

1. www.barhumanrights.org.uk/
2. www.lawsociety.org.uk/
3. https://www.ibanet.org/IBAHRI.aspx
4. www.delf.org.uk/
5. www.internationalextradition.org/?page_id=2
6. www.fairtrials.org/

such issues. The proposals fundamentally imperil the operation of the rule of law in Hong Kong.

4. The signatories call upon the government of the Hong Kong Special Administrative Region to place these weighty and substantial human rights concerns squarely at the forefront of its consideration of the proposed extradition laws, and for the immediate suspension of these ill-conceived proposals, pending (at a minimum) radical overhaul of Hong Kong's existing extradition laws.

Introduction

5. Insofar as they envisage removing the prohibition, in place since 1997, on extradition between Hong Kong and Mainland China, the proposed amendments to Hong Kong's Fugitive Offenders Ordinance (Cap.503: 'FOO') are controversial and disturbing.

6. The signatories consider that there are two fundamental fallacies in the Bill's purported rationale, namely that:

- '*...the rights and procedural safeguards for those to be surrendered provided in the [FOO] are in line with common international practice and regarded as a blueprint with reference value...*'[7]

- '*...similar case-based surrender arrangements have been practiced in the United Kingdom...for years...*'[8]

7. These twin fallacies have enabled the promotors of the Bill to reason that, by introducing a scheme of ad hoc extradition to Mainland China, Hong Kong is (merely) replicating a system which exists elsewhere, notably in the United Kingdom. For the reasons outlined below, we fundamentally disagree with that proposition and analysis.

Background

8. The act of settling bilateral or multilateral treaty extradition arrangements signals trust and confidence in another country's judicial and human rights protection systems. Such treaties are invariably dependent on baseline human rights records; often demonstrated by way of ratification of international human rights treaties and through human rights practice.

9. Hong Kong has ratified the ICCPR. Mainland China has not.

10. For this, and no doubt other, reasons, the United Kingdom has no bilateral or multilateral extradition treaty with Mainland China.

11. Notwithstanding that, extradition from the United Kingdom to Mainland China is not impossible.

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7. Security Bureau Legislative Council Paper, 31 May 2019, §2 (https://www.legco.gov.hk/yr18-19/english/panels/se/papers/se20190531cb2-1578-1-e.pdf)

8. Security Bureau Legislative Council Brief, April 2019, §9 (https://www.legco.gov.hk/yr18-19/english/bills/brief/b201903291_brf.pdf).

12. First, the United Kingdom is party to various multilateral treaties which provide for extradition in relation to certain offences. For those offences, the Extradition Act 2003 applies to Mainland China as if it were a designated state.[9] Those treaties / offences are:

Convention on Offences and certain other Acts committed on Board aircraft signed at Tokyo on 14th September 1963 ("the Tokyo Convention")	Any offence committed on board an aircraft in flight
Convention for the Suppression of Unlawful Seizure of Aircraft signed at the Hague on 16th December 1970 ("the Hague Convention")	Any offence under or by virtue of section 1 or 6(1) or (2)(a) of the Aviation Security Act 1982
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on 23rd September 1971 ("the Montreal Convention")	Any offence under or by virtue of section 2, 3 or 6(2)(b) or (c) of the Aviation Security Act 1982
Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons adopted by the United Nations General Assembly in 1973 ("the Internationally Protected Persons Convention")	An offence under section 1(1)(a) of the Internationally Protected Persons Act 1978 which is committed against a protected person within the meaning of that section An offence under section 1(1)(b) of that Act which is committed in connection with such an attack An offence under section 1(3) of that Act
International Convention against the Taking of Hostages opened for signature at New York on 18th December 1979 ("the Hostages Convention")	An offence under the Taking of Hostages Act 1982
Convention on the Physical Protection of Nuclear Material opened for signature at Vienna and New York on 3rd March 1980 ("the Nuclear Material Convention")	An offence under section 1(1)(a),(b),(c) or (d) of the Nuclear Material (Offences) Act 1983 which is committed by doing an act in relation to or by means of nuclear material and an offence under section 2 of that Act
United Nations Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the United Nations General Assembly on 10th December 1984 ("the Torture Convention")	Torture
Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, which was signed at Montreal on 24th February 1988 ("the Montreal Protocol")	An offence under section 1 of the Aviation and Maritime Security Act 1990
United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances which was signed in Vienna on 20th December 1988 ("the Vienna Convention")	Any offence which is specified in paragraph 1 of Schedule 2 to the Proceeds of Crime Act 2002 (drug trafficking offences) or so far as it relates to that paragraph, paragraph 10 of that Schedule

