

Cooperation between Hong Kong and other places on juridical assistance in criminal matters

Purpose

This paper sets out the current regime on cooperation between Hong Kong and other places on juridical assistance in criminal matters and the Government's proposals to improve the relevant legislations.

Background

2. Since Hong Kong's reunification with the Motherland, the Hong Kong Special Administrative Region ("HKSAR") Government has been actively promoting cooperation with other jurisdictions on mutual legal assistance in criminal matters ("MLA") and surrender of fugitive offenders ("SFO"). The juridical assistance network has been expanding through the signing of agreements with increased jurisdictions, with a view to combating crimes and upholding justice. According to the relevant provisions in the Basic Law, Hong Kong may, through assistance or authorization of the Central People's Government (CPG), maintain juridical relations and make appropriate arrangements with other jurisdictions for reciprocal juridical assistance. The Mutual Legal Assistance in Criminal Matters Ordinance ("MLAO") (Cap.525 of the Laws of Hong Kong) and the Fugitive Offenders Ordinance ("FOO") (Cap.503 of the Laws of Hong Kong) provide legal basis for cooperation between Hong Kong and other places on MLA and SFO. The two ordinances, effective since 1997, aim at enabling Hong Kong and other places to cooperate in combating serious crimes, pursuing judicial justice in criminal cases and preventing criminals from absconding to elude justice. So far, Hong Kong has signed MLA agreements with 32 jurisdictions¹ and SFO agreements with 20 jurisdictions².

¹ Argentina, Australia, Belgium, Canada, Czech, Denmark, France, Finland, Germany, India, Indonesia, Ireland, Israel, Italy, Japan, Malaysia, Mongolia, the Netherlands, New Zealand, the Philippines, Poland, Portugal, the Republic of Korea, Singapore, Sri Lanka, South Africa, Spain, Sweden, Switzerland, the United Kingdom, the United States and Ukraine.

² Australia, Canada, Czech, France, Finland, Germany, India, Indonesia, Ireland, Malaysia, the Netherlands, New Zealand, the Philippines, Portugal, the Republic of Korea, Singapore, South Africa, Sri Lanka, the United Kingdom and the United States.

3. When FOO and MLAO were first introduced into the Legislative Council (“LegCo”) in 1996 and 1997 respectively, the Administration clearly expressed that the two legislations were for combatting serious crime by strengthening co-operation in matters of criminal justice, and that no offenders should be able to avoid trial or serving a sentence by moving from one jurisdiction to another. We could not afford to have Hong Kong becoming a haven for fugitives or to allow criminals to avoid justice and the rule of law by seeking refuge in other places. The two ordinances have been in force for 21 years, during which there have been a number of serious crime cases in which the culprits have absconded to other jurisdictions to elude justice. Over the year, there have been grave concerns about injustice caused by the system’s loopholes in the community as well as doubts against the Government’s commitment to combating serious cross-boundary crimes. Having thoroughly reviewed MLAO and FOO, the Government considers that the two ordinances must be amended promptly to plug their loopholes and to protect public safety.

Review

Basis

4. There are two bases on which requests for MLA and SFO can be processed: (a) by adopting suitable “long-term arrangements”³ (including bilateral agreements or multilateral conventions); (b) by providing assistance on an one-off “case-based” approach (for MLA, individual cases can be handled based on “reciprocity undertaking”⁴; for SFO, a “case-based” arrangement can be handled according to an agreement

³ The current “prescribed arrangements” made by order under section 3(1) of FOO or section 4(1) of MLAO are all “long-term arrangements” which are bilateral arrangements between Hong Kong and other places or multilateral conventions applicable to Hong Kong.

⁴ Section 5(4) of MLAO:

“Without prejudice to the generality of subsection (3)(a), a request by a place outside Hong Kong for assistance under this Ordinance shall be refused if -

(a) the place is not a prescribed place; and

(b) the appropriate authority of the place fails to give an undertaking to the Secretary for Justice which satisfies the Secretary for Justice that the place will, subject to its law, comply with a future request by Hong Kong to the place for assistance in a criminal matter.

reached with the other party and implementation must be based on an enacted subsidiary legislation for that agreement). As far as “long-term arrangements” are concerned, both contracting parties are engaged in prescribed commitments and responsibilities, and such arrangements help build a more comprehensive cross-territory cooperation network and closer long-term cooperation partnership. Despite the generally good progress in our negotiations with other jurisdictions on long term arrangements, from experience, it takes time (usually at least several years) for such negotiations to complete and relevant agreements to come into effect. Furthermore, the Government has limited capacity to conduct several negotiations with different jurisdictions at one time. All these have made establishing an extensive cooperation network a very lengthy process.

