



3 June 2019

James P McGovern  
US Representative

Marco Rubio  
US Senator

Christopher H Smith  
US Representative

Steve Daines  
US Senator

Thomas R Suozzi  
US Representative

Tom Cotton  
US Senator

Brian Mast  
US Representative

Ben McAdams  
US Representative

Congressional-Executive Commission on China

Dear Sirs,

I am writing in response to your joint letter of 23 May 2019 addressed to me in relation to *the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 (the Bill)* being taken forward by the Government of the Hong Kong Special Administrative Region (HKSAR). With Hong Kong and the US enjoying strong and mutually beneficial links on many fronts and the presence of

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some 1 350 US companies in Hong Kong, your interest in our domestic legislative work is noted.

Governments and Parliamentarians all over the world will agree that every country and territory should co-operate to uphold cross-border criminal justice. In adopting the Model Treaty on Mutual Assistance in Criminal Matters in December 1990, the United Nations General Assembly expressed grave concern about the escalation of crime, both national and transnational, and urged Member States to increase their activity at the international level in order to combat crime, including, as appropriate, entering into bilateral treaties on extradition and mutual legal assistance. As a highly open and international city, Hong Kong values our long-standing and wide-ranging relationship with all our partners around the world, not just in the areas of commerce and business but also through extensive and mutually beneficial exchanges and co-operation between law enforcement agencies in the fight against organised and transnational crime as well as money laundering and terrorist financing. As a matter of fact, we have been an active, responsible and committed partner for many jurisdictions, including the US, in the fight against crime. We cherish our record as one of the world's safest cities, buttressed by our tried and trusted common law system upheld by an independent judiciary. This commitment to the rule of law and a level playing field has allowed Hong Kong to thrive as a hub for commerce, business, media and information in Asia.

Our concerted and continuous efforts in upholding these values have been widely recognised – the World Economic Forum's *Global Competitiveness Report* ranks Hong Kong 8<sup>th</sup> globally for judicial independence among 140 economies, 4<sup>th</sup> among common law jurisdictions and 1<sup>st</sup> in Asia. According to the *Worldwide Governance Indicators* project of the World Bank, which provides trends over longer periods rather than year-on-year fluctuations, Hong Kong's percentile ranking in the rule of law has improved from 69.9 per cent in 1996 to 93.3 per cent in 2016 over 20 years, or a leap from a top 70 place to a top 15 place. We will continue to vigorously support and promote this hard-fought recognition and foundation of our success. At the same time, we will also continue to devote time, energy and resources to protecting the safety of our residents and visitors from other places including foreign nationals. By extension, this means that we will not allow Hong Kong to become a bolt-hole for fugitive offenders.

It is against this backdrop and track record of unswerving commitment to the rule of law that we are taking forward amendments to our laws on surrender of fugitives and mutual legal assistance in criminal matters. *The Bill* aims to address some serious shortcomings in our existing regime, the deficiencies of which have been exposed by the unfortunate death of a young Hong Kong female citizen in Taiwan in a homicide case in February 2018. These deficiencies include geographical restrictions under the two existing laws prohibiting us from entering into any mutual legal assistance on criminal matters as well as handling fugitives with any other parts of China, that is, the Mainland, Taiwan and Macao, and the lack of an effective case-based regime for the surrender of fugitives with places with which Hong Kong has not signed any long-term agreements (the HKSAR has signed long-term surrender of fugitive offenders agreements with only 20 jurisdictions (including the US)). I can understand the concern in some quarters of the timing of this amendment but the Taiwan murder case has blatantly exposed the deficiencies that some are justifiably challenging the HKSAR Government for ignoring the current deficiencies for too long. As Mr Grenville Cross, former Director of Public Prosecutions (1997 - 2009) and currently Honorary Professor of Law at the University of Hong Kong and Visiting Professor of Law at the Chinese University of Hong Kong, aptly put it in his speech at the International Symposium on Cross-Border Criminal Justice under the Basic Law held on 31 May 2019, “although some people have suggested that the Taiwan homicide case should be dealt with on its own, this ignores the wider picture. That case has provided a catalyst, but the problem is huge and requires to be addressed holistically”. Realistically, I believe we would all agree that allowing an alleged murderer to walk free is not an option acceptable to the public or any government. We have a duty to make sure justice is done and an effective mechanism is in place to prevent similar occurrences in future. These are the dual objectives of *the Bill*.

