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January 5, 2004

The Honourable Mr. James To
Chairman of the Bills Committee on the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003
Legislative Council of the Hong Kong Special Administrative Region
Central, Hong Kong

Dear Mr. To:

Re: Second Written Submissions on the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003

I am pleased to provide you below with my latest comments on the above-mentioned Bill.

Freezing and Seizing Terrorist Property by Written Notice

1. I still believe that the terms of the freezing power in s. 6 of the Bill formulation can be made clearer and free of ambiguity. It is presently worded as a power that directs reasonably suspected terrorist property "*not be made available, directly or indirectly, to any person*". This wording is ambiguous because it is not clear whether the reference to "any person" includes the person holding the property. According to its plain meaning and analogous jurisprudence, the answer to this question is likely to be affirmative.[1] However, if this is the case, it becomes difficult to determine when a person holding onto property has made such property 'available' to himself. Take the example of a flat. At what point in time after a freeze notice is served, does the person living in the flat 'make the flat available' to himself? Does it occur the minute he receives the freeze notice?

[1] See *Lok Kar Win & Others* v. *HKSAR* [1999] HKLRD (Yrbk) 223 (CFA AC), refusing leave to appeal from [2000] 1 HKLRD 733 (CFI).

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Clarity is extremely important because the breach of a freeze notice constitutes a criminal offence for which the maximum punishment is seven years imprisonment.[2]

2. To address this problem, I recommend amending and aligning the terms of the freeze power with the terms of the well-established restraint power in section 10 of the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) (DTROPO) (and similarly in section 15 of the Organized and Serious Crimes Ordinance (Cap 455) (OSCO)). These restraint powers make clear that they *"prohibit any person from dealing with"* any realizable property. The word 'dealing' has a clear definition in both ordinances:

> "dealing" (處理)...includes-
>
> (a) receiving or acquiring the property;
> (b) concealing or disguising the property (whether by concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it or otherwise);
> (c) disposing of or converting the property;
> (d) bringing into or removing from Hong Kong the property;
> (e) using the property to borrow money, or as security (whether by way of charge, mortgage or pledge or otherwise);[3]

With this amendment, section 6(1) of the Bill formulation would become

> ***6. Freezing of property***
> *(1) Where the Secretary has reasonable grounds to suspect that any property is terrorist property, the Secretary may, by notice in writing specifying the property, prohibit any person from dealing with the property except under the authority of a licence granted by the Secretary.*

and the above definition for *dealing* would need to be incorporated into section 2 of the United Nations (Anti-Terrorism Measures) Ordinance (Cap 575) [hereinafter the "Ordinance"].

3. The administration should also consider shortening the expiry period of freezing notices from two years to one only. While this point was not raised in my submissions of October 31, 2003, I have made the point before (i.e. June 2002) and new thinking has led me to resurrect it. There is a great need for a shorter expiry period because the power to freeze property is more expansive

[2] See United Nations (Anti-Terrorism Measures) Ordinance (Cap 575), s. 14(2).
[3] See section 2 of each respective ordinance.

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than the power to forfeit property under s. 13 of the Ordinance. In other words, under the present law and proposal, the Secretary for Security has the power to freeze property that can never be the subject of forfeiture under the Ordinance. This is because, while the Secretary has the power to freeze any reasonably suspected "terrorist property", the court does not have the parallel power to forfeit "terrorist property" *per se*. The court's power to forfeit is restricted to terrorist property that

> i) in whole or in part directly or indirectly represents any proceeds arising from a terrorist act;
>
> (ii) is intended to be used to finance or otherwise assist the commission of a terrorist act; or
>
> (iii) was used to finance or otherwise assist the commission of a terrorist act.[4]

4. The legislation reflects the fair and sensible policy that if the State is to forfeit private property, it is not enough to show that it is property belonging to a terrorist or terrorist associate, it is also necessary to show that the property is tainted by terrorism in the sense that it is either the proceeds or instruments of terrorism. The law should not allow the State to freeze indefinitely private property that cannot be the subject of forfeiture. Given this broad power of the Secretary to freeze private property, it is necessary to have a relatively short expiry period to ensure that property rights are not being illegitimately impaired.

5. Indeed, it is a little odd that the power to freeze is not co-extensive with the power to forfeit. Under the Canadian antiterrorism laws, the test for seizing or restraining terrorist property requires being satisfied that there exists "any property in respect of which an order of forfeiture may be made".[5] In applying this test, the court ordering the restraint or seizure must consider the likelihood of forfeiting the property in question. This is different from the regime in Hong Kong where the Secretary for Security looks to see only if the property is 'terrorist property', which according to its definition includes all "the property of a terrorist or terrorist associate".[6]

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[4] See s. 13(1)(a) & (b) of the Ordinance.

