

**The Administration's response to the observations made by
the Assistant Legal Adviser in her letters of 9 January 2006 (in standard font) and 25 January 2006 (in italics)**

The Assistant Legal Adviser's observations

United Nations Sanctions (Iraq)(Amendment) Regulation 2004

United Nations Sanctions (Liberia) Regulation 2004

Serious offences punishable with unlimited fine and imprisonment are created without LegCo's scrutiny

Restriction on a person's liberty should be subject to the due process of scrutiny by the legislature. The United Nations Sanctions Ordinance (Cap. 537) is the only Ordinance that departs from other ordinances in that the Chief Executive is empowered to make regulations not to be subject to the scrutiny by LegCo.

The Administration's Response

Section 3(3) of the United Nations Sanctions Ordinance provides that regulations made under the Ordinance may prescribe that a contravention or breach thereof shall be punishable on conviction on indictment by an unlimited fine and imprisonment for a term not exceeding 7 years. The maximum penalty for serious offences (such as supply or delivery of arms to Iraq/Liberia) under the two captioned regulations (i.e. unlimited fine and imprisonment) is in line with the provision in the Ordinance. The exact level of penalty is a matter for the court to decide.

Section 3(5) of the United Nations Sanctions Ordinance provides that sections 34 and 35 of the Interpretation and General Clauses Ordinance shall not apply to regulations made thereunder. This provision has been deliberated at length at previous meetings of the Subcommittee. The Administration's position is set out in CB(1)1934/04-05(01).

The power of search and detention in the Iraq Regulation differs from Part 4B of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575) whereby in the latter, court orders are required

Though the Administration has deleted some sections in the earlier Iraq Regulation which relate to customs (for example, section 2(1)(a) and 2(5)(d) to the Schedule) “to avoid ultra vires implications”, similar provisions in other regulations (for example, in the United Nations Sanctions (Arms Embargoes) Regulation) still appear

Enforcement powers in individual ordinances are required to implement the specific provisions therein and may vary between ordinances having regard to the different provisions involved. In the case of the United Nations (Anti-Terrorism Measures) Ordinance, court warrants are required to enter premises and to search for, seize, remove and detain any terrorist property therein. In the case of the United Nations Sanctions (Iraq) Regulation, if an authorized officer has reason to suspect that a ship, aircraft or vehicle is being or is about to be used in contravention of section 7(2) of the Regulation, he may board and search it without a court warrant. Preventative action may then be taken which falls short of actually seizing evidence. If that step is needed a search warrant must be obtained from the court pursuant to the Schedule. Powers to board and search suspected ships/aircrafts/vehicles without warrant could also be found in other ordinances. Please refer to paragraph 6 of our letter of 13 January 2004 [LC Paper No. CB(2)983/03-04(01)].

Thank you for the observation. We shall take this into consideration when the United Nations Sanctions (Arms Embargoes) Regulation is amended.

Should provisions with “ultra vires implications” be quickly removed from our statute book?

With regard to the Iraq Regulation, how are the United Nations Security Council (“UNSC”) decisions, say, the return of cultural properties to Iraq, prohibitions of arms to Iraq except arms required by the United States of America and the United Kingdom, and the Development Fund reflected in the 2004 Regulation?

There is only one provision of this kind left in regulations made under the United Nations Sanctions Ordinance – section 9 of the United Nations Sanctions (Arms Embargoes) Regulation. We consider it arguable that section 9 is intra vires. However, to avoid debate we will delete the provision when the Regulation is amended or via a Miscellaneous Provisions Amendment Bill. If a provision is clearly ultra vires, we agree that it should be removed quickly.

Under paragraph 10 of UNSC Resolution 1483, UNSC decided that sale or supply to Iraq of arms and related material other than those arms and related material required by the Authority (i.e. the United States of America and the United Kingdom) should be prohibited. This is implemented vide sections 3A, 4 and 7 of the amended United Nations Sanctions (Iraq) Regulation. Sections 4 and 7 of the Regulation prohibits the supply, delivery and carriage of arms and related material to Iraq, except under the authority of a licence. Section 3A of the Regulation provides that the Chief Executive shall grant a licence if he is satisfied that the goods is required by the Authority.

