

CHAPTER 4

CROSS-BORDER CRIME

1. WHAT IS CROSS-BORDER CRIME?

[4-1] The term ‘cross-border crime’ is used here in two ways. First, those transnational crimes whose elements span more than one jurisdiction; such as money laundering when the predicate offence occurs in one place and the proceeds are dealt with in another place, or fraud when perpetrators of the fraud are situated in one jurisdiction and the victims of the fraud are situated in another. Second, those mechanisms between jurisdictions which facilitate transnational cooperation against crime; such as mutual assistance when part of the criminal activity occurs, or evidence or property is located, outside the territorial reach of one jurisdiction; or for surrender of fugitives wanted for prosecution in one jurisdiction who are found in another jurisdiction. The two concepts are often and necessarily linked because most cross-border offending in the first sense will require cross-border assistance in the second sense. For the same reason, modern multilateral penal conventions usually include mandatory requirements not only for the criminalization of convention offences with cross-border elements but also for extradition, mutual assistance, prisoner transfer and for other means of law enforcement cooperation.

[4-2] In today’s rapid global communications and travel environment, most serious offending will almost always have some cross-border element. In this regard, the oft used saying ‘crime knows no borders’ has never been more true. Certainly financial crime knows no borders, cybercrime knows no borders and organized crime knows no borders. Other specific crimes such as drug trafficking, human smuggling, arms trafficking, bribery, counterfeiting, piracy and terrorism all involve cross-border activities by criminals responsible for the offending and by the authorities responsible for apprehension of these persons. Since most of the offences are committed for profit-driven motives and will necessarily generate proceeds of crime, money laundering is most frequently a concomitant result. Thus, it might be said in the Hong Kong context that money laundering is the most common of all crimes because any financial

crime or other profit generating offence bears the result that one or more persons will deal in the proceeds of that offence either knowingly or with reasonable grounds to believe the property represents the proceeds of an offence; and profit generating crimes are the most common type of crime committed in or in relation to Hong Kong.¹

2. MULTILATERAL CONVENTIONS AND CROSS-BORDER CRIME

[4-3] The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the United Nations Convention Against Transnational Organised Crime 2000, and the United Nations Convention Against Corruption 2003 (sometimes referred to as the ‘Vienna Convention’, the ‘Palermo Convention’ and the ‘Merida Convention’ respectively, in recognition of the cities where each convention was opened for signature) are three prominent examples of multilateral penal conventions addressing cross-border issues for drug trafficking, organised crime and corruption. They impose requirements on State parties to criminalize relevant convention offences and they mandate mutual assistance and other mechanisms for the effective investigation and prosecution of those offences. Each Convention also requires the criminalization of money laundering arising from or in connection with convention offences.

2.1 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Vienna Convention)

[4-4] The Vienna Convention recognizes:

... that illicit traffic is an international criminal activity, the suppression of which demands urgent attention and the highest priority ... that illicit traffic generates large financial profits and wealth ... that eradication of illicit traffic is a collective responsibility of all States and that, to that end, coordinated action within the framework of international cooperation is necessary’.² The Convention also recognizes ‘... the importance of strengthening and enhancing effective legal means for international cooperation in criminal matters for suppressing the international criminal activities of illicit traffic.’³

1 See Hong Kong Money Laundering and Terrorist Financing Risk Assessment Report, April 2018. The most commonly identified internal offences posing risk are fraud and drug trafficking; and the most commonly identified external offences posing risk are fraud, drugs, corruption and tax evasion.

