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Edited by
VICTOR V. RAMRAJ, MICHAEL HOR
AND KENT ROACH

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Enacting security laws in Hong Kong

SIMON N. M. YOUNG

I. Introduction

This chapter outlines the events surrounding the resisted and, at times, frustrated attempts to enact security laws in Hong Kong from 2001 to 2004. It will be argued that the resistance was attributable to a number of factors, the most important of which was the absence of a grassroots concept of security, conceived in Hong Kong as a result of a genuine and informed public consultation process. In respect of both the anti-terrorism and national security initiatives, the misguided strategy of the government was to impose a set of proposals at the outset, adopt a defensive attitude in the consultation process, and make significant concessions at the final hour as acts of appeasement. This chapter will conclude with a discussion of ideas for developing a new implementation strategy that will take the discourse on security in Hong Kong to a new level.

II. Initiatives to enact security laws 2001–2004

A. Security regime before September 11

While under British rule, seven of the major international treaties on terrorism were extended to Hong Kong after ratification by the United Kingdom.[1] The

I would like to thank Mark Fenwick, Michael Hor and Kent Roach for their comments on an earlier draft.

[1] See Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents (1973), extended on 2 May 1979; International Convention Against the Taking of Hostages (1979), extended on 22 Dec. 1982; Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963), extended on 4 Dec. 1969; Convention for the Suppression of Unlawful Seizure of Aircraft (1970), extended on 22 Dec. 1971, effective 21 Jan. 1972; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), extended on 25 Oct. 1973; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988), extended on 21 May 1997; Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991), extended on 28 April 1997.

colonial government in turn implemented these treaties.[2] It was never considered necessary to apply the general anti-terrorism laws enacted in the United Kingdom to Hong Kong.

Following the resumption of sovereignty by China in 1997, Hong Kong's obligations under international instruments were to cease unless they continued in accordance with the new constitutional framework of The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ('Basic Law').[3] This framework was similar to the previous one in that treaty obligations of China did not automatically apply to Hong Kong, but required a separate decision by the Central People's Government after seeking the views of the Hong Kong government.[4] Showing respect for Hong Kong's high degree of autonomy, the Basic Law made it possible for previous implemented international agreements to continue their implementation even if China was not a party to those agreements.[5] After 1997 the seven anti-terrorism instruments and their implementations were allowed to continue.[6]

Hong Kong also adhered to the anti-terrorism measures contained in United Nations Security Council decisions made under Chapter VII of the United Nations Charter. On 16 July 1997 Hong Kong's Provisional Legislative Council enacted the United Nations Sanctions Ordinance (Cap 537) (UNSO), which gave the Chief Executive a lawmaking power (using subsidiary legislation) for the purpose of implementing Chapter VII sanctions.[7] There were two main prerequisites to the exercise of this power. First, there had to be instructions from the Central People's Government to implement such a sanction.[8] This was consistent with the framework under the Basic Law, which reserved matters of foreign affairs to the central

[2] See Internationally Protected Persons and Taking of Hostages Ordinance (Cap 468), originally Ord. No. 20 of 1995; Fugitives Offenders (Internationally Protected Persons and Hostages) Order (Cap 503H), originally L.N. 205 of 1997; Aviation Security Ordinance (Cap. 494), originally 52 of 1996; Fugitive Offenders (Safety of Civil Aviation) Order (Cap 503G), originally L.N. 204 of 1997; Crimes Ordinance (Cap 200), Part VIIA, originally Crimes (Amendment) Ordinance 1994, Ord. No. 52 of 1994.

[3] Adopted by the 7th National People's Congress at its Third Session on 4 April 1990 ('Basic Law').

[4] Basic Law, Art. 153. [5] Ibid.

[6] At the time, China was a party to all of the instruments except for the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991). The International Convention for the Suppression of Terrorist Bombings (1997) was applied to Hong Kong on 13 Nov. 2001.

[7] The Ordinance was originally Ord. No. 125 of 1997, coming into operation on 18 July 1997. Prior to 1 July 1997, Orders in Council made under English legislation (i.e. the United Nations Act 1946) were used to extend Chapter VII sanctions to British colonies. These Orders in Council were first made by Her Majesty in Council, then laid before the British Parliament, and once published in the Hong Kong Gazette, had legal force in Hong Kong.

[8] United Nations Sanctions Ordinance (Cap 537), s. 2(2) ('UNSO').

government.[9] Secondly, the sanctions had to be 'mandatory measures decided by the Security Council of the United Nations, *implemented against a place outside the People's Republic of China*' (emphasis added).[10] These two conditions were more than prerequisites since their satisfaction made it mandatory for the Chief Executive to exercise the power.[11] Strangely, regulations made under this power, unlike normal subsidiary legislation, were not subject to scrutiny by the Legislative Council of the Hong Kong Special Administrative Region ('LegCo').[12] As discussed below, it was the restrictiveness of this condition and also the second prerequisite that drew significant criticisms from legislators in late 2002 in the course of implementing legislation in response to September 11.

Using the power conferred by the UNSO, Hong Kong passed a regulation, the United Nations Sanctions (Afghanistan) Regulation (Cap 537K) (UNSAR), to implement the economic sanctions against the then Taliban regime in Afghanistan required by Security Council Resolution 1267 (R. 1267) adopted on 15 October 1999.[13] This regulation, for the first time, provided for the listing of individuals, groups, and property related to the Taliban, who were designated by the Committee established by R. 1267, in the Hong Kong Gazette for the purposes of enforcing the sanctions. When the Security Council extended these sanctions on 19 December 2000 by applying a general arms embargo to Taliban territory and against Osama bin Laden and the al Qaeda organization, Hong Kong made a further regulation to implement the extended sanctions.[14]

Overall, the Hong Kong measures against terrorism before September 11 were limited in terms of both the type of terrorist activity proscribed and the persons targeted. There were no general criminal offences proscribing terrorists or terrorist activities. Indeed, no definition of terrorist or terrorist activity was ever codified. There was no offence of financing terrorism. Terrorist acts that did not come within any of the implemented offences were left to be addressed by Hong Kong's ordinary criminal laws, e.g. murder, kidnapping, criminal damage to property, causing explosion likely to endanger, etc. The listing of persons in the Gazette was restricted to Osama bin Laden and members of the Taliban and the al Qaeda organization. Measures to cut off the flow of funds to terrorists were restricted to these persons.

[9] Basic Law, Art. 13. [10] UNSO, s. 2(1).

[11] Ibid., s. 3(1) which provides that the 'Chief Executive shall make regulations to give effect to a relevant instruction'.

[12] Normally, subsidiary legislation is subject to either positive or negative vetting according to ss. 34 and 35, respectively, of the Interpretation and General Clauses Ordinance (Cap 1). Subs. 3(5) of the UNSO provides that these sections are not to apply.

[13] Originally L.N. 229 of 2000, which came into effect on or about 15 June 2000.

[14] See United Nations Sanctions (Afghanistan) (Arms Embargoes) Regulation, L.N. 211 of 2001, which came into effect on or about 11 October 2001 and expired on 18 January 2002.

B. Legal response to September 11 (Part I)

1. Two stage strategy to implementation

The Security Council's first Chapter VII response to the September 11 attacks was in Resolution 1373 (R. 1373), adopted on 28 September 2001. This resolution required all states to implement measures against the financing of terrorism generally and to cut off all forms of support to terrorists and terrorist groups. On 16 January 2002, the Security Council adopted further Chapter VII action in Resolution 1390 (R. 1390), which strengthened its existing measures aimed at Osama bin Laden, members of the al Qaeda organization and the Taliban, and all their controlled entities and associates.

Unlike other jurisdictions, Hong Kong did not respond urgently and rashly with new anti-terrorism legislation after September 11. Since the matter concerned 'foreign affairs', Hong Kong itself was not free to enact laws until it received the relevant instructions from the central government, which were reportedly given in October 2001.[15] In late November 2001, the Security Bureau presented a paper in a LegCo joint meeting between the Panel on Administration of Justice and Legal Services and the Panel on Security outlining measures to combat terrorism.[16] During the course of the meeting, it became apparent that the Administration had internally debated the possible legal responses to September 11.[17] As R. 1373 was a Chapter VII measure, one might naturally have thought that the implementation would be by executive regulations made under the UNSO. However, it was not possible to do this since R. 1373, being a resolution adopted against terrorists anywhere in the world, did not come within the second prerequisite condition of containing measures 'implemented against a place outside the People's Republic of China'.[18] It was decided that this would be the first Security Council sanction to be implemented by ordinary legislation. Whether the Administration intended it or not, this was a positive move since the use of the UNSO executive power would have bypassed public scrutiny and the checks and balances of the legislative process. However,

[15] Security Bureau, '[LegCo] Brief: [the Bill]', SBCR 2/16/1476/74, 10 April 2002, para 2 ('LegCo Brief'). This document and others from the Security Bureau or LegCo Secretariat can be found on the LegCo website: www.legco.gov.hk.

