

立法會
Legislative Council

LC Paper No. CB(4)190/11-12
(These minutes have been seen
by the Administration)

Ref : CB4/BC/1/11

Bills Committee on
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012
Minutes of the third meeting
held on Monday, 7 May 2012, at 8:30 am
in Conference Room 3 of the Legislative Council Complex

- Members present** : Hon LAU Kong-wah, JP (Chairman)
Dr Hon Margaret NG
Hon James TO Kun-sun
Dr Hon Philip WONG Yu-hong, GBS
Hon Cyd HO Sau-lan
Hon WONG Kwok-kin, BBS
- Members absent** : Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Paul TSE Wai-chun, JP
- Public Officers attending** : Ms Carol YIP Man-kuen
Deputy Secretary for Security 1
- Ms Veronica WONG Hoi-yee
Assistant Secretary for Security A2
- Ms Leonora IP Wan-yok
Senior Assistant Law Draftsman
Department of Justice
- Ms Anthea LI Suk-kwan
Senior Government Counsel (Team 1)
Department of Justice

Clerk in attendance : Ms Miranda HON
Chief Council Secretary (4)2

Staff in attendance : Mr Bonny LOO
Assistant Legal Adviser 3

Mr Ian CHOW
Council Secretary (2)1

Ms Carmen HO
Senior Legislative Assistant (4)2

Action

I. Meeting with deputation and the Administration

[LC Paper Nos. CB(4)170/11-12(01), CB(4)172/11-12(01) and (02)]

The Bills Committee deliberated (index of proceedings attached at the **Annex**).

2. The Bills Committee noted the written submissions from the Hong Kong Bar Association [LC Paper No. CB(4)158/11-12(01)] and The Law Society of Hong Kong [LC Paper No. CB(4)169/11-12(01)]. The Bills Committee also noted that the representative of Hong Kong Human Rights Monitor, who had indicated attendance at the meeting, did not turn up.

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3. The Administration was requested to -

- (a) clarify in writing that the term "international organization" under the proposed definition of "terrorist act" in section 2(1) of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) did not include an international organization that was not constituted by or under an international multilateral treaty such as the Red Cross, contrary to what was stated in paragraph 7 of the Legislative Council Brief on the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012 (File ref.: SBCR 9/16/1476/74) issued by the Security Bureau in February 2012, and the reasons for that; and

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- (b) provide details of the United Kingdom Court of Appeal decision in *R v Cairns* to illustrate how the defence of necessity could apply to a person who was prosecuted for committing what would otherwise constitute a serious crime where the commission of the crime was necessary for the purpose of avoiding or preventing death or serious injury to himself or another.

4. After deliberation, the Chairman concluded that the Bills Committee had completed scrutiny of the Bill.

5. The Bills Committee agreed that it would report its deliberations to the House Committee on 1 June 2012, supporting the resumption of the Second Reading debate on the Bill at the Council meeting of 13 June 2012. The Chairman reminded members that the deadline for giving notice to move Committee Stage amendments to the Bill, if any, would be 4 June 2012.

II. Any other business

6. There being no other business, the meeting ended at 9:20 am.

Council Business Division 4
Legislative Council Secretariat
4 June 2012

**Proceedings of the third meeting of the
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012
on Monday, 7 May 2012, at 8:30 am
in Conference Room 3 of the Legislative Council Complex**

Time marker	Speaker	Subject	Action Required
000000 - 000921	Chairman Administration	Briefing by the Administration on its response to the submission dated 10 April 2012 from the Hong Kong Bar Association ("HKBA") and the issues raised by the Bills Committee at the meeting held on 16 April 2012 (LC Paper No. CB(4)170/11-12(01)), as well as its response to the submission dated 26 April 2012 from The Law Society of Hong Kong (LC Paper No. CB(4)172/11-12(02))	
000922 - 001838	Chairman ALA3 Administration	<p>ALA3 stated that in its submission, HKBA expressed concern over the definition of "international organization" in the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012 ("the Bill") that while many international organizations were treaty based, some were not, such as the International Committee of the Red Cross ("the Red Cross"). ALA3 enquired whether it was the Administration's intention that the term "international organization" under the proposed definition of "terrorist act" in section 2(1) of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) ("UNATMO") did not include an international organization that was not constituted by or under an international multilateral treaty. He also pointed out that paragraph 7 of the Legislative Council Brief on the Bill (File ref.: SBCR 9/16/1476/74) issued by the Security Bureau in February 2012 gave the Red Cross as an example of an "international organization".</p> <p>The Administration responded that it was commonly understood in the context of international law that an "international organization" referred to an international intergovernmental organization. For example, an international intergovernmental organization could be constituted by international multilateral treaty, had international legal personality and consisted of State members. After further consideration, the Administration noted that the Red Cross was a special organization which</p>	Admin (paragraph 3(a) of the minutes refers)

