

立法會
Legislative Council

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Date : 17 February 2006

From : Clerk to the Legislative Council

To : All Members of the Legislative Council

Council meeting of 8 March 2006

**Proposed resolutions under
the Mutual Legal Assistance in Criminal Matters Ordinance**

I forward for Members' consideration two proposed resolutions which the Secretary for Security will move at the Council meeting of 8 March 2006 under the Mutual Legal Assistance in Criminal Matters Ordinance relating to:

- (a) the Mutual Legal Assistance in Criminal Matters (Poland) Order;
and
- (b) the Mutual Legal Assistance in Criminal Matters (Israel) Order.

The President has directed that "it be printed in the terms in which it was handed in" on the Agenda of the Council.

2. The speeches, in both English and Chinese versions, which the Secretary for Security will deliver when moving the two proposed resolutions, are also attached.

(Ray CHAN)
for Clerk to the Legislative Council

Encl.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE

RESOLUTION

(Under section 4 of the Mutual Legal Assistance in Criminal
Matters Ordinance (Cap. 525))

RESOLVED that the Mutual Legal Assistance in Criminal Matters
(Poland) Order, made by the Chief Executive in Council
on 7 February 2006, be approved.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(POLAND) ORDER**

(Made by the Chief Executive in Council under section 4 of
the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525) subject to the approval
of the Legislative Council)

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. Ordinance to apply between Hong Kong and Poland

(1) In relation to the scheduled arrangements for mutual legal assistance, it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 1, apply as between Hong Kong and the Republic of Poland.

(2) In subsection (1), "scheduled arrangements for mutual legal assistance" (列明的相互法律協助的安排) means arrangements which are applicable to the Government and the Government of the Republic of Poland, a copy of which is annexed at Schedule 2.

SCHEDULE 1

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows -

"(e) the request relates to the prosecution of a person for an external offence in a case where the person -*

(i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place^{**} or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or

(ii)* has undergone the punishment provided by the law of that place or Hong Kong^{**} in respect of that offence or of another external offence constituted by the same act or omission as that offence;".

2. Section 17(1) of the Ordinance shall be modified by deleting paragraph (ii).

3. Section 17(3)(b) of the Ordinance shall be modified to read as follows -

"(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that his presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for~~^{**} -

(i) the purpose to which the request relates; ~~or~~^{**}

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a

criminal matter in relation to which it is desirable that the person give assistance.".

4. Section 23(2)(a) of the Ordinance shall be modified -
- (a) by adding "or" at the end of subparagraph (i);
 - (b) by deleting subparagraph (ii).

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

SCHEDULE 2

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION OF
THE PEOPLE'S REPUBLIC OF CHINA AND THE
GOVERNMENT OF THE REPUBLIC OF POLAND
CONCERNING MUTUAL LEGAL ASSISTANCE IN
CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorized by the Central People's Government of the People's Republic of China and the Government of the Republic of Poland, hereinafter referred to as "the Contracting Parties",

Desiring to improve the effectiveness of law enforcement of both Contracting Parties in the investigation, prosecution and

prevention of crime and the confiscation of the proceeds of crime through cooperation and mutual legal assistance in criminal matters;

Have agreed as follows:

ARTICLE 1

SCOPE OF ASSISTANCE

1. The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Agreement, in connection with the investigation, prosecution and prevention of offences. The Contracting Parties shall also provide such assistance in connection with the confiscation or forfeiture of the proceeds or instrumentalities of offences and other proceedings directly related to the commission of offences unless such assistance is not permitted by the laws of the Requested Party.

2. Assistance shall include:

(a) taking testimony or statements;

(b) providing items, including documents, records and articles of evidence;

(c) locating or identifying persons or items;

- (d) serving documents;
- (e) facilitating the personal appearance of persons, including persons in custody;
- (f) executing requests for search and seizure;
- (g) assisting in proceedings related to immobilization and confiscation or forfeiture of the proceeds or instrumentalities of offences and restitution of those proceeds or instrumentalities to the victims of crime; and
- (h) any other forms of assistance not prohibited by the laws of the Requested Party.

3. This Agreement is intended solely for mutual legal assistance between the Contracting Parties. The provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of the request.

ARTICLE 2

CENTRAL AUTHORITIES

1. Each Contracting Party shall have a Central Authority to make and receive requests pursuant to this Agreement.

2. For the Hong Kong Special Administrative Region, the Central Authority shall be the Secretary for Justice, or a person authorized by the Secretary for Justice. For the Republic of Poland, the Central Authority shall be the Minister of Justice - Prosecutor General, or a person authorized by the Minister of Justice - Prosecutor General. Either Contracting Party may change its Central Authority in which case it shall notify the other of the change.