[5] See Criminal Code, RS 1985, c C-46, s. 83.13(1).

[6] See s. 2 of the Ordinance, paragraph (a) of the definition of "terrorist property".

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6. It is also instructive to note that the period of expiry of restraint orders in Canada is only six months unless forfeiture or other relevant proceedings have commenced.[7]

7. The proposed subsection 6(10) is essentially a warrantless entry, search and seizure power given to the police. According to internationally recognized constitutional principles, warrantless search and seizure powers are presumptively unconstitutional unless shown to be strictly necessary and proportional.[8] The protection of privacy rights lies at the heart of this principle. The power to enter and search is qualitatively different from the mere power to freeze property. Accordingly, the warrantless power must be sufficiently narrow and restricted if it is to adhere to constitutional standards. Unfortunately, the present proposal lacks the necessary safeguards.

8. Under the proposal, the Secretary for Security does not need to be satisfied of any additional reasonable grounds before including the warrantless entry and search direction. While the direction to the officer must be "for the purpose of preventing any property the subject of the notice being removed from the HKSAR", this is only a good faith requirement and is not a reason-based requirement, i.e. reasonable grounds to suspect that the property will in fact be removed from the HKSAR. The criminalization of breaching freeze notices can itself serve a deterrent effect in preventing property from being removed from the jurisdiction. Given the impaired privacy interests and the broad power to freeze (beyond what may be forfeited), the principle of proportionality requires an added precondition of reasonable grounds to suspect that the property will be removed from the jurisdiction before the warrantless entry and search power can be triggered by the Secretary.

9. The principle of necessity requires another safeguard: the authorized officer must take reasonable steps to exhaust all possible warrant-based search powers to seize the targeted property before relying on the warrantless power. Such warrant-based powers would also include the proposed s. 12G in Part 4B. The administration has said that there is good reason to retain both the warrantless power and the warrant-based power in the Ordinance because they serve different purposes. However, given the wide definition of 'terrorist property' and the relative ease of obtaining the former, the practical reality is likely to be that the police will opt for the warrantless power in most

[7] See Criminal Code, RS 1985, c C-46, ss. 83.13(12), 462.33, 462.35.

[8] See *R* v *Yu Yem Kin* (1994) 4 HKPLR 75 (HC); *Katz* v *United States*, 389 US 347, 88 SCt 507; Hunter v Southam Inc. (1984) 14 CCC (3d) 97 (SCC). See also SNM Young,, "'Knock, knock. Who's there?' – Warrantless Searches for Article 23 Offences" (2003) Ce*ntre for Comparative and Public Law, Faculty of Law, University of Hong Kong, Occasional Paper Series*, No. 10, available online at http://www.hku.hk/ccpl/pub/occasionalpapers/index.html

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if not all cases. This has the effect of undermining the scheme of prior judicial authorization, which is accorded priority by constitutional principles.

Section 10 – Prohibition on membership in terrorist groups

10. There are two basic problems with the present proposal. First, there is a loophole for individuals who innocently become members of a specified terrorist group and later decide to maintain their membership after realizing that the group is so specified. Such a person is not caught by the proposed s. 10(1) because he lacks the required *mens rea* at the time he commits the *actus reus* of 'becoming a member'. He is also not caught by s. 10(2) because he became a member after the group was specified and could not be said to be a member "immediately before the date of [the specification's] publication in the Gazette". It would seem that the easiest way to close this loophole is by deleting the clause 'immediately before the date of its publication in the Gazette' in s. 10(2).

11. However, the second problem is that, contrary to the administration's intention, there is no requirement to prove that the body of persons has in fact been specified for the offences under s. 10(1). This is the legal effect of s. 10(1) because the reference to specification only appears in the clause setting out the *mens rea* element of knowledge or having reasonable grounds to believe. In accordance with the analogous jurisprudence for the offence of money laundering, it is understood that the specification element is only part of the *mens rea* and not a separate *actus reus* element.[9] To correct this deficiency, it is recommended that s. 10(1) be drafted along the lines of s. 10(2) to make clear that the group in question must in fact be specified. The offence should not be made merely a 'thought-crime'.