The decisions in UNSC Resolution 1483 in respect of the return of cultural properties to Iraq and the Development Fund for Iraq could not be implemented under the United Nations Sanctions Ordinance, and therefore do not feature in the United Nations Sanctions (Iraq)

(Amendment) Regulation 2004. The Administration is proceeding with work to implement these decisions. To date, we are not aware of the presence in Hong Kong of any Iraqi cultural properties and other items referred to in paragraph 7 of UNSC Resolution 1483 and shall continue to monitor the situation closely.

Would Hong Kong be regarded as not in compliance with international obligations?

The obligations in UNSC resolutions cannot be implemented immediately if legislation is required – the situation is different under international Conventions where a jurisdiction should not become a Party until it has the relevant legislation in place. We do not believe that we will be criticised for non-compliance as we are already proceeding with the preparation work for enacting the necessary legislation.

As for the Liberia Regulation 2005, it is noted that it has already expired but the UNSC has already passed a Resolution 1647 extending the sanctions on Liberia for a further period of 12 months as from 20 December 2005. When will this Resolution be implemented?

UNSC Resolution 1647 was adopted on 20 December 2005. We have started initial preparatory work for making the necessary subsidiary legislation. An amendment Regulation will be made after receipt of instruction from the Ministry of Foreign Affairs.

United Nations Sanctions (Sudan) Regulation

United Nations Sanctions (Sudan) (Amendment) Regulation 2005

In the LC Paper No. (CB(1)2029/04-05(03), the Administration has explained that

Under section 6A(1) of the amended United Nations Sanctions

the UNSC decides in Resolution 1591 that all States shall subject to certain exceptions, freeze all funds, financial assets and economic resources that are on their territories owned or controlled, directly or indirectly by the persons designated by the United Nations Security Council Committee. Could you please elaborate on how this decision is implemented in the Sudan Regulation? As the financial institutions in Hong Kong would be affected, have they been consulted?

Funds to be frozen would usually be funds held by a person and deposited in a financial institution. It differs from “making available funds to or for the benefit of a person”, the funds of which might not be his. In Cap. 575, s.6 provides for the freezing of funds while s.8 provides for the prohibition on making available funds to terrorists. If section 6A(1) of the Sudan Regulation, i.e. the making available of funds “would have effectively implemented the requirement to freeze

(Sudan) Regulation, a person shall not make available any funds, financial assets or economic resources to or for the benefit of a person or entity designated by the relevant UNSC Committee. In so doing, we would have effectively implemented the requirement to freeze the funds, financial assets and economic resources of these persons and entities.

The HKEx, Hong Kong Monetary Authority, Office of the Commissioner of Insurance, Securities and Futures Commission, the Chinese Gold and Silver Exchange Society and various major financial industry associations have already been informed of the prohibition and they have been invited to draw this to the attention of their respective constituents. We are not aware of the UNSC Committee having yet designated any persons/entities for the purpose of UNSCR 1591. Following designation and gazettal of the list of persons/entities, their attention would be drawn thereto again.

The provisions in the United Nations Sanctions (Sudan) Regulation are adequate to meet the requirements in UNSC Resolution 1591. By making it an offence to make available funds etc. to a relevant person, except under a licence, funds held by a relevant person and deposited in a financial institution would effectively have been frozen. The more detailed treatment in Cap. 575 (with forfeiture and

the funds”, then could you please clarify the purpose of enacting s. 6 of Cap. 575?

The Amendment Regulation imposes sanctions against “relevant persons” and no amendment to the UNSO was made. Please clarify the scope of the UNSO and whether the Regulation is made within the regulation-making power.

