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23 May 2008

Mrs Sharon Tong  
Clerk to Subcommittee  
Legislative Council Secretariat  
3/F, Citibank Tower  
3 Garden Road  
Central

Dear Mrs Tong,

**Subcommittee on Subsidiary Legislation  
to Implement the Obligations under the  
United Nations Convention Against Transnational Organized Crime**

At the Subcommittee meeting held on 13 May 2008, the Chairman of the Subcommittee requested the Administration to provide written response on a number of issues in relation to the operation of the United Nations Convention Against Transnational Organised Crime (“the Convention”). The ensuing paragraphs set out the response of the Administration.

**Articles 5, 6, 8 and 23 of the Convention**

2. Articles 5, 6, 8 and 23 of the Convention stipulate a number of requirements in relation to the criminalization of participation in an organized criminal group, laundering of proceeds of crime, corruption and obstruction of justice respectively. The table at **Annex** sets out how the requirements of Articles 5, 6, 8 and 23 of the Convention are implemented in Hong Kong.

### **The Extradition Requirements under the Convention**

3. Paragraphs 4 to 13 below elaborate on the offence coverage of the extradition Article of the Convention (i.e. Article 16), as provided for under paragraphs 1 and 2 of the Article.

#### ***Article 16(1)***

4. As the Administration explained at the Subcommittee meeting on 13 May 2008, Article 16(1) of the Convention applies to two categories of offences –

Category 1 : “the offences covered by this Convention”; and

Category 2 : “in cases where an offence referred to in article 3, paragraph 1 (a) or (b), involves an organised criminal group and the person who is the subject of the request for extradition is located in the territory of the requested State Party”.

5. The offences covered by the Convention are set out in Article 3(1) of the Convention. The Article provides that –

“(1) This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of :

- (a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and
- (b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group.”

6. Reading Article 16(1) with Article 3(1), the scope of the offence coverage in respect of Article 16(1) should be as follows –

*In respect of Category 1 offences :*

- (a) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention **that are transnational and involve an organised criminal group;**

- (b) Serious crimes **that are transnational and involve an organised criminal group.**

*In respect of Category 2 offences :*

- (c) Offences established in accordance with articles 5, 6, 8 and 23 of the Convention, **where the person who is to be extradited is located in the territory of the requested party and which involve an organised criminal group;** and
- (d) Serious crime, **where the person who is to be extradited is located in the territory of the requested party and where the offence involves an organised criminal group.**

The interpretation above is in line with the interpretation of the scope of Article 16(1) as set out in the *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organised Crime and the Protocols Thereto*, published by the United Nations Office on Drugs and Crime<sup>1</sup>.

### **Article 16(2)**

7. Article 16(2) of the Convention provides that “[i]f the request for extradition includes several separate serious crimes, some of which are not covered by this article, the requested State Party may apply this article also in respect of the latter offences.” “Serious crime” is defined in Article 2, paragraph (b) of the Convention to mean “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”. The effect of Article 16(2) is that the requested State Party **may** choose to allow extradition in respect of serious offences, as defined, that does not involve an organized crime group, if they are included in the same request covering crimes provided for under Article 16(1).

8. Article 16(2) is permissive, i.e. it enables the requested Party to deal with serious offences of the same alleged offender under the same extradition procedure, but **does not oblige** it to do so. Moreover, Article 16(2) does not operate on a stand alone basis, but can only operate where there is an extraditable offence under Article 16(1). In this sense, Article 16(2) is subject to Article 16(1). As stated in the Interpretative Notes for the official records (*travaux préparatoires*) of the negotiation of the

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<sup>1</sup> Chapter V, paragraphs 415 and 416 of the publication are relevant.

Convention<sup>2</sup>, “the purpose of paragraph 2 is to serve as an instrument for States Parties wishing to avail themselves of the facility it provides. It is not intended to broaden the scope of the article unduly.”

9. The permissive nature of Article 16(2) aside, its operation is subject to three important safeguards provided for under Article 16 of the Convention :

*(1) Article 16(7)*

10. Surrender of fugitive offenders is expressly made subject to the conditions provided for in domestic law of the requested State Party. This is consistent with our present approach, whereby the purpose of making the proposed Order under the Fugitive Offenders Ordinance (Cap. 503) (“FOO”) is to apply the provisions of the FOO to the surrender of fugitive offenders pursuant to the Convention. Hence, surrender of offenders by Hong Kong in accordance with Article 16 of the Convention will have to comply with the provisions of the FOO.

*(2) Article 16(1)*

11. It is expressly provided that the offence for which extradition is sought should be punishable under the domestic law of both the requesting State Party and the requested State Party. This is consistent with the “dual criminality” safeguard under section 2(2) of the FOO<sup>3</sup>.

*(3) Article 16(14)*

12. This provision expressly provides that the requested State Party is under no obligation to extradite if it has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person’s position for any one of these reasons. This is consistent with the safeguards under section 5(1)(c) and (d) of the FOO<sup>4</sup>.

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<sup>2</sup> A/55/383/Add.1, Note 28

<sup>3</sup> Under section 2(2) of the FOO, an offender can only be surrendered if the alleged criminal conduct in question would, inter alia, constitute a Hong Kong offence specified in Schedule 1 to the FOO had the conduct occurred in Hong Kong.

