



**UNODC**

United Nations Office on Drugs and Crime



# COMBATING WASTE TRAFFICKING

A GUIDE TO GOOD LEGISLATIVE PRACTICES



UNITED NATIONS OFFICE ON DRUGS AND CRIME

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# INTRODUCTION

## CONTEXT FOR THIS GUIDE

Crimes that affect the environment are among the most profitable and fastest growing types of international criminal activity.<sup>1</sup> In resolution 10/6, adopted in 2020, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime expressed its alarm at research indicating that crimes that affect the environment had become some of the most lucrative transnational criminal activities and were often closely interlinked with different forms of crime and corruption, and that money-laundering and the illicit financial flows derived from them may contribute to the financing of other transnational organized crimes and terrorism. It affirmed that the Organized Crime Convention

constitutes an effective tool and an essential part of the legal framework for preventing and combating transnational organized crimes that affect the environment and for strengthening international cooperation in this regard

and requested

the United Nations Office on Drugs and Crime, subject to the availability of extrabudgetary resources, and within its mandate, to provide technical assistance and capacity-building to State parties, upon request, for the purposes of supporting their efforts to effectively implement the Convention in preventing and combating transnational organized crimes that affect the environment.

In 2019, the Conference of the States Parties to the United Nations Convention against Corruption, in its resolution 8/12, noted with concern the role that corruption can play in crimes that have an impact on the environment and expressed concern that money-laundering may be used to disguise and/or conceal the sources of illegally generated proceeds, as well as to facilitate crimes that have an impact on the environment.

In 2021, the Fourteenth United Nations Congress on Crime Prevention and Criminal Justice adopted the Kyoto Declaration on Advancing Crime Prevention, Criminal Justice and the Rule of Law: Towards the Achievement of the 2030 Agenda for Sustainable Development, in which it reiterated the United Nations commitment to adopt effective measures to prevent and combat crimes that affect the environment, including, among other crimes, illicit trafficking in hazardous and other wastes, by making the best possible use of relevant international instruments and by strengthening legislation, international cooperation, capacity-building, criminal justice responses and law enforcement efforts aimed at, inter alia, dealing with transnational organized crime, corruption and money-laundering linked to such crimes, and illicit financial flows derived from such crimes, while acknowledging the need to deprive criminals of proceeds of crime.<sup>2</sup> In the same year, the General Assembly, in its resolution 76/185, urged Member States to take these same measures.

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<sup>1</sup> United Nations Environment Programme (UNEP), *The State of Knowledge of Crimes that have Serious Impacts on the Environment* (Nairobi, 2018), p. 1.

<sup>2</sup> General Assembly resolution 76/181, annex, para. 87.

## Conceptualizing waste crime, waste offences and waste trafficking

There is no universally accepted definition of waste crime. At its broadest, waste crime may be considered to refer to conduct that relates to waste and is criminalized. More precisely, waste crime can generally be understood as the trade, treatment or disposal of waste in ways that breach international or domestic environmental legislation and cause harm or risk to the environment and [or] human health and related conduct, such as fraudulent acts and omissions.<sup>3</sup>

The meaning of “waste offences” may vary depending on the context. In some contexts, waste offences may be used as a catch-all term to refer not only to criminal offences relating to waste but also to civil and administrative offences. In other contexts, where it is specifically criminal offences that are being discussed, waste offences may be considered to refer to waste crime. As the present guide is predominantly concerned with criminal liability, the latter approach is taken.

“Waste trafficking” is also a term that may have different definitions, ranging from narrower definitions that focus on the movement of waste and, in particular, the movement of waste that is transboundary or transnational, to more expansive definitions that encompass a broader range of acts and are not limited to transboundary movements. Waste trafficking may be understood as a subset of waste crime and waste offences, albeit a subset of varying breadth depending on how the term is used. For the purpose of the present guide, waste trafficking is understood broadly, and means importing, exporting, transporting, buying, selling, brokering, treating, processing, collecting, sorting, labelling, handling, utilizing, storing, recycling, disposing of and burning of scheduled wastes in breach of domestic law.<sup>4</sup> A broad conception of trafficking, which goes beyond mere transportation and seeks to include related acts, is in line with conceptions of trafficking from certain other contexts, such as the definition of trafficking in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,<sup>5</sup> and the notion of trafficking used in certain other publications of the United Nations Office on Drugs and Crime (UNODC), such as the *Guide on Drafting Legislation to Combat Wildlife Crime*<sup>6</sup> and *Combating Falsified Medical Product-Related Crime: A Guide to Good Legislative Practices*.<sup>7</sup>

The present guide is concerned with drafting legislation to prevent and combat waste trafficking. Accordingly, it mainly uses the term “waste trafficking”. Where the guide refers to the broader category of criminal offences concerning waste, the terms “waste crime” or “waste offences” are used.

## Nature, scale and impacts of waste crime and waste trafficking

Research on the nature and scale of waste crime remains limited, particularly from an empirical perspective.<sup>8</sup> Waste trafficking occurs both domestically and internationally. Internationally, waste is usually trafficked from developed to least developed countries, with trade flows from the global North (the European Union, Japan, the United States of America and Australia) to the global South (Africa, Asia and South America).<sup>9</sup> Waste trafficking involves a variety of actors, including companies operating in the licit waste

<sup>3</sup> Lieselot Bisschop and Wim Huisman, “Waste crime from three criminological perspectives: implications for crime control and harm prevention”, in *Green Crimes and Dirty Money*, Toine Spapens and other, eds. (London, Routledge, 2018), p. 150.

<sup>4</sup> See “Waste trafficking” in chapter 3, below.

<sup>5</sup> Art. 3. subpara. (a).

<sup>6</sup> United Nations Office on Drugs and Crime (UNODC), *Guide on Drafting Legislation to Combat Wildlife Crime* (Vienna, 2018), p. 13.

<sup>7</sup> UNODC, *Combating Falsified Medical Product-Related Crime: A Guide to Good Legislative Practices* (Vienna, 2019), p. 11.

<sup>8</sup> Daniela Andreatta and Serena Favarin, “Features of transnational illicit waste trafficking and crime prevention strategies to tackle it”, *Global Crime*, vol. 21, No. 2 (February 2020), p. 2; and Serena Favarin and Alberto Aziani, “The global waste trafficking and its correlates”, *Journal of Contemporary Criminal Justice*, vol. 36, No. 3 (July 2020), p. 352.

<sup>9</sup> Favarin and Aziani, “The global waste trafficking and its correlates”.

industry and organized criminal groups. Although the exact scale of waste crime is difficult to estimate,<sup>10</sup> waste crime is considered to be one of the most significant crimes that affect the environment.<sup>11</sup>

What is clear is the range of deleterious impacts of waste crime and waste trafficking on the environment, habitats, human and animal life, public health, food security, livelihoods, economies, development and the rule of law. Although the recovery of materials from certain types of waste provides an important means of generating income, particularly in the informal sector,<sup>12</sup> developing countries and vulnerable populations are the hardest hit by waste crime and waste trafficking, with women, children, indigenous people, persons with disabilities, workers,<sup>13</sup> the poor, migrants and minorities facing the greatest impacts.<sup>14</sup> Waste crime at large hinders progress towards the implementation of the 2030 Agenda for Sustainable Development and the achievement of the Sustainable Development Goals. As a result of the impacts noted above, waste crime threatens, among other goals, the achievement of Sustainable Development Goal 3 (Ensure healthy lives and promote well-being for all at all ages), Sustainable Development Goal 6 (Ensure availability and sustainable management of water and sanitation for all), Sustainable Development Goal 12 (Ensure sustainable consumption and production patterns), Sustainable Development Goal 8 (Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all), Sustainable Development Goal 14 (Conserve and sustainably use the oceans, seas and marine resources for sustainable development), Sustainable Development Goal 15 (Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, halt and reverse land degradation and halt biodiversity loss) and Sustainable Development Goal 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels).

It is in this context that UNODC has produced the present guide. Subsequent sections of the introduction address the purpose, scope and target audience of the guide and how it can be used.

## PURPOSE, SCOPE AND TARGET AUDIENCE OF THE GUIDE

The present guide is intended to support States in enacting or strengthening domestic legislation to prevent and combat waste trafficking, in particular through the implementation of the Organized Crime Convention. Accordingly, the guide is primarily intended for policymakers, legislators and the legislative drafters supporting them to enact and strengthen legislation. In addition, it contains discussion and analysis of the issues relating to the implementation of legislative frameworks aimed at preventing and combating waste trafficking by investigators, prosecutors, judges and other actors in the criminal justice system, in particular where those issues should also be considered by policymakers, legislators and legislative drafters. Beyond these groups, the guide may also be useful for criminal justice system actors, academics, civil society and other relevant stakeholders.

In addition to the Organized Crime Convention, the guide also takes into account the provisions of other relevant international instruments, including, notably, the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal.<sup>15</sup> The Basel Convention is introduced in chapter 1,<sup>16</sup>

<sup>10</sup> Lorraine Elliott, “Fighting transnational environmental crime”, *Journal of International Affairs*, vol. 66, No. 1, (2012), p. 92; and Jim Baird, Robin Curry and P. Cruz, “An overview of waste crime, its characteristics, and the vulnerability of the EU waste sector”, *Waste Management and Research: Journal for Sustainable Circular Economy*, vol. 32, No. 2 (February 2014), pp. 97–98.

<sup>11</sup> UNEP, *The State of Knowledge of Crimes*, p. 1.

<sup>12</sup> UNEP/CHW/OEWG/6/INF/17, para. 12.

<sup>13</sup> For an examination of the impacts of waste crime from a labour perspective and the sound management of waste at work, see Karin Lundgren, *The Global Impact of e-Waste: Addressing the Challenge* (Geneva, International Labour Office, Programme on Safety and Health at Work and the Environment, and Sectoral Activities Department, 2012); and International Labour Organization, “The sound management of chemicals and waste in the world of work” (Geneva, 2019).

<sup>14</sup> See A/HRC/36/41, paras. 24–44; A/75/290, paras. 20–48; A/HRC.25/53, paras. 69–78; A/HRC/33/41; and A/HRC/42/41.

<sup>15</sup> For a discussion of other relevant international instruments, see chap. 1, “International legal framework”.

<sup>16</sup> See chap. 1, item “International environmental law”.

but it is worth briefly noting, in discussing the scope of the guide, that it goes beyond the scope of the Basel Convention in two respects. First, unlike the Basel Convention, the offences covered by the present guide are not limited to transboundary movements of waste. Second, the guide is not limited to the categories of waste covered by the Basel Convention.<sup>17</sup> The reason for this approach is to ensure that the guide is comprehensive, addresses all forms of waste trafficking, and supports States to avoid and close gaps in national legislative frameworks.

At the outset, it is worth noting that the guide approaches waste trafficking and the problem of waste broadly, from a criminal justice policy perspective. While criminal justice approaches are a necessary component of a holistic policy response to waste trafficking, they are not – and must not be – the only approaches, as they are not, in and of themselves, sufficient. However, while broader regulatory approaches to waste management are critical to addressing waste trafficking, they are beyond the scope of the present publication and are not addressed herein.

## HOW TO USE THE GUIDE

States may use the present guide as a tool as they draft, review or amend relevant national legislation to prevent and combat waste trafficking. Because national legislation must be tailored to each State's legal tradition and social, economic, cultural and geographic circumstances, the guide does not provide and should not be seen as providing a “one size fits all” model law that is ready to be introduced into any and all domestic legal systems. Rather, States should adapt the model provisions and the guidance provided to fit local conditions, constitutional principles, legal culture and structures, and existing enforcement arrangements. The guide recommends that States consult with all relevant stakeholders as they engage in the process of drafting, reviewing or amending waste trafficking legislation.

Different States have taken different approaches to establishing waste trafficking offences. Some States have addressed waste trafficking offences in specialized waste or environmental legislation, whereas others have incorporated waste trafficking offences into existing penal codes. States should further ensure that waste trafficking offences and related provisions are harmonized with existing domestic legal systems to avoid the inadvertent creation of loopholes, overlaps or contradictions that inhibit the effectiveness of legislation.

Throughout the model legislative provisions contained in the guide, square brackets are used to indicate particular words or phrases that will need to be specially adapted to the State in question. For example, the guide uses square brackets where model provisions refer to the name of the State, other provisions contained in the guide, other domestic laws, and domestic courts, ministries and competent authorities. The guide also uses square brackets to emphasize situations in which alternative wording is presented to legislative drafters for their consideration.

The guide is divided into eight chapters:

- Chapter 1: General considerations
- Chapter 2: General provisions
- Chapter 3: Offences and liability
- Chapter 4: Investigation
- Chapter 5: International cooperation
- Chapter 6: Prosecution and penalties
- Chapter 7: Protection and assistance
- Chapter 8: National coordination

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<sup>17</sup> The Basel Convention defines “wastes”, broadly, in art. 2, para. 1, but the scope of the wastes that are subject to the Convention is limited by art. 1, including through references categories of waste set out in the annexes to the Convention.

Before specific model legislative provisions for combating waste trafficking are presented, chapter 1 sets out some preliminary issues that should be considered by legislators prior to adopting or amending relevant laws. Chapters 2 to 8 include both legislative guidance and model legislative provisions. Model legislative provisions are set out in blue boxes. National legislative examples are also included to show how States have legislated to combat waste trafficking and organized crime in practice. Care has been taken to ensure equitable geographical representation in the domestic legislative examples presented and to reflect the diversity of legal traditions of States.



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# Chapter 1.

## GENERAL CONSIDERATIONS

Before focusing on specific model legislative provisions for combating waste trafficking, the first chapter of the present guide addresses some general considerations that must be taken into account when drafting or amending legislation to combat waste trafficking. These considerations are the applicable international legal framework, domestic waste management legislation and the need for an appropriate national institutional framework to support the implementation of the legislation.

### INTERNATIONAL LEGAL FRAMEWORK

International law requires States to take certain legislative actions, while also establishing limits on the legislative actions available to States. For example, article 9, paragraph 5, of the Basel Convention requires parties to introduce appropriate national legislation to prevent and punish illegal traffic in waste. Article 5 of the Organized Crime Convention requires that States parties adopt legislative measures to criminalize participation in an organized criminal group. On the other hand, international human rights law prevents States from adopting legislative measures that do not respect the human rights of defendants, victims and the various stakeholders that may be affected by criminal justice measures.

Under international law, when developing legislation to combat waste trafficking, States must take due account of the applicable international legal framework, including international conventions, customary international law and the general principles of law. The present section provides a brief overview of key components of the international legal framework that apply to waste trafficking, and covers the following areas:

- International environmental law
- The international legal framework for combating serious crime
- International human rights law

The obligations of each particular State under international law will necessarily differ, depending, inter alia, on the international and regional treaties to which it is a party. Accordingly, in assessing the applicable international legal framework, States should consider the specific treaties to which they are party, in addition to the guidance contained in the present chapter.

## International environmental law

International environmental law refers to the legal and regulatory framework devised by the community of sovereign States to address global environmental harms.<sup>18</sup> The framework of international environmental law includes, among other sources, a growing number of international treaties as well as non-binding declarations and resolutions. In the present section, relevant sources of international environmental law are discussed before considering relevant principles of international environmental law.

### Relevant sources of international environmental law

The sources of international environmental law are various, and a comprehensive account and taxonomy of these sources is beyond the scope of the present publication.<sup>19</sup> Nevertheless, this section brings to the attention of readers several key sources of international environmental law relevant to developing legislation to combat waste trafficking. These sources include both instruments specifically addressing waste and general instruments of international environmental law.

The principal international agreement of relevance to waste trafficking is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. It was adopted on 22 March 1989 and entered into force on 5 May 1992. At the time of writing, the Basel Convention had 189 parties, reflecting near-universal adherence. A 2016 publication of the United Nations Environment Programme (UNEP) noted that the “overarching objective of the Basel Convention is to protect human health and the environment against the adverse effects of inappropriate management and transboundary movements of hazardous wastes”<sup>20</sup>

The Basel Convention establishes a procedure known as “prior informed consent”, under which parties are required to prohibit or refrain from permitting the export of hazardous and other wastes to an importing State if the importing State has not given its consent in writing to the specific import,<sup>21</sup> where the latter State has not prohibited the import of such wastes outright.<sup>22</sup> Consent is also required from any transit State, unless the transit State has dispensed with the requirement.<sup>23</sup> The Basel Convention considers illegal traffic in hazardous and other wastes to be criminal<sup>24</sup> and requires parties to introduce appropriate legislative measures to prevent and punish illegal traffic and to cooperate with each other to this end.<sup>25</sup> Parties are also obliged to take appropriate measures to ensure that the generation of hazardous and other wastes in their territory is reduced to a minimum<sup>26</sup> and to ensure the availability of adequate disposal facilities for the environmentally sound management<sup>27</sup> of hazardous and other wastes.<sup>28</sup> Parties must further ensure that the transboundary movement of hazardous and other wastes is reduced to the minimum consistent with the environmentally sound and efficient management of such wastes,<sup>29</sup> and are obliged to prevent the export or

<sup>18</sup> Lavanya Rajamani and Jacqueline Peel, “International environmental law: changing context, emerging trends and expanding frontiers”, in *The Oxford Handbook of International Environmental Law*, 2nd ed., Lavanya Rajamani and Jacqueline Peel, eds. (Oxford, Oxford University Press, 2021), p. 2.

<sup>19</sup> For an introduction to the sources of international environmental law, see Catherine Redgwell, “Sources of international environmental law: formality and informality in the dynamic evolution of international environmental law norms”, in *The Oxford Handbook of Sources of International Law*, Samantha Besson and Jean d’Aspremont, eds. (Oxford, Oxford University Press, 2017).

<sup>20</sup> Ieva Rucevska and others, *Waste Crime – Waste Risks: Gaps in Meeting the Global Waste Challenge – A Rapid Response Assessment*. (Nairobi, UNEP, 2015), p. 11.

<sup>21</sup> Basel Convention, art. 4, para. 1 (c). The prior informed consent procedure is given further detail by art. 6.

<sup>22</sup> *Ibid.*, art. 4, para. 1 (a)–(c).

<sup>23</sup> *Ibid.*, art. 6, para. 4.

<sup>24</sup> *Ibid.*, art. 4, para. 3.

<sup>25</sup> *Ibid.*, art. 9, para. 5. See also art. 4, para. 4. For the meaning of “illegal traffic” for the purposes of the Basel Convention, see art. 9, para. 1.

<sup>26</sup> Basel Convention, art. 4, para. 2 (a).

<sup>27</sup> Art. 2, para. 8, of the Basel Convention defines environmentally sound management as “taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes”.

<sup>28</sup> Basel Convention, art. 4, para. 2 (b).

<sup>29</sup> *Ibid.*, art. 4, para. 2 (d).



import of hazardous and other wastes where they have reason to believe that they will not be managed in an environmentally sound manner.<sup>30</sup> An amendment to the Convention (the Ban Amendment), which was originally adopted on 22 September 1995 and entered into force on 5 December 2019, requires parties listed in annex VII (at the time of writing, members of the Organisation for Economic Co-operation and Development (OECD), members of the European Union and Liechtenstein) to prohibit all transboundary movements of hazardous wastes destined for disposal in non-annex VII States, and also to prohibit all transboundary movements of hazardous wastes covered by article 1, paragraph 1 (a), of the Convention<sup>31</sup> and destined for reuse, recycling or recovery operations in non-annex VII States.<sup>32</sup>

In addition to the Basel Convention, States legislating to address waste trafficking should take into account the relevant provisions of international agreements regulating specific forms of waste, as well as any applicable regional instruments concerning waste. Regional instruments include the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted by the Council of Ministers of the Organization of African Unity (now known as the African Union); the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region (Waigani Convention), adopted by Governments in the South Pacific following negotiations in the Pacific Islands Forum; and Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, adopted by the European Union.

At the international level, there are also several instruments regulating specific forms of waste that legislators should take into account. These include the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the Stockholm Convention on Persistent Organic Pollutants and the Minamata Convention on Mercury.

These international and regional instruments concerning waste must be considered against the backdrop of a body of general principles of international environmental law. These principles have been developed through instruments such as the Declaration of the United Nations Conference on the Human Environment, adopted by the United Nations Conference on the Human Environment in Stockholm on 16 June 1972, and the Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil, on 13 June 1992. The Rio Declaration, while not an exhaustive statement of the principles of international law contained in the Stockholm Declaration, is nevertheless of particular significance under international environmental law as “the only international instrument adopted by consensus that brings together, around a common backbone, most foundational principles of international environmental law...placing them in a developmental perspective...in an attempt to conciliate them with socioeconomic development”.<sup>33</sup> In the next section of this chapter, several of the most important principles relevant to waste trafficking are discussed.

### *Relevant principles of international environmental law*

Underpinning multilateral environmental agreements such as the Basel Convention and international environmental law more broadly, are a number of general principles. These principles are also relevant to domestic legislation and should be duly taken into account by legislators in developing and amending legislation to combat waste trafficking. This section of the legislative guide considers several of the principles that are most

<sup>30</sup> *Ibid.*, art. 4, para. 2 (e) and (g).

<sup>31</sup> This includes wastes considered as hazardous by the Basel Convention but does not cover wastes that are only considered as hazardous by the domestic legislation of the Party of export, import or transit, not by the Convention.

<sup>32</sup> Basel Convention, art. 4A. See also Secretariat of the Basel Convention, Countries, Ban Amendment, “Amendment to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal”, accessible at [www.basel.int](http://www.basel.int).

<sup>33</sup> Jorge E. Viñuales, “The Rio Declaration on Environment and Development: preliminary study”, in *The Rio Declaration on Environment and Development: A Commentary*, Jorge Viñuales, ed. (Oxford, Oxford University Press, 2015), p. 60.

relevant to waste trafficking legislation. They are divided into general principles and principles that specifically concern waste management.

The discussion of each of these principles is not intended to suggest that each has the same status under international law. Rather, these principles are discussed alongside each other as each enjoys broad support from States through their embodiment in relevant instruments and their reflection in State practice. They represent general considerations that States, at a minimum, should take into account when developing and amending legislation to prevent and combat waste trafficking. Where the principles are embodied in treaty obligations or reflected in customary international law, States must take them into account.

### General principles of international environmental law

International environmental law recognizes a number of general principles. They are general “in the sense that they are potentially applicable to all members of the international community across the range of activities that they carry out or authorise and in respect of the protection of all aspects of the environment”.<sup>34</sup> The present section discusses several principles that are of particular relevance for the development and amendment of waste trafficking legislation. They are the no-harm principle, the principle of preventive action, the precautionary principle, the polluter pays principle, the principle of cooperation and the principles of access to information, access to justice and public participation.

#### No-harm principle

Principle 21 of the Stockholm Declaration and principle 2 of the Rio Declaration, which represent one expression of the no-harm principle, state that States have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”. The no-harm principle has been referred to, incorporated in or reflected in a number of treaties and resolutions concerning the environment and is recognized under customary international law.<sup>35</sup> In its advisory opinion on the legality of the threat or use of nuclear weapons, the International Court of Justice held that the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>36</sup>

The no-harm principle underpins international and regional instruments regulating waste management, such as the Basel Convention. The preamble to the Basel Convention notes that the parties to the Convention were, among other things, “[a]ware of the risk of damage to human health and the environment caused by hazardous wastes and other wastes and the transboundary movement thereof” and “[d]etermined to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes”.

#### Principle of prevention

The principle of prevention is closely related to the no-harm principle and requires that States take appropriate steps to prevent damage to the environment and otherwise “reduce, limit or control activities that might cause or risk such damage”.<sup>37</sup> In the *Pulp Mills* case, the International Court of Justice held that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory.<sup>38</sup> It went on to hold the following:

<sup>34</sup> Philippe Sands and others, *Principles of International Environmental Law*, 4th ed. (Cambridge, Cambridge University Press, 2018), p. 198.

<sup>35</sup> *Ibid.*, pp. 208–210.

<sup>36</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, para. 29.

<sup>37</sup> Sands and others, *Principles of International Environmental Law*, p. 211.

<sup>38</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, para. 101.

It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party.<sup>39</sup>

Likewise, article 3 of the International Law Commission draft articles on Prevention of Transboundary Harm from Hazardous Activities reads: “The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.”

The principle of prevention, like the no-harm principle, underpins international and regional instruments regulating waste management, such as the Basel Convention. Aware of the risk of damage to human health and the environment caused by hazardous and other wastes and the transboundary movement thereof,<sup>40</sup> article 9, paragraph 5, of the Basel Convention requires that each party introduces appropriate domestic legislation to prevent and punish illegal traffic of hazardous and other wastes. The principle of prevention is also evident throughout the other provisions of the Basel Convention, such as the obligation to take appropriate measures to ensure that the generation of hazardous and other wastes is reduced to a minimum.<sup>41</sup>

Beyond requiring States to take steps to prevent transboundary environmental harm, the principle of prevention, some commentators argue, also entails an obligation for States to prevent environmental harm within their own jurisdictions.<sup>42</sup>

### Precautionary principle

The precautionary principle seeks to ensure that a lack of full scientific certainty does not preclude taking effective action to prevent environmental harm. Principle 15 of the Rio Declaration, which reflects the core of the precautionary principle,<sup>43</sup> states the following:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The precautionary principle “calls for action at an early stage in response to threats of environmental harm, including in situations of scientific uncertainty. Applying the principle means giving the benefit of the doubt to the environment”<sup>44</sup>

The precautionary principle underpins, whether expressly or implicitly, numerous international and regional environmental agreements. The preamble to the Stockholm Convention acknowledges that “precaution underlies the concerns of all the Parties and is embedded within [the] Convention”. Article 1 of the Stockholm Convention expresses the objective of the Convention in the context of the precautionary approach, and expressly refers to principle 15 of the Rio Declaration. The precautionary principle is also expressly referred to in the Bamako Convention. Article 4, paragraph 3 (f), which also embodies the principle of prevention, provides the following:

Each Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter alia, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such

<sup>39</sup> Ibid., para. 197.

<sup>40</sup> Basel Convention, preamble.

<sup>41</sup> Basel Convention, art. 4, para. 2 (a). See also Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes (UNEP/GC.14/17, annex II, part II, para. 7).

<sup>42</sup> Sands and others, *Principles of International Environmental Law*, p. 212.

<sup>43</sup> Ibid., p. 230.

<sup>44</sup> Arie Trouwborst, “Prevention, precaution, logic and law: the relationship between the precautionary principle and the preventative principle in international law and associated questions”, *Erasmus Law Review*, vol. 2, No. 2 (November 2009), p. 108.

harm. The Parties shall cooperate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods [...]

The formulation of the precautionary principle in the Bamako Convention is noteworthy because, unlike principle 15 of the Rio Declaration, it does not require that there be a threat of “serious” or “irreversible” damage for the principle to apply and requires a lower level of scientific certainty before action is required.<sup>45</sup>

While the status of the principle is contested, some courts and commentators have argued that the precautionary principle is sufficiently supported by State practice to conclude that it has customary status under international law. Thus, Sands and Peel write the following:

The legal status of the precautionary principle...continues to evolve. There is certainly sufficient evidence of state practice to support the conclusion that the principle, as elaborated in Principle 15 of the Rio Declaration and various international conventions, has now received sufficiently broad support to allow a strong argument to be made that it reflects a principle of customary law, and that within the context of the European Union it has now achieved customary status, without prejudice to the precise consequences of its application in any given case. Although the ICJ and a WTO panel have declined to state that the principle has a customary international law status, the ITLOS Seabed Disputes Chamber has, in effect, reached that conclusion.<sup>46</sup>

### Polluter pays principle

The polluter pays principle refers to the principle that the costs of pollution should be borne by the natural or legal person responsible for causing the pollution. The polluter pays principle is expressed in principle 16 of the Rio Declaration by the following language:

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interest and without distorting international trade and investment.

The polluter pays principle, while not expressly referred to in the Basel Convention, forms part of the backdrop of international environmental law against which the Basel Convention and other relevant agreements must be read. The polluter pays principle is, moreover, reflected in the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal (Basel Protocol) (not yet in force).

### Principle of cooperation

The principle of cooperation between States is another fundamental principle of international environmental law. Principle 24 of the Stockholm Declaration states the following:

International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

<sup>45</sup> Sands and others, *Principles of International Environmental Law*, p. 232.

<sup>46</sup> *Ibid.*, pp. 239–240.

Principle 27 of the Rio Declaration states the following:

States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

Of particular relevance to addressing waste trafficking, principle 14 of the Rio Declaration further states the following:

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

The principle of cooperation underpins international and regional agreements concerning waste, including the Basel Convention. Article 10 of the Basel Convention provides that parties to the Convention shall cooperate with each other in order to improve and achieve environmentally sound management of hazardous wastes and other wastes and sets out several more specific obligations to this end. It further requires parties to employ appropriate means to cooperate in order to assist developing countries in the fulfilment of their general obligations under the Convention.<sup>47</sup> Article 9 contains a specific obligation for parties to cooperate with a view to preventing and punishing waste trafficking.<sup>48</sup> The principle of cooperation is closely related to the Convention's prior informed consent procedure and is reflected in several other provisions of the Convention,<sup>49</sup> including those on information-sharing.<sup>50</sup>

### Access to information, public participation and access to justice

Since at least the 1990s, the importance of access to information, public participation and access to justice as principles of international environmental law has continued to grow. These three related principles are recognized in principle 10 of the Rio Declaration, which states the following:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate *access to information* concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to *participate in decision-making processes*. States shall facilitate and encourage public awareness and participation by making information widely available. Effective *access to judicial and administrative proceedings*, including redress and remedy, shall be provided.<sup>51</sup>

Since the adoption of the Rio Declaration, provisions on public participation have been included in almost all international environmental treaties.<sup>52</sup>

The principles of access to information, public participation and access to justice (access rights) are further developed in international and regional instruments such as the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), adopted under the auspices of the Economic Commission for Europe, and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), adopted under the auspices of the Economic Commission for Latin America and the Caribbean. The language of the Escazú Agreement, in recognizing access to

<sup>47</sup> Basel Convention, art. 10, para. 3.

<sup>48</sup> *Ibid.*, art. 9, para. 5.

<sup>49</sup> See, for example, Basel Convention, arts. 4, para. 2 (h), 5–6 and 11.

<sup>50</sup> Basel Convention, art. 13.

<sup>51</sup> Emphasis added.

<sup>52</sup> Jonas Ebbesson, "Public participation", in *The Oxford Handbook of International Environmental Law*, p. 354.

information, public participation and access to justice as human rights, highlights the close link between these principles and international human rights law.

