

PAPER FROM HONG KONG HUMAN RIGHTS MONITOR DATED 28.3.2002

The paper deals with the following issues. Comments from the Administration appear in italics -

Fair Trial [pp 2-5 and Enclosure 1]

Human Rights Monitor : It is a fundamental assumption that the Parties to an extradition Agreement will act in good faith and ensure that a surrendered fugitive will be guaranteed a fair trial.

It is agreed that one of the fundamentals of any extradition Agreement is that a surrendered fugitive will receive a fair trial in the requesting jurisdiction. If there was clear evidence that a fugitive did not receive a fair trial the requested jurisdiction would make strong representations to the requesting jurisdiction. If the question could not be suitably resolved termination of the Agreement could follow.

The question whether a fugitive returned from Hong Kong to Sri Lanka will or will not receive a fair trial is dealt with subsequently in this paper.

But it is, we think, important to note what channels are available to a returned fugitive who claims that he will not or has not received a fair trial in Sri Lanka.

The Supreme Court of Sri Lanka has the power to entertain petitions alleging that a Fundamental Right [being a right deriving from the Universal Declaration of Human Rights and set out in the Sri Lanka Constitution] has been infringed or is about to be infringed. Equality before the law and equal protection before the law is one of the Constitutional rights referred to. The Supreme Court of Sri Lanka is recognised both locally and internationally as an independent judicial institution free from executive or legislative interference. Since 1994 there have been more than 5,000 petitions to the Supreme Court. Individual applications must be finally dealt with by the Court within 2 months.

In 1997 Sri Lanka acceded to the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). The effect of this is that any person who believes that one of his rights under the ICCPR has been

violated may petition the Human Rights Committee; the right to a fair trial is embodied in Article 14 of the ICCPR.

- **Human Rights Monitor** : Article 3(f) of the UN Model Treaty on Extradition should be included in the Agreement with Sri Lanka and reflected in the Fugitive Offenders Ordinance [CAP 503]. Article 3(f) provides for mandatory refusal of extradition -

“if the person whose extradition is requested has been or would be subjected in the requesting State to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14.”

We do not agree with this suggestion which does not reflect international practice. None of Hong Kong's SFO Agreements include such an Article. Nor have any of Hong Kong's negotiating partners ever proposed inclusion of such an Article. Australia has concluded Agreements with Paraguay and Indonesia which contain such an Article but these are the only Agreements of which we are aware. There would appear to be two reasons why this UN Model Treaty Article has not found favour. The first is the consistent jurisprudence to the effect that extradition should proceed on the fundamental assumption that the returned fugitive will receive a fair trial and that question is not a matter for enquiry in the Requested Party. The second is the desire of countries to avoid concluding agreements which could encourage fugitives to challenge extradition requests by calling into question the systems of administration of justice in requesting jurisdictions.

- **Human Rights Monitor** : The years of civil war and the prolonged state of emergency make it extremely doubtful whether a fugitive offender would receive a fair trial in Sri Lanka. This point is amplified in the enclosure to the Human Rights Monitor's paper by the following references :-

- the ongoing civil war has continued to be accompanied by serious human rights abuses by both sides to the conflict [US Dept. of State Report 2000].
- since 1983 Sri Lanka has been governed by the Emergency

Regulations and Prevention of Terrorism Act; under this legislation the security forces and police have been given wide powers of arbitrary arrest and detention without trial [referred to by Amnesty International Country Report 2000; UN Human Rights Committee 1995].

- in connection with the civil war there have been a number of involuntary disappearances “extra-judicial” killings and political murders [Working Group on Enforced or Involuntary Disappearances of the UN Commission 1999; US Department of State Report 1999].
- those responsible for human rights violations have not been punished [US Department of State Report 2000; UN Human Rights Committee 1995].

The Administration does not consider that because there have been reports of human rights abuses in the context of the civil war in Sri Lanka it follows that a returned fugitive offender will not receive a fair trial.