[9]. The Extradition Act 2003 (Parties to International Conventions) Order 2005 (SI. 2005 No. 46).

	Any offence which by virtue of section 415 of the Proceeds of Crime Act 2002 is a money laundering offence for the purposes of Part 8 of that Act Any offence which is specified in paragraph 2 of Schedule 4 to the Proceeds of Crime Act 2002 or so far as it relates to that paragraph, paragraph 10 of that Schedule Any offence which is specified in paragraph 1 of Schedule 5 to the Proceeds of Crime Act 2002 (drug trafficking offences) or so far as it relates to that paragraph, paragraph 10 of that Schedule
Convention for the Suppression of Terrorist Bombings, which was opened for signature at New York on 12th January 1998 ("the Terrorist Bombings Convention")	An offence, committed as an act of terrorism or for the purposes of terrorism, under– Section 2, 3 or 5 of the Explosive Substances Act 1883 (causing explosions), Section 1 of the Biological Weapons Act 1974 (biological weapons) or Section 2 of the Chemical Weapons Act 1996 (chemical weapons)

13. Secondly, the United Kingdom operates an ad hoc extradition scheme, which could, potentially, be triggered by a Chinese extradition request. Section 194 of the Extradition Act 2003 provides that:

> *'...(1) This section applies if the Secretary of State believes that—*
> *(a) arrangements have been made between the United Kingdom and another territory for the extradition of a person to the territory, and*
> *(b) the territory is not a category 1 territory or a category 2 territory.*
> *(2) The Secretary of State may certify that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the extradition of the person.*
> *(3) If the Secretary of State issues a certificate under subsection (2) this Act applies in respect of the person's extradition to the territory as if the territory were a category 2 territory.*
> *(4) As applied by subsection (3), this Act has effect—*
> *(a) as if sections 71(4) , 73(5) , 74(11)(b) , 84(7) and 86(7) were omitted;*[10]
> *(b) with any other modifications specified in the certificate.*
> *(5) A certificate under subsection (2) in relation to a person is conclusive evidence that the conditions in paragraphs (a) and (b) of subsection (1) are satisfied in relation to the person's extradition...'*

14. By this power, the Secretary of State may (by way of memoranda of understanding) agree case-specific extradition arrangements with a state with which the United Kingdom has no permanent extradition relations in relation to the offence in question, and it can be activated by conclusive, unreviewable, ministerial certification (the effect of which is that the state in question is treated, for the purpose of the individual case in question, as one to which the Extradition Act 2003 applies).

15. This latter provision is a power which has only ever been used sparingly and in exceptional circumstances. It was used, for example;[11]

- In respect of Rwanda's request for the extradition of Vincent Bajinja and others for crimes of genocide; crimes affecting the international legal order;

- In respect of Bermuda's request for the extradition of Patrick Stamp for murder; when it emerged during the process that in passing the 2003 Act, the United Kingdom had inadvertently deleted its extradition arrangements with its own Overseas Territories and, because of the number of territories involved, the problem could not be rectified immediately;

- In respect of Taiwan's request for the extradition of Zain Taj Dean, for manslaughter. Taiwan (the Republic of China) is a country in whose judicial and human rights protections systems the United Kingdom reposes trust and confidence but in respect of whom any treaty is impossible for other reasons (no state recognition).

