

**立法會**  
**Legislative Council**

LC Paper No. CB(2)1852/09-10  
(These minutes have been seen  
by the Administration)

Ref : CB2/SS/5/09

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

**Minutes of the first meeting  
held on Thursday, 20 May 2010, from 1:00 pm to 2:00 pm  
in Conference Room B of the Legislative Council Building**

**Members present** : Hon James TO Kun-sun (Chairman)  
Dr Hon Margaret NG  
Hon LAU Kong-wah, JP

**Public Officers attending** : Agenda item II

Security Bureau

Mr David LAU Kam-kuen  
Principal Assistant Secretary for Security A

Ms Veronica WONG Hoi-yee  
Assistant Secretary for Security A2

Department of Justice

Ms Elizabeth LIU Zoo-ring  
Senior Government Counsel, International Law Division

Miss Carrie WONG Ka-yee  
Senior Government Counsel, Law Drafting Division

Miss Emma WONG  
Senior Government Counsel, Law Drafting Division

**Clerk in attendance** : Miss Odelia LEUNG  
Chief Council Secretary (2)6

**Staff in attendance** : Ms Clara TAM  
Assistant Legal Adviser 9

Ms Catherina YU  
Senior Council Secretary (2)7

Miss Jenny LEE  
Legislative Assistant (2)6 (Acting)

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**I. Election of Chairman**

Dr Margaret NG, the Member who had the highest precedence in the Council among those who were present at the meeting, presided over the election of Chairman.

2. Mr James TO was nominated by Dr Margaret NG and the nomination was seconded by Mr LAU Kong-wah. There being no other nominations, Mr James TO was elected Chairman of the Subcommittee.

**II. Meeting with the Administration**

File Ref: SBCR 3/5691/95 Pt.46 and -- Legislative Council Brief  
SBCR 1/2716/89 Pt.25

LC Paper No. CB(3)643/09-10 -- Proposed resolution on the Mutual  
Legal Assistance in Criminal  
Matters (South Africa) Order

LC Paper No. LS61/09-10 -- Legal Service Division Report on  
the Fugitive Offenders (South  
Africa) Order

LC Paper No. LS62/09-10 -- Legal Service Division Report on  
the proposed resolution on the  
Mutual Legal Assistance in  
Criminal Matters (South Africa)  
Order

LC Paper No. CB(2)1568/09-10(01) -- Article-by-article comparison of the  
Fugitive Offenders (South Africa)  
Order with the model agreement on

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surrender of fugitive offenders provided by the Administration

LC Paper No. CB(2)1568/09-10(02) -- Model agreement on surrender of fugitive offenders provided by the Administration

LC Paper No. CB(2)1568/09-10(03) -- Article-by-article comparison of the Mutual Legal Assistance in Criminal Matters (South Africa) Order with the model agreement on Mutual Legal Assistance in Criminal Matters provided by the Administration

LC Paper No. CB(2)1568/09-10(04) -- Model agreement on Mutual Legal Assistance in Criminal Matters provided by the Administration

3. Members noted that the two Orders under deliberation, namely, the Fugitive Offenders (South Africa) ("FO Order") and the Mutual Legal Assistance in Criminal Matters (South Africa) Order, were subject to negative vetting and positive vetting respectively. Given the deadline for repeal of the FO Order, the Administration suggested and members agreed to deliberate this Order first.

4. The Subcommittee deliberated (index of proceedings attached at **Annex**).

Deliberations on the FO Order

Article 2

5. Members noted that the offences listed in items (1) to (46) of paragraph (1) were consistent with the description of extraditable offences listed in Schedule 1 to the Fugitive Offenders Ordinance (Cap. 503) ("the Ordinance"). They queried the reasons for including item (47) in paragraph (1) which provided that surrender should 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*".

6. Senior Government Counsel, International Law Division ("SGC/ILD") explained that item (47) was added to provide flexibility to either Party to amend its laws to include extraditable offences without the need for re-negotiation. A similar formulation had been included in almost all the Surrender of Fugitive Offenders Agreements ("SFO Agreements") signed by

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the Hong Kong Government with other foreign jurisdictions. She stressed that amendments to Cap. 503 were necessary before surrender for newly added offences under item (47) could be granted.

7. Members enquired about the scope of "international conventions" referred to in item (43) in paragraph (1). They were concerned about the certainty of application of extraditable offences, the possibility of surrender of a fugitive offender for minor offences, and whether "international conventions" covered bilateral agreements or conventions signed between the Requesting Party/Requested Party and any other countries/places.

8. SGC/ILD advised that item (43) in paragraph (1) was modelled on item (43) in Schedule 1 to the Ordinance which provided that "*offences for which persons may be surrendered under multi-lateral international conventions; offences created as a result of decisions of international organizations*". The intention was to include as many as possible serious offences within the scope of extraditable offences. The international conventions referred to in item (43) should apply to both Hong Kong and the Republic of South Africa, and these did not include bilateral agreements or conventions signed between the Requesting Party/Requested Party and any other countries/places.