3. The Central Authorities shall communicate directly with one another for the purposes of this Agreement.

ARTICLE 3

LIMITATIONS ON PROVIDING ASSISTANCE

1. The Central Authority of the Requested Party shall refuse assistance if:

(a) the execution of the request for assistance would impair the sovereignty, security or public order of the Republic of Poland or, in the case of the Hong Kong Special Administrative Region, the People's Republic of China;

(b) the request for assistance relates to an offence of a political character;

- (c) the request for assistance relates to an offence under military law which would not be an offence under ordinary criminal law;
- (d) there are substantial grounds for believing that the request for assistance was made for the purpose of prosecuting, punishing or otherwise proceeding against a person on account of his race, religion, nationality or political opinions;
- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted or acquitted in the Requested Party;
- (f) it is of the opinion that the execution of the request for assistance would impair the essential interests of the Requested Party;
- (g) the acts or omissions which constitute the criminal conduct in respect of which assistance is sought do not constitute an offence under the law of the Requested Party, or would not constitute an offence if committed within the Requested Party;
- (h) the primary purpose of the request for assistance is the assessment or collection of tax;

(i) the request for assistance relates to an offence which carries the death penalty under the law of the Requesting Party;

(j) the request for assistance is not made in conformity with this Agreement.

2. Before refusing assistance pursuant to this Article, the Central Authorities shall consult with each other to consider whether assistance can be given subject to conditions. If the Requesting Party accepts assistance subject to these conditions, it shall comply with the conditions.

3. If the Central Authority of the Requested Party refuses assistance, it shall inform the Central Authority of the Requesting Party of the reasons for the refusal.

ARTICLE 4

FORM AND CONTENTS OF REQUESTS

1. A request for assistance shall be made in writing except that the Central Authority of the Requested Party may accept a request in another form in emergency situations. In any such case, the request shall be confirmed in writing within ten days thereafter unless the Central Authority of the Requested Party indicates otherwise. The request shall be in the language of the Requesting

Party, with an attached translation into the language of the Requested Party, unless otherwise agreed.

2. The request shall include the following:

- (a) the name of the authority conducting the investigation, prosecution or proceeding to which the request relates;
- (b) a description of the nature of the criminal matter and a summary of the relevant facts and laws;
- (c) a description of the evidence, information or other assistance sought; and
- (d) a statement of the purpose for which the evidence, information, or other assistance is sought.

3. To the extent necessary and possible, a request shall also include:

- (a) information on the identity and location of any person from whom evidence or information is sought;
- (b) information on the identity and location of a person to be served, that person's relationship to the proceedings, and the manner in which service is to be made;

- (c) information on the identity and whereabouts of a person or an item to be located;
- (d) a precise description of the place or person to be searched and of the items to be seized;
- (e) a description of the manner in which any testimony, evidence or statement is to be taken and recorded;
- (f) a list of questions to be asked of a person or a description of the subject matter about which a person is to be examined or both;
- (g) a description of any particular procedure to be followed in executing the request;
- (h) any requirement for persons designated in the request to be present during the execution of the request;
- (i) information as to the allowances and expenses to which a person asked to appear in the Requesting Party will be entitled;
- (j) any time limits relevant to the request;
- (k) any requirements for confidentiality; and

- (1) any other information which may be brought to the attention of the Requested Party to facilitate its execution of the request.

ARTICLE 5

EXECUTION OF REQUESTS

1. The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities. The competent authorities of the Requested Party shall use their best efforts to execute the request. The judicial authorities or other competent authorities of the Requested Party shall issue subpoenas, search warrants, or other orders necessary to execute the request.

2. The Central Authority of the Requested Party shall make all necessary arrangements for representation of the Requesting Party in any proceedings in the Requested Party arising out of a request for assistance.

3. Requests shall be executed in accordance with this Agreement. As regards matters not governed by this Agreement, requests shall be dealt with in accordance with the laws of the Requested Party. The method of execution specified in the request shall be followed except insofar as it is prohibited by the laws of the Requested Party.

4. If the Central Authority of the Requested Party determines that the execution of a request would interfere with an ongoing criminal investigation, prosecution or other proceeding in that Party, it may postpone execution, or make execution subject to conditions determined necessary, after consultation with the Central Authority of the Requesting Party. If the Requesting Party accepts assistance subject to conditions, it shall comply with the conditions.

5. The Requested Party shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the Central Authority of the Requesting Party. If the request cannot be executed without breaching such confidentiality, the Central Authority of the Requested Party shall so inform the Central Authority of the Requesting Party, which shall then determine whether the request should nevertheless be executed.

6. The Central Authority of the Requested Party shall respond to reasonable enquiries by the Central Authority of the Requesting Party about progress toward execution of the request.