Before I go on to explain *the Bill*, I should highlight that the enactment of the Fugitive Offenders Ordinance (FOO) in 1997 was primarily an exercise to localise relevant UK legislation extended to Hong Kong to ensure a smooth transition. The safeguards on human rights protection and procedural justice in the FOO were then considered to provide a useful blueprint for future negotiations applying the arrangements to other jurisdictions as well as any other parts of China.

Without altering these safeguards, *the Bill* proposes three key amendments to achieve the above dual objectives as follows –

- (a) introducing a “special surrender arrangement” on a case-by-case basis with jurisdictions that are yet to have a long-term agreement with Hong Kong. Under this special arrangement, the HKSAR Government and the requesting jurisdiction will have to enter into an agreement meeting specific requirements. The Chief Executive of the HKSAR will, based on the agreement and the requisite evidence, issue a certificate to trigger the committal process involving the courts as illustrated in the flow chart attached at Annex A;
- (b) removing the geographical restrictions regarding any other parts of China thereby allowing surrender of fugitives on a case-based approach as well as provision of mutual legal assistance on criminal matters with the Mainland, Taiwan and Macao on exactly the same terms with other jurisdictions and subject to the same human rights and procedural safeguards; and
- (c) taking account of public concerns expressed during consultations, confining the “special surrender arrangement” to 37 of the 46 offence categories listed in the existing legislation and increasing the penalty threshold for such offences from “more than 1 year” to “more than 3 years”.

I should add that a similar case-based approach has been in force in the laws of other jurisdictions, including the UK and Canada, for several decades. And the “special surrender arrangement” shall continue to be based on the guidelines and model prescribed by the United Nations Model Treaty on Extradition, and will be fully underpinned by human rights protection principles to which many other jurisdictions around the world have also subscribed to and incorporated into their municipal laws, including but not limited to –

- (a) Double criminality principle (i.e. must be a crime in both jurisdictions);



- (b) Protection against death penalty;
- (c) Restriction against re-surrender;
- (d) Rule against double jeopardy;
- (e) No surrender for political offences;
- (f) No surrender if the request is based on political or other discriminatory motives;
- (g) No surrender if prejudiced at trial, punished, detained or restricted in liberty because of race, religion, nationality or political opinions;
- (h) No charges beyond the surrender order;
- (i) Application for *habeas corpus*; and
- (j) Judicial review and right to appeal.

Hong Kong's judicial independence is well recognised worldwide. As guaranteed under the Basic Law, the courts of the HKSAR exercise judicial power independently, free from any interference. The power of final adjudication is vested in the Court of Final Appeal (CFA) of the HKSAR and since 1997, eminent judges from other common law jurisdictions have been invited to sit on the CFA. At present, 14 such overseas judges from the UK, Australia and Canada are sitting on our CFA as non-permanent judges to hear civil, criminal and constitutional cases. This is a testimony of the independence of our judiciary.

Since presentation of our proposals in mid-February, in particular upon introduction of *the Bill* into the Legislative Council on 3 April, my Government has been engaging with various sectors including the consular corps and the international business community to explain the purposes of *the Bill* and listen to their views. Taking account of such feedback, we announced on 30 May six additional measures applicable to the "special surrender arrangement" with a view to addressing public concerns. Details are as follows –

**(A) Narrowing the application of special surrender arrangements to the most serious offences only**

- (1) According to the original proposal of *the Bill*, special surrender arrangements apply to offences punishable with imprisonment for more than 3 years and triable on indictment in Hong Kong. As special surrender arrangements are only supplementary measures before long-term surrender arrangements are in place, and having considered that the most serious offences are tried at the Court of First Instance of the High Court in Hong Kong and the offences involved are punishable with imprisonment for 7 years or more, we will introduce an amendment to *the Bill* to raise the threshold for offences to which special surrender arrangements apply from “more than 3 years” to “7 years or more”.

