1. I am a retired barrister, called to the Bar in 1979 and in practice until 2008. For the last twenty or so years of practice I specialised in immigration and asylum casework, but I have a small amount of experience of extradition. I was junior counsel for Amnesty International in the Pinochet series of cases in the High Court and the House of Lords (1998-2000).

2. Since my retirement I have written on issues including government policy on immigration, race, national security, human rights and the rule of law for journals and online news/comment sites. I am the author of Borderline Justice: the fight for refugee and migrant rights (Pluto Press, 2012), and a part-time lecturer in law at Birkbeck, vice-chair of the Institute of Race Relations, an honorary vice-president of the Haldane Society and a member of the Human Rights Advisory Board of the Helen Bamber Foundation.

3. I am concerned that the UK’s extradition law does not provide just outcomes for requested persons and that the demands of comity between states take precedence over concerns of justice and human rights. Given my limited familiarity with the daily practice of extradition, I do not propose to deal with all the Committee’s questions, but will make general observations on those where I feel qualified to comment.

4. **European arrest warrant:** I am concerned at the lack of a double criminality requirement or of any evidential requirement, and the inadequacy of protection for human rights, in the context of the huge variation in standards and procedures in criminal justice systems and in prison conditions.

5. It is unacceptable that the EAW Framework Decision does not require the Requesting State to demonstrate double criminality, given the disparities in behaviours deemed criminal in different Member States.

6. It is unacceptable, too, that there is no minimal evidential requirement which would ensure that persons who are the victims of mistaken identity or other errors cannot stop their extradition. In the UK, although since the abolition of committal hearings magistrates no longer consider whether there is a *prima facie* case before a case goes to the crown court, the CPS may only initiate prosecutions where there is a reasonable prospect of conviction. It will not prosecute where there is insufficient evidence. It is unfair that requested persons are sent with no consideration of the evidence to another country where such safeguards may have not been applied.
7. The human rights bar on extradition has been set far too high. Nearly all witnesses who gave evidence to the Joint Parliamentary Committee on Human Rights (15\textsuperscript{th} report 2010-12: the human rights implications of extradition) agreed that there is effectively a presumption that Member States comply with their ECHR obligations, which is very difficult to dislodge even where there is clear and cogent evidence of violations. Greece’s repeated condemnation by the ECtHR for breaches of Article 3 (inhuman/ degrading treatment) in respect of prison conditions is a good example. Similar issues arise here as under the Dublin Regulation (which requires asylum seekers who travelled through another EU Member State to be returned there), except that domestic legislation giving effect to Dublin contains an explicit presumption of safety and human rights compliance, while the presumption in extradition derives from case law and judicial considerations of ‘mutual trust’ and comity. Judges have in many cases refused to examine prison conditions in the Requesting State, and have refused to admit evidence of systemic or widespread violations. This means that requested persons’ rights (in particular to fair trial and to freedom from inhuman or degrading treatment) are frequently violated by their extradition.

8. The problem is that Member States’ criminal laws and practices have not been sufficiently reformed to ensure that the EAW does not lead to injustice. The political requirements of ‘mutual trust’ and of easy and fast extradition have been prioritised over the requirements of justice and fairness – which in the long term undermines the whole project of the EU as an area of freedom, security and justice.

9. To remedy this situation, legislation needs to make clear that in considering whether extradition is compatible with the requested person’s human rights, the threshold should be the same as that applying in other cases where human rights are engaged by expulsion (eg, deportation). Further, no presumption of compliance with human rights obligations on the part of Requesting States should be applied, and that evidence from reputable human rights organisations is admissible in determining whether there is a real risk of violation in the Requesting State.

10. \textit{Prima facie case}: see my observations at para 6 above. The human rights bar does not provide sufficient protection. A minimal evidential requirement (which does not necessarily need to be as high as a \textit{prima facie} case, but could be the US standard of ‘probable cause’) should be universally applied. There is no good reason why the protection owed to British citizens on extradition should be less than that owed to US citizens.

11. \textbf{Human rights bar}: it is widely accepted that this is not adequate to protect requested persons’ human rights, see my observations at paras 7 and 9 above, and the conclusions of the Joint Human Rights Committee 15\textsuperscript{th} report 2010-12 at paras 47-59.
12. The conduct of criminal proceedings and the length and conditions of detention in the Requesting State, and their impact, particularly on physically or mentally vulnerable people, give rise to the most serious human rights concerns. As an example, in early 2002 I conducted research into conditions in ‘supermax’ prisons in the US, and into the differences between the protections afforded by the Eighth Amendment (prohibition on cruel and unusual punishment) and Article 3 of the ECHR, in the context of the Al-Fawwaz case. Features of supermax incarceration included the excessive use of solitary confinement; 24-hour surveillance in bare concrete cells with constant artificial light; the use of female guards to monitor male prisoners, including watching them performing intimate bodily functions; punishment chairs which forced prisoners into stress positions for hours; barred cages and many other indignities and cruelties which had been upheld by the US courts. The appellants and the third-party interveners in the case of Babar Ahmad and others v United Kingdom (2013) 56 EHRR 1 presented a wealth of evidence (focussing on solitary confinement and sensory deprivation) which indicated in those areas at least, nothing had changed in the intervening years. I have read nothing to indicate improvements in other aspects of supermax prisons’ treatment of inmates.

