

Legislative Council Brief

File Ref.: SBCR 1/2716/89 (98) Pt.19

Fugitive Offenders Ordinance
(Cap. 503)

FUGITIVE OFFENDERS (SRI LANKA) ORDER

INTRODUCTION

At the meeting of the Executive Council on 28 January 2003, the Council ADVISED and the Chief Executive ORDERED that a new Fugitive Offenders (Sri Lanka) Order (New Order) at Annex A, which is identical in substance to the order previously repealed by the Legislative Council (LegCo) referred to in paragraph 2 below, should be made under section 3 of the Fugitive Offenders Ordinance to implement the bilateral agreement signed with Sri Lanka for the surrender of fugitive offenders.

JUSTIFICATIONS

Previous Executive Council Decision

2. On 18 September 2001, the Chief Executive in Council approved the making of the Fugitive Offenders (Sri Lanka) Order (the Order) to implement the Agreement pursuant to Section 3(1) of the Ordinance. The Order was gazetted on 12 October 2001 and was subsequently tabled in the LegCo on 17 October 2001 for negative vetting.

The LegCo Subcommittee

3. At the meeting of the LegCo House Committee held on 26 October 2001, Members agreed that a subcommittee be formed to study the Order. In its report to the House Committee on 16 November 2001, the subcommittee indicated there were issues relating to the Order that need to be further discussed and recommended that the Order should be repealed. On 21 November 2001, the LegCo passed a motion moved by the Honourable James To Kun-sun, the Chairman of the subcommittee to repeal the Order. The repeal was effected on the basis that the subcommittee would reconvene to consider the outstanding issues. This was the only available option as the period for LegCo scrutiny was to expire before the outstanding issues could be considered.

4. The subcommittee was later reconvened. The subcommittee held three meetings with the Administration and invited comments from the Hong Kong Human Rights Monitor (HKHRM), the Hong Kong Bar Association, the Law Society of Hong Kong and

law department in universities on the Order. During the deliberations, the Administration responded to the concerns and comments raised by the subcommittee and above-mentioned bodies concerning the provision on the surrender of nationals in the Agreement (Article 3) and the implications of Article 6(2) of the Agreement which excludes certain offences such as murder or manslaughter, any offence against the laws relating to explosive and any offence within the scope of any convention which is binding on both the HKSAR and Sri Lanka from the scope of political offences for which surrender could be refused. In response to concerns about the human rights situation in Sri Lanka raised by HKHRM, we had also provided the subcommittee with the concluding observations made in the reports of the United Nations bodies after their recent visits to Sri Lanka.

5. Having examined the Order in detail, the subcommittee reported back to the House Committee on 18 October 2002 that it has no objection to the re-gazettal of the Order. The subcommittee's report on the Order to the House Committee is at **Annex B**.

THE NEW ORDER

6. The Agreement was signed on 3 September 1999. The New Order to be made under section 3 of the Ordinance will enable the Agreement to be brought into force. The New Order, which includes the Agreement as a schedule, provides that the procedures in the Ordinance shall apply as between the HKSAR and Sri Lanka, subject to the terms of the Agreement.

7. The New Order will come into operation on a day to be appointed by the Secretary for Security by notice in the Gazette. That day will coincide with the day on which the Agreement enters into force. This will be settled after consultation with Sri Lanka.

LEGISLATIVE TIMETABLE

8. The legislative timetable will be -

Publication in the Gazette	7 February 2003
Tabling in the Legislative Council	19 February 2003
Commencement date	to be appointed by the Secretary for Security

IMPLICATIONS OF THE ORDER

9. The New Order is in conformity with the Basic Law, including the provisions concerning human rights. It will not affect the current binding effect of the Ordinance. It has no sustainability, financial or civil service implications.

PUBLIC CONSULTATION

10. The New Order will permit the Agreement to be brought into force in accordance with the existing legal framework. Public consultation is therefore considered not necessary.

PUBLICITY

11. A LegCo brief and a press release will be issued.

BACKGROUND

12. Section 3(1) of the Ordinance provides that the Chief Executive in Council may, in relation to any Surrender of Fugitive Offenders (SFO) arrangements, by order direct that the procedures in the Ordinance shall apply as between the HKSAR and the place outside the HKSAR to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications contained in the order.

