

LEGISLATIVE COUNCIL BRIEF

Fugitive Offenders Ordinance (Chapter 503)

Mutual Legal Assistance in Criminal Matters Ordinance (Chapter 525)

FUGITIVE OFFENDERS (GERMANY) ORDER

FUGITIVE OFFENDERS (REPUBLIC OF KOREA) ORDER

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (GERMANY) ORDER

INTRODUCTION

At the meeting of the Executive Council on 14 November 2006, the Council ADVISED and the Chief Executive ORDERED that –

- _____ (a) the Fugitive Offenders (Germany) Order, at **Annex A**, and the
_____ Fugitive Offenders (Republic of Korea) Order, at **Annex B**, should be made under section 3 of the Fugitive Offenders Ordinance to implement the bilateral surrender of fugitive offenders agreements signed with Germany and the Republic of Korea respectively; and

- _____ (b) the Mutual Legal Assistance in Criminal Matters (Germany) Order, at **Annex C**, should be made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance, subject to the approval of the Legislative Council, to implement the bilateral mutual legal assistance in criminal matters agreement signed with Germany.

JUSTIFICATIONS

2. Hong Kong is fully committed to international cooperation in combating serious crimes. In this connection, we have been expanding our network of bilateral agreements with other jurisdictions on surrender of fugitive offenders (SFO) and mutual legal assistance in criminal matters (MLA). These agreements enhance international cooperation in the fight against transnational crimes and ensure reciprocal assistance between the contracting parties.

3. The Fugitive Offenders Ordinance (Cap. 503) and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) respectively provide for the statutory framework for SFO and MLA arrangements. Specifically, Cap. 503 provides for the surrender to certain places outside Hong Kong of persons wanted for prosecution, or for the imposition or enforcement of a sentence, and for the treatment of persons surrendered to Hong Kong. Cap. 525 regulates the provision and obtaining of assistance 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.

The Fugitive Offenders (Germany) Order and the Fugitive Offenders (Republic of Korea) Order

4. Section 3(1) of Cap. 503 provides that the Chief Executive in Council may, in relation to any arrangements for SFO, by order direct that the procedures in Cap. 503 shall apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate, subject to the limitations, restrictions, exceptions and qualifications contained in the order. The SFO agreements with Germany and the Republic of Korea were signed on 26 May and 26 June 2006 respectively. The Fugitive Offenders (Germany) Order and the Fugitive Offenders (Republic of Korea) Order, which include the agreements as a schedule, to be made under section 3(1) of Cap. 503 will enable the agreements to be brought into force and provide that the procedures in Cap. 503 shall apply as between Hong Kong and the two countries, subject to the terms of the agreements.

The Mutual Legal Assistance in Criminal Matters (Germany) Order

5. Section 4(1) of Cap. 525 provides that the Chief Executive in Council may, with the approval of the Legislative Council, in relation to any arrangements for MLA, by order direct that Cap. 525 shall, subject to such modifications as may be specified in the order, apply as between Hong Kong and the place outside Hong Kong to which the arrangements relate. The MLA agreement with Germany was signed on 26 May 2006. The Mutual Legal Assistance in Criminal Matters (Germany) Order to be made under section 4(1) of Cap. 525 will enable the agreement to be brought into force and enable Cap. 525 to be applicable as between Hong Kong and Germany. Schedule 1 to the Order contains a copy of the agreement.

6. There are certain variations between the agreement and Cap. 525, and we need to modify Cap. 525 to enable Hong Kong to comply with the obligations of the agreement. Such modifications are summarized in Schedule 2 to the Order in accordance with section 4(3) of Cap. 525. An explanatory statement in relation to the modifications to Cap. 525 is at **Annex D**.

Conformity and Commencement

7. Section 3(9) of Cap. 503 and section 4(2) of Cap. 525 provide that the Chief Executive in Council shall not make an order under the respective Ordinances unless the arrangements for SFO or MLA to which the order relates are substantially in conformity with the provisions of the respective Ordinances. The three agreements with Germany and the Republic of Korea do so conform.

8. The commencement date of each of the three Orders will be appointed by the Secretary for Security by notice in the Gazette. This date will coincide with the date on which the relevant agreement enters into force. The commencement date will be settled after consultation with the country concerned and will depend upon when the necessary domestic procedures of that country are completed.

LEGISLATIVE TIMETABLE

9. The legislative timetable for the three Orders will be -

Fugitive Offenders (Germany) Order and Fugitive Offenders (Republic of Korea) Order

Publication in the Gazette 17 November 2006

Tabling in the Legislative Council 22 November 2006

Mutual Legal Assistance in Criminal Matters (Germany) Order

Introduction into the Legislative Council 6 December 2006

IMPLICATIONS OF THE ORDERS

10. The three Orders are in conformity with the Basic Law, including the provisions concerning human rights. They will not affect the current binding effect of Cap. 503 and Cap. 525. They have no sustainability, financial or civil service implications.

PUBLIC CONSULTATION

11. The Orders will permit the three agreements to be brought into force in accordance with the existing legal framework. Public consultation is, therefore, considered not necessary.

PUBLICITY

12. We have issued this Legislative Council brief. A spokesman will also be available to answer enquiries.

BACKGROUND

13. Fourteen Orders in relation to bilateral SFO arrangements signed with foreign jurisdictions have been made under section 3(1) of Cap. 503. These jurisdictions are the Netherlands, Canada, Australia, Malaysia, the Philippines, the USA, Indonesia, India, the UK, Singapore, New Zealand, Sri Lanka, Portugal and Finland.

14. Nineteen Orders in relation to bilateral MLA arrangements signed with foreign jurisdictions have been made under section 4(1) of Cap. 525. These jurisdictions are Australia, the USA, France, the UK, New Zealand, Italy, Republic of Korea, Switzerland, Canada, the Philippines, Portugal, Ireland, the Netherlands, Ukraine, Singapore, Belgium, Denmark, Israel and Poland.

ENQUIRES

15. Enquires on this brief should be directed to –

	<u>Telephone No.</u>
Ms Manda Chan Principal Assistant Secretary for Security	2810 2329
Miss Jane Lee Assistant Secretary for Security	2810 3523

Security Bureau
15 November 2006

FUGITIVE OFFENDERS (GERMANY) ORDER

(Made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503))

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. Procedures in Ordinance to apply between Hong Kong and Germany

In relation to the arrangements for the surrender of fugitive offenders the terms of which are recited in the Schedule, it is directed that the procedures in the Ordinance shall apply as between Hong Kong and the Federal Republic of Germany subject to the limitations, restrictions, exceptions and qualifications contained in the terms of the arrangements.

SCHEDULE

[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 FEDERAL REPUBLIC OF GERMANY FOR THE SURRENDER OF FUGITIVE OFFENDERS

The Government of the Hong Kong Special
Administrative Region of the People's
Republic of China,
having been duly authorised by the Central
People's Government of the People's
Republic of China and
the Government of the Federal Republic of Germany,

Desiring to make provision for the reciprocal surrender of fugitive offenders –

Have agreed as follows:

Article 1

Obligation to Surrender

(1) The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the Requested Party and who is wanted by the Requesting Party for prosecution or for the imposition or enforcement of a sentence in respect of an offence under Article 2.

(2) For the purposes of this Agreement, "sentence" includes a detention order involving deprivation of liberty made following conviction by a criminal court in addition to or instead of a prison sentence.

Article 2

Offences

(1) Surrender of fugitive offenders shall be granted for offences which are, according to the laws of both Parties, punishable by imprisonment or other form of detention for a maximum period of at least one year, or by a more severe penalty, and which come within any of the descriptions in the Appendix to this Agreement. The Appendix shall form part of this Agreement.

(2) Where surrender of a fugitive offender is requested for the purpose of carrying out a sentence, a further requirement shall be that at least six months of the sentence remain to be served.