Sri Lanka has a long judicial history dating back to the early 19th century and the judicial traditions which have evolved ensure a fair trial for the persons accused of crimes. All internationally accepted safeguards have been incorporated into the Constitution and to the Rules of Evidence and Procedure to safeguard the rights of the accused. Under the laws of procedure and evidence the burden of proof in criminal matters rests with the prosecutor and the prosecution must prove its case beyond reasonable doubt.

In any event the Emergency Regulations are no longer in force and the peace process has commenced. In accordance with the cease-fire agreement which came into force on 23.3.02 the Government has undertaken to refrain from making arrests or detaining suspects under the provisions of the Prevention of Terrorism Act; any necessary arrests etc, will be made pursuant to the normal criminal law (Code of Criminal Procedure Act).

It is also noteworthy that Sri Lanka is and has been opening up to independent scrutiny its human rights situation. In the recent past Sri Lanka has invited the following UN bodies to visit -

- *Special Rapporteur on Summary and Arbitrary*

Executions : 1997

- *UN Secretary General's Special Representative on Children in Armed Conflict : 1998*
- *UN Working Group on Disappearances : 1999*
- *Committee against Torture : 2000*

In 2000, Sri Lanka submitted its 2nd periodical report under the Convention on the Rights of the Child, and the 7th, 8th and 9th reports under the Convention for the Elimination of all Forms of Racial Discrimination. The Government of Sri Lanka is also in the process of submitting its 2nd periodic report under the International Covenant on Economic, Social and Cultural Rights and its 4th periodic report under the International Covenant on Civil and Political Rights. Sri Lanka also presented its 3rd and 4th periodic reports pursuant to CEDAW in January 2002.

The enclosure to the Human Rights Monitor's paper refers to US Department of State Reports which are critical of human rights abuses in the context of the civil war. Sri Lanka and the USA have nevertheless recently concluded a bilateral extradition Agreement [signed 7.1.01] which has been approved by the US Senate and Congress. Sri Lanka is negotiating extradition Agreements with a number of other countries. And, of course, Sri Lanka is in an extradition relationship with approximately 50 Commonwealth's jurisdictions (including, before 1997, Hong Kong).

To conclude, it is the Administration's view that there is no evidence that a fugitive returned from Hong Kong to Sri Lanka will suffer adversely because of any situation of internal conflict. This view would seem to be shared by the other jurisdictions which are in an extradition relationship with Sri Lanka.

Offences not to be regarded as of Political Character [pp 5-9]

- **Human Rights Monitor** : the exclusion of offences against "the laws relating to explosives" in the Agreement is wider than the comparable exclusions in the Convention for the Suppression of Terrorist Bombings and the European Convention on the Suppression of Terrorism because it is not also provided that the offences must be committed with intent to cause death, injury or damage to property.

- **Human Rights Monitor** : the exclusion of “murder or manslaughter”, without qualification (the Internationally Protected Persons Convention, for instance, qualifies the exclusion to murder of heads of state, foreign diplomats etc) is arbitrary and may have serious consequences for future agreements.

Although the exclusion relating to explosives is wider than the comparable exclusion in the Convention for the Suppression of Terrorist Bombings it should be noted that under the European Convention on the Suppression of Terrorism, in addition to certain specified offences [including offences involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb of this use endangers persons] which are not to be regarded as political offences, States may decide not to regard as political offences -

“a serious offence involving an act of violence, other than one covered by the list above against the life, physical integrity or liberty of a person and serious offences involving acts against property, if the act creates a collective danger for persons”

In conformity with this provision the UK has provided in the Suppression of Terrorism Act 1978 for a number of offences not listed in the Convention to be excluded from the political offence exception. These offences include -

- murder, manslaughter
- rape
- assault occasioning actual bodily harm, wounding, grievous bodily harm
- a wide range of offences involving explosives and firearms

The paper states that “offences against the laws relating to explosives” will comprehend offences found in the Dangerous Goods Ordinance [CAP 295] and the Crimes Ordinance [CAP 200]. But offences against CAP 295 only carry 6 months imprisonment and will not be extraditable. Offences against CAP 200 are serious offences which carry either life, 20 years or 14 years imprisonment.