7. The Central Authority of the Requested Party shall promptly inform the Central Authority of the Requesting Party of the outcome of the execution of the request. If the execution of the request is delayed or postponed or cannot be executed in whole or

in part, the Central Authority of the Requested Party shall inform the Central Authority of the Requesting Party of the reasons therefor.

ARTICLE 6

COSTS

1. The Requested Party shall pay all costs relating to the execution of the request, except for:

- (a) the fees of counsel retained at the request of the Requesting Party;
- (b) the fees for experts;
- (c) the cost of oral and written translations;
- (d) the cost incurred for transcription by private persons of testimony or statements, or the cost incurred for the preparation by private persons of written records or video records of testimony or statements;
- (e) the allowances and expenses related to travel of persons to a place in the Requested Party upon the request of the Requesting Party, or pursuant to Articles 10 or 11.

2. If, during the execution of the request, it becomes apparent that expenses of an extraordinary nature are required to fulfil the request the Contracting Parties shall consult each other to determine the terms and conditions under which the execution of the request may continue.

ARTICLE 7

LIMITATIONS ON USE

1. The Central Authority of the Requested Party may require that the Requesting Party not use any information or evidence obtained under this Agreement in any investigation, prosecution, or proceeding other than that described in the request without the prior consent of the Central Authority of the Requested Party. In such cases, the Requesting Party shall comply with the requirement.

2. The Central Authority of the Requested Party may require that information or evidence furnished under this Agreement be kept confidential or be used in accordance with any conditions which the Central Authority shall specify. If the Requesting Party accepts the information or evidence subject to such conditions, the Requesting Party shall use its best efforts to comply with the conditions.

3. Nothing in this Article shall preclude the use or disclosure of information to the extent that such information is exculpatory

to the defendant in a criminal prosecution. The Requesting Party shall notify the Requested Party in advance of any such proposed disclosure.

4. Information or evidence which has been made public in the Requesting Party in accordance with paragraph 1 or 2 may thereafter be used for any purpose.

ARTICLE 8

EVIDENCE IN THE REQUESTED PARTY

1. A person in the Requested Party from whom evidence is requested pursuant to this Agreement shall be compelled, if necessary, to appear and testify or produce items, including documents, records and articles of evidence. A person who gives false testimony, either orally or in writing, in execution of a request shall be subject to prosecution and punishment in the Requested Party in accordance with the criminal law of that Party.

2. Upon the request of the Requesting Party, the Central Authority of the Requested Party shall furnish information in advance about the date and place of the taking of the evidence pursuant to this Article.

3. The Requested Party shall permit the presence of persons specified in the request during the execution of the request, and

to the extent permitted by its law shall allow such persons to question the person giving the evidence.

4. The person referred to in paragraph 1 may refuse to give evidence if such person is entitled to do so according to the laws of the Requesting Party or the Requested Party.

5. If the person from whom evidence is sought asserts the right to decline to give evidence under the law of the Requested Party, the Requested Party shall resolve the matter in accordance with its own law. If the person from whom evidence is sought asserts the right to decline to give evidence under the law of the Requesting Party, the Requested Party shall resolve the matter on the basis of a certificate of the Central Authority of the Requesting Party.

6. The Requesting Party may request that items, including documents, records and articles produced in the Requested Party pursuant to this Article be certified in accordance with forms attached to the request. The absence or non-existence of items, including documents, records and articles may also be certified by forms attached to the request.

ARTICLE 9

DOCUMENTS AND OFFICIAL RECORDS

1. The Requested Party shall provide the Requesting Party with copies of documents or records in any form publicly available in the Requested Party, in the possession of the authorities of the Requested Party.

2. The Requested Party may provide copies of any documents or records in the possession of the authorities of that Party, but which are not publicly available, to the same extent and under the same conditions as such copies would be available to its own law enforcement or judicial authorities.

3. The Requesting Party may request that documents or records provided pursuant to this Article be certified in accordance with forms attached to the request. The absence or non-existence of documents or records may also be certified by forms specified in the request.

ARTICLE 10

APPEARANCE IN THE REQUESTING PARTY

When the Requesting Party requests the appearance of a person not in custody in that Party, the Requested Party shall invite the person to appear before the appropriate authority in the Requesting Party. The Requesting Party shall indicate the extent to which the expenses of that person will be paid. The Central Authority of Requested Party shall promptly inform the Central Authority of the Requesting Party of the person's response.

ARTICLE 11

TRANSFER OF PERSONS IN CUSTODY

1. A person in the custody of the Requested Party whose presence in the Requesting Party is sought for purposes of assistance under this Agreement shall be temporarily transferred from the Requested Party to the Requesting Party for that purpose if the person consents and if the Central Authorities of both Parties agree.