(3) In determining whether an offence is an offence punishable under the laws of both Parties, it shall not matter whether, under the laws of the Parties, the constituent elements of the offence differ, it being understood that the totality of the acts or omissions as presented by the Requesting Party shall be taken into account.

(4) Where surrender of a fugitive offender is requested for the purpose of carrying out a sentence on the grounds that the person sought has been convicted of an offence for which surrender may be granted under this Agreement, the Requested Party may refuse to return or to keep such person in custody for such a purpose if it appears that the conviction was obtained in his absence.

Article 3

Surrender of Nationals

(1) The Government of the Hong Kong Special Administrative Region reserves the right to refuse the surrender of nationals of the People's Republic of China and the Government of the Federal Republic of Germany reserves the right to refuse the surrender of its nationals.

(2) Where the Requested Party exercises this right, it shall, if asked to do so by the Requesting Party, take all possible measures in accordance with its own law to prosecute the person. The Requesting Party shall be informed of the result of its request.

Article 4

Death Penalty

If the offence for which surrender of a fugitive offender is requested under this Agreement is punishable according to the law of the Requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the Requested Party or is not normally carried out, surrender may be refused unless the Requesting Party gives such assurances as the Requested Party considers sufficient that this penalty will not be imposed or if imposed will not be carried out.

Article 5

Mandatory Refusal to Surrender

(1) A fugitive offender shall not be surrendered if the Requested Party considers that the offence of which that person is accused or was convicted is a political offence or an offence of a political character.

(2) A fugitive offender shall not be surrendered if the Requested Party has substantial grounds for believing:

1. that the request for his surrender (though purporting to be made on account of an offence for which surrender may be granted) is in fact made for the purpose of prosecuting or punishing him on account of his race, religion, nationality, sex, ethnic origin or political opinions; or
2. that he might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, sex, ethnic origin or political opinions.

Article 6

Non bis in idem

Surrender shall not be granted if the person whose surrender is requested has been finally acquitted or convicted, or has been pardoned, by either Party for the offence for which surrender is requested.

Article 7

Discretionary Refusal to Surrender

(1) The Requested Party may refuse to surrender a fugitive offender for an offence which is regarded by its law as having been committed within the jurisdiction of its courts. If the Requested Party so refuses, it shall if asked to do so by the Requesting Party, take all possible measures in accordance with its own law to prosecute the person.

(2) The surrender of a fugitive offender may also be refused if the Requested Party considers that:

1. in the circumstances of the case, the surrender of the fugitive offender would be incompatible with humanitarian considerations in view of age, health or other personal circumstances; or
2. the surrender would prejudice essential interests of the Requested Party; or
3. the surrender of the fugitive offender may place that Party in breach of its obligations under international treaties.

(3) Before refusing a request for surrender under this Article the Requested Party shall consider whether surrender may be granted subject to conditions. If the Requesting Party accepts surrender subject to those conditions, it shall comply with them.

Article 8

The Request and Supporting Documents

(1) Requests under this Agreement and responses thereto shall be transmitted through the Department of Justice of the Hong Kong Special Administrative Region of the People's Republic of China and the Federal Ministry of Justice of the Federal Republic of Germany.

(2) The request shall be accompanied by:

1. as accurate a description as possible of the fugitive offender, together with any other information which would help to establish his identity, nationality and, if known, his whereabouts;
2. a statement and particulars of the offence for which the surrender is requested unless the facts of the case are apparent from the warrant of arrest or the judgment of conviction;
3. the legal provisions creating the offence, a statement of the punishment which can be imposed therefore and, where applicable, a specification of the time bar that is imposed on the prosecution or on the enforcement of any sentence in respect of that offence.

(3) A request for the surrender of a person for the purpose of prosecution shall be accompanied, in addition to the documents provided for in paragraph (2), by a copy of the warrant of arrest issued by a judge or other competent authority of the Requesting Party, and by such evidence as, according to the law of the Requested Party, would justify his committal for trial if the offence had been committed within the jurisdiction of the Requested Party.

(4) If the request relates to a person already convicted or sentenced, in addition to the documents provided for in paragraph (2), it shall also be accompanied by:

1. a copy of the certificate of the conviction or sentence; and
2. if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of the warrant of arrest;
or
3. if the person was sentenced, a statement that the sentence is enforceable and indicating how much of the sentence has still to be served.

(5) If the information communicated by the Requesting Party is found to be insufficient to allow the Requested Party to make a decision in pursuance of this Agreement, the latter Party shall request the necessary supplementary information and may fix a time-limit for receipt thereof.

(6) The request and, if so required by the Requested Party, all documents submitted in support of the request shall be translated into an official language of the Requested Party.

Article 9

Authentication

Documents accompanying a request for surrender shall be admitted in evidence if authenticated. A document is authenticated if it has been:

1. signed or certified by a judge, magistrate or an official of the Requesting Party; and
2. sealed with the official seal of the competent authority of the Requesting Party.

Article 10

Provisional Arrest

(1) In urgent cases the person sought may, in accordance with the law of the Requested Party, be provisionally arrested on the application of the competent authorities of the Requesting Party.

(2) The application shall contain a description of the person sought, an indication of intention to request his surrender, a statement of the existence and terms of a warrant of arrest or a judgment of conviction against the person, a statement of the maximum punishment that can be imposed or the sentence that has been imposed for the offence, and a statement of the acts or omissions (including time and place) alleged to constitute the offence.

(3) The application for provisional arrest shall be in writing and may be forwarded through the same channels as a request for surrender or through the International Criminal Police Organisation (Interpol).

(4) The provisional arrest of the person sought shall be terminated upon the expiration of sixty days from the date of his arrest if the request for his surrender, supported by the documents referred to in paragraphs (2) to (4) of Article 8 of this Agreement, has not been received. This provision shall not prevent his re-arrest or surrender if the request for his surrender is received subsequently.

Article 11

Conflicting Requests

A Party which has received conflicting requests for the surrender or, in the case of the Government of the Federal Republic of Germany, extradition of the same person, either in respect of the same offence or of different offences, shall make its decision having regard to all the circumstances, including the relative seriousness and place of commission of the offence, the respective dates of the requests, the nationality of the person sought and any applicable international obligations as well as, in particular, the possibility of subsequent re-surrender or, in the case of the Government of the Federal Republic of Germany, re-extradition of that person.

Article 12

Representation and Costs

(1) The Requested Party shall, by all legal means within its power, assist the Requesting Party before the judicial and other competent authorities of the Requested Party.

(2) The Requested Party shall bear the expenses of the arrest of the person whose surrender is requested, of the maintenance in custody of the person until

he is handed over to a person nominated by the Requesting Party and in relation to any legal proceedings before the judicial authorities of the Requested Party arising out of the request for surrender.

(3) The Requesting Party shall bear the expenses incurred in conveying the person from the jurisdiction of the Requested Party.

Article 13

Arrangements for Handover

(1) The Requested Party shall promptly communicate its decision on the request for surrender to the Requesting Party. Reasons shall be given for any complete or partial refusal of the request.

(2) If the surrender of the fugitive offender has been granted, he shall be taken by the authorities of the Requested Party on a date agreed with the Requesting Party to a mutually convenient place of departure within the jurisdiction of the Requested Party. The Requested Party shall inform the Requesting Party of the length of time for which the fugitive offender was detained in connection with the request for his surrender.

(3) Subject to the provisions of paragraph (4) of this Article, if the Requesting Party does not take custody of the person on the date agreed by the two Parties, he shall be released on the expiry of thirty days thereafter or such lesser period as is provided by the law of the Requested Party. The Requested Party may subsequently refuse to surrender him for the same offence.

(4) If circumstances beyond its control prevent a Party from handing over or taking over the person as agreed, it shall notify the other Party. In that case, the

two Parties shall agree on a new date for the handover, and the provisions of paragraph (3) of this Article shall apply.