[16] See Security Bureau, 'Measures to combat terrorism', LC Paper No. CB(2)490/01–02(01) for Joint Meeting of the Panels on Administration of Justice and Legal Services, Financial Affairs and Security, 30 Nov. 2001.

[17] See LegCo Secretariat, 'Minutes of joint meeting held on Friday, 30 November 2001 at 10:45 am in the Chamber of the [LegCo] Building', LC Paper No. CB(2) 916/01–02 for LegCo Panels on Security and Administration of Justice and Legal Services, 8 January 2002 ('Minutes of Joint Meeting').

[18] UNSO, above n 8, s. 2(1). In the Minutes of Joint Meeting, ibid., para 28, the Solicitor General acknowledged this problem and made statements to the effect that the UNSO would have to be amended if it was to be used to implement R. 1373.

as will be seen below, the UNSO was not completely out of the picture since it was used to implement R. 1390.

In the November joint meeting, the Secretary for Security, Regina Yip, announced the two-stage strategy to implementation.[19] In the first stage, the 'essential elements' of R. 1373 were to be implemented in a new bill to be introduced in late February 2002.[20] The Administration later identified the 'essential elements' as paragraphs 1(a), (b), (c), (d) and 2(a) of R. 1373, which generally related to the financing and material support of terrorism and freezing of terrorist funds.[21] Added to the first stage was the implementation of Recommendations II, III and IV of the Special Recommendations of the Financial Action Task Force on Money Laundering (FATF).[22] While these recommendations overlapped somewhat with R. 1373, they widened the scope of implementation with new duties related to confiscating terrorist assets and reporting suspicious transactions related to terrorism.[23] In the second stage, the Administration was intending to implement the less urgent 'non-mandatory elements' of R. 1373 and other international conventions against terrorism, and to 'give full effect to the FATF's Special Recommendations'.[24]

While the Administration had planned to introduce legislation in late February 2002, it was not until 17 April 2002 that the United Nations (Anti-Terrorism Measures) Bill was first read in LegCo.[25] Apparently, the drafting of the Bill had 'taken more time than expected'.[26] Unfortunately, as it would turn out, this delay took away a critical amount of time for legislators and the public to scrutinize the Bill. The government was determined to pass the legislation by June 2002. There appeared to be three other reasons for this urgency. First, the FATF had imposed a deadline of June 2002 for countries to comply with its Special Recommendations on terrorist financing. Failure to comply could have resulted in countermeasures from FATF members. As Hong Kong held the Presidency of the FATF during this period, it would have been very embarrassing and a poor example for other countries if it did not comply with this deadline.[27]

[19] Minutes of Joint Meeting, ibid., para 3. [20] Ibid., paras 3, 9.

[21] LegCo Brief, above note 15, para 4. [22] Ibid.

[23] On 28–30 October 2001, the FATF held an extraordinary plenary meeting on the financing of terrorism, which led to eight Special Recommendations. See the FATF website: http://www1.oecd.org/fatf/. Hong Kong has been a member of the FATF since 1990. It held the Presidency in 2001–2002.

[24] LegCo Brief, above note 15, para 4.

[25] The Bill was gazetted on 12 April 2002. See the Government of the HKSAR Gazette website at http://www.gld.gov.hk/cgi-bin/gld/egazette/index.cgi?lang = e&agree = 0.

[26] See reply of Secretary for Security in LegCo Secretariat, 'Minutes of special meeting held on Tuesday, 5 February 2002 at 8:30 am in the Chamber of the [LegCo] Building', LC Paper No. CB(2) 1478/01–02 for LegCo Panel on Security, 25 March 2002, para 30.

[27] The Security Bureau described the consequence for Hong Kong as 'serious reputational risk as the FATF may publicly announce the jurisdictions which fail to comply with certain Special Recommendations'. It went on to say that this would 'reflect badly on HKSAR especially given our leading role as the President of the FATF'. See '[the Bill]', Paper No. CB(2)1930/01–02(03) for the Bills Committee on [the Bill], 17 May 2002.

Secondly, China had reported to the Counter-Terrorism Committee (CTC), established by R. 1373, on 22 December 2001 that Hong Kong would soon be enacting legislation to implement R. 1373.[28] The CTC replied with preliminary comments on the report and a request 'to provide a response in the form of a supplementary report by 24 June 2002'.[29] As it is unusual for China to accept United Nations reporting obligations, it would have been a loss of face if by June 2002 it could not report back to the CTC that concrete measures had been enacted in Hong Kong. China eventually provided its supplementary report in a letter dated 17 July 2002, five days after the Bill had passed through LegCo.[30]

Thirdly, China itself had implemented R. 1373 by enacting anti-terrorism laws for the mainland in late December 2001.[31] It would have greatly displeased China if the Hong Kong authorities had excessively delayed the implementation of R. 1373, especially since the instruction to Hong Kong was issued in October 2001.[32] As discussed below, these three reasons were the source of an immense amount of pressure to have the legislation passed before the 2002 summer recess.

2. United Nations (Anti-Terrorism Measures) Ordinance (UNATMO)[33]

a. The Process There is no doubt that the pressure to pass the Bill in less than three months resulted in faulty legislation. Indeed, the second stage of implementing anti-terrorism laws, which began in May 2003, was partly devoted to correcting the flaws in the UNATMO. The Bills Committee for the Bill met for the first time on 17 May 2002. Although the Bills Committee managed to hold fifteen meetings before the Bill was passed by LegCo on 12 July 2002, the last twelve meetings were packed within a period of 24 days, leaving on average a day between each meeting. No wide public consultations

[28] Jeremy Greenstock, 'Letter dated 27 December 2001 from the Chairman of the [CTC] addressed to the President of the Security Council', UN Doc. S/2001/1270, Annex.

[29] Jeremy Greenstock, 'Letter dated 10 April 2002 from the Chairman of the [CTC] addressed to the President of the Security Council', UN Doc. S/2002/399.

[30] Jeremy Greenstock, 'Letter dated 31 July 2002 from the Chairman of the [CTC] addressed to the President of the Security Council', UN Doc. S/2002/884, Annex.

[31] See the Government of China's supplementary report in the Annex to Jeremy Greenstock, 'Letter dated 4 January 2002 from the Chairman of the [CTC] addressed to the President of the Security Council', UN Doc. S/2001/1270/Add.1.

[32] As these instructions have never been revealed, it is not clear if the Chinese authorities imposed any deadline or timetable for implementation.

[33] Originally Ord. No. 27 of 2002. Partly in operation on 23 August 2002, see L.N. 137 of 2002.

were held on the Bill. While various public interest groups, media and business associations, legal academics and legal professional groups were invited to make written submissions, only two meetings were held to receive deputations from invited persons and groups.[34]

A common criticism amongst the commentators was the insufficient amount of time the government had allowed for review of the original Bill and the many proposed amendments that were being made. For example, in its written submission the Hong Kong Bar Association deplored 'the lack of proper time for full public consultation on the Bill when there is obviously no urgency to enact any anti-terrorist legislation in Hong Kong'.[35] From as early as the seventh meeting on 17 June 2002, the Administration began introducing a set of committee stage amendments (CSAs) that were constantly being updated and altered. The manner in which these amendments were being proposed, considered and modified was chaotic. Commentators were not properly informed of the latest changes to the proposed CSAs.[36] These sudden changes to rashly formulated proposals frustrated persons participating in the process.

The legislators who sat on the Bills Committee repeatedly criticized the government's moves to rush the Bill through LegCo. The following translated excerpt from legislator Audrey Eu's speech in the final debates captures the frustration felt by the Bills Committee members at the time:

> Actually, over the past one and a half months, Members have worked non-stop to scrutinize the Bill, convening 15 meetings in total. If my reckoning is correct, the Administration has submitted more than 10 revised drafts. Last Wednesday, when the last meeting of the Bills Committee was held, the Government could not submit a printed version of the finalized draft in time, and so, the draft had to be dictated to Members at the meeting, and Members were required to submit their amendments to the Government's finalized draft before midnight that day. This shows that the Bills Committee has never had any opportunity to discuss the Bill and submit appropriate amendments. It is extremely irresponsible, Madam President, to handle a bill like the anti-terrorism Bill, which is so very complicated in nature and extensive in implications.[37]

[34] See LegCo Secretariat, 'Minutes of the second meeting held on Monday, 3 June 2002 at 8:30 am in the Chamber of the [LegCo] Building', LC Paper No. CB(2)2323/01–02 for Bills Committee on the Bill, 17 June 2002, and LegCo Secretariat, 'Minutes of the 10th meeting held on Tuesday, 25 June 2002 at 8:30 am in Conference Room A of the [LegCo] Building', LC Paper No. CB(2)2880/01–02 for Bills Committee on the Bill, 7 Oct. 2002.

