

LS/B/22/01-02

Secretary for Security
F Division
Security Bureau
6/F, Main & East Wings
Central Government Offices
Lower Albert Road
Hong Kong

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BY FAX

Total no. of page(s) : 9

(Attn : Mr Johann Wong, Principal Assistant Secretary)

Dear Mr Wong,

United Nations (Anti-Terrorism Measures) Bill

With reference to your reply dated 16 May 2002, I write to seek further clarifications of the following :

Long title

The two papers submitted by the Administration for the joint meeting of the LegCo Panels on Security and Administration of Justice and Legal Services describe the existing measures to combat terrorism and terrorist financing giving effect to United Nations Security Council Resolution (UNSCR) 1267 and 1333. Please confirm that there are existing measures that implements UNSCR 1373.

Clause 2 Interpretation

"funds", "property"

The term "funds" is defined in the United Kingdom Terrorism (United Nations Measures) Order 2001 (as amended by The Al-Qa'ida and Taliban (United Nations Measures) Order 2002) to "mean financial assets, economic benefits and economic resources of any kind, including (but not related to) ...". The Bill ignores the first part of this definition and adopts only the remaining part. In setting out a separate definition for "property" in the Bill, "financial assets" and "economic resources" are,

according to your interpretation, property which cannot be described as "funds", such as real property. Since the Bill proposes different mechanisms for freezing of funds and property, please clarify the distinction between "funds" and "property". Why does the Administration prefer the question of scope to be decided by the court?

"terrorist act"

In asking why the test in paragraph (a)(i)(E) and (F) is different from the test for other actions, my focus is on the distinction between "an action that is designed" and the results of an action. Would an action that seriously interferes with or disrupts an electronic system, or an essential service, facility or system but not so designed be excluded by the definition? And would an action so designed but does not result in the interference or disruption be caught by the definition?

The Administration have commented, at the Bills Committee meeting as well as in your paper no. CB(2)2125/01-02(04), that unlawful act will not be caught by the Bill unless all three criteria are met. Would the Administration consider adding a clause similar to section 83.01(1.1) of the Canadian Anti-terrorism Act (see attached) to provide that the expression of a political, religious or ideological cause does not come within the definition of "terrorist act" unless it constitutes the use or threat of action that satisfies the criteria in that definition?

"terrorist associate"

It is not clear from the Bill whether a person designated by the Committee of the United Nations Security Council is a terrorist associate by virtue of the definition of the term. Please clarify whether the Chief Executive needs to specify those persons under Clause 4. Why does the Administration regard those persons as "terrorist associates" instead of "terrorists"?

Clause 3 Application of certain provisions outside HKSAR

Clause 14 Offences

Clause 14(11) provides that summary proceedings may be commenced at any time not later than 12 months from the date on which the person charged first enters the HKSAR after committing the offence. It is stated in your reply that the definition of "person" in Cap. 1 applies. Please explain how the provision would be enforced on a body outside HKSAR but incorporated or constituted under the law of the HKSAR. It is stated in your reply to Clause 14 that the concept of entry into the HKSAR does not apply to a body corporate.

Clause 4 Specification of persons and property as terrorists, terrorist associates or terrorist property

Please specify the factors that the Chief Executive would take into consideration before making a specification under Clause 4.

Please explain why a longer time would be required for completion of the legislative process if the notices are made subsidiary legislation. Under section 28 of the Interpretation and General Clauses Ordinance (Cap. 1), subsidiary legislation may come into operation on the day on which it is published in the Gazette.

The Administration has indicated that the presumption in Clause 4(5) does not apply if there is an appeal pursuant to Clause 16. Please clarify under which provision would the presumption cease to apply. Clause 16(3)(a) only prohibits the presumption from being applicable to the proceedings. Does the Administration regard an application to the court as evidence to the contrary under Clause 4(5)?

