

3.4 Provision of certain advice, assistance or training

[25-12] A person must not provide, directly or indirectly, to a relevant person or a relevant entity, any technical advice, assistance or training related to military activities.²⁹ The provision has extraterritorial effect to the extent that it applies to a person acting in the HKSAR and to any person acting outside the HKSAR who is both a Hong Kong permanent resident and a Chinese national, or a body incorporated or constituted under HKSAR law.³⁰ The offence is punishable on conviction on indictment to a fine and to imprisonment for 7 years, and on summary conviction to a fine at level 6 and to imprisonment for 6 months.³¹

[25-13] A statutory defence is available³² if the person did not know and had no reason to believe the advice, assistance or training concerned was or was to be provided to a relevant person or a relevant entity; or that the advice, assistance or training concerned related to military activities.³³

3.5 Making funds available or dealing with funds

[25-14] Except under authority of a licence, a person must not make available, directly or indirectly, any funds or other financial assets or economic resources to, or for the benefit of, a relevant person or a relevant entity; and a person ('first-mentioned person') must not deal with, directly or indirectly, any funds or other financial assets or economic resources owned by or otherwise belonging to, or held by, a relevant person or a relevant entity, and if the first-mentioned person is a relevant person or a relevant entity, including any funds and other financial assets or economic resources owned by or otherwise belonging to, or held by, the first-mentioned person.³⁴

[25-15] This provision largely captures the requirement under paragraph 1(a) of UNSCR 1988 (2011) and successor resolutions to prohibit both the 'making available of funds' or other financial assets or economic resources to relevant persons and entities and to 'freeze funds' or other

29 Section 5(2), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

30 Section 5(1), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX). However, the prohibition does not apply if a thing is done outside Hong Kong pursuant to a licence granted in that place: see s 11, United Nations Sanctions (Afghanistan) Regulation.

31 Section 5(3), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

32 The defendant may bear an evidential rather than persuasive onus. See *HKSAR v Diao Rui* [2015] 4 HKLRD 187, [2014] HKCU 1267; *Lee To Nei & Anor v HKSAR* [2012] 2 HKC 553.

33 Section 5(4), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

34 Section 6(2), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

financial assets or economic resources of such persons and entities.³⁵ The ‘deal with’ provision in the Regulation addresses the freezing requirement and it is broad enough to capture dealing by any third party as well as the relevant person or entity. The prohibition on making funds available or dealing with funds applies to any ‘funds or other financial assets or economic resources’. This language tracks the language of UNSCR 1988 (2011).

[25-16] ‘Funds’ are defined in the Regulation by inclusive reference to a list of various financial instruments and ‘economic resources’ are defined as assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services.³⁶ It is suggested the terms are broad enough, when taken together, to cover any form of property that is made available or dealt with.³⁷ It may be noted the term ‘deal with’ in the Regulation is also broadly defined in relation to ‘funds’ and in relation to ‘other financial assets or economic resources’ means to ‘use to obtain funds, goods or services in any way, including by selling, hiring or mortgaging the assets or resources’.³⁸

[25-17] A person is not to be regarded as having contravened the general prohibition by reason only of having credited an account owned by or otherwise belonging to a relevant person or a relevant entity with interest or other earnings due on that account, or for payment in favour of the

35 The Resolution is arguably under-implemented. Section 6(2) does not expressly cover property ‘controlled’ by relevant persons or entities, nor does it expressly apply to property ‘held on behalf of or at the direction of’ designated persons or entities; see paragraph 1(a) of UNSCR 1988 (2011).

36 Section 2, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

37 See the definition of ‘property’ in the Interpretation and General Clauses Ordinance (Cap 1). The term ‘property’ is used in provisions under UNATMO to implement similar targeted financial sanctions including against the Taliban; see Chapter 26 below. UNSCR 2255 (2015) has confirmed the requirements to freeze and to not make available funds and other financial assets or economic resources to the Taliban ‘...apply to financial and economic resources of every kind’; see paragraph 6. The International Convention for the Suppression of Financing of Terrorism has defined ‘funds’ as meaning: ‘assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit’; see Art 1 of the Convention. The Financial Action Task Force has defined ‘funds or other assets’ to mean ‘any assets, including but not limited to financial assets, economic resources (including oil and other natural resources), property of every kind...’: see General Glossary to the FATF Recommendations.