[35] See Hong Kong Bar Association, 'Submissions on [the Bill]', LC Paper No. CB(2)2548/01–02(01) for the Bills Committee on the Bill, 9 July 2002, para 5. To the same effect, see submissions of JUSTICE in '[The Bill]: Main Points and Suggested Draft Amendments', LC Paper No. CB(2)2390/01–02(01) for the Bills Committee on the Bill, June 2002, p 1.

[36] See generally Simon Young, 'Hong Kong's Anti-Terrorism Measures Under Fire', Occasional Paper No. 7 (Hong Kong: Centre for Comparative and Public Law, 2003) 8–10, which can be found at www.hku.hk/ccpl.

On the day of the ninth meeting in the Bills Committee, i.e. 24 June 2002, the government, somewhat high-handedly, gave notice to resume the second reading of the Bill on 10 July 2002.[38] This was done even though it was clear that the work of the Bills Committee was incomplete and members of the Committee objected to such notice being given.[39] This move was like adding fuel to the already fired atmosphere of the Committee. Three days later, in a show of protest, the Bills Committee passed, without objection, the following motion proposed by legislator Cyd Ho:

> That this Bills Committee expresses deep regret that the Executive has given notice to resume the Second Reading debate on the United Nations (Anti-Terrorism Measures) Bill on 10 July 2002 before scrutiny of the Bill has been completed, which is at variance with the established practice of the Legislative Council.[40]

The so-called 'embarrassing hiccup' with the enactment of the terrorist recruitment offence was symbolic of the defects resulting from the rushed and unconsidered passage of the Bill.[41] The original proposal made it an offence for a person to 'become a member of, or begin to serve in any capacity with, a person specified in a notice'.[42] This offence was drawn so broadly that it could have included the family members of the specified person and anyone providing a service to that person, including his or her legal counsel or someone as innocuous as a laundry delivery person. It was also problematic because it lacked express *mens rea* requirements. The government acknowledged these problems and prepared committee stage amendments to address some of them.[43] The embarrassing moment occurred in the Council meeting when due to a dinner break there were an insufficient number of legislators who

[37] *Official Record of Proceedings of the Legislative Council of the Hong Kong Special Administrative Region* ('*HK Hansard*'), 11 July 2002, 8863–4 (translated from Cantonese).

[38] Legislators questioned whether there had been a breach of R. 54(5) of the LegCo Rules of Procedure, which required consultation with the chairman of the House Committee before effective notice could be given. See LegCo Secretariat, 'Minutes of the 29th meeting held in the [LegCo] Chamber at 2:30 pm on Friday, 28 June 2002', LC Paper No. CB(2)2490/01–02 for House Committee of the [LegCo], 25 Sept. 2002, para 78–120.

[39] Ibid., para 99.

[40] See LegCo Secretariat, 'Minutes of the 11th meeting held on Thursday, 27 June 2002 at 8:30 am in Conference Room A of the [LegCo] Building', LC Paper No. CB(2)2881/01–02 for the Bills Committee on the Bill, 7 Oct 2002, para 2.

[41] See Ambrose Leung, Angela Li and Alyssa Lau, 'Embarrassing hiccup for terror bill', *South China Morning Post*, 12 July 2002.

[42] Bill, above note 25, clause 9(1)(b).

[43] LegCo Secretariat, 'Report of the Bills Committee on [the Bill]', LC Paper No. CB(2)2401/01–02 for House Committee meeting on 28 June 2002, para 44.

supported the government's amendment.[44] A competing amendment proposed by legislator Margaret Ng aimed at narrowing the provision even more was also defeated. After the absent legislators had returned, there was little choice for the government supporters but to accept the original proposal, which even the government acknowledged was faulty. The enacted proposal contained another obvious anomaly in that it referred only to persons specified by the Chief Executive and not to those specified by court order, which was a second form of specification added only in the CSAs.[45] Subsequently, the Administration stated that the provision would not be brought into operation until it was corrected in the second stage of implementation.[46]

b. The Substance In formulating its proposals, the Administration stated that it was adopting a 'minimalist approach' to implementing R. 1373.[47] To some extent, this was true. The Bill was relatively short, with only nineteen clauses and three schedules, spanning only twenty-two pages in the Gazette. Except in one respect, the proposals stayed within the aims and purposes of R. 1373 and the FATF Special Recommendations. None of the controversial detention powers or provisions affecting fair trial rights, as seen in other countries such as the United States and Canada, were proposed.[48] Nevertheless, the original proposals were often drawn in such broad terms without sufficient safeguards or clear limits that their impact on human rights seemed far from minimal.

One of the most pressing concerns with the proposals was the risk that the new specification system might be used to marginalize groups, such as the Falon Gong, that China had branded as 'terrorists' or counter-revolutionaries.[49] Whether this was possible turned on how 'terrorist act' was defined in the Bill since the definitions of 'terrorist', 'terrorist associate' and 'terrorist property' were all based on the concept of 'terrorist act'. The definition in the original Bill

[44] See *HK Hansard*, 11 July 2002, above note 37, 8990–9004; 'Embarrassing hiccup for terror bill', above note 41.

[45] See UNATMO, above note 33, s. 10.

[46] Legal Services Division, 'Legal Service Division Report on Subsidiary Legislation Gazetted on 23 August 2002', which is Annex III to LegCo Secretariat, 'Paper for the House Committee Meeting on 4 October 2002', LC Paper No. LS 131/01–02 for House Committee, 2 Oct. 2002.

[47] Security Bureau, 'Legislative Proposals to Implement Anti-terrorism Measures under United Nations Security Council Resolution (UNSCR) 1373', LC Paper No. CB(2)1021/01–02(01) for LegCo Panel on Security, January 2002, para 5.

[48] See, in this volume, Roach, Chapter 23; Fenwick and Phillipson, Chapter 21; Banks, Chapter 22.

[49] Minutes of Joint Meeting, above note 17, para 6(b).

together with the superimposed changes in the final enacted definition is shown below:

'terrorist act' (恐怖主義行為) –

(a) subject to paragraph (b), means the use or threat of action where–
  (i) the action (including, in the case of a threat, the action if carried out) –
    (A) ~~involves~~ causes serious violence against a person;
    (B) ~~involves~~ causes serious damage to property;
    (C) endangers a person's life, other than that of the person committing the action;
    (D) creates a serious risk to the health or safety of the public or a section of the public;
    (E) is ~~designed~~ intended seriously to interfere with or seriously to disrupt an electronic system; or
    (F) is ~~designed~~ intended seriously to interfere with or seriously to disrupt an essential service, facility or system, whether public or private; and
  (ii) the use or threat is–
    (A) ~~designed~~ intended to ~~influence~~ compel the Government or to intimidate the public or a section of the public; and
    (B) made for the purpose of advancing a political, religious or ideological cause;
(b) in the case of paragraph (a)(i)(D), (E) or (F), does not include the use or threat of action in the course of any advocacy, protest, dissent or ~~stoppage of work~~ industrial action.[50]

As shown by the amendments, the original definition used imprecise language, such as 'involves' and 'designed', unfamiliar to the criminal law. Legislators also felt that the exception clause for legitimate protest and dissent had to be extended to other non-directly violent forms of terrorism.[51] Despite these improvements to the original definition, there was one issue that the administration and legislators could not agree on. Margaret Ng, one of the main critics of the Bill and legislative process, proposed that the definition of 'terrorist act' should not include threats of action.[52] It was argued that this made the definition unjustifiably broad as it could catch merely mischievous behaviour.[53] Threats and other inchoate harm were already caught by the definition of 'terrorist', i.e. a 'person who commits, or attempts to commit, a terrorist act or who participates in or facilitates the commission of a terrorist act'.[54] The Secretary for Security, however, insisted

[50] See Bill, above note 25, clause 2(1); UNATMO, above note 33, s. 2(1).

[51] LegCo Secretariat, 'Report of the Bills Committee on [the Bill]', LC Paper No. CB(2)2537/01–02 for House Committee, 9 July 2002, paras 12–17 ('UNATMO Report').