2. A person in the custody of the Requesting Party whose presence in the Requested Party is sought for the purposes of assistance under this Agreement shall be temporarily transferred from the Requesting Party to the Requested Party if the person consents and if the Central Authorities of both Parties agree.

3. For the purposes of this Article:

(a) the receiving Party shall have the authority and the obligation to keep the person transferred in custody unless otherwise authorised by the sending Party;

(b) the receiving Party shall return the person transferred to the custody of the sending Party as soon as circumstances permit or as otherwise agreed by both Central Authorities;

- (c) the receiving Party shall not require the sending Party to initiate extradition proceedings or any other proceedings for the return of the person transferred; and
- (d) the person transferred shall receive credit for service of the sentence imposed in the sending Party for the time served in the custody of the receiving Party.

ARTICLE 12

SAFE CONDUCT

1. A person referred to in Article 10 or 11 who upon request appears in the Requesting Party shall not, subject to Article 11.3(a), be prosecuted, detained or restricted in his personal liberty in that Party for any acts committed before his departure from the Requested Party. That person shall not be required to give testimony in any proceedings other than the proceedings to which the request relates.

2. A person referred to in Article 10 or 11 who upon request appears in the Requesting Party shall not be prosecuted, detained or restricted in his personal liberty in that Party by reason of the content of testimony provided by him, unless he gives false testimony as a witness.

3. The provisions of paragraph 1 shall not apply if the person who appears, being free to leave the Requesting Party, has not left it within fifteen consecutive days after being notified by a competent authority that his presence is no longer required, or having left, has voluntarily returned.

4. A person who has not appeared in the Requesting Party when invited to do so under Article 10 or 11 shall not be liable to any penalty or coercive measure in the Requested Party.

ARTICLE 13

LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

If the Requesting Party seeks the location or identity of persons or items in the Requested Party, the Requested Party shall use its best efforts to establish the location or identity.

ARTICLE 14

SERVICE OF DOCUMENTS

1. The Requested Party shall use its best efforts to effect service of any document transmitted to it by the Requesting Party for the purposes of service.

2. The Requesting Party shall transmit any request for the service of a document requiring the appearance of a person before an authority in the Requesting Party a reasonable time before the

scheduled appearance. This principle shall apply equally to a request for the service of a document requiring the recipient to take any other specific steps or giving the recipient the opportunity to do so.

3. The Requested Party shall return a proof of service in the manner specified in the request.

4. A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure in the Requested Party.

ARTICLE 15

SEARCH AND SEIZURE

1. The Requested Party shall execute a request for the search, seizure, and delivery of any item to the Requesting Party if the request includes information justifying such action under the law of the Requested Party.

2. The Requested Party shall provide such information as may be required by the Requesting Party concerning the circumstances of any search, seizure and custody of the item seized. In particular the Requesting Party may request that each official who has had custody of a seized item certify the identity of the item, the continuity of custody and the integrity of its condition in accordance with forms attached to the request. Such certificates

shall be admissible as evidence in the Requesting Party as proof of the matters set forth therein.

3. The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized item which is delivered to the Requesting Party.

ARTICLE 16

RETURN OF ITEMS

If required by the Central Authority of the Requested Party the Central Authority of Requesting Party shall return as soon as possible any item furnished to it in execution of a request under this Agreement.

ARTICLE 17

ASSISTANCE IN CONFISCATION AND FORFEITURE PROCEEDINGS

1. If the Central Authority of one Contracting Party becomes aware that proceeds or instrumentalities of offences are located in the other Contracting Party, it may so inform the Central Authority of the other Contracting Party. If that other Party has jurisdiction to forfeit or temporarily immobilize those proceeds or instrumentalities, it may present this information to its authorities for a determination whether any action is appropriate. These authorities shall issue their decision in accordance with

law, and shall, through their Central Authority, inform the Party which has made the initial notification of the action taken.

2. The Contracting Parties shall assist each other to the extent permitted by their respective laws in proceedings relating to the confiscation or forfeiture of the proceeds or instrumentalities of offences and restitution to the victims of crime. The assistance may include action to temporarily immobilize the proceeds or instrumentalities pending further proceedings.

3. The Contracting Party that has custody of the proceeds or instrumentalities of offences shall dispose of them in accordance with its law. Either Party may transfer all or part of such assets or the proceeds of their sale to the other Party, to the extent permitted by the transferring Party's laws and upon such terms as may be agreed.

ARTICLE 18

AUTHENTICATION

Evidence or documents transmitted pursuant to this Agreement shall not require any form of authentication, unless expressly requested by either of the Contracting Parties in accordance with its law.

ARTICLE 19

COMPATIBILITY WITH OTHER AGREEMENTS

The provisions of this Agreement shall not prevent either of the Contracting Parties from granting assistance to the other Party through the provisions of other applicable international agreements or practices.