- **Human Rights Monitor** : the exclusion of offences in Conventions

which are binding on Sri Lanka and Hong Kong gives HK “blanket approval” to conclude agreements which will expand the range of offences which are not to be regarded as political offences.

This exclusion will only cover offences created by multilateral Conventions. Such conventions will cover crimes which are regarded by the international community as extremely serious and accordingly appropriate to be excluded from the political offence exception. Examples include hijacking, the taking of hostages and attacks on internationally protected persons.

Military Offences Non-extraditable [p 9]

Human Rights Monitor : The Agreement should provide that military offences are not to be extraditable along the lines of Article 3(c) of the UN Model Agreement on Extradition or Article 4 of the 1957 European Convention on Extradition.

This point is misconceived. Both the abovementioned provisions provide for refusal of surrender for military offences which are not offences under the ordinary criminal law. Unlike the UN Model Agreement and the European Convention the HKSAR/Sri Lanka Agreement provides for a list of extraditable offences. All of these listed offences are offences under the ordinary criminal law. Put another way none of the offences listed are purely military offences. There is accordingly no need to provide for refusal of surrender in relation to purely military offences. It should nevertheless be noted that the HKSAR/UK Agreement contains a military offence exception at the request of the UK side.

Chinese and non-Chinese Permanent Residents [pp 9-10]

Human Rights Monitor : The discretion to refuse the surrender of Chinese nationals should be extended to non-Chinese permanent residents so that all permanent residents will have the benefit of this discretion.

It has not been a feature of Hong Kong’s extradition practice to refuse the surrender of its sovereign’s nationals and there is no reason to seek the right to refuse to surrender Hong Kong permanent residents. The right to refuse the surrender of PRC nationals is provided for in Section 13(4) of the Fugitive Offenders Ordinance (CAP 503). It has not so far been

invoked, and is intended to be used very sparingly.

The principal reason such Articles appear in Hong Kong's Agreements is to cover a situation in future where arrangements exist to permit the rendition of persons from the HKSAR to the Mainland and the PRC and the requesting foreign jurisdiction may both have jurisdiction concurrently over the same offence. Such Articles will enable priority to be given to a Mainland request for the rendition of a Mainland Chinese national over a foreign request for the extradition of the same person for the same offence.

The discretion in the Agreement is accordingly directed to deciding to which jurisdiction a fugitive will be returned. It confers no real benefit on Chinese nationals vis a vis non-Chinese permanent residents.

Contingent provisions to deal with possible development

- **Human Rights Monitor** : Article 3(g) of the UN Model Agreement on Extradition should be included. This provision provides for mandatory refusal of surrender

“if the judgment of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence”.

The combined effect of section 5(1)(b) of the Fugitive Offenders Ordinance [CAP 503] and Article 2(5) of the HKSAR/Sri Lanka Agreement is the same as Article 3(g) of the UN Model Agreement. Under Sri Lankan law a person convicted in his absence will have the right to be retried upon surrender. The Sri Lanka side did not wish this aspect to be included in Article 2(5) but fully accept that if Sri Lankan law changes so as not to enable a surrendered fugitive who has been convicted in his absence to be tried again section 5(1)(b) will operate to preclude surrender.

- **Human Rights Monitor** : Article 4(g) of the UN Model Agreement on Extradition should be included. This provision provides for discretionary refusal of surrender

“If the person whose extradition is requested has been

sentenced or would be liable to be tried or sentenced in the requesting State by an extraordinary or ad hoc court or tribunal”.

It should be noted that this is described as an “optional ground for refusal” in the UN Model Agreement. A comparable provision was included, at New Zealand's request, as Article 7(1)(e) of the HKSAR/New Zealand Agreement. But this is the only agreement we have negotiated where such a proposal has been made by the other side. In our view such provisions might only be relevant where a military Government is in place in the other jurisdiction. That is not the situation in Sri Lanka and, if such a situation ever occurred suspension of the Agreement would be the most appropriate course (see Article 19(3)).