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		<p>could conclude treaties with countries but it did not meet the afore-mentioned conditions of "international organization". Hence, it should not be covered under the "international organization" referred to in the proposed definition of "terrorist act" in section 2(1) of UNATMO. The Administration undertook to make clarification in writing.</p> <p>ALA3 stated that the Financial Action Task Force on Money Laundering ("FATF") only recommended that the "collection" of funds for terrorists or terrorist organizations be made an offence, but not the "solicitation" of financial (or related) services. He requested the Administration to explain -</p> <p>(a) the reason for including a new offence of soliciting financial (or related) services under the proposed section 8(b) of UNATMO; and</p> <p>(b) whether overseas countries such as Singapore and Canada used the term "solicit" in similar legislation.</p> <p>The Administration responded that -</p> <p>(a) paragraph 1(d) of the United Nations Security Council Resolution 1373 ("UNSCR 1373") required all States to prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of terrorists, etc. Such requirement was currently implemented under the existing section 8 of UNATMO, which would become the proposed section 8(a). However, FATF considered that the existing section 8 could not cover the act of collection. For the purpose of consistency with section 8(a) and full implementation of paragraph 1(d) of UNSCR 1373, the proposed section 8(b) was included in the Bill so that both the making available of property or financial (or related) services to terrorists and terrorist associates and the act of collection in this respect would be criminalized;</p>	

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		<p>(b) in electing to use the expression "solicit financial (or related) services" instead of "collect financial (or related) services", the Administration had taken into consideration the legal advice that the word "collect" was not suitable for "financial (or related) services". In fact, both "collection" and "solicitation" referred to the act of collection as required by FATF; and</p> <p>(c) similar provisions under the anti-terrorism legislation in Singapore used the terms "collects property, provides or invites a person to provide, or makes available property or financial or other related services", which were similar to "collect property or solicit financial (or related) services" in the proposed section 8(b) of UNATMO as set out in the Bill.</p>	
001839 - 003351	<p>ALA3 Chairman Administration Mr James TO Ms Cyd HO</p>	<p>ALA3 referred to the Administration's clarification that the word "property" in sections 7 and 8 of UNATMO should be understood as including property outside Hong Kong. He pointed out that it was clearly specified in the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) that property under that ordinance included property "whether in Hong Kong or elsewhere". He considered that it was advisable to include in UNATMO a similar provision for the avoidance of doubt.</p> <p>ALA3 suggested that the Administration could consider amending section 3 of UNATMO by adding a subsection (2) thereto to the effect that "Sections 7 and 8 shall apply to property within or outside the HKSAR (第7及8條適用於在特區或特區以外的財產)", so as to expressly specify that those two sections would apply to property whether in Hong Kong or elsewhere.</p> <p>The Administration responded that Article 7(1) of the International Convention for the Suppression of the Financing of Terrorism ("the TF Convention") stated that the signatory States should establish their jurisdictions over the offence when it was committed in the territory of those States, or by a national of those States. The existing section 3 of UNATMO aimed at</p>	

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		<p>implementing the above Article of the TF Convention and establishing such a jurisdiction in Hong Kong. It should therefore not be amended as proposed by ALA3.</p> <p>In response to the Chairman's enquiry, the Administration explained that various references to "property" under UNATMO had consistently relied on the definition of "property" under the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO"). The definition of "property" under IGCO was neutral as to whether it covered property outside Hong Kong. Given that the requirements of UNSCR 1373 and the FATF recommendations were to prohibit financing of terrorism on the international level and that section 3 of UNATMO had also set out the extra-territorial effect, the property being covered under UNATMO should in-principle also cover property located outside Hong Kong whilst the actual application of individual provisions related to a property would depend on the facts of each case. The Administration was of the view that the definition of "property" in IGCO should continue to be adopted by UNATMO, which had not been challenged by FATF.</p> <p>Mr James TO asked whether a Hong Kong permanent resident in Paris (i.e. outside Hong Kong) who provided cash to a terrorist would be caught by section 7 of UNATMO.</p> <p>The Administration responded that under section 3(b) of UNATMO, section 7 applied to any person outside the HKSAR who was a Hong Kong permanent resident, or a body incorporated or constituted under the law of the HKSAR. Hence, the person mentioned by Mr TO would be caught by section 7.</p> <p>In view of the Administration's explanation, Mr TO indicated that he was satisfied and agreed that the existing section 3 of UNATMO had already covered property located outside Hong Kong, and hence it would not be necessary to amend section 3. Ms Cyd HO also agreed with the Administration in this regard.</p>	