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[10]. Broadly, the power to abrogate the requirement on a requesting state to show a prima facie case.

[11]. Equivalent power previously provided under preceding UK extradition legislation was, to the knowledge of the authors, never used.

16. It follows that the power to enter into ad hoc extradition arrangements has never been regarded by the United Kingdom as a substitute or '*interim measure'*[12] for deployment in situations of ongoing or failed negotiations to establish a proper extradition treaty.[13]

Why does the United Kingdom entertain the possibility of extradition to Mainland China?

17. Why, then, is it acceptable for extradition arrangements with states such as Mainland China, which manifestly don't respect human rights, to potentially exist at all?

18. That question is especially pertinent when it is recalled that:

- First, extradition arrangements, including ad hoc arrangements, have (unless the law stipulates otherwise) retroactive application; to offences whenever committed (being procedural not substantive, the general international law prohibition on retroactive criminal laws has no application: *R v Secretary of State for the Home Department Ex p. Hill* [1999] QB 886);[14] and

- Secondly, where the very act of establishing extradition relations, including ad hoc relations, raises a presumption of human rights compliance in that state (*Gomes v Trinidad & Tobago* [2009] UKHL 21; [2009] 1 WLR 1038,§36).

The reason

19. The reason the United Kingdom permits of even the possibility of extradition to such states is because it operates extradition legislation which demands robust and searching judicial scrutiny of human rights compliance in any requesting state.

20. As the House of Lords observed in *R v Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42, '*...Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country...*'.

21. At the beginning of the 21st century, it was widely recognised in the United Kingdom that its existing extradition schemes, most of which were developed to facilitate surrender within the Commonwealth, and which dated from the 19th century, were unfit for purpose and required radical overhaul.

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12. Security Bureau Legislative Council Brief, April 2019, §6 (https://www.legco.gov.hk/yr18-19/english/bills/brief/b201903291_brf.pdf).

13. The authors fail to see, in any event, how the current Hong Kong proposal could be faithfully described as an '*interim measure before long-term arrangements'* with Mainland China comes into effect, given that the proposals retain the ban on arrangements (other than ad hoc arrangements) with Mainland China; see the amended section 2 FOO.

14. The prohibition on retroactive criminalisation bites instead on the principle of dual criminality: the offence must have been criminal in the requested state at the time of its commission (*R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 3)* [2000] 1 AC 147).

22. Similar overhaul had, for example, occurred in Canada with the introduction of Canada's Extradition Act 1999, by which extradition is required, *inter alia*, to be compatible with the Canadian Charter of Rights and Freedoms.[15]

23. The result of that overhaul was the United Kingdom's current Extradition Act, introduced in 2003.[16] It represents a new, human rights-focussed legislative scheme. It contains robust *judicial* protections against exposure to human rights violations.

24. For example:

- Section 82 of the 2003 Act[17] protects people against extradition in respect of aged accusations or convictions, where a fair trial is endangered, or extradition is rendered otherwise oppressive, by the passage of time;

- Section 85 of the 2003 Act addresses convictions delivered in absentia, the unequivocal requirement for re-hearing, and (by section 85(8))[18] the minimum human rights standards such a re-hearing must afford;

- Section 91 of the 2003 Act[19] prohibits extradition where the person's physical or mental health would impact upon the fairness of the prospective trial (render it '*unjust'*) or otherwise render extradition '*oppressive'*.

25. Over the supervening years since 2003, those protections have been strengthened. For example:

- The courts have confirmed an implied jurisdiction to protect against abusive or bad faith extradition requests; *R (Bermingham) v Director of the Serious Fraud*

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15. Extradition proceedings automatically engage s.7 of the Charter. Further, s.44 of the Extradition Act specifies the circumstances when Canada's Minister of Justice must not issue an order for surrender of a fugitive resident in Canada to an extradition partner. The grounds upon which such a refusal may be based are closely linked to the Charter.