Admin

9. Members requested the Administration to provide written information to confirm the scope of application of item (43) and the reasons for including item (47) in paragraph (1).

Article 6

10. Referring to paragraph (3), members were concerned whether a fugitive offender, surrendered for an offence under ordinary criminal law, could be proceeded against for the same or another offence under military law. SGC/ILD explained that the basis for the surrender including the offence(s) must be stated very clearly in the Request. Principal Assistant Secretary for Security A supplemented that if the fugitive offender was prosecuted for another offence or the same offence but under military law after the surrender, the Requesting Party would be in breach of the agreement between the Government of the HKSAR of the People's Republic of China and the Government of Republic of South Africa concerning the Surrender of Fugitive Offenders ("the Agreement"). SGC/ILD added that under paragraph (1) of Article 18, a fugitive offender who had been surrendered should not be prosecuted for any offence committed prior to his surrender other than the offences specified in items (a) to (c) in paragraph (1). This provision was a safeguard to the surrendered fugitive offender. The fugitive offender could raise objection if he was prosecuted for another offence committed prior to the surrender or the same offence under military law. However, where the fugitive offender was prosecuted for another offence committed after the surrender, it would be outside the scope of the Agreement.

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Article 8

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11. Members were concerned about possible abuse of paragraph (3) of Article 8. Members pointed out that the meaning of "serving a sentence" and "in custody" as applied in the Republic of South Africa might be loose. If the forms of custody/serving a sentence in some countries were much more lenient than those of Hong Kong, the surrendered offender might not be held in custody or serving a sentence but were so deemed. In extreme cases, the offender might be no difference from a free man, and in such circumstances, justice could not be upheld. Members were of the view that in signing the SFO Agreements in future, the Administration should consider the forms of custody of the countries concerned and decide the appropriateness of including a formulation similar to paragraph (3). Members requested the Administration to consult the negotiation team on behalf of the Hong Kong Government on the reasons for agreeing to include paragraph (3) in Article 8 and provide information on the meaning of "serving a sentence" and "in custody" as applied in the Republic of South Africa.

Article 20

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12. Members requested the Administration to advise the reasons for including the 48-hour rule with regard to transit of offenders under paragraph (4).

Article 22

13. Assistant Legal Adviser 9 ("ALA9") drew members' attention to paragraph (3) which provided that the Requesting Party or the Requested Party might terminate the Agreement with immediate effect by mutual consent. ALA9 pointed out that there was no similar formulation in the SFO Agreements with other foreign jurisdictions. Normally, a notice period of six months would be given for the suspension or termination of such agreements. She was concerned about the impact, if any, of such a formulation in the Agreement.

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14. Members considered that since the Agreement could only be terminated with immediate effect by mutual consent, either party could refuse to give consent. As such, the formulation should not be a concern. Nevertheless, members requested the Administration to confirm whether their understanding was correct.

15. Noting the Administration's advice in the article-by-article comparison [LC Paper No. CB(2)1568/09-10(01)] that formulations similar to paragraph (3) were found in the SFO Agreements with many other foreign jurisdictions, members requested the Administration to re-examine the article-by-article comparison and confirm whether the provisions in the Agreement which were

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said to be similar to those in the Model Agreement or SFO Agreements with other foreign jurisdictions were really similar. The Administration should provide an updated list of articles which were found to be dissimilar in any sense and give explanations for the dissimilarities.

### **III. Any other business**

16. At the invitation of the Chairman, the Clerk explained that the scrutiny period of the FO Order would expire on 2 June 2010. Subject to members' consent, it was suggested that a motion be moved by the Chairman at the Council meeting on 26 May 2010 to extend the scrutiny period to 23 June 2010. Members agreed to extend the scrutiny period of the FO Order.

17. The meeting ended at 2:06 pm.

Council Business Division 2  
Legislative Council Secretariat  
18 June 2010

**Proceedings of the first meeting of the  
Subcommittee on Fugitive Offenders (South Africa) Order and  
Mutual Legal Assistance in Criminal Matters (South Africa) Order  
on Thursday, 20 May 2010, from 1:00 pm to 2:00 pm  
in Conference Room B of the Legislative Council Building**