13. Twelve orders in relation to SFO bilateral arrangements (with the Netherlands, Canada, Australia, Malaysia, the Philippines, the USA, Indonesia, India, the UK, Singapore, New Zealand and Portugal) have been made under section 3(1) of the Ordinance.

ENQUIRES

14. Enquires on the content of this paper should be directed to:-

Mrs. Margaret Chan Principal Assistant Secretary for Security	<u>Telephone</u> 2810 2329
Ms. Angelina Kwan Assistant Secretary for Security	2810 3523

FUGITIVE OFFENDERS (SRI LANKA) ORDER

(Made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503))

1. Commencement

This Order shall come into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.

2. Procedures in Ordinance to apply between Hong Kong and Sri Lanka

In relation to the arrangements for the surrender of fugitive offenders -

(a) which are applicable to the Government and the Government of the Democratic Socialist Republic of Sri Lanka; and

(b) the terms of which are recited in the Schedule, it is directed that the procedures in the Ordinance shall apply as between Hong Kong and the Democratic Socialist Republic of Sri Lanka subject to the limitations, restrictions, exceptions and qualifications contained in the terms so recited.

**AGREEMENT BETWEEN THE GOVERNMENT OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA
AND THE GOVERNMENT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA CONCERNING SURRENDER
OF FUGITIVE OFFENDERS**

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised to conclude this Agreement by the Central People's Government of the People's Republic of China, and the Government of the Democratic Socialist Republic of Sri Lanka, (hereinafter referred to as "the Parties"),

Desiring to make provision for the reciprocal surrender of fugitive offenders;

Have agreed as follows:

ARTICLE 1

OBLIGATION TO SURRENDER

(1) The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the requested Party and who is wanted by the requesting Party for prosecution or for the imposition or

enforcement of a sentence in respect of an offence described in Article 2.

(2) The procedures for determining whether a person is to be surrendered shall be regulated by the law of the requested Party and shall be in accordance with the provisions of this Agreement.

ARTICLE 2

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 causing death by criminal negligence; culpable homicide; assault with intent to commit murder
2. aiding, abetting, counselling or procuring suicide
3. 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 and psychotropic substances and precursors and essential chemicals used in the illegal manufacture of narcotic drugs and psychotropic substances and offences related 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; falsification of accounts; 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
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. any offence relating to counterfeiting; any offence against the law relating to forgery or uttering what is forged

14. any offence against the laws relating to protection of intellectual property, copyrights, patents or trademarks
15. any offence against the law relating to bribery, corruption, secret commissions, and breach of trust
16. perjury and subornation of perjury
17. offences relating to the perversion or obstruction of the course of justice
18. arson and offences involving incendiary weapons or devices; criminal damage or mischief including mischief in relation to computer data
19. any offence against the law relating to firearms
20. any offence against the laws relating to explosives
21. any offence against laws 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, according to international law
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. any offence against the laws relating to the control of exportation or importation of goods of any type, or the international transfer of funds
28. smuggling; offences against the laws 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 the jurisdiction of the requesting Party
31. any offence 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 or abuse of children, including any offence against the laws relating to child pornography
34. offences against the laws relating to prostitution and premises kept for the purposes of prostitution, including offences of procuring and trafficking for the purposes of prostitution
35. offences involving the unlawful use of computers
36. offences relating to fiscal matters, taxes or duties, notwithstanding that the law of the requested Party does

not impose the same kind of tax or duty as the law of the requesting Party

37. offences relating to the unlawful escape from custody; mutiny in prison
38. bigamy
39. any offence relating to women or children
40. any offence 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. 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
44. conspiracy to commit any offence for which surrender may be granted under this Agreement
45. aiding, abetting, counselling or procuring the commission of, inciting the commission of, being an accessory to, or attempting to commit any offence for which surrender may be granted under this Agreement
46. any other offence for which surrender may be granted in accordance with the law of the requested Party.

(2) Where surrender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of imprisonment or detention at least six months remain to be served.

(3) For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account.

(4) For the purposes of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of the requesting Party at the time it was committed and an offence against the law of the requested Party at the time the request for surrender is received.

(5) Where the surrender of a fugitive offender who was convicted in his absence is requested for the purpose of carrying out a sentence:

(a) the requested Party shall not refuse to surrender him 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

(b) he shall be considered for the purpose of the proceedings in the requested Party to be an accused person.

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.