Article 14

Deferred or Temporary Surrender

(1) If the fugitive offender is being proceeded against or is under punishment in the jurisdiction of the Requested Party for any offence other than the offence for which surrender is requested, his surrender may be deferred until the conclusion of the proceedings and the execution of any punishment awarded to him.

(2) Alternatively, the Requested Party may temporarily surrender the person sought to the Requesting Party for the purpose of prosecution. The person so surrendered shall be kept in custody by the Requesting Party and shall be returned to the Requested Party after conclusion of the proceedings against that person, in accordance with conditions to be determined by mutual agreement of the Parties.

Article 15

Handing Over of Property

(1) When a request for surrender of a fugitive offender is granted the Requested Party shall, at the request of the Requesting Party and in so far as its law allows, hand over to the Requesting Party all articles, including sums of money, found within its jurisdiction:

1. which may serve as proof of the offence; or

2. which have been acquired by the fugitive offender as a result of the offence and are in his possession or discovered subsequently.

(2) If the articles in question are liable to seizure or confiscation within the jurisdiction of the Requested Party the latter may, in connection with pending criminal proceedings, temporarily retain them or hand them over on condition that they are returned.

(3) These provisions shall not prejudice the rights of the Requested Party or of any person other than the person sought. When such rights exist the articles shall, on request, be returned to the Requested Party without charge as soon as possible after the end of the proceedings.

Article 16

Rule of Specialty

(1) A fugitive offender who has been surrendered shall not be proceeded against, sentenced, detained or subjected to any other restriction of personal liberty by the Requesting Party for any offence committed prior to his handover other than:

1. the offence or offences in respect of which his surrender was granted;
2. an offence, however described, based on substantially the same facts as that in respect of which his surrender was granted, provided such offence is one for which he could be surrendered under this Agreement, and provided further such offence is

punishable by a penalty no more severe than the penalty for the offence for which he was surrendered;

3. any other offence for which surrender may be granted under this Agreement and in respect of which the Requested Party consents to his being dealt with;

unless he has first had an opportunity to exercise his right to leave the jurisdiction of the Party to which he has been surrendered and he has not done so within forty days or has voluntarily returned to that jurisdiction having left it.

(2) A Party whose consent is requested under paragraph (1) number 3 of this Article may require the submission of any document or statement referred to in Article 8 of this Agreement, and a statement made by the surrendered person on the matter.

Article 17

Re-Surrender or Re-Extradition

(1) A fugitive offender who has been surrendered shall not be re-surrendered or, in the case of the Government of the Federal Republic of Germany, re-extradited to another jurisdiction for an offence committed prior to his handover unless:

1. the Requested Party consents to such re-surrender or re-extradition;
or
2. he has first had an opportunity to exercise his right to leave the jurisdiction of the Party to which he has been surrendered and has

not done so within forty days or has voluntarily returned to that jurisdiction having left it.

(2) A Party whose consent is requested under paragraph (1) number 1 of this Article may require the submission of any document or statement referred to in Article 8 of this Agreement, and a statement made by the surrendered person on the matter.

Article 18

Transit

To the extent permitted by its law, transit through the jurisdiction of a Party may be granted on a request in writing. The Party through whose jurisdiction transit will occur may request the information referred to in paragraph (2) of Article 10 of this Agreement. The Party requesting transit shall bear the expenses thereof.

Article 19

Result of Criminal Proceedings

The Requesting Party shall, upon request, inform the Requested Party of the result of the criminal proceedings against the person surrendered and shall send a copy of the final and binding decision to that Party.

Article 20

Surrender by Consent

(1) If the person consents voluntarily and in writing to surrender to the Requesting Party, the Requested Party may, subject to its law, surrender the person as expeditiously as possible without further formal proceedings.

(2) The provisions of Articles 16 and 17 shall apply to a person surrendered pursuant to this Article.

Article 21

Personal Data

(1) In this Article “personal data” means any information about an identified or identifiable natural person.

(2) Personal data transmitted on the basis of this Agreement shall be used for the purposes for which the data were transmitted and subject to such conditions as the transmitting Party determines. In addition such data may be used by the Party which has received it for the purpose of warding off substantial dangers to its security. Use of the data for other purposes requires the prior consent of the Party transmitting the data.

(3) Subject to the respective law of each Party, the following provisions shall apply to the transmission and use of personal data transmitted for the purpose of a request for surrender under this Agreement:

1. only data that relates to the request shall be transmitted;
2. upon request, the Party which has received the data shall identify the data received and inform the transmitting Party of the use made of the data and the results achieved therefrom;

3. if it appears to the transmitting Party that incorrect data have been transmitted or that data have been transmitted that should not have been, the transmitting Party shall notify without delay the Party that has received the data; the Party that has received the data shall without delay rectify any errors or destroy the data;
4. the Parties shall keep records in a readily retrievable form concerning the transmission and receipt of data;
5. the Parties shall protect personal data against unauthorised access, unauthorised alteration and unauthorised publication.

Article 22

Settlement of Disputes

Any dispute arising out of the interpretation, application or implementation of this Agreement shall be resolved through diplomatic channels if the Parties are themselves unable to reach agreement.

Article 23

Entry into Force, Suspension and Termination

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other that their respective requirements for the entry into force of this Agreement have been complied with. The date of receipt of the second notification shall be decisive.

(2) The provisions of this Agreement shall apply to requests made after its entry into force regardless of the date of the commission of the offence or offences set out in the request.

(3) This Agreement shall be of unlimited duration. Each of the Parties may suspend or terminate this Agreement at any time by giving notification to the other. Suspension shall take effect on receipt of the relevant notification. In the event of termination the Agreement shall cease to have effect six months after the receipt of the relevant notification.

Done at Hong Kong, this 26th day of May 2006 in two originals in the Chinese, English and German languages, each text being equally authentic.

Appendix to the Agreement between the Government
of the Hong Kong Special Administrative Region
of the People's Republic of China and the
Government of the Federal Republic of
Germany for the Surrender of
Fugitive Offenders

Description of offences referred to in Article 2 paragraph (1)

1. murder or manslaughter, including criminal negligence causing death, culpable homicide, assault with intent to commit murder

2. malicious wounding, maiming, inflicting grievous or actual bodily harm, assault occasioning actual bodily harm, threats to kill, intentional or reckless endangering of life whether by means of a weapon, a dangerous substance or otherwise, offences relating to unlawful wounding or injuring
3. offences of a sexual nature including rape, sexual assault, indecent assault, unlawful sexual acts on children, statutory sexual offences
4. gross indecency with a child, a mental defective or an unconscious person
5. kidnapping, abduction, false imprisonment, unlawful confinement, dealing or trafficking in slaves or other persons, taking a hostage
6. criminal intimidation
7. offences against the law relating to dangerous drugs including narcotics, psychotropic substances, precursors and essential chemicals used in the illegal manufacture of narcotics and psychotropic substances, offences relating to the proceeds of drug trafficking
8. obtaining property or pecuniary advantage by deception, theft, robbery, burglary (including breaking and entering), embezzlement, blackmail, extortion, unlawful handling or receiving of property, false accounting, any other offence in respect of property or fiscal matters involving fraud, any offence against the law relating to unlawful deprivation of property
9. offences against bankruptcy law or insolvency law
10. offences against the law relating to companies including offences committed by officers, directors and promoters

11. offences relating to securities and futures trading
12. offences relating to counterfeiting, offences against the law relating to forgery or uttering what is forged
13. offences against the law relating to protection of intellectual property, copyrights, patents or trademarks
14. offences against the law relating to bribery, corruption, secret commissions and breach of trust
15. perjury and subornation of perjury
16. offence relating to the perversion or obstruction of the course of justice
17. arson, criminal damage or mischief including mischief in relation to computer data
18. offences against the law relating to firearms
19. offences against the law relating to explosives
20. offences against the law relating to environmental pollution or protection of public health
21. mutiny or any mutinous act committed on board a vessel at sea
22. piracy involving ships or aircraft

