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Paper for the House Committee meeting on 11 June 2010

**Report of the Subcommittee on Fugitive Offenders (South Africa) Order
and Mutual Legal Assistance in Criminal Matters (South Africa) Order**

Purpose

This paper reports on the deliberations of the Subcommittee on Fugitive Offenders (South Africa) Order and the Mutual Legal Assistance in Criminal Matters (South Africa) Order.

The Fugitive Offenders (South Africa) Order

2. The Fugitive Offenders (South Africa) Order (L.N. 43 of 2010) ("the FO Order") was made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503) ("the FO Ordinance"). It directs that the procedures in the FO Ordinance for the surrender of fugitive offenders shall apply between Hong Kong and the Republic of South Africa ("South Africa"). The FO Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by the Government of the Hong Kong Special Administrative Region ("the SAR Government") and the Government of South Africa and signed in Hong Kong on 20 February 2009 ("the Agreement"). The Agreement is recited in the Schedule to the FO Order. Under section 2 of the FO Order, the relevant procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the Agreement.

3. The FO Order is subject to a mechanism of scrutiny by the Legislative Council ("LegCo") provided in section 3(2) to (6) of the FO Ordinance under which LegCo has the power only to repeal it. The deadline for repeal of the FO Order has been extended from 2 June 2010 to 23 June 2010 by a resolution of the Council.

4. The FO Order will come into operation on a date to be appointed by the Secretary for Security by notice published in the Gazette.

The Mutual Legal Assistance in Criminal Matters (South Africa) Order

5. The Secretary for Security gave notice to move a motion at the LegCo meeting on 19 May 2010 to seek the approval of the Council for the Mutual Legal Assistance in Criminal Matters (South Africa) Order ("the MLA Order") made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) ("the MLA Ordinance") by the Chief Executive in Council on 20 April 2010.

6. The MLA Order is made in consequence of the agreement between the SAR Government and the Government of South Africa signed in Hong Kong on 20 February 2009 ("the MLA Agreement"), which is reproduced in Schedule 1 to the MLA Order. The MLA Order specifies the scope and procedures in relation to the provision of mutual legal assistance in criminal matters. It also provides for safeguard for persons involved in criminal proceedings. Section 4(7) of the MLA Ordinance restricts LegCo's power only to repeal the whole MLA Order but not amend any part of it.

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

The Subcommittee

8. At the meeting of the House Committee on 7 May 2010, members agreed that a Subcommittee should be formed to study the two Orders. Under the chairmanship of Hon James TO, the Subcommittee held two meetings with the Administration. The membership list of the Subcommittee is in the **Appendix**.

Deliberations of the Subcommittee

9. The Subcommittee has made article-by-article comparisons of the Agreement with the Model Agreement for the Surrender of Fugitive Offenders ("the Model Agreement for SFO") and of the MLA Agreement with the Model Agreement on Mutual Legal Assistance in Criminal Matters ("the Model Agreement on MLA"). The deliberations of the Subcommittee are set out in the ensuing paragraphs.

The Agreement

Offences - Article 2

10. Members note that paragraph (1) of Article 2 of the Agreement sets out the description of offences for which surrender of offenders may be granted.

The offences listed in items (1) to (46) in paragraph (1) are consistent with the description of extraditable offences listed in Schedule 1 to the FO Ordinance. Of these offences, members have sought clarification of the scope of "international conventions" referred to in item (43) which provides that "*offences for which fugitive offenders may be surrendered under international conventions binding on the Parties or offences created as a result of decisions of international organizations which are binding on the Parties*". Members are concerned about the certainty of scope of extraditable offences and whether bilateral agreements or conventions signed between the Requesting Party/Requested Party and any other countries/places fall within the meaning of "international conventions".

