

立法會

Legislative Council

LC Paper No. CB(2)339/13-14(04)

Ref : CB2/SS/3/13

Subcommittee on Fugitive Offenders (Czech Republic) Order, Mutual Legal Assistance in Criminal Matters (Spain) Order and Mutual Legal Assistance in Criminal Matters (Czech Republic) Order

Background brief prepared by the Legislative Council Secretariat on bilateral agreements on the surrender of fugitive offenders

Purpose

This paper provides background information relating to scrutiny by the Legislative Council ("LegCo") of bilateral agreements in relation to the arrangements for the surrender of fugitive offenders ("SFO") signed between the Government of the Hong Kong Special Administrative Region ("HKSAR") and other jurisdictions.

Background

2. The Fugitive Offenders Ordinance (Cap. 503) ("FOO"), which came into operation on 25 April 1997, provides for the surrender to certain places outside Hong Kong persons wanted for prosecution, or for the imposition or enforcement of a sentence. It also provides for the treatment of persons surrendered to Hong Kong. Section 3 of FOO states that the Chief Executive ("CE") in Council may, in relation to any arrangements for SFO, by order direct that the procedures in the Ordinance shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications contained in the order.

3. According to the Administration, for the purpose of negotiations with prospective SFO agreement partners, it has adopted the "list" approach by seeking to list in agreements some or all of the 46 categories of offence in Schedule 1 to FOO as offences for which surrender is to be granted.

However, a number of SFO prospective partners, particularly the European countries have indicated difficulties in agreeing to adopt the "list" approach, as the approach is not compatible with their domestic law and practice. The Administration has since 2005 introduced the alternative formulation approach, in addition to the list approach, in negotiations with prospective SFO agreement partners, depending on the circumstances of each individual case. Under the alternative formulation approach, although the list of offences for which surrender will be granted is not explicitly specified in the SFO Agreements, a list of such offences will be provided to the SFO partners. As far as Hong Kong is concerned, SFO will only be permitted for "relevant offences" as specified in Schedule 1 to FOO. The proposed alternative formulation was discussed at the meeting of the Panel on Security on 13 June 2005 and the relevant paper provided by the Administration as well as relevant extract from minutes of the meeting are in **Appendices I and II** respectively.

4. An order for SFO is subject to a mechanism of scrutiny by LegCo provided in section 3(2) to (6) of FOO under which LegCo has the power only to repeal the order.

SFO Orders scrutinized by LegCo

5. A total of 19 Orders in relation to the bilateral arrangements for surrender of fugitive offenders signed with foreign jurisdictions have been made under section 3 of FOO. These jurisdictions are Singapore, New Zealand, Sri Lanka, Portugal, Finland, Germany, Republic of Korea, Malaysia, Ireland, South Africa, the Netherlands, Canada, Australia, the Philippines, the United States of America, India, Indonesia, the United Kingdom and Czech Republic.

The Czech Order

6. The Czech Order is made in consequence of the agreement to the arrangements for the surrender of fugitive offenders entered into by the HKSAR and the Czech Republic which was signed on 4 March 2013 ("the Agreement"). The Administration has confirmed that the Agreement is substantially in conformity with the provisions of FOO.

7. The commencement date of the Czech Order will be appointed by the Secretary for Security by notice in the Gazette which will coincide with the date on which the Agreement enters into force. According to the Administration, the Agreement provides that it shall enter into force on the 30th day after the day on which the Contracting Parties have notified each other in writing that the requirement for the entry into force of the agreement have been complied with. As it is likely that Hong Kong will first complete the domestic procedures for bringing the Agreement into force, the date of operation of the Agreement will depend on when the Czech Republic completes its domestic procedures and notifies Hong Kong.

Council Business Division 2
Legislative Council Secretariat
21 November 2013

Legislative Council Panel on Security

Bilateral Agreements on Surrender of Fugitive Offenders Article on Offences

Purpose

This note outlines an alternative formulation of the article in bilateral agreements on surrender of fugitive offenders (SFO) concerning offences in respect of which surrender can be granted.