Please consider clarifying the intent that the notice in the Gazette under Clause 4(6) is subsidiary legislation by either (a) redrafting the phrase "by notice in the Gazette" in Clause 4(6), or (b) including it in the avoidance of doubt provision in Clause 4(4).

Please consider amending Clause 4(8) to reflect the policy intent that the Clause would operate only when new evidence is available or where there is material change in the circumstance since the application.

Clause 5 Freezing of Funds

Clause 5 empowers the Secretary of Security to specify, by notice in writing, the funds that she has reasonable grounds to suspect are terrorist property and direct that such funds not be made available except under the authority of a licence. Please clarify how the Secretary would exercise the power under Clause 5, in particular, whether the Secretary would adopt the UK approach of listing the names of persons under The Terrorism (United Nations Measures) Order 2001.

Please consider amending Clause 5(4)(a) to reflect the policy intent that the Clause would operate only when new evidence is available or where there is material change in the circumstance since the application.

Clause 11 Disclosure of knowledge or suspicion that property is terrorist property

Your reply indicated that the obligation imposed by Clause 11 is consistent with section 25A of the Organized and Serious Crimes Ordinance and section 25A of the Drug Trafficking (Recovery of Proceeds) Ordinance ("existing provisions"). I suppose that you are referring to the obligation being imposed on any person vis-à-vis financial institutions or other businesses or entities subject to anti-money laundering obligations.

I note that Clause 11 follows the amendments proposed to the existing provisions under the Drug Trafficking and Organized Crime (Amendment) Bill 2000. Please justify why the Administration prefers the test of "knowing or having reasonable grounds to suspect" to "knowing or suspecting".

Clause 14 Offences

There is no dispute that in the absence of Clause 14(10), section 101E of the Criminal Procedure Ordinance (Cap. 221) would apply. The difference between the two provisions is that an officer of a body corporate would be personally liable under Clause 14(10) if the offence committed by the body corporate is proved to be attributable to any neglect on his part. Please justify why this is necessary.

Clause 16 Applications to Court of First Instance

The revised Chinese version of the last sentence in Clause 16(2)(a) is in order. Please consider whether the second sentence should also be revised by adding "其他" before "人".

Please explain how an applicant can satisfy the Court that the Administration had not and does not continue to have reasonable grounds to believe that he is a terrorist or terrorist associate or that the property is terrorist property.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

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c.c. Narcotics Division (Attn : Ms Judy Maguire, Legal Consultant)

D of J (Attn : Mr Geoffrey Fox, SALD)
(Attn : Mr Lawrence Peng, SGC)

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PART II.1

PARTIE II.1

TERRORISM

TERRORISME

*Interpretation**Définitions et interprétation*

Definitions

Définitions

83.01 (1) The following definitions apply in this Part.

83.01 (1) Les définitions qui suivent s'appliquent à la présente partie.

"Canadian"
« Canadien »

"Canadian" means a Canadian citizen or a permanent resident, within the meaning of subsection 2(1) of the *Immigration Act*, or a body corporate incorporated or continued under the laws of Canada or a province.

« activité terroriste »

a) Soit un acte — action ou omission, commise au Canada ou à l'étranger — qui, au Canada, constitue une des infractions suivantes :

« activité terroriste »
"terrorist activity"

"entity"
« entité »

"entity" means a person, group, trust, partnership or fund or an unincorporated association or organization.

(i) les infractions visées au paragraphe 7(2) et mettant en oeuvre la *Convention pour la répression de la capture illicite d'aéronefs*, signée à La Haye le 16 décembre 1970,

"listed entity"
« entité inscrite »

"listed entity" means an entity on a list established by the Governor in Council under section 83.05.