**(B) Adding more restrictions to the activation of special surrender arrangements**

- (2) In addition to the requirement that special surrender arrangements must comply with all provisions of FOO, provisions may be added in the arrangements in light of the needs of individual cases to further limit the circumstance for surrender (e.g. additional safeguards). We agree that the requesting party can be required to include safeguards that are in line with general human rights protection regarding special surrender arrangements, such as presumption of innocence, open trial, legal representation, right to cross-examine witnesses, no coerced confession, right to appeal, etc. A full list of such additional safeguards is attached at Annex B. Should the requesting party fail to meet the relevant requirements, the Chief Executive has the full right to decide not to process the surrender request.
- (3) The requesting party must provide assurance that the effective limitation period, if any, of the relevant offence has not expired, or the prosecution and punishment in respect of the offences is not precluded for any reasons, e.g. pardon.

**(C) Enhancing protection for the interests of surrendered persons**

- (4) We have drawn reference from the general international practice and come to the view that the HKSAR Government should only process requests from the central authority (as opposed to the local authorities) of a place. Take the Mainland as an example, the HKSAR Government will not process any requests for surrender other than those made by the Supreme People's Procuratorate. Likewise, for mutual legal assistance in criminal matters, the HKSAR Government will only process requests for assistance related to evidence/witnesses made by the Supreme People's Procuratorate; and as for assistance relating to restraining/confiscating the proceeds of crime, the HKSAR Government will only process those requests made by the Supreme People's Court.
- (5) There are views that Hong Kong people subject to surrender should be allowed to apply for serving their sentence in Hong Kong after conviction, hence allowing them to serve their sentence in an environment which they are familiar with in terms of language and habit and thereby facilitating their rehabilitation and visits by family members. We agree to this line of thinking and will explore helping sentenced persons to serve their sentence in Hong Kong according to the arrangement under the current Transfer of Sentenced Persons Ordinance. As the existing Ordinance is not applicable to the Mainland, we will follow up the work with the Mainland upon passage of *the Bill*.
- (6) To take better care of the interests of the surrendered persons, we will negotiate the issue of post-surrender visits on a case-by-case basis, so as to arrange visits via appropriate means, including visits by consuls (in the case of surrender to foreign countries) and officials, or other special cooperation arrangements.

The above additional safeguards are much welcomed by the local community and have met in full the requests from 39 (out of 69) Members of the Legislative Council as contained in a joint letter from them. My colleagues, the Secretary for Justice and the Secretary for Security, have

been attending special meetings of the Panel on Security of the Legislative Council to address Members' queries in preparation of the resumption of debate on *the Bill* on 12 June. At my meeting with the US Consul-General and the Canadian Consul-General on 29 May, I have undertaken to arrange further briefings for their respective business communities as they see fit.

The US plays a leading role in combating cross-border crimes and upholding cross-border criminal justice, and has entered into surrender of fugitive offenders agreements with over 100 countries or territories. These signatories of the US apparently have different legal systems and are of varying degrees in their rule of law ranking. The People's Republic of China has fugitive surrender arrangements with 55 other places of which about 40 are in force, including members of the European Union. As for Hong Kong, fugitive surrender arrangements are in place with 20 jurisdictions which have long-term agreements with us. *The Bill* seeks to enable Hong Kong to return fugitives, on a case-by-case basis, to other parts of China as well as over 170 countries or territories with no extradition agreement. The worries about undermining the rule of law in Hong Kong, compromising rights and freedoms and adversely affecting business interests are unfounded.

To conclude, let me make it clear that the principle of "One Country, Two Systems" has served Hong Kong well over the past 22 years – rights and freedoms, the rule of law, as well as independence of the judiciary are cornerstone of Hong Kong's continued success. As the Chief Executive of the HKSAR, I am duty bound to safeguard these fundamental values. *The Bill* will in no way undermine these strengths or their resilience. On the contrary, it will position Hong Kong better to discharge our international obligations to combat cross-boundary and transnational crimes, and making Hong Kong an even safer place for our people as well as overseas businesses and visitors.

Yours sincerely,



(Mrs Carrie Lam)

Chief Executive

Hong Kong Special Administrative Region  
The People's Republic of China

C.C.