### ENVIRONMENTAL IMPACT ASSESSMENTS AND STRATEGIC ENVIRONMENTAL ASSESSMENTS AS TOOLS FOR THE IMPLEMENTATION OF ACCESS RIGHTS

The principles of access to information, public participation and access to justice are also inherent in impact assessment processes, which are tools allowing for informed and participatory environmental decision-making. Principle 17 of the Rio Declaration reads: “Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”<sup>a</sup> In the Pulp Mills on the River Uruguay case, the International Court of Justice held that “it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”.<sup>b</sup> Although the Court suggested that conducting an environmental impact assessment may amount to a requirement under general international law, to be fulfilled before the activity is conducted, it considered that the scope and content of the environmental impact assessment are to be determined by the national legislator.<sup>c</sup>

During the past fifty years, environmental impact assessment processes have gained increasing acceptance and use as an integral part of decision-making for activities that may have an effect on the environment. Strategic environmental assessments are a more recent tool promoting an informed and participatory approach for the development of policies, plans and programmes, and also legislation. In many jurisdictions,<sup>d</sup> conducting them is seen as an important step for the completion of plans, programmes and policies, and one that sets the ground for future activities that will be subjected to an environmental impact assessment. The Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, adopted in Kyiv on 21 May 2003,<sup>e</sup> is the only international, legally binding instrument that provides specific guidance to parties on how to design strategic environmental assessment procedures.

<sup>a</sup> See also Convention on Biological Diversity, art. 14.

<sup>b</sup> Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment, I.C.J. Reports 2010, p. 14, para. 204.

<sup>c</sup> This is also the case with the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), which sets out the procedural steps for transboundary consultations on environmental impact assessments, but leaves the specifics to be set at the discretion of the domestic law.

<sup>d</sup> Notably, in the European Union context, see Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (Official Journal of the European Communities, L 197, 21 July 2001).

<sup>e</sup> Although negotiated in a regional context under the Economic Commission for Europe, the Protocol is a global instrument.

### Principles of waste management under international environmental law

In the previous section, general principles of international environmental law applicable across a range of activities were discussed, including but extending beyond waste management. In addition to these general principles, further principles specifically concerning waste management can be discerned from an examination of the international instruments governing this area of environmental law. Two of these principles are considered in the present section: the concept of waste management hierarchy and the proximity principle.

#### Waste management hierarchy

The Basel Convention is based on the principle of the waste management hierarchy.<sup>53</sup> The waste management hierarchy (sometimes known as the waste hierarchy) describes the preferred order of practices for

<sup>53</sup> Tatiana Terekhova, “The Basel Convention: a tool for combating environmental crime and enhancing the management of hazardous and other wastes”, in *Handbook of Transnational Environmental Crime*, Lorraine Elliott and William H Schaedla, eds. (Cheltenham, United Kingdom, Edward Elgar Publishing, 2016), p. 424.



waste prevention and management for the purpose of minimizing waste and, ultimately, for protecting the environment and human health. The waste hierarchy prioritizes the prevention of waste. If waste cannot be prevented, it should be minimized. If it cannot be minimized, it should be reused. If it cannot be reused, it should be recycled. If it cannot be recycled, it should be recovered (through, for example, energy recovery). Finally, if waste cannot be recovered, it should be disposed of.

The Basel Convention does not expressly refer to the waste management hierarchy, but the principle underpins its provisions, and the preamble to the Convention notes that the parties are mindful that the most effective way of protecting human health and the environment from the dangers posed by such wastes is the reduction of their generation to a minimum in terms of quantity and/or hazard potential. The strategic framework for the implementation of the Basel Convention for 2012–2021, adopted by the Conference of the Parties to the Basel Convention at its tenth meeting, recognizes the waste management hierarchy as a guiding principle for the implementation of the Convention, and encourages treatment options that deliver the best overall environmental outcome, taking into account life-cycle thinking.<sup>54</sup> The waste management hierarchy is also embodied in Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Text with EEA relevance), an extract of which is set out below.

#### EXAMPLE: EUROPEAN UNION

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives

##### Article 4 – Waste hierarchy

1. The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:
  - (a) prevention;
  - (b) preparing for re-use;
  - (c) recycling;
  - (d) other recovery, e.g. energy recovery; and
  - (e) disposal.
2. When applying the waste hierarchy referred to in paragraph 1, Member States shall take measures to encourage the options that deliver the best overall environmental outcome. This may require specific waste streams departing from the hierarchy where this is justified by life-cycle thinking on the overall impacts of the generation and management of such waste.

[...]

<sup>54</sup>Decision BC-10/2, annex, para. 3 (a).

**EXAMPLE: NETHERLANDS****Environmental Protection Act, 1979****Article 10.4**

1. When adopting the waste management plan and when taking other measures for the prevention and management of waste, Our Minister shall apply the following waste hierarchy as priority order:

- (a) prevention;
- (b) preparation for reuse;
- (c) recycling;
- (d) other applicable use, including energy recovery;
- (e) safe removal.

2. Paragraph 1 shall apply correspondingly with regard to the taking of measures as referred to in that paragraph by the provincial executive, mayor and municipal councillors.

**Proximity principle**

The proximity principle refers to the idea that, as far as possible, waste should be managed and/or disposed of as close as possible to the location where it is generated. The proximity principle is reflected in the preamble to the Basel Convention, which states that the parties to the Convention are convinced that hazardous wastes and other wastes should, as far as is compatible with environmentally sound and efficient management, be disposed of in the State where they were generated. The proximity principle seeks to reduce the environmental impact arising from the management and disposal of waste by limiting its transportation as much as possible. The strategic framework for the implementation of the Basel Convention for 2012–2021 recognizes the proximity principle as a guiding principle for the implementation of the Convention.<sup>55</sup>

**International legal framework to combat serious crime**

States developing or amending legislation to combat waste trafficking must also take into account the international legal framework for the suppression of serious crime. Two instruments are of particular note: the Organized Crime Convention and the Convention against Corruption.

The Organized Crime Convention is the only international legally binding instrument against transnational organized crime. It was adopted by the General Assembly on 15 November 2000 and has since become one of the world's most widely ratified treaties.<sup>56</sup> Article 1 of the Convention reads: "The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively." The articles of the Convention require and encourage States parties to establish a number of measures to this end. These include measures that require the criminalization of particular conduct, measures concerning the investigation, prosecution and adjudication of crime, measures for international cooperation and assistance, measures for the protection of and assistance to witnesses and victims, and prevention measures.

<sup>55</sup> Ibid., annex, para. 3 (b) (viii).

<sup>56</sup> For simplicity, the term "ratified" includes accession, acceptance and approval in this context. For an updated list of parties to the Organized Crime Convention, see United Nations Treaty Collection, Depository, Status of treaties, Multilateral treaties deposited with the Secretary-General, Chapter XVIII on penal matters, item No. 12, "United Nations Convention against Transnational Organized Crime". Available at <https://treaties.un.org>.



The scope of application of the Convention is defined in its article 3. Under that article, the measures contained in the Convention apply, except where the Convention provides otherwise, to the prevention, investigation and prosecution of offences established in accordance with its criminalization provisions, and to “serious crime”, where such offences are transnational in nature and involve an organized criminal group.<sup>57</sup> The Convention provides further detail as to the meaning of “organized criminal group” and “serious crime”, and regarding when an offence will be deemed to be transnational in nature. An “organized criminal group” is defined as

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 this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.<sup>58</sup>

The Convention also provides further clarification as to the meaning of a “structured group”.<sup>59</sup> “Serious crime” is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.<sup>60</sup> Article 3, paragraph 2, of the Convention sets out the criteria for determining when an offence will be considered transnational in nature, for the purpose of application.<sup>61</sup>

The use of the notion of “serious crime” to define the scope of the Convention with reference to the domestic law of States parties provides sufficient flexibility for the Convention to be applied to a broad range of manifestations of transnational organized crime<sup>62</sup> and enables the Convention to be applied to waste trafficking where it involves offences punishable by a maximum penalty of four or more years’ imprisonment under the law of a State party having jurisdiction over the offence, and where the other two requirements of transnationality and the involvement of an organized criminal group are met. Where this is the case, a particular State party may be subject to a number of duties under the Convention, including the duty to ensure that particular conduct relating to waste trafficking is criminalized,<sup>63</sup> the duty to enable the confiscation of proceeds of crime and other property relating to the offence,<sup>64</sup> the duty to cooperate with other States parties in respect of the offences<sup>65</sup> and the duty to protect witnesses and victims.<sup>66</sup>

As waste trafficking is often facilitated by corruption, the Convention against Corruption is also relevant to the development and amendment of waste trafficking legislation. The Convention against Corruption, adopted by the General Assembly on 31 October 2003, is the leading international anti-corruption instrument.<sup>67</sup> The Convention covers many different forms of corruption, such as bribery, trading in influence, abuse of functions and various acts of corruption in the private sector, and covers five main areas: preventive measures, criminalization and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. Measures to prevent and combat corruption are further considered in chapter 3 of the present guide.

<sup>57</sup> Organized Crime Convention, art. 3, para. 1.

<sup>58</sup> Ibid., art. 2 (a).

<sup>59</sup> Ibid., art. 2 (c).

<sup>60</sup> Ibid., art. 2 (b).

<sup>61</sup> Ibid., art. 3, para. 2.

<sup>62</sup> See Dimitri Vlassis, “Drafting the United Nations Convention against Transnational Organized Crime”, in *Combating Transnational Crime: Concepts, Activities and Responses*, Phil Williams and Dimitri Vlassis, eds. (London, Frank Cass, 2001), p. 373.

<sup>63</sup> Organized Crime Convention, art. 5 (Criminalization of participation in an organized criminal group); art. 6 (Criminalization of the laundering of proceeds of crime); and art. 23 (Criminalization of obstruction of justice). Art. 8 (Criminalization of corruption) requires that States parties criminalize acts of corruption independent of their connection to a serious crime.

<sup>64</sup> Organized Crime Convention, art. 12 (Confiscation and seizure).

<sup>65</sup> See Organized Crime Convention, art. 13 (International cooperation for purposes of confiscation); art. 16 (Extradition); art. 18 (Mutual legal assistance); and art. 27 (Law enforcement cooperation). Other forms of international cooperation addressed by the Convention do not entail mandatory duties, see art. 17 (Transfer of sentenced persons); art. 19 (Joint investigations); art. 20 (Special investigative techniques); and art. 21 (Transfer of criminal proceedings).

<sup>66</sup> Organized Crime Convention, art. 24 (Protection of witnesses) and art. 25 (Assistance to and protection of victims). See also art. 26 (Measures to enhance cooperation with law enforcement authorities).

<sup>67</sup> An updated list of parties to the Organized Crime Convention is available at <https://treaties.un.org>.

## International human rights law

International human rights law constitutes a further area of the international legal framework that States must take into account and comply with in developing and amending legislation to combat waste trafficking. The present section provides a brief introduction to relevant aspects of international human rights law in this context. It begins with an introduction to the sources of international human rights law and the components of international human rights obligations. It then considers how waste trafficking affects both the exercise of human rights and the rights that may be implicated by criminal justice responses to prevent and combat waste trafficking. Finally, it provides an introduction to the framework provided by international human rights law for dealing with cases in which competing human rights must be balanced.

### *Sources of international human rights law*

The source of States' international human rights obligations can be found both within and outside of numerous international and regional treaties. The General Assembly has adopted a number of treaties<sup>68</sup> and other related instruments, among them the nine “core” international human rights instruments,<sup>69</sup> namely, in order of their adoption, the following:

- International Convention on the Elimination of All Forms of Racial Discrimination
- International Covenant on Economic, Social and Cultural Rights
- International Covenant on Civil and Political Rights
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
- Convention on the Rights of Persons with Disabilities
- International Convention for the Protection of All Persons from Enforced Disappearances

Regional organizations also serve as forums for the adoption of binding and non-binding instruments of international human rights law. Among the notable regional human rights treaties are the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms.

Human rights obligations may also stem from sources of international law other than treaties, such as customary international human rights law. For example, while the Universal Declaration of Human Rights is not formally binding, there is broad consensus today that many of its provisions reflect customary international law.<sup>70</sup>

<sup>68</sup> See United Nations Treaty Collection, Depository, Titles of treaties, Multilateral treaties deposited with the Secretary-General, “Chapter IV: human rights”. Available at <https://treaties.un.org>, listing 16 treaties and supplementing protocols in this field. Other chapters of the database also include treaties that protect human rights of specific vulnerable groups (e.g. Chapter V: refugees and stateless persons, or Chapter VII: traffic in Persons).

<sup>69</sup> See also Office of the United Nations High Commissioner for Human Rights, “The core international human rights instruments and their monitoring bodies”. Available at [www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx](http://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx).

<sup>70</sup> Hurst Hannum, “The status of the Universal Declaration of Human Rights in national and international law”, *Georgia Journal of International and Comparative Law*, vol. 25, No. 1 (1996), p. 340.

### *Components of international human rights obligations*

International human rights norms involve obligations to respect, protect and fulfil human rights.<sup>71</sup> The obligation to respect human rights is generally understood as a negative obligation: an obligation not to harm or interfere with the human rights of others. The obligation to protect human rights requires that States protect individuals and groups against human rights violations by private persons and entities. States must establish and maintain legislative and administrative frameworks that ensure respect for human rights and provide appropriate protection to individuals.<sup>72</sup> Additionally, States must take reasonable steps to prevent violations of human rights and protect individuals from violations, to investigate violations, to prosecute and hold accountable those responsible, to eliminate impunity and to redress harm by providing victims with reparation.<sup>73</sup> The third component of international human rights norms, the obligation to fulfil, requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of human rights.<sup>74</sup> Obligations to fulfil are obligations of progressive realization – meaning that the full enjoyment of the right will generally not be possible immediately and may only be achievable progressively, over a period of time.<sup>75</sup>

The obligations to respect, protect and fulfil human rights must be duly considered in addressing waste trafficking, including through developing and amending relevant legislation. The following sections provide a brief overview of some of the human rights affected by waste trafficking and implicated in criminal justice responses thereto, and outline the framework provided by international human rights law for balancing these rights, where necessary.

### *Rights affected by waste trafficking*

Trafficking in hazardous and other wastes damages the environment and human health. In so doing, it constitutes a threat to the exercise of a number of human rights. The work of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes has demonstrated how activities such as waste trafficking threaten the exercise of the right to life, the right to health, the right to physical and mental integrity, the right to adequate food, the right to water, the right to safe and healthy working conditions and the right to a clean, healthy and sustainable environment.<sup>76</sup> Exposure to hazardous waste may also constitute cruel, inhuman or degrading treatment. Women, children, indigenous people, persons with disabilities, workers, the poor, migrants and minorities are particularly affected.<sup>77</sup> The disproportionate adverse impact of waste crime at large upon

<sup>71</sup> UNODC, *The United Nations Convention against Transnational Organized Crime and International Human Rights Law* (forthcoming).

<sup>72</sup> See, generally, International Covenant on Civil and Political Rights, art. 2, para. 2; African Charter on Human and Peoples' Rights, art. 1; American Convention on Human Rights, art. 1, para. 2; and Inter-American Court of Human Rights, *Velásquez-Rodríguez v. Honduras (Merits)*, Series C No. 4, Judgment of 29 July 1988, paras. 166–167, 175.

<sup>73</sup> *Velásquez-Rodríguez v. Honduras*, paras. 166–167, 174; Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 8; European Court of Human Rights, *Ergi v. Turkey*, Application Nos 66/1997/850/1057, Judgment, 28 July 1998, para. 82; and African Court on Human and Peoples' Rights, *Norbert Zongo and Others v. Burkina Faso (Merits)*, Application No. 13/2011, Judgment of 28 March 2014, paras. 150–156. See also General Assembly resolution 65/228 entitled “Strengthening crime prevention and criminal justice responses to violence against women”, p. 2.

<sup>74</sup> Committee on Economic, Social and Cultural Rights, general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 33; OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, para. 48.

<sup>75</sup> Committee on Economic, Social and Cultural Rights, general comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para. 1, of the Covenant).

<sup>76</sup> See, for example, E/CN.4/2004/46, A/HRC/7/21, A/HRC/21/48, A/HRC/33/41, A/HRC/36/41, A/HRC/42/41, A/74/480 and A/75/290. The right to a clean, healthy and sustainable environment was recognized as a human right by the Human Rights Council in its resolution 48/13, adopted on 8 October 2021. For an examination of the right to a healthy environment and the role of prosecutors, see Raoul Wallenberg Institute of Human Rights and Humanitarian Law, “The right to a healthy environment in Southeast Asia: National Prosecutors and Prosecuting Authorities”, Discussion Brief Series, No. 6 (October 2021).

<sup>77</sup> See A/HRC/36/41, paras. 24–44; A/75/290, paras. 20–48; A/HRC.25/53, paras. 69–78; A/HRC/33/41; and A/HRC/42/41.

these groups raises issues of non-discrimination in the protection of rights under international human rights law.<sup>78</sup>

As noted in the previous section, States must not only respect human rights themselves but must also protect individuals and groups from violations of these rights by private persons and entities. This includes an obligation to protect individuals and groups from violations posed by waste trafficking and related activities.<sup>79</sup> States have a duty to prevent exposure to hazardous wastes that derives from the many human rights threatened by such exposure.<sup>80</sup> This includes a duty to establish and maintain appropriate legislative and administrative frameworks to prevent and combat waste crime, including waste trafficking, and to take reasonable steps to prevent violations, protect individuals, investigate violations, prosecute and hold accountable those responsible, eliminate impunity, guarantee victims access to justice and redress harm by providing victims with reparation. The legislative provisions and related measures, institutions, processes and practices foreseen by the present guide may be seen, in this context, as contributing to the fulfilment of States' duties to protect individuals and groups from rights violations.

### *Rights implicated in criminal justice responses to waste trafficking*

The previous section has shown how international human rights law requires States to take appropriate measures to address waste crime, including waste trafficking. The human rights of those affected by or vulnerable to waste crime are not the only human rights that States must consider in developing and amending legislation to combat waste trafficking, however. States must also respect, protect and fulfil the rights of other groups of people, including persons suspected, accused or convicted of waste trafficking; other persons who may be affected by measures adopted for the repression of waste trafficking; and witnesses and persons collaborating with authorities.<sup>81</sup> The measures envisioned by the present guide – criminalization, investigation (including the use of special investigative techniques), international cooperation, prosecution, adjudication, detention, incarceration and punishment, as well as protection of and assistance to witnesses and victims – each has the capacity to affect the human rights of these groups. The rights include, among others, the principle of legality, the presumption of innocence, the right to freedom from arbitrary deprivation of liberty, the right to a fair trial, the right to be heard, the right to legal aid, the prohibition of torture and cruel or inhuman or degrading treatment or punishment, the right to privacy, the right to health, the right to property, freedom from discrimination, the right to a remedy and the right to the truth. States must give these rights appropriate consideration and comply with all of their human rights obligations under international law when developing and amending legislation to combat waste trafficking. The UNODC issue paper entitled *The United Nations Convention against Transnational Organized Crime and International Human Rights Law provides assistance to States in identifying and complying with their obligations in this regard*.

While each of the aforementioned rights, in the development of waste trafficking legislation and in the amendment of existing legislation, warrants full consideration, this is beyond what can be considered in the present guide. The guide will briefly make particular mention of the principle of legality, as it is integral to the process of drafting and amending criminal legislation. The principle of legality, *nullum crimen, nulla poena sine lege* (“nothing is a crime except as provided by law, and no punishment may be imposed except as provided by law”),<sup>82</sup> requires, among other things, that laws establishing criminal offences and providing for criminal punishments be clear and accessible such that the consequences of an individual's acts or omissions can be foreseeable to them in advance.<sup>83</sup> Accordingly, clarity in drafting is important not only from the

<sup>78</sup> A/HRC/36/41, paras. 15–16.

<sup>79</sup> See also A/HRC/36/41, para. 4.

<sup>80</sup> A/74/480, paras. 6–7.

<sup>81</sup> A/HRC/42/41, para. 21; UNODC, *The United Nations Convention against Transnational Organized Crime and International Human Rights Law* (forthcoming).

<sup>82</sup> Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge Studies in International and Comparative Law Series, No. 65 (New York, Cambridge University Press, 2009) p. 12.

<sup>83</sup> *Ibid.* pp. 362–364.

perspective of developing effective legislation but also from the perspective of respect for human rights. In drafting or amending legislation combating waste trafficking, States must take care to avoid unclear, imprecise, ambiguous, inconsistent or contradictory legal requirements.

### *Framework for balancing human rights*

The previous sections noted the variety of groups that may be affected by waste trafficking and criminal justice responses thereto and the variety of human rights applicable to those groups which may be affected. It is incumbent upon legislators to ensure that legislation combating waste trafficking respects, protects and fulfils the rights of all groups. Where these rights compete with each other, legislators (as well as courts, law enforcement agencies and other State organs) must strike an appropriate balance. International human rights law provides the framework that States must apply in achieving this balance.

International and regional human rights instruments may express human rights guarantees in either absolute or qualified terms. Absolute rights, such as the prohibition of torture and inhuman or degrading treatment or punishment, may never be restricted. Other rights may be limited provided certain conditions established by international human rights law are met. While the language used to qualify human rights may differ between and within instruments, in general, limitations may be imposed on human rights where they are prescribed by clear and accessible law (the principle of legality),<sup>84</sup> serve a legitimate aim, and are necessary for meeting, and proportionate to, that legitimate aim.<sup>85</sup> A legitimate aim may include respect for or protection of the rights of others or certain public interests, such as public order, public health, public safety and national security.<sup>86</sup> The protection of public health and the protection of the rights of those affected by or vulnerable to victimization by waste trafficking may thus justify the imposition of criminal justice measures to prevent and combat waste trafficking, provided that the measures are prescribed by clear and accessible law and are necessary for meeting, and proportionate to, their legitimate aim.

## **DOMESTIC WASTE MANAGEMENT LEGISLATION**

A key consideration for the development of legislation to combat waste trafficking in any country must be the relationship between such legislation and the legislation that governs waste management more generally, including its generation, collection, storage, transport, treatment and disposal. This is necessary not only to ensure that the two areas of legislation are harmonized, complementary and not inconsistent or contradictory, but also because waste trafficking provisions often rely upon waste management provisions to determine what conduct does and does not constitute a crime. Indeed, in many countries, waste trafficking is criminalized by provisions contained within waste management legislation. Accordingly, it is incumbent upon legislators to consider the relationship between legislation to combat waste trafficking and waste management legislation. This issue is discussed in more detail below in relation to the model legislative provision concerning waste trafficking.

## **NATIONAL INSTITUTIONAL FRAMEWORK**

The present publication is a legislative guide and not a guide concerning national institution-building. At the same time, it must be stressed that these two topics cannot be entirely separated from each other. Legislation is necessary for government institutions to be created and to carry out their functions in a manner

<sup>84</sup> Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 25; see also Oscar M. Garibaldi, “General limitations on human rights: the principle of legality”, *Harvard International Law Journal*, vol. 17, No. 3 (1976), p. 503.

<sup>85</sup> Human Rights Committee, general comment No. 31 (2004), para. 6; general comment No. 34 (2011), para. 22; and Human Rights Council resolution 15/21, para. 4.

<sup>86</sup> See Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/4, annex).

consistent with the rule of law, and even the most well-drafted laws will be powerless to achieve their goals if they are not supported by an effective national institutional framework. For practical reasons, the scope of the present publication is limited, with a focus on substantive legislation to address waste trafficking. No attempt is made to provide comprehensive guidance on building effective national institutions to prevent and combat waste trafficking. Nevertheless, because these topics are necessarily interwoven, this publication is not silent on the issue of national institution-building. The present section provides an overview of the types of powers and responsibilities that will need to be allocated to domestic institutions. It also provides an overview of the typical institutions in which these powers and responsibilities are vested. Subsequent chapters provide model provisions establishing relevant powers and responsibilities, such as powers and responsibilities concerning investigation, international cooperation, prosecution and sentencing. Finally, a model legislative provision for the establishment of a body to coordinate national institutions is provided in chapter 8.

## Responsibilities and powers

The appropriate allocation of responsibilities and powers is one necessary aspect of an effective national institutional framework. The allocation of responsibilities and powers by legislation is also necessary for government action against waste trafficking to be legitimate and consistent with the rule of law. National authorities involved in waste management and/or in preventing, investigating, prosecuting or adjudicating waste trafficking offences must be provided with clear responsibilities and appropriate powers to fulfil those responsibilities. The following is a non-exhaustive list of responsibilities and powers relating to preventing and combating waste trafficking that should be clearly designated by legislation to appropriate departments, agencies and public officers:

- Promulgate and amend subordinate or delegated legislation (such as regulations) concerning waste management
- Issue licences, permits and/or certificates in relation to waste management
- Monitor and evaluate the implementation of waste laws and regulations
- Implement and enforce the use of the World Customs Organization Harmonized Commodity Description and Coding System for waste imports and exports<sup>87</sup>
- Collect, report and analyse relevant data
- Investigate, prosecute and adjudicate breaches of waste laws and regulations
- Impose sanctions in cases of breach and monitor the implementation of sanctions
- Cooperate with foreign law enforcement agencies and other foreign authorities, as well as relevant international and regional organizations, including international and regional law enforcement cooperation agencies
- Raise awareness in the waste management sector and provide education to the general public

These responsibilities and powers will necessarily be vested in different departments, agencies and public officers, allowing these departments, agencies and public officers to develop specialized competences and expertise and thus carry out their functions more effectively. The separation of certain powers (such as the separation of the exercise of judicial powers of adjudication from the exercise of executive and administrative powers) may also be required by domestic constitutions. The following section considers the typical organs, departments, agencies and public agencies involved in preventing and combating waste trafficking.

<sup>87</sup> See also World Customs Organization, Topics, Nomenclature and classification of goods, “Instruments and tools”. Available at [www.wcoomd.org](http://www.wcoomd.org).



## Institutions involved in preventing and combating waste trafficking

The previous section concerned responsibilities and powers that must be designated by legislation to effectively address waste trafficking. In the present section, the typical government organs, departments, agencies and public officers that are likely to be involved in addressing waste trafficking are considered. These organs may exist at the local, national or regional levels of government.

How States allocate responsibilities and powers among relevant government organs, departments, agencies and public officers will vary. As such, this section provides only a general description of the responsibilities and powers that these organs, departments agencies and officers typically exercise.

### *Legislature*

Under the separation of powers, it is the legislature (known as the parliament in many States) that is responsible for passing legislation. Accordingly, it is domestic legislatures that are responsible for introducing and amending legislation concerning waste management and waste trafficking. Powers to legislate are typically set out in domestic constitutions and will typically be broad enough to legislate as to waste management and waste trafficking without further amendment. Where, however, States are obligated by an international agreement to which they are a party – such as the Organized Crime Convention or the Basel Convention – to establish legislation that is not within the legislative powers of their parliament, it is their responsibility to ensure that the parliament is provided with appropriate powers to allow the State to comply with its treaty obligations.<sup>88</sup>

### *Environmental departments and authorities*

Relevant government departments, ministries or agencies, such as departments of natural resources or the environment, will usually have particular functions and responsibilities concerning waste management and transboundary movements of waste and for dealing with waste offences, including waste trafficking. In some States these tasks may be delegated to regional or local authorities. Environmental authorities are involved in policy development, updating subordinate legislation (for example, waste schedules) and taking executive actions. Environmental authorities may review applications and grant licences, permits or certificates relating to waste. Officers of environmental authorities are typically involved in monitoring compliance with waste laws and regulations, conducting inspections and detecting or identifying waste trafficking and other waste offences. In some States, certain responsibilities relating to waste, such as granting licences, permits or certificates, may be handled by other departments, such as the departments of industry or trade.

### *Law enforcement authorities*

Law enforcement authorities may be involved in detecting or identifying waste offences or they may be called upon to fulfil specialized investigative functions that fall beyond the mandate of waste inspectors or officers, such as handling crime scenes and forensic investigations, conducting financial investigations, and the use of special investigative techniques. Relevant law enforcement authorities may include, depending on the country in question, national, regional, port, railway and local police, as well as police departments responsible for dealing with waste crime, organized crime, money-laundering, corruption and financial investigations. In complex cases of waste trafficking, the involvement of law enforcement authorities may become essential. Law enforcement authorities may exercise powers to investigate waste trafficking under a variety of national laws and regulations, including laws relating to organized crime, money-laundering and corruption, as well as specialized laws concerning waste trafficking and general laws establishing the powers of law enforcement agencies.

<sup>88</sup> Vienna Convention on the Law of Treaties, art. 27.

### *Customs agencies*

Customs agencies will also come into contact with waste trafficking, mainly at ports and land borders. Customs agencies are generally mandated to detect and identify waste trafficking at these locations in accordance with customs legislation. Customs officials are generally trained and empowered to conduct general investigations, file cases and collect and seize evidence. Customs officers often play important roles in collecting intelligence, identifying high-risk shipments and conducting investigations.

### *Authorities responsible for international cooperation in criminal matters*

Investigating, prosecuting and adjudicating cases of waste trafficking may require cooperation with other States. This may be the case where offending takes place across borders or where offenders, witnesses or victims are located in other jurisdictions. Organizing the efforts of a State to combat transnational organized crime is a complex task. Keeping track of all agreements, treaties, memorandums of understanding, police liaison services, legal regimes, developments in domestic and international law and various enforcement and investigative services that are the source of requests for cooperation, along with handling all of the incoming and outgoing requests themselves, requires legal and administrative expertise and authority. A designated central authority with responsibility for international cooperation in criminal matters is a critical tool for maintaining control and supervision over these matters and ensuring effective international cooperation.<sup>89</sup> Article 18, paragraph 13, of the Organized Crime Convention requires that States parties designate a central authority with the responsibility and power to receive requests for mutual legal assistance and to either execute them or to transmit them to the competent authorities for execution. This requirement is without prejudice to cooperation through diplomatic channels, the International Criminal Police Organization (INTERPOL), and informal cooperation between authorities.

### *Prosecutorial authorities*

The roles of prosecutors differ from country to country. In most systems, the core functions of prosecutors are the decision to prosecute and representation of the prosecution in court. Core functions in some jurisdictions may also encompass investigating crime, supervision of investigators' compliance with procedural rules, judicial interim release (bail), plea and sentencing agreements, diversion of offenders to alternatives to prosecution, victim support, recommendations regarding sentencing, the supervision of the execution of sentences and the treatment of persons in custody.<sup>90</sup>

### *Judicial authorities*

The functions of judicial authorities – that is, courts and judges – also differ from country to country. The core function of judges is to rule on procedural and legal issues in criminal cases before, during and after trial. During the investigation stage, judges may hear and rule on applications for the use of special investigative techniques or warrants to conduct searches. If a person has been arrested or detained on suspicion of criminal activity, judges or other judicial officers may be tasked with hearing applications for pretrial detention or bail. They may also make rulings as to the management of cases, such as setting dates for pretrial proceedings and trial, disclosure of evidence and the admissibility of certain evidence. At trial, the role of the judge differs according to whether the judge is the sole decision-maker or whether decision-making powers are also given to jurors or lay judges. In jury-focused systems, the judge is typically responsible for overseeing the jury trial according to law, instructing jurors on the applicable law and making rulings on questions of law. In such systems, responsibility for the determination of questions of fact, including the ultimate determination of guilt, is generally left to the jury rather than the judge. Where the jury

<sup>89</sup> See also UNODC, *Manual on Mutual Legal Assistance and Extradition* (Vienna, 2012), pp. 29–39.