ARTICLE 4

DEATH PENALTY

If the offence for which surrender of a fugitive offender is requested under this Agreement is punishable according to the law of the requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the requested Party or is not normally carried out, surrender may be refused unless the requesting Party gives such assurances as the requested Party considers sufficient that this penalty will not be imposed or, if imposed, will not be carried out.

ARTICLE 5

BASIS FOR SURRENDER

A person shall be surrendered only if the evidence be found sufficient according to the law of the requested Party either to justify the committal for trial of the person sought if the offence of which that person is accused had been committed in the territory of the requested Party or to prove that the person sought is the person convicted by the courts of the requesting Party.

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).

(3) A fugitive offender who has been finally acquitted, convicted or pardoned or whose prosecution is barred or whose conviction has been set aside under the law of the requesting or requested Party for any offence set out in the request shall not be surrendered for that offence.

ARTICLE 7

DISCRETIONARY REFUSAL OF SURRENDER

Surrender may be refused if the requested Party considers that:

(a) the offence is, having regard to all the circumstances, not sufficiently serious to warrant the surrender;

(b) there has been excessive delay, for reasons which cannot be imputed to the person sought, in bringing charges, in

bringing the case to trial or in making the person serve his or her sentence or the remainder thereof;

- (c) the offence for which surrender is sought was committed within the jurisdiction of its courts;
- (d) the surrender might place that Party in breach of its obligations under international treaties; or
- (e) in the circumstances of the case, the surrender would be incompatible with humanitarian considerations in view of the age, health or other personal circumstances of the person sought.

ARTICLE 8

POSTPONEMENT OF SURRENDER

If the person sought is being proceeded against or is under punishment in the jurisdiction of the requested Party for any offence other than that for which surrender is requested, surrender may be granted or deferred until the conclusion of the proceedings and the execution of any punishment imposed.

ARTICLE 9

THE REQUEST AND SUPPORTING DOCUMENTS

- (1) Requests for surrender and related documents shall be conveyed through the appropriate authority as may be notified from time to time by one Party to the other.

(2) The request shall be accompanied by:

- (a) as accurate a description as possible of the person sought, together with any other information which would help to establish that person's identity, nationality and location;
- (b) a statement of each offence for which surrender is sought and a statement of the acts and omissions which are alleged against the person in respect of each offence; and
- (c) the text of the legal provisions, if any, creating the offence, and a statement of the punishment which can be imposed therefor and any time limit on the institution of proceedings, or on the execution of any punishment for that offence.

(3) If the request relates to an accused person it shall also be accompanied by a copy of the warrant of arrest issued by a judge, magistrate or other competent authority of the requesting Party and by such evidence as, according to the law of the requested Party, would justify committal for trial if the offence had been committed within the jurisdiction of the requested Party.

(4) If the request relates to a person already convicted or sentenced, it shall also be accompanied by:

- (a) a copy of the certificate of the conviction or sentence;
- and

- (b) if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of the warrant of arrest; or
- (c) if the person was sentenced, a statement indicating that the sentence is enforceable and how much of the sentence has still to be served.

ARTICLE 10

AUTHENTICATION

(1) Documents supporting a request for surrender shall be admitted in evidence as proof of the facts contained therein if duly authenticated. Documents are duly authenticated if they purport to be:

- (a) signed or certified by a judge, magistrate or an official of the requesting Party, and
- (b) sealed with the official seal of a competent authority of the requesting Party.

(2) Any sworn translation of documents, duly authenticated and submitted in support of a request for surrender shall be admitted for all purposes in proceedings for surrender.

ARTICLE 11

ADDITIONAL INFORMATION

(1) If the information communicated by the requesting Party is found to be insufficient to allow the requested Party to make a decision in pursuance of this Agreement, the latter Party shall request the necessary supplementary information and may fix a time-limit for receipt thereof.

(2) If the person whose surrender is sought is under arrest and the additional information furnished is not sufficient in accordance with this Agreement or is not received within the time specified, the person may be discharged. Such discharge shall not preclude the requesting Party from making a fresh request for the surrender of the person.

ARTICLE 12

PROVISIONAL ARREST

(1) In urgent cases the person sought may, at the discretion of the requested Party and in accordance with its law, be provisionally arrested on the application of the requesting Party.

(2) The application for provisional arrest shall contain an indication of intention to request the surrender of the person sought, a statement of the existence of a warrant of arrest or a judgment of conviction against that person, information concerning identity, nationality and probable location, a description of the

person, a brief description of the offence and the facts of the case and a statement of the sentence that can be or has been imposed for the offence and, where applicable, how much of that sentence remains to be served.