2 See the Preamble to the Vienna Convention.

3 Ibid.

[4-5] It requires the criminalization of the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance; the cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs; the possession or purchase of any narcotic drug or psychotropic substance for the purpose of any such activities; the manufacture, transport or distribution of equipment, materials or of substances knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substance, and the organization, management or financing of such offences.⁴

[4-6] The Convention also requires the criminalization of: (1) the conversion or transfer of property, knowing that such property is derived from any such offence for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence to evade the legal consequences of his actions; and (2) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from such offences.⁵

[4-7] Thus, the Convention mandates both the criminalization of a range of substantive drug offences as well as the dealing in proceeds of those offences.⁶ The Convention requires assumption of jurisdiction over Convention offences when committed in the territory of a Party or when committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed.⁷ State Parties may also establish jurisdiction over Convention offences when committed by one of its nationals or by a person who has his habitual residence in its territory; when the offence is committed on board a vessel concerning which that Party has been authorized to take appropriate action pursuant to Article 17;⁸ or when the offence is an ancillary offence⁹ and is committed outside its territory with a view to the commission, within

4 Art 3(1)(a), Vienna Convention.

5 Art 3(1)(b), Vienna Convention.

6 Offences established under Art 3(1), Vienna Convention.

7 Art 4(1)(a), Vienna Convention.

8 A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested must render such assistance within the means available to them.

9 Participation in, association or conspiracy to commit, attempting to commit and aiding, abetting, facilitating and counselling the commission of any Convention offences; see Art 3(1)(c)(iv), Vienna Convention.

its territory, of a Convention offence.¹⁰ State Parties must establish jurisdiction over Convention offences when the alleged offender is present in its territory and it does not extradite him to another Party on the ground that the offence was committed in its territory or on board a vessel flying its flag or an aircraft which was registered under its law at the time the offence was committed; or that the offence was been committed by one of its nationals.¹¹ State Parties may also establish jurisdiction over Convention offences when it does not extradite the subject person for any reason.¹²

[4-8] The Convention contains express provisions for extradition¹³ and mutual legal assistance¹⁴ in respect of Convention offences in order to better facilitate international cooperation for the investigation and prosecution of those offences. Confiscation of the proceeds of Convention offences is a mandatory requirement.¹⁵ The criminal justice measures set out in the Vienna Convention are mainly implemented in Hong Kong under the provisions of the Dangerous Drugs Ordinance (Cap 134),¹⁶ the DTROP,¹⁷ the Fugitive Offenders Ordinance (Cap 503) (FOO)¹⁸ and the Mutual Legal Assistance in Criminal Matters Ordinance (Cap 525) (MLAO).¹⁹

2.2 United Nations Convention Against Transnational Organised Crime 2000 (Palermo Convention)

[4-9] The Palermo Convention recognizes:

...the negative economic and social implications related to organized criminal activities, and... the urgent need to strengthen cooperation to prevent and combat such activities more effectively at the national, regional and international levels.²⁰

[4-10] It notes with concern “the growing links between transnational organized crime and terrorist crimes, taking into account the Charter of the United Nations and the relevant resolutions of the General Assembly” and expresses determination “to deny safe havens to those who engage in

10 Art 4(1)(b), Vienna Convention. This is not a mandatory requirement.

11 Art 4(2)(a), Vienna Convention. The principle is referred to by the Latin expression ‘aut dedere aut judicare’: either extradite or prosecute.

12 Art 4(2)(b), Vienna Convention. This is not a mandatory requirement.

13 Art 6, Vienna Convention. See further Part 3 below.

14 Art 7, Vienna Convention. See further Part 4 below.

15 Art 5, Vienna Convention.

16 For example, see the substantive drugs offences in ss 4-9.

17 For example, see the s 25 offence of dealing in the proceeds of drugs trafficking; and the confiscation provisions in ss 8-19.