Operation

5. The long-term arrangements under MLAO and FOO have been operating smoothly over the past 21 years, where the persons concerned were protected by all safeguards specified in the two ordinances, namely:

(a) Safeguards on human rights

Which mainly include the following⁵:

- (i) The crime concerned must constitute an offence in both jurisdictions (i.e. the “double criminality” principle). For SFO cases, the crime concerned must also be among the offences within the 46 descriptions specified in Schedule I of FOO; cases involving offences outside these descriptions cannot be processed;
- (ii) In case of violation of the “double jeopardy” principle (i.e. an offence being tried in one place cannot be tried again in another), the requested party shall refuse the request;

⁵ Refusal of assistance under section 5 of MLAO; general restrictions on surrender under section 5 and order for surrender under section 13 of FOO.

- (iii) Requests in relation to offences of a political character shall be refused;
- (iv) Requests involving persons being prejudiced or prosecuted/punished on account of his race, religion, nationality or political opinions shall be refused; and
- (v) For an offence punishable with death, the requesting party shall assure that such punishment will not be carried out. Otherwise the request shall be refused.

(b) Procedural safeguards

For MLA, apart from the safeguards similar to those set out in paragraph 5(a) above, procedural safeguards are provided mainly under the relevant orders, including those on taking of evidence; search and seizure warrants; production of material, etc; and enforcement of confiscation orders, etc. These warrants/ orders will be issued only when the court is satisfied that the legal requirements concerned are complied with⁶. For SFO, major procedural safeguards are as follows:

- (i) Upon the issuance of an authority to proceed by the Chief Executive (“CE”), the court shall conduct an open hearing to carefully examine the evidence and circumstances of each case and whether the surrender request fully complies with the requirements and human rights safeguards under FOO and relevant arrangement. The person concerned may defend his case and object to his committal on grounds such as non-compliance with the conditions and human rights safeguards as prescribed in the law (including safeguards set out in paragraphs 5(a)(i)-(iv) above). A judge may, after considering the case in accordance with the law, decide whether to make an order of committal. If such order is not made, the person concerned will be

⁶ Assistance in Relation to Taking of Evidence and Production of Things under Part II, Assistance in Relation to Search and Seizure under Part III, Assistance in Relation to Production, etc, of Material under Part IV, Transfer of Persons to Give Assistance in Relation to Criminal Matters under Part V, and Assistance in Relation to Confiscation, etc. of Proceeds of Crime under Part VI of MLAO.

discharged at once; if such order is made, CE will then make the final decision on whether an order for surrender is to be made⁷;

- (ii) The person concerned may also apply for habeas corpus and lodge an appeal if his application is not successful⁸;
- (iii) If the person concerned makes a torture claim, the surrender will be suspended until the claim has finally been determined and the absence of any torture risk has been confirmed⁹;
- (iv) Under special circumstances, the person concerned may apply for the court to release him on bail¹⁰; or the person concerned may apply for discharge in case of a delay in his surrender¹¹; and
- (v) The person concerned may institute proceedings for judicial review against the final order for his surrender.

6. We consider that the above procedures and safeguards have been operating effectively over the years. They are in line with international practice and are recognized by other jurisdictions. We consider it not necessary to change these procedures and safeguards lest the current long-term arrangements which are in effect would be affected.

Limitations in operation

7. The Government has reviewed the environment in which MLAO and FOO operate. We are of the view that with rapid social development and globalization, today's people movement, commerce and business services, assets movement, and application of technologies, etc.

⁷ Procedure under Part 2 of FOO.

⁸ Application for habeas corpus under section 12 of FOO.

⁹ Order for surrender under section 13 of FOO.

¹⁰ Proceedings for committal under section 10(5) of FOO.

¹¹ Discharge in case of delay under section 14 of FOO.

are all totally different from those 21 years ago when the two ordinances were first introduced. Nowadays, the costs of cross-boundary crimes and absconding to another jurisdiction to avoid arrest are much lower, and the means to do so are much wider and easier. Having regard to the social development and the MLA and SFO regimes, the major limitations concerning the two existing ordinances are analysed as follows:

(a) Current operation of the one-off “case-based” approach is impracticable

With the current legislative scheme, surrender arrangements must be given effect through the enactment of subsidiary legislation. In the process of LegCo’s scrutiny, the operation on long-term arrangements has been smooth as only the general principles in such arrangements but not individual case details are discussed. However, if LegCo were to scrutinize one-off “case-based” surrender, relevant case details will inevitably be publicly disclosed. Irrespective of whether the personal particulars of the offenders would be made public, it would alarm the offender who would then flee. In subsequent hearing (if the offender is eventually arrested), the offender may also judicially challenge the authority on ground that his case details have been divulged or publicly discussed and his opportunity for fair hearing has been compromised.

