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Report of the Bills Committee on United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003

Purpose

This paper reports on the deliberations of the Bills Committee on the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bills Committee).

Background

2. The United Nations Security Council Resolution (UNSCR) 1373 passed on 28 September 2001 (**Appendix I**) aims at combatting international terrorism on various fronts, including measures against terrorist financing. By virtue of Chapter VII of the Charter of the United Nations, UNSCR 1373 is binding on all States. The Central People's Government gave instructions to the Hong Kong Special Administrative Region (HKSAR) in October 2001 to implement the resolution.

3. Hong Kong has been an active member of the Financial Action Task Force on Money Laundering (FATF), an international body specialising in recommending standards and best practices in countering money laundering. Following 11 September 2001 attacks in the United States, the FATF made eight Special Recommendations (**Appendix II**) to tackle terrorism financing.

4. A two-stage approach is adopted by the Administration to implement the anti-terrorism requirements. In stage one, the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) (the Ordinance) was enacted in July 2002 to give effect to the mandatory elements of UNSCR 1373 and the most pressing FATF Special Recommendations. In stage two, the Administration aims to give full effect to the requirements of UNSCR 1373 and the FATF Special Recommendations to freeze non-fund terrorist property, and to implement other international conventions relating to terrorism. They are, namely, the United Nations International Convention for the Suppression of Terrorist Bombings (the Bombings Convention), the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the

Maritime Safety Convention) and the United Nations Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (the Protocol).

5. The Bombings Convention, which was adopted by the United Nations in 1997, aims at preventing and repressing terrorist type attacks by means of explosives or other lethal devices. The People's Republic of China ratified the Convention and applied it to the HKSAR in November 2001, which has become effective to the HKSAR as from December 2001.

6. The Maritime Safety Convention was adopted by the United Nations in 1988 to prevent and suppress unlawful acts threatening the safety of ships, their passengers and crew. The Protocol adopted also in 1988 extends the requirements of the Convention to fixed platforms attached to the sea-bed for exploiting offshore resources. The People's Republic of China ratified the Maritime Safety Convention and the Protocol in August 1991. Before the reunification on 1 July 1997, the Chinese side had agreed to the British proposal that the Maritime Safety Convention and the Protocol should apply to Hong Kong. In view of the need to enact local legislation to give effect to the Maritime Safety Convention and the Protocol and because there was insufficient time to put in place local legislation before the reunification, it was considered that arrangements should be made to extend the Maritime Safety Convention and the Protocol to Hong Kong after 1 July 1997 when the necessary local legislation had been put in place. According to the Administration, necessary arrangements will be made to have the Maritime Safety Convention and the Protocol applied to the HKSAR in due course.

The Bill

7. The United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003 (the Bill), introduced into the Legislative Council on 21 May 2003, seeks to amend the Ordinance to -

- (a) give effect to the outstanding obligations of freezing terrorist property other than funds under UNSCR 1373 and the FATF;
- (b) implement the Bombings Convention;
- (c) implement the Maritime Safety Convention and the Protocol;
- (d) repeal and replace section 10 in relation to prohibition on recruitment for terrorist groups;
- (e) specify the authorities to which and the persons to whom information obtained under the Ordinance may be disclosed;

- (f) provide for the power of investigation in relation to offences under the Ordinance, and powers of seizure and detention of property suspected to be terrorist property; and
- (g) make other drafting and consequential amendments.

The Bills Committee

8. At the House Committee meeting on 23 May 2003, Members agreed to form a Bills Committee to study the Bill. The membership of the Bills Committee is in **Appendix III**.

9. Under the chairmanship of Hon James TO, the Bills Committee has held a total of 16 meetings. The Bills Committee has met with four organisations/individual, and has received 16 written submissions from the organisations/individual as listed in **Appendix IV**.

Deliberations of the Bills Committee

Clause 2 (Section 2) - Interpretation

Definition of "authorized officer"

10. Under clause 2(1), the definition of "authorized officer" means a public officer authorized under new section 3A(1). New section 3A reads as follows -

- "(1) The Secretary (for Security) may authorize in writing any relevant public officer to be an authorized officer for the purposes of this Ordinance and subject to such conditions as the Secretary thinks fit specified in the authorization.
- (2) In this section, "relevant public officer" means any public officer who is -
 - (a) a police officer;
 - (b) a member of the Immigration Service;
 - (c) a member of the Customs and Excise Service;
 - (d) an officer of the Independent Commission Against Corruption; or

- (e) a legal officer, within the meaning of section 2 of the Legal Officers Ordinance (Cap. 87), of the Department of Justice".

