

For information

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

**Response to the letter of 10 April 2012 from the Hong Kong Bar
Association and the issues raised at the Bills Committee meeting held
on 16 April 2012**

This note provides the information on the issues raised by the Hong Kong Bar Association in the letter of 10 April 2012 and the Bills Committee meeting held on 16 April 2012 in relation to the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2012 (“the Bill”).

Response to the Letter from the Hong Kong Bar Association

(i) Title of the United Nations (Anti-Terrorism Measures) Ordinance (“UNATMO”)

2. The long title of the UNATMO clearly states that the Ordinance aims to implement the United Nations Security Council Resolution 1373 (“UNSCR 1373”) and to implement certain of the Special Recommendations of the Financial Action Task Force on Money Laundering (“FATF”) in countering terrorist financing. The Bill also aims to address the shortcomings identified in the FATF’s 2008 Mutual Evaluation Report on Hong Kong (“the Report”) in relation to two of the FATF’s Special Recommendations already covered in the UNATMO where improvements are required. The long and short titles of the UNATMO cover the present proposed amendments.

(ii) Implementation of the International Convention on the Suppression of the Financing of Terrorism (“the Convention”)

3. In respect of the implementation of the Convention in the HKSAR, we submitted a paper to LegCo in 2007 (please refer to LC Paper No. CB(2)2176/06-07(01) at the Annex), setting out how domestic law could cover the principal obligations under the Convention that needed to be implemented by legislative measures.

4. Article 7(2) of the Convention, which is not a mandatory requirement, aims to encourage the signatory States to establish extra-territorial jurisdiction over the five offences (see footnote 1) under the Article. The established practice of the HKSAR is not to seek the establishment of extra-territorial criminal jurisdiction unless the requirements concerned are mandatory. We considered it more preferable for those offences to be prosecuted in the jurisdictions where they take place. The FATF did not specify in the Report that Hong Kong needed to make any improvement in respect of the non-application.

(iii) “International Organizations”

5. The reason why Hong Kong needs to include the term “international organization” in the definition of “terrorist act” under section 2(1) of the UNATMO is that FATF has specified in its Report that Hong Kong should “broaden the scope of terrorist acts to also cover the intended coercion of an international organization”. This FATF recommendation was based largely on the expressed reference to “international organization” made in Article 2.1(b) of the Convention. The Convention does not formulate a definition for the expression “international organization” or a list of relevant “international organizations”. Further, the FATF has not required its members to formulate a definition for the term. We note that major common law jurisdictions, such as Canada and Singapore, have included and covered “international organization” in the definition of “terrorist act” under their anti-terrorism legislation. These jurisdictions have not added any definition to the term and FATF has confirmed their compliance with the requirements of the relevant recommendations. As regards local legislation, only a few legislation contains a definition of the term “international organization” for the specific purposes of the ordinances (relevant legislation is at footnote 2), instead of

footnote 1 Article 7(2) states that – “A State Party may also establish its jurisdiction over any such offence when:

- (a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;
- (b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;
- (c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;
- (d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;
- (e) The offence is committed on board an aircraft which is operated by the Government of that State.”

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

affording protection to international organizations from being targets of coercion by terrorists as required by the present FATF's recommendation. As for the majority of such legislation that contains the term "international organization" (relevant legislation is at footnote 3), none of them provide a definition for the term.

Response to issues raised by members of the Bills Committee at the meeting on 16 April 2012

(i) Definition of "property"

6. A member requested the Administration to provide background information on the endorsement of the use of the Cap.1 definition of "property" under the UNATMO. The relevant Bills Committee Report in 2002 (LC Paper No. CB(2)2537/01-02) set out the background as follows —

"In view of Hon Audrey EU's concern about the meaning of the terms 'funds, financial assets, economic resources and funds derived from property' in the definition of 'property' in clause 2 of the Bill, the Administration has proposed to delete the definition and to rely instead on the definition as set out in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1). 'Property' in that section includes (a) money, goods, choses in action and land; and (b) obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as defined in (a)."

Having regard to the views of members of the Bills Committee, the Administration then agreed to move amendments to delete the original definition of "property" and rely instead on the definition under Cap.1 as the criteria for interpretation of "property" under the UNATMO. The amendments were passed by LegCo subsequently.

