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From : Clerk to the Legislative Council

To : All Members of the Legislative Council

Council meeting of 21 May 2008

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

I forward for Members' consideration a proposed resolution which the Secretary for Security will move at the Council meeting of 21 May 2008 under the Mutual Legal Assistance in Criminal Matters Ordinance relating to the Mutual Legal Assistance in Criminal Matters (Finland) Order. The President has directed that "it be printed in the terms in which it was handed in" on the Agenda of the Council.

2. The draft speech, in both English and Chinese versions, which the Secretary for Security will deliver when moving the proposed resolution, is also attached.

(Ms Justina LAM)
for Clerk to the Legislative Council

Encl.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL
MATTERS ORDINANCE

RESOLUTION

(Under section 4 of the Mutual Legal Assistance in Criminal Matters
Ordinance (Cap. 525))

RESOLVED that the Mutual Legal Assistance in Criminal Matters (Finland)
Order, made by the Chief Executive in Council on 22 April 2008,
be approved.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS (FINLAND) 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 Finland

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 specified in Schedule 2, apply as between Hong Kong and the Republic of Finland.

SCHEDULE 1

[s. 2]

AGREEMENT BETWEEN THE GOVERNMENT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
OF THE PEOPLE'S REPUBLIC OF CHINA AND THE
GOVERNMENT OF THE REPUBLIC OF FINLAND
CONCERNING MUTUAL LEGAL ASSISTANCE
IN CRIMINAL MATTERS

The Government of the Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong Special Administrative Region") having been duly authorised by the Central People's Government of the People's Republic of China to conclude this Agreement, and the Government of the Republic of Finland,

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 ASSISTANCE

(1) The Parties shall provide, in accordance with the provisions of this Agreement, the widest measure of mutual legal assistance in the investigation and prosecution of criminal offences falling within the jurisdiction of the Requesting Party and in proceedings related thereto.

(2) Assistance shall include:

- (a) identifying and locating persons;
- (b) serving of documents;
- (c) the obtaining of evidence, articles or documents;

- (d) executing requests for search and seizure;
- (e) facilitating the personal appearance of witnesses or experts;
- (f) effecting the temporary transfer of persons in custody to appear as witnesses;
- (g) obtaining production of judicial or official records;
- (h) tracing, restraining, forfeiting and confiscating the proceeds and instruments of crime;
- (i) providing information, documents and records;
- (j) delivery of property, including lending of exhibits;
- (k) assistance in connection with criminal offences related to taxation, customs duties, foreign exchange control or other revenue matters; and
- (l) other assistance consistent with the objects of this Agreement which is not inconsistent with the law of the Requested Party.

ARTICLE 2

CENTRAL AUTHORITY

- (1) The Central Authorities of the Parties shall process requests for mutual legal assistance in accordance with the provisions of this Agreement.

(2) The Central Authority for the Hong Kong Special Administrative Region is the Secretary for Justice or his duly authorised officer. The Central Authority for the Republic of Finland is the Ministry of Justice. Either Party may change its Central Authority in which case it shall notify the other of the change.

(3) Requests under this Agreement shall be transmitted by the Central Authority of the Requesting Party to the Central Authority of the Requested Party. In urgent cases requests may be transmitted by fax.

ARTICLE 3

OTHER ASSISTANCE

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

ARTICLE 4

LIMITATIONS ON COMPLIANCE

- (1) The Requested Party shall refuse assistance if:
 - (a) the granting of the request would impair the sovereignty, security or public order of the People's Republic of China in the case of the Hong Kong Special Administrative Region, or, of the Republic of Finland;

- (b) the request for assistance relates to an offence of a political character;
- (c) the request for assistance relates to an offence only under military law;
- (d) 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 or political opinions;
- (e) the request for assistance relates to the prosecution of a person for an offence in respect of which the person has been convicted, acquitted or pardoned in the Requested Party or for which the person could no longer be prosecuted by reason of lapse of time if the offence had been committed within the jurisdiction of the Requested Party;
- (f) it is of the opinion that the granting of the request would seriously impair its essential interests;
- (g) in the case of requests involving compulsory measures 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 for which compulsory measures are allowed;
- (h) the request relates to an offence which carries the death penalty in the Requesting Party.

(2) For the purpose of paragraph (1)(f), the Requested Party may include in its consideration of essential interests whether the provision of assistance could

prejudice the safety of any person or impose an excessive burden on the resources of the Requested Party.