18 Ie the surrender of persons for drugs offences.

19 Ie mutual legal assistance for drugs offences.

20 See the Preamble to the Palermo Convention.

transnational organized crime by prosecuting their crimes wherever they occur and by cooperating at the international level”.²¹

[4-11] The Convention applies to the prevention, investigation and prosecution of offences established under the Convention where the offence is transnational in nature²² and involves an organised criminal group.²³ It requires criminalisation of participation in an organised criminal group by either or both of the following: (1) agreeing with one or more other persons to commit a serious crime²⁴ for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;²⁵ (2) conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in criminal activities of the organized criminal group or other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.²⁶ It also requires criminalization of organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.²⁷

[4-12] The Convention makes mandatory the criminalization of public sector corruption for the giving or acceptance of advantages; and State Parties must also consider establishing as criminal offences other forms

21 Ibid.

22 An offence is transnational in nature if it is committed in more than one State; it is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State; it is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or it is committed in one State but has substantial effects in another State: Art 3(2), Palermo Convention.

23 Art 3(1), Palermo Convention.

24 ‘Serious crime’ means conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty: Art 2, Palermo Convention.

25 ‘Organized criminal group’ means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit: Art 2, Palermo Convention. ‘Structured group’ means a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure: Art 2, Palermo Convention.

26 Art 5(1)(a), Palermo Convention.

27 Art 5(1)(b), Palermo Convention.

of corruption.²⁸ Criminalization of the offence of obstruction of justice is also a mandatory requirement.²⁹ The Convention further requires the criminalization of the laundering of proceeds of crime, namely (1) the conversion or transfer of property, knowing that such property is the proceeds of crime,³⁰ for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence³¹ to evade the legal consequences of his or her action; (2) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property,³² knowing that such property is the proceeds of crime.³³ Subject to basic concepts of its legal system, State Parties must also criminalize the acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; and participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with the requirement to criminalize the dealing in the proceeds of crime.³⁴

[4-13] Thus, the Convention requires both the criminalization of offences of participation in an organized criminal group, certain corruption offences, and the offence of obstruction of justice as well as dealing in the proceeds of crime from a wide range of predicate offences not limited to those specific offences established by the Convention.³⁵ State Parties

28 Art 8, Palermo Convention. These requirements are a forerunner to the requirements now found in the United Nations Convention Against Corruption.

29 Art 23, Palermo Convention.

30 'Proceeds of crime' means any property derived from or obtained, directly or indirectly, through the commission of an offence: Art 2, Palermo Convention.

31 'Predicate offence' means any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in Art 6 of the Convention: Art 2, Palermo Convention.

32 'Property' means assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets: Art 2, Palermo Convention.

33 Art 6(1)(a), Palermo Convention.

34 Art 6(1)(b), Palermo Convention.

35 State Parties must include as predicate offences all serious crime as defined in Art 2 of the Convention and the offences established in accordance with Arts 5, 8 and 23 of the Convention. In the case of State Parties whose legislation sets out a list of specific predicate offences, they must at a minimum include a comprehensive range of offences associated with organized criminal groups. Predicate offences should include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party need constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying Art 6 had it been committed there: see Art 6, Palermo Convention.

must assume jurisdiction over Convention offences when the offence is committed in the territory of that State Party; or on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.³⁶ A State Party may also establish its jurisdiction over any such offence when the offence is committed against a national of that State Party; the offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or the offence is one of those established in accordance with Art 5(1) and is committed outside its territory with a view to the commission of a serious crime within its territory, or one of those established in accordance with Art 6(1)(b)(ii) and is committed outside its territory with a view to the commission of an offence established in accordance with Art 6(1) (a)(i) or (ii) or (b)(i) within its territory.³⁷ State Parties must establish jurisdiction over Convention offences when the alleged offender is present in its territory and it does not extradite the person solely on the ground that he or she is one of its nationals;³⁸ and State Parties may also establish jurisdiction over the offences covered by this Convention when the alleged offender is present in its territory and it does not extradite him or her.³⁹

[4-14] The Convention contains express provisions for extradition,⁴⁰ transfer of sentenced persons⁴¹ and mutual legal assistance;⁴² as well as for joint investigations and law enforcement cooperation between States.⁴³ Confiscation of the proceeds of Convention offences is a mandatory requirement, and express provision is made for international cooperation for the purpose of confiscation.⁴⁴ The criminal justice measures in the Palermo Convention are mainly implemented in Hong Kong by certain common law offences,⁴⁵ the Theft Ordinance (Cap 210),⁴⁶ the Crimes Ordinance (Cap 200),⁴⁷ the Criminal Jurisdiction Ordinance (Cap 461),⁴⁸

