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**Report of the Bills Committee on
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012**

Purpose

This paper reports on the deliberations of the Bills Committee on United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012 ("the Bills Committee").

Background

Recommendations of the Financial Action Task Force on Money Laundering ("FATF")

2. The United Nations Security Council Resolution ("UNSCR") 1373 was passed on 28 September 2001 after the terrorist attacks on the United States on 11 September 2001. It aims at combating international terrorism on various fronts, including the prevention and suppression of terrorist financing, criminalizing direct, indirect and wilful provision or collection of funds, establishing terrorist acts as serious criminal offences in domestic laws with appropriate penalties and enhanced exchange of information and intelligence to fight terrorism. By virtue of Chapter VII of the Charter of the United Nations ("UN"), UNSCR 1373 is binding on all Member States. In October 2001, the Central People's Government gave instructions to the Hong Kong Special Administrative Region ("HKSAR") to implement UNSCR 1373.

3. Hong Kong is a member of FATF, which is an international body specializing in recommending standards and best practices in countering money laundering. FATF has published a set of internationally recognized standards to cover the issues of anti-money laundering

("AML") and counter financing of terrorism ("CFT"), known as the "40 + 9 Recommendations".

4. In 2008, FATF completed the Mutual Evaluation Report ("the Report") on Hong Kong's compliance with its recommendations in countering money laundering and terrorist financing. While recognizing the strengths of Hong Kong's AML and CFT regime, the Report made a series of recommendations to improve Hong Kong's compliance with FATF's recommendations.

5. Specifically, the Report concluded that Hong Kong needed to effectively implement legislative measures to address certain key deficiencies in the AML/CFT regime, including improvement to compliance with two major recommendations, i.e. the requirement to criminalize the financing of terrorism, terrorist acts and terrorist organizations, and the full implementation of the requirements of UN on counter-terrorist financing. As informed by the Administration, Hong Kong's major trading partners, including the United Kingdom, the United States, Singapore, Canada, Australia, etc. have complied with these two major recommendations.

6. On the basis of the Report, FATF resolved that Hong Kong should be put on a follow-up process and be required to report to FATF on a regular basis on the improvement actions taken or planned. According to FATF's procedures, Hong Kong is expected to have addressed the above major deficiencies identified in the Report and seek FATF's agreement to remove Hong Kong from the follow-up process not later than four years after the Report, i.e. by June 2012. According to the Administration, if Hong Kong fails to seek removal from the follow-up process within a reasonable period due to absence of substantial improvements, FATF may tighten scrutiny and monitoring on Hong Kong which could affect Hong Kong's status as an international financial centre. Hong Kong's commitment and ability to address the key deficiencies would be crucial for the removal from FATF's follow-up process.

Legislative work on measures against terrorism and terrorist financing

Enactment of ordinances

7. Hong Kong did not have any anti-terrorism legislation of general application before 2002. Offences which were typically committed by terrorists or associated with terrorism were however offences against the laws of Hong Kong. These included laws which gave effect to

multilateral conventions, bilateral agreements and UNSCRs, and the ordinary criminal laws of Hong Kong. As there were areas of UNSCR 1373 which the laws of Hong Kong could not cover without new legislative measures, the Administration adopted a two-stage approach to implement the anti-terrorism requirements of UNSCR 1373.

8. In stage one, the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) ("UNATMO") was enacted in July 2002 to give effect to the mandatory elements of UNSCR 1373 and the most pressing FATF Special Recommendations.

9. In stage two, the United Nations (Anti-Terrorism Measures) (Amendment) Ordinance 2004 ("the Amendment Ordinance") was enacted in June 2004 to implement relevant international conventions against terrorism (i.e. the International Convention for the Suppression of Terrorist Bombings, the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, and the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf), and to provide for the Secretary for Security ("S for S") to effectively freeze terrorist assets which were not funds.