23. unlawful seizure or exercise of control of an aircraft or other means of transportation
24. genocide or direct and public incitement to commit genocide
25. facilitating or permitting the escape of a person from custody
26. offences against the law relating to the control of exportation or importation of goods of any type, or the international transfer of funds
27. smuggling, offences against the law relating to import and export of prohibited items, including historical and archaeological items
28. immigration offences including fraudulent acquisition or use of a passport or visa
29. arranging or facilitating for financial gain, the illegal entry of persons into the jurisdiction of the Requesting Party
30. offences relating to gambling or lotteries
31. offences relating to the unlawful termination of pregnancy
32. stealing, abandoning, exposing or unlawfully detaining a child, any other offences involving the exploitation of children
33. offences against the law relating to prostitution and premises kept for the purposes of prostitution
34. offences involving the unlawful use of computers

35. offences relating to fiscal matters, taxes or duties, notwithstanding that the law of the Requested Party does not impose the same kind of tax or duty or does not contain a tax duty or customs regulation of the same kind as that of the Requesting Party
36. offences relating to unlawful escape from custody, mutiny in prison
37. bigamy
38. offences relating to women and girls
39. offences against the law relating to false or misleading trade descriptions
40. offences relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement
41. impeding the arrest or prosecution of a person who has or is believed to have committed an offence for which surrender may be granted under this Agreement
42. offences for which persons may be surrendered under multilateral international conventions binding on the Parties, offences created as a result of decisions of international organizations which are binding on the Parties
43. conspiracy to commit fraud or to defraud

44. conspiracy to commit, or any type of association to commit, any offence for which surrender may be granted under this Agreement
45. aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting to commit any offence for which surrender may be granted under this Agreement
46. any other offence for which surrender may be granted in accordance with the laws of both Parties

Clerk to the Executive Council

COUNCIL CHAMBER

2006

Explanatory Note

This Order applies the procedures for the surrender of fugitive offenders set out in the Fugitive Offenders Ordinance (Cap. 503) as between Hong Kong and the Federal Republic of Germany. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by Hong Kong and the Federal Republic of Germany and signed in Hong Kong on 26 May 2006. The terms of those arrangements are recited in the Schedule to the Order. Those procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms so recited.

FUGITIVE OFFENDERS (REPUBLIC OF KOREA) ORDER

(Made by the Chief Executive in Council under section 3 of the Fugitive Offenders Ordinance (Cap. 503))

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. Procedures in Ordinance to apply between Hong Kong and Republic of Korea

In relation to the arrangements for the surrender of fugitive offenders the terms of which are recited in the Schedule, it is directed that the procedures in the Ordinance shall apply as between Hong Kong and the Republic of Korea subject to the limitations, restrictions, exceptions and qualifications contained in the terms of the arrangements.

SCHEDULE

[s. 2]

AGREEMENT FOR THE SURRENDER OF FUGITIVE OFFENDERS BETWEEN THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE REPUBLIC OF KOREA

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 to conclude this Agreement by the Central People's Government of the People's Republic of China, and the Government of the Republic of Korea (hereinafter referred to as "the Parties"),

Desiring to make provisions for the reciprocal surrender of fugitive offenders,

Affirming their respect for each other's legal system and judicial institutions,

Have agreed as follows:

ARTICLE 1

Obligation to Surrender

The Parties agree to surrender to each other, subject to the provisions laid down in this Agreement, any person who is found in the jurisdiction of the Requested Party and who is wanted by the Requesting Party for prosecution or for the imposition or enforcement of a sentence in respect of an offence referred to in Article 2 of this Agreement.

ARTICLE 2

Offences

1. Surrender of fugitive offenders shall be granted for an offence coming within any of the descriptions of offences specified in the Annex to this Agreement, which shall form an integral part of this Agreement, in so far as the offence is, according to the laws of both Parties, punishable by imprisonment or other form of detention for more than one year, or by a more severe penalty.
2. In determining whether an offence is against the laws of both Parties:
 - (a) it shall not matter whether the laws of the Parties place the offence within the same category of offence or denominate the offence by the same terminology;

- (b) the totality of the conduct alleged against the person whose surrender is sought shall be taken into account and it shall not matter whether, under the laws of the Parties, the constituent elements of the offence differ.

3. Where surrender of a fugitive offender is requested for the purpose of carrying out a sentence, a further requirement shall be that a period of imprisonment or detention of at least six (6) months remains to be served.

4. Where the surrender of a fugitive offender is requested for the purpose of carrying out a sentence, the Requested Party may refuse surrender if it appears that the conviction was obtained in his absence and he did not have the opportunity of being tried in his presence, unless he has the opportunity to have his case retried in his presence. Requests for the surrender of persons convicted in their absence shall be accompanied by the supporting documents referred to in paragraph 3 of Article 8 as well as the supporting documents referred to in paragraph 4 of Article 8.

5. Surrender may be granted pursuant to the provisions of this Agreement in respect of an offence, provided that:

- (a) it was an offence in the Requesting Party at the time of the conduct constituting the offence; and
- (b) the conduct alleged would, if it had taken place in the jurisdiction of the Requested Party at the time of the making of the request for surrender, have constituted an offence against the law in force in the jurisdiction of the Requested Party.

ARTICLE 3

Surrender of Nationals

1. The Government of the Hong Kong Special Administrative Region reserves the right to refuse the surrender of nationals of the People's Republic of China. The Government of the Republic of Korea reserves the right to refuse the surrender of its nationals.
2. Where the Requested Party exercises this right, the Requesting Party may request that the case be submitted to the authorities of the Requested Party in order that proceedings for prosecution of the person may be considered. That Party shall inform the Requesting Party of any action taken and the outcome of any prosecution.
3. Nationality shall be determined at the time of the commission of the offence for which surrender is requested.

ARTICLE 4

Death Penalty

If the offence for which surrender of a fugitive offender is requested under this Agreement is punishable according to the law of the Requesting Party with the death penalty, and if in respect of such an offence the death penalty is not provided for by the law of the Requested Party or is not normally carried out, surrender may be refused 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.

ARTICLE 5

Mandatory Refusal of Surrender

Surrender shall not be granted under this Agreement in any of the following circumstances:

- (a) when the Requested Party has substantial grounds for believing that the offence for which surrender is requested is a political offence or an offence connected with a political offence. Reference to a political offence shall not include the following offences:
 - (i) the taking or attempted taking of the life or an attack on the person of a Head of State or Head of Government or a member of the person's immediate family; and
 - (ii) any offence which, by reason of a multilateral international agreement, the Parties must not treat as a political offence or an offence connected with a political offence;
- (b) when the person sought is being prosecuted by the Requested Party for the offence for which the surrender is requested;
- (c) when the person sought has been finally convicted or acquitted by the Requested Party for the offence for which the person's surrender is requested;

- (d) when the prosecution or the punishment for the offence for which surrender is requested would be barred by reasons prescribed under the law of either Party including a law relating to the lapse of time;
- (e) when the Requested Party has substantial grounds for believing that the request for surrender has been presented with a view to prosecuting or punishing the person sought, by reason of race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of those reasons.

ARTICLE 6

Discretionary Refusal of Surrender

Surrender may be refused under this Agreement in any of the following circumstances:

- (a) when the offence for which surrender is sought is regarded under the law of the Requested Party as having been committed in whole or in part within the territory or area of the Requested Party, and in case of such refusal the Requesting Party may request that the case be submitted to the authorities of the Requested Party in order that proceedings for prosecution may be considered;
- (b) when the person sought has been finally acquitted or convicted in a third jurisdiction for the same offence for which surrender is requested and, if convicted, the sentence imposed has been fully enforced or is no longer enforceable;

- (c) when, in exceptional cases, the Requested Party while also taking into account the seriousness of the offence and the interests of the Requesting Party deems that, because of the personal circumstances of the person sought, the surrender would be incompatible with humanitarian considerations; and
- (d) when it appears to the Requested Party that, by reason of the passage of time since the person is alleged to have committed the offence for which surrender is sought or to have become unlawfully at large it would, having regard to all the circumstances, be unjust or oppressive to return him.

