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Paper for the House Committee meeting on 16 November 2001

**Report of the Subcommittee on
Fugitive Offenders (Sri Lanka) Order and
Fugitive Offenders (Portugal) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on Fugitive Offenders (Sri Lanka) Order and Fugitive Offenders (Portugal) Order.

The subsidiary legislation

Fugitive Offenders (Sri Lanka) Order

2. The Fugitive Offenders (Sri Lanka) Order (L.N. 203 of 2001) is made under section 3 of the Fugitive Offenders Ordinance (Cap. 503). It sets out the limitations, restrictions, exceptions and qualifications applicable between the Hong Kong Special Administrative Region (HKSAR) and the Democratic Socialist Republic of Sri Lanka in relation to the procedures in the Ordinance for the surrender to one another of fugitive offenders.

3. This Order is made consequential upon the agreement to the arrangements for the surrender of fugitive offenders signed by the HKSAR Government and the Government of the Democratic Socialist Republic of Sri Lanka (HKSAR/Sri Lanka Agreement) on 3 September 1999.

Fugitive Offenders (Portugal) Order

4. Made under section 3 of the Fugitive Offenders Ordinance (Cap. 503), the Fugitive Offenders (Portugal) Order (L.N. 204 of 2001) sets out the limitations, restrictions, exceptions and qualifications applicable between the HKSAR and the

Portuguese Republic in relation to the procedures in the Ordinance for the surrender to one another of fugitive offenders.

5. This Order is made consequential upon the agreement to the arrangements for the surrender of fugitive offenders signed by the HKSAR Government and the Government of the Portuguese Republic (HKSAR/Portugal Agreement) on 24 May 2001.

The Subcommittee

6. At the meeting of the House Committee on 26 October 2001, Members agreed that a subcommittee be formed to study the two Orders. The membership list of the Subcommittee is in **Appendix I**.

7. To allow time for the Subcommittee to examine the two Orders in detail, the Chairman of the Subcommittee, Hon James TO, moved a motion at the Council meeting on 14 November 2001 to extend the period for the repeal of the two Orders to the Council meeting on 21 November 2001. The motion was passed by the Council.

8. The Subcommittee has held two meetings with the Administration. The Subcommittee has also considered a submission from the Hong Kong Human Rights Monitor.

Deliberations of the Subcommittee

General issue - right to fair trial

9. Members have asked whether there are provisions in the International Covenant on Civil and Political Rights (ICCPR) and other international treaties as applied to Hong Kong providing that surrender may be refused if the requested Party considers that the person sought to be surrendered would not receive a fair trial in the territory of the requesting Party. Members have also asked whether there is any mechanism enabling the requested Party to take the necessary action if it finds that a person, after having been surrendered, could not receive a fair trial in the territory of the requesting Party.

10. The Administration has explained that Article 14 of the ICCPR sets out a number of requirements which aim at ensuring that accused persons receive a fair trial. The ICCPR however makes no reference to extradition, and is directed towards imposing obligations on the jurisdiction where the trial is in fact conducted.

11. The Administration has further explained that one of the fundamental assumptions of any extradition agreement is that a person sought will receive a fair trial in the territory of the requesting Party. Generally, the requested Party would not enquire into the operation of the legal system of the requesting Party. The requested Party may in

exceptional cases refuse the surrender of a person when there is clear evidence of a flagrant denial of the right to fair trial in the territory of the requesting Party. If the situation warrants, the bilateral agreement on the surrender of fugitive offenders would be terminated.

12. The Administration has also advised that if it was clear that a person extradited from the requested Party did not receive a fair trial in the place to which he was surrendered, the requested Party would make strong representations to the requesting Party. In addition, the requested Party, being a State Party to the ICCPR, could refer the matter to the United Nations Committee established pursuant to Article 41 of the ICCPR.

Fugitive Offenders (Sri Lanka) Order

Conviction in absentia

13. Article 2(5) of the HKSAR/Sri Lanka Agreement states that where the surrender of a fugitive offender who was convicted in his absence is requested for the purpose of carrying out a sentence, the requested Party shall not refuse to surrender the person on the ground that the conviction was obtained in his absence, unless he had not been given the opportunity to be present at his trial; and he shall be considered for the purpose of the proceedings in the requested Party to be an accused person.

14. Members note that this provision is not in the HKSAR model agreement on the surrender of fugitive offenders. Members have asked whether to surrender a person for serving in the territory of the requesting Party an imprisonment sentence upon his conviction in absentia would be in conformity with international obligations in connection with the right to fair trial.

15. The Administration has explained that in Sri Lanka and some European jurisdictions, conviction of a person can be made in absentia. Article 2(5) in effect provides that a person convicted in his absence can be surrendered unless he did not have an opportunity to be present at his trial, and he is to be treated as an accused person for the purposes of proceedings in the territory of the requested Party. If a decision is made by the requested Party to surrender the person, he will serve the sentence in the territory of the requesting Party without a re-trial.

16. The Administration has pointed out that Article 14 of ICCPR does not deal with the extradition of persons. The Article provides that a person charged with a criminal offence is to be tried in his presence. However, the Human Rights Committee established pursuant to the ICCPR has held that criminal trials in absentia are acceptable when the defendant has been given ample notice and adequate opportunity to attend the proceedings. Therefore, the provision is consistent with the views of the Human Rights Committee in relation to conviction in absentia.