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003352 - 004907	Chairman Mr James TO Administration ALA3	<p>Mr James TO enquired whether the Administration had responded to his concerns over the criminalization of a person who provided basic necessities, such as food or shelter, to terrorists on humanitarian grounds, which he had raised at the first meeting of the Bills Committee.</p> <p>The Administration referred to its response to the issues raised at the meeting of the Bills Committee on 20 March 2012 (LC Paper No. CB(4)157/11-12(01)), which explained that there was the element of "recklessness" in section 8 of UNATMO. By applying "recklessness" to section 8, the prosecution would have to prove that the offender either -</p> <ul style="list-style-type: none"> (a) had not given thought to whether the person concerned was a terrorist or terrorist associate in circumstances where there was an obvious risk that this was the case; or (b) having recognized that there was a risk the person concerned was a terrorist or terrorist associate, proceeded anyway. <p>It was also stated in the same paper that in appropriate cases, a defendant might be excused if he could show that -</p> <ul style="list-style-type: none"> (i) the commission of the crime was necessary, or reasonably believed to have been necessary, for the purpose of avoiding or preventing death or serious injuries to himself or another; (ii) that necessity was the <i>sine qua non</i> of the commission of the crime; and (iii) the commission of crime, viewed objectively, was reasonable and proportionate having regard to the evil to be avoided or prevented. <p>It would not avail the defendant that he believed what he did to have been necessary to avoid the evil if, viewed objectively, it was unnecessary, or though necessary, was disproportionate. It would be for the court to decide whether such defence could be substantiated having regard to the facts of each individual case.</p>	

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		<p>In response to Mr TO's enquiry, ALA3 said that the defence of necessity mentioned in (i) to (iii) above was cited from Archbold Hong Kong ("Archbold"), a commonly used practitioners' text on criminal law and practice in Hong Kong.</p> <p>Mr TO further enquired whether there were any cases that could illustrate how the defence of necessity could apply to a person who was prosecuted for committing what would otherwise constitute a serious crime where the commission of the crime was necessary for the purpose of avoiding or preventing death or serious injury to himself or another.</p> <p>The Administration undertook to provide members with details of the United Kingdom Court of Appeal decision in <i>R v Cairns</i> to illustrate the application of the defence of necessity.</p> <p>Noting that the word "funds" in section 15(1)(b) of UNATMO would be replaced by "property", Mr TO enquired whether the exception of "reasonable living expenses" as set out under section 15(1)(b)(i) should be replaced by "basic necessities" to ensure that the provision of basic necessities, such as food, to terrorists on humanitarian grounds could be defended. He also said that an alternative would be to add a new subparagraph (iv) under section 15(1)(b) to specify an additional exception of "basic necessities".</p> <p>The Administration referred to its response to the issues raised at the meeting of the Bills Committee held on 16 April 2012 (LC Paper No. CB(4)170/11-12(01)) and advised that the exceptions provided under section 15(1)(b) "may relate but are not limited to" the three exceptions set out therein. Exceptions related to non-fund property, such as medicines and medical treatment, could also be covered. As the existing section 15(1)(b) was already wide enough to cover other exceptions such as "basic necessities", it was more appropriate not to amend that section.</p> <p>The Administration further explained that the provisions in section 15(1) of UNATMO were</p>	<p>Admin (paragraph 3(b) of the minutes refers)</p>

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		<p>the conditions and exceptions which might be specified in the licences granted by the Secretary for Security under section 6(1) or 8 of UNATMO, rather than arguments for defence. The actual conditions or exceptions to be specified in a licence would depend on each case. Hence, it was not desirable to stipulate the different conditions and exceptions which could be specified in the licences.</p> <p>Mr TO queried whether the defence of necessity mentioned above was futile given that the defendant could apply for a licence.</p> <p>The Administration responded that a licence could be applied for if possible. However, there would be situations where a licence could not be applied for or granted in time, and the defendant might be excused by the defence of necessity.</p> <p>In response to Mr TO's enquiry, ALA3 advised that although he was not aware of any decided cases where the defence of necessity was applied specifically to terrorist offences, there were, according to Archbold, cases in the United Kingdom which set out the principles illustrating the application of the defence of necessity to a person who was prosecuted for committing what would otherwise constitute a serious crime where the commission of the crime was necessary for the purpose of avoiding or preventing death or serious injury to himself or another.</p>	
004908 - 004940	Chairman Administration	<p>Completion of scrutiny of the Bill</p> <p>Date of resumption of the Second Reading debate on the Bill, date of the Bills Committee to report its deliberations to the House Committee and deadline for giving notice to move Committee Stage amendments to the Bill</p>	