Rules of the High Court (Amendment) Rules 2009

10. Some provisions in UNATMO (as amended by the Amendment Ordinance) could only take effect after the making of rules of court to provide for the procedural matters involved. On 9 October 2009, the Rules of the High Court (Amendment) Rules 2009 ("the Amendment Rules"), made by the Rules Committee of the High Court under section 54 of the High Court Ordinance (Cap. 4) and section 20 of UNATMO, were gazetted. In essence, those rules provide for the procedural matters in making the relevant applications to the Court of First Instance ("CFI"), including the type of summons to be used for commencing the relevant proceedings in different circumstances; the timeframe for serving the summons, affidavit and order, as applicable; and on whom such documents should be served.

Code of practice

11. Section 12A of UNATMO provides that the Secretary for Justice may make an application to CFI for an order to require the relevant persons to answer questions, furnish information or produce material relevant to the investigation of an offence under UNATMO.

Section 12A(14) requires S for S to prepare a code of practice ("the Code") in connection with the exercise of the powers and the discharge of the duties under section 12A.

12. At the Council meeting of 7 July 2010, the motion moved by S for S to seek the Council's approval of the Code under section 12A of UNATMO was passed. In essence, the Code regulates the manner in which the law enforcement agencies conduct its interviews with persons who are required to answer questions, furnish information or produce material. It also sets out the rights of the interviewees.

The Bill

13. The United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012 ("the Bill"), introduced into the Legislative Council ("LegCo") on 22 February 2012, seeks to amend UNATMO in the following three main areas -

- (a) expanding the definition of "terrorist act" to cover acts intended to coerce international organizations;
- (b) broadening the scope of prohibited terrorist financing from acts involving "funds" to those involving "property" of every kind; and
- (c) creating a new offence of collecting property or soliciting financial (or related) services for terrorists or terrorist associates.

The Bills Committee

14. At the House Committee meeting on 24 February 2012, Members agreed to form a Bills Committee to study the Bill. The membership list of the Bills Committee is in the **Appendix**. Under the chairmanship of Hon LAU Kong-wah, the Bills Committee has held three meetings with the Administration. The Bills Committee has also received written submissions from the Hong Kong Bar Association ("HKBA") and The Law Society of Hong Kong ("LSHK").

Deliberations of the Bills Committee

Timing of introducing the Bill

15. Members have criticized the Administration for not promptly introducing legislative proposals to amend UNATMO to implement all the recommendations of the Report which are necessary for removing Hong Kong from the follow-up process of FATF, after the publication of the Report in 2008. Members consider that the Administration should have introduced the Bill earlier so as to allow sufficient time for examination by LegCo, instead of introducing the Bill in February 2012, leaving only a few months before June 2012, i.e. the deadline for Hong Kong to address the major deficiencies identified in the Report.

16. Members have also expressed dissatisfaction that the Administration had introduced the Amendment Rules and the Code prior to the Bill. They have pointed out that the Administration should have introduced the Bill first to enable LegCo to scrutinize the relevant legislative proposals in a comprehensive manner, including whether the proposed amendments in the Bill would have any impact on the Amendment Rules and the Code.

17. The Administration has explained that in 2008, FATF completed the Report on Hong Kong's compliance with FATF's recommendations on countering money laundering and terrorist financing. In respect of UNATMO, FATF recommended that Hong Kong should bring UNATMO into full operation as soon as possible in order to improve its compliance with Special Recommendation III¹. Further, the Administration also needed to amend UNATMO to comply with Special Recommendation I² and Special Recommendation II³.

¹ **Special Recommendation III** – Freezing and confiscating terrorist assets: Each country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organizations in accordance with UN resolutions relating to the prevention and suppression of the financing of terrorist acts. Each country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organizations.

² **Special Recommendation I** – Ratification and implementation of UN instruments. Each country should take immediate steps to ratify and to implement fully the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism. Countries should also immediately implement UN resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly UNSCR 1373.