ARTICLE 20

CONSULTATION

1. The Central Authorities of the Contracting Parties shall consult, whenever necessary, to promote the most effective use of this Agreement. The Central Authorities may also agree on such practical measures as may be necessary to facilitate the implementation of this Agreement.

2. Any differences arising out of the interpretation or application of this Agreement shall be resolved through diplomatic channels if the Central Authorities of the Contracting Parties are themselves unable to reach agreement.

ARTICLE 21

ENTRY INTO FORCE, DURATION AND TERMINATION

1. This Agreement shall be adopted by each Contracting Party in accordance with its laws.

2. This Agreement shall enter into force thirty days after the date of receipt of the later of the notifications by which the Contracting Parties notify each other that their respective legal requirements for entry into force of the Agreement have been complied with.

3. This Agreement has not been concluded for a predetermined period of time. It may be terminated by means of notification of either of the Contracting Parties; in such case it shall cease to be in force after the expiry of three months from the date of receipt of the notification.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement.

DONE at Hong Kong this twenty-sixth day of April 2005 in duplicate, in the Chinese, English and Polish languages, all texts being equally authentic; in case of a dispute as to their interpretation, the English text shall prevail.

Clerk to the Executive Council

COUNCIL CHAMBER

7 February 2006

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the Republic of Poland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Republic of Poland and signed in Hong Kong on 26 April 2005. A copy of those arrangements is annexed at Schedule 2 to the Order. It should be noted that the Ordinance is subject to the modifications summarized in Schedule 1 to the Order.

(Translation)

Mutual Legal Assistance in Criminal Matters (Poland) Order

**Draft Speech by the Secretary for Security
on the Resolution at Legislative Council Meeting on 8 March 2006**

Madam President,

I move that the resolution to make the Mutual Legal Assistance in Criminal Matters (Poland) Order be passed by this Council. I shall move another resolution to make the Mutual Legal Assistance in Criminal Matters (Israel) Order in a short while.

2. The Hong Kong Special Administrative Region is fully committed to international cooperation in combating serious crimes. In this respect, we have been expanding our network of bilateral agreements with other jurisdictions on mutual legal assistance in criminal matters. These agreements enhance international cooperation in the fight against transnational crimes and ensure reciprocal assistance between the contracting parties. We have so far signed nineteen bilateral agreements with other jurisdictions.

3. The Mutual Legal Assistance in Criminal Matters Ordinance provides the necessary statutory framework for implementing mutual legal assistance arrangements, enabling assistance to be provided to or obtained from other jurisdictions in the investigation and prosecution of criminal offences, which includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and

confiscation of the proceeds of crime.

4. Pursuant to section 4 of the Ordinance, the Chief Executive in Council has made two Orders to implement our bilateral arrangements on mutual legal assistance in criminal matters with Poland and Israel. These two Orders apply the arrangements prescribed in the Ordinance between Hong Kong and Poland, and between Hong Kong and Israel, allowing assistance to be provided or obtained under the agreements and in accordance with the procedures set out in the Ordinance. The Orders are substantially in conformity with the provisions in the Ordinance. Nevertheless, as legislation and arrangements on mutual legal assistance in criminal matters vary from jurisdiction to jurisdiction, it is necessary for the relevant orders to modify some of the provisions of the Ordinance to reflect the practices of individual negotiation partners. Such modifications are necessary for Hong Kong to comply with its obligations in the agreements concerned. The modifications made for the bilateral agreements with Poland and Israel are summarised in Schedule 1 to each of the two Orders.

5. To strengthen our cooperation with other jurisdictions in criminal justice and international law enforcement, it is important for the two Orders to be made to enable the bilateral agreements to be brought into force.

6. I now invite Members to approve the making of the Mutual Legal Assistance in Criminal Matters (Poland) Order. I shall in a moment move the resolution to make the Mutual Legal Assistance in Criminal Matters (Israel) Order.

7. Thank you, Madam President.

Security Bureau

February 2006

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ORDINANCE

RESOLUTION

(Under section 4 of the Mutual Legal Assistance in Criminal
Matters Ordinance (Cap. 525))

RESOLVED that the Mutual Legal Assistance in Criminal Matters
(Israel) Order, made by the Chief Executive in Council
on 7 February 2006, be approved.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS
(ISRAEL) ORDER**

(Made by the Chief Executive in Council under section 4
of the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525) subject to the approval of
the Legislative Council)

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. Ordinance to apply between Hong Kong and Israel

(1) In relation to the scheduled arrangements for mutual legal assistance, it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 1, apply as between Hong Kong and the State of Israel.