36 Art 15(1)(a)-(b), Palermo Convention.

37 Art 15(2), Palermo Convention. This is not a mandatory requirement.

38 Art 15(3), Palermo Convention. The principle is referred to by the Latin expression 'aut dedere aut judicare': either extradite or prosecute.

39 Art 15(4), Palermo Convention. This is not a mandatory requirement.

40 Art 16, Palermo Convention. See further Part 3 below.

41 Art 17, Palermo Convention. See further Part 5 below.

42 Art 18, Palermo Convention. See further Part 4 below.

43 Arts 19 and 27, Palermo Convention.

44 Arts 12-14, Palermo Convention.

45 For example, the common law offences of conspiracy to defraud and perverting the course of justice.

46 For example, conspiracy to commit the offence of fraud: s 16A, Theft Ordinance (Cap 210).

47 For example, forgery: s 71, Crimes Ordinance (Cap 200).

48 For example, jurisdiction in relation to Group A offences under the Theft Ordinance and the Crimes Ordinance; and Group B offences of conspiracy to defraud or conspiracy, attempt and incitement of Group A offences.

the Prevention of Bribery Ordinance (Cap 201),⁴⁹ the OSCO,⁵⁰ the FOO,⁵¹ the MLAO⁵² and the Transfer of Sentenced Persons Ordinance (Cap 513) (TSPO).⁵³

[4-15] The Convention has three protocols: (1) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; (2) the Protocol against the Smuggling of Migrants by Land, Sea and Air, and (3) the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition. The People's Republic of China is a party to the first and third Protocols but only the third Protocol been applied to the HKSAR under Article 153 of the Basic Law.⁵⁴ The non-application of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children has caused some controversy in Hong Kong in view of the presence of a large number of foreign workers including domestic helpers who may be potentially subject to the abuses against which the Protocol is directed.

[4-16] In *ZN v Secretary for Justice & Ors*,⁵⁵ the applicant in judicial review proceedings alleged failure by the Administration to protect him as a victim of human trafficking for forced labour after he was enticed to come to Hong Kong as a foreign domestic helper. The Administration argued there was already a comprehensive regime in place to address human trafficking or forced labour. It acknowledged the Protocol to Prevent, Suppress and Punish Trafficking in Persons did not apply to the HKSAR, but said it was nevertheless committed to dealing with human trafficking and was guided by the definition of human trafficking under Article 3 of the Palermo Protocol in doing so. The Court of First Instance rejected any suggestion the existing body of criminal offences available under statute and common law appropriately and fully addressed the problem of human trafficking. There was no law that prohibited slavery or trafficking in slavery, servitude or trafficking in servitude, and forced labour or trafficking in forced labour. On the evidence and material presented, the current regime did not address adequately or effectively the positive obligations under Article 4 of the Hong Kong Bill of Rights⁵⁶ to tackle the practice of forced labour and the trafficking

49 For example, offering or acceptance of advantages: s 4, Prevention of Bribery Ordinance (Cap 201).

50 For example, the offence of dealing in proceeds of an indictable offence: s 25 OSCO and the confiscation provisions under Parts III-IV OSCO.

51 Is the surrender of persons for transnational organized crime.

52 Is mutual legal assistance in transnational organized crime.

53 Is the transfer of sentenced persons for transnational organization crime.

54 The criminal justice measures in the third Protocol are mainly implemented under the Firearms and Ammunition Ordinance (Cap 238).

55 [2017] 1 HKC 340.

56 Art 4 provides (1) no one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited; (2) no one shall be held in servitude; (3) no one shall be required to perform forced or compulsory labour.