(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 interfere with an ongoing investigation or prosecution in the Requested Party.

(5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority:

- (a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
- (b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.

(6) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b), it shall comply with those terms and conditions.

ARTICLE 5

REQUESTS

- (1) Requests shall be made in writing.
- (2) Requests for assistance shall include:
 - (a) the name of the authority on behalf of which the request is made;
 - (b) a description of the purpose of the request and the nature of the assistance requested;
 - (c) a description of the nature of the investigation, prosecution, or proceedings;
 - (d) a summary of the relevant facts and laws;
 - (e) any requirements for confidentiality;
 - (f) details of any particular procedure the Requesting Party wishes to be followed;
 - (g) details of the period within which the request should be complied with; and
 - (h) any other information which is required to facilitate execution of the request.

(3) The request and all documents submitted in support of a request shall be translated into Chinese or English where the Hong Kong Special Administrative Region is the Requested Party and in or translated into Finnish, Swedish or English where Finland is the Requested Party.

ARTICLE 6

EXECUTION OF REQUESTS

(1) A request shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.

(2) 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.

(3) 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.

(4) The Requested Party shall use its best efforts to keep confidential a request and its contents except to the extent necessary to execute it.

ARTICLE 7

REPRESENTATION AND EXPENSES

(1) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:

- (a) fees of counsel retained at the request of the Requesting Party;
- (b) fees of experts;
- (c) expenses of translation; and
- (d) travel expenses and allowances of persons who travel between the Requesting and Requested Parties.

(2) If during the execution of the request it becomes apparent that expenses of an extraordinary or substantial nature 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 Central Authority of the Requested Party.

ARTICLE 9

OBTAINING OF EVIDENCE, DOCUMENTS ARTICLES OR RECORDS

(1) Where a request is made that evidence be taken for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the jurisdiction of the Requesting Party, the Requested Party shall arrange to have such evidence taken.

(2) For the purposes of this Agreement, the giving or taking of evidence shall include the production of documents, articles or records.

(3) For the purposes of requests under this Article, the Requesting Party shall specify the questions to be put to the witnesses or the subject matter about which they are to be examined.

(4) Where evidence is to be taken, pursuant to a request for assistance under this Article, the person to whom the investigation, prosecution or proceeding in the Requesting Party relates, the person who is to give evidence and representatives of the Requesting party may, subject to the law of the Requested Party, appear or have legal representation or both for the purpose of questioning the person giving the evidence.

(5) A person who is required to give evidence in the Requested Party pursuant to a request for assistance may decline to do so where either:

- (a) the law of the Requested Party would permit that witness to decline to give evidence in similar circumstances in proceedings which originated in the Requested Party; or
- (b) the law of the Requesting Party would permit him to decline to give evidence in such proceedings in the Requesting Party.

(6) If any person claims that there is a right to decline to give evidence under the law of the Requesting Party, the Requested Party shall with respect thereto rely on a certificate of the Central Authority of the Requesting Party.

ARTICLE 10

OBTAINING STATEMENTS OF PERSONS

Where a request is made to obtain the statement of a person for the purpose of an investigation, prosecution or proceeding in relation to a criminal matter in the Requesting Party, the Requested Party shall endeavour to obtain such statement.

ARTICLE 11

LOCATION OR IDENTITY OF PERSONS

The Requested Party shall, if requested, endeavour to ascertain the location or identity of any person specified in the request.

ARTICLE 12

SERVICE OF DOCUMENTS

- (1) The Requested Party shall serve any document transmitted to it for the purpose of service.
- (2) Service may be effected by simple transmission of the document to the person to be served. If the Requesting Party expressly so requests service shall be effected by the Requested Party in the manner provided for the service of analogous documents under its own law or in the manner specified in the request provided that such manner is not inconsistent with the law of the Requested Party.
- (3) The Requesting Party shall transmit a request for the service of a document that requires a response or appearance in the Requesting Party within a reasonable time before the scheduled response or appearance.
- (4) A request for the service of a document pertaining to an appearance in the Requesting Party shall include such notice as the Central Authority of the Requesting Party is reasonably able to provide of outstanding warrants or other judicial orders in criminal matters against the person to be served.
- (5) The Requested Party shall, subject to its law, return a proof of service in the manner required by the Requesting Party.
- (6) 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 Requested Party unless he subsequently voluntarily enters the territory of the Requesting Party and is there again duly summoned.