ARTICLE 7

Postponed or Temporary Surrender

1. If the person sought is being proceeded against or under punishment in the jurisdiction of the Requested Party for an offence other than that for which the person's surrender is requested, the person's surrender may be deferred until the conclusion of the proceedings and the execution of any punishment awarded to him.
2. If the request for surrender is granted in the case of a person who is being proceeded against or under punishment in the jurisdiction of the Requested Party for an offence other than that for which the person's surrender is requested, the Requested Party may temporarily surrender the person sought to the Requesting Party for the purpose of prosecution. The person so surrendered shall be kept in custody in the Requesting Party and shall be returned to the Requested Party after the conclusion of the proceedings against that person, in accordance with conditions to be determined between the Parties.

ARTICLE 8

Request and Supporting Documents

1. Requests for surrender shall be made in writing to the competent authority of the Requested Party through the Consulate General of the Republic of Korea in Hong Kong, unless the Parties otherwise agree. The competent authority for the Republic of Korea shall be the Ministry of Justice and the competent authority for the Hong Kong Special Administrative Region shall be the Department of Justice, unless a different competent authority is notified by either Party to the other.
2. The request shall be accompanied by:
 - (a) as accurate a description as possible of the person sought, together with any other information which would help to establish the person's identity and nationality including, if known, his or her whereabouts;
 - (b) a statement and particulars of the offence for which surrender is requested;
 - (c) the text of the legal provisions, if any, creating the offence, and a statement of the punishment which can be imposed for it and whether any time limit is imposed on the institution of proceedings, or on the execution of any punishment imposed, for that offence.
3. A request for surrender of a person who is sought for prosecution shall also be accompanied by:

- (a) a warrant of arrest issued by a judge or magistrate of the Requesting Party or a copy of that warrant; and
- (b) such evidence as, according to the law of the Requested Party, would permit a decision to be taken to surrender that person for the offence for which surrender is requested.

4. If the request relates to a person already convicted or sentenced, it shall also be accompanied by:

- (a) a copy of the certificate of the conviction or sentence; and
- (b)
 - (i) if the person was convicted but not sentenced, a statement to that effect by the appropriate court and a copy of the warrant of arrest; or
 - (ii) if the person was sentenced, a statement that the sentence is enforceable and indicating how much of the sentence has still to be served.

5. Documents supporting a request for surrender shall be admitted in evidence as proof of the facts contained therein if duly authenticated. Documents are duly authenticated if they purport to be:

- (a) signed or certified by a judge, magistrate, prosecutor or an official of the Requesting Party; and

- (b) sealed with the official seal of the competent authority of the Requesting Party.

6. All documents submitted in accordance with this Agreement shall be in or translated into an official language of the Requested Party, unless the Requested Party dispenses with this requirement.

ARTICLE 9

Provisional Arrest

1. In urgent cases, the person sought may, in accordance with the law of the Requested Party, be provisionally arrested on the application of the competent authority of the Requesting Party. The application for provisional arrest shall contain:

- (a) a description of the person sought;
- (b) the location of the person sought, if known;
- (c) a brief statement of the facts of the case, including, if possible, the time and location of the offence;
- (d) a description of the laws violated and the sentence prescribed by the law;
- (e) a statement of the existence of a warrant of arrest or a judgement of conviction against the person sought; and

- (f) a statement that a request for surrender of the person sought will follow.

2. An application for provisional arrest may be forwarded to the competent authority of the Requested Party by any means affording a record in writing through the same channels as a request for surrender or through direct contact between the competent authorities of both Parties.

3. On receipt of such an application, the Requested Party shall take the necessary steps to secure the arrest of the person sought and the Requesting Party shall be promptly notified of the result of its request.

4. The provisional arrest of the person sought shall be terminated upon the expiration of forty-five (45) days from the date of arrest if the request for surrender has not been received unless the Requesting Party can justify continued provisional arrest of the person sought, in which case the period of provisional arrest shall be terminated upon the expiration of a further fifteen (15) days. This provision shall not prevent the re-arrest or surrender of the person sought if the request for surrender is received subsequently.

ARTICLE 10

Surrender by Consent

1. If the person sought consents to surrender to the Requesting Party, the Requested Party may surrender the person as expeditiously as possible without further proceedings.

2. To the extent required under the law of the Requested Party, the provisions of Article 16 shall apply to a person surrendered pursuant to this Article.

ARTICLE 11

Additional Information

1. If the information communicated by the Requesting Party is found to be insufficient to allow the Requested Party to make a decision in pursuance of this Agreement, the latter Party shall request the necessary supplementary information and may fix a time-limit for receipt thereof.
2. If the person whose surrender is sought is under arrest and the additional information furnished is not sufficient in accordance with this Agreement or is not received within the time specified, the person may be released from custody. Such release shall not preclude the Requesting Party from making a fresh request for the surrender of that person.
3. Where the person is released from custody in accordance with paragraph 2, the Requested Party shall notify the Requesting Party as soon as practicable.

ARTICLE 12

Concurrent Requests

1. If the Requested Party receives requests from the other Party and from any other jurisdiction for the surrender of the same person either for the same offence or for different offences, the Requested Party shall determine to which jurisdiction the person is to be surrendered and shall notify each requesting jurisdiction of its decision.

2. In determining to which jurisdiction a person is to be surrendered, the Requested Party shall have regard to all the circumstances including the provisions in this regard in any agreements in force between the Requested Party and the Requesting Party or other jurisdictions, the relative seriousness and place of commission of the offences, the respective dates of the requests, the nationality and the ordinary place of residence of the person sought, and the possibility of subsequent surrender to another jurisdiction, and shall furnish the other Party with information justifying its decision in the event of surrender of the fugitive to another jurisdiction.

ARTICLE 13

Representation and Costs

1. The Requested Party shall, if asked by the Requesting Party, make the necessary arrangements for the Requesting Party's legal representation and assistance in any proceedings arising out of a request for the surrender of a fugitive offender. In the event that the Requesting Party arranges its own legal representation and assistance, it shall bear any costs incurred.

2. The Requesting Party shall bear the expenses related to the translation of documents and the transportation of the person surrendered from the Requested Party to the Requesting Party. The Requested Party shall pay all other expenses incurred in its jurisdiction by reason of the proceedings.

ARTICLE 14

Surrender

1. The Requested Party shall, as soon as a decision on the request for surrender has been made, communicate that decision to the Requesting Party. Reasons shall be given for any complete or partial refusal of a request for surrender.
2. The Requested Party shall surrender the person sought to the appropriate authorities of the Requesting Party at a mutually convenient location in the jurisdiction of the Requested Party.
3. Subject to the provisions of paragraph 4 of this Article, if the Requesting Party does not take custody of the person sought within the time prescribed by the law of the Requested Party, the person may be released and the Requested Party may subsequently refuse to surrender the person for the same offence.
4. If circumstances beyond its control prevent a Party from surrendering or taking over the person to be surrendered, it shall notify the other Party. In that case, the two Parties shall agree upon a new date for surrender and the provisions of paragraph 3 of this Article shall apply.

ARTICLE 15

Surrender of Property

1. To the extent permitted under the laws of the Requested Party, when a request for surrender of a fugitive offender is granted, the Requested Party shall hand over to the Requesting Party all property, including sums of money:
 - (a) which may serve as proof of the offence; or

- (b) which have been acquired by the person sought as a result of the offence and are in the person's possession or discovered subsequently.