<sup>90</sup> See also UNODC, *The Status and Role of Prosecutors: A United Nations Office on Drugs and Crime and International Association of Prosecutors Guide*, Criminal Justice Handbook Series (Vienna, 2014).



determines that the defendant is guilty of a crime, it is generally the judge that determines the appropriate sentence. Where judges do not share judicial decision-making powers with jurors, their powers will be more extensive and may include the determination of both guilt and sentence. Post-trial, judicial authorities may hear appeals, in particular appeals against conviction and/or sentence by the convicted person, as well as applications concerning the lawful enforcement of sentences. In some countries, specialist environmental courts hear environmental cases.<sup>91</sup>

### *Other government agencies*

Certain other government agencies may be involved in investigating waste trafficking offences. Their involvement will depend upon domestic arrangements, but they may include specialized agencies such as anti-money-laundering officers, financial investigation units, anti-corruption commissions and tax revenue authorities.

### **Further considerations**

Two further considerations relating to national institutional frameworks are briefly worth mentioning: resources and coordination. The various national institutions will not be able to effectively carry out their mandates to prevent and combat waste trafficking if they are not provided with adequate funding and other resources to exercise their functions. Additionally, it is not enough that each relevant institution be endowed with its own responsibilities and powers. It must also be ensured that these institutions effectively coordinate and cooperate with each other. States should be careful, in developing and improving national institutional frameworks to prevent and combat waste trafficking, that the various institutions do not develop “silos” that operate in isolation. States should also ensure effective coordination and cooperation between national, regional and local levels of government, where responsibilities are distributed among levels of government. To assist with coordination, chapter 8 includes a model legislative provision for the establishment of a national coordinating body.

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<sup>91</sup> See, generally, George Pring and Catherine Pring, *Environmental Courts and Tribunals: A Guide for Policy Makers* (Nairobi, United Nations Environment Programme, 2016).

the 1990s, the number of publications on the topic of the present review has increased steadily (see Figure 1).

The present review is organized as follows. Section 2 contains a general introduction to the topic of the present review. Section 3 contains a review of the literature on the topic of the present review.

Section 4 contains a review of the literature on the topic of the present review.

Section 5 contains a review of the literature on the topic of the present review.

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Section 29 contains a review of the literature on the topic of the present review.

Section 30 contains a review of the literature on the topic of the present review.

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# Chapter 2.

## GENERAL PROVISIONS

The second chapter of the present guide concerns general provisions for combating waste trafficking. These provisions are dealt with separately from subsequent chapters because of their broad relevance to all measures discussed in the guide. Three topics are addressed in chapter 2: legislative statements of principles of environmental law, definitions, and waste schedules and jurisdiction.

### STATEMENT OF PRINCIPLES OF ENVIRONMENTAL LAW

In chapter 1 of the present guide, it was explained that multilateral environmental agreements, such as the Basel Convention, and, more broadly, international environmental law, recognize a number of general principles of relevance to the development and amendment of legislation to combat waste trafficking. These general principles of international environmental law include the principle of prevention, the precautionary principle, the polluter pays principle, the principle of cooperation and the principles of access to information, public participation and access to justice. Two further principles under international environmental law of specific relevance to waste management were also discussed: the waste management hierarchy and the proximity principle.

While international environmental law does not generally require that States restate these principles under domestic law so long as States fulfil the substance of their obligations under binding principles of international environmental law, the statement of relevant principles in national legislation is a useful tool for ensuring the effective implementation of environmental legislation, including legislation to combat waste trafficking. Stating the overarching principles that underpin legislation combating waste trafficking can assist in the interpretation and implementation of such legislation, not only by the judiciary but also by relevant stakeholders. References to the relevant principles of international law could be included, as appropriate, in the preamble or operative part of relevant legislation.

### EXAMPLE: LESOTHO

#### Environment Act, 2008

##### Section 4 – Right to a clean and healthy environment

[...]

(4) The court shall in exercising its jurisdiction, be guided by the following principles of sustainable development –

- (a) the polluter pays principle;
- (b) the precautionary principle;
- (c) the principle of eco-system integrity;
- (d) the principle of public participation in the development of policies, plans and processes for the management of the environment; and
- (e) the principle of inter-generational and intra-generational equity.

### EXAMPLE: ZAMBIA

#### Environmental Management Act, 2011

##### Section 6 – Principles governing environmental management

The following principles shall be applied in achieving the purpose of this Act:

- (a) the environment is the common heritage of present and future generations;
- (b) adverse effects shall be prevented and minimized through long-term integrated planning and the co-ordination, integration and co-operation of efforts, which consider the entire environment as a whole entity;
- (c) the precautionary principle;
- (d) the polluter pays principle;
- (e) equitable access to environmental resources shall be promoted and the functional integrity of ecosystems shall be taken into account to ensure the sustainability of the ecosystems and to prevent adverse effects;
- (f) the people shall be involved in the development of policies, plans and programmes for environmental management;
- (g) the citizen shall have access to environmental information to enable the citizen to make informed personal choices which encourages improved performance by industry and the Government;
- (h) the generation of waste should be minimised, wherever practicable, and waste should, in order of priority, be re-used, re-cycled, recovered and disposed of safely in a manner that avoids creating adverse effects;
- (i) the environment is vital to people's livelihood and shall be used sustainably in order to achieve poverty reduction and socio-economic development;
- (j) non-renewable natural resources shall be used prudently, taking into account the needs for the present and future generations;
- (k) renewable natural resources shall be used in a manner that is sustainable and does not prejudice their viability and integrity; and
- (l) community participation and involvement in natural resources management and the sharing of benefits arising from the use of the resources shall be promoted and facilitated.

**EXAMPLE: PERU****Legislative Decree Approving the Act on Comprehensive Solid Waste Management, 2016****Article 2 – Purpose of comprehensive solid waste management**

The first and primary purpose of the comprehensive management of solid waste in Peru is to prevent or minimize the generation of solid waste at the point of origin, as a priority over any other option. Secondly, for waste that is generated, preference is given to reclaiming or converting component materials and energy potential through reutilization, recycling, composting and coprocessing, among other options, provided always that health conditions and the environment are protected.

Final disposal of solid waste in appropriate facilities is the waste management option of last resort and should be done in environmentally suitable conditions such as shall be defined in the implementing regulations for the present Legislative Decree as issued by the Ministry of the Environment.

**DEFINITIONS**

Model provision 1 of the present guide sets out definitions for certain key terms used in and of general relevance to the model provisions contained herein. Further definitions relevant to specific model provisions are included in those provisions.<sup>92</sup> Legislative drafters should ensure that the terminology used in legislation to combat waste trafficking is clear, precise and consistent. Care should be taken to avoid ambiguities that could frustrate effective enforcement or prosecution. Legislative drafters should also take into account other relevant domestic legislation to avoid gaps and contradictions.

**MODEL PROVISION 1: DEFINITIONS**

For the purpose of this [Act/Law/Chapter ...]:

- (a) “Waste” shall mean a substance or object disposed of, intended to be disposed of or required by law to be disposed of;
- (b) “Organized criminal group” shall mean 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 offences to which this [Act/Law/Chapter ...] applies, in order to obtain, directly or indirectly, a financial or other material benefit;
- (c) “Serious crime” shall mean an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;
- (d) “Financial or other material benefit” shall include any type of financial or non-financial inducement, payment, bribe, reward, or other advantage, including services;
- (e) “[Confiscation/forfeiture]” shall mean the permanent deprivation of property by order of the [insert relevant court or other competent authority];

<sup>92</sup>Namely, the definitions of “traffics” in model provision 3, “legal person” and “senior officer” in model provision 11, “controlled delivery” in model provision 12, “undercover investigation” in model provision 13, “assumed identity” in model provision 14, “surveillance of persons” in model provision 15, “electronic surveillance” in model provision 16, “seize” in model provision 17, “witness” and “person cooperating with law enforcement authorities” in model provision 25, “victims” in model provision 26.

- (f) “[Freezing/seizure]” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;
- (g) “Proceeds of crime” shall mean any property derived, in whole or in part, from, or obtained, directly or indirectly, through, the commission of an offence, whether committed within or outside the territory of [insert name of State];
- (h) “Person” shall mean a natural or legal person.

Definitions (a) to (g) are adapted from the Basel Convention and the Organized Crime Convention. Neither convention strictly requires that States establish these definitions under domestic law. Nevertheless, given that these definitions provide content to States’ obligations under each of these conventions, it may be useful for States to include them in domestic legislation.

The definition of waste contained in paragraph (a) is adapted from the definition of wastes contained in the Basel Convention.<sup>93</sup> The elements of this definition are disjunctive rather than cumulative. That is to say, only one of the elements (being disposed of, intended to be disposed of, or required by law to be disposed of) must be met for a substance or object to be considered waste. The definition is intended to be broad and may cover both hazardous and non-hazardous wastes and include, among other forms of waste, plastic waste, industrial and agricultural waste, waste oil, electronic and electrical waste, medical waste and other liquid and solid wastes. Where relevant for proposed legislation, States may also wish to define other related terms, such as “hazardous waste” and “other waste”. Where States wish to refer to particular types or streams of waste in particular legislative provisions, the present guide recommends the use of waste schedules to do so. The use of waste schedules is explained in the following section.

The definitions set out in paragraphs (b) to (g) are adapted from the Organized Crime Convention and the *Model Legislative Provisions against Organized Crime* (second edition, 2022). In paragraph (e), a choice is offered between using the terms “confiscation” and “forfeiture”. In paragraph (f), a choice is offered between “freezing” and “seizure”. These choices reflect the fact that the terminology for these concepts varies between States. Article 2, paragraph (f), of the Organized Crime Convention establishes identical definitions for “freezing” and “seizure”, and paragraph (g), in defining “confiscation”, provides that its definition “includes forfeiture where applicable”. The present guide uses the terms “confiscation” and “seizure”.

For further relevant commentary on the definitions contained in model provision 1, see article 3 of the *Model Legislative Provisions against Organized Crime* (2nd ed., 2022).

#### EXAMPLE: CHINA

##### Law of the People’s Republic of China on the Prevention and Control of Environment Pollution Caused by Solid Wastes, 1995

##### Article 124

For the purposes of this Act, the following terms shall have the meanings as indicated:

1. Solid waste refers to solid and semi-solid articles and substances, and gaseous articles and substances in containers, that have lost their original use value or have not lost their use value but have been abandoned or discarded, as well as articles and substances that fall within the provisions of laws and administrative regulations

<sup>93</sup> Basel Convention, art. 2, para. 1.

on the management of solid waste. Such articles and substances as have been rendered harmless through processing, and which comply with mandatory national product-quality standards, and which will not endanger public health and ecological safety, or which are not considered to be solid waste according to the criteria and procedures for solid waste identification, are excepted.

2. Industrial solid waste refers to solid waste generated in the course of industrial production activities.
3. Domestic waste refers to solid waste generated in daily life or in activities that provide services for daily life, as well as solid waste that is considered domestic waste in accordance with the provisions of laws and administrative regulations.
4. Construction waste refers to the discarded soil, refuse materials and other solid waste generated in the process of new construction, alteration, expansion or demolition of various types of buildings, structures, pipe networks, etc., as well as of residential decoration and renovation, by building and construction units.
5. Agricultural solid waste refers to solid waste generated in the course of agricultural production activities.
6. Hazardous waste refers to solid waste with hazardous characteristics that is listed on the national hazardous-waste registry or identified according to State-specified hazardous-waste criteria and identification methods.
7. Storage refers to the temporary placement of solid waste in a specific facility or site.
8. Utilization refers to the extraction of substances from solid waste for use as raw materials or fuel.
9. Disposal refers to the alteration of the physical, chemical or biological characteristics of solid waste by incineration or other methods to achieve a reduction in the quantity of solid waste generated, a reduction in the volume of solid waste, a reduction or elimination of the hazardous components or the final placement of solid waste in a landfill that meets the requirements of environmental protection regulations.

### NATIONAL EXAMPLE: ARGENTINA

#### Act No. 24.051 on Hazardous Waste, 1992

##### Article 2

For the purposes of this Act, any waste that is susceptible to cause harm, directly or indirectly, to living beings or to pollute the soil, water, air or environment in general shall be deemed hazardous.

In particular, the wastes indicated in annex I to this Act shall be considered hazardous, as shall those that possess any of the characteristics listed in annex II.

The provisions of this Act shall similarly apply to any hazardous waste as may be used as input for other industrial processes.

The scope of this Act shall not include household waste, radioactive waste or waste generated by normal operations of ships, all of which shall be governed by special legislation and relevant international agreements.

## WASTE SCHEDULES

Waste trafficking may involve a wide range of waste streams. To facilitate the drafting of clear legislation, it is useful to classify these streams into broad categories, such as hazardous waste and other waste. To do so, the present guide recommends the use of waste schedules. A waste schedule is a list of waste streams belonging to a particular category. These broad categories are then referred to in relevant legislative provisions as a shorthand way of referring to the waste streams listed therein. This makes legislation not only easier to read but simpler to amend. For example, if it is desired that legislation cover a new waste stream, only the relevant schedule (such as “hazardous waste”) would need to be amended, rather than every relevant provision.

Schedules of waste may be included in primary legislative instruments, such as statutes, or in subordinate or delegated legislative instruments, such as regulations. Their inclusion in subordinate legislation has the advantage that such legislation is more easily amended, which provides additional flexibility. The appropriate legal form of these schedules is a matter for each State to determine.

When deciding on the form of the legislative instrument for the schedules, States should also consider the applicable processes for amending that instrument. This is important because the technologies relating to the generation, treatment and management of waste are constantly changing. Methods that criminals use to commit waste trafficking offences will continue to evolve. States must update their laws, including the applicable schedules, to keep up with these changes. A State’s process for amending regulations or other subordinate legislation typically will be more streamlined than the process for amending legislation. Setting out the relevant schedules in regulations or other subordinate legislative instruments may therefore enable States to react more readily to developments. To the extent consistent with a State’s legislative framework, it is also recommended in the present guide that competent authorities be given a role in the process of enacting or initiating amendments to the schedules. Such powers will generally need to be delegated by the relevant legislature.

In developing domestic legislative provisions to prevent and combat waste trafficking, States must ensure that they comply with their obligations under international law. Where domestic legislation makes use of waste schedules to determine the content of legislative provisions, States must take into account international annexes or categories of waste that determine the content of their international obligations to legislate. For example, article 9, paragraph 5, of the Basel Convention provides that each party shall introduce appropriate national/ domestic legislation to prevent and punish illegal traffic. “Illegal traffic” is defined, for the purposes of the Basel Convention, in article 9, paragraph 1, as “any transboundary movement of hazardous wastes or other wastes” when certain further conditions are met. “Hazardous wastes” are defined in article 1, paragraph 1, of the Convention as follows:

(a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and

(b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit.

“Other wastes” are defined in of article 1, paragraph 2, as wastes that belong to any category contained in annex II. Thus, the content of the obligation of States in article 9, paragraph 5, of the Basel Convention to introduce legislation to prevent and punish illegal traffic is determined, in part,<sup>94</sup> by what is written in annexes I, II and III of the Convention. In introducing legislation to prevent and punish waste trafficking, States parties to the Basel Convention must ensure that domestic trafficking provisions cover the types of waste covered by these annexes. Annexes XIII and IX to the Basel Convention may also be relevant to this end. Other international annexes or categories of waste that States may be required to have regard to include the annexes to the Stockholm Convention on Persistent Organic Pollutants, the annexes to the Bamako

<sup>94</sup> The inclusion of paragraph (b) of this definition allows a State party to the Basel Convention to define, in its domestic legislation, additional waste streams that will be considered as hazardous wastes and will be subject to the Basel Convention’s control regime in respect of transboundary movements involving that State party.



Convention, the annexes to the Waigani Convention and the appendices of the OECD Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations.<sup>95</sup>

Related to the issue of the appropriate process for amending domestic schedules is the issue of how international annexes or categories of waste are to be incorporated into domestic law. Broadly speaking, this may be achieved either by reproducing these annexes or categories of waste in domestic schedules or by incorporating them by reference. In the latter case, the text of the international annexes or categories is not reproduced in domestic schedules, but rather a reference to those annexes or categories is included in such a way that wastes listed thereunder are deemed to be included under the relevant domestic schedules. In some countries, incorporation by reference may allow changes to international annexes and categories to be automatically incorporated into domestic law, without the need to amend domestic legislation or regulations each time these annexes or categories are updated. In other countries, the automatic updating of domestic schedules may not be possible through incorporation by reference because of constitutional or other principles. When determining the appropriate process for amending domestic schedules, States should assess what processes are permissible under their legal systems. Where automatic updating through incorporation by reference is permissible, this mechanism may be advantageous to States in ensuring that domestic schedules are up to date.

An example of the use of schedules from the Ethiopian Hazardous Waste Management and Disposal Control Proclamation is included below. The Proclamation includes three annexes (that is, schedules): categories of wastes to be controlled, a list of hazardous characteristics, and disposal operations. The annexes are then referred to in the definitions included in article 2 of the Proclamation. Because of the length of the three annexes, only short excerpts of each have been included.

### EXAMPLE: ETHIOPIA

#### Hazardous Waste Management and Disposal Control Proclamation, 2018

##### Article 2 – Definition

In this Proclamation:

[...]

3/ “disposal” means any hazardous waste disposal operation specified in Annex Three of this Proclamation;

[...]

10/“hazardous waste” means wastes that belong to any category contained in Annex One of this Proclamation, and possessed any of the characteristic contained in Annex Two; including those wastes that might be categorized as hazardous waste by the directive to be issued by the Ministry,

[...]

<sup>95</sup> Legislators may also wish to have regard to the classification of wastes included in the Harmonized Commodity Description and Coding System in the annex to the International Convention on the Harmonized Commodity Description and Coding System. In this regard, legislators may wish to consult World Customs Organization, *Correlation Between the Product Coverage of Selected International Conventions and the Harmonized System* (October 2021), which identifies correlations between Harmonized System codes and products controlled by selected international instruments, including the Basel Convention, the OECD Decision of the Council on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, and the Stockholm Convention.

**EXAMPLE: ETHIOPIA (CONTINUED)****Annex I: Categories of wastes to be controlled**

## Waste Streams

- Wastes from medical care in hospitals, medical centers and clinics [...]
- Wastes from the production and preparation of pharmaceutical products

[...]

- Waste oils/water, hydrocarbons/water mixtures, emulsions

[...]

## Wastes having as constituents

- Metal Carbonyls
- Beryllium; beryllium compounds
- Hexavalent chromium compounds
- Copper compounds

[...]

**Annex II: List of hazardous characteristics**

- Explosives

[...]

- Flammable liquids

[...]

- Oxidizing

**Annex III: Disposal operations**

A. Operations which do not lead to the possibility of resource recovery, recycling, reclamation, direct re-use or alternative uses

[...]

B. Operations which may lead to resource recovery, recycling reclamation, direct re-use or alternative uses

[...]

**JURISDICTION**

States should enact provisions establishing comprehensive jurisdiction for the prosecution and punishment of waste trafficking. Jurisdiction refers to the power of a State, through its prosecutors, courts and other institutions, to exercise legal authority over a territory, person or thing. Establishing comprehensive jurisdiction is particularly important in the context of waste trafficking, since this phenomenon often occurs across State borders.

Offenders may also move between States and exploit jurisdictional gaps in States' laws to avoid apprehension and prosecution. It therefore is important to clearly articulate the jurisdictional bases upon which national courts can determine proceedings for waste trafficking offences. Most obviously, States may exercise jurisdiction over acts committed within their territories, including their territorial waters (the territoriality

principle). International law also recognizes the right of States to exercise extraterritorial jurisdiction in several circumstances. While the precise scope of these circumstances remains unsettled,<sup>96</sup> the international community has generally recognized the jurisdiction of a State over its nationals, even when outside its territory (the active personality principle); the jurisdiction of a State over acts injurious to its nationals (the passive personality principle); and the jurisdiction of a State over acts committed outside the State but intended to have a substantial effect within the territory of the State (the objective territorial principle).<sup>97</sup>

As waste trafficking can occur across borders, this guide proposes that States enact provisions establishing jurisdiction over waste trafficking offences on the basis of both the territoriality principle and recognized principles of extraterritorial jurisdiction. Model provision 2 below provides an example of how a State could establish these jurisdictional bases.

### MODEL PROVISION 2: JURISDICTION

1. [Insert reference to relevant courts] shall have jurisdiction to determine proceedings for offences to which this [Act/Law/Chapter ...] applies when:
  - (a) Committed [in whole or in part] within the territory of [insert name of State]; or
  - (b) Committed [in whole or in part] on board a vessel that is flying the flag of [insert name of State] or an aircraft that is registered under the laws of [insert name of State] at the time that the offence was committed; or
  - (c) Committed by a [insert name of State] national present in [insert name of State] territory whose extradition is refused on the grounds of nationality; or
  - (d) Committed by a person present in [insert name of State] whose extradition is refused on any ground.
2. [Insert reference to relevant courts] shall also have jurisdiction to determine proceedings for offences committed outside the territory of [insert name of State] to which this [Act/Law/Chapter] applies when:
  - (a) The [victim/object of the crime] is a national [or permanent resident] [or habitual resident] of [insert name of State];
  - (b) The offence is committed by a national [or permanent resident] [or habitual resident] of [insert name of State] [or one of its legal persons];
  - (c) The offence is committed outside the territory of [insert name of State] with a view to the commission of a serious crime within the territory of [insert name of State]; or
  - (d) Such jurisdiction is based on an international agreement binding on [insert name of State].

<sup>96</sup> Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed., Oxford Monographs in International Law Series (Oxford, Oxford University Press, 2015) pp. 101, 110–113.

<sup>97</sup> See Organized Crime Convention, art. 15, para. 2; and United Nations Convention against Corruption, art. 42, para. 2. See also David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols*, Oxford Commentaries on International Law series (Oxford, Oxford University Press, 2007), p. 164.

Paragraph 1 of model provision 2 sets out the territorial jurisdiction for the judicial determination of waste trafficking offences. Paragraph 1 (a) and (b) reflects the obligations of States parties under article 15, paragraph 1, of the Organized Crime Convention. Paragraph 1 (c) reflects the *aut dedere aut judicare* (extradite or prosecute) principle<sup>98</sup> contained in article 16, paragraph 10, and article 15, paragraph 3, of the Organized Crime Convention. Article 16, paragraph 10, provides that if a State party to the Convention does not extradite a person in its territory solely on the basis that he or she is one of its nationals, it is obliged, at the request of the State party requesting extradition, to submit the case without undue delay to its competent authorities for prosecution. Article 15, paragraph 3, of the Organized Crime Convention requires States parties, for the purposes of article 16, paragraph 10, to establish jurisdiction over offences covered by the Convention — irrespective of where the offence occurred — in situations where the suspect is present in their territory and extradition is refused solely on the grounds that the suspect is a national. Paragraph 1 (d) of model provision 2 reflects article 15, paragraph 4, of the Organized Crime Convention, which provides that States parties may also establish jurisdiction over offences covered by the Convention when the alleged offender is present in their territory and the State does not extradite him or her on any ground. If paragraph 1 (d) of these model legislative provisions is used in domestic law, there is no need to include paragraph 1 (c), because the former covers situations where extradition is refused for any reason, including nationality.

Paragraph 2 of model provision 2 sets out four bases for the exercise of extraterritorial jurisdiction to judicially determine waste offences. Paragraph 2 (a) establishes jurisdiction over cases where the victim of an offence is a national of the State. Paragraph 2 (a) reflects the passive personality principle and article 15, paragraph 2 (a), of the Organized Crime Convention. States may also choose to extend the jurisdictional ground in paragraph 2 (a) to permanent residents or habitual residents of the State. Paragraph 2 (b) of model provision 2 establishes jurisdiction over offences committed by a national (or permanent or habitual resident) of the State, reflecting the active personality principle and article 15, paragraph 2 (b), of the Organized Crime Convention. Paragraph 2 (c) of model provision 2 provides for jurisdiction over offences committed outside the territory of the State but with a view to the commission of a serious crime within the territory of the State — that is, the objective territorial principle, as reflected in article 15, paragraph 2 (c), of the Organized Crime Convention.<sup>99</sup> Paragraph 2 (d) of model provision 2 provides a basis for the judicial determination of cases for which jurisdiction has been conferred by an international agreement binding on the State. This may also include decisions of the United Nations Security Council.

<sup>98</sup> UNODC, *Manual on Mutual Legal Assistance and Extradition*, paras. 108–110. See also A/69/10, paras. 57 ff.

<sup>99</sup> See also UNODC, *Model Legislative Provisions against Organized Crime* (Vienna, 2012), pp. 28–29.

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# Chapter 3.

## OFFENCES AND LIABILITY

Waste trafficking often involves a chain of actors that extends from waste generators, collectors, transporters, brokers and traders to recycling and disposal companies. Along this chain, actors may be involved in various criminal acts. In addition to waste trafficking, they may be involved in document fraud relating to waste, participation in an organized criminal group, money-laundering, corruption, obstruction of justice and tax evasion.

Chapter 3 of the present guide concerns the criminalization of this conduct. It begins with a general discussion of the elements of criminal offences. The purpose of the discussion in chapter 3 is to help readers of the guide to see the model criminal offences contained in this chapter in terms of their constituent elements rather than as predefined language that should be copied and pasted into domestic legislation. As noted in the introduction to the guide,<sup>100</sup> States should adapt the model provisions contained herein to fit local conditions, constitutional principles, legal culture and structures and existing enforcement arrangements.

Following the general discussion of the elements of criminal offences, offences directly concerned with waste are considered before considering ancillary offences — offences facilitating the core activities of waste trafficking. The issues of secondary liability and liability for attempt, liability of legal persons and defences are then considered.

To help ensure that waste trafficking activities are punished when appropriate, the offences as defined in the guide seek to criminalize the phenomenon of waste trafficking from a variety of angles. In taking such an approach, some overlap between offences is inevitable. How States deal with prosecuting offenders in the case of multiple partially overlapping offences is a matter for each State in accordance with its legal tradition. In some States, multiple partially overlapping charges are possible on a criminal indictment. In other States, the use of this approach would not be possible.

The model provisions contained in the present chapter do not stipulate the applicable penalty for each offence. Determination of the appropriate penalties has been left to each State, in accordance with its legal system and culture. For most of the offences contained in the guide, criminal liability will be appropriate. In certain cases, States may wish to provide for civil or administrative liability as well or as an alternative. How penalties should be structured within a given law is left to the individual State. Some States may elect to include the penalty applicable to each offence within the provision establishing the offence. Other States may

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<sup>100</sup> See “How to use this guide”.

decide to set out the applicable penalties for each offence within a special penalties provision, separate from the offences themselves.

## ELEMENTS OF CRIMINAL OFFENCES

All legislation establishing offences — whether criminal, civil or administrative — sets down certain generally applicable conditions, the satisfaction of which will render a person liable to a certain penalty or punishment. These conditions, which form the building blocks of an offence, are known as the elements of the offence. In general, while the exact terminology may vary between legal systems, offences may have two types of elements: the physical/objective elements and the mental elements.

The physical or objective elements of an offence (also known as the *actus reus*, in relation to criminal offences) relate to the acts that the accused person actually committed. They may include conduct (acts or omissions), the results of conduct and special circumstances relating to the conduct. Liability must be based on the conduct of a person in order for it not to be arbitrary.

The mental or subjective elements of an offence (also known as *mens rea*, in relation to criminal offences) relate to the accused person's state of mind at the time of the offence. For criminal offences, proof of a corresponding mental element is generally required in respect of each physical/objective element of the offence. The types of mental states recognized by the criminal laws of various States and the terms used to describe those mental states vary significantly between jurisdictions. These differences in terminology and underlying legal principles make it difficult to make generalizations about mental elements across the spectrum of legal traditions and legal systems. It can, however, be said that mental elements generally differ according to the degree of intention or knowledge of facts, probabilities and risks on the part of the person in question or, in some circumstances, what they should have known. Mental elements can be placed on a scale according to the degree of fault that they entail. Mental elements of intention and knowledge are at the upper end of this scale. Below them are mental elements of wilful blindness, recklessness and negligence. At the bottom of the scale are offences of strict liability and absolute liability, which do not require proof of any mental element.

The mental elements for the offences of waste trafficking and document fraud in connection with waste management are left open in the present guide. In the related provisions, the phrase “with the requisite mental state” is included in square brackets to emphasize that States should consider the appropriate mental elements, if any, for the offence. Where States seek to establish offences of strict liability, it is important that legislation clearly provide that no proof of any mental element is required. This is important not only to ensure that natural and legal persons involved in the waste industry can ascertain what they may potentially be criminally liable for (and hence to ensure compliance with the principle of legality), but also to ensure that the offence can be prosecuted as intended. Under many legal systems, the courts may apply a presumption that an offence requires proof of *mens rea*, with a requirement of clear intention to the contrary before this presumption may be rebutted. This and other issues related to the use of strict liability for waste offences are considered in the following example from the United Kingdom.

**EXAMPLE: UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND**

*KV v The Crown* [2011] EWCA Crim 2342 (19 October 2011) and *Ezeemo v The Crown* [2012] EWCA Crim 2064 (16 October 2012)

These cases concerned the prosecutions of natural and legal persons for transportation of waste destined for recovery in Nigeria in breach of regulation 23 of the United Kingdom's Transfrontier Shipment of Waste Regulations 2007. At the relevant time, this provision provided that:

A person commits an offence if, in breach of Article 36(1) [of Regulation No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste], he transports waste specified in that Article that is destined for recovery in a country to which the OECD Decision [Decision C(2001)107/Final of the OECD Council concerning the revision of Decision C(92)39/Final on control of transboundary movements of wastes destined for recovery operations] does not apply.

At a preparatory hearing for the trial, the judge made a ruling on the interpretation of regulation 23 of the UK regulations and article 36 of the EU regulation. This ruling rejected submissions made by the defendants that regulation 23 was disproportionate and ultra vires (made without lawful authority).

Six defendants made an interlocutory appeal against this ruling, which was heard by the Court of Appeal of England and Wales. In this appeal, the defendants argued, inter alia, that the judge erred in finding that regulation 23 was proportionate and therefore within the scope of article 50 of the EU Regulation, which required the imposition of effective, proportionate and dissuasive sanctions. The defendants argued that the creation of a strict liability offence, punishable by up to two years' imprisonment and which could be committed by a wide range of individuals and organizations, was not proportionate.