(3) An application for provisional arrest may be transmitted by any means affording a record in writing through the channel notified under paragraph (1) of Article 9 or through the International Criminal Police Organisation (Interpol).

(4) The provisional arrest of the person sought shall be terminated upon the expiration of sixty days from the date of arrest if the request for surrender and supporting documents have not been received. The release of a person pursuant to this paragraph shall not prevent the institution or continuation of surrender proceedings if the request and the supporting documents are received subsequently.

ARTICLE 13

CONCURRENT REQUESTS

If the surrender of a person is requested concurrently by one of the Parties and a state or jurisdiction with whom Sri Lanka or the Hong Kong Special Administrative Region, whichever is being requested, has an agreement or arrangement for the surrender of fugitive offenders, the requested Party shall make its decision having regard to all the circumstances including the provisions in this regard in any agreements or arrangements in force between the

requested Party and the requesting Parties, the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality and ordinary place of residence of the person sought and the possibility of subsequent surrender to another state or jurisdiction, and furnish the other Party with information in support of its decision in the event of surrender of the person to another state or jurisdiction.

ARTICLE 14

REPRESENTATION AND COSTS

(1) The requested Party shall make all necessary arrangements for and meet the costs of any proceedings arising out of a request for surrender and shall otherwise represent the interests of the requesting Party.

(2) If it becomes apparent that exceptional expenses may be incurred as a result of a request for surrender the Parties shall consult with a view to deciding how these expenses will be met.

(3) The requested Party shall bear the expenses arising out of the arrest and detention of the person whose surrender is sought until that person is surrendered in accordance with Article 15(2). The requesting Party shall bear all subsequent expenses.

ARTICLE 15

ARRANGEMENTS FOR SURRENDER

(1) The requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the requesting Party.

(2) When a person is to be surrendered, that person shall be sent by the authorities of the requested Party to such convenient place of departure within that Party's jurisdiction as the requesting Party shall indicate.

(3) Subject to the provisions of paragraph (4) of this Article, the requesting Party shall remove the person within the period specified by the requested Party and if the person is not removed within that period the requested Party may refuse to surrender that person for the same offence.

(4) If circumstances beyond its control prevent a Party from surrendering or taking over the person to be surrendered, it shall notify the other Party. In that case, the two Parties shall agree to a new date for surrender and the provisions of paragraph (3) of this Article shall apply.

ARTICLE 16

SURRENDER OF PROPERTY

(1) To the extent permitted under the law of the requested Party, when a request for surrender of a fugitive offender is granted, the requested Party:

(a) shall hand over to the requesting Party all articles, including sums of money,

(i) which may serve as proof of the offence; or

(ii) which have been acquired by the person sought as a result of the offence and are in that person's possession or are discovered subsequently;

(b) may, if the articles in question are liable to seizure or confiscation within the jurisdiction of the requested Party in connection with pending proceedings, temporarily retain them or hand them over on condition they are returned.

(2) The provisions of paragraph (1) shall not prejudice the rights of the requested Party or of any person other than the person sought. When such rights exist the articles shall on request be returned to the requested Party without charge as soon as practicable after the end of the proceedings.

(3) The articles in question shall, if the requesting Party so requests, be surrendered to that Party even if the surrender cannot be carried out due to the death or escape of the person sought.

ARTICLE 17

SPECIALTY AND RESURRENDER

(1) A fugitive offender who has been surrendered shall not be proceeded against, sentenced, detained or subjected to any other restriction of personal liberty by the requesting Party for any offence committed prior to his surrender other than:

(a) the offence or offences in respect of which his surrender was granted;

(b) an offence, however described, based on substantially the same facts in respect of which his surrender was granted, provided such offence is one for which he could be surrendered under this Agreement, and provided further such offence is punishable by a penalty no more severe than the penalty for the offence for which he was surrendered;

(c) any other offence for which surrender may be granted under this Agreement in respect of which the requested Party may consent to his being dealt with,

unless he has first had an opportunity to exercise his right to leave the jurisdiction of the Party to which he has been surrendered and he has not done so within forty-five days or has voluntarily returned to that jurisdiction having left it.