11. Members are concerned that a legal officer ought not be authorised by the Secretary for Security (S for S). They have suggested that "authorized officer" be clearly set out to refer to an officer of the Police Force, the Customs and Excise Department, the Immigration Service and the Independent Commission Against Corruption, as they are the law enforcement agencies to exercise the investigatory powers in new Parts 4A and 4B. The Administration will move Committee Stage amendments (CSAs) to the definition of "authorized officer" along the lines suggested by members.

Definition of "public body"

12. Under clause 2(1), the term "public body" is defined as -

- "(a) any Government department; and
- (b) any public body specified by the Chief Executive under subsection (8)".

13. The Bills Committee notes that new section 2(8) provides that "The Chief Executive may, by notice published in the Gazette, specify a body to be a public body for the purposes of the definition of "public body"". Members have raised concern that a private body may be specified as a public body for furnishing information or producing materials in accordance with a court order issued under new section 12A(2) or 12B(2).

14. The Administration explains that the definition of "public body" is provided for the purposes of new sections 12A(10), 12B(7) and 12B(12). These provisions are intended to put it beyond doubt that a public body may be required to furnish information or produce materials in accordance with a court order issued under new section 12A(2) or 12B(2). Regarding the new section 2(8), the Administration has no intention to specify organisations that are purely private. Having noted that a "person" is required to furnish information or produce materials under new sections 12A and 12B and as "person" is defined in the Interpretation and General Clauses Ordinance (Cap. 1) to include "any public body and any body of persons, corporate or unincorporate", the Administration will delete the definition of "public body", sections 2(8), 12A(10), 12B(7) and 12B(12) to allay members' concern. The Administration has also agreed to explain the above during Committee Stage to avoid any misunderstanding that public bodies are excluded from the definition of "person".

Definition of "terrorist act"

15. Hon Margaret NG and JUSTICE, one of the organisations which has made written submissions to the Bills Committee, are of the view that the definition of "terrorist act" in section 2(1) must be amended so as to require specific intention to cause an outcome in paragraph (a)(i) of the definition.

16. To address concern raised, the Administration will tighten the definition by strengthening the element of "intention". In effect, "terrorist act" will be tightened to mean the use or threat of action where the action is carried out with the intention of, or the threat is made with the intention of using that action that would have the effect of causing serious violence against a person, causing serious damage to property, endangering other persons' lives, creating a serious risk to the health or safety of the public etc.

Clause 4 (new section 3A) on authorization of public officers

17. Clause 4 empowers S for S to authorise any public officer of the Hong Kong Police Force, Immigration Department, Customs and Excise Department, Independent Commission Against Corruption and the Department of Justice to be an authorized officer for the purposes of the Ordinance.

18. As the definition of "authorized officer" will be amended along the lines mentioned in paragraph 11 above, clause 4 becomes unnecessary and the Administration will move CSA to delete clause 4.

Clause 5 (Section 6) on freezing of property

19. Clause 5 extends S for S's power to freeze terrorist funds under section 6 of the Ordinance to non-fund terrorist property, and empowers S for S to authorise seizure of the frozen property to prevent it from being moved from Hong Kong.

20. Hon Margaret NG, Hon Cyd HO and Hon Audrey EU consider the use of "having reasonable ground to suspect" as a test to freeze property objectionable, as S for S could freeze any property which is merely suspected to be terrorist property for as long as two years and without having to make an application to the Court.

21. Mr Simon YOUNG of the Faculty of Law of the University of Hong Kong and the Law Society of the Hong Kong, two of the deputations which have made written submissions to the Bills Committee, have raised similar concern. They are of the view that the proposed freezing mechanism under new section 6 should be replaced in entirety with the more familiar scheme to restrain crime-tainted property adopted in the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) (DTRPO) and the Organized and Serious

Crimes Ordinance (Cap. 455) (OSCO). Moreover, under DTRPO and OSCO, a restraint order may be made on an ex parte application to a judge in chambers. This can prevent third parties from being aware of the judicial procedures.