ARTICLE 13

PUBLICLY AVAILABLE AND OFFICIAL DOCUMENTS

(1) Subject to its law, the Requested Party shall provide copies of publicly available documents.

(2) The Requested Party may provide copies of any document, record or information in the possession of a government department or agency, but not publicly available, to the same extent and under the same conditions as such document, record or information would be available to its own law enforcement and judicial authorities.

ARTICLE 14

CERTIFICATION AND AUTHENTICATION

Documents, transcripts, records, statements or other material which are to be transmitted to the Requesting Party shall only be certified or authenticated if the Requesting Party so requests. Material shall be certified or authenticated by consular or diplomatic officers only if the law of the Requesting Party specifically so requires.

ARTICLE 15

TRANSFER OF PERSONS IN CUSTODY

- (1) A person in custody in the Requested Party whose presence is requested in the Requesting Party as a witness pursuant to this Agreement shall, if the Requested Party consents, be transferred from the Requested Party to the Requesting Party for that purpose, provided the person consents and the Requesting Party has guaranteed the maintenance in custody of the person and his subsequent return to the Requested Party.
- (2) A witness may decline to give evidence where he would be permitted to do so on the basis of either the law of the Requesting or Requested Party.
- (3) Where the sentence of imprisonment of a person transferred pursuant to this Article expires whilst the person is in the Requesting Party, the Requested Party shall so advise the Requesting Party which shall ensure the person's release from custody.

ARTICLE 16

TRANSFER OF OTHER PERSONS

- (1) If the Requesting Party considers the personal appearance of a witness or expert for the purpose of providing assistance necessary it shall so inform the Requested Party. The Requested Party shall invite the witness or expert to appear and advise the Requesting Party of the reply from the witness or expert.

(2) A witness or an expert may decline to give evidence where he would be permitted to do so on the basis of either the law of the Requesting or Requested Party.

(3) Where a request is made pursuant to this Article the Requesting Party shall advise the approximate amounts of allowances payable, including travelling and accommodation expenses.

ARTICLE 17

SAFE CONDUCT

(1) A person who consents to provide assistance pursuant to Article 15 or 16:

(a) shall not be prosecuted, detained, or restricted in his personal liberty in the Requesting Party for any criminal offence which preceded his departure from the Requested Party;

(b) shall not be subject to civil suit to which the person could not be subject if he were not in the Requesting Party.

(2) Paragraph (1) shall not apply if the person, being free to leave, has not left the Requesting Party within a period of 15 days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Article 15 or 16 shall not be subject to prosecution based on his testimony, except for perjury.

(4) A person who consents to provide assistance pursuant to Article 15 or 16 shall not be required to provide assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Article 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.

ARTICLE 18

SEARCH AND SEIZURE

(1) The Requested Party shall, insofar as its law permits, carry out requests for search, seizure and delivery of any material to the Requesting Party which is relevant to an investigation, prosecution or proceeding in relation to a criminal matter.

(2) The Requested Party shall provide such information as may be required by the Requesting Party concerning the result of any search, the place of seizure, the circumstances of seizure, and the subsequent custody of the property seized.

(3) The Requesting Party shall observe any conditions imposed by the Requested Party in relation to any seized property which is delivered to the Requesting Party.

ARTICLE 19

PROCEEDS OF CRIME

(1) The Requested Party shall, upon request, endeavour to ascertain whether any proceeds of a crime against the law of the Requesting Party are located within its jurisdiction and shall notify the Requesting Party of the result of its inquiries. In making the request, the Requesting Party shall notify the Requested Party of the basis of its belief that such proceeds may be located in its jurisdiction.

(2) Where pursuant to paragraph (1), suspected proceeds of crime are found, the Requested Party shall take such measures as are permitted by its law to prevent any dealing in, transfer or disposal of, those suspected proceeds of crime, pending a final determination in respect of those proceeds by a court of the Requesting Party.

(3) Where a request is made for assistance in securing the confiscation of proceeds, such request shall be executed pursuant to the law of the Requested Party. This may include enforcing an order made by a court in the Requesting Party and initiating or assisting in proceedings in relation to the proceeds to which the request relates.

(4) Proceeds confiscated pursuant to this Agreement shall be retained by the Requested Party unless otherwise agreed upon between the Parties.

(5) For the purposes of this Agreement, “proceeds of crime” includes –

- (a) property which represents the value of property and other benefits derived from the commission of an offence;

- (b) property derived or realized directly or indirectly from the commission of an offence; and
- (c) property used or intended to be used in connection with an offence or the value of such property.