(2) In subsection (1), "scheduled arrangements for mutual legal assistance" (列明的相互法律協助的安排) means arrangements which are applicable to the Government and the Government of the State of Israel, a copy of which is annexed at Schedule 2.

SCHEDULE 1

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(e) of the Ordinance shall be modified to read as follows -

"(e) the request relates to the prosecution of a person for an external offence in a case where the person -*

(i)* has been convicted, acquitted or pardoned by a competent court or other authority in the place^{**} or Hong Kong in respect of that offence or of another external offence constituted by the same act or omission as that offence;* or

(ii)* has undergone the punishment provided by the law of that place or Hong Kong^{**} in respect of that offence or of another external offence constituted by the same act or omission as that offence;".

2. Section 17(1) of the Ordinance shall be modified by deleting paragraph (ii).

3. Section 17(3)(b) of the Ordinance shall be modified to read as follows -

"(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that his presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for~~^{**} -

(i) the purpose to which the request relates; ~~or~~^{**}

(ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a

criminal matter in relation to which it is desirable that the person give assistance.".

4. Section 23(2)(a) of the Ordinance shall be modified -
- (a) by adding "or" at the end of subparagraph (i);
 - (b) by deleting subparagraph (ii).

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

SCHEDULE 2

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION OF
THE PEOPLE'S REPUBLIC OF CHINA AND THE
GOVERNMENT OF THE STATE OF ISRAEL
CONCERNING MUTUAL LEGAL ASSISTANCE IN
CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorized by the Central People's Government of the People's Republic of China and the Government of the State of Israel,

DESIRING to improve, through co-operation and mutual legal assistance in criminal matters, the effectiveness of law

enforcement of both Parties in the investigation, prosecution and prevention of crime and the forfeiture of criminal proceeds,

HAVE AGREED as follows:

ARTICLE 1

SCOPE OF ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, mutual assistance in the investigation, prosecution and prevention of offences and in proceedings related to criminal matters.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) obtaining of evidence, articles or documents, including execution of letters rogatory;
- (d) executing requests for search and seizure;
- (e) facilitating the personal appearance of witnesses;

- (f) effecting the temporary transfer of persons in custody to appear as witnesses or for other assistance under this Agreement;
- (g) obtaining the production of judicial or official records;
- (h) tracing, restraining and forfeiting the proceeds and instrumentalities of criminal activities;
- (i) providing information, documents and records;
- (j) delivery of material, including lending of exhibits; and
- (k) providing any other form of assistance not inconsistent with the laws of the Requested Party.

(3) The Parties may, in accordance with their laws, grant assistance in fiscal offences, but shall refuse assistance if the primary purpose of the request is the assessment or collection of taxes.

(4) This Agreement is intended solely for mutual assistance between the Parties. The provisions of this Agreement shall not give rise to any right on the part of any private person to

obtain, suppress or exclude any evidence or to impede the execution of a request.

ARTICLE 2

CENTRAL AUTHORITY

(1) Each party shall establish a Central Authority for the purposes of the Agreement.

(2)(a) The Central Authority for Israel for the purpose of submitting requests under this Agreement shall be the Attorney General or an official designated by the Attorney General; the Central Authority for Israel for the purpose of accepting requests under this Agreement shall be the Minister of Justice, or an official designated by the Minister of Justice;

(b) The Central Authority for the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorised officer.

(3) Either Party may change its Central Authority in which case it shall notify the other of the change.

(4) Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.

ARTICLE 3

OTHER ASSISTANCE

The Parties may provide assistance to each other pursuant to other applicable International Agreements or through the provisions of their domestic laws. The Parties may also provide assistance pursuant to any applicable bilateral arrangement or agreement, provided such assistance is consistent with the laws of the Requested Party.

ARTICLE 4

LIMITATIONS ON ASSISTANCE

(1) The Requested Party may, or if so required by its laws shall, deny assistance if it determines that:

- (a) the request for assistance impairs the sovereignty, security or public order of the State of Israel or, in the case of the Government of the Hong Kong Special Administrative Region, the People's Republic of China;
- (b) granting the request would seriously impair its essential interests;
- (c) the request for assistance relates to an offence of a political character;

- (d) the request for assistance relates to an offence under military law which would not be an offence under ordinary criminal law;
- (e) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, religion, nationality, sex, social origin or political opinions;
- (f) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in either Party;
- (g) the Requesting Party cannot comply with any conditions of the Requested Party in relation to confidentiality or limitation as to use of the material provided;
- (h) the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence;

(i) the request is not made in conformity with this Agreement; or

(j) the request will impose an excessive burden on the resources of the Requested Party.

(2) For the purpose of paragraph (1)(b), the Requested Party may include in its consideration of essential interests whether the provision of assistance could endanger the safety of any person.