<b>Time Marker</b>	<b>Speaker(s)</b>	<b>Subject(s)</b>	<b>Action required</b>
000000 - 000112	Dr Margaret NG Mr LAU Kong-wah Mr James TO	Election of Chairman	
000113 - 000509	Chairman Admin	Members' agreement to the Administration's suggestion to deliberate the Fugitive Offenders (South Africa) Order ("FO Order") first as it was subject to negative vetting with a deadline for repeal.	
000510 - 000612	Admin	Briefing by the Administration on the FO Order with reference to the article-by-article comparison of the FO Order with the Model Agreement [LC Paper No. CB(2)1568/09-10(01)] ("the article-by-article comparison").	
000613 - 002259	Admin Chairman Dr Margaret NG Mr LAU Kong-wah	<p><u>Article 1</u></p> <p>Members noted.</p> <p><u>Article 2</u></p> <p>Chairman's enquiry about the reasons for including item (47) in paragraph (1) of Article 2 and concerns over the certainty of application of offences subject to surrender.</p> <p>SGC/ILD's explanation that item (47) was intended to cover any future amendments to the law of either party which might affect the list of extraditable offences without the need for re-negotiation. Her confirmation that the offences in paragraph (1) were consistent with the extraditable offences listed in Schedule 1 to the Fugitive Offenders Ordinance (Cap. 503) ("the Ordinance") and amendments to the Ordinance were necessary before surrender for any newly added offences under item (47) could be effected.</p> <p>Chairman and Dr Ng's enquiry on the coverage of "international conventions" referred to in item (43) in paragraph (1).</p>	

Time Marker	Speaker(s)	Subject(s)	Action required
		<p>SGC/ILD's clarifications that international conventions did not cover bilateral agreements.</p> <p>Chairman's request for written information on whether international conventions covered bilateral agreements or conventions signed between the Requesting Party/Requested Party and other countries/places.</p>	Admin
002300 – 002350	Admin	<p><u>Article 3 to Article 5</u></p> <p>Members noted.</p>	
002351 – 003707	Admin Chairman Mr LAU Kong-wah Dr Margaret NG	<p><u>Article 6</u></p> <p>Members' enquiry on whether fugitive offenders could be prosecuted for the same offence under military law after the surrender or for other offences committed prior to the surrender.</p> <p>SGC/ILD's explanation on the need for specifying clearly in the Request the basis for the surrender including the offences. Her highlighting of paragraph (1) of Article 18 which stipulated that a fugitive offender should not be proceeded against for any offence committed prior to the surrender except those listed in items (a) to (c) in paragraph (1). Principal Assistant Secretary for Security A's advice that the Requesting Party would be in breach of the SFO Agreement should it do so.</p>	
003708 – 003949	Admin Chairman Dr Margaret NG	<p><u>Article 7</u></p> <p>Chairman's request for a more detailed explanation of paragraph (2).</p> <p>SGC/ILD's explanation that the surrender might be refused if the Requested Party had accepted jurisdiction in respect of the offence.</p>	
003950 – 005229	Admin Chairman Mr LAU Kong-wah Dr Margaret NG	<p><u>Article 8</u></p> <p>Chairman's concern about the possible loose meaning of "serving a sentence" and "in custody" as applied in the Republic of South Africa and enquiry of the reasons for agreeing to include paragraph (3) in Article 8.</p>	



Time Marker	Speaker(s)	Subject(s)	Action required
		<p>Dr Ng's request for consulting the negotiation team on behalf of the Government of the Hong Kong Special Administration Region on the reasons for agreeing to include paragraph (3) in Article 8.</p> <p>Chairman and Dr Ng's request for written information on the meaning of "serving a sentence" in the Republic of South Africa.</p>	<p>Admin</p> <p>Admin</p>
005230 - 005809	Admin	<p><u>Article 9 to Article 21</u></p> <p>Members noted.</p>	
005810 - 005830	Admin ALA 9 Chairman Dr Margaret NG	<p><u>Article 22</u></p> <p>ALA9's advice on the absence of a provision for the termination of the Agreement with immediate effect by mutual consent of the Requesting Party and Requested Party in other SFO Agreements and concern over the impact, if any, of such a provision in the Agreement.</p> <p>Chairman's request for written confirmation of whether a similar provision for terminating the Agreement with immediate effect by mutual consent was provided in other SFO Agreements.</p> <p>Dr Ng's request for -</p> <ul style="list-style-type: none"> <li>(a) the re-examination of the article-by-article comparison;</li> <li>(b) confirmation of the provisions in the Agreement which were said to be similar to those in the Model Agreement or other SFO Agreements were really similar; and</li> <li>(c) the provision of an updated list of articles which were found to be dissimilar in any sense and the explanations for the dissimilarities.</li> </ul>	<p>Admin</p> <p>Admin</p>
005831 - 010700	Chairman Clerk Dr Margaret NG Admin	<p><u>Article 20</u></p> <p>Chairman's enquiry of the reasons for including the 48-hour rule regarding transit of offenders.</p>	Admin

<b>Time Marker</b>	<b>Speaker(s)</b>	<b>Subject(s)</b>	<b>Action required</b>
		Members' consent to the moving of a motion by the Chairman at the Council meeting on 26 May 2010 to extend the scrutiny period of the FO Order to 23 June 2010.	

Council Business Division 2  
Legislative Council Secretariat  
18 June 2010