[52] *HK Hansard*, 11 July 2002, above note 37, 8916–18. [53] Ibid.

[54] UNATMO, above note 33, s. 2(1).

on keeping the threat component mainly because other countries had it in their definition and threats of terrorist acts would inevitably cause public panic.[55]

The original proposed specification system contributed to concerns that it could be misused against certain groups. The original proposal gave the Chief Executive the exclusive power to specify persons and property as 'terrorists', 'terrorist associates' or 'terrorist property' on reasonable grounds to believe.[56] Once a person or property was specified and gazetted, the person or property was presumed to be a terrorist, terrorist associate, or terrorist property, as the case may be, until proven to the contrary. It was left to persons specified to bring proceedings in the Court of First Instance to contest the specification. Without a system of prior judicial authorization, there was a real concern that Beijing might try to influence the Chief Executive on what individuals and groups to specify.

To the government's credit, it accepted these criticisms and revamped the system by introducing a number of safeguards.[57] While specification by the Chief Executive was maintained, it was restricted to only persons and property already specified by a United Nations sanctions committee.[58] If other persons or property were to be specified, it had to be by the Chief Executive's application to the Court of First Instance.[59] There were further judicial checks on this second form of specification by way of review and appeal.[60] Another safeguard that was added was a compensation provision for persons wrongly specified.[61] But one of the threshold preconditions for obtaining compensation required the court to be satisfied that 'there has been serious default on the part of any person concerned in obtaining the relevant specification'.[62] To many legislators and commentators critical of the Bill, this threshold was so high that it essentially nullified the provision.[63] Until recently, the government has always held that the threshold is appropriate to cap government expenditure and also because it is the same standard as for the compensation provisions in Hong Kong's money laundering laws.[64]

Specification facilitates the freezing and forfeiture of terrorist property, which under the Bill (later accepted unchanged in the UNATMO) was defined as:

(a) the property of a terrorist or terrorist associate; or
(b) any other property consisting of funds that–
  (i) is intended to be used to finance or otherwise assist the commission of a terrorist act; or
  (ii) was used to finance or otherwise assist the commission of a terrorist act.[65]

[55] *HK Hansard*, 11 July 2002, above note 37, 8912–8914.
[56] Bill, above note 25, clause 4.
[57] See UNATMO Report, above note 51, paras 29–38.
[58] UNATMO, above note 33, s. 4.
[59] Ibid., s. 5.
[60] Ibid., ss. 2(7), 17.
[61] Ibid., s. 18.
[62] Ibid., s. 18(2)(c).
[63] See criticisms in UNATMO Report, above note 51, paras 83–91.
[64] *HK Hansard*, 11 July 2002, above note 37, 9045–6.
[65] See Bill, above note 25, clause 2(1); UNATMO, above note 33, s. 2(1).

By virtue of the first limb of the definition, 'terrorist property' was defined very broadly. The first limb presumptively tainted all property connected to the terrorist or terrorist associate; in other words, there was no need to show that the property was in fact crime tainted. In the Bill, it was proposed that the Secretary for Security would have the exclusive power to freeze funds that were terrorist property, subject to subsequent review by a court.[66] A scheme of executive freezing was controversial not only because of the absence of prior judicial scrutiny but also because it deviated from the general approach under Hong Kong's money laundering laws of obtaining court orders to restrain suspected proceeds of crime.[67] Ultimately, the government insisted upon maintaining the scheme on grounds that urgency and swift action required executive control.[68] It was moderately mitigated by added safeguards such as the power of the Secretary for Security and of the courts to grant a licence to release frozen funds to pay reasonable living and legal expenses, the reduction in the time limit of a freeze notice from three years to two years, and the need to show a 'material change in the grounds' if an application was made to re-freeze previously but no longer frozen funds.[69]

The scheme of forfeiting terrorist property was also somewhat unique to Hong Kong because it involved civil forfeiture, i.e. it was not predicated on a criminal conviction; the standard of proof was the civil standard, and hearsay evidence was admissible.[70] One important safeguard of this scheme was that not all terrorist property was forfeitable. It had to be shown to have some connection to crime, which was true for the second limb of the definition but not for the first. Merely being property of a terrorist or terrorist associate was insufficient for forfeiture; it also had to be property which:

i. in whole or in part directly or indirectly represents any proceeds arising from a terrorist act;
ii. is intended to be used to finance or otherwise assist the commission of a terrorist act; or
iii. was used to finance or otherwise assist the commission of a terrorist act.[71]

[66] Bill, ibid., clause 5.
[67] See Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405), s. 10 ('DTROPO'); Organized and Serious Crimes Ordinance (Cap 455), s. 15 ('OSCO'). An exception is seen in Part IVA of the DTROPO, which allows a limited warrantless power to seize money suspected to be proceeds of drug trafficking going across the border.
[68] See Security Bureau, 'Summary of Written Submissions and the Administration's Response', Paper No. CB(2)2424/01–02(04) for Bills Committee on the Bill, 26 June 2002.
[69] See *HK Hansard*, 11 July 2002, above note 37, 8945–8947.
[70] Civil forfeiture does exist on a limited basis in Part IVA of the DTROPO, above note 67. On the use of such powers in other countries, see Davis, Chapter 9, in this volume.
[71] UNATMO, above note 33, s. 13(1)(a).

One of the implications of this narrower forfeiture power is that the power to freeze is more extensive than the power to forfeit, since the former applies to all terrorist property in the form of funds. This raises the issue of the legitimacy of allowing the government to hold on to property that it cannot forfeit. Ultimately, this is an issue of whether the first limb of the 'terrorist property' definition is too broad.

Another area of great controversy in the Bills Committee was the enactment of new criminal prohibitions.[72] The fiasco concerning the terrorist recruitment offence has already been mentioned.[73] There were five other new criminal prohibitions. Two of the new provisions concerned the financing of terrorism and appeared to overlap each other substantially, leaving one to wonder if more time should have been given to their formulation. The first was concerned with providing or collecting funds to be supplied or otherwise used by a person known or reasonably believed to be a terrorist or terrorist associate.[74] The second was concerned with making funds or financial (or related) services available to or for the benefit of a person known or reasonably believed to be a terrorist or terrorist associate.[75] A third provision prohibiting the supply of weapons to terrorists was relatively uncontroversial.[76]

One debated issue that was common to all three offences was the repeated use of the *mens rea* standard of has or having 'reasonable grounds to believe', a standard that appears five times in these three provisions.[77] It is controversial since Hong Kong courts have interpreted it as an objective standard. Having actual belief is not required; it is enough if sufficient objective grounds for the belief exist and one is aware of those objective grounds.[78] Calls for a purely subjective standard were rebuffed by the Administration primarily on the basis that the standard was well established in Hong Kong's money laundering offences.[79] In stage two of the implementation, the Administration has softened its position on this point. Signs of this change were already seen in respect of the *mens rea* standard for the disclosure offence. In the Bill, it was proposed that any person who knew or had 'reasonable grounds to suspect' that any property was terrorist property had a duty to make a secret disclosure to the police.[80] This was an offence

[72] For a discussion on the limits of the criminal law in preventing terrorism, see Roach, Chapter 7, in this volume.
[73] See text accompanying above note 41. [74] UNATMO, above note 33, s. 7.
[75] Ibid., s. 8. [76] Ibid., s. 9.
[77] By comparison, see the discussion of *mens rea* standards in the Canadian and United States offences in Davis, Chapter 9, in this volume.
[78] See *HKSAR* v. *Shing Siu Ming & Others* [1999] 2 HKC 818 at 825 (CA), leave to appeal to CFA refused, [1999] 4 HKC 452 (CFA AC); *HKSAR* v. *Yam Ho Keung* [2002] 1230 HKCU 1 (CA).
[79] *HK Hansard*, 11 July 2002, above note 37, 8985–6.
[80] Bill, above note 25, clause 11(1).

that had the greatest potential impact on ordinary persons, particularly those in the financial and business sectors. After significant concerns were expressed by the business and professional community, the government yielded by replacing the objective element with the subjective standard of 'knows or suspects'.[81]

The most controversial new criminal offence introduced was the prohibition against false threats of terrorist acts.[82] Legislators and media groups objected to the proposal for various reasons, including the chilling effect on press freedoms, being outside R. 1373 or the FATF recommendations, and being already covered by offences in the Public Order Ordinance (Cap 245).[83] In the words of Margaret Ng, the 'Secretary [had] not kept her word' of applying a minimalist approach.[84] While the government acknowledged that it was outside the scope of R. 1373 and the FATF recommendations, it nevertheless said that the offence was necessary because of the incidences of false threats of anthrax after September 11.[85] Ultimately, without achieving any reconciliation of these divergent views, the offence provision was passed with only an amendment to confine the scope of the *mens rea* requirement.[86]