16. The Extradition Act 2003 applies to England, Wales, Scotland and Northern Ireland.

17. '...A person's extradition to a category 2 territory is barred by reason of the passage of time if (and only if) it appears that it would be unjust or oppressive to extradite him by reason of the passage of time since he is alleged to have–
(a) committed the extradition offence (where he is accused of its commission), or
(b) become unlawfully at large (where he is alleged to have been convicted of it)...'

18. '...(8) The judge must not decide the question in subsection (5) in the affirmative unless, in any proceedings that it is alleged would constitute a retrial or a review amounting to a retrial, the person would have these rights—
(a) the right to defend himself in person or through legal assistance of his own choosing or, if he had not sufficient means to pay for legal assistance, to be given it free when the interests of justice so required;
(b) the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...'

19. '...(1) This section applies if at any time in the extradition hearing it appears to the judge that the condition in subsection (2) is satisfied.
(2) The condition is that the physical or mental condition of the person is such that it would be unjust or oppressive to extradite him.
(3) The judge must—
(a) order the person's discharge, or
(b) adjourn the extradition hearing until it appears to him that the condition in subsection (2) is no longer satisfied...'

Office [2007] QB 727; *R (Government of the United States of America) v Bow Street Magistrates' Court* [2006] EWHC 2256 (Admin); [2007] 1 WLR 1157; and

- Parliament has introduced further protections, such as sections 83A-F ('forum') which address cases of concurrent jurisdiction, and permit a United Kingdom court to determine whether the matter ought, in the interests of justice, more properly be tried in the United Kingdom (and to deny extradition even where the United Kingdom authorities have ceded jurisdiction to the requesting state).

26. All of these protections have been utilised by the United Kingdom courts, in appropriate cases, to deny extradition.

27. Foremost, however, among the protections embedded within the United Kingdom scheme is section 87 which provides that:

> *'...(1) If the judge is required to proceed under this section (by virtue of section 84, 85 or 86) he must decide whether the person's extradition would be compatible with the Convention rights within the meaning of the Human Rights Act 1998 (c. 42).*
> *(2) If the judge decides the question in subsection (1) in the negative he must order the person's discharge.*
> *(3) If the judge decides that question in the affirmative he must send the case to the Secretary of State for his decision whether the person is to be extradited...'*

28. The '*Convention'* is the European Convention on Human Rights. Extradition is prohibited if it would violate the person's human rights. The United Kingdom extradition courts operate no principle of '*non-enquiry'* into the affairs of, or human rights situation in, the foreign state. The United Kingdom courts will inquire into the human rights situation in the requesting state because, per *Soering v United Kingdom* (1989) 11 EHRR 439; the act of exposure to a Convention violation abroad is itself a Convention violation.

29. Section 87 has been (and is) a potent weapon vested in the United Kingdom's judiciary, to prevent any extradition which exposes a person to human rights violations.

30. For example, the prohibition on exposure to inhuman or degrading treatment (art. 3 ECHR) has enabled the United Kingdom courts to prevent exposure to such diverse matters as unfitness to travel, inadequate medical care and abhorrent prison detention conditions. Even within the EU's close system of judicial cooperation, the power to halt extradition in the face of such a prospect is deemed fundamental (see *Criminal Proceedings against Aranyosi* (C-404/15 PPU) [2016] QB 921).[20] Thus, to take but one example, extradition to Portugal was recently refused in *Mohammed v Portugal* [2017] EWHC 3237 (Admin); [2018] EWHC 225 (Admin) based on an assessment of its prison conditions.

31. Likewise, exposure to a compromised or corrupt judicial system, or to a system of justice that '*flagrantly'* fails to protect basic fair trial rights, can be stopped. The United

[20]. Belgium, for example, has refused to extradite to certain prisons in the United Kingdom.