2. If the property in question is liable to seizure or confiscation within the jurisdiction of the Requested Party, that Party may, in connection with pending proceedings, temporarily retain it or hand it over to the Requesting Party on condition it is returned.

3. These provisions shall not prejudice the rights of the Requested Party or of any person other than the person sought. When such rights exist, the property shall on request be returned to the Requested Party without charge as soon as possible after the end of the proceedings.

4. The property mentioned in paragraph 1 shall, if the Requesting Party so requests, be handed over to that Party to the extent permitted by the laws of the Requested Party, even if the surrender cannot be carried out due to the death or escape of the person sought.

ARTICLE 16

Rule of Speciality

1. A fugitive offender who has been surrendered shall not be proceeded against, sentenced or detained with a view to the carrying out of a sentence for any offence committed prior to surrender other than:

- (a) the offence in respect of which surrender is granted;

- (b) an equivalent or lesser offence, however described, based on the facts in respect of which his surrender was granted, provided such offence is one for which he could be surrendered under this Agreement;
- (c) any other offence being an offence for which surrender may be granted under this Agreement and the Requested Party consents;

unless that person has first had an opportunity to leave the jurisdiction of the Requesting Party and has not done so within forty (40) days of having been free to do so or has returned voluntarily to that jurisdiction having left it.

2. A Party whose consent is requested under subparagraph (c) of paragraph 1 of this Article may require the submission of any document referred to in Article 8 and any statement made by the surrendered person on the matter.

ARTICLE 17

Re-surrender

1. Where a person has been surrendered to the Requesting Party, that Party shall not surrender the person to any other jurisdiction for an offence committed before that person's surrender unless:

- (a) the Requested Party consents; or
- (b) the person has first had an opportunity to leave the jurisdiction of the Requesting Party and has not done so within forty (40) days of having been free to do so or has returned voluntarily to that jurisdiction having left it.

2. A Party whose consent is requested under subparagraph (a) of paragraph 1 of this Article may require the production of the documents submitted by the other jurisdiction in support of its request for surrender.

ARTICLE 18

Transit

1. To the extent permitted by its law, the right to transport through the jurisdiction of one of the Parties a person surrendered to the other Party by a third party may be granted on request made by any means affording a record in writing. The request for transit shall contain a description of the person being transported and a brief statement of the facts of the case. The request for transit may be forwarded to the competent authority of the Requested Party through the same channels as a request for surrender or through direct contact between the competent authorities of both Parties.

2. Permission for the transit of a person surrendered shall include authorization for accompanying officials to hold that person in custody or request and obtain assistance from authorities in the Party of transit in maintaining custody.

3. Where a person is being held in custody pursuant to paragraph 2 of this Article, the Party in whose jurisdiction the person is being held may direct that the person be released if transportation is not continued within a reasonable time.

4. Authorization for transit shall not be required when air transport is to be used and no landing is scheduled in the jurisdiction of the Party of transit. If an unscheduled landing occurs in the jurisdiction of that Party, it may require the

other Party to furnish a request for transit as provided in paragraph 1 of this Article. The Party of transit shall, within the limits permitted by its law, detain the person to be transported until the transportation is continued, provided that the request is received within ninety-six (96) hours of the unscheduled landing.

ARTICLE 19

Consultations

1. The Parties shall, at the request of either Party, promptly hold consultations concerning the interpretation, application or implementation of this Agreement.
2. The competent authorities of the Parties may consult each other directly in connection with the processing of individual cases.

ARTICLE 20

Entry Into Force and Termination

1. This Agreement shall enter into force thirty (30) days after the date on which the Parties have notified each other in writing that their respective requirements for the entry into force of this Agreement have been complied with.
2. This Agreement shall apply to requests made after its entry into force regardless of the date of commission of the offence or offences.
3. Either of the Parties may terminate this Agreement at any time by giving notice in writing to the other. In that event, this Agreement shall cease to have effect six (6) months after the receipt of the notice.

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

Done in duplicate at Hong Kong this twenty-sixth day of June 2006 in the Chinese, English and Korean languages, all texts being equally authentic.

ANNEX

Descriptions of Offences referred to in Article 2

- (1) The unlawful taking of human life; assault with intent to commit murder.
- (2) Aiding, abetting, counselling or procuring suicide.
- (3) Maliciously wounding; maiming; inflicting grievous or actual bodily harm; assault occasioning actual bodily harm; threats to kill; intentional or reckless endangering of life whether by means of a weapon, a dangerous substance or otherwise; offences relating to unlawful wounding or injuring.
- (4) Offences of a sexual nature including rape; sexual assault; indecent assault; unlawful sexual acts on children; statutory sexual offences.
- (5) Gross indecency with a child, a mental defective or an unconscious person.
- (6) Kidnapping; abduction; unlawful imprisonment or detention; dealing or trafficking in slaves or other persons; taking a hostage.
- (7) Criminal intimidation.
- (8) Offences against the law relating to dangerous drugs including narcotics and psychotropic substances and precursors and essential chemicals used in the illegal manufacture of narcotic drugs and psychotropic substances and offences related to the proceeds of drug trafficking.
- (9) Obtaining property or pecuniary advantage by deception; theft; robbery; burglary (including breaking and entering) or similar offences; embezzlement; blackmail; extortion; handling or receiving stolen property; false accounting; any other offence in respect of property or fiscal matters

involving fraud; any offence against the law relating to unlawful deprivation of property.

- (10) Offences against bankruptcy law or insolvency law.
- (11) Offences against the law relating to companies including offences committed by officers, directors and promoters.
- (12) Offences relating to securities and futures trading.
- (13) Any offence relating to counterfeiting; any offence against the law relating to forgery or uttering what is forged.
- (14) Offences against the laws relating to protection of intellectual property, including copyright, patents, trademarks, designs or trade secrets.
- (15) An offence against the law relating to bribery, corruption, secret commissions and breach of trust.
- (16) Perjury and subornation of perjury.
- (17) Offences relating to the perversion or obstruction of the course of justice.
- (18) Arson; criminal damage or mischief including mischief in relation to computer data.
- (19) An offence against the law relating to firearms.
- (20) An offence against the law relating to explosives.
- (21) An offence against laws relating to environmental pollution or protection of public health.
- (22) Mutiny or any mutinous act committed on board a vessel at sea.
- (23) Piracy involving ships or aircraft.
- (24) Unlawful use, seizure or exercise of control of an aircraft, vessel or other means of transportation.
- (25) Genocide or direct and public incitement to commit genocide.
- (26) Facilitating or permitting the escape of a person from custody.
- (27) An offence against the laws relating to the control of exportation or importation of goods of any type, or the international transfer of funds.
- (28) Smuggling; offences against the laws relating to import and export of prohibited items, including historical and archaeological items.

- (29) Immigration offences including fraudulent acquisition or use of a passport or visa.
- (30) Arranging or facilitating for financial gain, the illegal entry of persons into the jurisdiction of the Requesting Party.
- (31) An offence relating to gambling or lotteries.
- (32) Offences relating to the unlawful termination of pregnancy.
- (33) Stealing, abandoning, exposing or unlawfully detaining a child; any other offences involving the exploitation of children.
- (34) Offences against the laws relating to prostitution and premises kept for the purposes of prostitution.
- (35) Offences involving the unlawful use of computers.
- (36) Offences relating to fiscal matters, taxes or duties, notwithstanding that the law of the Requested Party does not impose the same kind of tax or duty or does not contain a tax, duty or customs regulation of the same kind as the law of the Requesting Party.
- (37) Offences relating to unlawful escape from custody or flight to avoid prosecution; mutiny in prison.
- (38) Offences relating to women and girls.
- (39) Offences against the law relating to false or misleading descriptions of goods.
- (40) Offences relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted under this Agreement.
- (41) Impeding the arrest or prosecution of a person who has or is believed to have committed an offence for which surrender may be granted under this Agreement.
- (42) Offences for which fugitive offenders may be surrendered under international conventions binding on the Parties; offences created as a result of decisions of international organisations which are binding on the Parties.