13. The Court’s judgment, upholding the men’s extradition, has been widely criticised as unfortunate in suggesting that a higher threshold for Article 3 violations exists for extra-territorial cases (and hinting at an even higher threshold when the Requesting State has a history of respect for justice and human rights): see eg Mavronicola and Messineo, ‘Relatively absolute: the undermining of Article 3 ECHR in Ahmad v UK’, Modern Law Review 2013, 76(3), 589.

14. If the international human rights system is to provide effective protection against human rights violations, in particular those which involve violations of absolute rights such as the protection from inhuman or degrading treatment, it is particularly important that treatment which would be condemned in the domestic context is not condoned, overlooked or tolerated in the extradition context. For this purpose legislation should make it clear that a judge considering whether someone’s extradition is compatible with their human rights should not apply a higher threshold of harm than would be applied in the domestic context.

15. Inordinately lengthy detention at both ends of the extradition process – both awaiting extradition, and pre-trial in the Requesting State, has been tolerated by the judiciary. Requested persons should not be languishing in prison for six, seven, eight or ten years before extradition. In addition, the requirements of Article 8 ECHR (right to respect for family and private life) are rarely recognised in extradition cases, despite the frequently lengthy separation from family members which is entailed. There seems to be a de facto rule that Article 8 rights are always outweighed by the
public interest in extradition, regardless of the nature and gravity (or lack of it) of the extradition offence.

16. **Assurances**: the core problem here is that an assurance from the Requesting State promises a protection which is not afforded to everyone within its jurisdiction (otherwise it would not be necessary to obtain it). Frequently this means that the State concerned is in breach of its international obligations – at least this is the case with national security deportations, when deportation is frequently to torturing states. The use and acceptance of diplomatic assurances as a substitute for insistence on compliance with universal human rights standards undermines the rule of law.

17. The effective monitoring of assurances is an acutely difficult problem. It is by no means unknown for prisoners to face severe reprisals for reporting human rights violations (this happened in the case of Ali Aarrass, whose extradition by Spain to Morocco in December 2010 (on the basis of assurances) was recently condemned by UNHRC, see eg EDM 310 2013-14, 26 June 2013). The Special Immigration Appeals Commission allowed national security deportations to Algeria despite the Algerian government’s refusal to permit any independent monitoring of its assurances, which has resulted in allegations by deportees of torture and now, following substantial litigation, in a halt to deportations there. Assurances from Jordan were breached in the case of HA, who was detained without trial for a lengthy period following his deportation, apparently without response by the British government.

18. Assurances from states which fail to comply with human rights standards are not only inherently objectionable but also inherently unreliable, and very difficult to monitor effectively. In addition, both States (the Requesting or destination State and the Requested or deporting State) have an interest in turning a blind eye to breaches.

19. **The forum bar**: As a matter of principle the forum bar is an extremely welcome development. It is eminently sensible that a judge should be able to take into account the interests of justice, and in particular where most of the harm occurred, the interests of any victims and a requested person’s connections with the UK (inter alia) in deciding whether to allow extradition or not.

20. However, the ability of the forum bar to do justice is severely compromised by the prosecutor’s certificate mechanism, and the criteria for its exercise. It is wrong, as well as wholly counter-intuitive, that a prosecutor’s certificate that there is insufficient admissible evidence to prosecute in the UK, or that there is no public interest in prosecution, should lead to extradition rather than discharge. The Joint Human Rights Committee recognised (at para 195) that the problem derives from Article 5(3) of the US-UK Treaty, but it does not just affect extraditions to the US.
21. It is equally objectionable that, having removed the role of the Home Secretary so as to render extradition less susceptible to diplomatic or political considerations, those same considerations should be re-imported as a means of overriding the forum bar to extradition in cases where the interests of justice require prosecution in the UK. Political and diplomatic considerations should not trump the interests of justice. The interests of justice also come second to the interests of non-disclosure of ‘sensitive’ material in this provision; they should not.

22. Under these certification provisions, it is likely that Gary McKinnon would have been extradited, particularly since the Secretary of State’s discretion to decline extradition at the end of the judicial process has been removed. It is almost certain that because of the certification provisions, the forum bar would not have prevented the extradition of Talha Ahsan and Babar Ahmad, whose lack of any connection to the US apart from their internet server rendered their extradition there a matter causing grave public concern.

23. **Legal aid** for extradition proceedings is vital to ensure equality of arms, given that Requesting States receive specialist legal assistance. Liberty has reported that most requested persons are represented by duty solicitors, most of whom have no specialist knowledge of extradition law. This is a particularly serious problem when combined with the removal of automatic rights of appeal.

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