ARTICLE 20

SETTLEMENT OF DISPUTES

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

ARTICLE 21

ENTRY INTO FORCE AND TERMINATION

- (1) This Agreement shall enter into force 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 the Agreement have been complied with.
- (2) This Agreement shall apply to offences committed before as well as after its entry into force.
- (3) Each of the Parties may terminate this Agreement at any time by giving notice to the other. In that event this Agreement shall cease to have effect on receipt of that notice. Requests for assistance which have been received prior to

termination of this Agreement shall nevertheless be processed in accordance with the terms of the Agreement as if the Agreement were still in force.

In witness whereof the undersigned, being duly authorised by their respective governments have signed this Agreement.

Done in duplicate at Helsinki, this fourth day of October, Two thousand and seven in the Chinese, English and Finnish languages, each text being equally authentic. In case of divergence between the texts, the English text shall prevail.

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 5(1) of the Ordinance shall be modified by adding –

“(ea) the request relates to the prosecution of a person in respect of an act or omission that, if it had occurred in Hong Kong, could no longer be prosecuted in Hong Kong by reason of lapse of time;”*

3. Section 17(3)(b) of the Ordinance shall be modified to read as follows –
- “(b) the person, being free to leave Hong Kong, has not left Hong Kong within a period of 15 days after being notified that his presence is no longer required for any of the following purposes* ~~has had an opportunity of leaving Hong Kong and has remained in Hong Kong otherwise than for**~~ –
- (i) the purpose to which the request relates; ~~or**~~
 - (ii) the purpose of giving assistance in relation to a criminal matter in Hong Kong certified in writing by the Secretary for Justice to be a criminal matter in relation to which it is desirable that the person give assistance.”.

* The words underlined are added. (The underlining is for ease of identifying the modification).

** The words crossed out are deleted. (The crossing out is for ease of identifying the modification).

Clerk to the Executive Council

COUNCIL CHAMBER

22 April 2008

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 Republic of Finland. The Order is made in consequence of the arrangements for mutual legal assistance entered into by the Government of the Hong Kong Special Administrative Region and the Government of the Republic of Finland and signed in Helsinki on 4 October 2007. A copy of those arrangements is annexed at Schedule 1 to the Order. The Ordinance is to apply subject to the modifications specified in Schedule 2 to the Order.

(Translation)

Mutual Legal Assistance in Criminal Matters (Finland) Order

**Draft Speech by the Secretary for Security on the Resolution
at the Legislative Council Meeting on 21 May 2008**

Madam President,

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

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

3. The Mutual Legal Assistance in Criminal Matters Ordinance provides the statutory framework for implementing agreements on mutual legal assistance signed between Hong Kong and other jurisdictions, enabling assistance to be provided to or obtained from foreign jurisdictions in the investigation and prosecution of criminal offences, 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.

4. Pursuant to the Ordinance, the Chief Executive in Council has made the Mutual Legal Assistance in Criminal Matters (Finland) Order to implement the bilateral agreement on mutual legal assistance in criminal matters signed between Hong Kong and Finland. By applying the Ordinance between Hong Kong and Finland, the Order allows Hong Kong to provide and obtain assistance in accordance with the procedures set out in the Ordinance and the provisions under the agreement. As the legislation and arrangements on mutual legal assistance in criminal matters vary from jurisdiction to jurisdiction, modifying certain provisions of the Mutual Legal Assistance in Criminal

Matters Ordinance to reflect the practices of individual jurisdictions in implementing the orders on the bilateral agreements concerned is often required. Such modifications are necessary to enable Hong Kong to discharge its obligations under the bilateral agreements concerned. The modifications made for the bilateral agreement between Hong Kong and Finland are specified in Schedule 2 to the Order. These modifications do not affect the substantial conformity of the Order with provisions of the Mutual Legal Assistance in Criminal Matters Ordinance.

5. The making of the Mutual Legal Assistance in Criminal Matters (Finland) Order will enable the implementation of the bilateral agreement signed between Hong Kong and Finland on mutual legal assistance in criminal matters. This is important to the strengthening of Hong Kong's cooperation with foreign jurisdictions in mutual legal assistance in criminal matters.

6. May I invite Members to approve the making of the Mutual Legal Assistance in Criminal Matters (Finland) Order.

7. Thank you, Madam President.

- END -