22. The Administration has pointed out that "reasonable suspicion" cannot be supported solely on the basis of personal factors. The test as to whether reasonable grounds for suspicion to justify a freezing action exist is partly subjective, in that S for S must have formed a genuine suspicion that the property concerned is terrorist property, and partly objective, in that there have to be reasonable grounds for forming such a suspicion; such grounds could arise from information received from another, provided that a reasonable person, having regard to all circumstances, would regard them as reasonable grounds for suspicion.

23. The Administration has also explained that speed is of paramount importance for freezing of terrorist property. This differs from DTRPO and OSCO, which are essentially directed towards confiscation of proceeds of crimes already committed. It will therefore be prudent not to underestimate the availability of modern technology and arrangements that allow funds to be transferred from one jurisdiction to another almost instantly, and non-fund property to be quickly liquidated or physically transferred out of Hong Kong. Upon careful deliberation that an appeal mechanism is available under section 17 of the Ordinance, the Administration has therefore proposed to apply the freezing mechanism for terrorist funds under the existing section 6 to non-fund terrorist property. Moreover, in the event of incorrect freezing, compensation is payable to the aggrieved under section 18 of the Ordinance.

24. The Administration also confirms that the legal effect of a freezing order and that of a restraint order is essentially the same. A restraint order under OSCO prohibits any person from dealing with any realisable property held or controlled by the defendant, whilst a freezing notice under new section 6 directs a person not to make available suspected terrorist property specified in the notice. Under section 15(11) of OSCO, where any property specified in a restraint order is immovable property the order shall, for the purposes of the Land Registration Ordinance (Cap. 128) be deemed to be an instrument affecting land and registrable as such in the Land Registry. New section 6(9) in the Bill contains similar provisions.

25. Members have asked how "making available" in new section 6 should be construed as far as non-fund terrorist property is concerned. They are of the view that a person living in a residential flat "frozen" under that section should not be considered as "making available" the flat to himself.

26. The Administration confirms that a person holding a residential flat "frozen" under new section 6 would not be considered as "making available" the property concerned to himself. This is in line with the intention

underlying paragraph 1(c) of UNSCR 1373 and Special Recommendation III of FATF which aims to prevent funds and other assets from being provided to terrorists/terrorist associates and to prohibit terrorists/terrorist associates from mobilising funds and other assets. To reflect the aforesaid intention more clearly, the Administration has agreed to members' suggestion of replacing "make available" with "deal with" in new section 6. "Deal with" will also be defined in new section 6, based on the definition of "dealing" in OSCO.

27. The Administration has also accepted members' suggestion to add provisions under new 6(10) to the effect that S for S may give a direction to seize terrorist property only if he has reasonable grounds to suspect that the property will be removed from Hong Kong.

Section 7 on prohibition on supply of funds to terrorists and terrorist associates

28. Members have pointed out that the scope of section 7 goes beyond the requirement of paragraph 1(b) of UNSCR 1373 which requires all States to criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.

29. Having taking into account the views of members, the Administration has agreed to amend section 7 to follow closely the formulation of paragraph 1(b) of UNSCR 1373. In so doing, the Administration will also further improve the drafting of new section 7 to the effect that funds to be used "in whole or in part, to commit one or more terrorist acts" will be criminalised, taking reference from the Terrorism Suppression Act 2002 of New Zealand.

Section 8 on prohibition on making funds, etc. available to terrorists and terrorist associates

Section 9 on prohibition on supply of weapons to terrorists and terrorist associates

30. Hon Margaret NG and Hon James TO consider that the coverage of section 8 is too wide, having regard to the fact that paragraph 1(d) of UNSCR 1373 does not seem to require criminalising every ordinary citizen for making funds available to terrorists and terrorist associates.

31. The Administration has advised that a criminal approach in the implementation of UNSCR 1373 is adopted by major common law and European jurisdictions. The Administration has also pointed out that UNSCR 1373 takes a very broad approach to the suppression of terrorist financing. To facilitate the setting of priorities by States to implement the wide range of measures required by UNSCR 1373, the United Nations Counter Terrorism Committee (CTC) has stated that it first looks at whether a Member State has

put in place effective counter-terrorism legislation in all areas of activity related to UNSCR 1373 (including its paragraphs 1(b) and 1(d)), with specific focus on combating terrorist financing. The CTC has also elaborated that it focuses on legislation as the key issue because without an effective legislative framework States cannot develop the executive machinery to prevent and suppress terrorism, or bring terrorists and their supporters to justice.