Background

2. Hong Kong is committed to playing a full part in international cooperation in law enforcement and has embarked on a programme to establish a network of bilateral agreements on SFO. Implementation of these agreements is taken forward in accordance with the Fugitive Offenders Ordinance (the Ordinance) (Cap. 503). Each agreement has to be covered by an order made by the Chief Executive in Council and approved by the Legislative Council under section 3. Pursuant to section 4 of the Ordinance, a person in Hong Kong who is wanted in a place with which Hong Kong has an SFO agreement may be arrested and surrendered to that place for the prosecution or imposition of sentence in respect of a “relevant offence”. A “relevant offence” is conduct which, if it had occurred in Hong Kong would constitute an offence – (i) coming within any of the descriptions specified in Schedule 1 to the Ordinance and (ii) punishable in Hong Kong with imprisonment for more than 12 months, or any greater punishment. Schedule 1 to the Ordinance in turn lists 46 categories of offence.

3. Hitherto, for the purpose of negotiations with prospective SFO agreement partners, we have adopted the “list” approach by seeking to list in the agreements some or all of the 46 categories of offence in Schedule 1 to the Ordinance as offences for which surrender is to be granted. A copy of the relevant provisions in the model text is at **Annex A**.

4. As of end April 2005, Hong Kong has signed SFO Agreements with 13 foreign jurisdictions. These jurisdictions are Australia, Canada, India, Indonesia, Malaysia, The Netherlands, New Zealand, Philippines, Portugal, Singapore, Sri Lanka, United Kingdom and the United States of America. The “list” approach mentioned in paragraph 3 above has been adopted in each of these Agreements.

5. However, a number of our prospective partners, particularly the European countries such as France and Switzerland, have indicated difficulties in agreeing to adopt the “list” approach, as the approach is not compatible with their domestic law and practice which generally permit extradition in respect of all criminal offences with a penalty above a certain threshold. Negotiations with these countries have stalled as a result.

Proposed alternative formulation

6. It is in Hong Kong’s interest to be able to establish a wider network of SFO partners for the purpose of combating crime. We consider that an alternative formulation should be possible to both address the concerns mentioned in paragraph 5 above and satisfy the requirements of the Ordinance. The proposed alternative formulation is set out at **Annex B** and explained below.

7. Paragraph (1) of the proposed article will oblige the Parties to the Agreement to grant surrender in respect of offences for which surrender is permitted under their domestic law. As far as Hong Kong is concerned, surrender of fugitives will only be permitted for “relevant offences” as defined in section 2(2) of the Ordinance, i.e. the categories of offence specified in Schedule 1 to the Ordinance which carry more than 12 months’ imprisonment. Paragraph (1) will therefore not change the categories of offence for which surrender may be granted under the Ordinance.

8. Paragraph (2) of the proposed article complements paragraph (1) by ensuring that the Parties to the Agreement shall provide each other with a list of the offences for which surrender will be granted. For Hong Kong’s part the list of categories of offence in Schedule 1 to the Ordinance will be provided to the other Party. It can therefore be seen that although such offences will not be listed in the SFO Agreements, both Hong Kong and its partners will be clearly aware of the list of offences for which SFO is permitted.

9. The proposed new formulation will not change Hong Kong’s obligation with respect to SFO. The requirements under the Ordinance will invariably continue to be complied with. It is a mere adjustment of the approach to facilitate our negotiations with foreign jurisdictions, for the purpose of extending our partnership in bringing fugitive offenders to justice. The list of categories of offences for which surrender may be granted under the Ordinance will be preserved, although it is not explicitly specified in the SFO Agreements.

Way Forward

10. We intend to adopt either the list approach or the alternative approach set out in paragraphs 6 to 9 above in our future negotiations with prospective SFO agreement partners, depending on the circumstances of each individual case. Any future SFO Agreement concluded will only be implemented by an order made by the Chief Executive in Council and approved by the Legislative Council in accordance with section 3 of the Ordinance.

