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From : Clerk to the Legislative Council

To : All Members of the Legislative Council

Council meeting of 19 May 2010

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

I forward for Members' consideration a proposed resolution which the Secretary for Security will move at the Council meeting of 19 May 2010 under the Mutual Legal Assistance in Criminal Matters Ordinance. 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 speech, in both English and Chinese versions, which the Secretary will deliver when moving the proposed resolution is also attached.

(Mrs Justina LAM)
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 (South
Africa) Order, made by the Chief Executive in Council on 20 April
2010, be approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (SOUTH AFRICA) ORDER

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

1. Commencement

This Order comes 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 South Africa

In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance, subject to the modifications specified in Schedule 2, applies as between Hong Kong and the Republic of South Africa.

SCHEDULE 1

[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 SOUTH AFRICA
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 authorised by the Central People's Government of the People's Republic of China and the Government of the Republic of South Africa;

Desiring to extend to each other the widest measure of co-operation in criminal matters and to improve the effectiveness of law enforcement of both Parties in the investigation, prosecution and prevention of crime and the confiscation 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 and prosecution of criminal offences and in proceedings related to criminal matters.
- (2) Assistance shall include:
 - (a) identifying and locating persons;
 - (b) serving of documents;
 - (c) the obtaining and delivery of statements, evidence, articles or documents, including the execution of letters rogatory and lending of exhibits;

- (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;
 - (g) obtaining production of judicial or official records;
 - (h) tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities; and
 - (i) providing information, documents and records.
- (3) Assistance under this Agreement may be granted in connection with offences against a law related to taxation, customs duties, foreign exchange control or other revenue matters but not in connection with non-criminal proceedings relating thereto.
- (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.
- (5) The Parties may provide assistance pursuant to other agreements, arrangements or practices.

ARTICLE 2

CENTRAL AUTHORITY

- (1) Requests under this Agreement shall be made by the Central Authority of the Requesting Party to the Central Authority of the Requested Party.
- (2) The Central Authority of the Hong Kong Special Administrative Region shall be the Secretary for Justice or his or her duly authorised officer. The Central Authority for the Republic of South Africa shall be the Director-General of the Department of Justice and Constitutional Development. Either Party may, at any time, change its Central Authority in which case it shall notify the other of the change.
- (3) The Central Authorities may communicate directly with one another for the purposes of this Agreement.

ARTICLE 3

LIMITATIONS ON COMPLIANCE

- (1) The Requested Party shall refuse assistance if:
 - (a) the request for assistance impairs the sovereignty, security or public order of the Republic of South Africa or, in the case of the Government 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 the ordinary criminal law of the Requested Party;
- (d) there are substantial grounds for believing that the request for assistance will result in a person being prejudiced on account of his race, gender, 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, acquitted or pardoned in the Requesting or Requested Party or for which the person could no longer be prosecuted by reason of lapse of time according to the law of the Requesting Party;
- (f) the execution of the request would prejudice the public order or similar essential interests of the Requested Party;
- (g) the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided;
- (h) the execution of the request may prejudice the safety of witnesses or victims; or
- (i) in the case of a request by the Republic of South Africa the acts or omissions alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Hong Kong Special Administrative Region, have constituted an offence.

- (2) 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, not carried out.
- (3) In instances in which the Requesting Party provides an assurance in accordance with paragraph (2) of this Article, the death penalty, if imposed by the courts of the Requesting Party, shall 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 –
 - (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
 - (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.
- (6) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b) of this Article, it shall comply with those terms and conditions.

ARTICLE 4

REQUESTS

- (1) Requests shall be made in writing.
- (2) Requests for assistance shall include:
 - (a) the name of the authority on behalf of which the request is made;
 - (b) a description of the purpose of the request and the nature of the assistance;
 - (c) a description of the nature of the investigation, prosecution, offence or criminal matter and whether or not proceedings have been instituted;
 - (d) where proceedings have been instituted, details of the proceedings;
 - (e) a summary of the relevant facts and laws;
 - (f) any requirements for confidentiality;
 - (g) details of any particular procedure the Requesting Party wishes to be followed; and
 - (h) details of the period within which the request should be complied with.
- (3) To the extent necessary and possible, a request shall also include:

- (a) information in respect of the identity and location of any person from whom evidence is sought;
- (b) information on the identity and location of any person to be served, that person's relationship to the proceedings, and the manner in which service is to be effected;
- (c) information on the identity and whereabouts of any person to be located;
- (d) a precise description of any place or person to be searched and of any articles to be seized;
- (e) a description of the manner in which any testimony or statement is to be taken and recorded;
- (f) a list of questions to be asked of a witness;
- (g) a description of any particular procedure to be followed in executing the request;
- (h) information as to the allowances and expenses to which a person asked to appear in the Requesting Party will be entitled;
- (i) any other information to facilitate execution of the request; and
- (j) a court order if any, or certified copy thereof, which is to be enforced and a statement to the effect that it is a final order.

