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Report of the Bills Committee on Safety of United Nations and Associated Personnel Bill

PURPOSE

This paper reports on the deliberation of the Bills Committee on Safety of United Nations and Associated Personnel Bill (the Bill).

BACKGROUND

The Convention on the Safety of United Nations and Associated Personnel

2. The Convention on the Safety of United Nations and Associated Personnel (the Convention) was adopted by the United Nations Assembly at its 49th session on 9 December 1994 and entered into force on 15 January 1999. The People's Republic of China (PRC) acceded to the Convention on 22 September 2004 and the Convention entered into force for the PRC, including Hong Kong, on 22 October 2004.

3. The objective of the Convention is to ensure the safety and security of United Nations and associated personnel by requiring State Parties to take all necessary measures to protect United Nations and associated personnel by establishing criminal offences punishable by appropriate penalties, cooperating in the prevention of such crimes, and providing assistance to one another in connection with criminal proceedings.

Legislative proposals

4. Hong Kong's existing administrative measures and legislation already comply with the majority of the requirements of the Convention. However, the following provisions need to be implemented by new legislative measures -

- (a) the provision on the duty to release and return United Nations and associated personnel captured or detained (Article 8 of the Convention);
- (b) the requirement on each State Party to make the acts proscribed by the Convention crimes under its national law and punishable by appropriate penalties (Article 9 of the Convention);

- (c) the requirement on each State Party to establish its jurisdiction over the crimes proscribed by the Convention (Article 10(1) of the Convention); and
 - (d) the extradition-related provisions (Articles 13(1) and 15 of the Convention).
5. The new legislative measures proposed by the Administration are as follows -
- (a) the Bill introduced into the Legislative Council (LegCo) on 4 May 2006 will give effect to Articles 9 and 10(1) of the Convention;
 - (b) the International Organizations (Privileges and Immunities) (United Nations and Associated Personnel) Order, to be made under section 3 of the International Organizations (Privileges and Immunities) Ordinance (Cap. 558), will give effect to Article 8 of the Convention; and
 - (c) the Fugitive Offenders (Safety of United Nations and Associated Personnel) Order, to be made under section 3 of the Fugitive Offenders Ordinance (Cap. 503), will give effect to Articles 13(1) and 15 of the Convention.

THE BILLS COMMITTEE

6. At the House Committee meeting on 19 May 2006, Members formed a Bills Committee to study the Bill. Hon Margaret NG was elected Chairman of the Bills Committee. The membership list of the Bills Committee is in **Appendix**.

7. The Bills Committee has held three meetings with the Administration. Apart from the Bill, the Bills Committee has also scrutinized the following two draft Orders -

- (a) Draft International Organizations (Privileges and Immunities) (United Nations and Associated Personnel) Order; and
- (b) Draft Fugitive Offenders (Safety of United Nations and Associated Personnel) Order.

The two Orders are subsidiary legislation for which approval of the LegCo is required under the negative vetting procedure. Upon passage of the Bill, the two draft Orders will be referred back to the Chief Executive in Council to be made.

DELIBERATIONS OF THE BILLS COMMITTEE

The Bill

Objective of the Bill

8. The objective of the Bill is to implement Articles 9 and 10(1) of the Convention by -

- (a) establishing the jurisdiction of Hong Kong courts in respect of the offences set out in Article 9 of the Convention that are committed outside Hong Kong by any Chinese national who is a Hong Kong permanent resident; and
- (b) creating a new offence of threat to commit the attack described in Article 9 of the Convention.

Article 9 of the Convention

9. Article 9 of the Convention requires each State Party to make the following acts specified in Article 9(1) crimes under its national law and punishable by appropriate penalties which shall take into account their grave nature -

"The intentional commission of :

- (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
- (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
- (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
- (d) An attempt to commit any such attack; and
- (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack."

10. The Administration has explained that currently, the general criminal offences stipulated under the Crimes Ordinance (Cap. 200), the Offences against the Person Ordinance (Cap. 212) and the Criminal Procedure Ordinance (Cap. 221) as well as

common law can already deal with the crimes under Article 9(1)(a), (b), (d) and (e) of the Convention.