The case was heard on the assumption that regulation 23 did indeed create an offence involving strict liability. This had been the assumption of the judge at the preparatory hearing and contrary submissions were not made at the interlocutory appeal. The Court of Appeal held that, even assuming that the offence involved strict liability, it was not disproportionate for that reason. There remained ample power for the court to avoid ordering a sentence of imprisonment or another serious punishment if a defendant had genuinely committed the offence entirely without fault.

The matter proceeded to trial. At the close of the prosecution case, the trial judge made a ruling that there was evidence to go to the jury that each of the defendants was involved in the transportation of waste destined for recovery in Nigeria and, moreover, that the offence was an offence of strict liability in that the prosecution was neither required to prove that the defendants knew that the product transported was waste, nor that they knew or intended that the waste would be transported to Nigeria for recovery. Following this ruling, several of the defendants changed their pleas to guilty. The other defendants were convicted at the conclusion of the trial, with one defendant acquitted of some charges.

Seven defendants, four natural persons and three legal persons, appealed against their conviction in the Court of Appeal of England and Wales. On appeal, they argued, inter alia, that the trial judge had erred in ruling that the offence was one of strict liability.

The Court of Appeal noted that it is a presumption of the law of England and Wales that a criminal offence requires a *mens rea* (and hence is not a strict liability offence) unless the *mens rea* is excluded by necessary implication. Interpreting the UK regulations, the Court held that it was clear that regulation 23 was intended to be an offence of strict liability. The Court held that if it were the case that the offence required the prosecution to prove a *mens rea* of knowledge,

the offence could not be proved unless the prosecution could establish against any of those defined as transporters that he had personal knowledge of the intentions of others and/or had inspected the loads. In our judgment, if this were to be the requirement of regulation 23 the regulation would be substantially deprived of its intended effect, which was to deter those in the business of handling such material for export from taking risks with the environment.

**EXAMPLE: UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND (CONTINUED)**

The Court further held:

In our respectful opinion, the provisional view expressed by the court in *KV and Others* is correct. The offence created by regulation 23 is an offence of strict liability. We recognise, as was submitted, that this construction has the effect of catching those who may have no personal knowledge that a container contains waste or that the contents of the container were destined for recovery in a non-OECD country. One of the reasons for imposing strict liability is ... to promote greater vigilance among those who undertake activities which may cause harm to the public. The obligation which the regulations place upon transporters is to take care to acquire knowledge of the cargos they are transporting. If they do not they take the risk of breach.

Finally, the Court quoted with approval the decision of *Hooper LJ in Jackson v The Crown* [2006] EWCA Crim 2380 (17 October 2006), in which his honour held that:

Whilst it is always possible to adumbrate situations which would appear to be covered by a statutory provision and yet could have manifestly unjust results, one has to rely on the good sense of Prosecuting Authorities and the overall supervisory role of the courts to avoid such a situation developing. Likewise of course the penalty actually imposed in any particular case can reflect the actual degree of culpability involved in a particular case.

The Court rejected this and the other grounds for appeal and upheld the appellants' convictions.<sup>a</sup>

<sup>a</sup> For further information, see UNODC, "Sharing Electronic Resources and Laws on Crime (SHERLOC) knowledge management portal", Case law database, *R v. Ezeemo and Ors*. Available at <https://sherloc.unodc.org>.

## WASTE OFFENCES

This section of the guide concerns offences that directly relate to waste trafficking. There are two offences addressed in this section: waste trafficking and document fraud in connection with waste management.

### Waste trafficking

To effectively prevent and combat waste trafficking, it is essential that waste trafficking be appropriately criminalized under domestic legislation. Model provision 3 below provides an example of how this could be achieved. In the present section, before the text of this model provision is set out, the drafting of waste trafficking offences in general is discussed, including their physical/objective and mental elements, and the design of model provision 3 is explained.

There are essentially three physical/objective elements of any waste trafficking offence: the acts which may amount to trafficking, the wastes which may be trafficked (that is, the object of the offence) and the circumstances that determine when the relevant acts will be considered to be trafficking, and hence a criminal offence. Each of these elements must be present for conduct to be considered waste trafficking. In this section, discussion centres around each of these elements, how they are provided for in model provision 3 and why certain choices were made in relation to these elements when drafting the model provision.

The first element is the acts that may constitute trafficking. In different legal systems and in different contexts, the term trafficking may refer to different acts. To ensure that model provision 3 is as comprehensive as possible and to avoid leaving gaps, this guide takes a broad approach to the acts included in the waste trafficking offence. Through the definition of "traffics" in paragraph 1, model provision 3 covers importing, exporting, transporting, buying, selling, brokering, treating, processing, collecting, sorting, labelling, handling, utilizing, storing, recycling, disposing of and burning waste. For the purposes of this guide, importing



and exporting should be interpreted as including reimporting and re-exporting, respectively. Where this would not be clear under domestic legislation, legislators may wish to make specific reference to reimporting and re-exporting among the acts that may constitute trafficking. States may also wish to include, in the appropriate form for domestic legislation, examples of some or all of the acts that may constitute trafficking.

Some countries may take a narrower view as to the acts included in the notion of trafficking, preferring to criminalize certain acts through dedicated offences rather than instituting a general trafficking offence. For example, whereas the notion of trafficking in model provision 3 includes the illegal disposal of waste, this conduct is criminalized by a specific illegal disposal offence in some countries rather than through the notion of waste trafficking. The same may also be said for other acts included in the notion of waste trafficking under model provision 3. Whichever approach is taken, legislators should ensure that all relevant illicit activities committed along the chain of actors involved in waste trafficking are appropriately criminalized.

The second element is the object of the offence. In other words, what is the object that, when trafficked, constitutes the offence of waste trafficking? This is also an issue regarding which States have taken different approaches. In some countries, offences of waste trafficking cover only hazardous wastes or other specified categories of waste. In other countries, the offence of waste trafficking may be committed by trafficking any kind of waste.

Model provision 3 makes use of two legislative tools for determining the scope of wastes to which it may apply. The first is that, by using the term “waste”, it refers to the definition of waste contained in model provision 1 of this guide, namely, “a substance or object disposed of, intended to be disposed of or required by law to be disposed of”. Second, the types of waste included in the offence of trafficking are wastes “belonging to a category listed in [insert reference to relevant schedules]”. The present guide does not stipulate which wastes may be the object of trafficking. Recommendations of international lists of waste for inclusion in domestic schedules are, however, included in chapter 2, along with a general explanation of the use of waste schedules.

The third element of the offence of waste trafficking is the circumstances that characterize the particular acts covered by this provision as trafficking and thus render these acts criminal offences (the “circumstance element”). This element is necessary because not all of the acts included in this offence will amount to crimes under all circumstances. In the same way that driving a car is not a criminal offence, but driving a car without a licence or under the influence of alcohol generally will be, various acts relating to waste will not generally amount to criminal conduct unless one or more other conditions are met. For example, treatment or disposal of waste will not amount to a crime if it is performed by the holder of a valid licence or permit in a manner compliant with the conditions of that licence or permit. It is thus necessary for legislators to determine when the various acts covered by a waste trafficking provision will be regarded as the crime of trafficking, distinguishing these cases from cases in which these same acts are lawfully performed.

Circumstance elements of waste trafficking offences generally refer to legal duties or obligations pertaining to waste management. There is a variety of ways in which this can be accomplished. For example, legislation may define trafficking as particular acts in breach of “the law”, in breach of a particular law or regulation, or in breach of specific provisions of a particular law or regulation. Trafficking may also be defined as particular acts “without lawful authority”, without a permit, licence or certificate, or in breach of the conditions of such a licence, permit or certificate. The requirements for holding or exercising lawful authority and for the granting of a licence, permit or certificate may be set out in other provisions of the same law or in a different law. Trafficking offences may also define the duties or obligations pertaining to the acts within the offence. For example, in defining trafficking, some States have closely followed the language of the Basel Convention, defining trafficking as certain acts without notification to States concerned, without the consent of States concerned, or with consent obtained through falsification, misrepresentation or fraud or in a manner that does not confirm consent in a material way with relevant documents.<sup>101</sup>

<sup>101</sup> See Basel Convention, art. 9, para. 1.

The duties and obligations that may apply to each of the acts covered by model provision 3 – importing, exporting, transporting, buying, selling, brokering, treating, processing, collecting, sorting, labelling, handling, utilizing, storing, recycling, disposing of or burning – will necessarily vary between States and may be complex. Because of this, and in keeping with the scope of this publication as a criminal justice tool and not a broader waste management tool, model provision 3 does not set out the duties and obligations that, when breached, will turn these acts into trafficking. Rather, model provision 3 leaves the specification of these duties and obligations to waste management legislation and regulations, and instead, sets out four general circumstances that will capture when these duties or obligations are breached, as follows:

(a) Where the act is performed without lawful authority, and where such authority is required by law to perform those acts;

(b) Where the act is performed without a relevant licence, permit or certificate granted by a competent authority;

(c) Where the act is performed in contravention of the conditions of such a licence, permit or certificate; or

(d) Where the act is otherwise in contravention of waste management legislation.

It is then the purview of legislators to ensure that waste management legislation adequately covers the circumstances in which acts of importing, exporting, transporting, buying, selling, brokering, treating, processing, collecting, sorting, labelling, handling, utilizing, storing, recycling, disposing of or burning waste can be performed through requirements of lawful authority, requirements to hold and comply with a licence, permit or certificate, or through other applicable duties, obligations or prohibitions. In some countries, certain acts, notably the importation of hazardous waste, will always amount to criminal offences. Indeed, the Bamako Convention requires that parties criminalize the import of hazardous wastes into Africa from non-parties.<sup>102</sup>

This necessarily means, however, that this model legislative provision – and this legislative guide – only provides one piece of the puzzle to effectively address waste trafficking. The other piece is the provisions of domestic waste management legislation that determine the legality of waste management conduct. The present guide cannot, alone, provide a comprehensive approach to criminalizing waste trafficking for States that do not have such legislation. It is suggested that, in such cases, States seek legislative assistance for the development of waste management legislation in conjunction with legislative assistance for the development of waste trafficking legislation.

Model provision 3 thus provides for a broad offence of waste trafficking, covering various acts, various wastes and various circumstances rendering the conduct illicit. In so doing, model provision 3 may represent a simplification of how legislators actually wish to criminalize waste trafficking. Rather than covering all of this in a single criminal offence, legislators may wish to establish specific offences for specific acts, specific wastes and/or specific types of breaches (that is, circumstances that render the conduct illicit). There are various reasons that legislators may wish to do this. States may wish to make use of different physical/objective and/or mental elements for different types of waste trafficking. They may also wish to provide for different maximum penalties in relation to different types of waste trafficking. As further discussed below,<sup>103</sup> States must consider the need for penalties to be proportionate. States may also wish to establish separate offences to enable the use of different powers or procedures in relation to some but not all offences or, in the legislative drafting style in the country, it may simply be preferred to criminalize different conduct in separate provisions.

Two further observations may be made about the physical/objective elements of the offence in model provision 3. First, pursuant to the approach taken in the present guide, there is no supervening requirement

<sup>102</sup> Bamako Convention, art. 4, para. 1.

<sup>103</sup> See “Effective, proportionate and dissuasive sanctions” in chapter 6, below.

that the trafficking involve a transboundary movement of waste. While some of the acts constituting the offence may involve a transboundary movement (such as importing and exporting), it is not necessary that the offence involve a transboundary movement in all cases. Second, there is no requirement of harm, whether to the environment, human health or otherwise, for the offence of trafficking to be committed. The harm actually or potentially caused by waste trafficking may be relevant at other stages of the criminal process, such as in the determination of the appropriate sentence,<sup>104</sup> but the prosecution is not required to prove harm in order for a defendant to be convicted.

Regarding the mental elements of the offence, it was noted in the section of the present chapter on elements of criminal offences that proof of a corresponding mental element is generally required in respect of each physical/objective element of an offence. Thus, legislative drafters must consider the appropriate mental element, if any, in respect of each of the three aforementioned physical/objective elements: the acts, the waste and the circumstance element. This may be intention, knowledge or another appropriate mental element. In some cases, it may be appropriate for legislators to impose strict liability (that is, liability without proof of a mental element) in relation to certain conduct amounting to waste trafficking.

### MODEL PROVISION 3: WASTE TRAFFICKING

- (1) “Traffics”, in relation to waste, means imports, exports, transports, buys, sells, brokers, treats, processes, collects, sorts, labels, handles, utilizes, stores, recycles, disposes of or burns:
- (a) Without lawful authority where such authority is required by law;
  - (b) Without a [insert relevant terminology for licences, permits, certificates etc.] granted by [insert competent authorities];
  - (c) Contravening the conditions of said [insert relevant terminology for licences, permits, certificates etc.]; or
  - (d) In a manner that otherwise contravenes [insert reference to relevant waste management legislation].
- (2) Any person who [with the requisite mental state] traffics waste belonging to a category listed in [insert reference to relevant schedules] commits an offence.

### EXAMPLE

#### Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989

##### Article 9 – Illegal Traffic

1. For the purpose of this Convention, any transboundary movement of hazardous wastes or other wastes:
  - (a) without notification pursuant to the provisions of this Convention to all States concerned; or
  - (b) without the consent pursuant to the provisions of this Convention of a State concerned; or
  - (c) with consent obtained from States concerned through falsification, misrepresentation or fraud; or
  - (d) that does not conform in a material way with the documents; or
  - (e) that results in deliberate disposal (e.g. dumping) of hazardous wastes or other wastes in contravention of this Convention and of general principles of international law, shall be deemed to be illegal traffic.

[...]
5. Each Party shall introduce appropriate national/domestic legislation to prevent and punish illegal traffic. The Parties shall co-operate with a view to achieving the objects of this Article.

<sup>104</sup> See “Aggravating and mitigating factors” in chapter 6, below.

**EXAMPLE: AFRICAN UNION****Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 1991****Article 4 – General Obligations**

## 1. Hazardous Waste Import Ban

All Parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties. Such import shall be deemed illegal and a criminal act. All Parties shall:

- (a) Forward as soon as possible, all information relating to such illegal hazardous waste import activity to the Secretariat who shall distribute the information to all Contracting Parties;
- (b) Cooperate to ensure that no imports of hazardous wastes from a non-Party enter a Party to this Convention. To this end, the Parties shall, at the Conference of the Contracting Parties, consider other enforcement mechanisms.

[...]

**EXAMPLE: RWANDA****Law N°48/2018 on Environment****Article 45 – Prohibited acts related to chemicals and waste**

The following acts in connection with chemicals and waste are prohibited:

1. to pile, dispose of and dump waste on unauthorised public places or any other inappropriate places;
2. to import toxic waste and any other product harmful to human health and environment;
3. to purchase, sell, import, export, transit, store and pile chemicals, diversity of chemicals and other polluting or dangerous substances;

[...]

7. to burn domestic waste, rubbish, tyres and plastic materials.

An Order of the Minister determines a list of chemicals and other polluting substances that are not permitted.

**Document fraud in connection with waste management**

Documents relating to the waste management activities are critical to tracing and tracking waste and ensuring the environmentally sound management of waste. Licences, permits and certificates are used to lawfully carry out various waste management activities. Criminals use fraudulent licences, permits and certificates to disguise illegal activities with the appearance of legality. Document fraud can be committed in a variety of ways. In some cases, criminals forge entire licences, permits or certificates. In other cases, fraudulent licences, permits or certificates are produced by altering genuine documents. Waste trafficking may also be facilitated through the use of genuine licences, permits or certificates obtained by fraudulent misrepresentations made in applications and supporting documents, such as reports of analyses, certificates, data sheets, information on waste composition, waste treatment contracts, proof of consent, notification forms, customs documentation and waste movement documentation. Document fraud may further be committed when genuine licences, permits or certificates are used by persons other than the rightful holder.

States must tackle each of these forms of document fraud. Model provisions 4 and 5 below include offences addressing each of these aspects of document fraud. Model provision 4 criminalizes producing, offering, distributing, procuring, trading, exchanging, providing, selling, acquiring, buying, using or possessing a fraudulent permit, certificate or part thereof. It targets actors involved at all stages of the supply chain of fraudulent permits and certificates, from the producers and intermediaries of such fraudulent documents through to the ultimate users or possessors. It covers both forgery and fraudulent alteration of permits and certificates.

#### **MODEL PROVISION 4: FRAUDULENT [LICENCES, PERMITS, CERTIFICATES, ETC.] IN CONNECTION WITH WASTE MANAGEMENT**

Any person who [with the requisite mental state] produces, offers, distributes, procures, trades, exchanges, provides, sells, acquires, buys, uses or possesses a fraudulent [insert relevant terminology for licences, permits, certificates, etc.] or a part thereof commits an offence.

Falsifying documents or submitting false information in relation to an application for or the use of a licence, permit or certificate to manage waste should be considered an offence. Misrepresenting the actual waste by, for example, hiding its dangerous characteristics, can have huge consequences for both the environment and the people dealing with that waste. Model provision 5 establishes a criminal offence for intentionally making a false or misleading statement or representation, submitting a fraudulent document, or omitting information or documentation required to be provided in or in connection with an application for a licence, permit or certificate. It also covers fraudulent conduct in connection with the use of a licence, permit or certificate. This could include, for example, a person making a fraudulent misrepresentation that they are they rightful holder of such a document.

In establishing such an offence, States should consider how legislation should handle purely accidental errors made in the application for or use of licences, permits or certificates. One possibility is to set the applicable mental element of the offence to require a measure of fault – intention, knowledge, recklessness or negligence – to exclude misrepresentations that are not made intentionally, knowingly, recklessly or negligently. Another possibility is to establish the offence as a strict liability offence but allow an absolute defence of honest and reasonable mistake of fact.

#### **MODEL PROVISION 5: FRAUDULENT CONDUCT IN CONNECTION WITH AN APPLICATION FOR THE USE OF A [LICENCE, PERMIT, CERTIFICATE, ETC.]**

Any person who [*with the requisite mental state*]:

- (a) makes a false or misleading statement or representation;
- (b) submits a fraudulent document; or
- (c) omits information or documentation required to be provided;

to [insert competent authorities] in, or in connection with, an application for or the use of a [insert relevant terminology for licences, permits, certificates, etc.] commits an offence.

## **ANCILLARY OFFENCES**

Waste trafficking is facilitated by a number of other offences, such as conspiracy and criminal association, money-laundering, corruption and obstruction of justice. These offences may be called “ancillary offences” or “modus operandi offences” because they concern the ancillary conduct, the *modi operandi*, used by waste traffickers to carry out their principal criminal activities. It is critical that States adopt appropriate legislative

and other measures to address these ancillary offences. Indeed, the Organized Crime Convention requires that States parties criminalize money-laundering, corruption, obstruction of justice and either conspiracy or criminal association.<sup>105</sup> The present section provides guidance on criminalizing these forms of conduct in the context of waste trafficking.

It should also be noted that corporations and organized criminal groups involved in waste trafficking may also engage in other offences, such as tax evasion. While tax evasion is not further addressed by the present guide, States should take appropriate legislative and other measures to prevent and combat tax evasion by those involved in licit and illicit waste management.

## Conspiracy and criminal association

Article 5 of the Organized Crime Convention requires that States parties adopt legislative measures to criminalize participation in an organized criminal group. Article 5, paragraph 1 (a), gives States parties a choice of one or both of two different models for achieving this.

These models reflect the differing approaches traditionally taken by common-law jurisdictions and civil law jurisdictions to criminalize participation in organized criminal groups. The agreement-type offence in article 5, paragraph 1 (a) (i), reflects the conspiracy model traditionally taken by common-law jurisdictions, whereas the offence in paragraph 1 (a) (ii) reflects the criminal association model traditionally taken by civil law jurisdictions.

Model provisions 6 and 7 below reflect these two alternative models of criminalizing participation in an organized criminal group. The provisions are based on the wording of article 5, paragraph 1 (a), of the Organized Crime Convention, but have been adapted to relate to the waste trafficking offences contained in the present guide.

As with the two models contained in the Organized Crime Convention, States have a choice of whether to introduce one or both of these offences. To establish criminal liability for the conspiracy offence in model provision 6, it must be proved that the accused agreed with one or more other persons to commit a serious crime (the physical/objective element of the offence). An optional paragraph 2 is included for States that wish to require or are obliged by domestic law to require the additional physical/objective element of an act taken by one of the participants in furtherance of the agreement. States may also choose to include a further physical/objective element, namely, that the agreement involved an organized criminal group.

There are two mental elements for this offence:

- (a) An intention to agree with one or more other persons to commit the offence; and
- (b) The purpose of the agreement being to obtain a financial or other material benefit.

Model provision 6 does not expressly include the word “intention”. Nevertheless, the wording of the offence implies a mental element (a) of intention. The act of agreement to commit an offence can only be committed intentionally.

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<sup>105</sup> Organized Crime Convention, arts. 5, 6, 8 and 23.

**MODEL PROVISION 6: CONSPIRACY**

1. Any person who agrees with one or more other persons to commit a serious crime in order to obtain directly or indirectly, a financial or other material benefit, commits an offence punishable by [insert penalty].
- [2. For a person to be convicted under this section, an act other than the making of the agreement must be undertaken by one of the participants in furtherance of the agreement.]

Model provision 7 contains two criminal association offences. The first of these offences concerns participation in the criminal activities of an organized criminal group, whereas the second relates to participation in other activities of the organized criminal group. The physical/objective element of the offence in paragraph 1 is the accused taking an active part in the criminal activities of an organized criminal group. The mental elements of the offence in paragraph 1 are :

- (a) An intention to take an active part; and
- (b) Knowledge of either:
  - (i) The aim and general criminal activity of the organized criminal group; or
  - (ii) The intention of the organized criminal group to commit one or more offences covered by the present guide.

The physical/objective element of the offence in paragraph 2 is the accused taking an active part in any other activities of an organized criminal group. The mental elements of the offence in paragraph 2 are:

- (a) An intention to take an active part;
- (b) Knowledge of either:
  - (i) The aim and general criminal activity of the organized criminal group; or
  - (ii) Its intention to commit the crimes in question; and
- (c) Knowledge that the acts or omissions of the accused will contribute to the achievement of the criminal aim described above.

The “other” activities for the purposes of the offence in paragraph 2 need not otherwise be illegal for the elements constituting the offence to be met. States may wish to clarify this fact in their legislation. Further information about each model of criminalizing participation in an organized criminal group can be found in the *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, published by UNODC.

**MODEL PROVISION 7: PARTICIPATING IN AN ORGANIZED CRIMINAL GROUP**

1. Any person who intentionally [or knowingly] takes an active part in criminal activities of an organized criminal group, knowing either the aim and general activity of the organized criminal group, or its intention to commit the crimes in question, commits an offence punishable by [insert penalty].
2. Any person who intentionally [or knowingly] takes an active part in [any other] activities of an organized criminal group:
  - (a) knowing either the aim and general activity of the organized criminal group, or its intention to commit the crimes in question; and
  - (b) knowing that his or her conduct will contribute to the achievement of the aim of the organized criminal group or its intention to commit the crimes in question;
 commits an offence punishable by [insert penalty].



## Money-laundering

Economic incentives are among the biggest drivers of waste trafficking.<sup>106</sup> Money earned from waste trafficking can be laundered to conceal its illicit origins. States should ensure that measures are in place to criminalize the laundering of money obtained from waste trafficking. Article 6 of the Organized Crime Convention requires States parties to introduce measures to criminalize money laundering. A similar provision is contained in article 23 of the Convention against Corruption.

Article 6, paragraph 1, of the Organized Crime Convention contains a number of subsections that require States parties to introduce criminal offences relating to various aspects of money-laundering. The first of these, article 6, paragraph 1 (a) (i), requires that States parties criminalize the intentional conversion or transfer of property, knowing that such property is the proceeds of crime, 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 offence to evade the legal consequences of his or her action. The link between this offence and other forms of organized crime is provided in the term “predicate offence”.

The concept of predicate offences is essential to criminalization in many jurisdictions. Article 2, paragraph (h), of the Organized Crime Convention defines “predicate offence” as “any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 6 of this Convention”. Article 6, paragraph 2 (a), requires that each State party seek to apply the offences in paragraph 1 of article 6 to “the widest range of predicate offences”. Article 6, paragraph 2 (b), specifically requires that States parties include as predicate offences all serious crimes, as defined in article 2 of the Convention, and the offences specifically provided for under the Convention.

States have taken different approaches to defining the term “predicate offence”. Some States have defined “predicate offence” by reference to an exhaustive list of offences contained in legislation. Other States have defined “predicate offence” broadly, as including all crimes, all serious crimes, or all crimes subject to a maximum penalty at or above a certain threshold. The approach of designating all crimes as predicate offences is the widest approach and the one that best serves the purpose of article 6 of the Organized Crime Convention and the equivalent provision of the Convention against Corruption.<sup>107</sup> For States utilizing a list of predicate offences, article 6, paragraph 2 (b), of the Organized Crime Convention requires that the list include, at a minimum, “a comprehensive range of offences associated with organized criminal groups”.

As per the provisions of Article 6 of the Organized Crime Convention, States parties shall include as predicate offences, for the purposes of money-laundering legislation, all waste trafficking offences that are deemed to be serious crimes.

Where this would not automatically be provided for under existing legislation, States may decide to expressly state in waste management legislation either that waste trafficking offences are predicate offences to money-laundering or that waste trafficking offences constituting serious crimes are predicate offences. Not all waste trafficking offences contemplated are serious enough to be considered serious crimes. An example of a provision designating serious waste trafficking offences as predicate offences for money-laundering is provided in model provision 8 below.

<sup>106</sup> Rucevska and others, *Waste Crime–Waste Risks*, p. 41.

<sup>107</sup> UNODC, *Status of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed. (Vienna, 2017), p. 73.



### MODEL PROVISION 8: DESIGNATION OF PREDICATE OFFENCES FOR MONEY-LAUNDERING

Offences contained in this [Act/Law/Chapter etc.] [punishable by a maximum penalty of [insert maximum penalty] or greater] are to be considered predicate offences for money-laundering under [insert reference to money-laundering offences].

Regardless of the manner in which States parties choose to identify predicate offences, it should not be necessary that a person be convicted of a predicate offence when proving that property is the proceeds of crime. Comprehensive guidance on money-laundering legislation is beyond the scope of the present guide, but other UNODC publications provide further guidance on the matter. UNODC has previously published two sets of model money-laundering provisions. In 2005, UNODC and the International Monetary Fund published *Model Legislation on Money Laundering and Financing of Terrorism, for use by legislative drafters in civil law jurisdictions*. In 2016, UNODC, the Commonwealth Secretariat and the International Monetary Fund published *Common Law Legal Systems Model Legislative Provisions on Money Laundering, Terrorism Financing, Preventive Measures and Proceeds of Crime*, for use by legislative drafters in common-law jurisdictions. Both of these documents contain detailed model legislative provisions on money-laundering, confiscation and international cooperation in relation to the proceeds of crime.

## Corruption

Organized criminal groups, including those involved in waste trafficking, frequently make use of corruption in the course of their operations. Bribery and other acts of corruption are used to create or exploit opportunities for criminal operations and to protect such operations from interference from criminal justice systems and other control structures. Corruption reduces risks, increases criminal profits and is less likely to attract the same attention and punishment as attempts to influence public officials through intimidation or actual violence.

Corruption is both a driving force and a product of organized crime. The effects of corruption extend well beyond the facilitation of serious crime. The fact that public officials become compromised and act against the public interest undermines the stability of government systems in general and public confidence in them. When corruption reaches high levels in the government, it affects relationships among States and undermines the quality of peoples' lives, as it hampers the economic and social advancement of societies.

While the political and economic consequences of corruption are many, it has additional effects related to the fight against serious transnational crime. Corruption fuels the demand for illegal markets. Moreover, corrupt officials facilitate efforts by organized criminal groups to obstruct justice, intimidate witnesses and victims, and otherwise impede the international cooperative processes that the Organized Crime Convention seeks to promote, including by possibly refusing to extradite serious transnational criminals.

The Convention against Corruption is the only legally binding universal anti-corruption instrument. The Convention's far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem. The Convention covers five main areas: prevention, criminalization and law enforcement measures, international cooperation, asset recovery, and technical assistance and information exchange. The Convention addresses many different forms of corruption, such as bribery, embezzlement, trading in influence, abuse of power and various acts of corruption in the private sector. The Convention also has a specific chapter dealing with the recovery of assets, a major concern for countries that pursue the assets of former leaders and other officials accused of or found to have engaged in corruption.

The Organized Crime Convention also covers three types of corruption offences in the public sector: active bribery (the giving of bribes), passive bribery (the acceptance of bribes) and participation as an accomplice to bribery. In addition to these mandatory offences, States are required to consider criminalizing other forms of corruption, including bribery of foreign officials. The Organized Crime Convention also requires the introduction of legislative and other measures designed to prevent, detect and punish corrupt practices and enhance accountability.

Corruption impairs the proper implementation and enforcement of waste management frameworks. With respect to the environmentally sound management of waste, corruption may take place in the granting of permits and licences, such as the licensing of disposal facilities or the authorization of persons to transport hazardous wastes. With regard to transboundary movements of wastes, corruption can occur at all stages, including in the following situations:

- When the State of export authorizes the initiation of the prior informed consent procedure (commonly known as the PIC procedure)
- When the State of export authorizes the export to take place
- When the State of import consents to the shipment
- At each border control<sup>108</sup>

Corruption may involve various stakeholders, including politicians, environmental or competent authorities, port authorities, police officers, customs officials, landowners, traders and brokers, shipping lines, importers and exporters.<sup>109</sup> The obtaining of a financial or other material benefit, through either lowering costs or increasing income, is a key driver of corruption.

Preventing and combating waste trafficking requires legislation to effectively prevent and combat corruption. In this regard, States should review their obligations under the Convention against Corruption, the Organized Crime Convention and publications of UNODC concerning their implementation.<sup>110</sup>

## Obstruction of justice

Waste trafficking can be a source of income for organized criminal groups. To maintain and expand their criminal operations, organized criminal groups attempt to pervert the course of justice by using threats, coercion and violence against judges, prosecutors, law enforcement officers and other officials, jurors and witnesses. To effectively tackle waste trafficking, States need adequate provisions criminalizing the obstruction of justice.

The offence contained in model provision 9 below criminalizes attempts to obstruct justice. Model provision 9 is based on the requirements of article 23 of the Organized Crime Convention for the criminalization of obstruction of justice.

States should assess their need to include in their waste trafficking legislation a specific provision that criminalizes the obstruction of justice by reference to existing obstruction of justice offences. Whether attempts to obstruct justice in relation to inspectors, investigators, law enforcement officers and other similar officers would be covered by existing offences is of particular importance in this regard. Some States already have comprehensive provisions that extend protection to such officers and would cover the conduct criminalized by model provision 9. States that have instead opted to include specialized obstruction of justice provisions in specific laws may wish to consider including in their waste management legislation an offence like that

<sup>108</sup> Tatiana Terekhova, “Transboundary movements of hazardous wastes and corruption: the special case of e-waste in West Africa”, in UNODC, *Corruption, Environment and the United Nations Convention against Corruption* (2012), p. 14.