Kingdom courts regularly refuse extradition to states including Russia or Turkey based on its assessment of the judicial systems there. This was also the notable fate of the ad hoc extradition arrangement made with Rwanda mentioned above. In *Bajinja v Rwanda* [2009] EWHC 770, the High Court observed that '*...We certainly cannot sanction extradition as a means of encouraging the Rwandan authorities to redouble their efforts to achieve a justice system that guarantees due process. That might serve a political aspiration, but would amount to denial of legal principle...*' (§120)

32. When Rwanda repeated its extradition request, the High Court rejected it again: *Government of Rwanda v Nteziryayo* [2017] EWHC 1912 '*...the arrangements for defence in Rwanda are clearly inadequate. They would be inadequate even if the remainder of the criminal justice system was acceptable and the concerns which arise were not present. In an authoritarian state, where judicial independence is institutionally weak and has been compromised in the past, where there is established fear by witnesses, not all of which can be effectively countered, the existing arrangements are quite insufficient to ensure a reasonable fairness in the proceedings...*' (§378).

33. The United Kingdom extradition courts have also refused extradition, in suitably appropriate cases, based upon the likelihood of exposure to violations of the right to liberty (art. 5 ECHR), for example in *Government of the United States of America v Giese* [2015 EWHC 2733 (Admin) concerning a real risk of exposure to a civil commitment order (civil detention), or the right to family life / proportionality (art. 8 ECHR), for example in *R (HH) v Westminster City Magistrates' Court* [2012] UKSC 25; [2013] 1 AC 338.

34. Multiple other examples could be provided, but the short point is that the United Kingdom operates a robust, human-rights oriented extradition scheme entirely capable of addressing the issues that ad hoc extradition cases inevitably raise.

35. That scheme operates alongside, and is bolstered by, a mature and developed system for taking and assessing '*assurances'* of human rights compliance from a requesting state. Where the human rights situation is genuinely poor, the United Kingdom court can refuse to entertain assurances at all: *Othman v United Kingdom* (2012) 55 EHRR 1 at §188. States such as Kazakhstan, Tajikistan, and Turkmenistan have been variously deemed by the European Court of Human Rights to meet this test. In other cases, and more usually '*...the Court will assess first, the quality of assurances given and, second, whether, in light of the receiving state's practices they can be relied upon. In doing so, the Court will have regard, inter alia, to*' a long list of fact-specific factors (*Othman* at §189).[21]

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[21]. (1) whether the terms of the assurances have been disclosed to the Court;
(2) whether the assurances are specific or are general and vague;
(3) who has given the assurances and whether that person can bind the receiving state;
(4) if the assurances have been issued by the central government of the receiving state, whether local authorities can be expected to abide by them;
(5) whether the assurances concerns treatment which is legal or illegal in the receiving state;
(6) whether they have been given by a Contracting State;
(7) the length and strength of bilateral relations between the sending and receiving states, including the receiving state's record in abiding by similar assurances;
(8) whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant's lawyers;

36. The United Kingdom courts will accordingly reject assurances where appropriate; see, for example, *Shmatko v The Russian Federation* [2018] EWHC 3534 (Admin) where Russian assurances were rejected as untrustworthy, especially in view of Russia's efforts to curtail independent monitoring of prisons.

37. Whilst ad hoc arrangements *can* survive a robust human rights analysis, where appropriate, the essential point is that the United Kingdom scheme empowers the United Kingdom's independent judiciary to decide these fundamental issues.

Hong Kong's Fugitive Offenders Ordinance

38. Under the FOO, the Hong Kong court is the arbiter of:

- The '*political offence'* exception (s.5(1)(a));
- Requiring retrials in cases of convictions in absence (s.5(1)(b));
- Political or other motivation (s.5(1)(c)-(d));[22]
- Double jeopardy (s.5(1)(e));[23]
- Specialty (s.5(2));
- Re-extradition (s.5(5));
- Dual criminality (s.10(6)(b)(i));
- Authentication (s.10(6)(b)(ii)); and
- Prima facie case (s.10(6)(b)(iii)).