- (43) Conspiracy to commit fraud or to defraud.
- (44) Conspiracy to commit, or any type of association to commit, any offence for which surrender may be granted under this Agreement.
- (45) Aiding, abetting, counselling or procuring the commission of, inciting, being an accessory before or after the fact to, or attempting to commit any offence for which surrender may be granted under this Agreement.
- (46) Any other offence which is punishable under the laws of both Parties by imprisonment or other form of detention for more than one year, or by a more severe penalty, unless surrender for such offence is not permitted by the laws of the Requested Party.

Clerk to the Executive Council

COUNCIL CHAMBER

2006

Explanatory Note

This Order applies the procedures for the surrender of fugitive offenders set out in the Fugitive Offenders Ordinance (Cap. 503) as between Hong Kong and the Republic of Korea. The Order is made in consequence of the arrangements for the surrender of fugitive offenders entered into by Hong Kong and the Republic of Korea and signed in Hong Kong on 26 June 2006. The terms of those arrangements are recited in the Schedule to the Order. Those procedures are subject to the limitations, restrictions, exceptions and qualifications contained in the terms so recited.

**MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS (GERMANY) 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 Germany

In relation to the arrangements for mutual legal assistance a copy of which is annexed at Schedule 1, it is directed that the Ordinance shall, subject to the modifications summarized in Schedule 2, apply as between Hong Kong and the Federal Republic of Germany.

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
FEDERAL REPUBLIC OF GERMANY CONCERNING MUTUAL
LEGAL ASSISTANCE IN CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of
the People's Republic of China,
having been duly authorised by the Central People's Government of
the People's Republic of China
and
the Government of the Federal Republic of Germany;

Desiring 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 Legal Assistance

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

(2) Mutual legal assistance, for the purpose of paragraph (1), shall be any assistance in a criminal matter, irrespective of whether the assistance is sought or to be provided by a court or some other authority.

(3) Assistance shall include:

1. taking of evidence and obtaining of statements of persons;
2. provision of information, documents and other records, including extracts from judicial and official records;
3. location of persons and objects, including their identification;
4. search and seizure;

5. tracing, restraining, forfeiting and confiscating the proceeds and instrumentalities of criminal activities;
6. delivery of property, including lending of exhibits;
7. making detained persons and others available to give evidence or assist investigations;
8. service of documents, including documents seeking the attendance of persons; and
9. other assistance consistent with the objects of this Agreement, which is not inconsistent with the law of the Requested Party.

(4) Assistance under this Agreement shall include assistance in relation to taxation offences.

(5) 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

Channels of Communication

Requests under this Agreement and responses thereto shall be transmitted through the Department of Justice of the Hong Kong Special Administrative Region of the People's Republic of China and the Federal Ministry of Justice of

the Federal Republic of Germany. Such requests may be made by or on behalf of courts, prosecutors and authorities responsible for investigations or proceedings related to criminal matters.

Article 3

Other Legal Assistance

The Parties may provide legal assistance pursuant to other agreements, arrangements or practices.

Article 4

Refusal or Postponement of Assistance

- (1) The Requested Party shall, if required by its law, refuse assistance if:
1. the execution of the request for assistance would, in the case of the Government of the Hong Kong Special Administrative Region, impair the sovereignty, security or public order of the People's Republic of China or, in the case of the Government of the Federal Republic of Germany, impair the sovereignty, security or public order of the Federal Republic of Germany;
 2. it is of the opinion that the granting of the request would seriously impair its essential interests;
 3. the request for assistance relates to an offence of a political character;

4. the request for assistance relates to an offence only under military law;
5. 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, ethnic origin or political opinions;
6. 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 jurisdiction of the Requested Party;
7. the main purpose of the request is the assessment or collection of tax;
8. 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.

(2) The Requested Party shall refuse assistance if the request relates to an offence which carries the death penalty in the jurisdiction of the Requesting Party and the Requesting Party shall not use evidence or information provided to it in proceedings for any such offence.

(3) The Requested Party may refuse assistance if the Requesting Party cannot comply with any conditions in relation to confidentiality or limitation as to the use of material provided.

(4) The Requested Party may postpone assistance if execution of the request would impair ongoing investigations or proceedings in the jurisdiction of the Requested Party.

(5) Before denying or postponing assistance pursuant to this Article, the Requested Party

1. shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
2. 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 Requested Party provides assistance subject to certain terms and conditions referred to in paragraph (5) number 2, the Requesting Party shall comply with those terms and conditions.

Article 5

Requests for Assistance

- (1) Requests for assistance shall be made in writing.
- (2) Requests for assistance shall include:
 1. the name of the authority concerned with the criminal matter to which the request relates;
 2. a description of the purpose of the request and the nature of the assistance requested;

3. a description of the nature of the criminal matter and a summary of the relevant facts and laws;
4. any requirements for confidentiality;
5. details of any particular procedure the Requesting Party wishes to be followed;
6. details of any period within which the Requesting Party wishes the request to be complied with;
7. where possible, the identity and location of the person who is the subject of the investigation or criminal proceedings; and
8. any other information which is required to facilitate execution of the request.

(3) In addition, requests for assistance shall include:

1. in the case of requests for service of documents, the name and address of the person to be served;
2. in the case of requests for delivery of property obtained, or to be obtained, by search and seizure:
 - a) a declaration by a competent authority of the Requesting Party that seizure of the property could be obtained by compulsory measures if it were situated in the jurisdiction of the Requesting Party; or

- b) an order by a court in the Requesting Party authorising seizure of the property;
 - 3. in the case of requests to take evidence from a person, the subject matter on which the person is to be examined, including, where possible, a list of questions and details of any right of that person to decline to give evidence under the law of the Requesting Party.
- (4) The request and, if so required by the Requested Party, all documents submitted in support of the request shall be translated into an official language of the Requested Party.

Article 6

Execution of Requests

- (1) 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 possible under the law of the Requested Party, in accordance with the directions stated in the request.
- (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 Requested Party shall use its best efforts to keep confidential a request and its contents except when authorised otherwise by the Requesting Party.

Article 7

Expenses

(1) The Requested Party shall meet the cost of executing the request for assistance, except that the Requesting Party shall bear:

1. the expenses associated with conveying any person to or from the area of the Requested Party at the request of the Requesting Party, and any allowances or expenses payable to that person in connection with the execution of the request;
2. the expenses and fees of experts in the area of either the Requested Party or the Requesting Party;
3. fees of counsel retained at the request of the Requesting Party; and
4. expenses of translation carried out at the request of the Requesting Party.

(2) If during the execution of the request it becomes apparent that exceptional expenses, including the costs 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 8

Limitations on Use

- (1) The Requested Party may require, after consultation with the Requesting Party, that information or evidence furnished, including documents, articles or records, 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, including documents, articles or records, for purposes other than those stated in the request without the prior consent of the Requested Party.

Article 9

Personal Data

- (1) In this Article “personal data” means any information about an identified or identifiable natural person.
- (2) Personal data transmitted on the basis of this Agreement shall be used for the purposes for which the data were transmitted and subject to such conditions as the transmitting Party determines. In addition such data may be used by the Party which has received it for the purpose of warding off substantial dangers to its security. Use of the data for other purposes requires the prior consent of the Party transmitting the data.
- (3) Subject to the respective law of each Party, the following provisions shall apply to the transmission and use of personal data transmitted for the purpose of a request for assistance under this Agreement –

1. only data that relates to the request shall be transmitted;
2. upon request, the Party which has received the data shall identify the data received, and inform the transmitting Party of the use made of the data and the results achieved therefrom;
3. if it appears to the transmitting Party that incorrect data have been transmitted or that data have been transmitted that should not have been, the transmitting Party shall notify without delay the Party that has received the data; the Party that has received the data shall without delay rectify any errors or destroy the data;
4. the Parties shall keep records in a readily retrievable form concerning the transmission and receipt of data;
5. the Parties shall protect personal data against unauthorised access, unauthorised alteration and unauthorised publication.