(3) The Requested Party may refuse assistance if the request relates to an offence which carries the death penalty in the Requesting Party but in respect of which the death penalty is either not provided for in the Requested Party or not normally carried out unless the Requesting Party gives such assurances as the Requested Party considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out.

(4) The Requested Party may postpone assistance if execution of the request would interfere with an ongoing investigation or prosecution in the Requested Party.

(5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority, shall:

- (a) promptly inform the Requesting Party of the reason for the denial or postponement; and
- (b) consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary; if the Requesting Party accepts assistance subject to such terms and conditions, it shall comply with those terms and conditions.

ARTICLE 5

REQUESTS

- (1) Requests for assistance shall be made in writing and shall include the following:
 - (a) the name of the authority on behalf of which the request is made;
 - (b) a description of the purpose of the request, the nature of the assistance requested, and the connection between the assistance sought and the criminal matter to which it relates;
 - (c) a description of the nature of the investigation, prosecution, offence or criminal matter, including the criminal laws which relate to the offence;

- (d) a statement of whether criminal proceedings have been instituted in the matter, and if so, details of the proceedings;
- (e) a summary of the relevant facts and laws;
- (f) any requirements for confidentiality;
- (g) details of any particular procedure that the Requesting Party wishes to be followed; and
- (h) details of the period within which the request should be complied with.

(2) The Requested Party shall use its best efforts, in accordance with its law, to keep confidential a request and its contents except where otherwise authorized by the Requesting Party.

(3) The request and all documents submitted in support of a request shall be in English or shall be accompanied by a translation into English.

ARTICLE 6

EXECUTION OF REQUESTS

(1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.

(2) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

(3) The Requested Party shall promptly inform the Requesting Party of any circumstances which are likely to cause a significant delay in responding to the request.

(4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.

(5) Each Party shall respond promptly to reasonable inquiries from the other Party concerning the execution of the request or the proceedings in the Requesting Party to which the request relates.

ARTICLE 7

REPRESENTATION AND EXPENSES

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any

proceeding arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Requested Party shall bear all ordinary expenses relating to the execution of a request, except for the following:

(a) fees of legal counsel retained at the request of the Requesting Party;

(b) fees of experts;

(c) expenses of translation, interpretation and transcription; and

(d) travel expenses and allowances of persons transferred pursuant to Articles 14 or 15 of this Agreement.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

(4) In the case of requests for seizure, immobilization or forfeiture of assets or restraining orders pursuant to this Agreement, in which a court of the Requested Party, in accordance

with its laws, issues an order to compensate an injured party or requires the furnishing of a bond or other security, those costs shall be borne by the Requesting Party unless otherwise agreed by the Parties.

ARTICLE 8

LIMITATIONS ON USE

(1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished to the Requesting Party be kept confidential or be disclosed or used only subject to such terms and conditions as it may specify.

(2) The Requesting Party shall not disclose or use information or evidence furnished to it for purposes other than those stated in the request without the prior consent of the Requested Party.

ARTICLE 9

OBTAINING OF EVIDENCE

(1) Where a request is made that evidence be taken for the purpose of a proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party, the Requested Party shall endeavour to have such evidence taken.

(2) For the purposes of this Agreement:

(a) the giving or taking of evidence shall include the taking of statements and testimony, and the production of documents, records or other material; and

(b) proceedings shall include investigations and prosecutions.

(3) For the purposes of requests under this Article, the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(4) Where, pursuant to a request for assistance, a person is to give evidence for the purpose of proceedings in the Requesting Party, the parties to the relevant proceedings in the Requesting Party, their legal representatives or representatives of the Requesting Party may, subject to the laws of the Requested Party, appear and question the person giving that evidence.

(5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to give evidence if the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party.

(6) If such person asserts a claim of immunity, incapacity or privilege under the laws of the Requesting Party, the evidence shall nonetheless be taken and the claim be made known to the Central Authority of the Requesting Party for resolution by the authorities of that Party.

(7) Upon request, the Central Authority of the Requested Party shall furnish information in advance about the date and place of the taking of the evidence pursuant to this Article.

(8) The Central Authority of the Requested Party may require that the Central Authority of the Requesting Party return any documents, records, or articles of evidence furnished to it in the execution of a request under this Agreement as soon as possible.

(9) If permitted by their laws, the Parties may agree in specific cases that the taking of evidence of a witness in accordance with this Article may take place by means of video conference or other technological means.

ARTICLE 10

LOCATION OR IDENTIFICATION OF PERSONS OR ITEMS

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person or item specified in the request.

ARTICLE 11

SERVICE OF DOCUMENTS

(1) The Requested Party shall use its best efforts to serve any document transmitted to it for the purpose of service, and to the extent possible, shall effect such service in the manner specified by the Requesting Party.