11. The Administration has advised that item (43) in paragraph (1) is modelled on item (43) in Schedule 1 to the FO Ordinance which provides the description of "*offences for which persons may be surrendered under multi-lateral international conventions; offences created as a result of decisions of international organizations*". The intention is to include as many as possible serious offences within the scope of extraditable offences. The scope of "international conventions" is restricted to that provided in item (43) in Schedule 1 to the FO Ordinance, i.e. multi-lateral international conventions only, and does not include bilateral agreements or conventions signed between the Requesting Party/Requested Party and any other countries/places.

12. Members have queried the reasons for including item (47) in paragraph (1) which provides that surrender shall be granted for "*any other offence which each Party has confirmed to the other, by notice in writing, is an offence for which surrender may be granted in accordance with its laws*". According to the Administration, item (47) is added to provide flexibility to either party to the Agreement to amend its laws which may affect the list of relevant offences. With this "catch-all" clause, re-negotiation to incorporate changes to the list of relevant offences in the Agreement can be avoided. A similar formulation has been included in almost all the Surrender of Fugitive Offenders Agreements ("SFO Agreements") signed by the SAR Government with other foreign jurisdictions. The Administration has assured members that notwithstanding the "catch-all" clause in item (47), the FO Ordinance has to be amended first before surrender for any other offences under item (47) can be granted by the SAR Government.

Refusal of surrender - Article 6

13. Article 6 sets out the conditions under which a fugitive offender shall not be surrendered. Paragraph (3) provides that "*The Requested Party shall refuse surrender for offences under military law that are not offences under ordinary criminal law*". Members are concerned whether a fugitive offender, surrendered for an offence under ordinary criminal law, can be proceeded against for the same or another offence under military law.

14. According to the Administration, the basis for the surrender including the offence(s) must be stated very clearly in the Request. If the fugitive offender is prosecuted for another offence or the same offence under military law after the surrender, the Requesting Party will be in breach of the Agreement. Under paragraph (1) of Article 18, a fugitive offender who has been surrendered shall not be prosecuted for any offence committed prior to his surrender other than the offences in respect of which surrender has been granted and any other extraditable offences to which the Requested Party may give consent. This provision is a safeguard to the surrendered fugitive offender. The fugitive offender may raise objection if he is prosecuted for another offence committed prior to the surrender or the same offence under military law. However, where the fugitive offender is prosecuted for another offence committed after the surrender, it will be outside the scope of the Agreement.

Postponement and temporary surrender - Article 8

15. Paragraph (3) provides that "*A person serving a sentence in the Requested Party who is surrendered under this Article shall, whilst in custody in the Requesting Party, be regarded as continuing to serve the sentence imposed in the Requested Party.*". Concern has been raised about possible abuse of this paragraph as the meaning of "serving a sentence" and "in custody" in South Africa may be loose. Members are worried that in some countries, a person may not be held in custody or serving a sentence in effect but are so deemed. In such circumstances, a surrendered fugitive offender who should be serving a sentence may be no different from a free man, and justice cannot be upheld.

16. The Administration has pointed out that paragraph (3) has been added at the request of South Africa and is consistent with section 15(3) of the FO Ordinance. At members' request, the Administration has also confirmed that South Africa has the same understanding in respect of "serving a sentence" and "in custody" as that of Hong Kong.

17. Members are of the view that in signing other SFO Agreements in future, the Administration should consider the meaning of "serving a sentence" and "in custody" adopted by the foreign jurisdictions concerned and decide the appropriateness of including a formulation similar to paragraph (3) therein.

Termination - Article 22

18. Under paragraph (3), the Requesting Party or the Requested Party may terminate the Agreement with immediate effect by mutual consent. Members note that there is no similar formulation in the SFO Agreements with other foreign jurisdictions. Normally, a notice period of six months will be given for the suspension or termination of such agreements. Members have accepted the Administration's explanation that since this termination clause can only be

effected by mutual consent, it will not create a less favourable situation as compared with that under the termination clauses in other SFO Agreements.