- (4) Except when otherwise authorized by the Requesting Party, the Requested Party shall use its best efforts to keep confidential a request and its contents and shall where necessary ensure the safety of witnesses and victims. 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.
- (5) All documents submitted in support of a request shall be in or translated into a language acceptable to the Requested Party.

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.
- (2) Requests shall be executed in accordance with the law of the Requested Party. However, the method of execution specified in the request shall be followed except insofar as it is not permitted by the law of the Requested Party.
- (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) The Central Authority of the Requested Party shall respond to reasonable inquiries by the Central Authority of the Requesting Party concerning progress towards the execution of the request.

ARTICLE 6

REPRESENTATION AND EXPENSES

- (1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.
- (2) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:
 - (a) fees of counsel retained at the request of the Requesting Party;
 - (b) fees of experts;
 - (c) expenses of translation;
 - (d) expenses of transcription; and
 - (e) travel expenses and allowances of persons.

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

ARTICLE 7

LIMITATIONS OF USE

- (1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished 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 for purposes other than those stated in the request without the prior consent of the Central Authority of the Requested Party.
- (3) Nothing in this Article shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the law of the Requesting Party. The Requesting Party shall notify the Requested Party in advance of any such proposed disclosure.

ARTICLE 8

OBTAINING OF EVIDENCE, ARTICLES OR DOCUMENTS

- (1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party, the Requested Party shall arrange to have such evidence taken.
- (2) A request for assistance in obtaining evidence made to the Central Authority of the Republic of South Africa shall be accompanied by a statement by or on behalf of the Central Authority of the Hong Kong Special Administrative Region in which it is certified:
 - (a) that proceedings have been instituted in a court or tribunal exercising jurisdiction in the Hong Kong Special Administrative Region; or
 - (b) that there are reasonable grounds for believing that an offence has been committed in the Hong Kong Special Administrative Region or that it is necessary to determine whether an offence has been so committed, and that an investigation in respect thereof is being conducted in the Hong Kong Special Administrative Region.
- (3) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, records or other material.
- (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 where either:
 - (a) 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; or
 - (b) where the law of the Requesting Party would permit him to decline to give evidence in such proceedings in the Requesting Party.
- (6) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.
- (7) The Requesting Party may request that documents, records, and any other items that are produced or that are the subject of evidence taken under this Article in the Requested Party be certified in accordance with requirements specified in the request.

ARTICLE 9

RETURN OF ITEMS AND OBJECTS

The Central Authority of the Requested Party may require that the Central Authority of the Requesting Party return any item or object, including

documents, records, or articles of evidence furnished to it in execution of a request under this Agreement as soon as possible.

ARTICLE 10

SERVICE OF DOCUMENTS

- (1) The Requested Party shall use its best efforts to effect service of any document transmitted to it for the purpose of service.
- (2) The Requesting Party shall transmit a request for the service of a document pertaining to a response or appearance in the Requesting Party 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 information 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 proof of service in the manner required by the Requesting Party.
- (5) A person who fails to comply with any process served on him or her which requires his or her appearance in the Requesting Party shall not if he or she fails to appear, be liable to any penalty or coercive measures in the Requesting Party or Requested Party.

ARTICLE 11

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 12

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements, court orders or other material which are to be transmitted to the Requesting Party, and which the Requesting Party requires to be authenticated:

- (a) are authenticated if they purport to be signed by or on behalf of the Central Authority of the Requested Party; and
- (b) need be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party so requires.

ARTICLE 13

TRANSFER OF PERSONS IN CUSTODY

- (1) A person in custody in the Requested Party whose presence is required in the Requesting Party for the purposes 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. The person transferred shall, whilst in custody in the Requesting Party, be regarded as continuing to serve the sentence imposed in the Requested Party.
- (2) Where the sentence of imprisonment of a person transferred pursuant to this Article is likely to expire whilst the person is in the jurisdiction of the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody upon the expiration of the sentence.

ARTICLE 14

TRANSFER OF OTHER PERSONS

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

- (2) The Requested Party shall, if satisfied that satisfactory arrangements for that person's security will be made by the Requesting Party, request the person to travel to the Requesting Party to provide assistance.