Offence of a political character

17. Under Article 6 of the HKSAR/Sri Lanka Agreement, a fugitive offender shall not be surrendered if the requested Party has substantial grounds for believing that the offence of which that person is accused or was convicted is an offence of a political character. Under Article 6(2), murder or manslaughter, any offence against the laws relating to explosives, and any offence within the scope of any convention which is binding on both Parties and which obligates the Parties to prosecute or grant surrender for such offence shall not be considered to be offences of a political character.

18. Members and the Hong Kong Human Rights Monitor have expressed concern about the implications of Article 6(2). This provision, which is not found in other Fugitive Offenders Orders made in the past except the Fugitive Offenders (India) Order, will in effect allow a request for surrendering a fugitive offender be made in respect of an offence of a political character if the offender is involved in murder or any offence against the laws relating to explosives or any convention offences. Members have also pointed out that under section 5(1)(a) of the Fugitive Offenders Ordinance, a person shall not be surrendered if it appears to the appropriate authority that the offence in respect of which surrender is sought is an offence of a political character. Members are concerned that the provision may not be in conformity with the provision in the Fugitive Offenders Ordinance.

19. The Administration has explained that there are two categories of offences which fall within the meaning of an offence of a political character. The first category comprises offences which are political by their nature, for example, treason and sedition. The second category comprises offences which, although on their face offences against the ordinary criminal law, are, because of the context in which they are committed, offences of a political character. Since there is no statutory definition of an offence of a political character, it would be for the courts to decide whether an offence would fall into the second category of political offences having regard to the circumstances of the case. As shown in previous court cases in overseas, the court in considering whether an offence is an offence of a political character would have regard to the motive of the jurisdiction requesting extradition and the motive of the person committing the offence.

20. The Administration has pointed out that there are also safeguards in Article 6(1) (b) and (c). Under Article 6(1)(b), a fugitive offender shall not be surrendered if the requested Party has substantial grounds for believing that the request for surrender is in fact made for the purpose of prosecution or punishment on account of race, religion, nationality or political opinions. Article 6(1)(c) provides that a fugitive offender shall not be surrendered if the requested Party has substantial grounds for believing that the person might, if returned, be prejudiced at that person's trial or punished, detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinions.

21. The Administration has further advised that Article 6(2) is made having regard to the problem of terrorism in Sri Lanka. Under the European Convention on the Suppression of Terrorism, kidnapping, taking of hostages, murder, and etc. should not be, in relation to European countries, considered as political offences. There are also other international conventions concerning suppression of terrorism which provide that there should be no political offence exemptions for offences covered by those conventions.

22. As regards the question of conformity with the Fugitive Offenders Ordinance, the Administration has pointed out that under section 3(1) of the Ordinance, limitations, restrictions, exceptions and etc. are permitted to be made in bilateral agreements signed between HKSAR and other jurisdictions. In addition, section 3(9) of the Ordinance provides that a Fugitive Offender Order shall not be made unless the arrangements for the surrender of fugitive offenders are substantially in conformity with the provisions in the Ordinance. In the view of the Administration, Article 6(2) is not inconsistent with the provisions of the Ordinance.

23. Members have requested the Administration to provide detailed information on the international conventions referred to in paragraph 21 above, the new development in respect of the international conventions, how the provisions of the Fugitive Offenders Ordinance work and where the dividing line for substantial conformity lies.

24. As there are issues relating to the Sri Lanka Order that need to be further discussed with the Administration, members have agreed that the Order should be repealed. The Administration has indicated that it does not see the need for the Order to be repealed but respects the decision of the Subcommittee.

Fugitive Offenders (Portugal) Order

25. Members note that the provisions in the HKSAR/Portugal Agreement are substantially as those in other signed agreements with other jurisdictions.

26. Members also note that under Article 2(5) of the Agreement, where a request for the surrender of a fugitive offender is made for the purpose of carrying out a sentence, the requested Party may refuse to surrender him if it appears that the conviction was obtained in his absence, unless he has the opportunity to have his case retried in his presence.

Recommendations

27. The Subcommittee recommends that -

- (a) the Chairman of the Subcommittee, Hon James TO, should move a motion on 21 November 2001 to repeal the Fugitive Offenders (Sri Lanka) Order;
- (b) the House Committee's support be sought to seek President's leave to waive the requisite notice period for Hon James TO's motion;
- (c) the Fugitive Offenders (Portugal) Order be supported; and
- (d) a subcommittee be formed to study issues relating to the Fugitive Offenders (Sri Lanka) Order.

Advice Sought

28. Members are invited to support the recommendations of the Subcommittee in paragraph 27 above.

Council Business Division 2
Legislative Council Secretariat
16 November 2001

**Subcommittee on
Fugitive Offenders (Sri Lanka) Order and
Fugitive Offenders (Portugal) Order**

Membership list

Chairman Hon James TO Kun-sun

Members Hon Margaret NG

 Hon Jasper TSANG Yok-sing, JP

 Hon Mrs Miriam LAU Kin-yee, JP

 Hon Emily LAU Wai-hing, JP

 Hon Audrey EU Yuet-mee, SC, JP

 (Total : 6 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr KAU Kin-wah

Date 7 November 2001