(2) A fugitive offender who has been surrendered shall not be re-surrendered to another jurisdiction for an offence committed prior to his surrender unless:

- (a) the requested Party consents to such re-surrender; or
- (b) he has first had an opportunity to exercise his right to leave the jurisdiction of the Party to which he has been surrendered and has not done so within forty-five days or has voluntarily returned to that jurisdiction having left it.

(3) A Party whose consent is requested under paragraphs (1)(c) or (2)(a) of this Article may require the submission of any document or statement referred to in Article 9, and any statement made by the surrendered person on the matter.

ARTICLE 18

TRANSIT

To the extent permitted by its law, transit of a person through the jurisdiction of either Party to the other Party from another jurisdiction may be granted on a request in writing. The Party through whose jurisdiction transit will occur may request the information referred to in paragraph (2)(b) of Article 9.

ARTICLE 19

ENTRY INTO FORCE SUSPENSION AND TERMINATION

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.

(2) The provisions of this Agreement shall apply to requests made after its entry into force regardless of the date of the commission of the offence or offences set out in the request.

(3) Each of the Parties may suspend or terminate this Agreement at any time by giving notice to the other through the channel notified under paragraph (1) of Article 9. Suspension shall take effect on receipt of the relevant notice. In the case of termination the Agreement shall cease to have effect six months after the receipt of notice to terminate.

In witness whereof the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

Done at the Hong Kong Special Administrative Region, this third day of September One thousand nine hundred and ninety nine in the Chinese, Sinhala and English languages, each text being equally authentic.

Clerk to the Executive Council

COUNCIL CHAMBER

2003

Explanatory Note

This Order applies the procedures for the surrender of fugitive offenders set out in the Fugitive Offenders Ordinance (Cap. 503) as between Hong Kong and the Democratic Socialist Republic of Sri Lanka. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by Hong Kong and the Democratic Socialist Republic of Sri Lanka and signed in Hong Kong on 3 September 1999. The terms of those arrangements are recited in the Schedule to the Order. It should be noted that those procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms so recited.

立法會
Legislative Council

LC Paper No. CB(2)78/02-03

Ref : CB2/SS/6/01

Paper for the House Committee meeting on 18 October 2002

**Report of the Subcommittee to study
issues relating to the Fugitive Offenders (Sri Lanka) Order**

Purpose

This paper reports on the deliberations of the Subcommittee to study issues relating to the Fugitive Offenders (Sri Lanka) Order.

Background

2. The Fugitive Offenders (Sri Lanka) Order (L.N. 203 of 2001) is made under section 3 of the Fugitive Offenders Ordinance (Cap. 503) (the Ordinance). 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.
4. At the meeting of the House Committee on 26 October 2001, Members agreed that a subcommittee be formed to study the Fugitive Offenders (Sri Lanka) Order and the Fugitive Offenders (Portugal) Order. The Subcommittee on Fugitive Offenders (Sri Lanka) Order and the Fugitive Offenders (Portugal) Order (the then Subcommittee) reported its deliberations to the House Committee on 16 November 2001.

5. The then Subcommittee was concerned about the implications of Article 6(2) of the HKSAR/Sri Lanka Agreement. It requested the Administration to provide detailed information on the international conventions concerning suppression of terrorism, how the provisions of the Ordinance worked and where the dividing line for substantial conformity lay.

6. As there were issues relating to the Fugitive Offenders (Sri Lanka) Order that needed to be further discussed with the Administration, the then Subcommittee recommended that the Order should be repealed.

7. The Chairman of the then Subcommittee, Hon James TO Kun-sun, moved a motion at the Council meeting on 21 November 2001 to repeal the Fugitive Offenders (Sri Lanka) Order. The motion was passed by the Council.

The Subcommittee

8. At the House Committee meeting on 23 November 2001, Members agreed that a subcommittee be formed to study issues relating to the Fugitive Offender (Sri Lanka) Order. The membership list of the Subcommittee is in **Appendix I**.

9. Under the chairmanship of Hon James To Kun-sun, the Subcommittee has held three meetings with the Administration. The Subcommittee has considered submissions from the Hong Kong Human Rights Monitor (HKHRM), the Hong Kong Bar Association, The Law Society of Hong Kong and Ms Janice Brabyn, a lecturer of the Department of Law of The University of Hong Kong.