**Security Bureau
Department of Justice**

April 2005

**Provisions in the Model Text regarding
Offences for which Surrender is to be granted**

OFFENCES

(1) Surrender shall be granted for an offence coming within any of the following descriptions of offences in so far as it is according to the laws of both Parties punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty :

1. Murder or manslaughter, including criminal negligence causing death; culpable homicide; assault with intent to commit murder
2. Aiding, abetting, counselling or procuring suicide
3. Maliciously wounding; maiming; inflicting grievous or actual bodily harm; assault occasioning actual bodily harm; threats to kill; intentional or reckless endangering of life whether by means of a weapon, a dangerous substance or otherwise; offences relating to unlawful wounding or injuring
4. Offences of a sexual nature including rape; sexual assault; indecent assault; unlawful sexual acts on children; statutory sexual offences
5. Gross indecency with a child, a mental defective or an unconscious person
6. Kidnapping; abduction; false imprisonment; unlawful confinement; dealing or trafficking in slaves or other persons; taking a hostage
7. Criminal intimidation
8. Offences against the law relating to dangerous drugs including narcotics, psychotropic substances, precursors and essential chemicals used in the illegal manufacture of narcotics and psychotropic substances; offences relating to the proceeds of drug trafficking
9. Obtaining property or pecuniary advantage by deception; theft; robbery; burglary (including breaking and entering); embezzlement; blackmail; extortion; unlawful handling or receiving of property; false accounting; any other offence in respect of property or fiscal matters involving

fraud; any offence against the law relating to unlawful deprivation of property

10. Offences against bankruptcy law or insolvency law
11. Offences against the law relating to companies including offences committed by officers, directors and promoters
12. Offences relating to securities and futures trading
13. Offences relating to counterfeiting; offences against the law relating to forgery or uttering what is forged
14. Offences against the law relating to protection of intellectual property, copyrights, patents or trademarks
15. Offences against the law relating to bribery, corruption, secret commissions and breach of trust
16. Perjury and subornation of perjury
17. Offence relating to the perversion or obstruction of the course of justice
18. Arson; criminal damage or mischief including mischief in relation to computer data
19. Offences against the law relating to firearms
20. Offences against the law relating to explosives
21. Offences against the law relating to environmental pollution or protection of public health
22. Mutiny or any mutinous act committed on board a vessel at sea
23. Piracy involving ships or aircraft
24. Unlawful seizure or exercise of control of an aircraft or other means of transportation
25. Genocide or direct and public incitement to commit genocide
26. Facilitating or permitting the escape of a person from custody

27. Offences against the law relating to the control of exportation or importation of goods of any type, or the international transfer of funds
28. Smuggling; offences against the law relating to import and export of prohibited items, including historical and archaeological items
29. Immigration offences including fraudulent acquisition or use of a passport or visa
30. Arranging or facilitating for financial gain, the illegal entry of persons into a jurisdiction
31. Offences relating to gambling or lotteries
32. Offences relating to the unlawful termination of pregnancy
33. Stealing, abandoning, exposing or unlawfully detaining a child; any other offences involving the exploitation of children
34. Offences against the law relating to prostitution and premises kept for the purposes of prostitution
35. Offences involving the unlawful use of computers
36. Offences relating to fiscal matters, taxes or duties
37. Offences relating to unlawful escape from custody; mutiny in prison
38. Bigamy
39. Offences relating to women and girls
40. Offences against the law relating to false or misleading trade descriptions
41. Offences relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement
42. Impeding the arrest or prosecution of a person who has or is believed to have committed an offence for which surrender may be granted under this Agreement

43. Offences for which persons may be surrendered under multi-lateral international conventions; offences created as a result of decisions of international organizations
44. Conspiracy to commit fraud or to defraud
45. Conspiracy to commit, or any type of association to commit, any offence for which surrender may be granted under this Agreement
46. Aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting to commit any offence for which surrender may be granted under this Agreement