<sup>109</sup> Ibid.

<sup>110</sup> See UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd rev. ed. (2012); UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017); and UNODC, *Status of Implementation of the United Nations Convention against Corruption*. See also Terekhova, “Transboundary movements of hazardous wastes and Corruption”.

contained in model provision 9. In jurisdictions in which enforcement powers are exercised by competent authorities other than police, States should ensure that specialized obstruction of justice provisions cover all officers responsible for verifying compliance and for inspection and enforcement actions in relation to waste management provisions.

#### MODEL PROVISION 9: OBSTRUCTION OF JUSTICE

1. Any person who in relation to the commission of any offence under this [Act/Chapter/Law ...] uses force, threats or intimidation, or promises, offers or gives any undue advantage in order to:
  - (a) Induce false testimony; or
  - (b) Interfere in the giving of testimony or production of evidence;
 commits an offence punishable by [insert the penalty].
2. Any person who in relation to the commission of any offence under this [Act/Chapter/Law ...] uses force, threats or intimidation in order to interfere with the exercise of the duties of law enforcement, prosecution or judicial officials commits an offence punishable by [insert the penalty].

#### EXAMPLE: ITALY

##### Penal Code

##### Article 452-*septies* – Preventing control

Unless the fact constitutes a more serious offence, whoever prevents, hinders or circumvents environmental surveillance and control activities, as well as occupational safety and hygiene practices or compromises their outcome denying access to places, setting obstacles or artificially changing their state shall be punished with imprisonment from six months to three years.

## SECONDARY LIABILITY

In addition to principal offenders, there are a number of actors involved in waste trafficking who organize, direct, aid, abet, facilitate or counsel the commission of waste trafficking. Legislation combating waste trafficking should criminalize the conduct of these offenders. The term “secondary liability” refers to situations where establishing liability requires at least *prima facie* proof of wrongdoing by a third party.<sup>111</sup> It is to be distinguished from primary liability, which may be based entirely on the acts or omissions of a single principal offender.

Secondary liability generally requires a higher degree of fault than that required for primary offending. This is because, “as the form of criminal liability moves further away from the actual infliction of harm, the grounds of liability should become narrower”.<sup>112</sup> Accordingly, aiding, abetting, counselling, procuring or facilitating the commission of an offence requires proof of intention — that the person intended the act of assistance or encouragement and knew that the principal offender intended to or contemplated performing actions which constitute the offence.<sup>113</sup>

<sup>111</sup> See also Jaani Riordan, “A theoretical taxonomy of intermediary liability”, in *The Oxford Handbook of Online Intermediary Liability*, Giancarlo Frosio, ed. (Oxford, Oxford University Press, 2020), pp. 63–65.

<sup>112</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law*, 7th ed. (Oxford, Oxford University Press, 2013), p. 432.

<sup>113</sup> A.P. Simester and others, *Simester and Sullivan’s Criminal Law: Theory and Doctrine*, 6th ed. (London, Hart Publishing, 2016), pp. 228–229, 240; and Ashworth and Horder, *Principles of Criminal Law*, pp. 431–432.

In many jurisdictions, secondary liability is established for all criminal offences by the provisions of the general criminal law. In such jurisdictions, specific provisions on secondary liability in waste management legislation may not be necessary. Where this is not the case, waste management legislation should expressly establish secondary liability.

Model provision 10 below contains an offence that extends the liability for involvement in waste trafficking to secondary offenders. These provisions are based on of article 5, paragraph 1 (b), of the Organized Crime Convention, which requires that States parties criminalize the organizing, directing, aiding, abetting, facilitating, or counselling of the commission of a serious crime involving an organized criminal group.

**SUMMARY OF MAIN CRIMINALIZATION REQUIREMENTS OF ARTICLE 5, PARAGRAPH 1 (B), OF THE ORGANIZED CRIME CONVENTION**

Article 5, paragraph 1 (b), of the Convention extends criminal liability to persons who provide advice or assistance with respect to the commission of serious crimes involving an organized criminal group. This specifically includes persons intentionally “organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group”. Paragraph 1 (b) thus enables the prosecution of leaders, accomplices, organizers and arrangers, as well as lower-level participants, in the commission of serious crime.

“Aiding, abetting, facilitating or counselling” covers secondary parties and accomplices who are not themselves principal offenders.

“Organizing” and “directing”, on the other hand, are extensions not commonly found (or defined) in national laws. To that end, paragraph 1 (b) is intended to ensure the liability of leaders of organized criminal groups who give orders relating to, but do not themselves engage in, the commission of the actual crimes.

Model provision 10 establishes secondary liability for organizing, directing, aiding, abetting, facilitating, counselling or procuring the commission of waste trafficking offences. This provision enables the prosecution of leaders, organizers and accomplices, as well as persons involved in waste trafficking at lower levels. States may elect to establish higher penalties for organizing or directing than for aiding, abetting, facilitating or counselling because of the higher-level nature of this conduct. In some cases, it may be appropriate for the penalties for organizers and directors to be higher than those given to principal offenders.

**MODEL PROVISION 10: ORGANIZING, DIRECTING, AIDING, ETC., THE COMMISSION OF AN OFFENCE**

1. Any person who intentionally organizes or directs the commission of an offence to which this [Act/Law/Chapter ...] applies commits an offence punishable by [insert penalty appropriate for taking a leading role in such an offence].
2. Any person who intentionally aids, abets, facilitates, counsels or procures the commission an offence to which this [Act/Law/Chapter ...] applies commits an offence punishable by [insert penalty appropriate for taking a supporting role in an offence].

## LIABILITY FOR ATTEMPT

States should also ensure that liability for attempt for the offences contemplated in the present guide is established under domestic law. The general criminal law of many States provides for liability for attempt automatically. Where this is not the case, States should introduce specific provisions in waste legislation to achieve this. In addition to liability for criminal attempt, States should also review the extent to which the existing law provides for liability for attempt for administrative offences.

## LIABILITY OF LEGAL PERSONS

“Legal persons” (sometimes known as juristic or juridical persons) refers to organizations that, for the purposes of the laws of a particular jurisdiction, are considered to be “persons”, and that enjoy some — but not necessarily all — of the rights and obligations of a natural person in that jurisdiction. Corporations are the classic example of an organization with legal personality, but legal persons can also include a range of other entities, depending on the law of a given State.

Legal persons play a significant role in the commission and facilitation of waste trafficking. Waste trafficking is distinguishable from other forms of organized crime, such as trafficking in drugs and the smuggling of migrants, by its close links to licit industry, namely, the licit waste management industry.<sup>114</sup> In other words, many of the perpetrators of waste trafficking are corporations operating in the licit waste management industry. This type of offending is sometimes omitted from accounts of the involvement of legal persons in organized crime, which typically focus on the use of legal persons by organized criminal groups as a veil to hide their offending. Such accounts imply the existence of an organized criminal group that is separate from and precedes the legal person and conceive of the members of the organized criminal group as the perpetrators of offences, with the legal person being seen as a mere veil or shield — a tool to achieve the ends of the group, lacking its own agency. While this is undoubtedly true of some legal persons involved in waste trafficking, it does not accurately represent the reality of the involvement of all legal persons. In reality, many corporations that commit waste trafficking were not established by organized criminal groups to commit illegal acts. Rather, they were established to participate in the licit waste management industry, and they subsequently make decisions — knowingly or unknowingly — to contravene their legal obligations, in order to reduce costs and pursue greater profits. In these cases, the corporations are most accurately seen as the direct perpetrators of waste trafficking, not merely as tools used in the perpetration of waste trafficking by natural persons or organized criminal groups.

### THE ROLE OF ONLINE INTERMEDIARIES IN ADDRESSING WASTE TRAFFICKING

In some cases, waste trafficking is committed or facilitated through the use of the services of legal persons acting as online intermediaries. For an examination of policy issues relating to preventing and combating illicit trafficking online, see UNODC publication *Policymaking and the Role of Online Intermediaries in Preventing and Combating Illicit Trafficking*.

Effectively combating waste trafficking requires that legal persons be held responsible when they commit criminal offences. Article 10, paragraph 1, of the Organized Crime Convention requires that States parties adopt such measures as necessary to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offences established in accordance with the Convention.

<sup>114</sup> Lieselot Bisschop, “Illegal trade in hazardous waste”, in *Handbook of Transnational Environmental Crime*, Lorraine Elliott and William H Schaedla, eds, (Cheltenham, United Kingdom, Edward Elgar, 2016), p. 196.

The liability of legal persons shall be without prejudice to the criminal liability of the natural persons who have committed the offences.<sup>115</sup>

The Organized Crime Convention leaves the nature of the liability of legal persons to each State to decide. Article 10, paragraph 2, of the Convention provides that the liability of legal persons may be criminal, civil or administrative. Some States may also opt to make use of two, or indeed, of all of these forms of liability for legal persons within their legal system.

Criminal liability is the most serious form of liability that a State can impose on legal persons. It is generally associated with trials in criminal courts, high levels of potential sanctions and relatively higher procedural protections for defendants. The criminal liability of a legal entity has the potential to cause costly reputational damage to the entity and may also deter legal persons from engaging in unlawful conduct.<sup>116</sup>

Civil and administrative liability are alternatives to criminal liability for legal persons. The meanings of these terms are theoretically distinct, but their usage may vary under different legal systems, and the terms may sometimes even be used interchangeably. For the purposes of the present guide, civil liability refers to civil penalties imposed by courts or similar bodies. Administrative liability is generally associated with liability imposed by a regulator, but in some legal systems, judicial bodies may also impose administrative penalties. Like civil liability, administrative liability does not result in a criminal conviction. Civil and administrative liability are both generally associated with lower standards of proof than criminal liability.

Where criminal, civil or administrative liability for legal persons involved in waste trafficking is not already provided for under domestic law, States should include specific provisions establishing such liability. The choice of whether to establish criminal, civil or administrative liability should be made by each State, taking into account its legal tradition and whether the legal system recognizes the capacity for legal persons to commit criminal offences. Whichever form of liability is established, States should ensure that courts or regulators can impose effective, proportionate and dissuasive sanctions — indeed, this is a requirement of the Organized Crime Convention.<sup>117</sup> Relevant sanctions for legal persons are discussed in chapter 6, below.

Model provision 11 provides a basic example of a provision establishing criminal liability for legal persons in respect of the waste trafficking offences covered by this guide. Paragraph 1 provides that legal persons may be criminally liable for the offences to which this guide applies (namely, waste trafficking and related offences). Paragraph 3 (a) provides a model definition of legal persons for the purposes of the guide. The list of legal persons in paragraph 3 (a) is not exhaustive. The forms of legal personality and their status vary considerably between jurisdictions, and careful consideration should be given to the range of entities that may be subject to liability. Among the issues for consideration by drafters in this regard is the extent to which provisions relating to the liability of legal persons should cover public bodies, if at all.<sup>118</sup> Public bodies could include government agencies, State-owned corporations and local authorities.

An important part of establishing the criminal liability of legal persons is to determine whose conduct is capable of attribution to the legal person — in other words, for whose conduct the legal person may be held liable. As explained further below, paragraph 4 of model provision 11 provides that a legal person may be liable for the conduct of a senior officer of that legal person or, optionally, for the conduct of persons under a senior officer's supervision or management. Paragraph 3 (b) defines "senior officer" as "an employee, agent or officer of the legal person with duties of such responsibility that his or her conduct may fairly be assumed to represent the legal person's policy". It is important that legislative drafters ensure that provisions concerning the attribution of the conduct of certain persons to a legal person focus on the person's actual role in the organization and are not limited to persons holding certain titles or positions.

<sup>115</sup> Organized Crime Convention, art. 10, para. 3. For guidance for prosecutors on the choice of natural and/or legal persons as defendants for proceedings for waste trafficking, see WasteForce, *Guidance for Prosecutors of Waste Crime* (2020), pp. 32–36.

<sup>116</sup> UNODC, *Legislative Guide*.

<sup>117</sup> Organized Crime Convention, art. 10, para. 4.

<sup>118</sup> UNODC, *Legislative Guide*.



Paragraph 4 sets out the circumstances in which a legal person becomes liable for offences associated with senior officers of that legal person. This reflects the so-called attribution or identification doctrine of liability of legal persons that can be found in a range of jurisdictions. It states three different ways in which the legal person can be liable for the conduct of senior officers (or, if desired, persons under a senior officer's supervision or management). First, the legal person may be liable when senior officers (or a person under their supervision or management) commit an offence (subparagraph (a)). Additionally, options are provided to legislative drafters to extend liability to circumstances in which such persons authorize or permit the commission of an offence (subparagraph (b)) or fail to take reasonable steps to prevent the commission of an offence (subparagraph (c)). While subparagraphs (a) and (b) require some active steps on the part of the senior officer, subparagraph (c) imposes liability where there has been a failure of supervision. Paragraph 5 clarifies that reasonable steps to prevent the commission of an offence shall include the adoption and effective implementation of an appropriate organizational and managerial model. The mental state, if any, required for attribution of the senior officer's conduct to the legal person in subparagraphs (b) and (c) is left open by the inclusion of the language "with the requisite mental state" in square brackets. Establishing *mens rea* in cases of liability of legal persons is further discussed below, under "Challenges to establishing liability of legal persons".

Paragraph 2 of model provision 11, which reflects article 10, paragraph 3, of the Organized Crime Convention, provides that States parties are obliged to ensure that the liability of legal persons is without prejudice to the criminal liability of the natural persons who have committed the offences.

#### MODEL PROVISION 11: LIABILITY OF LEGAL PERSONS

1. Legal persons [other than the State] may be criminally liable for offences to which this [Act/Law/Chapter ...] applies.
2. The liability of a legal person under this [article/section] does not preclude the criminal liability of any natural person for the same act or omission.
3. In this [Act/Law/Chapter ...]:
  - (a) "Legal persons" include [bodies corporate, company, firm, associations, society, partnerships, local government, trade union, municipality and a public body].
  - (b) "Senior officer" means an employee, agent or officer of the legal person with duties of such responsibility that his or her conduct may fairly be assumed to represent the legal person's policy [, including persons exercising de facto management or control].
4. A legal person is liable for an offence where a senior officer of the legal person [, or persons under the senior officer's supervision or management,] acting on behalf or for the benefit of the legal person:
  - (a) commits the offence;
  - (b) [[with the requisite mental state] authorises or permits the commission of the offence;] or
  - (c) [[with the requisite mental state] fails to take reasonable steps to prevent the commission of the offence.
5. For the purpose of paragraph 4 (c), reasonable steps shall include the adoption and effective implementation of an appropriate organizational and managerial model.

**EXAMPLE: SINGAPORE****Organised Crime Act 2015****Section 76 – Offences by bodies corporate etc.**

(1) Where an offence under this Act committed by a body corporate is proved —

- (a) to have been committed with the consent or connivance of an officer of the body corporate; or
- (b) to be attributable to any neglect on his or her part,

the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director of the body corporate.

(3) Where an offence under this Act committed by a partnership is proved —

- (a) to have been committed with the consent or connivance of a partner; or
- (b) to be attributable to any neglect on his or her part,

the partner as well as the partnership shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(4) Where an offence under this Act committed by an unincorporated association (other than a partnership) is proved —

- (a) to have been committed with the consent or connivance of an officer of the unincorporated association or a member of its governing body; or
- (b) to be attributable to any neglect on the part of such an officer or member,

the officer or member as well as the unincorporated association shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(5) In this section —

“body corporate” includes a limited liability partnership which has the same meaning as in section 2(1) of the Limited Liability Partnerships Act (Cap. 163A);

“officer” —

in relation to a body corporate, means any director, partner, member of the committee of management, chief executive, manager, secretary or other similar officer of the body corporate and includes any person purporting to act in any such capacity; or

in relation to an unincorporated association (other than a partnership), means the president, the secretary, or any member of the committee of the unincorporated association, or any person holding a position analogous to that of president, secretary or member of such a committee and includes any person purporting to act in any such capacity;

“partner” includes a person purporting to act as a partner.

(6) The Minister may make regulations to provide for the application of any provision of this section, with such modifications as the Minister considers appropriate, to a body corporate or an unincorporated association formed or recognised under the law of a territory outside Singapore.



**EXAMPLE: ITALY**

Regulation of the administrative liability of legal persons, companies and associations, including those without legal personality (Legislative Decree 231/2001 of 8 June 2001)

**Article 5 – Liability of the agency**

1. The entity is liable for crimes committed in its interest or to its advantage:
  - (a) by persons who have functions of representation, administration or management of the entity or one of its organizational units with financial and functional autonomy as well as persons who exercise, even de facto, the management and control thereof
  - (b) by persons subject to the management or supervision of one of the persons referred to in lit. a).
2. The entity is not liable if the persons indicated in paragraph 1 have acted in their own exclusive interest or that of third parties.

**EXAMPLE – UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND****Bribery Act 2010****Section 7 – Failure of commercial organisations to prevent bribery**

- (1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—
  - (a) to obtain or retain business for C, or
  - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.
- (3) For the purposes of this section, A bribes another person if, and only if, A—
  - (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
  - (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
- (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

[...]

### **EXAMPLE: TUVALU**

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#### **Counter Terrorism and Transnational Organized Crime Act 2009**

##### **Section 85 – Liability of a company**

- (1) This Act applies to a company in the same way as it applies to an individual and a company may be found guilty of any of the offences set out in this Act, in addition to the liability of any person for the same offence.
- (2) For an offence under this Act, the conduct or state of mind of an employee, agent or officer of a company is taken to be attributed to the company if that person is acting:
  - (a) within the scope of the person's employment; or
  - (b) within the scope of the person's actual or apparent authority; or
  - (c) with the consent or agreement (express or implied) of a director, servant or agent of the company, and giving that consent is within the actual or apparent authority of the director, servant or agent.
- (3) A reference to this section to the state of mind of a person includes the person's knowledge, intention, opinion, belief or purpose, and the person's reasons for that intention, opinion, belief or purpose.

### **EXAMPLE: ROMANIA**

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#### **Criminal Code Law No. 286/2009**

##### **Article 135 – Conditions for the criminal liability of legal entities**

- (1) Legal entities, except for state and public authorities, shall be held criminally liable for offenses perpetrated in the performance of the object of activity of legal entities or in their interest or behalf.
- (2) Public institutions shall not be held criminally liable for offenses perpetrated in the performance of activities that cannot be the object of the private domain.
- (3) Criminal liability of legal entities does not exclude the criminal liability of the individual participating in the perpetration of the same act.

### **EXAMPLE: CHINA**

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#### **Criminal Law of the People's Republic of China, 1979**

##### **Article 30**

A company, enterprise, institution, organization, or group which commits an act endangering society that is considered a crime under the law shall bear criminal responsibility.

## Relevance of due diligence

In the context of liability of legal persons, due diligence refers to steps taken by a legal person to ensure compliance with a particular law. When introducing or amending provisions for the liability of legal persons, States should consider how the law should address a situation in which a legal person has exercised due diligence to ensure compliance with the law but has nevertheless committed an offence. There are different ways in which due diligence may be taken into account in relation to the liability of legal persons. Due diligence on the part of the legal person may exclude a finding of liability. For example, where proof of an offence requires proof of a lack of due diligence (in other words, negligence), the fact that a legal person has exercised due diligence will mean that they cannot be found to be liable. In other States, proof of due diligence may provide an absolute defence to the liability for legal persons. In others still, due diligence may be a factor relevant to the exercise of prosecutorial discretion in bringing a case against a legal person or may provide a mitigating factor in sentencing. The party that bears the burden of proof of due diligence (or lack thereof) may also differ between States.

What constitutes due diligence will differ according to the legal system in question, the charge, the circumstances of the alleged offence and the nature of the defendant. In general, the exercise of due diligence will involve risk management and compliance systems to prevent and detect misconduct. An adequate risk management system will generally include systems for accessing information, assessing risk based on that information and mitigating risk based on that assessment. Inadequate corporate management, control or supervision or failure to provide adequate systems for conveying relevant information to relevant persons may be evidence of a lack of due diligence. The mere existence of policies, procedures and systems to prevent and detect misconduct will not generally be sufficient to absolve a legal person from liability, however. Whether a legal person has exercised due diligence will always depend on the facts and circumstances of the individual case.

## Challenges to establishing liability of legal persons

Establishing the liability of legal persons for crimes such as waste trafficking can be challenging for prosecutors. In order to ensure the effectiveness of legislation, legislators should consult with prosecutors and consider potential challenges to establishing convictions for legal persons.

This section briefly considers four challenges involved in prosecuting legal persons. This should not be considered an exhaustive list of significant challenges for prosecutors. The challenges considered in this section are establishing fault (*mens rea*), determining the “nationality” of a legal person for the purposes of asserting jurisdiction, effectively prosecuting the most appropriate entity when the legal person makes use of complex corporate structures, and requirements of dual criminality in cases involving legal persons.

One of the great challenges in imposing criminal liability on legal persons is the need to attribute responsibility to an artificial entity. As a legal person can only act through individuals, it is necessary to develop mechanisms through which liability can be attributed to the organization. While the attribution of physical/objective conduct can be comparatively straightforward, the attribution of mental states such as “intention” or “knowledge” is more complex. Broadly speaking, two models of liability for legal persons have emerged: “nominalist” or “derivative” liability and “organizational fault”. Within these models, different approaches have been taken to establishing fault (that is, *mens rea*).

Model provision 11 does not provide a single model for establishing fault. The mental state, if any, required for attribution of the senior officer’s conduct to the legal person is left open by the inclusion of the language “with the requisite mental state” in square brackets. As noted above,<sup>119</sup> mental elements and the terminology used to refer to them vary between jurisdictions but could include aspects such as intention, knowledge, wilful blindness, recklessness and negligence. In some cases, strict liability — that is, liability not requiring

<sup>119</sup> See “Elements of criminal offences”.

proof of any mental element — may be appropriate for offences relating to waste trafficking committed by legal persons. The present guide leaves these choices to legislators.

An additional challenge is that of determining the “nationality” of a legal person for the purposes of asserting jurisdiction. As a legal person cannot be extradited, there is arguably a special responsibility on the home jurisdiction to prosecute a legal person within its jurisdiction. This may be particularly important where a State will not hear proceedings without the personal “presence” of the defendant. One criterion of jurisdiction in such cases is based on the “nationality” of the legal person (the active personality principle). Although there is no universal basis for determining nationality of legal persons, two common bases are the place of incorporation and the principal place of business.

A further challenge concerns the use of complex corporate structures by legal persons. In many cases, legal persons make use of complex corporate structures and act through subsidiaries and other related entities, each potentially having legal personality of their own. Where these complex structures are used to commit crimes, there may be challenges not only in investigating the offences but also in determining which legal person (or persons) would be the appropriate defendant(s). The challenges are compounded when corporate structures stretch across jurisdictions. Case law concerning waste trafficking is replete with jurisdictional issues. Legal persons take advantage of jurisdictional gaps, legal loopholes and differing enforcement capacities to evade prosecution for waste trafficking, often dumping waste in countries where facilities for the treatment and disposal of waste are less developed and sanctions for waste trafficking are ineffective or non-existent.

The present legislative guide has focused on the attribution of liability to legal persons based on the conduct of natural persons. Legislators should, however, also consider how legal persons may be held liable for their role in offences committed by related organizations. For example, an investigation into waste trafficking may implicate a parent company in criminal acts carried out by its subsidiary. In some cases, it may be possible to impose liability on the parent company for being an accessory to the offence, or for conspiring to commit the offence or being part of a criminal association. This may, however, be difficult to establish. An alternative is to impose liability on the parent company on the basis of its control of the other entity. That is, where a legal person can be shown to exercise control over another entity, the parent company is held liable for the offence of the controlled entity. Liability could also be established on the basis of a legal person knowing that an offence is to be committed on its behalf or for its benefit, or where it has failed to adopt and effectively implement appropriate organizational and managerial models to prevent the commission of an offence by a subsidiary or other related entity. The legislation of France, an excerpt of which is set out below, provides one example of how the acts of subsidiaries can be included in provisions establishing the liability of legal persons.

Finally, a failure to legislate for liability for legal persons can pose a challenge to mutual legal assistance in cases involving waste trafficking. While the Organized Crime Convention requires that States parties afford each other “the widest measure”<sup>120</sup> of mutual legal assistance in investigations, prosecution and judicial proceedings, and provides that mutual legal assistance “shall be afforded to the fullest extent possible” in relation to offences for which a legal person may be held liable in accordance with article 10 of the Convention,<sup>121</sup> States parties may also decline to render mutual legal assistance on the ground of absence of dual criminality.<sup>122</sup> This may result in obstacles to cooperation where the legal person, because of a failure to legislate for liability of legal persons, would not be capable of committing the relevant offence in the requested State. In one survey of European Union member States, 32 per cent of requesting and 21 per cent of requested States experienced difficulties in relation to mutual assistance due to non-recognition of the criminal liability of legal persons.<sup>123</sup>

<sup>120</sup> Organized Crime Convention, art. 18, para. 1.

<sup>121</sup> *Ibid.*, art. 18, para. 2.

<sup>122</sup> *Ibid.*, art. 18, para. 9.

<sup>123</sup> Gert Vermeulen, Wendy De Bondt and Charlotte Ryckman, *Liability of Legal Persons for Offences in the EU*, vol. 44, International Research on Criminal Policy (IRCP) Series (Antwerpen, Belgium, Maklu Publishers, 2012).

**EXAMPLE: FRANCE****Penal Code****Article 121-2**

Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions.

The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

**EXAMPLE: CANADA****Criminal Code (R.S.C., 1985, c. C-46)****Section 22.1 – Offences of negligence — organizations**

In respect of an offence that requires the prosecution to prove negligence, an organization is a party to the offence if

- (a) acting within the scope of their authority
  - (i) one of its representatives is a party to the offence, or
  - (ii) two or more of its representatives engage in conduct, whether by act or omission, such that, if it had been the conduct of only one representative, that representative would have been a party to the offence; and
- (b) the senior officer who is responsible for the aspect of the organization's activities that is relevant to the offence departs — or the senior officers, collectively, depart — markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent a representative of the organization from being a party to the offence.

**Section 22.2 – Other offences — organizations**

In respect of an offence that requires the prosecution to prove fault — other than negligence — an organization is a party to the offence if, with the intent at least in part to benefit the organization, one of its senior officers

- (a) acting within the scope of their authority, is a party to the offence;
- (b) having the mental state required to be a party to the offence and acting within the scope of their authority, directs the work of other representatives of the organization so that they do the act or make the omission specified in the offence; or
- (c) knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.

## DEFENCES

States may consider it desirable for certain partial or complete defences to be available for particular offences. Defences are to be distinguished from exemptions to criminal liability. Whereas a defence excuses or justifies conduct that otherwise would constitute an offence, an exemption excludes certain conduct from the offence itself.

States may wish to make available several defences for the offences related to waste trafficking or illegal waste management. These include, for example, actions taken out of necessity, force majeure, or “sudden and extraordinary emergency” — for example, a spill or a fire at the management site, or conduct under an honest and reasonable mistake of fact. In many States, these defences will already exist as defences of general application under the general part of the criminal law. Where such defences do not exist as defences of general application, or specific defences are otherwise desirable, States may wish to introduce these defences into waste management legislation. As noted above, due diligence may also be established as a defence to liability of legal persons.

### EXAMPLE: AUSTRALIA

#### Protection of the Environment Operations Act 1997 (NSW)

#### Section 143 – Unlawful transporting or depositing of waste

[...]

#### (3) Defence—owner of waste

It is a defence in any proceedings against an owner of waste for an offence under this section if the owner did not transport the waste and establishes—

- (a) that the commission of the offence was due to causes over which the owner had no control, and
- (b) that the owner took reasonable precautions and exercised due diligence to prevent the commission of the offence.

[...]

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# Chapter 4.

## INVESTIGATION

Waste trafficking offences cannot serve as effective deterrents in the absence of enforcement. To effectively prevent and combat waste trafficking, it is necessary for States to establish an effective regime for investigating waste trafficking offences. This includes, among other things, providing investigative officers with the powers necessary to carry out their functions. The present chapter addresses four topics relating to the investigation of waste trafficking offences: general investigative powers, special investigative techniques, seizure and confiscation, and the collection, handling and admissibility of evidence.

### GENERAL INVESTIGATIVE POWERS

Officers involved in investigating waste trafficking and related offences may include law enforcement officers, environmental officers, customs officers and officers of financial intelligence units and multi-agency task forces. The appropriate powers for each such officer necessarily will differ, but may include powers to:

- Stop and search persons, vehicles, vessels or other conveyances
- Enter and search premises
- Question witnesses, suspected offenders and other persons of interest
- Require the inspection or production of documents
- Take photographs or make audiovisual recordings of a thing or place suspected of being involved in the commission of an offence
- Manage crime scenes
- Seize waste and other objects suspected of being involved in the commission of an offence
- Seize any weapon, device or means suspected of being involved in the commission of an offence covered by the present guide
- Seize and analyse phones, computers and like devices found in the possession of suspected offenders
- Request forensic information from specialized laboratories
- Where appropriate, compel persons to answer questions and/or to produce documents relevant to the investigation of an offence
- Request access to bank and financial records

- Request access to telecommunications records
- Request the seizure or freezing of assets
- Request the use of special investigative techniques, controlled delivery, undercover investigations and electronic or other forms of surveillance
- Request the suspension, variation or revocation of permits or certificates held by suspected offenders
- Disqualify suspected offenders from holding permits or certificates
- Exchange information with foreign law enforcement agencies
- Participate in and/or coordinate joint investigations

Investigative powers must be adequately provided for, by law, if enforcement actions are to be legitimate and consistent with the rule of law. The procedures for the exercise of investigative powers may vary between States. It may be appropriate or necessary for States to restrict some such powers to being exercised only under the supervision of a judge or magistrate or, in some cases, a senior law enforcement officer. For example, a warrant or another order of a judge or magistrate may be necessary to exercise certain powers of search, entry and seizure, powers to freeze assets, and powers to use special investigative techniques, such as wiretapping, controlled delivery and undercover investigations.

#### EXAMPLE: NAMIBIA

##### Public and Environmental Health Act, 2015

##### Section 63 – Investigation of premises

The head of health services or a staff member authorised by him or her in writing may —

- at all reasonable times enter a building or premises for the purpose of investigating as to the existence of a health nuisance; and
- if necessary, open up the ground of the premises and cause the drains to be tested or other works to be done as may be necessary for the effectual investigation of the premises,

but if no health nuisance is found to exist, the local authority must restore the premises at its own expense.