³ **Special Recommendation II** – Criminalizing the financing of terrorism, terrorist acts and terrorist organizations: Each country should criminalize the financing of terrorism, terrorist acts and terrorist organizations. Countries should ensure that such offences are designated as money laundering predicate offences.

18. The Administration has also explained that as recommended by FATF, it needed to press ahead with the legislative work in relation to Special Recommendation III, which was relatively complicated, to ensure timely completion within the timeframe to seek removal from FATF's follow-up process. The required legislative work included the enactment of a new Order 117A of the Rules of the High Court in December 2009, the making of the Code under section 12A of UNATMO in July 2010, and the making of and formal gazettal of a commencement notice in October 2010 to appoint 1 January 2011 as the date on which UNATMO came into full operation. During the drafting process, considerable time was required for consultation with various relevant parties, including the Judiciary, Department of Justice and the law enforcement agencies.

19. The Administration has further pointed out that according to FATF's procedures, it had reported in the progress report submitted to FATF in 2011 that UNATMO had been brought into full operation to address Special Recommendation III. As regards Special Recommendation I and Special Recommendation II, they are to be implemented through the Bill.

Title of UNATMO

20. The Bills Committee notes the concern of HKBA that UNATMO, as its title indicates, was enacted to give effect to UNSCR 1373. HKBA opines that the Bill proposes amendments that seem to go beyond the terms of UNSCR 1373. The amendments are introduced because of the recommendations of FATF, a different international body. While HKBA notes that the long title of UNATMO has made reference to the implementation of FATF recommendations, it suggests that consideration should be given to renaming UNATMO with a more suitable title in the light of the amendments in the Bill, which, if enacted, will hybridize UNATMO for the purpose of implementing requirements from two different institutions.

21. The Administration has responded that the long title of UNATMO clearly states that the Ordinance aims to implement UNSCR 1373 and to implement certain of the Special Recommendations of FATF in countering terrorist financing. The Bill also aims to address the shortcomings identified in the Report in relation to two of FATF's Special Recommendations already covered in UNATMO where improvements are required. According to the Administration, the long and short titles of UNATMO cover the present proposed amendments.

Implementation of the International Convention on the Suppression of the Financing of Terrorism ("the TF Convention")

22. The Bills Committee also notes HKBA's comments that the FATF recommendations to be implemented by the Bill are based on the TF Convention. While the People's Republic of China ("PRC") has ratified the TF Convention and applied it to HKSAR, the TF Convention has apparently not been implemented in Hong Kong by legislation. HKBA has suggested the Administration to address the questions of whether and how the TF Convention is to be implemented in the separate legal system of HKSAR, including whether and how the jurisdiction over the five offences set out in the TF Convention is to be established in Hong Kong.

23. In respect of the implementation of the TF Convention in HKSAR, the Administration has advised that it had set out in the paper submitted by the Security Bureau to the LegCo Subcommittee on Fugitive Offenders (Suppression of the Financing of Terrorism) Order in 2007 (LC Paper No. CB(2)2176/06-07(01)) how domestic law could cover the principal obligations under the TF Convention that needed to be implemented by legislative measures. For example, as stated in the paper, the principal obligations under Articles 2, 4, 5, 7, 8 and 18 of the TF Convention can be implemented through sections 3, 6, 7 and 12 of UNATMO.

24. The Administration has also advised that Article 7(2) of the TF Convention, which is not a mandatory requirement, aims to encourage the signatory States to establish extra-territorial jurisdiction over the five offences under the Article. The established practice of HKSAR is not to seek the establishment of extra-territorial criminal jurisdiction unless the requirements concerned are mandatory. The Administration considers it preferable for the prosecution of those offences to take place in the jurisdictions where they are committed. FATF did not specify in the Report that Hong Kong needed to make any improvement in respect of the non-application.