Deliberations of the Subcommittee

Surrender of nationals

10. Under Article 3 of the HKSAR/Sri Lanka Agreement, the Government of Sri Lanka reserves the right to refuse the surrender of its citizens, and the Government of the HKSAR reserves the right to refuse the surrender of nationals of the People's Republic of China (PRC).

11. Members and the HKHRM have queried why the HKSAR/Sri Lanka Agreement only provides the HKSAR Government the right to refuse the surrender of PRC national, while the right to refuse the surrender of permanent residents of the HKSAR is not covered. They have pointed out that permanent residents of the HKSAR may not necessarily be PRC nationals, and express concern about the protection to these permanent residents. The HKHRM considers that a provision to permit refusal of the surrender of HKSAR permanent residents should be included, as Chinese and non-Chinese permanent residents should be treated equally.

12. The Administration has explained that it has not been a practice for common law jurisdictions to refuse surrender of their nationals. It has also not been a feature of Hong Kong's practice in extradition to refuse the surrender of its sovereign's nationals or Hong Kong permanent residents. Although section 13(4) of the Ordinance provides the right to refuse the surrender of PRC nationals, this provision has so far not been invoked and is intended to be used very rarely. The main reason for such a provision in surrender of fugitive offender agreements is to cover a situation in future where arrangements exist to permit the rendition of persons from the HKSAR to the Mainland, and both the PRC and the requesting foreign jurisdiction have jurisdiction concurrently over the same offence. Such provision 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.

13. In the view of the Administration, reserving the right to refuse the surrender of HKSAR permanent residents would not result in practical benefits for them from being not surrendered because it has not been a practice for the HKSAR to refuse surrender of its permanent residents.

Substantial Conformity with the Ordinance

14. Article 6(1) of the HKSAR/Sri Lanka Agreement provides that -

"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 punishment detained or restricted in his or her personal liberty by reason of race, religion, nationality or political opinions."

15. Article 6(2) provides that murder or manslaughter, any offence against the laws relating to explosive 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.

16. Members have pointed out that under section 5(1)(a) of the 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. 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. Members have raised concern whether Article 6(2) is substantially in conformity with the Ordinance, and whether Article 6(2) is consistent with international trends in the area of extradition law.

17. The Administration has responded that Article 6(1)(a), (b) and (c) of the HKSAR/Sri Lanka Agreement corresponds to section 5(1)(a), (c) and (d) of the Ordinance. The only difference between the provisions in the Agreement and the Ordinance is the exception created by Article 6(2). The Administration does not consider that this exception results in the Agreement failing to be in substantial conformity with the Ordinance.

18. The Administration has 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, the courts would take into consideration two factors. The first factor 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 an offence of a political character. If this factor is not present, the courts would look at the second factor, the political motivation of the fugitive committing the offence. Article 6(1)(b) of the HKSAR/Sri Lanka Agreement covers the first factor taken into account by the courts, and Article 6(1)(c) covers the second factor.

19. The Administration has further explained that 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). The exception created by Article 6(2) does not apply to Article 6(1)(b) and (c). 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. Because of the narrow scope of the qualification in Article 6(2) of the political offence exception, i.e. only three offences are excluded from being regarded as political offences for the purpose of Article 6(1)(a), the Administration considers that the HKSAR/Sri Lanka Agreement is substantially in conformity with section 5 of the Ordinance.

20. Regarding the international trend in respect of political offence exception, the Administration has provided members with information on the European Convention on the Suppression of Terrorism 1977, United Nations Convention for the Suppression of Terrorist Bombings 1998, United Nations Convention for the Suppression of the Financing of Terrorism 2000 and United Nations Security Council Resolution 1373. The Administration has pointed out that, as evidenced by these Conventions and decisions of the United Nations Security Council, the international trend is to limit the

political offence exception as far as terrorist activity is concerned. Jurisdictions to which these instruments apply should ensure that their domestic law reflects the limitations on the political offence exception contained therein.

21. The Administration has further pointed out that the existing Fugitive Offenders Orders in respect of the bilateral agreements with Australia, India, Malaysia, the Philippines and the United States as well as the Order implementing the extradition obligations in the Genocide Convention have set out limitations on the scope of the political offence exception.