(ii) les infractions visées au paragraphe 7(2) et mettant en oeuvre la *Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile*, signée à Montréal le 23 septembre 1971,

"terrorist activity"
« activité terroriste »

"terrorist activity" means

(a) an act or omission that is committed in or outside Canada and that, if committed in Canada, is one of the following offences:

(iii) les infractions visées au paragraphe 7(3) et mettant en oeuvre la *Convention sur la prévention et la répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques*, adoptée par l'Assemblée générale des Nations Unies le 14 décembre 1973,

(i) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on December 16, 1970,

(ii) the offences referred to in subsection 7(2) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on September 23, 1971,

(iii) the offences referred to in subsection 7(3) that implement the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the General Assembly of the United Nations on December 14, 1973,

(iv) the offences referred to in subsection 7(3.1) that implement the *International Convention against the Taking of Hostages*, adopted by the General

(iv) les infractions visées au paragraphe 7(3.1) et mettant en oeuvre la *Convention internationale contre la prise d'otages*, adoptée par l'Assemblée générale des Nations Unies le 17 décembre 1979,

(v) les infractions visées aux paragraphes 7(3.4) ou (3.6) et mettant en oeuvre la *Convention sur la protection physique des matières nucléaires*, conclue à New York et Vienne le 3 mars 1980,

(vi) les infractions visées au paragraphe 7(2) et mettant en oeuvre le *Protocole pour la répression des actes*

Assembly of the United Nations on December 17, 1979,

(v) the offences referred to in subsection 7(3.4) or (3.6) that implement the *Convention on the Physical Protection of Nuclear Material*, done at Vienna and New York on March 3, 1980,

(vi) the offences referred to in subsection 7(2) that implement the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, signed at Montreal on February 24, 1988,

(vii) the offences referred to in subsection 7(2.1) that implement the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988,

(viii) the offences referred to in subsection 7(2.1) or (2.2) that implement the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, done at Rome on March 10, 1988,

(ix) the offences referred to in subsection 7(3.72) that implement the *International Convention for the Suppression of Terrorist Bombings*, adopted by the General Assembly of the United Nations on December 15, 1997, and

(x) the offences referred to in subsection 7(3.73) that implement the *International Convention for the Suppression of the Financing of Terrorism*, adopted by the General Assembly of the United Nations on December 9, 1999, or

(b) an act or omission, in or outside Canada,

(i) that is committed

illicites de violence dans les aéroports servant à l'aviation civile internationale. complémentaire à la Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, signé à Montréal le 24 février 1988,

(vii) les infractions visées au paragraphe 7(2.1) et mettant en oeuvre la *Convention pour la répression d'actes illicites contre la sécurité de la navigation maritime*, conclue à Rome le 10 mars 1988,

(viii) les infractions visées aux paragraphes 7(2.1) ou (2.2) et mettant en oeuvre le *Protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental*, conclu à Rome le 10 mars 1988,

(ix) les infractions visées au paragraphe 7(3.72) et mettant en oeuvre la *Convention internationale pour la répression des attentats terroristes à l'explosif*, adoptée par l'Assemblée générale des Nations Unies le 15 décembre 1997,

(x) les infractions visées au paragraphe 7(3.73) et mettant en oeuvre la *Convention internationale pour la répression du financement du terrorisme*, adoptée par l'Assemblée générale des Nations Unies le 9 décembre 1999;

b) soit un acte — action ou omission, commise au Canada ou à l'étranger :

(i) d'une part, commis à la fois :

(A) au nom — exclusivement ou non — d'un but, d'un objectif ou d'une cause de nature politique, religieuse ou idéologique,

(B) en vue — exclusivement ou non — d'intimider tout ou partie de la population quant à sa sécurité, entre autres sur le plan économique, ou de contraindre une personne, un gouvernement ou une organisation nationale ou internationale à ac-

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law appli-

complir un acte ou à s'en abstenir, que la personne, la population, le gouvernement ou l'organisation soit ou non au Canada,

(ii) d'autre part, qui intentionnellement, selon le cas :

(A) cause des blessures graves à une personne ou la mort de celle-ci, par l'usage de la violence,

(B) met en danger la vie d'une personne,

(C) compromet gravement la santé ou la sécurité de tout ou partie de la population,

(D) cause des dommages matériels considérables, que les biens visés soient publics ou privés, dans des circonstances telles qu'il est probable que l'une des situations mentionnées aux divisions (A) à (C) en résultera,

(E) perturbe gravement ou paralyse des services, installations ou systèmes essentiels, publics ou privés, sauf dans le cadre de revendications, de protestations ou de manifestations d'un désaccord ou d'un arrêt de travail qui n'ont pas pour but de provoquer l'une des situations mentionnées aux divisions (A) à (C).