7. In this regard, the word "property" under the UNATMO has consistently relied on the definition of "property" under Cap.1. Accordingly, the United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003, as later passed by LegCo in 2004, used the word "property" to replace the term "funds" under section 6 of the UNATMO to implement the requirement of the UNSCR 1373 and FATF Special Recommendation for freezing "fund"

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

and “non-fund” assets of terrorists and terrorist associates. According to the Report, the FATF did not raise any adverse comment on the use of the term “property” in the UNATMO. As stated in the supplementary paper submitted earlier (LC Paper No. CB(4)157/11-12(01)), the definition of “property” under Cap.1 is neutral as to whether it covers property outside Hong Kong. Given that the requirements of the UNSCR 1373 and the FATF recommendations are to prohibit financing of terrorism on the international level and that section 3 of the UNATMO has also set out the extra-territorial effect, the property being covered under the UNATMO should in-principle also cover property located outside Hong Kong whilst the actual application of individual provisions related to a property will depend on the facts of each case. We are of the view that the definition in Cap. 1 should continue to be used lest the FATF may consider that Hong Kong has made any substantial changes. We also note that major common law jurisdictions, such as Singapore, Canada and Australia, do not make express reference in their definition of “property” as to where the “property” is located.

(ii) Exceptions under section 15(1)(b)

8. Section 15(1)(b) of the UNATMO states that —

“(1) Without prejudice to the generality of conditions and exceptions which may be specified in a licence mentioned in section 6(1)-

(a).....;

*(b) such exceptions **may relate but are not limited** to-*

(i) the reasonable living expenses;

(ii) the reasonable legal expenses; and

(iii) the payments liable to be made under the Employment Ordinance (Cap 57),

of any person by, for or on behalf of whom the ~~funds are~~ property is held.”

9. Obviously, the list of exceptions stated under section 15(1)(b) is not limited to items (i), (ii) and (iii) above. For example, exceptions related to non-fund property can cover medicines and medical treatment, etc. Given that the word “funds” in section 6 has been replaced by “property” under the United Nations (Anti-Terrorism Measures) (Amendment) Ordinance (21 of 2004) and that section 15(1)(b) aims to provide the exceptions covered by the licence under section 6(1), the word “funds” in section 15(1)(b) should be replaced by “property” so that the scope of exceptions would correspond with the “property” under section 6(1).

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

10. The provisions under the Rules of the High Court that contain the word “property” include rules 1, 6, 7, 9, 10, 11, 13, 19, 20, 21, 22, 23, 24 and 25. These provisions have all along used the definition of “property” under Cap.1. The Bill has not made any amendment to these provisions.

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

Security Bureau
April 2012

Legislative Council Subcommittee on Fugitive Offenders (Suppression of the Financing of Terrorism) Order

Purpose

This note provides information on how the Fugitive Offenders (Suppression of the Financing of Terrorism) Order (the Order) gives effect to the extradition provisions under the International Convention on the Suppression of the Financing of Terrorism (the Convention). It also outlines how the other principal obligations under the Convention are implemented.

Background

2. The Convention entered into force for China, including Hong Kong, in May 2006. It proscribes wilful and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that the funds may be used to carry out terrorist acts. It requires States Parties to, inter alia, establish such acts as criminal offences, and to freeze, seize or forfeit any funds used for the purposes of committing the offences. It also requires States Parties to extradite alleged offenders.

The Order

3. Articles 9 and 11 of the Convention require States Parties to include the offences under the Convention as extraditable offences. The Order made under section 3(1) of the Fugitive Offenders Ordinance (Cap. 503), which sets out the Convention in a schedule, provides that in relation to the extradition provisions of the Convention, the extradition procedures in Cap. 503 shall apply as between Hong Kong and the States Parties to the Convention, subject to the limitations, restrictions, exceptions and qualifications contained in the extradition provisions of the Convention. It does not have the effect of implementing the non-extradition related provisions of the Convention.

4. Section 3(9) of Cap. 503 provides that an order should not be made unless the arrangements for surrender of fugitive offenders to which the order relates are substantially in conformity with the provisions of

Cap. 503. The extradition arrangements under the Convention taken as a whole do so conform. Indeed Article 9 of the Convention provides that the State Party in whose territory the alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition. Article 11(2) specifies that extradition shall be subject to other conditions provided by the law of the requested State.