Sanctions under the UNSO are now imposed against “persons” instead of “places outside the PRC”. In the European Community, Article 308 EC was adopted as a legal basis for regulations against Taliban etc. in order to supplement the base supplied by Article 60 EC and 301 EC, so as to make it possible to adopt measures not only in respect of third countries but also in respect of individuals who and non-State bodies which are not necessarily linked to governments of those countries. In the U.K., the Afghanistan (United Nations Sanctions) Order 2001 was repealed. The Al-Qa’ida and Taliban (United Nations Measures) Order 2002 was enacted to implement Resolution 1390.

But in Hong Kong, in order to implement Resolution 1390, the United Nations Sanctions (Afghanistan) Regulation was enacted without amending the definition of “sanction” in the Ordinance. New section 10 is added to empower the Chief Executive to designate a person, undertaking, or entity as a person, undertaking

appeal provisions) would not be appropriate to regulations under the United Nations Sanctions Ordinance which are usually time-limited.

The “relevant persons”, i.e. persons designated by the relevant UNSC Committee, will be persons with a sufficient connection to Sudan and thus the measures imposed by UNSC Resolution 1591 could be implemented under, and fall within the regulation-making power of the United Nations Sanctions Ordinance.

The Administration’s position is, as previously advised to the Subcommittee, that it would be inappropriate to view “place” in the context of the United Nations Sanctions Ordinance in isolation from the people who operate in that place or have a connection with that place. As far as UNSC Resolution 1390 is concerned, it should be noted that the list to be maintained by the Committee (established pursuant to UNSC Resolution 1267) which the Chief Executive is to designate is a list of individuals and entities, associated with the Taliban or the Al-Quida organisation. As such, there is a clear connection with Afghanistan.

or entity referred to in the list maintained by the Committee for the purposes of Resolution 1390.

Pursuant to this section, for example, in G.N. 38 of Gazette No. 1/2006, the Secretary for Commerce, Industry and Technology has designated over hundreds of individuals associated with Taliban to be specified persons under the Afghanistan Regulation. Some are Malaysians, Indonesians, Germans, thought to be an Egyptian origin, and most of them have only names without any passport numbers or identification documents. Some live in the United Kingdom, of no fixed address in Italy, Switzerland, etc. It is doubtful whether the designation is within the "sanctions" since some of these persons are not connected with the place of Afghanistan. As for the Sudan Regulation, if a person with no sufficient connection to Sudan is designated, would similar doubt be raised on the scope of the Ordinance and the regulation made thereunder?

On the designation of person, what if a mistake is made, say, by the United Nations Security Council Committee or by the HKSAR Government when publishing the names in the Gazette? Is there any appeal for the person wrongly "designated"?

If a person feels that he has been wrongly designated by the UNSC Committee, it would be for him to raise the matter with the Committee. This falls outside the scope of the HKSAR Government. The persons to be specified by notice published in the Gazette will follow strictly those designated by the Committee. In the unlikely event that a mistake is made by the HKSAR Government, a new name list will be gazetted.

If a person feels aggrieved for having been designated by the UN committee and that his money in a Hong Kong account has been frozen, can he apply to the Hong Kong court for delisting from such designation? If the Hong Kong court has no such jurisdiction, please clarify the purpose of such “designation” in Hong Kong law.

For the Chinese term of “有關連人士” (person connected with Sudan), it seems that “與蘇丹” has not been reflected. It is quite confusing since there are definition of “有關人士”, “有關連人士” and also “指明人士” in section 5. Then in section 6C, there is the mentioning of “有關的指明人士” but no such definition is provided. Could this be improved?

As for the term “funds”, it is noted that the word “payable instruments” is rendered as “票據” but as “文書” in the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575), which one is more appropriate? Should there be consistency of this term?

The purpose of such designation is to implement decisions of the relevant UNSC Committee which is a requirement of the UNSC Resolution.

“有關連人士”, “有關人士” and “指明人士” are defined terms in the Regulation. Though they all contain the words “人士”, there is no confusion or ambiguity as to their meanings. “有關的指明人士” in section 6C is not a defined term but there is no confusion or ambiguity as to its meaning in the context of that section. We will, however, take your observation into consideration when the United Nations Sanctions (Sudan) Regulation is amended.