There were two other major amendments to the original Bill that were important from the perspective of human rights. The first amendment removed two lengthy schedules that would have conferred controversial new police powers to enforce the provisions in the Bill.[87] The other amendment, to the relief of various legal and media groups, provided for express preservation of legal professional privilege, the privilege against self-incrimination and the protective regime governing journalistic materials in the Interpretation and General Clauses Ordinance (Cap 1).[88]

After all the amendments were made, the enacted legislation had transformed significantly from the original Bill.[89] One ponders why the Bill in its original form was so short-sighted and over-broad to begin with. It was certainly not for lack of preparation time since the instructions from China had arrived in October 2001, six months before the Bill was gazetted. As argued below, it was due to insufficient consultation with the public and experts at the 'Bill formulation stage', and not only at the 'Bill amendment

[81] UNATMO Report, above note 51, paras 60–72. [82] Bill, above note 25, clause 10.
[83] UNATMO Report, above note 51, paras 53–9.
[84] *HK Hansard*, 11 July 2002, above note 37, 8861. [85] Ibid., 9004–16.
[86] The original proposal made it an offence to communicate information known or believed to be false to another person 'with the intention of inducing in him or any other person a false belief that a terrorist act has been, is being or will be carried out'. The enacted provision confines the added intent element to that of 'causing alarm to the public or a section of the public by a false belief that a terrorist act has been, is being or will be carried out'. See UNATMO, above note 33, s. 11.
[87] Bill, above note 25, Schedules 2 and 3. [88] Ibid., paras 26–7.
[89] See Young, above note 36 for discussion of the legislative process.

stage'. This is a problem that reoccurs with the National Security Bill. The critical tasks of formulating policies and drafting the bill, carried out from October 2001 to April 2002, were largely completed by government lawyers and officials with no outside participation.

The willingness of the government to make concessions was more likely due to the June 2002 deadline than an earnest desire to safeguard fundamental rights and freedoms. Where the government was unwilling to change a proposal, there was a tendency to try to justify its position by reference to finding the same provision in other Hong Kong laws or in the laws of other countries. But this approach to justification is narrow-minded because, in respect of existing Hong Kong laws, it fails to question whether those laws are themselves illegitimate (particularly in the areas of police powers and *mens rea* standards) or otherwise inappropriate for the anti-terrorism context. In respect of the anti-terrorism laws of other countries, it cannot be assumed that what is appropriate for country A, B and C is necessarily appropriate for Hong Kong, particularly having regard to its relatively low risk of attracting terrorist-related activity.

3. United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002

On the same date the UNATMO was passed through LegCo, the Chief Executive made the United Nations Sanctions (Afghanistan) (Amendment) Regulation 2002 (UNSAAR), which amended the UNSAR in light of R. 1390, adopted by the Security Council on 16 January 2002.[90] To the outsider, this new regulation came as a bit of a surprise since it suddenly emerged as law without any prior consultation with the public or even the elected members of the legislature. It would also have been surprising for the legislators who had just completed an intense one and a half month exercise of scrutinizing the UNATMO. The UNSAAR and UNATMO had much in common in terms of origin, purpose and provisions, yet the manner in which both were enacted could not have been more unique. It did not take long for legislators and the legal advisors in the LegCo Secretariat to start questioning the legal basis of the UNSAAR and the manner in which it came into being.

On 4 October 2002, legislators discussed three issues concerning the UNSAAR identified by LegCo's Legal Service Division.[91] First, legislators questioned whether R. 1390 was a sanction to be implemented 'against a

[90] Published in the *Hong Kong Gazette* on 19 July 2002, amending the United Nations Sanctions (Afghanistan) Regulation (Cap 537K).

[91] LegCo Secretariat, 'Minutes of the meeting held in the [LegCo] Chamber at 2:30 pm on Friday, 4 October 2002', LC Paper No. CB(2) 2886/01–02 for House Committee, Oct. 2002, paras 20–5.

place' as required by the UNSO.[92] If it was not, then there had to be a legal basis for the amendment regulation other than the UNSO, possibly the Basic Law itself. While the antecedents of R. 1390 certainly arose out of events in Afghanistan, by January 2002, it appeared the real focus of R. 1390 was on certain individuals and entities linked to Osama bin Laden and al Qaeda, persons who were probably no longer physically in Afghanistan. The Administration's position was that R. 1390 was a sanction implemented against a place and the use of the UNSO was appropriate.[93] In making this argument, it cited the number of references to 'Afghanistan' in R. 1390, and the antecedent resolutions, R. 1267 and R. 1333, which were more clearly applied against a place.[94]

The second issue identified by the Legal Service Division was the overlap of the supply of weapons offences in the UNATMO with three offences in the UNSAAR.[95] The difficulty was that the offences in the UNSAAR involved strict liability, subject to statutory defences for the accused to satisfy on balance. The equivalent offences in the UNATMO required proof of *mens rea*. In theory, if a relevant case arose, the prosecution could avoid this *mens rea* requirement by choosing to prosecute under the UNSAAR offences. In its response of 26 November 2002 the Administration acknowledged that there was overlap, but said that this was inevitable since there was overlap between R. 1373 and R. 1390.[96] Recognizing that the offence in the UNATMO was wider, it was prepared to repeal the strict liability offences in the UNSAAR.[97] The LegCo Legal Service Division later questioned whether the Hong Kong government could amend the sections in the UNSAR that overlapped with those in the UNATMO without fresh instructions from the Central People's Government.[98]

In respect of the third issue, the Legal Service Division noticed the 'wide powers of search and investigation' contained in six provisions of the

[92] LegCo Secretariat, 'Legal Service Division Report on Subsidiary Legislation gazetted from 19 July 2002 to 27 September 2002', LC Paper No. LS 131/01–02 for the House Committee Meeting on 4 October 2002, 2 Oct. 2002, Annex I, paras 5–7 ('Report on regulations').

[93] Commerce, Industry and Technology Bureau, '1: Whether the [UNSAAR] (Amendment Regulation) is within the regulation making powers of the UN Sanctions Ordinance? (Raised by the Hon James To)', Paper No. CB(2)164/02–03(01) for House Committee, October 2002.

[94] Ibid. [95] Report on regulations, above note 92, para 9.

[96] Anita Chan for Secretary for Commerce, Industry and Technology, Letter to Clerk to Subcommittee on UNSAAR and United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002, Paper No. CB(2)477/02–03(01), 26 Nov. 2002.

[97] Ibid.

[98] LegCo Secretariat, 'Report of the Subcommittee on [UNSAAR] and United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002', LC Paper No. CB(2)3003/02–03 for the House Committee meeting on 3 October 2003, Appendix II, paras 6–10.

UNSAAR.[99] R. 1390 did not expressly require the inclusion of these new police powers. The Administration's response was that these powers were necessary to facilitate the enforcement of the new sanctions in the UNSAAR and that they also existed in a previous UNSO regulation relating to Liberia.[100]

Legislators in the House Committee were not satisfied with these responses.[101] Concerns about the UNSO and its regulations dragged on in two subcommittees of the House Committee.[102] Three further issues developed. The first was whether the implementing instructions from the Central People's Government should be disclosed to legislators. While the Administration was prepared to advise as to the contents of the instructions, it refused to make disclosure on grounds that they are intended for internal use only and disclosure would be unprecedented.[103] The second issue concerned the means by which to implement United Nations sanctions, and particularly when administrative measures, regulations or primary legislation should be used.[104] Finally, the third issue, and the more fundamental one, was whether the regulations made under the UNSO should be subject to legislative scrutiny. These issues remained unresolved at the conclusion of LegCo's 2000–2004 term.