Definition and coverage of "property"

Replacement of "funds" by "property"

25. The Bills Committee notes that the Bill repeals the definition of "funds" and replaces the term "funds" by "property" under various sections of UNATMO. "Property" is not defined in the Bill or UNATMO. In the absence of such definition, the definition of "property"

in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO") is to apply save where the contrary intention appears either from IGCO or from the context of UNATMO. Under section 3 of IGCO, "property" is defined to include:

- (a) money, goods, choses in action and land; and
- (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in (a).

26. Members have expressed concern that the coverage of "property" as defined in section 3 of IGCO is too wide as compared to that of "funds" in section 2(1) of, and Schedule 1 to, UNATMO. They have also requested a comparison of the scope of coverage of the definition of "funds" in UNATMO with that of "property" in IGCO.

27. The Administration has advised that FATF recommended that the definition of "funds" under UNATMO should be extended to "assets of every kind, whether tangible or intangible, movable or immovable" as required under its Special Recommendation II. The Bill seeks to replace the term "funds" by "property" throughout UNATMO to cover assets of every kind in order to address the recommendation of FATF, as set out in the Report.

28. The Administration has further pointed out that the definition of "property", as set out under IGCO, will extend the existing coverage of "funds" as defined in section 2 of, and Schedule 1 to, UNATMO to encompass both "fund" and "non-fund" property. "Non-fund" property includes goods, land, obligations, easements, etc. The proposed amendment is consistent with the recommendation of the relevant Bills Committee during the scrutiny of UNATMO in 2002 that the definition of "property" in section 3 of IGCO should be adopted under UNATMO.

29. As informed by the Administration, the various references to "property" under UNATMO have consistently relied on the definition of "property" under IGCO. The United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003, as passed by LegCo in 2004, used the word "property" to replace the term "funds" under section 6 of UNATMO to implement the requirement of UNSCR 1373 and FATF Special Recommendation for freezing "fund" and "non-fund" assets of terrorists and terrorist associates. According to the Report, FATF did not raise any adverse comment on the use of the term "property" in UNATMO.

"Property" whether in Hong Kong or elsewhere

30. The Legal Adviser to the Bills Committee has pointed out that Schedule 1 to the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance (Cap. 615) ("AMLCTFO") clearly specifies that "property" under that Ordinance includes property "whether in Hong Kong or elsewhere". He has enquired whether, for the purposes of UNATMO, "property" is intended to cover property outside Hong Kong, and if so, whether UNATMO should include a definition of "property" similar to that in AMLCTFO or otherwise make clear that UNATMO applies to property whether within or outside Hong Kong.

31. The Administration has clarified that the definition of "property" under IGCO is neutral as to whether it covers property outside Hong Kong. Whether a particular provision applies to property outside Hong Kong will depend on the context and legislative intent of that provision.

32. The Administration has further advised that paragraph 1(b) and (d) of UNSCR 1373 mandates the exercise of jurisdiction on the basis of territoriality (i.e. the provision or collection of funds etc. by persons and entities within the States' territories) and nationality (i.e. the provision or collection by the States' nationals within or outside the States' territories). Section 3 of UNATMO provides that sections 7 and 8 (among other provisions) shall apply to a Hong Kong permanent resident or body incorporated or constituted under the law of Hong Kong that is outside Hong Kong. Taking into account the intention of UNSCR 1373 and section 3 of UNATMO, the Administration is of the view that the word "property" in sections 7 and 8 of UNATMO should be understood as including property outside Hong Kong.

33. Having regard to the Administration's clarification, the Legal Adviser to the Bills Committee has suggested that, for the avoidance of doubt, the Administration may 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.

34. The Administration has responded that as the requirements of UNSCR 1373 and FATF recommendations are to prohibit financing of terrorism on the international level and that section 3 of UNATMO has 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 any property will depend on the facts of each case. The Administration is of the view that the definition in IGCO should continue to be used lest FATF may consider that Hong Kong has made any substantial changes. According to the Administration, major common law jurisdictions, such as Singapore, Canada and Australia, do not make express reference in the definition of "property" in their anti-terrorism legislation as to where the "property" is located.