39. The FOO derives from, and resembles, the United Kingdom's Extradition Act 1989.[24] It is outdated and possesses none of the fundamental human rights protections now vested in a United Kingdom extradition court. For example:

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(9) whether there is an effective system of protection against torture in the receiving state, including whether it is willing to co-operate with international monitoring mechanisms (including international human-rights NGOs), and whether it is willing to investigate allegations of torture and to punish those responsible;
(10) whether the applicant has previously been ill-treated in the receiving state; and
(11) whether the reliability of the assurances has been examined by the domestic courts of the sending/Contracting State...'

[22]. A provision broadly equivalent to section 83 of the 2003 Act.
[23]. A provision broadly equivalent to section 81 of the 2003 Act.
[24]. However, even the 1989 Act contained basic protections covering e.g. passage of time, triviality, bad faith etc.

- The '*political offence'* exception in s.5(1)(a) FOO is now widely recognised to be hollow and redundant. Persecuting states do not realistically advertise the '*political'* nature of their allegations. It is a 'protection' not found in most contemporary extradition treaties.

- The trials in absentia protection in s.5((1)(b) FOO is noticeably less robust than section 85(8) of the 2003 Act referred to above.

- The '*political motivations'* exception in s.5(1)(c)-(d) FOO is likewise broadly useless. Proving political or other motivation is an almost impossible task in the real world.

40. Most crucially, the FOO vests no power in a Hong Kong court to refuse extradition on the grounds that extradition exposes the person to violation of the ICCPR or the Hong Kong Bill of Rights. In the circumstances, a requirement that any ad hoc arrangements be '*substantially in conformity*' with the FOO (s.3(9))[25] provides little comfort in the context of a requesting state with dire judicial and human rights records, such as Mainland China.

41. The authors note that, occasionally, the FOO can provide the Hong Kong courts with greater powers. Section 3(1) FOO implies any additional protections contained in the underlying treaty. Because of the international move towards rights-protection, in this area, contemporary extradition treaties often do contain substantive human rights protections (of the type that are conspicuously absent from the FOO itself). For example, article 7 of the Hong Kong / Netherlands treaty, which is carried into the FOO by the Fugitive Offenders (Netherlands) Order (Cap. 503), provides that:

'...The surrender of a fugitive offender may also be refused if the requested Party considers that:

(a) the offence is, having regard to all the circumstances, not sufficiently serious to warrant the surrender; or

(b) there has been excessive delay, for reasons which cannot be imputed to the fugitive offender, in bringing charges against him, in bringing his case to trial or in making him serve his sentence or the remainder thereof; or

(c) the surrender of the fugitive offender may place that Party in breach of its obligations under international treaties; or

(d) in the circumstances of the case, the surrender of the fugitive offender would be incompatible with humanitarian considerations in view of age, health or other personal circumstances...'

42. '*Obligations under international treaties'* presumably implies a power to ensure ICCPR-compliance.

43. But protections such as these are, under Hong Kong's present extradition scheme, utter happenstance. Hong Kong law does not *require* extradition arrangements to contain such clauses (or indeed any beyond those in the FOO itself).

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[25]. It is not even apparent to the authors that this would be a requirement that would apply to any ad hoc arrangement, which would be governed instead by the new section 3A FOO.

44. The authors recognise and note that the Hong Kong government has made various (late) concessions to human rights, most notably in the Security Bureau's Legislative Council Paper, 31 May 2019.[26] The authors believe that these concessions fall short in terms of addressing the problems at hand.

45. Setting a punishability threshold, for the purposes of dual criminality, of 7 years is not a substantial protection. It leaves a very broad array of loosely defined Hong Kong offences, especially economic offences, which could easily be employed to fit any given accusation. Shoplifting is punishable in Hong Kong (as it is in the United Kingdom) with 10 years' imprisonment. In the experience of these signatories, extradition requests for petty offences are made. It was precisely this phenomenon which prompted European countries to move to introduce powers for their courts to reject extradition as disproportionate (in the United Kingdom's case, via art. 8 ECHR). The absence of even a basic triviality exception vested in the Hong Kong courts by the FOO (unless it happens to appear in the underlying treaty) clearly illustrates the extent of its unfitness for purpose.