22. Ms Janice Brabyn, a lecturer of the Department of Law of The University of Hong Kong has suggested that even though Article 6(2) may be technically compatible with the Ordinance, it should not be accepted in the absence of a clear legislative mandate. The Administration does not consider that such a mandate is necessary. Nevertheless, it has undertaken to consider amending the Ordinance to give a clearer legislative mandate for future Orders to specify exceptions to the political offence restriction on surrender contained in section 5(1)(a) of the Ordinance. The Administration has stressed that such an amendment would, however, be for the avoidance of doubt.

23. Since a number of previous Orders which contain such exceptions have been validly made in accordance with the provisions of section 3(1) and (9) of the Ordinance, and Sri Lanka has already completed its internal procedures for implementing the Agreement, the Administration considers that the making of the Fugitive Offenders (Sri Lanka) Order should not be delayed.

24. Members note that the Hong Kong Bar Association is of the view that Article 6(2) is substantially in conformity with the provisions of the Ordinance, and The Law Society of Hong Kong has no objection to the arrangements proposed in the Fugitive Offenders (Sri Lanka) Order.

Human rights situation in Sri Lanka

25. Members share the concern of the HKHRM about the human rights situation in Sri Lanka. The HKHRM has pointed out that the guarantee of a fair trial is the prerequisite for concluding any agreement on surrender of fugitive offenders with another jurisdiction. It is a fundamental assumption that the Parties to an extradition agreement will act in good faith and ensure that a surrender fugitive will be guaranteed a fair trial. 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. The HKHRM has made particular reference to the concerns about human rights abuses in Sri Lanka in reports of the United Nations (UN) Commission and the United States Department of State issued between 1995 to 2000. For example, Sri Lanka has been under the regime of the Emergency Regulations and Prevention of Terrorism Act since 1983. This statute gives the security forces and police wide powers of arbitrary arrest and detention without trial.

26. The Administration does not agree 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 have a fair trial. The Administration has advised that internationally accepted safeguards have been incorporated into the Constitution of Sri Lanka and in the Rules of Evidence and Procedures to protect the rights of the accused. In accordance with the cease-fire agreement which came into force on 23 March 2002, the Government of Sri Lanka has undertaken to refrain from making arrests or detaining suspects under the provisions of the Prevention of Terrorism Act. Any necessary arrests will be made pursuant to the normal criminal law, i.e. the Code of Criminal Procedure Act.

27. According to the Administration, the Government of Sri Lanka has also established several committees to look into human rights problems in the country and taken steps to implement the recommendations of these committees. Sri Lanka has been opening up to independent scrutiny of its human rights situation. It has invited UN bodies to visit Sri Lanka. In addition, Sri Lanka has as recent as early 2001 concluded a bilateral extradition agreement with the United States which has been approved by the US Senate and Congress. In the view of the Administration, there is no evidence that a fugitive returned from Hong Kong to Sri Lanka will suffer adversely because of any situation of internal conflict.

28. At the request of members, the Administration has provided the concluding observations made in the reports of the UN bodies after their visit to Sri Lanka. These UN bodies are the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (1997), UN Secretary General's Special Representative for Children and Armed Conflict (1998), UN Working Group on Enforced or Involuntary Disappearances (1998) and Committee Against Torture (1998).

29. Given the concern about the human rights situation in Sri Lanka, the Administration has undertaken to consider, in each case, whether a review of the general human rights situation in a particular jurisdiction should be conducted before negotiations for an surrender of fugitive offenders agreement are commenced.

The Subcommittee's view

30. The Subcommittee does not object to the re-gazettal of the Fugitive Offenders (Sri Lanka) Order.

Follow-up actions by the Administration

31. The Administration has undertaken -

- (a) To consider amending the Ordinance to give a clearer legislative mandate for future Orders to specify exceptions to the political offence restriction on surrender contained in section 5(1)(a) of the Ordinance (paragraph 22 above refers); and
- (b) To consider, in each case, whether a review of the general human rights situation in a particular jurisdiction should be conducted before negotiations for an surrender of fugitive offenders agreement are commenced (paragraph 29 above refers).

Advice Sought

32. Members are invited to note the deliberations of the Subcommittee in paragraphs 10 to 30 above.

Council Business Division 2
Legislative Council Secretariat
8 October 2002

**Subcommittee to study issues relating to the
Fugitive Offenders (Sri Lanka) Order**

Membership list

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Members Hon Margaret NG

Hon Jasper TSANG Yok-sing, GBS, JP

Hon Miriam LAU Kin-yee, JP

Hon Audrey EU Yuet-mee, SC, JP

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Date 20 December 2001