5. Six similar orders implementing the extradition provisions under other international conventions have previously been made, as follows -

- (a) the Fugitive Offenders (Safety of Civil Aviation) Order (Cap. 503G) giving effect to the extradition provisions under the Convention for the Suppression of Unlawful Seizure of Aircraft, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation;
- (b) the Fugitive Offenders (Internationally Protected Persons and Hostages) Order (Cap. 503H) giving effect to the extradition provisions under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents and the International Convention Against the Taking of Hostages;
- (c) the Fugitive Offenders (Torture) Order (Cap. 503I) giving effect to the extradition provisions under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- (d) the Fugitive Offenders (Drugs) Order (Cap. 503J) giving effect to the extradition provisions under the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances;
- (e) the Fugitive Offenders (Genocide) Order (Cap. 503K) giving effect to the extradition provisions under the Convention on the Prevention and Punishment of the Crime of Genocide; and
- (f) the Fugitive Offenders (Safety of United Nations and Associated Personnel) Order (L.N. 61 of 2007) giving effect to the extradition requirements under the Convention on the Safety of United Nations and Associated Personnel.

Other provisions of the Convention

6. For the other principal obligations under the Convention which need to be implemented by legislative measures, they are already covered in our domestic law. Details are set out in the ensuing paragraphs.

Articles 2 and 4

7. Articles 2 and 4 of the Convention require States Parties to establish the offences of financing terrorist acts as criminal offences. Section 7 of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575), which prohibits provision or collection of funds to commit terrorist acts, meets this Convention requirement.

Article 5

8. Article 5 requires States Parties to, in accordance with its domestic legal principles, take the necessary measures to enable a legal entity located in its territory or organized under its law to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence under the Convention. This requirement is met by section 3 of Cap. 575 which provides that section 7 shall apply to any person (including a legal entity) within Hong Kong as well as section 101E of the Criminal Procedure Ordinance (Cap. 221) which stipulates that where any person by whom an offence under any Ordinance has been committed is a company and it is proved that the offence was committed with the consent or connivance of a director or other officer concerned in the management of the company, the director or other officer shall be guilty of the like offence.

Article 7

9. Article 7 requires States Parties to take necessary measures to establish jurisdiction over the offences under the Convention when the offences are committed in their territory, on board a vessel flying their flags or an aircraft registered under their laws at the time the offences are committed, or by their nationals. This requirement is fulfilled by section 3 of Cap. 575 which provides that section 7 shall apply to any person within Hong Kong and any person outside Hong Kong who is a Hong Kong permanent resident, section 23B of the Crimes Ordinance which provides that any act of any person taking place on board a Hong Kong ship on high seas and (were it to take place in Hong Kong) constituting an

offence under the law of Hong Kong shall constitute that offence, and section 3 of the Aviation Security Ordinance (Cap. 494) which provides that any act taking place on board a Hong Kong-controlled aircraft while in flight than in or over Hong Kong and (were it to take place in Hong Kong) constituting an offence under the law of Hong Kong shall constitute that offence.

Article 8

10. Article 8 requires States Parties to take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences under the Convention as well as the proceeds derived from such offences, for purposes of possible forfeiture. This requirement is fulfilled by section 6 of Cap. 575, which provides for freezing of terrorist funds, section 12G of Cap. 575, which provides for seizure of terrorist funds and section 13 of Cap. 575, which provides for forfeiture of funds used to finance or otherwise assist the commission of a terrorist act or proceeds arising from a terrorist act.

Articles 12 to 16

11. Article 12 provides that States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings in respect of the offences under the Convention. Article 12(5) stipulates that States Parties shall carry out such obligations in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties, States Parties shall afford one another assistance in accordance with their domestic law. For States Parties with whom we have already entered into bilateral agreements on mutual legal assistance, we will be able to provide assistance in accordance with the agreements. For those with whom we have not concluded bilateral agreements, section 5(4) of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525) enables us to provide assistance on the basis of reciprocity.

Article 17

12. Article 17 specifies that any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to the Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and

applicable provisions of international law, including international human rights law. This requirement is met by the Hong Kong Bill of Rights Ordinance (Cap. 383).

Article 18

13. Article 18 provides that States Parties shall cooperate in the prevention of the offences under the Convention by taking all practicable measures to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories. Such measures include requiring financial institutions and other professions involved in financial transactions to utilize measures available for the identification of their customers, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. In this respect, the Hong Kong Monetary Authority has promulgated relevant guidelines on prevention of terrorist financing, requiring financial institutions to undertake the customer due diligence process to verify customers' identity and report suspicious financial transactions to the law enforcement agencies. Section 12 of Cap. 575 also requires disclosure of knowledge or suspicion that property is terrorist property to the law enforcement agencies.

Security Bureau
June 2007