11. As regards the offence of "threat" under Article 9(1)(c), the Administration has explained that section 24 of the Crimes Ordinance (Cap. 200) already provides that a person in Hong Kong who threatens any other person with any illegal act with intent to cause the person to do any act which he is not legally bound to do or to omit to do any act which he is legally entitled to do, shall be guilty of an offence. Under section 27 of the Crimes Ordinance, the maximum penalty for such an offence is imprisonment for five years. However, having regard to the requirement under Article 9(2) of the Convention that the offences proscribed should be punishable for appropriate penalties, the international obligation to ensure the safety and security of United Nations and associated personnel and the penalty level in Australia, Canada and the United Kingdom, the Administration proposes to prescribe a higher maximum penalty (imprisonment for 10 years) for the offence of threat under the Bill.

Article 10(1) of the Convention

12. Article 10(1) of the Convention provides that each State Party shall take measures as may be necessary to establish its jurisdiction over the crimes under Article 9 in the following cases -

"(a) when the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State."

13. According to the Administration, by virtue of section 23B of the Crimes Ordinance (Cap. 200) and section 3 of the Aviation Security Ordinance (Cap. 494), Hong Kong also has jurisdiction over any offence committed on board a Hong Kong registered ship and a Hong Kong registered aircraft respectively. However, these provisions cannot cover the crimes under Article 9(1) of the Convention committed outside Hong Kong territory and not on board a Hong Kong registered ship or aircraft. New legislative measures are therefore needed to give effect to the extra-territoriality over nationals under Article 10(1) of the Convention.

Clause 2

14. Clause 2 of the Bill defines the terms used in the Bill. Members note that "specified person" is defined to mean a person who is a Chinese national and a Hong Kong permanent resident. Members have requested the Administration to explain the reasons for adopting the term "specified person", instead of a "national of that State" as stipulated in Article 10(1)(b) of the Convention, and to consider whether the reference to "a Hong Kong permanent resident" could be deleted from the definition of "specified person".

15. The Administration has explained that Article 10(1)(b) of the Convention requires each State Party to take measures to establish its jurisdiction over the crimes proscribed by the Convention when the alleged offender is a national of that State. The existing general criminal offences under the Crimes Ordinance (Cap. 200), the Offences Against the Person Ordinance (Cap. 212) and the Criminal Procedure Ordinance (Cap. 221) as well as common law can already deal with such crimes when committed in Hong Kong, irrespective of the offenders' nationality. New legislative measures are only needed to give effect to the Convention requirement to establish extra-territorial jurisdiction over Chinese nationals who are Hong Kong permanent residents. Specifically, the Bill will provide that any person who is a Hong Kong permanent resident of Chinese nationality, when outside Hong Kong, intentionally commits an act to any United Nations or associated personnel as proscribed by Article 9(1) would be in contravention of the relevant criminal offences under the Crimes Ordinance (Cap. 200) or the Offences Against the Person Ordinance (Cap. 212), and commits an offence.

16. As Hong Kong does not have its own "nationals", the status of "permanent residency" is the most akin to the concept of "nationality" under Hong Kong's legal system. On this basis, Hong Kong may establish jurisdiction over persons of Chinese and other nationalities who are permanent residents of Hong Kong. Regarding Chinese nationals and other nationals who merely ordinarily reside in Hong Kong but are not Hong Kong permanent residents, or who have no residency in Hong Kong, Article 10(1)(b) of the Convention contemplates that only the States of which they are nationals will establish the required extra-territorial jurisdiction.

17. The Administration has advised that having regard to the above, "specified person" is defined in the Bill as a person who is a Chinese national and a Hong Kong permanent resident. Establishing extra-territorial jurisdiction over the proscribed crimes committed by a "specified person" is consistent with Hong Kong's obligation under Article 10(1)(b) of the Convention to establish jurisdiction over "nationals".

18. The Administration has pointed out that if the reference to "a Hong Kong permanent resident" was deleted from the definition of "specified person", a "specified person" would simply mean "a Chinese national". The extension of extra-territorial jurisdiction to Chinese nationals who are not Hong Kong permanent residents would be inconsistent with Hong Kong's obligation under Article 10(1)(b) of the Convention.