C. *The Article 23 episode*[105]

With the first stage of the anti-terrorism initiative completed, the path was clear for the Security Bureau to commence its national security initiative in late 2002. Only two months after the enactment of the UNATMO, the Security Bureau released *Proposals to Implement Article 23 of the Basic Law: A Consultation Document* ('*Consultation Document*').[106] Article 23 of the Basic Law required Hong Kong to enact laws on its own to prohibit acts of treason, secession, sedition, and subversion against the Central People's Government. It also required laws against the theft of state secrets and foreign political organizations or bodies conducting activities in Hong Kong or forming ties with Hong Kong political organizations or bodies. It is well known that Article 23 was inserted in the Basic Law by China following the mass demonstrations in Hong Kong against the 1989 Tiananmen incident in Beijing.[107] After several months of public consultation, the National Security (Legislative Provisions) Bill ('National Security Bill') was introduced in LegCo on 26 Feb 2003.[108]

The legislative exercise to implement Article 23 probably would have occurred even if September 11 did not happen. Nevertheless, following as it did after the first stage of implementing anti-terrorism laws, the two initiatives were closely related in many ways. It was very much the same group of officials responsible for implementing both initiatives. The Secretary for Security, Regina Yip, was the person-in-charge of both. This can probably explain why some of the same tactics and strategies to legal drafting, consultation and concession-making were employed. As well, the substance of the proposals shared many commonalities. Professor Kent Roach has argued that the National Security Bill 'combined an older vision of security based on betrayal of the state with a newer vision of security found in post-September 11 anti-terrorism laws'.[109] Two of the more noteworthy commonalities were found in the National Security Bill's definition of 'serious criminal means' and its use of the proscription mechanisms to ban local organizations.

As was true with the anti-terrorism Bill, though for different reasons, there was a significant amount of criticism of both the consultation and legislative processes. Two critical observations were generally made about the *Consultation Document*.[110] Although a significant amount of research from

[99] Report on regulations, above note 92, para 10. [100] Ibid.

[101] See LegCo Secretariat, 'Minutes of meeting held on Monday, 31 March 2003 at 4:30 pm in Conference Room A of the [LegCo] Building', LC Paper No. CB(2)2064/02–03 for the Panel on Administration of Justice and Legal Services, 13 May 203, paras 45–51; LegCo Secretariat, Minutes of the meeting held in the LegCo Chamber at 2:30 pm on Friday, 3 October 2003, paras 53–6.

[102] The Subcommittee on UNSAAR and United Nations Sanctions (Angola) (Suspension of Operation) Regulation 2002 held four meetings from 30 Oct. 2002 to 25 Feb. 2003. The Subcommittee on the United Natio s Sanctions (Liberia) Regulations 2003 held five meetings from 11 Dec. 2003 to 21 June 2004.

[103] Donald Tsang, Chief Secretary for Administration, Letter to Hon Miriam Lau, Chairman of the House Committee dated 13 Nov. 2003.

[104] The problem of having multiple listing mechanisms in domestic law has also been the subject of criticism in Canada. See E. A. Dosman, 'For the Record: Designating "Listed Entities" for the Purposes of Terrorist Financing Offences at Canadian Law' (2004) 62 *University of Toronto Faculty of Law Review* 1.

[105] The events surrounding the rise and fall of the National Security (Legislative Provisions) Bill together with a detailed examination of all the government proposals is the subject of a book, *National Security and Fundamental Freedoms: Hong Kong's Article 23 Under Scrutiny*, edited by Fu Hualing, Carole Petersen and Simon Young published by Hong Kong University Press in March 2005 ('*Article 23 Book*').

[106] Security Bureau, *Proposals to Implement Article 23 of the Basic Law: A Consultation Document* (Hong Kong Government, 2002) was released on 24 September 2002.

[107] See Fu Hualing, 'The National Security Factor: Putting Article 23 of the Basic Law in Perspective' in Steve Tsang, ed., *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press, 2001) 73–98.

[108] National Security (Legislative Provisions) Bill, gazetted on 14 February 2003 ('National Security Bill').

[109] Kent Roach, 'Old and New Visions of Security: Article 23 Compared to Post-September 11 Security Laws', in *Article 23 Book*, above note 105.

[110] See generally, Carole Petersen, 'Hong Kong's Spring of Discontent: The Rise and Fall of the National Security Bill in 2003' in *Article 23 Book*, ibid.; Carole Petersen, 'National Security Offences and Civil Liberties in Hong Kong: A Critique of the Government's "Consultation" on Article 23 of the Basic Law' (2002) 32 *Hong Kong Law Journal* 457–70.

international sources was reflected, the document presented what seemed to be *fait accompli* proposals rather than different options for reform. The second critical observation was that the 62-page document contained proposals often described in vague and ambiguous language. One of the most common sayings floated by commentators at the time was that the 'devil was in the details'; until the details were revealed, it was difficult to come to any final opinions on the proposals. It was not long after the publication of the *Consultation Document* that commentators began asking the government to publish a 'white bill' before presenting the 'blue bill' for first reading in LegCo.

The government ultimately declined to issue a white bill, saying that amendments would still be possible when the blue bill was scrutinized.[111] Legislators and public interest groups, aware of how difficult it was to amend a blue bill without support from the government, were greatly disappointed. Before the issuance of the Bill in February 2003, the government suffered another blow to its credibility with the *Compendium of Submissions* fiasco, which led some legislators to condemn the Administration for compiling a compendium 'in a slipshod, incomplete and inequitable manner, distorting the views expressed by the public and organizations'.[112]

There was much in the substance of the National Security Bill that was indeed positive from the viewpoint of modernization and rationalization of the law. Hong Kong's laws concerning treason and sedition have never been updated since they were introduced pre-World War II.[113] If some of these offences and related police powers were to be applied now, they would surely be challenged on constitutional human rights grounds, e.g. freedom of expression.

Unlike with the anti-terrorism initiative, the Administration never claimed to take a 'minimalist approach' to implementation. There were at least three main proposals that were not expressly required by Article 23.[114] The first related to the creation of a new offence of illegal access to protected information and a new category of protected information related to 'international relations or affairs concerning the Hong Kong Special Administrative Region which are, under the Basic Law, within the responsibility of the Central Authorities'.[115] This proposal was of great concern to

[111] Ravina Shamdasani and Jimmy Cheung, 'Officials stand firm against white bill', *South China Morning Post*, 24 December 2002, 2.

[112] Words taken from a condemnatory motion, introduced by legislator Sin Chung Kai, which did not pass. See debates in *HK Hansard*, 26 February 2003, above note 37, 4182–257. See also Press Release, 'Transcript of remarks by Secretary for Security', 6 February 2003.

[113] See generally Crimes Ordinance (Cap 200), Parts I and II.

[114] See generally Benny Y. T. Tai, 'The Principle of Minimum Legislation for Implementing Article 23 of the Basic Law' (2002) 32 *Hong Kong Law Journal* 579–614.

[115] See National Security Bill, above note 108, clauses 10 and 11.

journalists.[116] The second overreaching proposal was to give the Secretary for Security a new power to proscribe organizations endangering national security.[117] The power could be exercised if the organization was subordinate to an organization proscribed on the mainland. With this proposal, the earlier fears that the anti-terrorism laws might be used to marginalize religious groups undesired by the mainland were re-emerging in a new and real way.[118] The third proposal was to give the police a new warrantless entry and search power to gather evidence in urgent circumstances.[119] The difficulty with this proposal was that there was no empirical necessity for the power or anything to suggest that existing powers were inadequate.[120]

Although the Administration had always said that amendments to the blue bill were possible during the legislative process, it became clear as the work of the Bills Committee progressed that the Administration would only agree to minor changes and not budge on the main proposals.[121] Indeed, it was this very defensive attitude taken by the Secretary for Security and other staff and colleagues that angered legislators and commentators causing much resentment.

The boiling point of this anger and resentment was reached on 1 July 2003 (a public holiday celebrating Hong Kong's reunification with China) when approximately half a million people marched in protest primarily against the National Security Bill but also against the Administration generally.[122] At the time of the 1 July march, the Bills Committee for the National Security Bill had already completed its work, and Second Reading debate on the Bill was scheduled to continue on 9 July 2003.[123] Four days after the march, the Chief Executive announced three significant amendments to the Bill: (1) deletion of the 'subordinate to a mainland organization' triggering condition to the proscription power; (2) introduction of a 'public interest' defence for unlawful disclosure of certain protected information; and (3) deletion of the

[116] See Doreen Weisenhaus, 'Article 23 and Freedom of the Press: A Journalistic Perspective' in *Article 23 Book*, above note 105.

[117] National Security Bill, above note 108, clause 15.

[118] See Lison Harris, Lily Ma and C. B. Fung, 'A Connecting Door: The Proscription of Local Organizations' in *Article 23 Book*, above note 105.

[119] National Security Bill, above note 108, clause 18B.

[120] See Simon Young, '"Knock, knock. Who's there?" Entry and search powers for Article 23 Offences' in *Article 23 Book*, above note 105.

[121] LegCo Secretariat, 'Report of the Bills Committee on [National Security Bill]', LC Paper No. CB(2)2646/02–03 for House Committee on 27 June 2003, 27 June 2003 ('BC Art 23 Report').