## SPECIAL INVESTIGATIVE TECHNIQUES

Article 20, paragraph 1, of the Organized Crime Convention requires States parties, if permitted by the basic principles of their domestic legal systems, to take the necessary measures to allow for the appropriate use of special investigative techniques, such as electronic or other forms of surveillance and undercover operations. Where compatible with the basic principles of their legal systems and to the extent possible, States should ensure that the special investigative techniques extend to investigations of serious cases of waste trafficking. Where special investigative techniques would not be available to law enforcement agencies investigating serious cases of waste trafficking under existing domestic laws, States should consider including such provisions within legislation combating waste trafficking.

There are many different types of special investigative techniques. Three types are specifically noted in article 20 of the Organized Crime Convention: controlled deliveries, undercover operations (involving the use of assumed identities) and electronic surveillance. The *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* explains the following:



Controlled delivery is useful in particular in cases where contraband is identified or intercepted in transit and then delivered under surveillance to identify the intended recipients or to monitor its subsequent distribution throughout a criminal organization. Legislative provisions are often required to permit such a course of action as the delivery of the contraband by a law enforcement agent or other person may itself be a crime under domestic law.

Undercover operations may be used where it is possible for a law enforcement agent or other person to infiltrate a criminal organization to gather evidence.

Electronic surveillance in the form of listening devices or the interception of communications performs a similar function and is often preferable where a close-knit group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance is generally subject to strict judicial control and numerous statutory safeguards to prevent abuse.<sup>124</sup>

The present section contains model legislative provisions for several types of special investigative techniques: controlled delivery, undercover investigation, the use of assumed identities, surveillance of persons and electronic surveillance. Each of these has different levels of risk and implications. Some of the techniques can be particularly intrusive, and thus require careful balancing of a suspect's right to privacy against the need to investigate serious criminality. Special investigative techniques will typically require a legislative basis, without which they may not be authorized by law. Special investigative techniques also raise specific concerns about privacy and human rights. Provisions on special investigative techniques should fully take into account the rights of the suspect and of third parties. The decisions of international human rights bodies and courts on the permissibility of special investigative techniques and their parameters should be taken into consideration when drafting relevant provisions.

As a result of these concerns about privacy and human rights, most jurisdictions require a number of strict safeguards against abuse, including the requirements that the offence be serious, that the use of the technique be vital to the case and that essential evidence cannot be secured by less intrusive means. The model legislative provisions for special investigative techniques in the present section include a requirement that the authorizing authority be satisfied on reasonable grounds that the nature and extent of the criminal activity justify the use of the special investigative technique. This requires the authorizing authority to consider the necessity and proportionality of the undercover investigation in assessing the application.

Oversight of the use of special investigative techniques by judicial or other independent authorities is common practice in most jurisdictions and is required under international human rights law. The appropriate safeguards for special investigative techniques may vary depending on the technique in question. It may be appropriate, for example, that controlled delivery be authorized by senior law enforcement officials, whereas electronic surveillance usually requires judicial authorization and supervision. Accordingly, each type of special investigative technique is addressed in separate articles in the present chapter so that an appropriate regime can be established for each.

In general, for each form of special investigative technique, drafters will need to consider the following issues:

- Mechanism for approving the technique
- Threshold for granting of approval
- Conditions imposed on the use of the technique
- Extent to which officials using special investigative techniques are protected from civil and criminal liability
- Use of evidence obtained through the technique
- Extent to which that information can be disseminated

<sup>124</sup> UNODC, *Legislative Guide*, paras. 443–445.

- Supervision, review and oversight mechanisms
- International cooperation
- Possible impact of the use of the technique on third parties

Finally, the provisions set forth in the present section are intended to operate in addition to existing laws and regulations concerning the investigative powers of law enforcement and other agencies. It is thus vital for national drafters to consider the operation of these provisions alongside other national laws, including laws relating to police powers generally, criminal procedure laws, privacy laws and laws on other forms of international cooperation, in particular mutual legal assistance and extradition.

The present section draws upon chapter III of the UNODC *Model Legislative Provisions against Organized Crime* (2nd ed., 2022). For further information, including further commentary on the design of the model legislative provisions for special investigative techniques and relevant national legislative examples, please refer to that publication.

## Controlled delivery

Under article 20, paragraph 1, of the Organized Crime Convention, States parties shall, if permitted by the basic principles of their national legal systems, allow for the appropriate use of controlled delivery for the purpose of combating organized crime. Model provision 12 below establishes a model legislative provision regulating the use of controlled deliveries.<sup>125</sup>

### MODEL PROVISION 12: CONTROLLED DELIVERY

1. For the purpose of this article, “controlled delivery” means the technique of allowing illicit or suspect consignments to pass into, within, through or out of the territory of [insert name of State] with the knowledge and under the supervision of [insert competent authority], with a view to the investigation and the identification of persons involved in offences to which this [Act/Law/Chapter ...] applies.
2. A controlled delivery under paragraph 1 is only lawful if it has been authorized in accordance with this article.
3. A controlled delivery may be authorized by [insert designated position holder or office, such as head and deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].
4. An application to conduct a controlled delivery can be made by [insert means needed to submit application]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application to conduct a controlled delivery must state:
  - (a) All available information regarding the consignment and its destination;
  - (b) Whether the matter has been the subject of a previous application; and
  - (c) [Insert additional requirements as appropriate/required].
6. After considering the application, the authorizing authority may:
  - (a) Authorize the controlled delivery unconditionally;

<sup>125</sup> This model provision is taken from chapter III of *Model Legislative Provisions against Organized Crime*, 2nd ed., published by UNODC in 2022. For further information, including further commentary on the design of the model provision and relevant national legislative examples, refer to that publication.

- (b) Authorize the controlled delivery subject to conditions, including the type and extent of substitution of the consignment; or
  - (c) Refuse the application to conduct the controlled delivery.
7. The authorizing authority must not approve the application unless satisfied, on reasonable grounds, that:
    - (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed;
    - (b) The nature and extent of the suspected criminal activity are such as to justify conducting the controlled delivery;
    - (c) Any unlawful activity shall be limited to the minimum necessary to achieve the objectives of the controlled delivery;
    - (d) The controlled delivery will be conducted in a way that ensures that, to the greatest extent possible, any illicit goods involved in the controlled delivery will be under the control of a law enforcement official at the end of the controlled delivery;
    - (e) The controlled delivery will not be conducted in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and
    - (f) Any conduct involved in the controlled delivery will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
  8. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
  9. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
  10. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.
  11. The authorizing authority shall report annually to [Parliament/a Parliamentary Committee/the public] on the number of applications received under this article, and the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

## Undercover investigation

Under article 20, paragraph 1, of the Organized Crime Convention, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of undercover operations in their territory for the purpose of combating organized crime. Model provision 13 establishes a model legislative provision for the use of undercover investigations.<sup>126</sup>

In addition to the process of applying for and authorizing undercover investigations set out in this provision, it is vital for drafters to consider the issue of whether evidence obtained through undercover investigations can be adduced in court and, if so, whether the undercover investigator must reveal his or her real identity or whether the undercover investigator may testify by special means in order to protect his or her real identity.

<sup>126</sup> Ibid.

**MODEL PROVISION 13: UNDERCOVER INVESTIGATION**

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1. For the purpose of this article, “undercover investigation” means an investigation that makes use of one or more law enforcement officials [or other persons authorized by [insert law enforcement agency]] who for the purpose of investigating an offence to which this [Act/Law/Chapter ...] applies neither disclose nor reveal their official position or their mandate.
2. An undercover investigation under paragraph 1 is only lawful if it has been authorized in accordance with this article.
3. Undercover investigations can be authorized by [insert designated position holder or office, such as head and deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].
4. An application to conduct an undercover investigation can be made by [insert means needed to submit application]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application to conduct an undercover investigation must state:
  - (a) The duration for which the authorization is sought;
  - (b) Whether the matter has been the subject of a previous application; and
  - (c) [Insert additional requirements as appropriate/required]
6. After considering the application, the authorizing authority may:
  - (a) Authorize the undercover investigation unconditionally;
  - (b) Authorize the undercover investigation subject to conditions; or
  - (c) Refuse the application to conduct the undercover investigation.
7. The authorizing authority must not approve the application unless satisfied, on reasonable grounds, that:
  - (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify an undercover investigation;
  - (c) Any unlawful activity shall be limited to the minimum necessary to achieve the objectives of the undercover investigation;
  - (d) The undercover investigation will not be conducted in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and
  - (e) Any conduct involved in the undercover investigation will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
8. The authorization must specify the time period for which the undercover investigation is authorized, which shall in any case not be longer than [insert appropriate time period]. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be criminally or civilly liable for that conduct.
12. The authorizing authority shall report annually to [Parliament/a Parliamentary Committee/the public] on the number of applications received under this article, and the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

## Assumed identity

Under article 20, paragraph 1, of the Organized Crime Convention, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of special investigative techniques in their territory for the purpose of combating organized crime. In addition to the techniques expressly mentioned, this may include the use of assumed identities. Model provision 14 below establishes a model legislative provision regulating the use of assumed identities.<sup>127</sup>

In addition to the matters addressed in article 12, legislators should also give consideration to how law enforcement officials or other authorized persons using an assumed identity can provide testimony in criminal trials. In particular, procedure for giving testimony should ensure that testimony can be given in a manner that provides appropriate protection for the identity of the official or other authorized person and that is not prejudicial to the conduct of any ongoing investigations, while still respecting the rights of the defence and, in particular, the right to a fair trial.

### MODEL PROVISION 14: ASSUMED IDENTITIES

1. For the purpose of this article, “assumed identity” means a false or altered identity created, acquired and/or used by law enforcement officials [or other persons authorized by [insert law enforcement agency or judicial authority]] to, for the purpose of investigating an offence to which this [Act/Law/Chapter ...] applies, establish contact and build a relationship of trust with another person or infiltrate a criminal network.
2. The creation, acquisition and use of an assumed identity under paragraph 1 is only lawful if it has been authorized in accordance with this article.
3. The creation, acquisition and use of an assumed identity may be authorized by [insert designated position holder or office, such as head and deputy head of competent law enforcement agency, prosecutor, investigative judge or preliminary investigation judge] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].
4. An application to create, acquire and use an assumed identity can be made by [insert means needed to submit application]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application to create, acquire and use an assumed identity must state:
  - (a) Details of the proposed assumed identity;
  - (b) The duration for which the authorization is sought;
  - (c) Whether the matter has been the subject of a previous application; and
  - (d) [Insert additional requirements as appropriate/required]
6. After considering the application, the authorizing authority may:
  - (a) Authorize the creation, acquisition and use of an assumed identity unconditionally;
  - (b) Authorize the creation, acquisition and use of an assumed identity subject to conditions; or
  - (c) Refuse the application to create, acquire and use an assumed identity.
7. The authorizing authority must not approve the application unless satisfied on reasonable grounds that:
  - (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify the use of an assumed identity;

<sup>127</sup> Ibid.

**MODEL PROVISION 14: ASSUMED IDENTITIES (CONTINUED)**

- (c) The assumed identity will not be used in such a way that a person is likely to be induced to commit an offence that the person would otherwise not have intended to commit; and
- (d) Any conduct involved in the use of the assumed identity will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
8. The authorization must specify the time period for which the creation, acquisition and use of the assumed identity is authorized, which shall in any case not be longer than [insert appropriate time period]. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A person acting under an authorization to create, acquire or use an assumed identity may request assistance from relevant officials or agencies to obtain evidence of an assumed identity, including identity and other supporting documents, that has been approved under this article. Notwithstanding any other laws, an official or agency may create or provide evidence of an assumed identity in response to a request under this article.
12. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.
13. The authorizing authority shall report annually to [Parliament/a Parliamentary Committee/the public] on the number of applications received under this article, and the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

**Surveillance of persons**

Under article 20, paragraph 1, of the Organized Crime Convention, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of surveillance of persons in their territory for the purpose of combating organized crime. Model provision 15 below establishes a model legislative provision regulating the use of surveillance of persons.<sup>128</sup>

**MODEL PROVISION 15: SURVEILLANCE OF PERSONS**

1. For the purpose of this article, “surveillance of persons” means the observation of persons, by law enforcement officials, for the purposes of investigating an offence to which this [Act/Law/Chapter ...] applies that has been, is being or may be committed.
2. Surveillance of persons under paragraph 1 is only lawful if it has been authorized in accordance with this article.
3. The surveillance of persons may be authorized by [insert designated position holder or office, such as head and deputy head of competent law enforcement agency; prosecutor, investigative judge or preliminary investigation judge] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].

<sup>128</sup> Ibid.

4. An application to conduct surveillance of persons can be made by [insert means needed to submit application]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. An application for authorization of surveillance of persons must state:
  - (a) The duration for which the authorization is sought;
  - (b) Whether the matter has been the subject of a previous application; and
  - (c) [Insert additional requirements as appropriate/required].
6. After considering the application, the authorizing authority may:
  - (a) Authorize the surveillance of persons unconditionally;
  - (b) Authorize the surveillance of persons subject to conditions; or
  - (c) Refuse the application for the surveillance of persons.
7. The authorizing authority must not authorize the surveillance of persons unless satisfied on reasonable grounds that:
  - (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed;
  - (b) The nature and extent of the suspected criminal activity are such as to justify the surveillance of persons; and
  - (c) Any conduct involved in the surveillance of persons will not cause the death of or serious injury to any person and will not seriously endanger the life, health or safety of any person.
8. The authorization must specify the time period for which surveillance of persons is authorized, which shall in any case not be longer than [insert appropriate time period]. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.

## Electronic surveillance

Under article 20, paragraph 1, of the Organized Crime Convention, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of electronic surveillance for the purpose of combating organized crime. Electronic surveillance may include:

- Audio surveillance (through the use of means such as phone-tapping, voice over Internet protocol (VOIP) and listening devices)
- Video and visual surveillance (such as hidden video surveillance devices, in-car video systems, body-worn video devices, thermal imaging/forward looking infrared, CCTV, satellite imagery and automatic licence plate recognition systems)
- Tracking surveillance (such as global positioning systems (GPS)/transponders, silent SMS and other mobile phone tracking technologies, radio frequency identification devices (RFID), and biometric information technology such as retina scans)



- Data surveillance (including both interception of content and traffic data and the use of means such as computer/Internet spyware/cookies, mobile phones, and keystroke monitoring)

Electronic surveillance involving the interception of communications is particularly useful where an organized criminal group cannot be penetrated by an outsider or where physical infiltration or surveillance would represent an unacceptable risk to the investigation or the safety of investigators. Given its intrusiveness, electronic surveillance must be subject to strict judicial control and numerous statutory safeguards to prevent abuse.<sup>129</sup> Model provision 16 presents a legislative model for regulating the use of electronic surveillance.<sup>130</sup>

#### MODEL PROVISION 16: ELECTRONIC SURVEILLANCE

1. For the purpose of this article, “electronic surveillance” means:
  - (a) The monitoring, interception, copying or manipulation of messages, data or signals transmitted by electronic means; or
  - (b) The monitoring or recording of activities by electronic means;

for the purposes of investigating an offence to which to which this [Act/Law/Chapter ...] applies that has been, is being or may be committed.
2. Electronic surveillance under paragraph 1 is only lawful if it has been authorized in accordance with this article.
3. Electronic surveillance of persons can be authorized by [insert designated position holder or office, such as head and deputy head of competent law enforcement agency; prosecutor, investigative judge or preliminary investigation judge] (the “authorizing authority”) on application by a law enforcement official [or public prosecutor].
4. An application to conduct electronic can be made by [insert means needed to submit application]. The authorizing authority must keep a written record of the application and the subsequent decision made under paragraph 6.
5. The application for authorization for electronic surveillance must state:
  - (a) The type of electronic surveillance for which authorization is sought;
  - (b) The duration for which the authorization is sought;
  - (c) The nature of the information that it is expected to be collected;
  - (d) The individuals, locations or devices that are the target of the surveillance;
  - (e) The measures that are in place to ensure that the privacy and other human rights of individuals are protected as far as possible;
  - (f) Whether the matter has been the subject of a previous application; and
  - (g) [Insert additional requirements as appropriate/required].
6. After considering the application, the authorizing authority may:
  - (a) Authorize the electronic surveillance unconditionally;
  - (b) Authorize the electronic surveillance subject to conditions; or
  - (c) Refuse the application for electronic surveillance.

<sup>129</sup> UNODC, *Legislative Guide*, para. 445.

<sup>130</sup> See footnote 139. [[x-ref]]

7. The authorizing authority must not authorize the electronic surveillance unless satisfied on reasonable grounds that:
  - (a) An offence to which this [Act/Law/Chapter ...] applies has been, is being or is likely to be committed; and
  - (b) The nature and extent of the suspected criminal activity are such as to justify the type of electronic surveillance for which authorization is sought;
8. The authorization must specify the time period for which electronic surveillance is authorized, which shall in any case not be longer than [insert appropriate time period]. The authorization may be renewed on application.
9. The authorizing authority shall revoke an authorization granted under paragraph 6 if it is no longer satisfied, on reasonable grounds, of the matters referred to in paragraph 7.
10. The authorizing authority shall cancel an authorization granted under paragraph 6 upon receipt of a request for cancellation from the applicant.
11. A law enforcement official or other authorized person who engages in conduct authorized in accordance with this article shall not be subject to criminal or civil liability for that conduct.
12. Information obtained through electronic surveillance must not be disseminated outside the [relevant law enforcement agency or other competent authority] without the approval of [the head of the law enforcement agency or other competent authority or their delegate]. Such approval may be given only for the purposes of:
  - (a) Preventing or prosecuting an offence to which this [Act/Law/Chapter ...] applies;
  - (b) Enhancing international cooperation on the prevention or prosecution of [serious] crime; or
  - (c) Ensuring proper oversight of the activities of the agency.
13. The [head of the law enforcement agency] must ensure that information which has been collected through electronic surveillance authorized under this article but which is not relevant to the prevention or prosecution of an offence to which this [Act/Law/Chapter ...] applies is destroyed as soon as practicable, and no later than [six] months after the expiry of the authorization.
14. The authorizing authority shall report annually to [Parliament/a Parliamentary Committee/the public] on the number of applications received under this article, and the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

## SEIZURE AND CONFISCATION

Article 12, paragraph 1, of the Organized Crime Convention requires States parties to adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable the confiscation of both proceeds of crime derived from offences covered by the Convention and of property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention. Article 12, paragraph 2, requires States parties to adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any such item for the purpose of eventual confiscation.

Where not adequately provided for already under other laws, legislation combating waste trafficking should provide for the seizure and confiscation of such property and proceeds and of evidence of the commission of an offence.

Model provision 17 provides a model for how this could be achieved. It is based, in part, on article 12 of the Organized Crime Convention and the definition of seizure included in article 2, paragraph (f), but goes further than the Convention by also addressing the seizure of evidence that would not otherwise fall within

the categories liable to seizure under the Convention. Paragraph 1 of model provision 17 sets out a definition of “seize” adapted from the Convention’s definition of “seizure”. Paragraph 2 then provides that a law enforcement or other relevant officer may seize a thing reasonably suspected of being evidence of the commission of an offence covered by this guide. Paragraph 3 concerns the seizure of property, equipment, instrumentalities and proceeds covered by article 12 of the Organized Crime Convention. Optional language is included to restrict the use of this seizure power to situations where it has been ordered by a relevant court or authorized by a relevant official. In determining who may order or authorize seizure, legislators must balance the need to protect the rights of defendants and bona fide third parties with the need to carry out effective investigations. Where investigators are not provided with sufficient powers of seizure, they may not be able to collect evidence to effectively investigate and prosecute waste trafficking. On the other hand, if investigators’ powers of seizure are too broad and exercised without supervision and accountability, there is a risk that these powers will be abused.

Model provision 17 only addresses the seizure of evidence, property, equipment, instrumentalities and proceeds. It does not address confiscation. Confiscation is further considered under chapter 6 as an ancillary order to sentencing.

#### MODEL PROVISION 17: SEIZURE

- (1) For the purpose of this [Act/Law/Chapter ...], “seize” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of a thing or temporarily assuming custody or control of the thing.
- (2) A [insert reference to relevant law enforcement and other officers] may seize a thing that the officer reasonably suspects is evidence of the commission of an offence against this [Act/Law/Chapter ...].
- (3) A [insert reference to relevant law enforcement and other officers] may [on the basis of an order of [insert reference to relevant court] or the authorization of [insert reference to relevant official]] seize:
- (a) Property, equipment or another instrumentality used in or destined for use in an offence against this against this [Act/Law/Chapter ...];
  - (b) Proceeds of crime derived from an offence against this [Act/Law/Chapter ...] or property resulting from the transformation or conversion of such proceeds, whether such proceeds or property has been intermingled with proceeds or property acquired from a legitimate source; or
  - (c) Income or other benefits derived from proceed or property referred to in paragraph (b).

It should also be recalled that, under international environmental law, including under instruments such as the Basel Convention, States have obligations relating to the environmentally sound management of hazardous and other wastes, including seized wastes. Under the Basel Convention, it is States that are ultimately responsible for the environmentally sound management of trafficked wastes, whether or not the offenders have been identified or apprehended and whether or not the offenders can be effectively made to pay for or carry out the environmentally sound management of such wastes.

### Return of waste trafficked across international borders

Article 9, paragraph 2, of the Basel Convention provides that where the transboundary movement of hazardous wastes or other wastes is deemed to be illegal traffic as a result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are taken back to it by the exporter or generator within 30 days of being informed of the illegal traffic. Where necessary, the wastes should be taken back by the State of export itself. If the return of the waste to the State of export is impracticable, the State of export shall ensure that the wastes are otherwise disposed of in accordance with the provisions of

the Basel Convention. The requirement for return or disposal of the waste within 30 days may be varied by agreement by the States concerned.

The decision of whether the take-back procedure is to be initiated requires a determination of whether there has been an instance of illegal traffic (as defined in the Basel Convention) that may lead to the waste being taken back. The Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention notes that this requires a three-step approach to determine whether the case falls within the scope of the Convention, whether there appears to be a case of illegal traffic, and whose conduct is the cause of the illegal traffic.<sup>131</sup> These matters overlap to a significant extent with the matters that must be investigated in order to identify, apprehend and prosecute the offenders for relevant offences. In practice, however, the respective investigations are often carried out by different agencies within a State. Where this is the case, it is critical that these agencies coordinate and collaborate with each other to avoid duplication of efforts and to assist rather than interfere with each other's investigations. For example, States should ensure that the return or disposal of waste pursuant to the take-back procedure under the Basel Convention does not hinder, frustrate or obstruct the effective investigation and prosecution of offences relating to the illegal trafficking. Where an offence is being investigated or prosecuted in the importing State, additional evidence may need to be collected prior to the return or disposal of waste. Effective cooperation between the competent authorities of the importing and exporting States and any other relevant States is again crucial to ensuring the return of waste pursuant to the Basel Convention and other instruments, while also ensuring the effective investigation and prosecution of waste trafficking consistent with the spirit of these instruments<sup>132</sup> and other instruments such as the Organized Crime Convention.

Although the Basel Convention does not expressly address the return of trafficked waste, it is commonly agreed that the costs related to its return (such as storage, packaging, labelling, transportation and disposal) should be borne by the party responsible for the illegal trafficking — that is, the exporter or generator, as the case may be.<sup>133</sup> Domestic legislation should include provisions to this effect and should also clarify the responsibility for other costs resulting from the trafficking, such as the costs of storage prior to the notification of illegal trafficking and the costs of investigation.<sup>134</sup>

## EVIDENCE

From a legal perspective, evidence refers to the material submitted before a court during a trial for the purpose of enabling the finder of fact (the judge or jury) to reach a decision on the issues in dispute. Evidence can include the following:

- Oral evidence (testimony)
- Documentary evidence (such as copies of contracts, invoices and declarations; this also includes photographs and videos)
- Real evidence (relevant objects, such as samples of wastes)

Rules of evidence govern how evidence is collected, handled and received in court. Legislators must ensure that domestic evidentiary laws are appropriately adapted to handle the collection, use and admissibility of relevant forms of evidence. One issue worth noting in this context is the collection, handling and admissibility of electronic evidence, which is playing a growing role in criminal investigations and prosecutions.<sup>135</sup>

<sup>131</sup> UNEP/CHW.12/9/Add.2, para. 14.

<sup>132</sup> See, for example, Basel Convention art. 9, para. 5. See also UNEP/CHW.12/9/Add.2, para. 77.

<sup>133</sup> UNEP/CHW.12/9/Add.2, para. 74.

<sup>134</sup> Ibid.

<sup>135</sup> For further information regarding the collection, handling and admissibility of electronic evidence, see UNODC, Counter-Terrorism Committee Executive Directorate and International Association of Prosecutors, *Practical Guide for Requesting Electronic Evidence Across Borders*, 2nd ed. (Vienna, 2021). Access to this publication is limited to registered users of the UNODC directory of competent national authorities. For more information, see <https://sherloc.unodc.org/cld/en/st/evidence/practical-guide.html>.

From the perspective of investigators and prosecutors, successful prosecutions can take place only on the basis of admissible evidence. Evidence must therefore be collected and handled in compliance with applicable laws.

While the present guide does not provide any model legislative provisions on the collection, handling or admissibility of evidence (other than the collection of evidence through special investigative techniques, outlined above), the present section provides some basic guidance on these topics that may be useful to readers.

## Collection

Evidence collection can be a time-consuming and expensive undertaking and it is important that investigators and prosecutors work together to ensure that it is carried out effectively and efficiently.

While in some cases visual inspections may be sufficient to identify and determine the characteristics of seized waste, in other cases sampling may be necessary. Sampling should be performed in accordance with national guidance and requirements, as well as international best practices. The Conference of the Parties to the Basel Convention has provided guidance on sampling and analysis as part of its Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes.<sup>136</sup> Appendix 3 to that document provides guidance on issues relating to investigations, sampling and analysis, including the handling of samples and the chain of custody. The INTERPOL *Pollution Crime Forensic Investigation Manual* is another valuable resource for practical guidance on the conduct of investigations and the collection of evidence, including sampling hazardous wastes.<sup>137</sup>

The collection of evidence through the use of special investigative techniques, such as controlled delivery, undercover investigation, assumed identities, surveillance of persons and electronic surveillance, is addressed above. Model provisions are also provided for each of these forms of special investigative techniques.<sup>138</sup>

## Handling

To protect the rights of defendants to a fair trial, legal rules govern the handling of evidence. These rules are intended to prevent defendants from being convicted on the basis of false or contaminated evidence. Evidence that has not been handled in accordance with these rules may be inadmissible in court. Accordingly, compliance with these rules is critical, not only for the protection of the rights of the defendants but also to ensure that defendants may be prosecuted and tried effectively.

States should ensure that appropriate systems are in place to protect evidence and to record its handling in order to ensure that the chain of custody is maintained. Wastes, samples and other evidence should be protected from tampering during storage. Continuity and integrity should also be ensured for electronic evidence.

Additionally, States must ensure that seized wastes are safely stored in a manner that does not pose a threat to human health or the environment.

<sup>136</sup> Approved by decision VI/16 of the Conference of the Parties to the Basel Convention.

<sup>137</sup> See INTERPOL, Environmental Security Sub-directorate, *Pollution Crime Forensic Investigation Manual*, vol. I (Lyon, France, 2014), pp. 50–66; and vol. II, pp. 143–156. See also WasteForce, *Guidance for Prosecutors of Waste Crime*, pp. 24–30.

<sup>138</sup> See “Special investigative techniques” in this chapter, above.

## Admissibility

States should ensure that their laws regarding the admissibility of evidence in court are appropriately adapted to deal with evidential issues that may arise in the prosecution of waste trafficking. These issues may include the transmission of evidence to forensic services located in foreign jurisdictions and the admissibility of evidence obtained from foreign law enforcement agencies through mutual legal assistance and international cooperation, evidence obtained pursuant to joint investigations and electronic evidence, including electronic evidence obtained from foreign-based service providers.





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# Chapter 5.

## INTERNATIONAL COOPERATION

Transnational waste trafficking is a matter of global concern. Effective international cooperation between State agencies is essential to prevent and combat this form of crime. This is recognized in instruments such as the Organized Crime Convention and the Basel Convention. Moreover, in chapter 1 of the present guide, it is noted that the principle of cooperation between States is one of the fundamental principles of international environmental law.<sup>139</sup>

International cooperation refers to the sharing of information, resources and personnel and to the provision of assistance to achieve common goals. Cooperation between States may occur formally or informally. Formal cooperation may be based on the Organized Crime Convention, the Basel Convention, other multilateral or bilateral treaties, or the general principles of international law, such as the principle of reciprocity. Informal cooperation generally involves direct officer-to-officer or agency-to-agency contact across borders. It is not generally dealt with by legislation but may sometimes be based on a memorandum of understanding between the cooperating States or their agencies. Informal cooperation is expressly recognized in the Organized Crime Convention.<sup>140</sup>

As noted in chapter 1 of the present guide, the Basel Convention sets out a number of obligations for parties to cooperate. In particular, article 10 provides that parties to the Convention shall cooperate with each other in order to improve and achieve environmentally sound management of hazardous wastes and other wastes, and sets out several more specific obligations to this end. Article 9 of the Basel Convention specifically addresses cooperation to prevent and punish waste trafficking,<sup>141</sup> but the Convention does not contain detailed provisions on international cooperation in criminal matters. In this regard, the Organized Crime Convention can be a useful instrument for States, as it sets out detailed provisions on international cooperation that can be applied to cases of waste trafficking.

The Organized Crime Convention serves as a basis for international cooperation in cases falling within its scope. It requires States to take steps or consider taking steps to implement a number of measures to enable and facilitate international cooperation in such cases. As noted in chapter 1, cases of waste trafficking fall within the scope of the Organized Crime Convention when they amount to “serious crime” and where the

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<sup>139</sup> See “General principles of international environmental law”, above.

<sup>140</sup> See Organized Crime Convention, art. 18, para. 4 and art. 27.

<sup>141</sup> Basel Convention, art. 9, para. 5.

offence is transnational in nature and involves an organized criminal group.<sup>142</sup> The Organized Crime Convention includes articles on international cooperation measures such as law enforcement cooperation (article 27), joint investigations (article 19), mutual legal assistance (article 18), extradition (article 16), international cooperation for purposes of confiscation (article 13), transfer of criminal proceedings (article 21) and transfer of sentenced persons (article 17). Provisions relating to international cooperation are also included in a number of other articles of the Organized Crime Convention.<sup>143</sup> The following sections provide legislative guidance for establishing provisions concerning the following forms of international cooperation in the context of waste trafficking: mutual legal assistance, extradition, law enforcement cooperation and joint investigations. As in other chapters, model provisions are included to assist with the implementation of these principles.