The Proposed Alternative Formulation

OFFENCES

- (1) Surrender shall be granted for an offence:
 - (a) which is punishable under the laws of both Contracting Parties by imprisonment or other form of detention for more than one year or a more severe penalty, and
 - (b) for which surrender is permitted by the law of the Requested Party.
- (2) Each Contracting Party shall provide to the other a list of the offences for which surrender may be granted under its law. Each Contracting Party shall provide such a list no later than the date on which it notifies the other Contracting Party that its requirements for the entry into force of this Agreement have been complied with. Each Contracting Party shall promptly inform the other of any subsequent changes to its list.

EXTRACT**立法會*****Legislative Council***

Ref : CB2/PL/SE/1

LC Paper No. CB(2)491/05-06
(These minutes have been seen
by the Administration)

Panel on Security

**Minutes of special meeting held on Monday, 13 June 2005
at 8:30 am in the Chamber of the Legislative Council Building**

- Members present** : Hon James TO Kun-sun (Chairman)
Hon Albert HO Chun-yan
Dr Hon LUI Ming-wah, JP
Hon Margaret NG
Hon CHEUNG Man-kwong
Dr Hon Philip WONG Yu-hong, GBS
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon LEUNG Kwok-hung
- Member attending** : Hon Ronny TONG Ka-wah, SC
- Members absent** : Hon Daniel LAM Wai-keung, BBS, JP (Deputy Chairman)
Hon WONG Yung-kan, JP
Hon CHOY So-yuk
Hon CHIM Pui-chung
- Public Officers attending** : Item I
Mr Francis LEE Chun-sang, IDS
Director of Investigation/Private Sector
Independent Commission Against Corruption

Mrs Betty CHU FU Kam-lui
Assistant Director/Administration
Independent Commission Against Corruption

Mr Vitus CHUNG Kee-ying
Chief Investigator
Independent Commission Against Corruption

Item II

Ms Manda CHAN
Principal Assistant Secretary for Security A

Miss Jane LEE
Assistant Secretary for Security A2

Ms Amelia LUK
Deputy Law Officer (Mutual Legal Assistance)
Department of Justice

Item III

Mr Stanley YING
Permanent Secretary for Security

Mrs Jennie CHOK
Deputy Secretary for Security 2

Mr Michael WONG
Deputy Secretary for Security 3

Mr John NG
Government Security Officer

Clerk in attendance : Mrs Sharon TONG
Chief Council Secretary (2)1

Staff in attendance : Mr LEE Yu-sung
Senior Assistant Legal Adviser 1

Mr Raymond LAM
Senior Council Secretary (2) 5

X X X X X X X X

II. Bilateral agreements on surrender of fugitive offenders : article on offences

(LC Paper No. CB(2)1409/04-05(02))

31. Principal Assistant Secretary for Security A (PAS(S)A) briefed Members on the proposed alternative formulation for the article on offences in respect of which surrender could be granted in bilateral agreements on surrender of fugitive offenders.

32. Mr CHEUNG Man-kwong asked whether the prospective partners who preferred the proposed alternative formulation to the “list” approach would accept the provision by Hong Kong of a list of offences for which surrender of fugitive offenders would be granted.

33. PAS(S)A responded that a number of prospective partners for surrender of fugitive offenders, particularly the European countries, had indicated difficulties in agreeing to adopt the “list” approach, as it was not compatible with their domestic laws and practices which generally permitted extradition in respect of all criminal offences with penalty above a certain threshold. As far as Hong Kong was concerned, surrender would be permitted for the categories of offence specified in Schedule 1 to the Fugitive Offenders Ordinance (the Ordinance) (Cap. 503) which carried more than 12 months’ imprisonment. Although such offences would not be listed in the bilateral agreements to be drawn up on the basis of the proposed alternative formulation, both Hong Kong and its partners would be clearly aware of the categories of offences for which surrender of fugitive offenders could be granted.