32. Hon Margaret NG considers that the use of the mental element of "having reasonable grounds to believe" in sections 8 and 9 is too low a threshold, as terrorists and terrorist organisations do not carry a label proclaiming themselves to be terrorists. It is therefore wrong to criminalise every ordinary citizen unless he knows that. The gazettal of an organisation as a terrorist organisation is an insufficient and unsafe basis. Miss NG has therefore suggested replacing the mental element of "having reasonable grounds to believe" in sections 8 and 9 with "recklessness". It is an objective test, with the proof being whether the risk involved would have been obvious to an ordinary prudent man. Applying "recklessness" to sections 8 and 9, 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.

The Administration will move CSAs to replace the mental element of "having reasonable grounds to believe" with "recklessness" in sections 8 and 9.

33. In response to members' enquiry, the Administration has clarified that the Ordinance does not provide that a person is presumed to know of the existence or contents of a notice or an order published in the Gazette. The purpose of the presumption as provided for under sections 4(5) and 5(4) of the Ordinance is to relieve the prosecution of the requirement to prove that the specified persons or property are terrorists, terrorist associates or terrorist property as appropriate, in the absence of evidence to the contrary. However, if a person is charged with an offence relating to a terrorist or terrorist associate, (for instance, under sections 7, 8 or 9) the prosecution will still need to prove that the person knew, or was reckless as to whether he was dealing with such a person. The fact that the specification has been published in the Gazette does not create a presumption or proof that the accused person had the requisite mens rea.

Clause 6 (Section 10) on prohibition on recruitment to specified terrorist groups

34. New section 10 seeks to replace the existing section 10 of the Ordinance on prohibition of recruitment of members for terrorist groups or becoming members of terrorist groups. In fact, the amendment was proposed as a CSA before the passage of the Ordinance, but was not approved due to a technicality. The purpose is to introduce improvements in the following two areas -

- (a) improving the language of the provision by making it clear that recruitment of members for or becoming members of terrorist bodies is prohibited; and
- (b) providing for the appropriate mens rea such that a recruiter or an existing member will be criminalised only when he “knows” or “has reasonable grounds to believe” that the organisation concerned is a terrorist organization published in the Gazette.

35. In response to members' suggestions, the Administration will improve the drafting of new section 10(1) to make it clear that a person shall not recruit member(s) for or become a member of a terrorist group gazetted under section 4 or 5 of the Ordinance. Similar to the proposed amendments to sections 8 and 9 mentioned in paragraph 32 above, the Administration will replace the mental element of "having reasonable grounds to believe" with "recklessness". The Administration will also delete new section 10(2), as new section 10(1) already fulfills the requirement to suppress recruitment of members of terrorist groups under paragraph 2(a) of UNSCR 1373.

Clause 7 (new Sections 11A-I) - New Parts 3A and 3B on prohibitions relating to the Bombings Convention, the Maritime Safety Convention and the Protocol

36. Some members and JUSTICE have raised queries as to why it is necessary to make new legislative provisions for implementing the requirements in the Bombings Convention, the Maritime Safety Convention and the Protocol, since the prohibited acts should have been covered under the existing criminal law.

37. The Administration explains that not only are new provisions required to criminalise certain acts proscribed by the Maritime Safety Convention and the Protocol, new provisions are also required to give effect to the jurisdictional requirements under the Bombings Convention, the Maritime Safety Convention and the Protocol. If the jurisdictional requirements are implemented without creating new offences in accordance with the Conventions/Protocol, the jurisdictional coverage of the existing general criminal law may be inappropriately extended. In addition, it is more transparent and tidier to make provisions under one ordinance for offences created by multilateral

conventions. This is the approach that is usually adopted, for instance, in the Aviation Security Ordinance (Cap. 494), the Internationally Protected Persons and Taking of Hostages Ordinance (Cap. 468) and the Crimes (Torture) Ordinance (Cap. 427). There is also an added advantage that the extent of extra-territorial jurisdiction can be directly related to the offences.