#### EXAMPLE: ENFORCE

The Environmental Network for Optimizing Regulatory Compliance on Illegal Traffic (ENFORCE) was established by the Conference of the Parties to the Basel Convention at its eleventh meeting.<sup>a</sup> It aims to promote parties' compliance with the provisions of the Basel Convention relating to preventing and combating waste trafficking through better implementation and enforcement of domestic law. ENFORCE brings together existing resources to enhance and improve cooperation and coordination between relevant entities that are mandated to deliver capacity-building activities and tools on preventing and combating illegal trafficking.<sup>b</sup>

<sup>a</sup> Decision BC-11/8.

<sup>b</sup> See also Basel Convention, Implementation, Enforcement, "Overview". Available at [www.basel.int](http://www.basel.int).

## MUTUAL LEGAL ASSISTANCE

Mutual legal assistance in criminal matters is a process by which States seek and provide assistance in gathering evidence for use in criminal cases.<sup>144</sup> Through mutual legal assistance, witnesses can be interviewed or summoned, persons can be located, evidence can be produced, objects and sites can be examined and analysed, and warrants for search and seizure can be issued and executed in foreign jurisdictions.<sup>145</sup> Mutual legal assistance can be used, for example, to have samples of waste taken and analysed and for the results of that analysis to then be shared with the requesting State.

Mutual legal assistance is usually given on the basis of bilateral or multilateral treaties, although some States provide such assistance without any underlying agreement, on the basis of their domestic law and/or the principle of reciprocity.<sup>146</sup> Article 18 of the Organized Crime Convention establishes a framework for mutual legal assistance between States parties in relation to serious crimes and offences established under the

<sup>142</sup> See "International legal framework to combat serious crime", above.

<sup>143</sup> These include articles relating to measures to combat money-laundering (art. 7, para. 1 (b) and para. 4), disposal of confiscated proceeds of crime or property (art. 14, paras. 2–3), jurisdiction (art. 15, para. 5), special investigative techniques (art. 20, para. 2–4), protection of witnesses (art. 24, para. 3), measures to enhance cooperation with law enforcement authorities (art. 26, para. 5), collection, exchange and analysis of information on the nature of organized crime (art. 28, para. 2), training and technical assistance (art. 29, para. 2 and 4), implementation of the Convention through economic development and technical assistance (art. 30) and prevention (art. 31, para. 7), of the Organized Crime Convention.

<sup>144</sup> UNODC, *Manual on Mutual Legal Assistance and Extradition*.

<sup>145</sup> See also UNODC, SHERLOC, Legislative Guide, chap. V, sect. B, "Mutual legal assistance in criminal matters". Available at [www.unodc.org/cld/v3/sherloc/legislative-guide/index.html](http://www.unodc.org/cld/v3/sherloc/legislative-guide/index.html).

<sup>146</sup> The principle of reciprocity has long been an established principle in the relations of States with respect to matters of international law and diplomacy. It is basically a promise that the requesting State will provide the requested State the same type of assistance in the future, should the requested State ever be asked to do so. This principle is usually incorporated into treaties, memorandums of understanding and domestic law.

Convention and the Protocols thereto. It encourages States parties to consider, where necessary, concluding bilateral or multilateral agreements or arrangements to give practical effect to or enhance the provisions of article 18.<sup>147</sup>

States parties should ensure that domestic mutual legal assistance regimes, whether established under bilateral or multilateral treaty or providing an independent basis for mutual legal assistance, apply to investigations, prosecutions and judicial proceedings concerning waste trafficking. Model provision 18 below provides an example of a provision to this effect, which a State could include in waste legislation introduced pursuant to the present guide.

#### MODEL PROVISION 18: MUTUAL LEGAL ASSISTANCE

The provisions on mutual legal assistance contained in [insert national legislation on mutual legal assistance] and in any applicable bilateral or multilateral treaty to which [insert name of the State] is a party shall apply to investigations, prosecutions and judicial proceedings in relation to the offences established under this [Act/Law/Chapter etc.].

Before a formal request for mutual legal assistance is drafted and submitted, time should be taken to consider and enquire as to whether such a request must be drafted at that time or whether the same goal could be achieved through less formal and generally more agile cooperation mechanisms. In particular, consideration should be given to whether assistance can be obtained through police-to-police cooperation or cooperation between other competent authorities, such as prosecutors, or whether the documentation required is in the public domain of the requested State and is therefore a matter that does not require mutual legal assistance. In other cases, informal cooperation between agencies may assist in identifying what needs to be included in a mutual legal assistance request and may enable the request to be prepared and executed more quickly.

For further information about mutual legal assistance, as well as practical step-by-step suggestions on how to best initiate, respond to and follow through on mutual legal requests, refer to the UNODC *Manual on Mutual Legal Assistance and Extradition*.

## EXTRADITION

Extradition is the formal process whereby one State requests from another State the return of a person accused or convicted of a crime for that person to stand trial or serve a sentence in the requesting State. Arrangements for extradition are critical for the effective prosecution of waste trafficking offenders, given the often transnational nature of the crime.

Extradition is generally dealt with under bilateral or multilateral treaties, although it may also be conducted on the basis of the principle of reciprocity or the principle of comity. Extradition is addressed in article 16 of the Organized Crime Convention. Article 16 provides a basis for the extradition of persons sought in respect of offences established in accordance with the Convention and those involving serious crimes, where such offences involve an organized criminal group. It applies to cases where the offence for which extradition is sought is punishable under the domestic law of both the requesting and requested State. In that regard, what matters is that the conduct for which extradition is sought is criminalized under the laws of both States, regardless of the formal denomination of such offences.<sup>148</sup> Article 16 is intended to complement existing

<sup>147</sup> Organized Crime Convention, art. 18, para. 30.

<sup>148</sup> See also UNODC, *Manual on Mutual Legal Assistance and Extradition*, para. 103.

bilateral and multilateral extradition treaties<sup>149</sup> and can be relied upon as a basis for extradition for offences covered by article 16 when no extradition treaty is in force between the States in question.<sup>150</sup>

Extradition is a complex area of law. Most States have existing frameworks for extradition that rely on multilateral or bilateral treaties with other States. In recognition of these complexities, the present guide does not attempt to provide a comprehensive examination of legal issues relating to extradition or model legislative provisions for establishing a complete legal framework for extradition. The guide does, however, address some of the basic legal issues relating to extradition that a State must consider when introducing legislation to combat waste trafficking.

For the purposes of the present guide, the key legal issue with respect to extradition is the designation of waste trafficking offences as extraditable offences. Some of the offences contained in the guide may not be deemed by a State to be sufficiently serious to warrant extradition. This is a matter for each State to determine in accordance with its legal system and values. For offences potentially warranting extradition, States should take care to ensure that they are considered as such under the domestic law of the State and under its bilateral and multilateral extradition treaties. The manner in which this can be implemented will depend on the method for the designation of extraditable offences used by the State in question.

Two approaches have historically been used for designating offences as extraditable offences: the “list approach” and the “minimum penalty approach”. Under the list approach, whether an offence is extraditable is determined by reference to a list of extraditable offences contained in the extradition treaty and in implementing legislation. Under the minimum penalty approach, whether an offence is extraditable is determined by reference to the maximum or, in some cases, the minimum penalty applicable to the offence. Any offence with a maximum (or, as appropriate, minimum) penalty at or above a certain threshold is liable to be an extraditable offence.

States using the list approach should take steps to ensure that offences that involve waste trafficking and warrant extradition are included in lists of extraditable offences in relevant bilateral and multilateral extradition treaties and in any relevant implementing legislation. States using the minimum penalty approach should ensure that waste trafficking offences legislated under the present guide meet the minimum requirements for extradition under their bilateral and multilateral extradition treaties.

States should also ensure that extradition legislation that applies to waste trafficking offenders is consistent with the “extradite or prosecute” principle outlined in Article 16, paragraph 10, of the Organized Crime Convention. Paragraph 10 provides that, in relation to an offence covered by the Convention, a State party shall, at the request of a State party seeking the extradition of an alleged offender, submit the case to its competent authorities for the purpose of prosecution, where the requested State party refuses to extradite the alleged offender solely on the basis that he or she is a national of that State.

## LAW ENFORCEMENT COOPERATION

International cooperation of law enforcement agencies is addressed in article 27 of the Organized Crime Convention. Article 27, paragraph 1, requires States parties to closely cooperate with each other, in a manner consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat serious crime involving organized criminal groups and other offences covered by the Convention. The particular measures required under article 27 include establishing channels of communication between competent authorities, agencies and services for the secure and rapid exchange of information related to organized crime; exchanging such information; cooperating with other States

<sup>149</sup> Besides the already existing bilateral and multilateral treaties on extradition, States may also consider entering into a new arrangements applying the Model Treaty on Extradition adopted by the General Assembly in its resolution 45/116 and amended by the Assembly in resolution 52/88.

<sup>150</sup> Organized Crime Convention, art. 16, para. 4.

parties in investigating persons, property and proceeds involved in organized crime; sharing items and substances for analytical and investigative purposes; and posting liaison officers.

A model for legislating for such forms of international law enforcement cooperation is provided in model provision 19 below. The provision is primarily relevant to those States in which a legal mandate is required for investigative agencies to cooperate with international counterparts. In other States, such a provision may not be necessary, but could be desirable for clarifying and enhancing existing mechanisms for law enforcement cooperation.

#### MODEL PROVISION 19: INTERNATIONAL LAW ENFORCEMENT COOPERATION

1. [Notwithstanding relevant data protection and privacy laws and other confidentiality provisions applicable to personal data], [insert national law enforcement agency] may provide to a foreign law enforcement agency or an international or regional law enforcement agency information concerning all aspects of offences to which this [Act/Law/Chapter ...] applies [including links with other criminal activities].
2. [Insert national law enforcement agency] may cooperate with a foreign law enforcement agency or an international or regional law enforcement agency, with regard to:
  - (a) Conducting inquiries concerning:
    - (i) The identity, whereabouts and activities of persons suspect of involvement in offences to which this [Act/Law/Chapter ...] applies or the location of other persons concerned;
    - (ii) The movement of proceeds of crime or property derived from the commission of such offences;
    - (iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;
  - (b) Providing items, substances, documents or records for analytical or investigative purposes;
  - (c) Seconding or exchanging personnel, including by posting liaison law enforcement officials or liaison magistrates and by making experts available;
  - (d) Exchanging information on specific means and methods used by organized criminal groups, including routes and conveyances and the use of false identities, altered or false documents or other means of concealing their activities;
  - (e) [Joint investigations;]
  - (f) Witness protection, including relocation of a protected witness; and
  - (g) Other administrative assistance.
3. [Insert name of national law enforcement agency] may enter into an agreement with a foreign law enforcement agency or an international or regional organization to enhance law enforcement cooperation to prevent, identify and combat the offences to which this [Act/Law/Chapter ...] applies.

Care should also be taken to ensure that national legislation is adequately adapted to deal with evidential issues that may arise from international cooperation in cases of waste trafficking. These include, among other possible issues, the admissibility of evidence obtained from foreign law enforcement agencies through mutual legal assistance and international cooperation and the transmission of evidence to forensic services located in foreign jurisdictions.

## JOINT INVESTIGATIONS

As waste trafficking often involves transnational offending, joint investigations can sometimes prove to be more effective in dismantling organized criminal groups than investigations conducted by one State, especially in complex cases. The term “joint investigation” encompasses a range of collaborative efforts in the investigation of crime. Such efforts may generally be classified as involving joint parallel investigations, joint

investigative teams or joint investigative bodies. “Joint parallel investigations” refers to non-co-located but closely coordinated investigations undertaken in two or more States with a common goal. “Joint investigative teams” are teams of law enforcement authorities, prosecutors, judges or investigative judges that are established pursuant to an agreement between the competent authorities of two or more States for a limit duration and for the specific purpose of conducting criminal investigations in one or more of the States involved.<sup>151</sup> Joint investigative teams may further be classified into passively or actively integrated teams.<sup>152</sup> A passively integrated joint investigative team could be, for example, one where a foreign law enforcement officer is integrated with officers from the host State in an advisory or consultancy role or in a supportive role based on the provision of technical assistance to the host State. An actively integrated joint investigative team would include officers from at least two jurisdictions with the ability to exercise equivalent operational powers, or at least some operational powers, under host State control in the territory or jurisdiction where the team is operating.<sup>153</sup>

The concept of joint investigative bodies is introduced in the Organized Crime Convention. Pursuant to article 19 of the Organized Crime Convention, States parties are required to consider concluding agreements or arrangements to establish joint investigative bodies in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States.<sup>154</sup> Neither the text of the Convention nor the *Travaux préparatoires* define what is to be understood as a joint investigative body.

Model provision 20 seeks to provide the legal basis for a relevant national authority to conclude the agreements or arrangements to conduct joint investigations, either through the establishment of a joint investigative body or through the undertaking of joint investigations on a case-by-case basis. The domestic laws of most States already permit such joint activities, and for those few States whose laws do not, model provision 20 will be a sufficient source of legal authority for case-by-case cooperation of this sort.

#### MODEL PROVISION 20: JOINT INVESTIGATIONS

1. For the purpose of investigating offences to which this [Act/Law/Chapter ...] applies, the [insert the name of relevant national law enforcement agency and/or prosecution or judicial authority as appropriate] may, in relation to matters that are the subject of investigations [or prosecutions or judicial proceedings] in one or more States, conclude agreements or arrangements with one or more foreign law enforcement agencies [or prosecution or judicial authorities] or relevant international or regional law enforcement or judicial cooperation organizations regarding either or both of the following:
  - (a) The establishment of a joint investigative body; and
  - (b) The undertaking of joint investigations on a case-by-case basis.
2. Where an agreement or arrangement under paragraph 1 has been made, the [insert name of law enforcement agency or public prosecution or judicial authority] may engage in joint investigations with the relevant State or international or regional law enforcement or judicial cooperation organizations.
3. Evidence collected outside of the territory of [insert name of State] pursuant to a joint investigation under this article shall be admissible in judicial proceedings as if such evidence had been collected within the territory of [insert name of State].

<sup>151</sup> See also Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, art. 20; Council Framework Decision 2002/465/JHA on joint investigative teams; and Council resolution on a model agreement for setting up a joint investigation team, annex.

<sup>152</sup> CTOC/COP/WG.3/2020/2, paras. 6–8.

<sup>153</sup> *Ibid.*, para. 51.

<sup>154</sup> An identical provision is contained in article 49 of the United Nations Convention against Corruption. Resolution 10/4 of the Conference of the Parties to the Organized Crime Convention further invited States parties to consider establishing “joint investigation bodies that make use of modern technologies” (CTOC/COP/2020/10).

Previous work done by UNODC has identified several legal impediments relating to the establishment of joint investigations. These include the lack of clear framework or specific legislation dealing with the establishment of joint investigations, a lack of clarity regarding control of operations and a lack of clarity regarding liability for the costs of joint investigations. These issues should be considered by legislators in drafting the provisions relating to joint investigations.

Legislation providing for joint investigations in the context of waste trafficking must ensure that each of these issues is clearly addressed in order for joint investigations to operate effectively.

A clear legal framework is particularly important in the case of actively integrated joint investigative teams and/or joint investigative bodies, as these may involve the operational deployment of officers from foreign jurisdictions. While joint investigative teams and/or joint investigative bodies have, in some cases, been established in the absence of specific domestic legislation concerning such teams or bodies, through the use of international conventions and other rules of domestic legislation, States should consider whether legislation is needed to deal with the following matters, among others:

- The conferral of powers on foreign law enforcement officers or, where appropriate, public prosecutors or investigative judges
- Who has the responsibility for operational control
- Evidence-gathering by foreign law enforcement officers and its admissibility in any proceedings
- The possibility for mutual legal assistance procedures to be dispensed with in relation to evidence obtained pursuant to the joint investigation
- The civil and criminal liabilities of foreign law enforcement officers and other personnel involved in the joint investigation

Model provision 21 deals with two of these issues: the conferral of powers on foreign officials and the liabilities of seconded officials.

Additional considerations include the following:

- Ensuring clarity with respect to supervision and the roles and responsibilities of seconded officers
- Ensuring limits on which activities seconded officers can perform

A further issue is whether officials who engage in conduct authorized by a joint investigation are criminally or civilly liable for that conduct. Paragraph 2 of model provision 21 suggests taking account of this by conferring certain protections on seconded foreign officials, equivalent to those enjoyed by the corresponding national officials.

#### **MODEL PROVISION 21: CONFERRAL OF POWERS ON FOREIGN OFFICIALS IN JOINT INVESTIGATIONS**

1. Where [insert name of State] has an agreement covering conferral of powers in joint investigations with a foreign State, [insert competent authority] may confer upon law enforcement officials [or public prosecutors or investigative judges] of that State one or more of the following powers, which they can then exercise in [insert name of State], subject to [insert name of State] law:

- (a) [The power to receive information and take statements, in accordance with the law of the foreign State];
- (b) [The power to record charges in the official record, including in a form required by their national law]; and
- (c) [The authority to undertake surveillance of persons and/or undercover operations].

2. An official to whom any of the powers specified under paragraph 1 has been confirmed shall be entitled to the same protections as an equivalent official of [insert name of State] under [insert name of State] law.





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# Chapter 6.

## PROSECUTION AND PENALTIES

The investigation of waste trafficking offences is only one step of the process of preventing and combating waste trafficking; effective criminal procedures are also required. The present chapter addresses topics related to two aspects of criminal procedure: prosecution and penalties.

### PROSECUTION

As noted in chapter 1, the roles of prosecutors differ between countries. In most systems, the core functions of prosecutors are the decision to prosecute and the representation of the prosecution in court. Core functions in some jurisdictions may also encompass investigating crime, the supervision of investigators' compliance with procedural rules, judicial interim release ("bail"), plea and sentencing agreements, the diversion of offenders to alternatives to prosecution, victim support, recommendations regarding sentencing, the supervision of the execution of sentences and the treatment of persons in custody.<sup>155</sup>

In the present section, several issues are considered relating to prosecutorial procedure: prosecutorial discretion and prosecution and enforcement guidelines, pretrial detention, alternatives to trial and limitation periods.<sup>156</sup>

### Prosecutorial discretion and prosecution and enforcement guidelines

In some States, prosecutors are afforded discretion as to whether to prosecute offences, either by law or through administrative procedures. Conditions on the exercise of that discretion may include the community interest in prosecuting or not prosecuting an offence and the need to bring offenders to justice and deter the commission of like offences. Prosecutorial discretion may relate not only to the decision to initiate and continue a prosecution, but also to requests for pretrial measures restricting personal freedom, decisions concerning the management and prioritization of prosecutors' case load and decisions to accept plea bargaining arrangements. In some States, plea bargaining can be a useful tool for prosecutors and can allow prosecutors to bring cases against high-level offenders by securing testimony from lower-level offenders. In other States, prosecutors do not exercise such discretion.

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<sup>155</sup> See also UNODC, *The Status and Role of Prosecutors*.

<sup>156</sup> For practical guidance for prosecutors, readers may also wish to consult WasteForce, *Guidance for Prosecutors of Waste Crime*.

Given the differences in legal traditions with respect to prosecutorial discretion, the present guide does not contain any model provisions relating to that topic. For States that do afford prosecutors discretion as to whether to initiate and continue prosecutions, there is a need to ensure consistency in prosecutorial decision-making as to when to initiate prosecutions, maintain or drop prosecutions, and accept plea bargains. Where applicable, States should adopt appropriate measures to ensure consistency, such as legislative or non-legislative guidelines for the exercise of discretion.<sup>157</sup> More generally, environmental enforcement and prosecution guidelines and policies can be useful tools for informing stakeholders regarding the ways in which regulators and prosecutorial authorities approach their statutory functions and for improving compliance.<sup>158</sup> The enforcement and sanctions policy of the Environment Agency in the United Kingdom is an example of a document that informs stakeholders of how regulatory responsibilities will be exercised.<sup>159</sup> It sets out the desired outcomes of enforcement and sanctions, the principles applied in regulatory action, the approach taken to enforcement, applicable powers and procedures and how the agency makes enforcement decisions.

## Pretrial detention

Waste traffickers cannot be brought to justice if they evade the jurisdiction of prosecuting and judicial authorities. Waste trafficking is sometimes committed by foreign nationals or by persons who may otherwise be at risk of absconding. It is imperative that States, within their constitutional and human rights frameworks, take steps to prevent offenders from fleeing the country prior to trial or sentencing. In some cases, the flight risk of an offender may require that the offender be detained pending trial. In other cases, measures such as the confiscation of an offender's passport may be sufficient to mitigate flight risk.

Article 11, paragraph 3, of the Organized Crime Convention requires that, with respect to the offences established under the Convention, each State party take appropriate measures, in accordance with its domestic law and with due regard for the rights of the defence, to seek to ensure that the conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

The illegal operations in which organized criminal groups engage may generate substantial profits such that large sums of money may be available to suspects and the accused, enabling them to post bail and avoid detention before their trial or their appeal. Thus, article 11, paragraph 3, of the Convention and model provision 22 encourage the prudent use of pretrial detention by requiring that States parties take appropriate measures, consistent with their respective laws and with the rights of suspects and of the accused, to ensure that they do not abscond.

While its consideration is not expressly required by the Convention, the capacity of the suspect to influence witnesses, tamper with evidence or take other steps to undermine the administration of justice may need to be considered in decision-making concerning pretrial release or detention. Accordingly, these factors are mentioned for consideration in model legislative provision 22.

<sup>157</sup> See also guideline 17 of the Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana from 27 August to 7 September 1990.

<sup>158</sup> See also WasteForce, *Guidance for Prosecutors of Waste Crime*, pp. 18–19.

<sup>159</sup> Updated 17 March 2022. Available at [www.gov.uk](http://www.gov.uk).

**MODEL PROVISION 22: PRETRIAL DETENTION**

1. Where a person has been charged with an offence to which this [Act/Law/Chapter/...] applies, the court may order pretrial detention if one of the grounds listed in paragraph 2 exists.
2. The court may order pretrial detention if it is satisfied that there are serious indications of the accused's guilt and that there is an unacceptable risk that the person may, if not detained:
  - (a) Fail to appear at subsequent criminal proceedings;
  - (b) Influence a witness, tamper with evidence or otherwise obstruct the course of justice;
  - (c) Commit a further offence; or
  - (d) Endanger the life, health or safety of a person who is claimed to be a victim of the offence with which the person is charged or any other person.
3. An order for the pretrial detention of a person under this article must not exceed a period of [insert time limit]. The court may extend the period of pretrial detention under paragraph 2 of this article on the application of a prosecutor. The total period of pretrial detention must not exceed [insert time limit].
4. Pretrial detention must not be ordered, maintained or extended if the objectives of the detention may be achieved through less severe means. In lieu of pretrial detention, the court may impose conditions on the [person/accused] pending trial or appeal to ensure their presence at the subsequent criminal proceedings and to ensure the administration of justice, including:
  - (a) [Seizure/confiscation] of travel or other identity documents of the person;
  - (b) Notification of the relevant authorities at border control points;
  - (c) Holding of a surety bond;
  - (d) Restrictions on the movement of the person, such as home confinement or electronic monitoring of movements;
  - (e) Other measures considered by the court to be necessary and proportionate to prevent the person from influencing witnesses, tampering with evidence or otherwise obstructing the course of justice.

**Alternatives to trial**

In some jurisdictions, law enforcement, environmental authorities or prosecutors may exercise discretion to resolve cases, where appropriate, through alternatives to trial, such as formal cautions, enforcement notices, diversion programmes, discharge and deferred prosecution agreements. Alternatives to trial may be particularly appropriate in cases of minor and/or first-time offending and may be inappropriate in relation to significant or repeat offending. Factors that may be relevant to determining whether an alternative to trial should be pursued may include the intent and motives of the offender, the foreseeability of the breach, the environmental and other impacts of the offence, the need for specific or general deterrence, whether the offender has a history of non-compliance or offending, the attitude of the offender to the offence and the extent to which they have cooperated during the investigation, the actions of the offender to remediate the impacts of the offending and/or compensate victims, the measures put in place by the offender to prevent future breaches and the offender's personal circumstances.

Two alternatives to trial, enforcement notices and deferred prosecution agreements, are briefly discussed in the following sections. States may also wish to consider other alternatives, such as environmental mediation and other restorative justice-based approaches.

**Enforcement notices**

Enforcement notices can typically be issued by competent environmental authorities. They can be issued where the authority believes that a natural or legal person is breaching or will breach an environmental law

or regulation or a condition of a permit, licence or authorization that they hold. Enforcement notices usually specify the steps that must be taken to remedy the breach or anticipated breach. Provision should be made to allow recipients to appeal the issuing of enforcement notices. Failure to comply with an enforcement notice may constitute an offence.

### NATIONAL EXAMPLE: UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

#### Environmental Protection Act 1990

##### Section 13 – Enforcement notices

- (1) If the enforcing authority is of the opinion that the person carrying on a prescribed process under an authorisation is contravening any condition of the authorisation, or is likely to contravene any such condition, the authority may serve on him a notice (“an enforcement notice”).
- (2) An enforcement notice shall—
  - (a) State that the authority is of the said opinion;
  - (b) Specify the matters constituting the contravention or the matters making it likely that the contravention will arise, as the case may be;
  - (c) Specify the steps that must be taken to remedy the contravention or to remedy the matters making it likely that the contravention will arise, as the case may be; and
  - (d) Specify the period within which those steps must be taken.
- (3) The Secretary of State may, if he thinks fit in relation to the carrying on by any person of a prescribed process, give to the enforcing authority directions as to whether the authority should exercise its powers under this section and as to the steps which are to be required to be taken under this section.
- (4) The enforcing authority may, as respects any enforcement notice it has issued to any person, by notice in writing served on that person, withdraw the notice.]

##### Section 23 – Offences<sup>a</sup>

- (1) It is an offence for a person—
 

[...]

  - (c) to fail to comply with or contravene any requirement or prohibition imposed by an enforcement notice or a prohibition notice;
- (2) A person guilty of an offence under paragraph (a), (c) or (l) of subsection (1) above shall be liable:
  - (a) on summary conviction, to a fine or to imprisonment for a term not exceeding three months, or to both;
  - (b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years, or to both.

[...]

<sup>a</sup> The excerpt of this legislative provision applies to England and Wales. The text of sect. 23, para. 2 (a), of the Environmental Protection Act 1990 is different insofar as it applies to Scotland. See also [www.legislation.gov.uk/ukpga/1990/43/section/23](http://www.legislation.gov.uk/ukpga/1990/43/section/23).

### Deferred prosecution agreements

In relation to waste trafficking, deferred prosecution agreements may be offered to defendants who agree to fulfil certain conditions, such as paying compensation for and repairing environmental harm. In other legal systems, deferred prosecution agreements or other alternative trials are not permissible.

States making use of the possibility of deferred prosecution agreements for waste trafficking offences should ensure that the laws or guidelines regulating their use prohibit or discourage agreements to close cases solely on the basis of monetary payment by the offender. Monetary payments from members of organized criminal groups or legal persons involved in waste trafficking are at high risk of having an illicit origin. There is also a danger that organized criminal groups will simply incorporate payments under deferred prosecution agreements as an operating cost of involvement in waste trafficking, without the payments having any deterrent effect on their criminal conduct.

### EXAMPLE: FRANCE

#### Code of Criminal Procedure

##### Article 41-1-3

Provided that public prosecution has not been initiated, the public prosecutor may offer a legal person accused of one or more ordinary offences provided for in the environmental regulations or related offences, excluding serious crimes and ordinary offences against the person as established in Book II of the Criminal Code, the possibility of entering into a judicial public interest agreement imposing one or more of the following obligations:

- (1) To pay a public interest fine to the treasury. The amount of such a fine shall be determined in a proportionate manner and, as applicable, taking into account the benefits derived from the violations found to have been committed, up to a limit of 30 per cent of the average annual turnover calculated on the basis of the three most recent annual turnovers known at the date on which the violations were established. Payment may be made in instalments, according to a schedule determined by the public prosecutor, over a period specified in the agreement and not exceeding one year;
- (2) To normalize its situation with regard to the law or regulations within the framework of a compliance programme lasting a maximum of three years, under the supervision of the competent entities of the Ministry of the Environment and the entities of the French Biodiversity Agency;
- (3) To ensure, within a maximum of three years and under the supervision of the same entities, remediation of the environmental damage resulting from the offences committed.

The costs incurred by the competent entities of the Ministry of the Environment or the entities of the French Biodiversity Agency in calling on experts or qualified persons or authorities to assist them in carrying out the technical assessments required for their supervisory activities shall be borne by the legal person in question, up to a limit established by the agreement. Such costs shall not be reimbursed if the execution of the agreement is suspended.

Where the injured party is identified, unless the accused legal person can prove that it has made good the harm caused, the agreement shall also provide for the amount and terms of compensation for the damage caused by the offence, to be paid within a period not exceeding one year.

The applicable procedure shall be that provided for in article 41-1-2 and in the texts adopted for the purposes of application of that article. The validation order, the amount of the public interest fine and the agreement shall be published on the websites of the Ministry of Justice, the Ministry of the Environment and the municipality in which the offence was committed or, if the municipality has no website, the public intermunicipal cooperation establishment to which the municipality belongs.

## Limitation periods

In some jurisdictions, the commencement of a prosecution is limited by periods of time known as “limitation periods” under laws known as “statutes of limitations”. In other jurisdictions, limitation periods do not apply to criminal offences. Article 11, paragraph 5, of the Organized Crime Convention requires States parties that do impose limitation periods on the prosecution of criminal offences to ensure that the limitation periods applying to offences covered by the Convention are sufficiently long, in particular where the

alleged offender has deliberately sought to evade the administration of justice. States should ensure that the legislative provisions implementing this obligation under the Organized Crime Convention also extend to the offences covered by this guide. Legislation should also be clear as to the time at which the limitation period starts to run (for example, whether this based on the time of commission or the time of discovery) and the circumstances in which the running of time on a limitation period may be suspended, such as where the offender has deliberately sought to evade the administration of justice.

In some States, the running of time on a limitation period can be suspended while evidence is gathered from abroad. States should consider whether such a provision would be desirable in their legal system, considering the length of any limitation periods applicable to waste trafficking offences and potential difficulties in gathering evidence from abroad. Whatever approaches to limitation periods are taken by a State, the State should ensure that its prosecutorial process is sufficiently streamlined to bring prosecutions to trial in a timely fashion.

Model provision 23 provides an example of a provision setting out the applicable limitation period for waste trafficking offences. Paragraph 2 of this provision provides for the suspension of the running of time on such a limitation period where the suspect has deliberately sought to evade the administration of justice.

#### MODEL PROVISION 23: LIMITATION PERIOD

1. Subject to paragraph 2, the limitation period for criminal proceedings for offences to which this [Act/Law/Chapter ...] applies is [insert number of years] after the commission of the offence.
2. Where a person suspected of an offence to which this [Act/Law/Chapter ...] applies deliberately seeks to evade the administration of justice, the limitation period in paragraph 1 shall not run for the duration of such evasion.