“作付款用的文書” is used as the Chinese rendition for “payment instruments” in the United Nations (Anti-Terrorism Measures) Ordinance, the United Nations Sanctions (Afghanistan) Regulation and the United Nations Sanctions (Liberia) Regulation. During the preparation of the United Nations Sanctions (Sudan) (Amendment) Regulation 2005, “作付款用的票據” was considered to be a more appropriate rendition for “payment instruments” and that it should be so used in that Amendment Regulation and in subsequent legislation. You may wish to note that in the United Nations Sanctions (Democratic Republic of Congo) Regulation 2005, “作付

Under section 8A, if the Chief Executive is satisfied that once certain requirements are met, he may grant a licence for making available funds to a relevant person. One of the requirements is that the funds have been determined by the Chief Executive to be necessary for extraordinary expenses, 'and the Committee has been notified by the Chief Executive of the determination, and the Committee has approved the determination' (subsection (2)(b)). Could the Chief Executive notify the United Nations Security Council Committee direct without going through the Ministry of Foreign Affairs?

Should this section be then amended?

款用的票據” is also used as the Chinese rendition for "payment instruments".

We note the inconsistency in the Chinese renditions for "payment instruments" in different legislation. We will replace references to “作付款用的文書” by “作付款用的票據” when an appropriate opportunity arises.

If the Chief Executive is satisfied that any one of the requirements in section 8A(2) are met and that he intends to grant a licence for making available funds to a relevant person, it is envisaged that he will notify the UNSC Committee (in the case of section 8A(2)(a) and section 8A(2)(c)), or consult the UNSC Committee (in the case of section 8A(2)(b)), through the Ministry of Foreign Affairs.

It would be for the Chief Executive to determine whether any one of the requirements in section 8A(2) are met, having taken into account all relevant considerations. If he is satisfied that the relevant requirements are met and that he intends to grant a licence for making available funds to a relevant person, he will notify/consult the UNSC Committee via the Ministry of Foreign Affairs. Such notification/consultation can be handled administratively – we do

not see a need to amend section 8A.

United Nations Sanctions (Côte d'Ivoire) Regulation

This Regulation expires at midnight on 14 December 2005. A new resolution 1643(2005) has been passed by the UNSC deciding, inter alia, to renew the provisions of paragraphs 7 to 12 of Resolution 1572(2004) until 15 December 2006. Similar to the Regulation on Sudan, this Regulation also empowers the Chief Executive to specify "a relevant person" and it is a prohibition to make available funds to the "relevant person". During the period when a new Regulation is not yet in place, how can this decision be implemented in Hong Kong?

Pending the making of a new Regulation, this prohibition could not be fully implemented in Hong Kong. That said, we are not aware of the UNSC Committee having yet designated any individuals or entities who would be subject to such prohibition.

United Nations Sanctions (Democratic Republic of the Congo) Regulation

United Nations Sanctions (Democratic Republic of the Congo) (Amendment) Regulation 2005

United Nations Sanctions (Democratic Republic of the Congo) Regulation 2005

By Resolution 1649(2005), the UNSC has decided that, inter alia, for a period expiring on 31 July 2006, the provisions of para. 13 to 16 of Resolution 1596 shall extend to certain individuals, as designated by the United Nations Security Council Committee. How and when will this Resolution be implemented?

Under section 36 of the United Nations Sanctions (Democratic Republic of the Congo) Regulation 2005, the Chief Executive may by notice published in the Gazette specify a person designated by the UNSC Committee with respect to the measures set out in paragraph 15 of Resolution 1596. As soon as the Committee publishes a new name list, the individuals will be specified accordingly under section 36 of the United Nations Sanctions

(Democratic Republic of the Congo) Regulation 2005. Similarly, the persons designated by the Committee will be prohibited from entering into or transitting through the HKSAR under section 9 of the Regulation.