[122] Ambrose Leung, Klaudia Lee and Ernest Kong, 'Hopes for freedom float upon a sea of political discontent', *South China Morning Post*, 2 July 2003, 3; Jimmy Cheung and Klaudia Lee, 'Turnout piles the pressure on Tung administration', *South China Morning Post*, 2 July 2003, 3.

[123] BC Art 23 Report, above note 121, para 156.

warrantless entry and search power.[124] Having made these major concessions at the last minute, the Chief Executive still insisted on proceeding with the second reading on 9 July.[125]

It soon became apparent that these concessions raised further issues, particularly the scope and definition of the public interest defence. Legislators and members of the public expressed concerns over the insufficient amount of time they had to consider the new amendments. These concerns escalated until they climaxed when James Tien, legislator and leader of the Liberal Party, resigned from the Executive Council, an unelected body of special advisors to the Chief Executive.[126] This hurt the Administration because the Liberal Party, representing mostly business and corporate interests, held a sizeable number of votes in LegCo.

On the day after Tien's resignation, 7 July 2003, the Chief Executive announced that the second reading would be deferred and efforts would be stepped up to explain the amendments to the public.[127] Nine days later, the Secretary for Security and another principal official, who had been embroiled in a car buying scandal, announced their decisions to resign.[128] Shortly afterwards, the Chief Executive said that the government was going to 'put forward the Bill to the whole community for consultation again'.[129] He promised a 'more extensive [consultation exercise] than the previous one' and 'to win the maximum understanding and support of the community as a whole'.[130] The timeline was to 'depend very much on how the consultation [went]'.[131] After the summer recess, however, the Chief Executive announced on 5 September 2003 that the National Security Bill was being withdrawn to allow the public sufficient time to 'study the enactment question' and for the Security Bureau to establish a special working group to review the legislative work afresh.[132] In September 2004, the Chief Executive announced that there were no immediate plans to resume the legislative exercise.[133]

It has never been disclosed how much of a role the Chinese authorities played in the making of the three amendments and the withdrawing of the Bill. The general perception is that the Chief Executive consulted the central authorities as these decisions were being made. It became rather clear that the Hong Kong government was not fully in charge of the legislative exercise when, shortly before his resignation, James Tien traveled to Beijing to determine from officials that there was no deadline to implementing Article 23.[134]

[124] Press Release, 'Chief Executive's transcript on Basic Law Article 23', 5 July 2003.
[125] Ibid. [126] Press Release, 'Statement by CE', 7 July 2003. [127] Ibid.
[128] Press Release, 'Statement by Secretary for Security', 16 July 2003.
[129] Press Release, 'CE's transcript', 17 July 2003. [130] Ibid. [131] Ibid.
[132] Press Release, 'CE's opening remarks on Basic Law Article 23', 5 September 2003.
[133] Press Release, 'Chief Executive Comments on Basic Law Article 23', 16 September 2004.
[134] See Albert Chen, 'Hong Kong's Political Crisis of July 2003' (2003) 33 *Hong Kong Law Journal* 265, 267; Petersen, above note 110.

D. Legal response to September 11 (Part II)

Even before the march on 1 July 2003, stage two of the implementation of anti-terrorism laws had commenced with the introduction of the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 ('Amendment Bill') in LegCo on 21 May 2003.[135] The Amendment Bill contained proposals to expand the freezing power, to implement three additional anti-terrorism treaties,[136] to replace the recruitment offence provision with a new one, to add a new warrant-based power to search and seize terrorist property, to add three additional investigation powers involving prior judicial authorization, and to provide for limited international sharing of information obtained using the new powers.

In this second stage, there were a number of signs that the Administration, with its new Secretary for Security, had modified its approach after learning from the failings and problems of the two earlier legislative exercises. Indeed, the change was so apparent that it attracted the following complimentary comments from the staunchest critic of the original Bill, Margaret Ng:

> Thankfully, the Government changed its attitude in the end, and worked together with the Bills Committee with a more open mind. The many amendments to be introduced by the Government is a result of that process. Although it has caused us much effort, I am pleased that it has happened, and I do sincerely thank the Government for its co-operation.
>
> I took some time to revisit the Committee stage amendments I proposed last year. I am pleased to say that many of them are now being effected through the Government's amendments. I would like to mention the most significant improvements from the point of view of better legislation and better regard for human rights.[137]

This time there was no externally imposed deadline and more time was given to legislators and the public to study the Amendment Bill. A total of sixteen

[135] Gazetted on 9 May 2003. The Amendment Bill was passed on 3 July 2004, and signed and promulgated by the Chief Executive on 8 July 2004. The United Nations (Anti-Terrorism Measures) (Amendment) Ordinance, Ord. No. 21 of 2004 ('Amendment Ordinance') comes into operation on a day to be appointed by the Secretary for Security by notice published in the Gazette.
[136] The International Convention for the Suppression of Terrorist Bombings (1997), Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), and Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988). When the Bill was introduced, the latter two instruments had neither been ratified by China nor applied to Hong Kong. However, the Administration indicated that they would be applied to Hong Kong in due course. See LegCo Secretariat, 'Legal Service Division Report on [Amendment Bill]', LC Paper No. LS 107/02–03 for House Committee Meeting on 23 May 2003, 21 May 2003, para 2.
[137] *HK Hansard*, 3 July 2004, above note 37, 470.

Bills Committee meetings were held over the course of eight months from 10 October 2003 to 18 June 2004. The rushed and confused atmosphere that marked the first stage of implementation was not repeated, and interested groups had ample opportunity to comment on both the original Amendment Bill and the draft CSAs to that Bill. A mutually acceptable deadline was naturally set by the 2004 summer recess, which concluded LegCo's first complete four-year term since the transfer of sovereignty.

This open public consultation process contributed to an informed, balanced and acceptable piece of legislation. The Administration showed a willingness to revisit the UNATMO to correct and improve defects resulting from the rushed enactment. The United Nations (Anti-Terrorism Measures) (Amendment) Ordinance narrowed the definition of 'terrorist act' with new *mens rea* qualifiers,[138] enacted a narrower recruitment offence with subjective *mens rea* requirements,[139] removed some of the objective *mens rea* standards in the existing criminal prohibitions,[140] and removed the 'serious' from the 'serious default' precondition to obtaining compensation.[141] Important amendments were also made to clarify and restrict some of the new police powers introduced in the original Amendment Bill.[142]

III. Ideas for a new implementation strategy

The defects with Hong Kong's security laws and policies have been more procedural than substantive. It is not so much the substance of the laws (in their final enacted or proposed form) that is problematic. And it is not so much the policy behind the law that is troubling because most Hong Kong people accept the reasons for having to implement anti-terrorism and national security laws. Instead, this chapter has shown that the problems lie more in how the laws and policies are formulated, debated, subjected to

[138] Under part (a)(i) of the definition, a terrorist act must now involve the use or threat of action where the action 'is carried out with the intention of, or the threat is made with the intention of using action that would have the effect of' realizing one of the harmful consequences enumerated in clauses (A) to (F). See s. 3 of the Amendment Ordinance, above note 135.

[139] Section 10 of the UNATMO now makes it an offence to: (a) recruit another person to become a member; or (b) become a member, of a specified terrorist body knowing that, or being reckless as to whether, it is a body so specified. See s. 9 of the Amendment Ordinance, ibid.

[140] The objective standard of 'having reasonable grounds to believe' in ss. 7 to 9 of the UNATMO has now been replaced with fault standards of recklessness, knowledge and intention. See ss. 6 to 8, and 14 of the Amendment Ordinance, ibid.

[141] See s. 17 of the Amendment Ordinance, ibid.

[142] See ss. 3, 5, and 12 of the Amendment Ordinance, ibid., the significance of which is explained in LegCo Secretariat, 'Report of the Bills Committee on [Amendment Bill]', LC Paper No. CB(2)2915/03–04, 25 June 2004.

public consultations, reformulated and finally enacted. In other words, it has been the implementation strategy that has been plagued by problems. If the Administration is to win the public's trust and confidence behind future legislative initiatives, it must first understand the reasons why the public resisted and frustrated its previous attempts at implementation. These reasons and possible ways of addressing them are discussed under the following three headings.