Clauses 4 to 6

19. Members note that clauses 4 to 6 implement Articles 9 and 10(1) of the Convention. Clauses 4 and 6 make it an offence for a "specified person", when outside Hong Kong, to do any act to or in relation to a member of the United Nations and associated personnel which, if done in Hong Kong, would constitute a common law offence or an offence under the relevant sections of the Crimes Ordinance (Cap. 200) and the Offences Against the Persons Ordinance (Cap. 212); or to attempt to commit such an

act; or to aid, abet, counsel or procure the commission of such an act. The offender shall be subject to the same penalty as if the offence is committed in Hong Kong.

20. Clause 5 makes it an offence of a person in Hong Kong, or a person who is a "specified person" when outside Hong Kong, to make a threat to commit an act which would constitute an offence described in clause 4. A person who commits an offence is liable on conviction on indictment to imprisonment for 10 years.

21. On the Administration's proposal to prescribe a higher maximum penalty of 10 years' imprisonment for the offence of threat under Article 9(1)(c), members have expressed concern about the appropriateness to impose different penalties on the same act committed under the Crimes Ordinance and the Bill, depending on whether the victims are United Nations and associated personnel or not.

22. In response to members' request, the Administration has provided a comparison of the level of penalties imposed by Australia, Canada and the United Kingdom when the offence of threat is committed against United Nations and associated personnel as opposed to other threat offences. Members note that the penalties for the offence of threat against United Nations and associated personnel are generally higher than those for other threat offences.

23. Given the higher penalty prescribed for the offence of threat under the Bill, members have suggested that the "intent" to commit crimes against United Nations and associated personnel, or the "knowledge" that the crime was targeted at a member of United Nations and associated personnel should be included as an element of the offence of threat. The Administration accepts the suggestion and proposes to revise clause 5 to provide that in the context of a threat offence, an offender knowing or having reason to believe that the person to or in relation to whom an act constituting a "relevant offence" will be done is a member of the United Nations and associated personnel, commits an offence. Consequential amendment will also be made to clause 7 to provide for an exception for clause 5.

Application of the Bill

Hong Kong permanent residents who are stateless

24. Members have requested the Administration to consider the need to extend the Bill's coverage to stateless persons who are Hong Kong permanent residents. They point out that Article 10(2)(a) of the Convention provides, as a non-mandatory requirement, that a State Party may establish its jurisdiction over any crime proscribed by the Convention when it is committed by a stateless person whose habitual residence is in that State.

25. The Administration has agreed that extending jurisdiction to a stateless person who is a Hong Kong permanent resident would facilitate a better attainment of the objective of the Convention in protecting United Nations and associated personnel.

The Administration will introduce an amendment to the effect that a "specified person" under the Bill could also cover a stateless person who is a Hong Kong permanent resident. As a corollary of this amendment, the long title of the Bill will be amended to refer to both Article 10(1) and (2)(a) of the Convention.

Hong Kong permanent residents residing in Taiwan

26. In response to members' enquiry, the Administration has advised that persons of Chinese nationality may acquire Hong Kong permanent resident status pursuant to paragraphs 2(a), 2(b), 2(c) and 6(2) of Schedule 1 to the Immigration Ordinance (Cap. 115). The extra-territorial jurisdiction will cover Hong Kong permanent residents of Chinese nationality who have acquired Hong Kong permanent resident status by the aforesaid provisions including those residing in Taiwan.

Hong Kong permanent residents with dual nationality

27. Members have noted that the Panel on Security had expressed concern whether a Hong Kong permanent resident who possesses dual nationality, namely Chinese nationality and another nationality, and had committed crime in another jurisdiction would be covered by the legislative proposals.

28. The Administration has explained that the Nationality Law of the People's Republic of China, as applied to Hong Kong by virtue of Article 18 and Annex III of the Basic Law, does not recognise dual nationality for any Chinese national. The Chinese nationality of a Hong Kong resident would be lost only if his declaration of change of nationality or his application for renunciation of Chinese nationality has been approved by the Director of Immigration in accordance with the relevant provisions. Hence, a Hong Kong permanent resident of Chinese nationality who has subsequently acquired another nationality will be considered as a Chinese national unless he has lost his Chinese nationality in accordance with the foregoing, and will be covered by the extra-territorial jurisdiction stated above.

Other related issues

Concurrent extra-territorial jurisdiction over Chinese nationals who are Hong Kong permanent residents

29. Members have requested the Administration to clarify whether the Mainland and Hong Kong have concurrent extra-territorial jurisdiction over Chinese nationals who are Hong Kong permanent residents having committed the crimes proscribed by the Convention after the enactment of the Bill, and how such offenders would be dealt with.

