

立法會
Legislative Council

LC Paper No. CB(2)2143/07-08

Ref : CB2/SS/4/07

Paper for the House Committee meeting on 6 June 2008

**Report of the Subcommittee on
Subsidiary Legislation to Implement the Obligations under
the United Nations Convention Against Transnational Organized Crime**

Purpose

This paper reports on the deliberations of the Subcommittee on Subsidiary Legislation to Implement the Obligations under the United Nations Convention Against Transnational Organized Crime.

Background

2. The Central People's Government of the People's Republic of China has ratified the United Nations Convention Against Transnational Organized Crime (the Convention). The Convention, which entered into force for Hong Kong on 27 September 2006, seeks to strengthen the power of governments in combating serious crimes by providing a basis for common actions against organized crimes, money laundering, corruption and obstruction of justice. It also promotes extradition, and enhances judicial cooperation, mutual legal assistance and law enforcement cooperation.

3. Legislative measures are required to give effect to the obligations in relation to extradition and mutual legal assistance in criminal matters under the Convention.

The subsidiary legislation

Fugitive Offenders (Transnational Organized Crime) Order (L.N. 78 of 2008)

4. The Fugitive Offenders (Transnational Organized Crime) Order (the FO Order) is made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503) (FOO) for the purpose of implementing the extradition requirements under Article 16 of the Convention. FOO provides for the surrender to

certain places outside Hong Kong of persons who are wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of certain offences against the laws of those places. It also provides for the treatment of persons wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of certain offences against the law of Hong Kong who are surrendered from certain places outside Hong Kong.

5. The objective of the FO Order is, in relation to the extradition provisions of the Convention, to apply as between Hong Kong and the places outside Hong Kong to which the Convention relates the procedures for the surrender of fugitive offenders set out in FOO. Those procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms of the Convention as recited in the Schedule to the FO Order.

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

Mutual Legal Assistance in Criminal Matters (Transnational Organized Crime) Order

7. The Secretary for Security gave notice to move a motion at the Council meeting on 7 May 2008 to seek the Council's approval of the Mutual Legal Assistance in Criminal Matters (Transnational Organized Crime) Order (the MLA Order). Made by the Chief Executive in Council under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (MLAO), the MLA Order seeks to fulfil the requirements under Articles 14 and 18 of the Convention. The MLA Order directs that, in relation to the mutual legal assistance provisions of the Convention, MLAO shall, subject to the modifications specified in Schedule 2 to the Order, apply as between Hong Kong and the places outside Hong Kong to which the Convention relates. The Convention is recited in Schedule 1 to the MLA Order.

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

The Subcommittee

9. At the House Committee meeting on 25 April 2008, Members formed a subcommittee to study the FO Order and the MLA Order.

10. To allow more time for the Subcommittee to study the FO Order, the scrutiny period of the Order has been extended from 21 May 2008 to 11 June 2008 by a resolution of the Council passed on 21 May 2008. At the request of the House Committee, the Secretary for Security withdrew his notice for moving the motion at the Council meeting on 7 May 2008 to allow more time for the Subcommittee to study the MLA Order in detail.

11. The membership list of the Subcommittee is in the **Appendix**. Under the chairmanship of Hon James TO, the Subcommittee has held one meeting with the Administration.

Deliberations of the Subcommittee

Fugitive Offenders (Transnational Organized Crime) Order

Need for the Order

12. On the need for the FO Order, the Administration has explained that pursuant to Article 16 of the Convention, a State Party shall, subject to relevant conditions, make extradition arrangements for a person who is the subject of a request for extradition and is located in its territory for offences covered by the Convention, namely participation in an organized criminal group, money laundering, corruption, obstruction of justice or other serious crimes as defined in Article 2 of the Convention, which are transnational in nature and involve an organized criminal group. To give effect to Article 16, it is necessary to make the FO Order.

Implementation of Articles 5, 6, 8 and 23 of the Convention

13. Articles 5, 6, 8 and 23 of the Convention stipulate a number of requirements in relation to the criminalization of participation in an organized criminal group, laundering of proceeds of crime, corruption and obstruction of justice respectively. At the request of the Subcommittee, the Administration has provided a paper explaining how the requirements of Articles 5, 6, 8 and 23 of the Convention are implemented in Hong Kong.

Scope of offences covered by Articles 16(1) and 16(2)

14. Article 16(1) of the Convention provides that this Article shall apply to the offences covered by the Convention or in cases where an offence referred to in Article 3(1)(a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party. Under Article 16(2), if the request for extradition includes separate serious crimes, some of which are not covered by this Article, the requested State Party may apply this Article also in respect of the latter offences.

15. The Subcommittee has raised concern about the scope of offences covered by Articles 16(1) and 16(2), in particular Article 16(2), if implemented, may allow offences not covered by the Convention to be extraditable. The Subcommittee has

enquired about the correlation of Articles 16(1) and 16(2) with Article 3, and whether Article 16(2) is subject to the requirements in Article 16(1).

16. The Administration has explained that Article 16(1) of the Convention applies to two categories of offences -

Category 1 : "the offences covered by this Convention"; and

Category 2 : "in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organized criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party".

The offences covered by the Convention are set out in Article 3(1) of the Convention. The Article provides that -

"(1) This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of :

(a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and

(b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group."

17. Reading Article 16(1) with Article 3(1), the scope of the offence coverage in respect of Article 16(1) should be as follows -

(a) In respect of Category 1 offences :

(i) offences established in accordance with articles 5, 6, 8 and 23 of the Convention that are transnational and involve an organized criminal group; and

(ii) serious crimes that are transnational and involve an organized criminal group.