38. In response to members' suggestions, the Administration has agreed to move CSAs to tighten offences created in new Parts 3A and 3B by closely following the provisions in the Bombings Convention, the Maritime Safety Convention and the Protocol.

39. Hon James TO has suggested that S for S should include in his speech during the resumption of the Second Reading debate on the Bill that the formulation of paragraphs (a), (b) and (c) of new section 11G(1) would not become a standard provision for defining "an act by any person occurs in connection with the commission or attempted commission of any of the acts" for general application in other local legislation. The Administration agrees.

Clause 8 (Section 12) on disclosure of knowledge or suspicion that property is terrorist property

40. Clause 8 replaces the existing section 12(6) with a new provision to enable law enforcement agencies to disclose information on transactions of suspected terrorist property which has been obtained pursuant to section 12 to their local counterparts and relevant overseas authorities.

41. To address members' concern that the provision may allow unrestricted disclosure of the information concerned, the Administration has accepted members' suggestion to stipulate that the disclosure is for the purpose of preventing and suppressing terrorist financing. Similar revisions will also be made to new section 12D(2)(a) and (b), and section 25A(9) of DTRPO and OSCO under clause 20 of the Bill.

42. Hon James TO has raised queries whether the Joint Financial Intelligence Unit (JFIU), to which all the disclosures under the Ordinance, DTRPO and OSCO are made, has a mechanism in place to ensure the proper implementation of new section 12(6)(b) of the Ordinance and new section 25A(9)(b) of DTRPO and OSCO. The Administration has confirmed that information will only be released by JFIU after it has been satisfied that this is the case.

43. Hon Margaret NG has pointed out that neither UNSCR 1373 nor FAFT requires Hong Kong to make a potential criminal of every ordinary citizen to disclose information on suspicious terrorist transaction. FATF Special Recommendation IV only imposes the obligation to make reports on "financial institutions, or other businesses or entities subject to anti-money laundering

obligations". Miss NG has therefore suggested that section 12 be revised by making reference to the United Kingdom Terrorism Act 2000 (the Act) to the effect that the obligation to report terrorist property would only cover information or other matters which come to a person arising from his work.

44. The Administration has agreed to consider the possibility of introducing a two-tier reporting system provided for under sections 19 and 21A of the Act in Hong Kong. Sections 19 and 21A of the Act read as follows -

Section 19

- “(1) This section applies where a person -
- (a) believes or suspects that another person has committed an offence under any of sections 15 to 18 (i.e. terrorist financing offences), and
 - (b) bases his belief or suspicion on information which comes to his attention in the course of a trade, profession, business or employment.
- (2) The person commits an offence if he does not disclose to a constable as soon as is reasonably practicable -
- (a) his belief or suspicion, and
 - (b) the information on which it is based.”

Section 21A

- “(1) A person commits an offence if each of the following three conditions is satisfied.
- (2) The first condition is that he -
- (a) knows or suspects, or
 - (b) has reasonable grounds for knowing or suspecting, that another person has committed an offence under any of sections 15 to 18.
- (3) The second condition is that the information or other matter -
- (a) on which his knowledge or suspicion is based, or
 - (b) which gives reasonable grounds for such knowledge or

suspicion, came to him in the course of a business in the regulated sector.

- (4) The third condition is that he does not disclose the information or other matter to a constable or a nominated officer as soon as is practicable after it comes to him.”

The “regulated sector”, following amendments made by the Terrorism Act 2000 (Business in the Regulated Sector and Supervisory Authorities) Order 2003, essentially covers all financial institutions as well as the designated non-financial businesses and professions (DNFBPs), i.e. casinos, lawyers, accountants, company and trust service providers, estate agents, and precious metals and precious stones dealers. The DNFBPs have been brought into the fold of the revised Forty Recommendations of FATF in June 2003.

45. In view of the possible implications such a reporting system may have on the sectors concerned, as well as the need to ensure consistency between the reporting requirements under section 25A of the DTRPO and OSCO and under section 12 of the Ordinance, the Administration agrees with the Bills Committee that a thorough consultation should be carried out before amendments should be contemplated. Due to the need to enact the Bill prior to the expiry of the current legislative session to meet international obligations, the Administration has agreed to undertake a review of the present reporting requirements under the three Ordinances in the context of the exercise to implement FATF's Forty Recommendations which is scheduled to start in 2004-05. The exercise will involve consultation with the various sectors (i.e. accountants; lawyers; real estate agents; company and trust service providers; and precious metals and stones dealers) to be brought into the fold of the Recommendations and thus are subject to the reporting requirements. The review will cover both the scope of the obligation to report as well as the mental threshold to be adopted for making disclosures, having regard to similar legislation in the United Kingdom and other common law jurisdictions.