34. The Chairman asked about the difficulties encountered by the European countries concerned in adopting the “list” approach in surrender of fugitive offender agreements. PAS(S)A responded that the “list” approach was not compatible with the domestic laws and practices of members of the European Union which generally permitted extradition in respect of all criminal offences with a penalty above a certain threshold. The Chairman asked whether the proposed alternative formulation would be incompatible with the legislation of such jurisdictions. PAS(S)A said that the proposed alternative formulation should be consistent with the legislation of the European countries.

35. Mr Ronny TONG asked whether the persons to be surrendered would be restricted to nationals of the requesting party and those convicted but could not further appeal.

Action

36. Deputy Law Officer (Mutual Legal Assistance) (DLO/MLA) responded that reservation of the right to refuse surrendering Chinese nationals had been provided in the Ordinance. The Ordinance provided no such reservation over nationals of other countries. Under the Ordinance, surrender could be granted for persons to be prosecuted or convicted persons who had not yet served their sentences.

37. Ms Margaret NG asked whether the proposed alternative formulation required the introduction of legislative amendments. PAS(S)A replied in the negative.

38. Ms Margaret NG queried why legislative amendments would not be required for the implementation of the proposed alternative formulation. She asked whether there were provisions in existing legislation restricting the surrender of fugitive offenders. Mr Ronny TONG asked whether a requested jurisdiction could exercise any discretion in the surrender of fugitive offenders.

39. DLO(MLA) responded that section 2(2) of the Ordinance provided that surrender of fugitive offenders would only be permitted for the categories of offence specified in Schedule 1 to the Ordinance. Under the proposed alternative formulation, offences for which surrender to another jurisdiction could be granted would still be confined to the 46 categories of offences specified in Schedule 1 to the Ordinance. The proposed alternative formulation would not change the obligation of Hong Kong in the surrender of fugitive offenders.

40. Ms Margaret NG asked whether amendments to Schedule 1 to the Ordinance required legislative amendments. DLO(MLA) responded that the Schedule could be amended by an order made by the Chief Executive in Council under section 25 of the Ordinance. Such an order would be subject to negative vetting by the Legislative Council.

41. Mr CHEUNG Man-kwong asked whether the following international safeguards, which were found in the surrender of fugitive offender agreement signed recently between Hong Kong and Finland, would be incorporated in the agreements to be signed on the basis of the proposed alternative formulation -

- (a) the double criminality rule;
- (b) the death penalty rule;
- (c) the prima facie rule;
- (d) the political offences rule;
- (e) the specialty rule; and
- (f) the rule against surrender to a third jurisdiction.

Action

42. PAS(S)A responded that the usual international safeguards had been reflected in the 13 surrender of fugitive offender agreements signed with other jurisdictions. Such a practice would be continued for future agreements. The international safeguards were also reflected in the Ordinance.

43. Mr CHEUNG Man-kwong asked whether the adoption of the proposed alternative formulation might result in a mismatch between the offences for which surrender was to be granted, thus contravening the double criminality rule. Mr Ronny TONG asked whether there would be offences for which surrender would not be granted because of the differences in legislation between the requesting and requested parties.

Adm

44. PAS(S)A responded that the 46 categories of offences listed in Schedule 1 to the Ordinance had already encompassed a wide scope of offences. Surrender of fugitive offenders from Hong Kong to other jurisdictions had been and would continue to be confined to the 46 categories of offences listed in the Schedule, and the double criminality requirement had to be invariably met. The Chairman suggested that the Administration should publicise the list of offences for which surrender would be granted when announcing the first surrender of fugitive offender agreement concluded on the basis of the alternative formulation.

45. The Chairman expressed concern whether the proposed alternative formulation might undermine the safeguards in the surrender of fugitive offender arrangement to be established between Hong Kong and the Mainland. In his view, the proposed alternative formulation should not affect the safeguards in the arrangement.

X X X X X X X X