Sont visés par la présente définition, relativement à un tel acte, le complot, la tentative, la menace, la complicité après le fait et l'encouragement à la perpétration; il est entendu que sont exclus de la présente définition l'acte — action ou omission — commis au cours d'un conflit armé et conforme, au moment et au lieu de la perpétration, au droit international coutumier ou au droit international conventionnel applicable au conflit ainsi que les activités menées par les forces armées d'un État dans l'exercice de leurs fonctions officielles, dans la mesure où ces activités sont régies par d'autres règles de droit international.

cable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.

"terrorist group"
"groupe terroriste"

"terrorist group" means

- (a) an entity that has as one of its purposes or activities facilitating or carrying out any terrorist activity, or
 - (b) a listed entity,
- and includes an association of such entities.

« Canadien » Citoyen canadien ou résident permanent, au sens du paragraphe 2(1) de la *Loi sur l'immigration*, ou personne morale constituée ou prorogée sous le régime d'une loi fédérale ou provinciale.

« Canadien »
"Canadian"

« entité » Personne, groupe, fiducie, société de personnes ou fonds, ou organisation ou association non dotée de la personnalité morale.

« entité »
"entity"

« entité inscrite » Entité inscrite sur la liste établie par le gouverneur en conseil en vertu de l'article 83.05.

« entité inscrite »
"listed entity"

« groupe terroriste »

« groupe terroriste »
"terrorist group"

a) Soit une entité dont l'un des objets ou l'une des activités est de se livrer à des activités terroristes ou de les faciliter;

b) soit une entité inscrite.

Est assimilé à un groupe terroriste un groupe ou une association formé de groupes terroristes au sens de la présente définition.

For greater certainty

(1.1) For greater certainty, the expression of a political, religious or ideological thought, belief or opinion does not come within paragraph (b) of the definition "terrorist activity" in subsection (1) unless it constitutes an act or omission that satisfies the criteria of that paragraph.

(1.1) Il est entendu que l'expression d'une pensée, d'une croyance ou d'une opinion de nature politique, religieuse ou idéologique n'est visée à l'alinéa b) de la définition de « activité terroriste » au paragraphe (1) que si elle constitue un acte — action ou omission — répondant aux critères de cet alinéa.

Interprétation

Facilitation

(2) For the purposes of this Part, facilitation shall be construed in accordance with subsection 83.19(2).

(2) Pour l'application de la présente partie, faciliter s'interprète en conformité avec le paragraphe 83.19(2).

Facilitation

Financing of Terrorism

Providing or collecting property for certain activities

83.02 Every one who, directly or indirectly, wilfully and without lawful justification or excuse, provides or collects property intending that it be used or knowing that it will be used, in whole or in part, in order to carry out

(a) an act or omission that constitutes an offence referred to in subparagraphs (a)(i) to (ix) of the definition of "terrorist activity" in subsection 83.01(1), or

(b) any other act or omission intended to cause death or serious bodily harm to a civilian or to any other person not taking an

Financement du terrorisme

83.02 Est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans quiconque, directement ou non, fournit ou réunit, délibérément et sans justification ou excuse légitime, des biens dans l'intention de les voir utiliser — ou en sachant qu'ils seront utilisés — en tout ou en partie, en vue :

a) d'un acte — action ou omission — qui constitue l'une des infractions prévues aux sous-alinéas a)(i) à (ix) de la définition de « activité terroriste » au paragraphe 83.01(1);

Fournir ou réunir des biens en vue de certaines actes