35. To clarify the extra-territorial effect of section 3 of UNATMO, members have asked whether a Hong Kong permanent resident outside Hong Kong who provides cash to a terrorist would be caught by section 7 of UNATMO. The Administration has advised that under section 3(b) of UNATMO, section 7 applies to any person outside HKSAR who is a Hong Kong permanent resident. Hence, the person would be caught by section 7.

36. In view of the Administration's explanation, members are satisfied and agree that the existing section 3 of UNATMO has already covered property located outside Hong Kong, and hence it will not be necessary to amend that section.

"International organization"

37. The Bills Committee notes that clause 3 of the Bill also seeks to expand the scope of the definition of "terrorist act" in section 2(1) of UNATMO to cover the intended coercion of international organizations. The term "international organization" is, however, not defined in the Bill or UNATMO.

38. The Bills Committee has enquired whether it is necessary to define in the Bill the term "international organization" and about the types of international organizations intended to be included. The Bills Committee also notes that both HKBA and LSHK have suggested that the applicable international organizations be specified in UNATMO by way of a list to be updated from time to time.

39. The Administration has responded that the proposed inclusion of the term "international organization" in the definition of "terrorist act" under section 2(1) of UNATMO is for the purpose of implementing the recommendation of FATF in the Report that Hong Kong should "broaden the scope of terrorist acts to also cover the intended coercion of an international organization". This recommendation was based largely on

expressed references to "international organization" made in Article 2.1(b) of the TF Convention. The TF Convention does not formulate a definition for the expression "international organization" or a list of relevant "international organizations". Further, FATF has not required its members to formulate a definition for the term. The Administration has also advised that major common law jurisdictions, such as Canada and Singapore, have included and covered "international organization" in the definition of "terrorist act" under their anti-terrorism legislation. However, these jurisdictions have not defined "international organization" in their legislation and FATF has confirmed their compliance with the requirements of the relevant recommendations.

40. According to the Administration, it is commonly understood in the context of international law that an "international organization" refers to an international intergovernmental organization, as discussed in Parry and Grant, *Encyclopaedic Dictionary of International Law*, 2nd edition, p. 370. For example, an international intergovernmental organization can be constituted by international multilateral treaty and has international legal personality and consisted of State members. Examples of international intergovernmental organizations would include UN, the European Union, the African Union, and the World Trade Organization. In light of the foregoing, the Administration considers that there is no need for the term "international organization" to be specifically defined in the Bill.

41. The Bills Committee notes HKBA's comment that while many international organizations are treaty based, some are not, such as the International Committee of the Red Cross ("the Red Cross"). The Bills Committee further notes that paragraph 7 of the LegCo Brief on the Bill (File ref.: SBCR 9/16/1476/74 issued by the Security Bureau in February 2012) has given the Red Cross as an example of an "international organization". Members have therefore sought clarification as to whether the term "international organization" under the proposed definition of "terrorist act" does not include an international organization, such as the Red Cross, that is not constituted by or under an international multilateral treaty.

42. The Administration has clarified that the Red Cross has a special place in the international arena. It has concluded international agreements with a number of states and carries certain rights and duties under international law. However, it was not established by a treaty under international law and has no member states or state representatives. In fact, it sees itself distinct from intergovernmental agencies (such as

UN organizations) and non-governmental organizations. In view of the foregoing, the Red Cross does not fall within the scope of "international organization" as commonly understood in international law. As such, the Administration has confirmed that the Red Cross is not an "international organization" for the purposes of the Bill.