38 See definition of ‘deal with’ in s 6(6), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

person or entity.³⁹ This addresses UNSCR 1452 (2002)⁴⁰ which authorises additions to accounts of designated persons and entities provided such interest or other earnings and payments remain subject to the general prohibition. If the Chief Executive determines that access to the funds is necessary for meeting basic living expenses, or for the payment of reasonable professional fees including legal services, or for fees for the routine holding or maintenance of the funds, or for necessary extraordinary expenses, the Chief Executive must grant a licence for making funds available or for dealing in the funds, provided the 1988 Committee has been notified.⁴¹ This addresses UNSCR 1452 (2002)⁴² which permits release of funds for certain essential use by designated persons and entities with the approval of the 1988 Committee.

[25-18] The general prohibition on the making of funds available or dealing with funds has extraterritorial effect to the extent that it applies to a person acting in the HKSAR and to any person acting outside the HKSAR who is both a Hong Kong permanent resident and a Chinese national, or is a body incorporated or constituted under HKSAR law.⁴³ The offence is punishable on conviction on indictment to a fine and to imprisonment for 7 years, and on summary conviction to a fine at level 5 and to imprisonment for 6 months.⁴⁴ A statutory defence is available⁴⁵ if the person did not know and had no reason to believe that the funds or other financial assets or economic resources concerned were, or were to be made available to, or for the benefit of, a relevant person or a relevant entity; or that the person was dealing with funds or other financial assets or economic resources owned by or otherwise belonging to, or held by, a relevant person or a relevant entity.⁴⁶

39 Section 6(5), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

40 See paragraph 2.

41 Section 9 United Nations Sanctions (Afghanistan) Regulation (Cap 537AX). The Committee may make a negative decision within 3 days of the notification of the Chief Executive's intention to grant a licence for basic living or legal expenses; but the Committee must positively approve a determination by the Chief Executive to grant a licence for extraordinary expenses. It is an offence to provide false information or documents in support of an application for a licence: s 10, United Nations Sanctions (Afghanistan) Regulation.

42 See paragraph 1.

43 Section 6(1), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX). However, the prohibition does not apply if a thing is done outside Hong Kong pursuant to a licence granted in that place: see s 11, United Nations Sanctions (Afghanistan) Regulation.

44 Section 6(3), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

45 The defendant may bear an evidential rather than persuasive onus. See *HKSAR v Diao Rui* [2015] 4 HKLRD 187, [2014] HKCU 1267; *Lee To Nei & Anor v HKSAR* [2012] 2 HKC 553.

46 Section 6(4), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

3.6 Entry or transit of certain persons

[25-19] A relevant person must not enter or transit through the HKSAR.⁴⁷ The prohibition does not apply in the case of a person who has right of abode in Hong Kong,⁴⁸ if the entry or transit is necessary for the fulfillment of a judicial process,⁴⁹ or the 1988 Committee concludes the entry or transit is justified.⁵⁰ A person who contravenes the prohibition commits an offence and is liable on conviction to a fine at level 4 and to imprisonment for 2 years.⁵¹

3.7 Enforcement

[25-20] Parts 5-6 of the Regulation grants various investigatory and other powers to authorised officers⁵² in relation to the investigation of suspected ships,⁵³ the investigation of suspected aircraft,⁵⁴ the investigation of suspected vehicles,⁵⁵ and application for and execution of search warrants.⁵⁶ Part 7 provides a statutory gateway for disclosure of material obtained during an investigation. Information or documents provided or seized under the Regulation may be disclosed with the consent of the person who provided the information or document or from whom the document was seized; or when the information or document is disclosed to a person who would have been empowered under the Regulation to request that it be provided; or if it is disclosed on the authority of the Chief Executive for transmission through and with the approval of the Ministry of Foreign Affairs to the United Nations or the Government of a place outside the PRC for the purpose of assisting the United Nations or that Government in securing compliance with, or detecting evasion of, the measures in relation to Afghanistan.⁵⁷

[25-21] The information or document may also be disclosed with a view to or for the purpose of institution of proceedings for an offence under the Regulation.⁵⁸ Part 8 concerns miscellaneous matters and provides that proceedings for an offence under the Regulation may only be commenced with the consent of the Secretary for Justice.⁵⁹ If a person convicted of an

47 Section 7(1), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

48 Section 7(3), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

49 Section 8, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

50 Ibid.

51 Section 7(2), United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

52 A police officer, member of the Customs and Excise Service, or a Trade Controls officer: see s 2, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

53 Sections 12-14, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

54 Sections 15-17, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

55 Sections 18-20, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

56 Sections 22-23, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

57 Section 24, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).

58 Ibid.

59 Section 28, United Nations Sanctions (Afghanistan) Regulation (Cap 537AX).