30. The Administration has explained that in the event of concurrent jurisdiction, the usual practice is for the jurisdiction where the offence was committed to institute

proceedings against the offender. If the Mainland and Hong Kong have concurrent extra-territorial jurisdiction over a Chinese national who is a Hong Kong permanent resident having committed an offence proscribed by the Convention outside the Mainland and Hong Kong, the offender may be dealt with as follows -

- (a) the jurisdiction where the offence was committed may institute proceedings against the offender;
- (b) if the offender is located in Hong Kong, Hong Kong may exercise jurisdiction over him; and
- (c) depending on the availability of evidence, both Hong Kong and the Mainland may request the jurisdiction where the offence was committed to surrender the offender, and it would be up to that jurisdiction to decide whether and to whom the offender should be surrendered.

Existing criminal offences with extra-territorial effect

31. Members have requested the Administration to clarify, in relation to crimes over which Hong Kong has extra-territorial jurisdiction, the categories of persons to whom the extra-territoriality would apply.

32. The Administration has provided some examples of existing criminal offences with extra-territorial jurisdiction, and pointed out that the practice varies. The Administration considers that the scope of extra-territorial jurisdiction should be considered in the context of the requirements of individual circumstances. The extra-territoriality proposed under the Bill aims to fulfill the requirement of establishing jurisdiction over "nationals" under Article 10(1)(b) of the Convention, and is appropriate for the purpose.

The draft Orders

Draft International Organizations (Privileges and Immunities) (United Nations and Associated Personnel) Order

33. Article 8 of the Convention provides that if United Nations and associated personnel are captured or detained in the course of the performance of their duties, they shall not be subjected to interrogation and shall be promptly released and returned to the United Nations or other appropriate authorities. An Order needs to be made under section 3 of the International Organizations (Privileges and Immunities) Ordinance (Cap. 558) to give effect to this requirement.

34. Members note that the draft Order provides that Article 8 of the Convention shall have the force of law in Hong Kong. They have raised no queries on the draft Order.

Draft Fugitive Offenders (Safety of United Nations and Associated Personnel) Order

35. Articles 13(1) and 15 of the Convention require taking measures to extradite to another State Party offenders who have committed the crimes set out in the Convention. An Order needs to be prepared under section 3 of the Fugitive Offenders Ordinance (Cap. 503) to implement these extradition requirements.

36. The Administration has explained that the Fugitive Offenders Ordinance (Cap. 503) provides for the surrender to certain places outside Hong Kong of persons who are wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of certain offences against the laws of those places. It also provides for the treatment of persons wanted for prosecution, or for the imposition or enforcement of a sentence, in respect of certain offences against the law of Hong Kong who are surrendered from certain places outside Hong Kong. The objective of the Order is to apply as between Hong Kong and the places outside Hong Kong to which the Convention relates the procedures for the surrender of fugitive offenders set out in the Fugitive Offenders Ordinance (Cap. 503).

37. In response to members' questions, the Administration has advised that "the places outside Hong Kong to which the Convention relates" refer to the State Parties to the Convention other than the Mainland. Under section 2 of the Fugitive Offenders Ordinance (Cap. 503), the arrangements for the surrender of fugitive offenders under it are not applicable to the CPG or the government of any other part of the PRC. In addition, the Order will apply to the State Parties to the Convention, irrespective of whether bilateral surrender of fugitive offender agreements had been signed between Hong Kong and the relevant jurisdictions. Members have raised no queries on the draft Order.

COMMITTEE STAGE AMENDMENTS (CSAs)

38. The CSAs to be moved by the Administration to the Bill are supported by the Bills Committee.

CONSULTATION WITH THE HOUSE COMMITTEE

39. The Bills Committee made a report on its deliberations to the House Committee on 19 January 2007 and recommended support of the resumption of the Second Reading debate on the Bill at the Council meeting on 31 January 2007.

Bills Committee on Safety of United Nations and Associated Personnel Bill

Membership list

Chairman Hon Margaret NG

Members Hon James TO Kun-sun
 Hon Jasper TSANG Yok-sing, GBS, JP

Total: 3 Members

Clerk Mrs Percy MA

Legal Adviser Miss Kitty CHENG

Date 1 June 2006