43. In response to members' query as to whether any local legislation contains a definition of the term "international organization", the Administration has advised that only a few pieces of local legislation contain a definition of the term "international organization" for the specific purposes of the ordinances in question⁴, which are not concerned with the protection of international organizations from coercion by terrorists as required by the present FATF recommendation. The majority of local ordinances that contain references to the term "international organization"⁵ do not provide a definition for the term.

Criminalization of the collection of funds for terrorists or terrorist organizations

44. The Bills Committee notes that the Bill proposes the addition of a new provision under section 8 of UNATMO to prohibit the collection of property or the solicitation of financial (or related) services for terrorists or terrorist associates.

Mental element of "recklessness"

45. Members have expressed concern that the coverage of the proposed section 8 of UNATMO is too wide. They have enquired whether a person who provides basic necessities, such as food or shelter, to terrorists on humanitarian grounds, or collects reasonable legal expenses or solicits legal services for alleged terrorists will be criminalized under the proposed section 8(b).

⁴ The legislation includes: Section 2 of the International Organizations (Privileges and Immunities) Ordinance (Cap. 558), section 12(4)-(6) of the Official Secrets Ordinance (Cap. 521) and section 198 of the Copyright Ordinance (Cap. 528). The term "international organization" under Cap. 558 is limited to such an organization on which an international agreement confers privileges and immunities in Hong Kong. As for Cap. 521, the term "international organization" is used in the context of prevention of unlawful disclosure of information related to international relations, whereas "international organization" in Cap. 528 is used in the context of copyright protection.

⁵ The legislation includes: Schedule 3 to the Genetically Modified Organisms (Control of Release) Ordinance (Cap. 607), section 57 of the Personal Data (Privacy) Ordinance (Cap. 486), Schedule to the Defamation Ordinance (Cap. 21), Regulation 12F of the Road Traffic (Registration and Licensing of Vehicles) Regulations (Cap. 374E) and sections 14, 15, 20 of and Schedule 2 to the Ombudsman Ordinance (Cap. 397).

46. The Administration has explained that the proposed offences under section 8 of UNATMO require the mental element of knowledge or "recklessness", the latter of which was suggested by the Bills Committee on the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 and agreed by the Administration. The then Bills Committee agreed that applying "recklessness" to section 8, the Prosecution would have to prove that the offender either: (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 recognised that there was a risk the person concerned was a terrorist or terrorist associate, proceeded anyway.

47. For the provision of basic necessities to terrorists (such as food or shelter), a person would only commit an offence under the proposed section 8(a) if he knows that, or is reckless as to whether, the person is a terrorist or terrorist associate. Similarly, a person who collects property (such as legal expenses) for a terrorist or terrorist associate would commit an offence under the proposed section 8(b) if he knows that, or is reckless as to whether, the person is a terrorist or terrorist associate. The Prosecution has to prove the requisite *mens rea* of "knowledge" or "recklessness".

48. The Court of Final Appeal has previously held⁶ that the subjective interpretation of "recklessness" in *R v G & Another* has to be followed. In other words, the Prosecution has to show that the defendant's state of mind was culpable in that he acted recklessly in respect of a circumstance if he was aware of a risk which did or would exist, or in respect of a result if he was aware of a risk that it would occur, and it was, in the circumstances known to him, unreasonable to take the risk. Conversely, a defendant cannot be regarded as culpable so as to be convicted if, due to his age or personal characteristics, he genuinely did not appreciate or foresee the risks involved in his action.

Defence of necessity

49. The Administration has advised that according to paragraph 16-97 of *Archbold Hong Kong 2012* ("Archbold"), "a person will have a defence to a charge of crime if: (a) the commission of the crime was necessary, or reasonably believed to have been necessary (see *R v Cairns* [1999] 2 Cr App R 137, CA), for the purpose of avoiding or preventing death or serious injuries to himself or another; (b) that necessity was the

⁶ The relevant Court of Final Appeal case was: *Sin Kam Wah & Another v HKSAR* (2005) 8 HKCFAR 192.

sine qua non of the commission of the crime; and (c) the commission of crime, viewed objectively, was reasonable and proportionate having regard to the evil to be avoided or prevented." It will 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 will be for the court to decide whether such defence can be substantiated having regard to the facts of each individual case.