Part 4B – Seizure and detention of terrorist property

12. The attempt to support the police powers in the proposed Part 4B by reference to Part IVA of the DTROPO is misguided for two reasons. First, Part IVA of the DTROPO is only concerned with the import and export of proceeds of drug trafficking. In practical terms, Part IVA aims at drug proceeds that travelers attempt to take across the HKSAR borders, e.g. a suitcase full of cash at the airport.[10] Secondly, Part IVA powers can only be exercised in relation to money not less than HK$125,000. Thus, Part IVA of the DTROPO provides a narrowly circumscribed set of police powers aimed

[9] See *HKSAR* v *Wong Ping Shui and Another* [2001] 1 HKLRD 346 (CFA AC).
[10] See *Secretary for Justice* v *Lin Xin Nian* [2001] 2 HKLRD 851 (CA).

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at tackling the real problem of 'suspicious drug money found at the border'. It is important to note that there is no equivalent Part in OSCO, in relation to the proceeds of all serious and organized crimes. The police powers in Part IVA are justifiable not only because of the heightened interest against drug proceeds coming into and leaving Hong Kong but also because of the reduced reasonable expectation of privacy of individuals crossing a country's borders.[11]

13. By contrast, Part 4B proposes to give the police entry and search powers beyond the context of State borders and in relation to property of all forms and not only in the form of money. Given the breadth of this power, it is necessary for there to be prior judicial authorization. While the administration believes that a magistrate should have this authorizing role, I question why the role should not be given to a superior court. Presently, our superior courts have been accorded such a role in the restraint and charging of proceeds of crime. The law related to anti-terrorism is complex and often involves important State interests. The decision to authorize police powers in relation to such matters involves a level of inquiry of difficult legal and factual matters that should only be given to a superior court.

14. The administration has expressed an intention to clarify the preconditions for issuing the search warrant in the proposed s. 12G(1). I hope in the course of doing so, the administration will make clear that the issuing judicial officer must in all cases have reasonable cause to suspect that terrorist property or evidence of a relevant offence will be found in the premises to be searched. The constitutional validity of this search power will likely require this precondition.[12]

15. I still maintain my concerns with the stop and search power contained in the proposed s. 12G(3)(a), irrespective of whether similar powers already exist in other Hong Kong ordinances. The power involves constructive suspicion that a person found in premises in which terrorist property is found will necessarily have terrorist property on his person. As I mentioned in my previous submission, this constructive suspicion is problematic in public and quasi-public places where persons found in the premises will likely be unconnected to the terrorist activity. Presently, there is nothing in the proposal to prevent the power from being used indiscriminately, subjecting all unconnected persons to violative detention and search.

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[11] Support for this principle can be found in *R* v *Simmons* (1988) 45 CCC (3d) 296 (SCC).

[12] See "Chapter 19 Human Rights" in *Archbold Hong Kong 2004* (Hong Kong: Sweet & Maxwell Asia, 2003) at para. 19-152.

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Compensation

16. Reference to the availability of common law remedies is not an answer to the high threshold "serious default" requirement for obtaining compensation. This is because the common law remedies themselves are very limited given the historical immunity enjoyed by the government from civil suit. It must be recognized that the specification system is a new mechanism for enforcing criminal laws and prohibitions. Serious consequences to a person's liberty and proprietary interests can and will likely result from a specification. As well, specification inevitably injures the reputation and commercial interests of persons specified. Given the potential damage resulting from the improper or unlawful use of this new mechanism, the government has a correlative duty to provide for effective compensation, which logically should be more expansive than common law remedies.

17. This is consistent with the constitutional right in Art. 5(5) of the Hong Kong Bill of Rights: "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." While a specification does not necessarily result in a person's arrest or detention, where it does, the 'serious default' requirement is inconsistent with the Art. 5(5) right.

18. The administration cites English legislation to support the 'serious default' precondition. However, this restriction was included in English law before the coming into force of the Human Rights Act 1998 (UK). This restriction, which results in parsimonious governmental compensation, is not without its critics. In 1991, the Irish Law Reform Commission criticized this high threshold for compensation in the context of confiscation of proceeds of crime. It ultimately refused to follow English law and recommended that "*the court should have power to order the payment of compensation to any [aggrieved] person where it is satisfied that it is just and reasonable so to do.*"[13] See the enclosed relevant excerpts from the Commission's report. Presently, under the Irish Proceeds of Crime Act 1996, compensation is available for improperly seized property on a discretionary basis, as the court "considers just in the circumstances in respect of any loss incurred by the person by reason of the order concerned."[14] It is recommended that the test for compensation in s. 18 of the Ordinance (and consequently in the DTROPO and OSCO) be made more discretionary along the lines of the Irish model.

[13] See Law Reform Commission, *Report on the Confiscation of Proceeds of Crime* (Dublin: Law Reform Commission, 1991) 47-8.