46. Nevertheless, Hon Margaret NG has given notice to move a CSA to section 12(1) to the effect that the obligation to report terrorist property would only cover information or other matters which come to a person arising from his work.

Clause 9 (new sections 12A-K) - New Parts 4A and 4B on powers of investigation and seizure and detention of property suspected to be terrorist property

47. Clause 9 provides for the necessary law enforcement powers. New sections 12A, 12B and 12C empower law enforcement agencies to require relevant persons to furnish information or produce materials, to search premises for relevant materials, and to seize and retain such materials, for the

purposes of investigation into offences under the Ordinance. The new section 12G empowers law enforcement agencies to search premises where there is suspected terrorist property, or with respect to which an offence under the Ordinance has been committed or is about to be committed, and to seize and detain such property.

48. The Hong Kong Journalists Association (HKJA) is particularly concerned that journalists may be forced to disclose sources of information or information which may be used to reveal sources under new sections 12A and 12B. HKJA is of the view that journalists should be protected from such onerous provisions through the granting of an exemption for journalists carrying out legitimate activities. Alternatively the provisions could be tightened when seeking information or materials from a journalist, by providing for inter partes court hearing and appeal mechanisms.

49. The Administration explains that under sections 12A and 12B, the Court of First Instance will only issue an order to require a journalist to furnish information or produce materials if the objective tests set out in new sections 12A(4) and 12B(5) are met. These safeguards are comparable to those conditions under section 84 of Cap. 1 for making a court order requiring production of journalistic material. Under new sections 12A(15) and 12B(9), any person on whom a requirement is imposed under an order may apply for the revocation or variation of the order. Although the operation of Part XII of Cap. 1, which concerns search and seizure of journalistic materials, is not applicable to new sections 12A and 12B, it should be noted that both sections are already subject to sufficient judicial safeguards.

50. To address members' concern about the broad power of the law enforcement agencies, the Administration has agreed to adopt the model of the exercise of law enforcement powers in OSCO for new Part 4A. Notably, "authorized officer" will be replaced with "Secretary for Justice" and "Secretary for Justice or an authorized officer" to make an ex parte application to the Court of First Instance under sections 12A and 12B respectively. Amendments will also be made to improve new sections 12A(3)(c)(ii) and (6) to the effect that only materials "relevant to" the investigation will be required to be produced.

51. To put it beyond doubt that nothing in new sections 12A and 12B affect the protection of legal privilege and of the privilege against self-incrimination guaranteed under the existing section 2(5) of the Ordinance, the Administration will add "Subject to section 2(5)(a), (b) and (c)," at the beginning of sections 12A(11) and 12B(13), and delete new sections 12A(9) and 12A(12)(b).

52. Having regard to the comments of members, the Administration will substitute the Court of First Instance for a magistrate as the warrant issuing authority under new section 12G(1) and improve the drafting of that section to

the effect that the Court of First Instance may issue a warrant to authorise the law enforcement agencies to enter premises and to search for, seize, remove and detain any terrorist property therein. A new provision will also be added to set out that the law enforcement agencies may use any assistance and force as is necessary and reasonable for the purpose of giving effect to the warrant. As the new section 12G already provides for seizure and detention of suspected terrorist property, the Administration has also proposed to move CSA to delete new section 12H which provides that an authorized officer may, in accordance with the provisions of Part 4B, detain any seized property.

53. Members have raised queries about the rationale for stipulating that seized suspected terrorist property cannot be detained for more than 30 days under new section 12I(1), having regard to the fact that seized property may not be detained under DTRPO for more than 10 working days.