Article 10

Obtaining of Evidence, Documents, Articles or Records

- (1) The Requested Party shall, upon request, arrange for evidence to be taken from a witness and, following the taking of the evidence, shall make available to the Requesting Party a written record including any documents, articles or records produced by the witness in accordance with the law of the Requested Party.
- (2) The Requested Party shall, upon request, inform the Requesting Party of the time and place of execution of the request for assistance.

(3) Subject to the law of the Requested Party, judges or officials of the Requesting Party and other persons concerned in the investigation or proceedings may be permitted to be present at the execution of the request, to appear or be legally represented in the proceedings in the jurisdiction of the Requested Party and to question the person giving evidence at such proceedings.

(4) A person who is required to give evidence in the jurisdiction of the Requested Party pursuant to a request for assistance may decline to do so where the law of either of the Parties permits the witness to decline to give evidence.

(5) If any person claims that he has a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto obtain a certificate from the Requesting Party.

Article 11

Service of Documents

(1) The Requested Party shall effect the service of documents transmitted to it by the Requesting Party for this purpose.

(2) A request for service of a summons on an accused person shall, unless there are exceptional circumstances, be executed only if it is received by the Requested Party at least one month before the date fixed for the person's appearance. Where the person to be served is not an accused person, the request for service shall be sent to the Requested Party within a reasonable time.

(3) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.

(4) 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 the Requested Party.

Article 12

Official Documents

In response to a request the Requested Party may, subject to its law, provide the Requesting Party with copies of official documents which are not publicly available.

Article 13

Certification and Authentication

Unless otherwise requested, evidence or documents transmitted pursuant to this Agreement shall not require any form of authentication. Material shall be certified or authenticated by consular posts or diplomatic missions only if the law of the Requesting Party specifically so requires.

Article 14

Making Detained Persons Available to Assist in Investigations or Criminal Proceedings

(1) A person in custody in the jurisdiction of the Requested Party shall, at the request of the Requesting Party, be temporarily transferred to the jurisdiction of the Requesting Party to assist in investigations or criminal proceedings provided that the person consents to that transfer and there are no overriding grounds against transferring the person.

(2) While the person transferred is required to be kept in custody under the law of the Requested Party, the Requesting Party shall hold that person in custody and shall return the person in custody either at the conclusion of the investigations or criminal proceedings, or at such earlier time stipulated by the Requested Party.

(3) Where the sentence imposed expires, or where the Requested Party advises the Requesting Party that the transferred person is no longer required to be held in custody, that person shall be set at liberty and be treated as a person present in the jurisdiction of the Requesting Party pursuant to a request under Article 15.

Article 15

Appearance of Other Persons

(1) The Requesting Party may request the assistance of the Requested Party in inviting a person to appear in the jurisdiction of the Requesting Party to assist in investigations or criminal proceedings.

(2) The Requested Party shall inform the Requesting Party of that person's response.

Article 16

Safe Conduct

(1) A person present in the jurisdiction of the Requesting Party in response to a request seeking that person's attendance shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the jurisdiction of that

Party in respect of acts, omissions or convictions prior to his departure from the jurisdiction of the Requested Party.

(2) A person summoned before the judicial authorities of the Requesting Party to answer for acts forming the subject of proceedings against him, shall not be prosecuted or detained or subjected to any other restriction of his personal liberty for acts, omissions or convictions prior to his departure from the jurisdiction of the Requested Party and not specified in the summons.

(3) The immunities provided for in paragraphs (1) and (2) shall cease when the person, having been notified by the Requesting Party that his presence is no longer required and having had, for a period of 15 consecutive days from the date of notification, an opportunity to leave has nevertheless remained in the jurisdiction of the Requesting Party or having left the jurisdiction of the Requesting Party has returned.

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

(5) A person present in the jurisdiction of the Requesting Party in response to a request seeking that person's attendance shall not be obliged to provide assistance in any investigations or criminal proceedings other than those to which the request relates.

(6) A person who does not respond to a request seeking that person's attendance shall not, even if the request contains a notice of penalty, be subjected to any punishment or measure of constraint.

Article 17

Search and Seizure

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of property and documents to the Requesting Party which are relevant to an investigation, prosecution or criminal proceeding as evidence.

(2) The delivery of property and documents requested under paragraph (1) shall be made upon such terms and conditions as the Requested Party sees fit. In addition, property may be returned to the person who was deprived of it.

(3) The delivery of property requested under paragraph (1) shall not affect the rights of third parties. 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.

(4) 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.

Article 18

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 under 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 request shall be executed pursuant to the law of the Requested Party. This may include enforcing an order made by a court in the jurisdiction of the Requesting Party.

(4) Proceeds confiscated 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 Parties are themselves unable to reach agreement.

Article 20

Entry into Force, Suspension and Termination

(1) This Agreement shall enter into force thirty days after the date on which the Parties have notified each other that their respective requirements for the

entry into force of the Agreement have been complied with. The date of receipt of the second notification shall be decisive. Both Parties shall apply the Agreement provisionally from the date of signing of the agreement in accordance with their respective law.

(2) This Agreement shall be of unlimited duration. Each of the Parties may suspend or terminate this Agreement at any time by giving notification to the other. Suspension shall take effect on receipt of the relevant notification. In the event of termination the Agreement shall cease to have effect six months after receipt of the relevant notification.

Done at Hong Kong, this 26th day of May 2006 in two originals in the Chinese, English and German languages, each text being equally authentic.

SCHEDULE 2

[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 has had an opportunity of leaving Hong Kong and has remained in Hong Kong for a period of 15 consecutive days from the date of being notified that his presence is no longer required for any of the following purposes* ~~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).

Clerk to the Executive Council

COUNCIL CHAMBER

2006

Explanatory Note

This Order directs that the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) (“the Ordinance”) shall apply as between Hong Kong and

the Federal Republic of Germany. 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 Federal Republic of Germany and signed in Hong Kong on 26 May 2006. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications summarized in Schedule 2 to the Order.

Explanatory Statement on the Modifications to the Mutual Legal Assistance in Criminal Matters Ordinance

Mutual Legal Assistance in Criminal Matters (Germany) Order

Previous Convictions etc

Section 5(1)(e) of the Ordinance provides that the Secretary for Justice shall refuse assistance if the request relates to the prosecution of a person for an offence in respect of which he has been convicted, acquitted, pardoned or punished in the requesting jurisdiction. Article 4(1)6 of the Hong Kong / Germany Agreement provides for this protection in relation to conviction etc in the requested jurisdiction. The modification to section 5(1)(e) reflects the provision in the Agreement by extending the protection to cover convictions etc in the requested jurisdiction.

Immunities

2. Section 17 of the Ordinance gives certain immunities to a person who comes to Hong Kong from another jurisdiction to render assistance. These immunities cease to apply if the person has had the opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for the purpose of rendering assistance. Article 16(3) of the Hong Kong / Germany Agreement provides that the immunities will continue to be applicable for a period of 15 consecutive days after the person, having had an opportunity to leave, has been notified that his presence is no longer required. The modification reflects the additional protection in the Agreement by providing for a period of 15 consecutive days in section 17(3)(b).

3. Sections 17(1)(ii) and 23(2)(a)(ii) of the Ordinance relate to immunity from civil suit where a person is rendering assistance in Hong Kong (section 17) or in a place outside Hong Kong (section 23). Such immunity is omitted from the Agreement as the immunity is not available under German law. The modifications to sections 17(1) and 23(2)(a) reflect the omission of this immunity.