The MLA Agreement

Limitations on compliance - Article 3

19. Article 3 sets out the conditions under which a request for assistance shall be refused by the Requested Party. Of the various conditions, members are concerned about paragraph (1)(i) which states that the Requested Party shall refuse assistance if "*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*". Members have queried why the principle of double criminality applies only in respect of a request made by South Africa to Hong Kong. Members are concerned whether South Africa will provide assistance to Hong Kong if the acts or omissions alleged to constitute the offence would not have constituted an offence in South Africa.

20. According to the Administration, the provision has been included in the MLA Agreement at the request of South Africa. Unlike Hong Kong, there is no double criminality requirement in South Africa. As such, South Africa shall not refuse assistance if Hong Kong makes a request in respect of an offence which would not have constituted an offence in South Africa.

Requests - Article 4

21. Article 4 sets out mainly the form and language of a request and the information that should be included therein. Paragraph 3 specifies the detailed description of information to be supplied in support of a request for assistance, such as information in respect of the identity and locations of any person from whom evidence is sought, a precise description of any place or person to be searched and of any articles to be seized, a list of questions to be asked of a witness, etc. Members consider this provision very reasonable as it will not only facilitate execution of the request but also avoid fishing for information, particularly in cases where sensitive information is involved. Members have requested the Administration to consider including such a provision in future MLA agreements as far as possible.

22. Apart from the information to be included in a request, members take note of paragraph (4) which requires the Requested Party to use its best efforts to keep the request and its contents confidential. Noting that proceedings are normally held in open court in Hong Kong, members have enquired whether such a request and its content are kept confidential in practice, how this can be achieved and the circumstances under which proceedings are held in camera.

23. The Administration has clarified that a request for assistance will not be submitted to the court and its contents shall not be disclosed unless the court has made an order for disclosure. Section 10(3)(c) of the MLA Ordinance provides that a proceeding shall be held in open court except where "*the criminal matter outside Hong Kong to which the proceeding relates is an investigation and the magistrate is satisfied that there are reasonable grounds for believing that it is in the interest of the person required to give evidence, or produce a thing, for the purposes of that matter that the proceeding be held in camera*". Members note that an application for the holding of the proceedings in camera can only be made at the investigation stage but not at the prosecution stage. Where an application for an in-camera hearing is rejected, the Requesting Party shall be so informed and then determine whether the request should nevertheless be executed.

Limitations of use - Article 7

24. Members are concerned that notwithstanding the express limitations on the use and disclosure of information or evidence provided by the Requested Party, paragraph (3) permits the use and disclosure of such information or evidence provided that the Requesting Party has notified the Requested Party in advance of any such proposed disclosure.

25. The Administration has stressed that a similar provision has been included in the MLA agreements signed by the SAR Government with the United States. The Requesting Party cannot disclose the information or evidence for the purposes other than those stated in the request without the prior consent of the Requested Party as required under paragraph (2).

Return of items and objects - Article 9

26. Article 9 provides that "*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*". Members have sought clarification of the meaning of the phrase "as soon as possible". Members are concerned whether the Requesting Party has to return the documents, records, articles of evidence, etc. as soon as the Requested Party has so requested, even though the proceedings are still in progress.

27. According to the Administration's understanding, as the items and objects are furnished for the purpose of the proceedings, they should be returned to the Requested Party as soon as the proceedings have been concluded. This Article includes all items and objects, be they originals or copies, and its scope is wider than a similar provision in Cap. 525 which provides for the return of the originals only. At members' request, the Administration has undertaken to clarify with South Africa about the meaning of this Article and to advise

members in writing.

Recommendation

28. The Subcommittee recommends that the FO Order and the MLA Order be supported. The Subcommittee also supports the Secretary for Security giving fresh notice to move a motion on the MLA Order at a future Council meeting.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
9 June 2010

**Subcommittee on Fugitive Offenders (South Africa) Order and
Mutual Legal Assistance in Criminal Matters (South Africa) Order**

Membership list

Chairman Hon James TO Kun-sun

Members Dr Hon Margaret NG
 Hon LAU Kong-wah, JP

(Total : 3 Members)

Clerk Miss Odelia LEUNG

Legal Adviser Ms Clara TAM