<sup>4</sup> Section 5(1)(c) and (d) of the FOO provides for a number of mandatory grounds for refusing a surrender request including the situation where it appears to an appropriate authority that the request for surrender is in fact made for the purpose of prosecuting or punishing the fugitive on account of his race, religion, nationality or political opinions, or where it appears to an appropriate authority that the fugitive might, if surrendered, be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality or political opinions.

Any requests for surrender not in compliance with such safeguards shall be refused.

13. In the light of the above, we consider that the extradition provisions of the Convention are consistent with the FOO. In any case, as noted in paragraph 10 above, with the making of the Order under the FOO, the provisions of the FOO apply to surrender of fugitive offenders under the Convention. Thus, the protection of individuals' fundamental rights provided under the FOO has not been affected following the implementation of the Convention in Hong Kong.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Apollonia Liu". The signature is fluid and cursive, with a large loop at the end.

(Apollonia Liu)  
for Secretary for Security

c.c. D of J (Attn: Mr Wayne Walsh, Miss S K Lee, Ms Mabel Cheung,  
Mr John Reading)

**Implementation of the requirements of Articles 5, 6, 8 and 23  
of the United Nations Convention Against Transnational Organised Crime in Hong Kong**

Article	Requirements under the Article	How the requirements are being implemented in Hong Kong
5	<p><u><i>Criminalization of participation in an organized criminal group</i></u> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally,</p> <p>(a) either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:</p> <p>(i) agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;</p> <p>(ii) conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in criminal activities of the organized criminal group; or other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;</p> <p>(b) organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.</p>	<p>The requirements under Article 5(1)(a) are implemented by the conspiracy offence under section 159A of the Crimes Ordinance (Cap. 200). If a person agrees with any other person(s) that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, would involve commission of offence(s) by any of the parties involved, then he will commit the conspiracy offence under section 159A of the Crimes Ordinance.</p> <p>The requirements under Article 5(1)(b) are implemented by the common law inchoate and accomplice offences (inciting, aiding, abetting, counselling and procuring a crime).</p>

Article	Requirements under the Article	How the requirements are being implemented in Hong Kong
6	<p><u><i>Criminalization of the laundering of proceeds of crime</i></u></p> <p>Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish the conversion or transfer of proceeds of crime and the concealment or disguise of the true nature, source, location, disposition, movement or ownership of proceeds or crime as criminal offences; and a comprehensive range of predicate offences associated with organized criminal groups.</p>	<p>The type of conduct described in Article 6(1) already constitutes offences under sections 25 and 25A of both the Organized and Serious Crimes Ordinance (Cap. 455) (“OSCO”) and the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405).</p> <p>The money laundering offence under OSCO is committed once a person “deals” with property knowing or having reasonable grounds to believe it to be “proceeds of an indictable offence”. Indictable offence has a broad coverage. Only minor offences are not indictable, e.g. littering.</p>
8	<p><u><i>Criminalization of corruption</i></u></p> <p>(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving, to a public official, and the solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.</p> <p>(2) Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establish as criminal offences other forms of corruption.</p>	<p>(1) The requirement is implemented under the Prevention of Bribery Ordinance (Cap. 201) (“POBO”). Under section 4 of the POBO, any person who offers a bribe to a public servant, and any public servant who solicits or accepts a bribe will commit an offence.</p> <p>(2) Under section 9 of the POBO, any person who offers a bribe to a foreign public official in Hong Kong, and any foreign public official in Hong Kong who solicits or accepts a bribe will commit an offence. While this section does not have extra-territorial application, if a bribe is offered in Hong Kong and there is an agreement to accept that bribe outside Hong Kong, Hong Kong will have jurisdiction over that</p>

Article	Requirements under the Article	How the requirements are being implemented in Hong Kong
	<p>(3) Each State Party shall adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.</p>	<p>offence. In these circumstances, if the foreign public official is no longer in Hong Kong, the HKSARG will consider making a request to an overseas jurisdiction for surrender of the foreign public official in question, in order to stand trial in Hong Kong.</p> <p>(3) The requirement under this paragraph is implemented under section 89 of Criminal Procedure Ordinance (Cap. 221), which provides that any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence. Sections 159A to F of the Crimes Ordinance (Cap. 200) provide that a person shall be liable for an offence of conspiracy if he agrees with another to commit an offence.</p>
23	<p><i>Criminalization of obstruction of justice</i> Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally –</p> <p>(a) the use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in proceedings in relation to the commission of the offences covered by the Convention; and</p> <p>(b) the use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by the Convention.</p>	<p>The requirements are implemented under sections 13A and 13B of the Independent Commission Against Corruption (ICAC) Ordinance (Cap. 204), section 63 of the Police Force Ordinance (Cap. 232) and section 23 of the Summary Offences Ordinance (Cap.228), which provide that a person shall be guilty of an offence if he resists or obstructs an ICAC/police officer/public officer in the performance of his duty. Section 24 of the Crimes Ordinance (Cap. 200) prohibits intimidation, and section 25 the use of force to compel someone to do something he is not legally bound to do. There is also the common law offence of perverting the course of justice.</p>