(b) In respect of Category 2 offences :

(i) offences established in accordance with articles 5, 6, 8 and 23 of the Convention, where the person who is to be extradited is located in the territory of the requested State Party and which involve an organized criminal group; and

- (ii) serious crime, where the person who is to be extradited is located in the territory of the requested State Party and where the offence involves an organized criminal group.

The Administration's interpretation is in line with the interpretation of the scope of Article 16(1) as set out in the Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, published by the United Nations Office on Drugs and Crime.

18. Regarding Article 16(2) of the Convention, the Administration has explained that "serious crime" is defined in Article 2(b) of the Convention to mean "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". The effect of Article 16(2) is that the requested State Party may choose to allow extradition in respect of serious offences, as defined, that do not involve an organized criminal group, if they are included in the same request covering crimes provided for under Article 16(1). Article 16(2) is permissive, i.e. it enables the requested State Party to deal with serious offences of the same alleged offender under the same extradition procedure, but does not oblige it to do so. Moreover, Article 16(2) does not operate on a stand alone basis, but can only operate where there is an extraditable offence under Article 16(1). In this sense, Article 16(2) is subject to Article 16(1). As stated in the Interpretative Notes for the official records (*travaux préparatoires*) of the negotiation of the Convention, "the purpose of paragraph 2 is to serve as an instrument for States Parties wishing to avail themselves of the facility it provides. It is not intended to broaden the scope of the article unduly."

Impact of the Order on existing safeguards under the Fugitive Offenders Ordinance

19. The Subcommittee has expressed concern whether the protection of individual's fundamental rights provided under FOO will be affected following the implementation of the FO Order in Hong Kong.

20. The Administration has advised that the permissive nature of Article 16(2) aside, its operation is subject to three important safeguards provided for under Article 16 of the Convention as follows -

- (a) under Article 16(7), surrender of fugitive offenders is expressly made subject to the conditions provided for in domestic law of the requested State Party. This is consistent with the present approach, whereby the purpose of making the FO Order under FOO is to apply the provisions of the FOO to the surrender of fugitive offenders pursuant to the Convention. Hence, surrender of offenders by Hong Kong in accordance with Article 16 of the Convention will have to comply with the provisions of the FOO;
- (b) it is expressly provided in Article 16(1) that the offence for which extradition is sought should be punishable under the domestic law of both

the requesting State Party and the requested State Party. This is consistent with the "dual criminality" safeguard under section 2(2) of the FOO, which provides that an offender can only be surrendered if the alleged criminal conduct in question would, *inter alia*, constitute a Hong Kong offence specified in Schedule 1 to the FOO had the conduct occurred in Hong Kong; and

- (c) Article 16(14) expressly provides that the requested State Party is under no obligation to extradite if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons. This is consistent with the safeguards under section 5(1)(c) and (d) of FOO. Any requests for surrender not in compliance with such safeguards shall be refused. Section 5 of FOO provides for a number of mandatory grounds for refusing a surrender request, including the situation where it appears to an appropriate authority that the request for surrender is in fact made for the purpose of prosecuting or punishing the fugitive on account of his race, religion, nationality or political opinions (section 5(1)(c) of FOO), or where it appears to an appropriate authority that the fugitive might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions (section 5(1)(d) of FOO).

21. In the light of the safeguards highlighted in paragraph 20(a), (b) and (c) above, the Administration considers that the extradition provisions of the Convention are consistent with the FOO. In any case, as noted in paragraph 20(a) above, with the making of the FO Order under the FOO, the provisions of the FOO apply to surrender of fugitive offenders under the Convention. Thus, the protection of individuals' fundamental rights provided under the FOO will not be affected following the implementation of the Convention in Hong Kong.

Mutual Legal Assistance in Criminal Matters (Transnational Organized Crime) Order

Need for the Order

22. On the need for the MLA Order, the Administration has explained that Article 18 of the Convention requires States Parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. Specifically, Article 18(27) stipulates that a person who consents to give evidence in a proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested

State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of 15 consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

23. In addition, Article 14 of the Convention requires each State Party, to the extent permitted by domestic law and if so requested, to give priority consideration to returning confiscated proceeds of crime or property to the requesting State Party. To give effect to Articles 14 and 18, it is necessary to make the MLA Order.

Modification to the Mutual Legal Assistance in Criminal Matters Ordinance

24. The Subcommittee notes that Schedule 2 to the MLA Order modifies section 17(3)(b) of MLAO such that the safe conduct period of a person who consents to give evidence in a proceeding in the territory of the requesting State Party will be the period agreed upon by the requesting and requested State Parties or, if no such agreement is made, 15 consecutive days.

Conclusion

25. The Subcommittee is in support of the FO Order and the MLA Order. The Administration will give fresh notice for moving the motion to seek the Council's approval of the MLA Order.

Advice Sought

26. Members are invited to note the deliberations of the Subcommittee.

**Subcommittee on Subsidiary Legislation to Implement the Obligations under
the United Nations Convention Against Transnational Organized Crime**

Membership list

Chairman Hon James TO Kun-sun

Members Hon Margaret NG
Hon Howard YOUNG, SBS, JP
Hon LAU Kong-wah, JP
Hon LEUNG Kwok-hung

(Total : 5 Members)

Clerk Mrs Sharon TONG LEE Yin-ping

Legal Adviser Mr Timothy TSO

Date 13 May 2008