54. The Administration explains that the provision of not more than 30 days under new section 12I(1) for detaining suspected terrorist property is based on operational considerations of the time required to substantiate the origin or derivation of the seized property, or to take forward any proceedings in Hong Kong or elsewhere against any person in relation to the seized property, or to institute the steps for freezing the seized property in accordance with section 6 of the Ordinance. The seizure and detention of suspected terrorist property envisaged under new sections 12G and 12I will most likely be taken on the basis of overseas intelligence. To further confirm the origin or derivation of the seized property, it is expected that additional information or evidence will need to be sought from the relevant overseas jurisdictions through such procedures as the mutual legal assistance arrangements, so as to facilitate any proceedings in Hong Kong or elsewhere, or the freezing of the property concerned under section 6.

Clause 11(Section 14) on offences

55. Having regard to the comments of members, the Administration has agreed to amend new sections 14(7H) and 14(7J) to the effect that a person who "intentionally" and "without reasonable excuse" obstructs an authorized officer in the execution of a warrant under new section 12C or 12G respectively commits an offence.

Clause 14 (Section 18) on compensation

56. Members have pointed out that the compensation provision under the existing section 18 is not of practical benefit to someone who is wrongly specified as a "terrorist" or "terrorist associate" and whose property is wrongly specified as "terrorist property", the main reason being that it would be difficult for the affected persons to satisfy the court there has been "serious default" on the part of the Government.

57. To address members' concern, the Administration has proposed to lower the threshold from "serious default" to "default" under the existing section 18(2)(c) and new section 18(2B)(a), and to add a new section 18A to clearly preserve remedy available at common law.

58. Hon Cyd HO, Hon Albert HO, Hon Margaret NG and Hon James TO are of the view that a compensation arrangement better than the common law position should be provided, in view of the Administration's wide freezing power under section 6. They have suggested that the Administration should provide compensation to a person wrongfully specified as a terrorist or terrorist associate or whose property is wrongfully specified as terrorist property without requiring that person to prove any default on the part of the Government -

- (a) by reversing the burden of proof so that the Government has to prove that there has been no fault on the part of any person concerned in obtaining the relevant specification; or
- (b) that the Court of First Instance should not order compensation to be paid if the Government could satisfy the Court that the obtaining of the relevant specification is misled by the applicant's act or conduct.

Hon Miriam LAU does not agree with members' suggestion, given the impact of the suggestion on existing compensation policy, public expenditure as well as the compensation arrangement available under existing law.

59. The Administration considers that section 18 as proposed to be amended by the Administration is proportionate and reasonable, and strikes a balance between Hong Kong's obligation to combat terrorist financing and the need to compensate the aggrieved. The reasons are as follows -

- (a) person "wrongfully" specified by the Government can appeal to the Court of First Instance under section 17 of the Ordinance to revoke the specification order. Under the appeal procedure, the Government will bear the burden of proof and have to satisfy the Court that the person or property specified is a terrorist/terrorist associate and whose property is "terrorist property". If the specification order is revoked under section 17, the affected person will be able to satisfy the Court pursuant to section 18(2)(a) or (b) that he or the property in question is not a terrorist/terrorist associate or terrorist property, as the case may be. Accordingly, for practical purpose, compensation will be able to be claimed if the Government cannot satisfy the Court that its original specification was correct;

- (b) the provision of "default" as proposed to be adopted in section 18(2)(c) and new section 18(2B)(a) is consistent with the common law position that something more than negligence has to be established on the part of the Government; and
- (c) anti-terrorism laws in other major common law jurisdictions do not provide for compensation for "incorrect" Government specification or freezing.

60. Hon Albert HO has given notice to move CSAs to clause 14 to delete the requirement for proving default on the part of any person concerned in obtaining the relevant specification, and to provide that the Court shall not order compensation to be paid unless it is satisfied that there has not been any default or misconduct on the part of the applicant.

Committee Stage amendments

61. Hon Margaret NG and Hon Albert HO will move CSAs as mentioned in paragraphs 46 and 60 above respectively. The CSAs to be moved by the Administration include the amendments mentioned in paragraphs 11, 14, 16, 18, 26, 27, 29, 32, 35, 38, 41, 50, 51, 52, 55 and 57 above, as well as a number of technical and textual amendments.

