

SURRENDER OF FUGITIVE OFFENDERS HKSAR/SRI LANKA

Comments on the Agreement have been made by the -

- Hong Kong Human Rights Monitor
- Ms Janice Brabyn of the Department of Law, Hong Kong University
- The Hong Kong Bar Association, and
- The Law Society of Hong Kong

2. The Hong Kong Human Rights Monitor has suggested that the Agreement should permit refusal of the surrender of Hong Kong Permanent Residents as well as Chinese nationals. It has also raised the issue of whether Article 6(2) is substantially in conformity with the Fugitive Offenders Ordinance (CAP 503) as required by section 3(9) of CAP 503 and whether Article 6(2) is consistent with international trends in the area of extradition law. These points were dealt with in a paper which was submitted to Legislative Council on 14.12.01. As to "substantial conformity" the following was stated in that paper -

Article 6(1)(a), (b) and (c) of the Agreement correspond to Section 5(1)(a), (c) and (d) of the Fugitive Offenders Ordinance (CAP 503). The only difference between the provisions in the Agreement and the Ordinance is the exception created by Article 6(2) of the Agreement.

It is not considered that the exception created by Article 6(2) results in the Agreement failing to be in substantial conformity with the Ordinance. In the paper previously

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presented to the Subcommittee, it was explained that the courts have been unable to provide an exhaustive definition of what amounts to an "offence of a political character". In considering whether an offence is an offence of a political character they take into consideration two factors. The first is the motive of the jurisdiction requesting extradition; if the motive is other than the normal enforcement of the criminal law the offence itself may be treated as one of a political character. If this factor is not present, the courts will look at the second factor, the political motivation of the fugitive in committing the offence. Article 6(1)(b) of the Agreement covers the first factor taken into account by the courts; and Article 6(1)(c) covers the second factor.

In this way the courts, in ruling upon whether certain offences are offences of a political character within the meaning of provisions similar to Article 6(1)(a), have laid down criteria which are very similar to the grounds for refusing surrender that are explicitly set out in Article 6(1)(b) and (c). In other words, there is substantial overlap between Article 6(1)(a), on the one hand, and Article 6(1)(b) & (c) on the other. But the exception created by Article 6(2) does not apply to 6(1)(b) & (c). Because of the narrow scope of the qualification in Article 6(2) of the "political" exception, it follows that the Sri Lanka Agreement is "substantially in conformity" with section 5 of the Ordinance.

3. Ms Janice Brabyn's submission concludes that -

- Article 2(5) of the Agreement is in substantial conformity

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with CAP 503 and is compatible with current human rights norms.

- Article 6(1)(a) (we believe that the reference in her submission should be to Article 6(2)) is either not in substantial conformity with CAP 503 or, if technically compatible, should not be accepted in the absence of a clearer legislative mandate.

4. The Hong Kong Bar Association is of the view that Article 6(2) of the Agreement is substantially in conformity with the provisions of CAP 503.

5. The Law Society of Hong Kong has stated that it has no objection to the arrangements proposed in the Fugitive Offenders (Sri Lanka) Order.

6. The Administration would like to make the following points

- For the reasons given in the paper of 14.12.01 it is considered that the Sri Lankan Agreement is, as required by section 3(9) of CAP 503, substantially in conformity with the provisions of CAP 503. This position is supported by the Hong Kong Bar Association and the Law Society of Hong Kong
- As indicated in the paper of 14.12.01, the international trend, as evidenced by Conventions, Agreements and decisions of the United Nations Security Council is to limit the political offence exception.
- Existing Fugitive Offenders Orders in respect of the bilateral Agreements with

Australia
Malaysia
Philippines
USA

all limit the scope of the political offence exception. So does the Order implementing the extradition obligations in the Genocide Convention.

7. We have considered Ms Brabyn's suggestion that, even though Article 6(2) may be technically compatible with CAP 503 it should not be accepted in the absence of a clearer legislative mandate. For the reasons given we do not consider that such a mandate is necessary. Nor do we think that this Order should be delayed to enable further consideration of this issue since as noted above, a number of Orders limiting the scope of the political offence exception have already been made. And another reason is that Sri Lanka has already completed its internal procedures for implementation of the Agreement and is ready for the Agreement to enter into force.

8. Legislation will shortly be required to implement the extradition obligations in the Conventions concerning the Suppression of Terrorist Bombings and the Financing of Terrorism. This legislation will need to exclude offences referred to in the Conventions from being adjudged political offences for the purposes of extradition. In the context, therefore, of future legislation to implement these Conventions, we will consider submitting for Legislative Council's consideration amendments to the Fugitive Offenders Ordinance which would clarify this question of Orders qualifying the political offence exception in the Ordinance.