

SURRENDER OF FUGITIVE OFFENDERS HKSAR/SRI LANKA

This paper addresses issues raised by the Subcommittee in connection with Articles 3 and 6 of the Surrender of Fugitive Offenders Agreement between the Government of Sri Lanka and the Government of the Hong Kong SAR.

A. ARTICLE 3 (SURRENDER OF NATIONALS)

The Government of Sri Lanka reserves the right to refuse the surrender of its citizens. The Government of the Hong Kong Special Administrative Region reserves the right to refuse the surrender of nationals of the People's Republic of China.

2. The Hong Kong Human Rights Monitor has suggested that Hong Kong's Agreements concerning the Surrender of Fugitive Offenders should also permit refusal of the surrender of Hong Kong permanent residents as well as nationals.

3. It has not been a feature of Hong Kong's extradition practice to refuse the surrender of its sovereign's nationals or of Hong Kong permanent residents. The right to refuse the surrender of PRC nationals under Section 13(4) of the Fugitive Offenders Ordinance (CAP 503) has not so far been invoked, and is intended to be used very sparingly.

4. The principal reason such Articles need to 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 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.

B. ARTICLE 6 (MANDATORY REFUSAL OF SURRENDER)

(1) *A fugitive offender shall not be surrendered if the requested Party has substantial grounds for believing :*

- (a) *that the offence of which that person is accused or was convicted is an offence of a political character;*
- (b) *that the request for surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecution or punishment on account of race, religion, nationality or political opinions; or*
- (c) *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.*

(2) *For the purposes of this Agreement, the following shall not be considered to be offences of a political character :*

- (a) *offences specified in Item 1, Item 20 or Item 43 of Article 2(1);*
- (b) *conspiracy to commit, aiding, abetting, counselling or procuring the commission of, inciting the commission of, being an accessory to, or attempting to commit any offence referred to in paragraph (a).*

6. The issues that have been raised here are -

- (a) whether the exception created by Article 6(2) results in the Agreement not being "substantially in conformity" with the Fugitive Offenders Ordinance (CAP 503) [See section 3(9) of the Ordinance].

- (b) whether Article 6(2) is consistent with international trends in this area of extradition law.

Substantial conformity

7. 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.

8. 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 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.

9. 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.

International Trends

10. It is clear that the international trend, as evidenced by Conventions, Agreements and decisions of the United Nations Security Council, is to limit the political offence exception as far as terrorist activity is concerned. Attached is a brief description of provisions in such instruments. Jurisdictions to which these instruments apply should ensure that their domestic law reflects the limitations on the political offence exception contained therein.

ATTACHMENT

European Convention on the Suppression of Terrorism 1977

Parties are not to consider the following offences as political offences for the purposes of extradition -

- hijacking or other offences against aircraft
- serious attacks on internationally protected persons
- kidnapping
- taking of hostages
- explosives and firearms offences

United Nations Convention for the Suppression of Terrorist Bombings 1998

Offences set forth in the Convention are not to be regarded as political offences for the purposes of extradition.

United Nations Convention for the Suppression of the Financing of Terrorism 2000

Offences set forth in the Convention are not to be regarded as political offences for the purposes of extradition.

United Nations Security Council Resolution 1373 (2001)

States are called upon to ensure that claims of political motivation are not recognized as grounds for refusing requests for extradition of alleged terrorists.