[14] See Proceeds of Crime Act 1996 (Ireland), s. 16(1).

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Thank you again for this important opportunity.

Yours truly,

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(v) *It should be an offence to act in contravention of a restraint order.*

(vi) *Where a court is proceeding to make a confiscation order in accordance with the procedure recommended at a later stage in this Report and the property is subject to a restraint order, the court should be empowered to set aside at its discretion any conveyance of the property other than to a*

bona fide purchaser for value without notice.

12.

As to the payment of compensation, there is obviously room for argument as to whether a person who is subsequently acquitted or pardoned should be entitled as of right to compensation or whether that right should arise only where there has been both **serious default** on the part of the prosecution authorities and substantial loss caused. (The latter is the position under the relevant UK legislation).

13.

The argument against giving an automatic right to compensation is that there should not be an unnecessary inhibition on the bringing of applications of this nature. The defendant, it is urged, is sufficiently protected by a provision entitling him to apply to the court for relief from the order where, for example, he has to meet bills. In most cases, the only damage which he might sustain of a permanent nature would be the loss of a possible sale and for this he could be compensated. But it would be wrong, it is said, to allow such compensation in cases where the defendant was subsequently acquitted on a technicality or because a witness had been intimidated. It may also be pointed out that a defendant who is acquitted, even where the acquittal is on the merits and not simply due to a technicality, is not entitled as of right to have his costs paid by the State and it has never been suggested that this is a constitutionally dubious position.

14.

The argument in favour of having a broader provision for compensation than that contained in the English legislation is that it makes it more likely that the legislation would survive a constitutional challenge. In this connection, it may be noted that the procedure under consideration is similar to a *Mareva* injunction which would never be granted in the absence of an undertaking as to damages by the plaintiff. There seems no reason why the defendant in criminal proceedings – who suffers the additional indignity of resting under the suspicion of being a criminal – should be in any worse position than the defendant in civil proceedings. It is extremely unlikely that the State will be deterred from using the procedure because of the fear that compensation might be payable. It is very rarely that one finds a plaintiff in civil proceedings (invariably with far less resources than the State) put off by being advised that he will have to give an undertaking as to damages. In the overwhelming majority of cases, the defendant will in any event be unable to show any loss, since if a sale of the asset is being impeded, he can always come to court and ask for the restraint to be lifted. It is clear

that any potential liability to the State will, in the overall context of State expenditure, be minuscule.

15.

It must be recognised that there are cases such as the *Attorney General v Southern Industrial Trust*[14] and *O'Callaghan v Commissioners of Public Works*[15] where an interference with a person's property rights in the interests of social

14 (1957) 94 ILTR 161.

15 [1987] ILRM 391.

justice was upheld even though no compensation was payable. In *Dreher v The Irish Land Commission*,[16] moreover, Walsh J said:

> "It may well be that in some particular cases social justice may not require the payment of any compensation upon a compulsory acquisition that can be justified by the State as being required by the exigencies of the common good."[17]

As against this, in *ESB v Gormley*[18] the Supreme Court held that, although the interference with property rights was required by the common good, in the circumstances of the case the absence of a provision for compensation rendered the provision unjust.

16.

One can safely conclude, therefore, that the absence of a provision for compensation would not of itself necessarily render the suggested legislation unconstitutional. At the same time, the balance of the argument would seem to favour the inclusion of a more generous provision for compensation than that contained in the UK legislation, having regard to the constitutional dimension absent in that jurisdiction. We have had some difficulty in coming to a conclusion on this issue, but on balance we are inclined to the view that the best solution would be to enable the courts to award compensation where it was just and reasonable to do so. This would not automatically entitle every defendant to compensation, but would avoid the constitutional dangers inherent in an entitlement hedged round with specific restrictions. In particular, it could encompass a case where a defendant may not be contemplating an actual sale, but may for his own good reasons wish to be in a position to demonstrate to another person the extent of his wealth. He is hardly going to be in a strong position to do that if he has to tell the person concerned that it is subject to a court order because it is suspected of being the proceeds of crime. A provision along the lines we have suggested would enable the court to award compensation in such a case while not going to the extreme of entitling every person to compensation, although in the event he may have sustained no real loss. We recommend that *there should be a provision enabling any person claiming an interest in property affected by a restraint order to apply to the court within a specified period for an order returning the property to such person or ordering the payment by the State to that person of a sum equivalent to the value of the property. In addition, the court should have power to order the payment of compensation to any such person where it is satisfied that it is just and reasonable so to do.*

17.