50. Members have enquired whether there are cases where the defence of necessity mentioned in the last paragraph has been applied to terrorist offences. The Legal Adviser to the Bills Committee has advised that while he is not aware of any decided cases where the defence was applied specifically to terrorist offences, the authors of Archbold have referred to a number of 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.

Solicitation of financial (or related) services

51. The Bills Committee notes that FATF apparently 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. LSHK has also commented that including "solicitation" of financial (or related) services, by any means, directly or indirectly, under the proposed section 8 of UNATMO may be beyond the scope of FATF recommendations and is too wide.

52. The Bills Committee has requested the Administration to explain the reason for including a new offence of soliciting financial (or related) services under the proposed section 8(b) of UNATMO.

53. The Administration has explained that paragraph 1(d) of UNSCR 1373 requires 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. This requirement is currently implemented under the existing section 8 of UNATMO, which will 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 Administration has proposed adding section 8(b) to 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.

54. The Administration has further stated that in electing to use the expression "solicit financial (or related) services" instead of "collect financial (or related) services", it has taken into consideration the legal advice that the term "collect" is not suitable for "financial (or related) services". In fact, both "collection" and "solicitation" refer to the act of collection as required by FATF.

55. Members have also asked whether overseas countries such as Singapore and Canada use the term "solicit" in similar legislation. The Administration has advised that similar provisions under the anti-terrorism legislation in Singapore use the terms "collects property, provides or invites a person to provide, or makes available property or financial or other related services"⁷, which are not dissimilar to "collect property or solicit financial (or related) services" in the proposed section 8(b) of UNATMO as set out in the Bill.

Licence

56. The Bills Committee notes that under the proposed section 8(a) of UNATMO, S for S may grant a licence to allow a person to make property or financial (or related) services available to terrorists or terrorist associates, but that there is no similar provision in the proposed section 8(b) for collecting property or soliciting financial (or related) for terrorists or terrorist associates. Nor does the proposed section 7 of UNATMO provide for the grant of similar licences in respect of the provision and collection of property to commit terrorist acts.

57. The Bills Committee has enquired about the reason for such inconsistency and whether the provision of the grant of a licence can be added to the proposed section 8(b). It has also asked whether the anti-terrorism legislation in overseas jurisdictions provides for exceptions/exemptions in relation to the collection of property and/or the solicitation of services.

58. The Administration has explained that the proposed section 7 of UNATMO involves a serious crime of providing or collecting property

⁷ See section 4 of the Terrorism (Suppression of Financing) Act, Act 16 of 2002, of Singapore.

with the intention or knowledge that the property will be used to commit one or more terrorist acts, while the proposed section 8(b) involves an active act of collecting property or soliciting financial (or related) services for the benefit of a person knowing that, or being reckless as to whether, the person is a terrorist or terrorist associate. Hence, there is no provision for the grant of a licence in these sections. In fact, the existing section 7 does not have any exception/exemption provision.

59. The Administration has also advised that except for the United Kingdom and Singapore, the anti-terrorism legislation of major common law jurisdictions, such as Australia, New Zealand and Canada, does not provide for exceptions (such as a licence) under the legal provisions in relation to prohibition on the provision and collection of property for terrorists or terrorist associates. According to the Administration, exceptions are only provided for in similar legislation in the United Kingdom and Singapore under the legal provision that prohibits the making of funds, economic resources or financial services available to terrorists or terrorist associates (i.e. the proposed section 8(a) of UNATMO), but not for the collection of funds, economic resources or financial services for terrorists or terrorist associates (i.e. the proposed section 8(b)). The proposed new section 8(b) is consistent with the anti-terrorism legislation of major common law jurisdictions and the requirements of FATF.