Consul-General of the United States to Hong Kong  
Hong Kong Commissioner for Economic and Trade Affairs to the United  
States



Proposed case-based  
surrender of fugitive offenders

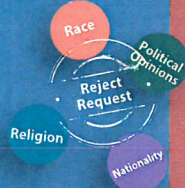
**Multiple  
safeguards  
and  
legal  
protection**

Surrender  
request by the  
relevant jurisdiction

**Scrutiny by the  
Executive Authority**

Department of Justice (DoJ) examines whether  
following conditions are met:

- Double criminality principle  
(i.e. the act concerned is a criminal offence  
in both jurisdictions )
- Offence(s) fall within the 37 stipulated  
categories and punishable with  
imprisonment of more than 3 years
- No death penalty, no political offence
- No prosecution on account of race,  
religion, nationality or political opinions
- Sufficient evidence
- No double jeopardy
- The requesting jurisdiction has to guarantee  
that no prosecution for other offences  
outside the surrender order and no  
re-surrender to another jurisdiction



**Executive Scrutiny**

The Chief Executive (CE) has to  
be satisfied that the conditions  
for processing a request are met,  
taking into account DoJ's advice

CE issues an authority  
to proceed; committal  
hearing is held

Subject can apply  
for judicial review,  
with a right of appeal to  
the Court of Final Appeal

CE has the  
authority to  
refuse a request

Denied

**Judicial Process**

Magistrates' Court openly hears  
submission of evidence by the  
requesting jurisdiction and the  
subject's reply to decide if there is  
sufficient evidence and whether the  
conditions to commit a person to  
custody are met

Subject can raise  
objection to being  
remanded in custody  
and apply to the  
High Court for *habeas corpus*, with a right  
of appeal to the Court of Final Appeal

**Scrutiny by the  
Executive Authority**

After the judicial process,  
CE decides whether to  
issue a surrender order

Subject can apply for judicial  
review of CE's decision, with a  
right of appeal to the Court of  
Final Appeal

CE issues a  
surrender order

Surrender  
Order

Subject can petition  
the CE to oppose surrender



**Special Surrender Arrangements:  
Factors that the HKSAR Government may take into account**

- I. When making special surrender arrangements with a requesting party, the HKSAR Government will, apart from ensuring that such surrender arrangements comply with the provisions in the Fugitive Offenders Ordinance and the human rights safeguards therein, take into account whether the requesting party will conduct an open hearing. The HKSAR Government may, in light of the circumstances, consider adding factors including but not limited to the following in the text of the agreement and duly specify the undertakings to be provided by the requesting party –
  1. A person charged with a criminal offence (the suspect) has the right to be presumed innocent until proved guilty according to the law.
  2. The requesting party shall promptly inform the suspect of the nature and cause of the charge against him in detail and in a language the suspect understands.
  3. The suspect shall be given considerable amount of time and facilities to prepare for his defence and to communicate with a lawyer of his own choosing.
  4. The suspect shall be tried without undue delay.
  5. The suspect shall be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; if he does not have legal assistance, he shall be informed of this right; he shall be granted legal assistance where the interests of justice so require in the case, and without payment by him if he does not have sufficient means to pay for it.
  6. The suspect may examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

7. If the suspect cannot understand or speak the language used in court, he shall have the free assistance of an interpreter.
  8. The suspect shall not be compelled to testify against himself or to admit guilt.
  9. In case the suspect is a juvenile person, the procedure shall be such as will take account of his age and the desirability of promoting his rehabilitation.
  10. Where the suspect is convicted of a crime, he shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
  11. When a suspect has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
  12. No suspect shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of a country.
  13. If a surrender request involves a criminal offence which did not take place within the requesting country, and according to the laws of the requested country, the latter has no extra-territorial jurisdiction over such criminal offences, the surrender may be refused.
  14. The surrender of a person sought may be refused for humanitarian reasons such as age, health and other personal circumstances.
- II. In the course of the surrender procedures, the Chief Executive reserves the final right of not surrendering. Even if the court makes a committal order, the Chief Executive may still refuse to issue a surrender order in view of the relevant rights of the person to be

surrendered under applicable laws and all circumstances of the case, including but not limited to the following –

1. the representation made by the person to be surrendered or his reasons for objecting to the surrender (including surrender restrictions under the Fugitive Offenders Ordinance and reasons for objecting to the surrender under other applicable laws);
2. the latest circumstances of the case or any changes to such circumstances; and
3. the person to be surrendered may be visited by his family, legal representatives and their relevant officers.