Issues to be mentioned by the Administration during resumption of Second Reading debate

62. The Administration has agreed to mention the following during the resumption of the Second Reading debate on the Bill -

- (a) the proposed deletion of the definition of "public body" does not exempt a public body from a requirement to furnish information or produce materials in accordance with a court order issued under new sections 12A and 12B (paragraph 14 above refers);
- (b) the formulation of paragraphs (a), (b) and (c) of new section 11G(1) would not become a standard provision for defining "an act by any person occurs in connection with the commission or attempted commission of any of the acts" for general application in other local legislation (paragraph 39 above refers); and
- (c) the Administration will review the reporting requirements under section 12 of the Ordinance and section 25A of DTRPO and OSCO in the context of the exercise to put in place FATF's Forty

Recommendations which is scheduled to start in 2004-05 (paragraph 45 above refers).

Consultation with the House Committee

63. The Bills Committee consulted the House Committee on 18 June 2004 and obtained its support for the Second Reading debate on the Bill to be resumed on 30 June 2004.

Council Business Division 2
Legislative Council Secretariat
25 June 2004

United Nations

S/RES/1373 (2001)

Security CouncilDistr.: General
28 September 2001

Resolution 1373 (2001)**Adopted by the Security Council at its 4385th meeting, on
28 September 2001**

The Security Council,

Reaffirming its resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001,

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts,

Deeply concerned by the increase, in various regions of the world, of acts of terrorism motivated by intolerance or extremism,

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism,

Reaffirming the principle established by the General Assembly in its declaration of October 1970 (resolution 2625 (XXV)) and reiterated by the Security Council in its resolution 1189 (1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts,

Acting under Chapter VII of the Charter of the United Nations,

1. Decides that all States shall:

(a) Prevent and suppress the financing of terrorist acts;

(b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;

(c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) 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 persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. Decides also that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

(g) Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

3. Calls upon all States to:

(a) Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups;

(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts;

(c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts;

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

(f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts;

(g) Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists;

4. Notes with concern the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security;

5. Declares that acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations and that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations;

6. Decides to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and calls upon all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution;

7. Directs the Committee to delineate its tasks, submit a work programme within 30 days of the adoption of this resolution, and to consider the support it requires, in consultation with the Secretary-General;

8. Expresses its determination to take all necessary steps in order to ensure the full implementation of this resolution, in accordance with its responsibilities under the Charter;

9. Decides to remain seized of this matter.

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

Recognising the vital importance of taking action to combat the financing of terrorism, the FATF has agreed these Recommendations, which, when combined with the FATF Forty Recommendations on money laundering, set out the basic framework to detect, prevent and suppress the financing of terrorism and terrorist acts.

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 the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.

II. Criminalising the financing of terrorism and associated money laundering

Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offences are designated as money laundering predicate offences.

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 organisations in accordance with the United Nations 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 organisations.

IV. Reporting suspicious transactions related to terrorism

If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations, they should be required to report promptly their suspicions to the competent authorities.

V. International co-operation

Each country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organisations.

Countries should also take all possible measures to ensure that they do not provide safe havens for individuals charged with the financing of terrorism, terrorist acts or terrorist organisations, and should have procedures in place to extradite, where possible, such individuals.

VI. Alternative remittance

Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

VII. Wire transfers

Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain.

Countries should take measures to ensure that financial institutions, including money remitters, conduct enhanced scrutiny of and monitor for suspicious activity funds transfers which do not contain complete originator information (name, address and account number).

VIII. Non-profit organisations

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

**Bills Committee on United Nations
(Anti-Terrorism Measures) (Amendment) Bill 2003**

Membership List

Chairman	Hon James TO Kun-sun
Members	Dr Hon David CHU Yu-lin, JP
	Hon Cyd HO Sau-lan
	Hon Albert HO Chun-yan
	Hon Margaret NG
	Hon LAU Kong-wah, JP
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	Hon Audrey EU Yuet-mee, SC, JP
	(Total : 8 Members)
Clerk	Miss Mary SO
Legal Adviser	Ms Bernice WONG
Date	31 October 2003

**Bills Committee on United Nations
(Anti-Terrorism Measures) (Amendment) Bill 2003**

List of deputations

- Hong Kong Bar Association
- JUSTICE, the Hong Kong Section of the International Commission of Jurists
- Hong Kong Journalists Association
- Mr Simon N M YOUNG, Associate Professor of the Faculty of Law of the University of Hong Kong

Organisations which have provided written submissions only

- The Law Society of Hong Kong
- Hong Kong Association of Banks
- Hong Kong Christian Institute