60. The Administration is of the view that it would not be appropriate to include a licence provision under section 8(b) which might create a loophole under UNATMO, making it possible for individuals to use humanitarian or similar (e.g. legal defence) grounds as an excuse to freely collect property for terrorists or terrorist associates.

Exceptions under section 15(1)(b) of UNATMO

61. The existing section 15(1)(b) of UNATMO provides that S for S, in granting a licence under section 6(1), may specify certain exceptions which "may relate but are not limited to -

- (i) the reasonable living expenses;
- (ii) the reasonable legal expenses; and
- (iii) the payments liable to be made under the Employment Ordinance (Cap. 57),

of any person by, for or on behalf of whom the funds are held."

62. Noting that the term "funds" in the existing section 15(1)(b) of UNATMO will be replaced by "property", the Bills Committee has requested the Administration to explain the effect of the replacement with regard to the three exceptions enumerated in that section which may be specified in a licence granted by S for S under section 6(1) of UNATMO.

63. Members have further enquired whether the exception of "reasonable living expenses" as set out under section 15(1)(b)(i) of UNATMO should be replaced by "basic necessities", or an additional exception of "basic necessities" should be specified under section 15(1)(b), to ensure that the provision of basic necessities, such as food or shelter, to terrorists on humanitarian grounds can be defended.

64. The Administration has advised that the list of exceptions specified under section 15(1)(b) is not exhaustive. For example, exceptions related to non-fund property could cover medicines and medical treatment, etc. Given that the word "funds" in section 6 of UNATMO has been replaced by "property" under the Amendment Ordinance and that section 15(1)(b) aims to provide for exceptions to be specified in a licence granted under section 6(1), the word "funds" in section 15(1)(b) should be replaced by "property" so that the scope of exceptions would correspond with the scope of "property" that may be frozen under section 6(1).

65. The Administration takes the view that since the existing section 15(1)(b) of UNATMO is already wide enough to permit exceptions to be made in relation to non-fund property such as "basic necessities", it is not appropriate to amend that section.

66. The Administration has further explained that the provisions in section 15 of UNATMO are the conditions and exceptions which may be specified in the licences granted by S for S under section 6(1) or 8 of UNATMO, rather than arguments for defence. The actual conditions or exceptions to be specified in a licence will depend on the circumstances of each case.

Implications on the Rules of the High Court (Cap. 4 sub. leg. A, Order 117A)

67. Members have asked the Administration to explain how the concerns raised by members of the Subcommittee on the Amendment Rules that were related to various definitions, including "funds" and "property", may impact on the proposed replacement of "funds" by "property" under the Bill.

68. According to the Administration, the provisions under the Rules of the High Court that contain the word "property" include rules 1, 6, 7, 9, 10, 11, 13, 19, 20, 21, 22, 23, 24 and 25. Those provisions have all along used the definition of "property" under IGCO. The Bill has not made any amendment to those provisions.

69. As regards the reference to "funds", it is only limited to rule 24. The proposed replacement of "funds" by "property" under the Bill will only require one amendment to Order 117A which is to repeal the word "funds" in rule 24 of the Order. As rule 24 has already covered "property", there is no need to add the word "property" to the provision.

Consultation with the House Committee

70. The Bills Committee reported its deliberations to the House Committee on 1 June 2012 and obtained its support for the resumption of the Second Reading debate on the Bill at the Council meeting of 13 June 2012.

Council Business Division 4
Legislative Council Secretariat
5 June 2012

**Bills Committee on
United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012**

Membership list

Chairman Hon LAU Kong-wah, JP

Members Dr Hon Margaret NG
Hon James TO Kun-sun
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
Hon Cyd HO Sau-lan
Hon WONG Kwok-kin, BBS
Hon Paul TSE Wai-chun, JP

(Total : 8 Members)

Clerk Ms Miranda HON

Legal Adviser Mr Bonny LOO