ARTICLE 15

SAFE CONDUCT

- (1) A person who consents to provide assistance pursuant to Articles 13 or 14 shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence or civil matter which preceded his departure from the Requested Party.
- (2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 13, 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 13 or 14 shall not be subject to prosecution based on his testimony, except for perjury or contempt of court.
- (4) A person who consents to provide assistance pursuant to Articles 13 or 14 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 provide assistance pursuant to Articles 13 or 14 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 16

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.
- (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. 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 requirements specified in the request.
- (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.

ARTICLE 17

PROCEEDS OF CRIME

- (1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law 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 may be located in its jurisdiction.
- (2) Where pursuant to paragraph (1) suspected proceeds of crime are found the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court of the Requesting Party.
- (3) Where a request is made for assistance in securing the confiscation of proceeds such assistance shall be given by whatever means are appropriate. 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 to which the request relates.
- (4) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

ARTICLE 18

SETTLEMENT OF DISPUTES

If any dispute arising out of the interpretation, application or implementation of this Agreement cannot be resolved through consultation between the Central Authorities of the Parties, the Parties shall by mutual consent resort to diplomatic channels.

ARTICLE 19

ENTRY INTO FORCE 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 the Agreement have been complied with.
- (2) Either Party may terminate this Agreement at any time by giving notice to the other. In that event the Agreement shall cease to have effect on receipt of that 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 20th day of February, Two thousand and Nine in the Chinese and English languages, each text being equally authentic.

SCHEDULE 2

[s. 2]

MODIFICATIONS TO THE ORDINANCE

1. Section 5(1)(d) of the Ordinance is modified to read as follows –
 - “(d) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, gender,* religion, nationality or political opinions;”.

2. Section 5(1)(e) of the Ordinance is 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;”.

3. Section 5(1) of the Ordinance is modified by adding –
 - “(ea) the request relates to the prosecution of a person in respect of an act or omission that can no longer be prosecuted in the place by reason of lapse of time under the law of the place;**”.

4. Section 17(3)(b) of the Ordinance is 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 the person’s 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.”.

* 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).

Clerk to the Executive Council

COUNCIL CHAMBER

20 April 2010

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (“the Ordinance”) applies as between Hong Kong and the Republic of South Africa. 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 South Africa and signed in Hong Kong on 20 February 2009. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order.

(Translation)

Mutual Legal Assistance in Criminal Matters (South Africa) Order

**Draft Speech by the Secretary for Security on the Resolution
at the Legislative Council Meeting on 19 May 2010**

Mr President,

I move that the motion, as printed on the Agenda, on the resolution to make the Mutual Legal Assistance in Criminal Matters (South Africa) Order be passed by this Council.

2. Hong Kong has been actively cooperating with other jurisdictions in combating serious crime, and is committed to concluding bilateral agreements with partners who wish to have closer cooperation with us in mutual legal assistance in criminal matters. These bilateral agreements ensure reciprocal assistance between the contracting parties, and are conducive to enhancing international cooperation in the fight against cross-border crime.

3. The Mutual Legal Assistance in Criminal Matters Ordinance provides the statutory framework for implementing agreements on mutual legal assistance signed between Hong Kong and other jurisdictions, enabling assistance to be provided to or obtained from foreign jurisdictions in the investigation and prosecution of criminal offences. Such assistance includes the taking of evidence, search and seizure, production of material, transfer of persons to give evidence and confiscation of crime proceeds.

4. Pursuant to the Ordinance, the Chief Executive in Council has made the Mutual Legal Assistance in Criminal Matters (South Africa) Order to implement the bilateral agreement on mutual legal assistance in criminal matters signed with South Africa. By applying the Ordinance to the cooperation between Hong Kong and South Africa, the Order allows Hong Kong to provide and obtain mutual legal assistance in accordance with the procedures set out in the Ordinance and the provisions under the agreement. As the legislation and the arrangements on mutual legal assistance in criminal matters vary from jurisdiction to jurisdiction, it is often necessary for the implementing order of a bilateral agreement to modify certain provisions of the Mutual Legal Assistance in Criminal Matters Ordinance to a limited extent in order to reflect the practices of individual jurisdictions. Such modifications are necessary to enable Hong Kong to discharge its obligations under the relevant bilateral agreement. The modifications made for the bilateral agreement between Hong Kong and South Africa are specified in Schedule 2 to the Order. These modifications do not affect the substantial conformity of the Order with the provisions of the Mutual Legal Assistance in Criminal Matters Ordinance.

5. I now invite Members to approve the making of the Mutual Legal Assistance in Criminal Matters (South Africa) Order.

6. Thank you, President.