46. Enabling the Chief Executive to include the type of '*safeguards'* listed in Annex 2 to the 31 May 2019 Council Paper would likewise fail to meet the problem:

- First, the proposal is merely that the Chief Executive '*may'* require such matters to be included in any ad hoc arrangement, not that she must do so. She cannot be compelled to include any of those matters in any arrangement. Neither would her refusal to demand any of them be capable of being reviewed by any Hong Kong court.

- In the context of extradition to Mainland China, the authors fail to see why the Chief Executive (who is appointed by Beijing) should be incentivised at all to exercise that discretion.

- Even if she did, the list of proposed factors that the Chief Executive '*may'* include in an ad hoc arrangement is notably thin. What about exposure to torture? Or admission of evidence coerced from others? Or prison conditions?[27] Or prospective medical care? Or civil detention? Or the right to apply for bail? Or protection against triviality? Or delay? Or forum? Etc.

- And even if any or all of those matters listed (or indeed others not listed) were included in an ad hoc arrangement, under the proposed section 3A to FOO it would be the Chief Executive, not any Hong Kong judicial officer, who would determine whether such '*assurances'* were reliable, trustworthy, or capable of being met <u>in practice</u> (according to, say, the *Othman* §189 factors detailed above).

- Not only would the Chief Executive be the arbiter of these fundamental human rights matters under the proposed scheme, she would under the proposed section

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[26]. https://www.legco.gov.hk/yr18-19/english/panels/se/papers/se20190531cb2-1578-1-e.pdf

[27]. The authors note, for example, that, despite maintaining extradition arrangements with Portugal, no Hong Kong court would have had power under the FOO to protect Mr Mohammed had he been arrested in Hong Kong.

3A(2) be able to '*conclusively certify'* her satisfaction of whatever assurances she had required. Judicial review is ousted.

47. These manifest inadequacies mask another problem. Hong Kong's Chief Executive is appointed by Beijing. That is to say, in the case of extradition to Mainland China, she is answerable to the executive of the requesting state in question. That poses an immediate concern over her independence and impartiality (appearance of or actual) in determining any issue in the context of extradition to Mainland China, including a fair assessment the human rights situation.

48. Even in situations where the requesting state plays no part in the appointment of the executive of the requested state, executive (rather than judicial) supervision of such matters is fundamentally at odds with international human rights standards and the right to liberty in particular: *R (Kashamu) v Governor of Brixton Prison* [2001] EWHC 980 (Admin); [2002] QB 887 '*...Having regard, as this court must, to the Strasbourg jurisprudence, it seems to me to be clear that a court and not the Secretary of State is the appropriate forum for a decision as to the lawfulness of a fugitive's detention...*' (§29).

49. In a nutshell, that explains why human rights supervision and protection is, in the extradition scheme operating in the United Kingdom, vested in its independent judiciary.

50. The scheme being proposed for Hong Kong falls woefully short of what international human rights laws require.

Conclusion

51. Even leaving aside the broader rule of law implications of the proposals, Hong Kong's current extradition system is not nearly robust enough to carry the heavy burden of ad hoc extradition. Unlike what is being proposed in Hong Kong, the ad hoc extradition arrangements in the United Kingdom operate pursuant to a robust judicial process equipped and empowered to deny any extradition that would expose a person to a violation of their human rights, including an unfair trial and/or oppression. That matters in the context of comparison being made in the public debate surrounding the Hong Kong extradition law proposals between the degree of protection they afford, or do not afford, and that found in extradition law internationally, including in the United Kingdom.

52. Accordingly we, the signatories of this document, call upon the government of the Hong Kong Special Administrative Region to place these weighty and substantial human rights concerns, squarely at the forefront of its consideration of the proposed extradition laws. For all the reasons set out above, we stand alongside the Hong Kong legal community and others who have called for the immediate suspension of these ill-conceived proposals, pending (at a minimum) radical overhaul of Hong Kong's existing extradition laws.

14 June 2019

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