A. External imposition without internal need

With both the anti-terrorism and national security initiatives, there was no empirical necessity in Hong Kong for new laws. Instead, the public perception was that these new measures were being externally imposed on Hong Kong, in which case adopting a 'minimalist approach' seemed to follow logically. Closer examination revealed that the external imposition came from China in both cases. This form of imposition touches upon a particularly sensitive area for Hong Kong people. The Basic Law promised a 'high degree of autonomy' for Hong Kong which meant that China's socialist political system would not be applied in Hong Kong. Naturally any steps taken by China that appear to interfere with this high degree of autonomy are viewed with mistrust by Hong Kong people.[143]

Both the anti-terrorism and national security initiatives were matters under the Basic Law that required intervention from the central authorities. As a matter of political reality, both initiatives were of great interest and concern to China. The Hong Kong Administration had the responsibility of mediating between China and the Hong Kong people. This was a challenging task since it required, on the one hand, upholding Hong Kong's autonomy, while, on the other hand, carrying out the mainland instructions.[144] Judging from its performance and the public reaction, the Administration failed to strike the proper balance by insufficiently upholding Hong Kong's autonomy. Indeed, the manner in which the proposals were initiated, the inability to compromise on certain issues until the final hour and the imposition of artificial deadlines were strategies that clearly reinforced the external imposition perception.

Contributing to the distrust were two other factors: the internal policy not to disclose the instructions from China in respect of UN sanctions and the

[143] This mistrust was exacerbated in early 2004 when the Standing Committee of the National People's Congress adopted an Interpretation of the Basic Law and made a Decision that ruled out universal suffrage for 2007/2008, which was an aim that many in Hong Kong had hoped to realize.

[144] In respect of the national security initiative, it is unknown if China gave further instructions beyond Article 23.

proposal to make information concerning Hong Kong and China affairs protected information under the Official Secrets Ordinance (Cap 521). Without transparency about China's instructions to Hong Kong in respect of both initiatives, there would always be a lingering suspicion that the Administration's hard bargaining and imposed deadlines were a product of Chinese interference.

B. Faulty consultation processes

Where there is no apparent empirical need for new criminal laws and police powers, the need for genuine public consultation at the earliest possible moment is greatest. Even where there is an empirical need, subject matters such as anti-terrorism and national security can involve very technical legal proposals, which is another reason for ensuring early and full consultations. A third reason for having early consultations is that it helps to remove the perception of external imposition. When the public is involved as early as the proposal formulation stage then the public can take ownership in the final product. This is a strategy that engenders autonomy over the initiatives.

Unfortunately this has not been a strategy used by the Administration. Some have criticized the Administration for not using the Hong Kong Law Reform Commission (HKLRC) in developing the Article 23 proposals.[145] Using the HKLRC would have involved the public in a wide consultation during the proposal formulation stage. However, the HKLRC may not be the best vehicle for implementing laws on security in Hong Kong. It is not unknown for governments to ignore completely the recommendations of an independent law reform agency. When this is the case, the initiative goes back to the drawing board, although with the benefit of the work done by the law reform body. To avoid this potential roadblock, it may be necessary to include some of the responsible government officials in the law reform process. By having the officials actively involved in the formulation process (but not in any leading role), there is a greater chance that the formulated proposals will later be accepted. More importantly, the officials will have the opportunity to gain broader perspectives by interacting directly with the independent experts forming part of the body. The present system of consultation, in the formal and politically charged atmosphere of a bills committee, leaves very little room for focused and rational discussion and exchange. A plurality of expert views in the drafting process is very important in order to avoid the formulation of short-sighted and overreaching proposals, as was seen in the initial drafts of the anti-terrorism and national security bills.

[145] See Petersen in *Article 23 Book*, above note 110, 21–3.

Another limitation of the HKLRC is that its subcommittees are generally non-permanent made up of the volunteer services of members of the community. Typically the subcommittee is disbanded once the specific law reform reports are complete. There are no standing committees in the HKLRC devoted to the study of specific areas of law. In the area of security laws, it is probably a good idea to have a standing committee of experts that not only proposes new laws when needed but also reviews existing ones. This standing committee will also be able to formulate policies and principles governing security issues in Hong Kong. The aim is to develop a new discourse on security that arises from the grass roots rather than from outside of Hong Kong.[146]

C. Defects in policy and practice

The anti-terrorism initiative revealed some serious defects in the Administration's present policies and practices in implementing Security Council sanctions. The UNSO is in dire need of a complete overhaul.[147] The triggering condition of implementing sanctions 'against a place' needs to be reconsidered for at least two reasons. First, it falsely assumes that Chapter VII decisions are always against a particular place. R. 1373 proved this assumption was false, and increasingly, there is a greater tendency to employ 'smart sanctions' that target specific persons or subject matters without territorial boundaries.[148]

The other difficulty with the condition and the general scheme is that Chapter VII sanctions against a place must necessarily require implementation using the UNSO (assuming instructions from the central authorities have been received). In other words, regardless of the urgency of the matter, the Chief Executive has no choice but to implement the measure by making regulations that are not subject to scrutiny by the legislature. This raises important issues concerning the accountability of the executive and the

[146] Although it has not been a problem in Hong Kong, this informed standing committee can also help to avoid the problem, which Victor V. Ramraj discusses, of having an overreacting populist democracy motivated by misperceptions of risk and public fear. See Ramraj, Chapter 6, in this volume.

[147] The UNSO was originally enacted in a matter of days without question or dissent in the first few weeks after the resumption of sovereignty. The expediency was a product of the need to ensure that the existing UN sanctions continued to apply in Hong Kong after 1 July 1997. Unfortunately, it was enacted by the Provisional Legislative Council, an unelected body put in place by China to facilitate the resumption of sovereignty. The body was notoriously known to be uncritical of legislation put forward by the government.

[148] See Security Council Resolution 1540 (2004) (Non-proliferation of Weapons of Mass Destruction) and Peter L. Fitzgerald, 'Managing "Smart Sanctions" Against Terrorism Wisely' (2002) 36 *New England Law Review* 957.

separation of powers. It has been seen that these implementing regulations can contain wide police powers and strict liability offences. There has yet to be any reasonable justification on policy grounds for R. 1390 being implemented with UNSO regulations while R. 1373 was implemented with primary legislation. Having these two overlapping laws has also given rise to confusion due to their separate terrorist listing mechanisms.[149] Currently there are two lists published in the Gazette on a regular basis as required by both the UNATMO and UNSAR. While the names on the two lists have been the same, this will not always be the case since the power to specify under the UNATMO is broader than the power under the UNSAR.

The urgency in having the sanction implemented may be one explanation for why executive regulations should be used over primary legislation, but presently this is not a triggering condition in the UNSO. Even if regulations are the desired method of implementation in urgent circumstances, it still does not explain why there cannot be tabling of the subsidiary legislation before LegCo for negative vetting. Ironically, even with the present scheme of executive regulations under the UNSO, there has still been considerable delay in implementing UN sanctions. Some of this delay may be explained by the existing practice of the Chief Executive seeking views from the Executive Council. Conferring this task on the proposed standing committee may very well lead to a more expeditious process of implementation.

In reforming the UNSO Hong Kong can learn from the enabling legislation used in Canada and Singapore, both of which share the same name and are very similar in nature.[150] Both laws give the executive a discretionary power to implement Chapter VII sanctions by regulations 'as appear to him to be necessary or expedient for enabling the measure to be effectively applied'.[151] Neither have the anomaly of restricting the lawmaking power to Chapter VII resolutions implemented 'against a place'. Both laws also preserve legislative scrutiny by requiring the regulations to be tabled before their respective parliaments within a short time after they are made.[152]

[149] See similar problems in Canada, E. A. Dosman, above note 104.

[150] See the United Nations Act, R.S.C. 1985, c. U-2 (CAN) originally enacted in 1945 ('Canada UNA'), and the United Nations Act, Chapt. 339, originally No. 44 of 2001, Republic of Singapore Government Gazette, enacted on 17 October 2001 ('Singapore UNA').

[151] See s. 2 of the Canada UNA, ibid., and s. 2(1) of the Singapore UNA, ibid. However, this formulation is not without its difficulties; see criticisms of the Singapore UNA in C. L. Lim, 'Executive Lawmaking in Compliance of International Treaty' [2002] *Singapore Journal of Legal Studies* 73–103.

[152] See s. 4 of the Canada UNA, ibid., and s. 2(4) of the Singapore UNA, ibid.

IV. Conclusion

There are signs from stage two of the anti-terrorism initiative that the Administration is changing its strategy to implementation. Indeed, the decision to withdraw the National Security Bill, even though its passage through LegCo was imminent, reflected the Administration's willingness to heed public sentiment despite the absence of genuine democratic accountability in Hong Kong. In the next four year term of LegCo, starting in October 2004, the issue of Article 23 is bound to return together with ever-increasing new global anti-terrorism initiatives. No time should be wasted in implementing the procedural and consultative mechanisms that will lead to the development of grass roots security laws and policies for Hong Kong.