In addition, different from the other subsidiary legislation which follows the negative vetting procedures, FOO stipulates that the relevant procedures regarding the surrender request (inclusive of the arrest procedure) cannot come into effect before LegCo’s scrutiny period expires. In other words, even if a request for individual surrender is received from another place during the scrutiny period of LegCo (i.e. ranging from 28 days at the earliest or 49 days at the latest¹²), there is nothing that can be done, including any form of arrest, during the scrutiny period. The situation will be further aggravated if the subject is a foreign national who is allowed to remain in Hong Kong only for a short

¹² The scrutiny period will be lengthened to three months if it straddles the end of a LegCo session or dissolution of LegCo.

period. As there is no legal authority to detain such a national, he will probably abscond during LegCo's scrutiny period, and no committal and surrender can subsequently be executed at all. Therefore, the existing arrangement is considered operationally impracticable.

(b) Limited applicability

The two existing ordinances are not applicable to requests for MLA and SFO between Hong Kong and other parts of the PRC (e.g. requests arising from a homicide case in Taiwan last year) highlighting the inadequacy and shortcomings of the current regime. Thus far, there has been no long-term arrangement between Hong Kong and other parts of the PRC. We propose to remove the limitation in the existing relevant provisions to provide a legal basis for instituting "case-based" MLA and SFO cooperation between Hong Kong and any jurisdictions over the world.

8. In summary, the serious crime cases in recent years have highlighted the loopholes in the existing legislative scheme, enabling offenders of serious crimes in other places (such as murderers, rapists, etc.) to seek refuge in Hong Kong without ways and means to handle them. Apart from breaching the justice, it also poses serious threat to Hong Kong's public order and public safety. Therefore we must uphold justice and strengthen cooperation with other places in MLA and SFO at the same time.

Other places

9. According to our research, SFO arrangement on a "case-based" approach has already been in place in the United Kingdom, Canada, New Zealand, Ireland, Malaysia, South Africa, etc., with the aim to address the blank that cannot be filled by standing long term SFO arrangements only. This approach serves the useful purpose of effectively combating criminals and preventing their escape in appropriate cases, without unduly disclosing sensitive, confidential information of suspects prior to arrest or commencement of judicial hearing.

Proposals under consideration

10. Premising on the existing frameworks of MLAO and FOO, we propose that the mechanism for “case-based” cooperation and its scope of application be enhanced. The human rights and procedural safeguards in the two ordinances will remain unchanged. Our major proposals are as follows:

- (a) Differentiating the one-off case-based surrender arrangement from the general long-term surrender arrangement under FOO clearly, with express stipulation that the former must substantively in full compliance with the provisions in FOO, and in terms of human rights protection, the former can only be subject to more, not less, limitations to surrender than what is currently required under FOO. As for procedures, with reference to the practice of many countries which have put in place “case-based” surrender arrangements where certificates are issued by executive authorities (such as Secretary of State or Minister of Foreign Affairs), we propose that a certificate should be issued by the CE as a basis to trigger the processing of requests for provisional arrest and surrender.

The certificate to be issued by the CE aims to provide a basis to activate the case-based surrender procedures without alarming the offenders or disclosing the case details in public. With the certificate, a provisional arrest warrant can be applied from the court and the subsequent process can commence to allow hearing and decision by the court. On timeliness and confidentiality, this will better suit the actual operational needs. The certificate, which will form the basis of consent to the activation of procedures, will not imply that the fugitive will be surrendered. Individual surrender request must comply with various evidential requirements and human rights safeguards set out in FOO, the person concerned will continue to be protected by the existing procedural safeguards (as mentioned in paragraph 5(b) above).

(b) Amending FOO and MLAO to enable the one-off case-based approach to be applicable to any places with which Hong Kong has not entered into any applicable long-term arrangement. Cooperation under the one-off case-based approach will be superseded by the long-term arrangement once the latter is in place in the future.

Way Forward

11. Subject to the views received, we aim at introducing an amendment bill to implement the above proposals in this legislative year.

Security Bureau
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