(2) The Requesting Party shall transmit a request for service of a document pertaining to a response or an appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.

(3) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.

(4) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party. If service cannot be effected, or cannot be effected in the manner specified, the Requesting Party shall be so informed and shall be advised of the reasons.

(5) A person who fails to comply with any process served on him shall not thereby be liable to any penalty or coercive measure pursuant to the law of the Requesting Party or Requested Party.

ARTICLE 12

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law, the Requested Party shall provide copies of publicly available documents.

(2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE 13

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

ARTICLE 14

TRANSFER OF PERSONS IN CUSTODY

(1) A person in custody in the Requested Party, whose presence is requested in the Requesting Party for the purpose of providing assistance pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party without the need for extradition proceedings.

(2) Where the sentence of imprisonment of a person transferred pursuant to this Article expires while the person is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody. Such person shall be entitled to receive from the Requesting Party an allowance and travel expenses for his return travel to the Requested Party, if he returns to that Party.

ARTICLE 15

APPEARANCE OF OTHER PERSONS

(1) The Requesting Party may request the assistance of the Requested Party in inviting a person to travel to the Requesting Party for the purpose of providing assistance pursuant to this Agreement.

(2) The Requested Party shall, if satisfied that satisfactory arrangements have been made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance. Such arrangements will include, but need not be limited to, ensuring the security of the person and providing travel expenses and living allowances; the person shall be under no compulsion to accept such invitation.

(3) The Central Authority of the Requested Party shall promptly inform the Central Authority of the Requesting Party of the response of the person.

ARTICLE 16

SAFE CONDUCT

(1) A person who consents to provide assistance pursuant to Articles 14 or 15 shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party, except as provided in Article 14.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 14, and being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Articles 14 or 15 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Articles 14 or 15 shall not be required to give evidence in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to give evidence pursuant to Articles 14 or 15 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 17

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to a proceeding or investigation in relation to a criminal matter if the request includes information justifying such action under the laws of the Requested Party.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of

any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party including conditions deemed necessary to protect third party interests in the property delivered to the Requesting Party.

ARTICLE 18

PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds or instrumentalities of a crime against the laws of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds or instrumentalities may be located in its jurisdiction.

(2) Where pursuant to paragraph (1) suspected proceeds or instrumentalities of crime are found, the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, use of, transfer or disposal of, such suspected proceeds or instrumentalities of crime, pending a final

determination in respect thereof by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the forfeiture of proceeds or instrumentalities of crime, such assistance may be given by whatever means are appropriate under the laws of the Requested Party. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds or instrumentalities to which the request relates.

(4) Proceeds or instrumentalities forfeited pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

ARTICLE 19

SETTLEMENT OF DISPUTES

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Central Authorities have not succeeded in reaching an agreement.

ARTICLE 20

ENTRY INTO FORCE AND TERMINATION

(1) Each Contracting Party shall notify the other Contracting Party in writing of the completion of its internal legal procedures required for the entry into force of this Agreement. This Agreement shall enter into force thirty days after the date of the later of the two notifications.

(2) This Agreement shall apply to any request presented after its entry into force, even if the request relates to offences which occurred before that date.

(3) Either Party may terminate this Agreement by means of written notice to the other Party. In that event the Agreement shall cease to have effect on the receipt of such notice. Requests for assistance which have been received prior to termination of the Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement was still in force.

IN WITNESS WHEREOF, the undersigned, being duly authorised by their respective governments, have signed this Agreement.

DONE at Hong Kong this twenty-sixth day of July two thousand and five, in duplicate, in the Chinese, English and Hebrew languages, all texts being equally authentic. In case of divergence of interpretation, the English text shall prevail.

Clerk to the Executive Council

COUNCIL CHAMBER

7 February 2006

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) shall apply as between Hong Kong and the State of Israel. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the State of Israel and signed in Hong Kong on 26 July 2005. A copy of those arrangements is annexed at Schedule 2 to the Order. It should be noted that the Ordinance which is applicable to Hong Kong and the State of Israel is subject to the specified modifications summarized in Schedule 1 to the Order.

(Translation)

Mutual Legal Assistance in Criminal Matters (Israel) Order

**Draft Speech by the Secretary for Security
on the Resolution at Legislative Council Meeting on 8 March 2006**

Madam President,

I move that the resolution to make the Mutual Legal Assistance in Criminal Matters (Israel) Order be passed by this Council.

2. In moving the resolution to make the Mutual Legal Assistance in Criminal Matters (Poland) Order earlier, I have explained the purpose and importance of making orders on mutual legal assistance in criminal matters. I now invite Members to approve the making of the Mutual Legal Assistance in Criminal Matters (Israel) Order.

3. Thank you, Madam President.

Security Bureau

February 2006