## PENALTIES AND SENTENCING

The legislation that establishes offences covered by the present guide should provide for appropriate penalties and should seek to ensure that persons convicted of waste trafficking offences receive appropriate sentences. Given that approaches to setting penalties and sentencing offenders vary greatly between States according to their legal tradition, the guide does not provide any sample provisions on penalties and sentencing. Rather, the present section sets out several relevant issues for consideration by States in drafting legislative provisions relating to penalties and sentencing. In the present section, some of the most pertinent considerations underlying sentencing for waste trafficking are examined before specific types of sanctions are considered.

### Considerations underlying sentencing

#### *Effective, proportionate and dissuasive sanctions*

The overriding considerations in determining appropriate penalties for the offences contained in the present guide are that the penalties should be effective, proportionate and dissuasive. These principles are reflected in the text of the Organized Crime Convention. Article 11, paragraph 1, of the Convention requires that each State party make the commission of an offence established in accordance with the Convention liable to sanctions that take into account its gravity. Article 11, paragraph 2, refers to the need to deter the commission of these offences. Article 10, paragraph 4, requires that States parties ensure that legal persons held liable in accordance with article 10 are subject to “effective, proportionate and dissuasive criminal or non-criminal sanctions”.



Requirements for effective, proportionate and dissuasive sanctions for waste trafficking are also included in the international instruments addressing waste. Article 4, paragraph 4, of the Basel Convention also provides the following:

Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.

Article 9, paragraph 2, of the of the Bamako Convention provides the following:

Each Party shall introduce appropriate national legislation for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties shall be sufficiently high to both punish and deter such conduct.

In the European Union, requirements for member States to establish “effective, proportionate and dissuasive” penalties for waste trafficking are set out in the Environmental Crime Directive,<sup>160</sup> Waste Framework Directive<sup>161</sup> and Waste Shipment Regulation.<sup>162</sup>

The principle of proportionality of sentence is a general principle of criminal law common to national legal systems. Moreover, it is protected by international human rights law and enshrined in instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)<sup>163</sup> and the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules).<sup>164</sup>

Many of the offences covered by the present guide are serious crimes. It is important that the penalties for these offences reflect their serious nature and be comparable to sanctions for other serious crimes. They must reflect the community’s condemnation of waste trafficking and act as effective deterrents. At the same time, not all of the offences contained in the guide are equally grave. The penalty for each offence must be proportionate to its seriousness. Furthermore, the circumstances of each offence and of each offender are infinitely variable. The sentences available to judges need to be flexible enough to take into account the individual circumstances of each case.

### *Aggravating and mitigating factors*

A corollary of the requirement that sentences be proportionate to the seriousness of the offending is the requirement that sentences must take into account the relevant circumstances of the offending. Circumstances that tend to raise the seriousness of the offence or the culpability of the offender, or otherwise warrant higher sentences, are known as aggravating factors. Circumstances that tend to lower the seriousness of the offence or the culpability of the offender, or otherwise warrant lower sentences, are known as mitigating factors.

Different approaches to aggravating and mitigating factors are taken in different jurisdictions. In some jurisdictions, legislative provisions require stricter penalties, such as higher minimum and/or maximum sentences, where particular aggravating factors are present. In other jurisdictions, statutory provisions set out relevant factors to be taken into account by sentencing judges in deciding upon the appropriate sentence. In some cases, specific lists of aggravating and mitigating factors will be legislated for particular offences. In other jurisdictions, sentencing judges will rely upon general lists of factors relevant to sentencing for all criminal offences. Some jurisdictions use a mix of these approaches, depending on the legislation and the offence in question. It is for each State to determine how aggravating and mitigating factors are taken into account in sentencing offenders for waste trafficking and related offences, taking into account their

<sup>160</sup> Directive 2008/99/EC of the European Parliament and of the Council on the protection of the environment through criminal law, art. 5.

<sup>161</sup> Directive 2008/98/EC of the European Parliament and of the Council on waste and repealing certain Directives, art. 36, para. 2.

<sup>162</sup> Regulation (EC) No. 1013/2006 of the European Parliament and of the Council on shipments of waste, art. 50, para. 1.

<sup>163</sup> General Assembly resolution 40/33, annex, rules 5.1 and 17.1.

<sup>164</sup> General Assembly resolution 45/110, annex, rules 2.3 and 3.2.

obligations under international law, including international human rights law. Irrespective of the approach taken, a number of suggested aggravating and mitigating factors are set out below.

Once a sentencing judge has taken into consideration all relevant aggravating and mitigating factors, the sentencing judge should take a “step back” to consider whether the proposed sentence, as a whole, meets the objectives of sentencing — namely, whether the sentence is effective, proportionate and dissuasive.

### Aggravating factors

Circumstances that may be considered as aggravating factors, warranting higher penalties for an offence covered by this guide, may include the following:

- (a) Any harm caused or likely to be caused by the offence;
- (b) Where the offence took place, in whole or in part, including whether the offence was committed near housing, schools, livestock or environmentally sensitive sites (e.g. a designated protected area or of significant biodiversity importance);
- (c) The type and characteristics of the waste to which the offence related, including any hazardous characteristics;
- (d) The quantity or volume of the waste to which the offence related;
- (e) Where the conduct of the defendant involved the risk of any injury or death, whether such injury or death actually occurred;
- (f) The size of any direct or indirect financial or other material benefit to the offender or to any other person as a result of the offence;
- (g) The size of any direct or indirect financial or other material loss to another person caused by the offence, including costs of clean-up and remediation of an environment, habitat or location;
- (h) Where the offence was committed as part of the activity of an organized criminal group;
- (i) Where the offender exercised a leadership or managerial role in the organized criminal group;
- (j) Whether the offence was part of a pattern of ongoing criminal activity;
- (k) Whether the offender had previously committed any related or similar offence, irrespective of whether the offender was charged or convicted in relation to such offence;
- (l) Whether the offender attempted to obstruct the administration of justice during the investigation, prosecution or sentencing of the offence;
- (m) Where the offence was committed by a government official;
- (n) Where the offence was committed by a person in a position of trust or authority, including the holder of a relevant permit or certificate.

Where an aggravating factor is already an element of the offence, or an element of another offence for which the accused has been convicted arising from the same offence, it should not also be regarded as an aggravating factor for the instant offence. Some of the aforementioned aggravating factors are elements of offences set out in the present guide, and thus would not be appropriate to use to increase the offender’s sentence in circumstances where an offender has been or is being sentenced for such an offence. For example, the aggravating factor of commission as part of the activity of an organized criminal group should not apply where the offender also has been convicted of the offence of participation in an organized criminal group. A second example would be that an offender could not be liable for organizing or directing the commission of an offence and also be given an even higher sentence because of a leadership or managerial role within an organized criminal group.

**EXAMPLE: AUSTRALIA*****Protection of the Environment Operations Act 1997 (NSW)*****Section 241 – Matters to be considered in imposing penalty**

(1) In imposing a penalty for an offence against this Act or the regulations, the court is to take into consideration the following (so far as they are relevant)—

- (a) the extent of the harm caused or likely to be caused to the environment by the commission of the offence,
- (b) the practical measures that may be taken to prevent, control, abate or mitigate that harm,
- (c) the extent to which the person who committed the offence could reasonably have foreseen the harm caused or likely to be caused to the environment by the commission of the offence,
- (d) the extent to which the person who committed the offence had control over the causes that gave rise to the offence,
- (e) whether, in committing the offence, the person was complying with orders from an employer or supervising employee,
- (f) the presence of asbestos in the environment.

(2) The court may take into consideration other matters that it considers relevant.

**Mitigating factors**

Circumstances that may be considered as mitigating factors warranting lower penalties for an offence covered by this guide may include the following:

- (a) The type and characteristics of the waste to which the offence relates, including the absence of any hazardous characteristics;
- (b) The quantity or volume of waste involved in the offending;
- (c) Where the offending did not cause or risk any discernible harm;
- (d) Where the offence was not committed for a financial or other material benefit;
- (e) Where the offender obtained no or little financial or other material benefit from the offending;
- (f) Where the offender had a lower or minor role in the offending;
- (g) Where the offender had limited awareness or understanding of the offence;
- (h) Where the offender committed the offence under the influence of coercion, intimidation or exploitation;
- (i) Whether the offender was or is suffering from reduced mental capacity at the time of the offending or the time of sentencing;
- (j) The steps taken by the offender to rectify or mitigate the impacts of the offending;
- (k) Where the offender has shown remorse for the offending;
- (l) Where the offender voluntarily cooperated by providing information or otherwise assisted competent authorities, including to investigate and prosecute waste trafficking or related offences;
- (m) Where the offender pleaded guilty, especially where the defendant entered an early guilty plea;

- (n) Where the offender had no or no relevant prior criminal record or no recent convictions;
- (o) Where the offender was otherwise of prior good character;
- (p) The age of the offender at the time of the offending or at the time of sentencing;
- (q) Whether the offender is a sole or primary caregiver for dependent relatives;
- (r) Any physical disability or serious medical condition requiring urgent, intensive or long-term treatment;
- (s) Any relevant mental disorder, developmental disorder or neurological impairment.

### EXAMPLE: ITALY

#### Penal Code

##### Article 452-*decies* – Active repentance

The penalties envisaged for the offences referred to in this title, for criminal conspiracy under article 416 as aggravated under article 452-octies, as well as for the offence under article 260 of legislative decree No. 152 of 3 April 2006 and subsequent amendments, shall be reduced from half to two thirds against whoever endeavors to prevent criminal activity from being led to further consequences or whoever, before the opening of the hearing of first instance, concretely ensures the safety, remediation and, where possible, restoration of the condition of places, and shall be reduced from one third to half against whoever concretely assists the police or judicial authorities in reconstructing the facts, identifying the perpetrators and subtracting resources pertaining to the commission of the above mentioned offenses.

The statute of limitations shall be suspended where the judge, upon the defendant's request and before the opening declaration of the hearing of first instance, orders that the proceedings be suspended for a reasonable period of time, in any case not exceeding two years and extendable for a further year maximum, in order to allow the ongoing activities referred to under the previous paragraph to be carried out.

### Sentencing guidelines

Some countries have adopted guidelines for use by judges in sentencing offenders, including for environmental offences such as waste offences. The primary purpose of sentencing guidelines is often to promote consistency in sentencing, but they may also promote public confidence in sentencing and in the criminal justice system more broadly.<sup>165</sup>

It is for each State to decide whether the use of sentencing guidelines would be beneficial under its legal system. The introduction of a system for issuing and using sentencing guidelines is a reform that is likely to be beyond the scope of legislation aimed squarely at preventing and combating waste trafficking. Nevertheless, for States that are interested in establishing sentencing guidelines or in reviewing the existing systems for issuing and using sentencing guidelines, the present section provides some basic guidance. The discussion of the considerations in the present section should not be considered as exhaustive.

<sup>165</sup> Julian V. Roberts and Andrew Ashworth, "The evolution of sentencing policy and practice in England and Wales, 2003–2015", *Crime and Justice*, vol. 45 (2016), pp. 344–345.

The power to register a criminal conviction and to impose criminal punishment is an exercise of judicial power. Legislators and policymakers considering the introduction of sentencing guidelines should, in the first instance, remember that the purpose of sentencing guidelines is to guide the exercise of judicial power and not to usurp it. Legislators must not constrain the process of judicial determination of sentence to the extent that they prevent sentencing courts from exercising their judicial functions. Nevertheless, legislators can have a role to play in promoting the proper exercise of judicial powers by establishing procedures for issuing and using guidelines.

A preliminary question in developing a system for issuing and using sentencing guidelines is to clarify its purpose. Above, it was suggested that the primary purpose of sentencing guidelines is often thought to be to promote consistency in sentencing, but that having such guidelines may also promote public confidence in sentencing and in the criminal justice system. In ascertaining the purposes of such guidelines, it is worthwhile clarifying what is meant by “consistency”. In that regard, literature concerning sentencing has distinguished between consistency of approach, consistency in outcome and uniformity in outcome. Consistency of approach is concerned with applying a consistent method to the sentencing process, whereas consistency in outcome is focused on the result of the sentencing process.<sup>166</sup> Uniformity of outcome applies where different offenders committing offences in different circumstances receive the same sentence. A focus on consistency of approach provides greater possibilities for judges to take into consideration differences in circumstances while also promoting consistency, but not uniformity, in outcomes.<sup>167</sup> Uniformity of outcome is undesirable because it is contrary to one of the fundamental considerations underlying sentencing discussed in this chapter, the principle of proportionality.<sup>168</sup>

Clarity on the purpose of sentencing guidelines and on issues such as the meaning of “consistency” is important because it underscores the importance of the design of any system of sentencing guidelines and the methods by which the system seeks to achieve its goals. For example, a system focusing on consistency of approach may emphasize the prescription of a sequence of steps for courts to follow when deciding upon an appropriate sentence, rather than specifying sentence ranges and discouraging or restricting judges from passing sentences outside of those ranges.<sup>169</sup>

A further question for legislators and policymakers is the proper body to issue sentencing guidelines and the composition of that body. An independent body consisting of current or former members of the judiciary and persons from other relevant professions, such as criminal justice professionals and academics, may be an appropriate issuing body.

Finally, legislators and policymakers should bear in mind the difficulties of anticipating all potential constellations of circumstances that judges will be required to pass sentence on. Sentencing guidelines provide guidance for determining the appropriate sentence applicable to the majority of cases, but they may not be appropriate for cases falling at the extreme ends of offending – that is, cases with either extreme aggravating or mitigating circumstances.<sup>170</sup> It should be ensured that the legislation providing for the use of sentencing guidelines enables courts to depart from the ranges included in sentencing guidelines where doing so would be in the interest of justice.

<sup>166</sup> Sarah Poppleton and others, “A review of consistency in sentencing” (London, Sentencing Council, 2021), p. 10.

<sup>167</sup> *Ibid.*; and Julian V. Roberts, “Sentencing guidelines in England and Wales: recent developments and emerging issues”, vol. 76, *Law and Contemporary Problems*, (2013), p. 21.

<sup>168</sup> See “Effective, proportionate and dissuasive sanctions”, above.

<sup>169</sup> Roberts, “Sentencing guidelines in England and Wales”, p. 5.

<sup>170</sup> *Ibid.*, p. 13.

**EXAMPLE: UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND****Sentencing guidelines for environmental offences**

In the United Kingdom, the Coroners and Justice Act 2009 established the Sentencing Council for England and Wales (“Sentencing Council”).<sup>a</sup> The Sentencing Council is empowered to prepare and, following consultations, issue sentencing guidelines, whether general in nature or limited to a particular offence, particular category of offence or particular category of offender.<sup>b</sup> When preparing sentencing guidelines, the Sentencing Council is required to have regard to the desirability of sentencing guidelines relating to a particular offence being structured according to a scheme for sentencing ranges and starting points set out in the Act.<sup>c</sup> In sentencing an offence, courts are required to follow any sentencing guidelines which are relevant to the offender’s case, unless satisfied that it would be contrary to the interests of justice to do so.<sup>d</sup>

The Sentencing Council has issued a number of sentencing guidelines, including a general guideline on overarching principles of sentencing<sup>e</sup> and guidelines on sentencing for environmental offences. The guidelines on sentencing for environmental offences comprise, at the time of writing, guidelines for sentencing offences of “unauthorised or harmful deposit, treatment or disposal etc. of waste” and “illegal discharges to air, land and water”, with separate guidelines for natural and legal persons<sup>f</sup> and general guidelines for other environmental offences.<sup>g</sup>

The guidelines relating to the specific environmental offences each set out a 12-step process to be followed in sentencing offenders for such offences. Different steps are set out for natural and legal persons. The process for sentencing set out in the guidelines involves, among other steps, determining the appropriate offence category by reference to the culpability of the offender, identifying the applicable starting point and category range, identifying and taking into account relevant aggravating and mitigating factors, and reviewing whether the sentence, as a whole, is proportionate and meets, in a fair way, the objectives of punishment, deterrence and the removal of gain derived through the commission of the offence. Non-exhaustive lists of relevant aggravating and mitigating factors are provided in the guidelines. The guidelines also address the making of ancillary orders, including remediation orders, confiscation orders and disqualification orders.<sup>h</sup>

<sup>a</sup> Coroners and Justice Act 2009, sect. 118.

<sup>b</sup> *Ibid.*, sect. 120.

<sup>c</sup> *Ibid.*, sect. 121.

<sup>d</sup> Sentencing Code, sect. 59

<sup>e</sup> See United Kingdom, Sentencing Council, “General guideline: overarching principles” (effective from 1 October 2019). Available at [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk).

<sup>f</sup> See United Kingdom, Sentencing Council, “Organisations: unauthorised or harmful deposit, treatment or disposal etc of waste/Illegal discharges to air, land and water” (effective from 1 July 2014), and “Individuals: unauthorised or harmful deposit, treatment or disposal etc of waste/Illegal discharges to air, land and water. Available at [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk).

<sup>g</sup> United Kingdom, Sentencing Council, Environmental offences (other) (effective from 1 July 2014). Available at [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk).

<sup>h</sup> For a further discussion of such orders, see “Ancillary orders” below.

**Types of sanctions**

The previous section outlined some of the most pertinent considerations underlying sentencing for waste trafficking. In the present section, consideration now turns to the specific types of sanctions that may be ordered when these and other relevant considerations are synthesized. Imprisonment and non-custodial penalties are considered first, before turning to so-called ancillary orders. Finally, a specific section is included on sanctions for legal persons, which includes a model legislative provision.

*Imprisonment*

The most serious offences contained in the present guide should be subject to maximum sentences of imprisonment proportional to the seriousness of the offence and high enough to serve as effective deterrents. The need for effective, proportionate and dissuasive sentences was discussed above as a general consideration

underlying sentencing for waste trafficking offences.<sup>171</sup> In addition to these general considerations, there are also several further considerations that States should take into account in setting the maximum sentences of imprisonment for waste trafficking offences.

First, as was noted in chapter 1,<sup>172</sup> for the Organized Crime Convention to apply to an offence, the offence must either be an offence established in accordance with the Convention or a “serious crime”. “Serious crime” is defined as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.<sup>173</sup> While certain offences related to waste trafficking — participation in an organized criminal group, corruption, money-laundering and obstruction of justice — are expressly addressed in the Convention, waste trafficking itself is not. Accordingly, for the Organized Crime Convention to apply to the most serious waste-trafficking-related offences set out in the present guide, maximum penalties of at least four years’ imprisonment should be provided for each of these serious offences.

Second, in some States, the designation of predicate offences for the purpose of money-laundering legislation is determined by reference to the maximum penalty for the offence in question. In such States, legislators should ensure that the maximum penalties for the offences intended for designation as predicate offences are sufficiently high to meet the threshold of at least four years’ imprisonment.<sup>174</sup>

Finally, in some States, the eligibility of an offence to serve as a basis for extradition is determined by reference to the maximum penalty for the offence in question. Where this is the case, legislative drafters should ensure that the maximum penalties for offences serious enough to warrant extradition are sufficiently high for extradition to be possible under the State’s extradition treaties and domestic legislation.<sup>175</sup> Some of the offences covered by the present guide are of a gravity serious enough to warrant extradition. Other offences may be deemed by a State to not be sufficiently serious to warrant extradition.

### *Non-custodial penalties*

Legislation establishing or amending waste trafficking offences should take into consideration the desirability of alternatives to custodial sentences in certain circumstances. The types of non-custodial sentences capable of being given to offenders and the availability of each type of non-custodial sentence may vary between States and are matters for each State to determine in accordance with its legal framework for sentencing. Guidance on alternatives to imprisonment can be found in the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules)<sup>176</sup> and in rules 57 to 66 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules),<sup>177</sup> as well as in the UNODC handbooks on basic principles and promising practices on alternatives to imprisonment and on strategies to reduce overcrowding in prisons.<sup>178</sup>

Under the Tokyo Rules, domestic law should provide for a wide range of non-custodial measures for persons convicted, from pretrial to post-sentencing provisions.<sup>179</sup> In particular, the authorities investigating or prosecuting criminal cases should be empowered to discharge the offender in appropriate circumstances and to impose non-custodial measures for minor cases.<sup>180</sup> Non-custodial penalties may include verbal sanctions, such as admonition, reprimands or warnings; conditional discharge; status penalties; economic sanctions and monetary penalties, such as fines and day fines; confiscation or expropriation orders; compensation to the victim or compensation orders; suspended and deferred sentences; probation and judicial supervision;

<sup>171</sup> See “Considerations underlying sentencing”.

<sup>172</sup> See “International legal framework to combat serious crime”.

<sup>173</sup> Organized Crime Convention, art. 2 (b).

<sup>174</sup> See also the discussion on money-laundering in chapter 3, above.

<sup>175</sup> See also the discussion on extradition in chapter 5, above.

<sup>176</sup> General Assembly resolution 45/110, annex.

<sup>177</sup> General Assembly resolution 65/229, annex.

<sup>178</sup> Available at: <https://www.unodc.org/unodc/justice-and-prison-reform/index.html>.

<sup>179</sup> Rules 2.3 and 3.1.

<sup>180</sup> Rule 5.1.



community service orders; referral to an attendance centre; house arrest; any other mode of non-institutional treatment; and any combination of such measures.<sup>181</sup>

### Fines

Like other penalties for waste trafficking, maximum fines must adequately reflect the seriousness of the offences and be high enough to act as effective deterrents. In some circumstances, fines may be imposed in addition to a sentence of imprisonment. In determining the appropriate value for maximum fines for offences covered in the present guide, legislators should bear in mind that waste trafficking can be an extremely lucrative business for offenders. If fines are not high enough, there is a danger that they simply become incorporated into the operating costs of organized criminal groups without deterring their offending. The financial status and capacities of the offender should be taken into account in determining the appropriate sum of any fine. In relation to legal persons, the court or another competent authority may require access to accounts and other financial documents of the legal persons and, where appropriate, of related entities, to assess the offender's financial status.

In some cases, a fine alone will not serve as an effective deterrent without confiscation of the proceeds of crime. The confiscation of the proceeds of crimes and of property, equipment and other instrumentalities used in or destined for use in criminal offences is addressed in article 12 of the Organized Crime Convention.

Legislation should provide that, in sentencing an offender for waste trafficking or another offence covered by the present guide, priority is to be given to restitution or compensation to the victims of the offence. Fines of an amount that would undermine the ability of the defendant to make restitution or pay compensation to the victims should not be imposed.

States should also consider implementing measures to prevent the real value of fines being reduced over time by inflation. One approach could be to tether fine values to penalty units, which can then be adjusted in step with inflation.

### Community service orders

In some cases, community service orders may be an appropriate sentencing option. Community service orders have traditionally been given to natural persons convicted of crimes, but they may also be used for sentencing legal persons. Community service orders for legal persons may be particularly appropriate where the convicted organization “possesses knowledge, facilities or skills that uniquely qualify it” to repair damage,<sup>182</sup> although such orders may also be appropriate in other circumstances.

Community service orders bear some similarities to restitution and compensation. Under some legal systems, community service orders may differ from orders for restitution and compensation in that the latter can only be ordered for victims of the crime for which sentence is passed, whereas community service orders do not have such a limitation.<sup>183</sup> In other jurisdictions, the distinction between these types of orders may be less clear.

A community service order may be inappropriate where the defendant cannot be trusted to carry out the terms of the order. For example, where a defendant has a history of repeated violations of environmental laws or regulations, or otherwise evinces a disregard for compliance with environmental laws and regulations, there may be doubts as to the effectiveness of a community service order. More generally, to ensure that sanctions are effective, proportionate and dissuasive, it may also be appropriate for community service

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<sup>181</sup> Rule 8.2.

<sup>182</sup> United States Sentencing Commission, *Guidelines Manual 2021* (November 2021) §8B1.3.

<sup>183</sup> Kris Dighe, “Organization community service in environmental crimes cases”, *United States Attorneys’ Bulletin*, vol. 60, No. 4 (July 2012), p. 100.



orders to only be given in addition to other criminal sanctions, such as fines and imprisonment (including suspended sentences of imprisonment).

### EXAMPLE: UNITED STATES OF AMERICA

#### Community service for legal persons

In the United States of America, community service may be ordered as a discretionary condition of a sentence of probation.<sup>a</sup> A 2009 memorandum of the Environmental and Natural Resources Division of the United States Department of Justice provides guidance to prosecutors concerning the inclusion of community service orders in plea agreements.<sup>b</sup> This guidance includes the following:

- Appropriate regulatory and technical assistance should be obtained during the development of a community service requirement
- There must be a clear nexus between the community service and the offence for which it is imposed, including both a geographical nexus and an “environmental medium nexus”;
  - The geographical nexus requires that there be a clear connection between where the offence was committed or caused harm and where the community service is proposed
  - The environmental medium nexus requires that there be a clear connection between the medium to which the offence related (such as air, water or wildlife) and the community service proposed
- Community service should not amount to more than 25 per cent of the total value of the entire sanction package pursuant to a plea agreement, except under extraordinary circumstances
- Community service should not augment resources for an activity otherwise required of a federal agency
- Prosecutors and federal government agencies should not be involved in managing or controlling community service projects, but provision should be made for proper oversight to ensure that community service is properly carried out; and
- Prosecutors should ensure that a defendant does not obtain any unintended benefits as a result of the community service order. In particular, a defendant should not:
  - Receive credit for capital improvements or other changes already planned or already required to comply with relevant permits or regulations;
  - Be able to rely on work pursuant to the order to obtain tax credits or benefits; or
  - Be able to advertise the activities performed pursuant to the order to gain favourable publicity.

A community service order was part of the plea agreement in the case of *United States v. Princess Cruise Lines, Ltd.* In this case, the defendant company pleaded guilty to charges including conspiracy to knowingly discharge and dispose of oily bilge waters in the navigable waters of the United States, knowingly failing to maintain an accurate oil record book and to obstruction of the investigation of the United States Coast Guard. The defendant company entered into a plea agreement for a total monetary penalty of \$40 million, including a fine of \$30 million and the payment of \$10 million as organization community service. The organizational community service included a payment of \$7 million to the National Fish and Wildlife Foundation, a non-profit organization established by the United States Congress, the purposes of which included the administration of property to further the conservation and management of fish, wildlife, plants and other natural resources, as well as \$3 million to the South Florida National Parks Trust, a non-profit organization established to support four national parks in South Florida. The terms of probation also included that the defendant develop, adopt, establish, implement and fund environmental remedial measures set forth in an Environmental Compliance Plan.<sup>c</sup>

<sup>a</sup> United States Code, Title 18, sect. 3563 (b) (12).

<sup>b</sup> Memorandum to Environmental Crimes Section Attorneys from Assistant Attorney General, Ronald J. Tenpas, on guidance on restitution, community service, and other sentencing measures imposed in environmental crimes cases, dated 16 January 2009. See also Kris Dighe, “Organization community service in environmental crimes cases”, *United States Attorneys’ Bulletin*, vol. 60, No. 4 (July 2012), p. 100.

<sup>c</sup> For further information, see UNODC, “SHERLOC”, Case law database, *United States of America v. Princess Cruise Lines, Ltd.* Available at <https://sherloc.unodc.org>.

### Ancillary orders

Depending on the circumstances of the case, a sentence of imprisonment or a non-custodial alternative to imprisonment alone may be insufficient. It may be necessary for a court to make additional orders, sometimes known as “ancillary orders”. The term “ancillary order” refers, in some jurisdictions, to orders that are available to judges upon passing a conviction but which are not the primary punishment for the offender (such as a sentence of imprisonment, a fine or another non-custodial penalty).<sup>184</sup> In this sense, the orders are “ancillary” (or additional) to the main penalty. This is not to suggest that these orders are somehow not important or may not have serious consequences for the offender. On the contrary, orders for restitution or compensation, for example – discussed in this section – should be given priority over fines, which are discussed above. Moreover, orders disqualifying a natural or legal person from exercising an occupation, carrying out an activity or holding a permit or licence may be significant penalties for the offender in question.

The present section discusses several orders commonly classified as ancillary orders under domestic law that should be considered in developing legislation to prevent and combat waste trafficking. These include restitution and confiscation orders, orders for confiscation and disposal, and disqualification orders.

Readers should be aware that the discussion of orders in the present section is without prejudice to the classification of these orders under domestic law. What is considered an ancillary order and, conversely, what may be ordered as an independent sentencing option, will differ between jurisdictions. For example, in some jurisdictions, restitution or compensation orders or disqualification orders may be regarded as independent sentencing options under domestic law.

Additionally, while the measures discussed in this section are discussed in the context of penalties and sentencing, readers should also be aware that in some jurisdictions, a criminal conviction is not required to make an order for some of the measures discussed in this section. For example, in some jurisdictions, procedures for non-conviction-based confiscation and/or forfeiture (also known as “civil forfeiture” or “in rem forfeiture”) are possible.<sup>185</sup> Orders for restitution and compensation may also be made in some jurisdictions independent of a criminal conviction. States may consider, where appropriate, establishing procedures for such measures to be ordered in the absence of a criminal conviction.

### Restitution and compensation

As discussed below, article 25, paragraph 2, of the Organized Crime Convention requires that States parties establish appropriate procedures to provide access to restitution and compensation for the victims of offences covered by the Convention. While the Convention does not contain any further details on the types of procedures that may be appropriate for providing compensation and restitution, procedures allowing for the granting of restitution and compensation orders as ancillary orders to sentencing should be considered by States as a means of providing restitution and compensation to victims of waste trafficking.

Restitution and compensation are further considered under chapter 7 below, concerning the protection of and assistance to witnesses and victims. Chapter 7 contains a model provision enabling the use of restitution and compensation as ancillary sentencing orders.

<sup>184</sup> Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice*, 7th ed. (London, Bloomsbury Publishing, 2021), p. 348.

<sup>185</sup> For further information on non-conviction-based confiscation, see Theodore S. Greenberg and others, *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* (Washington, D.C., World Bank, 2009).

### Confiscation orders

In chapter 4 of the present guide, the issue of seizure and confiscation under the Organized Crime Convention was considered. It was noted that article 12, paragraph 1, of the Organized Crime Convention requires States parties to adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable the confiscation of both proceeds of crime derived from offences covered by the Convention and of property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention.

States should ensure that orders for the confiscation of such proceeds, property, equipment and other instrumentalities can be made as ancillary orders during sentencing for offences covered by this guide. Where this is not already adequately provided for under other laws, the matter should be addressed in legislation combating waste trafficking.

States parties to the Organized Crime Convention should also be aware of their obligations relating to international cooperation for the purpose of confiscation and for the disposal of confiscated proceeds of crime or property pursuant to articles 13 and 14 of the Convention.

### Disqualification orders, cancellation of permits and licences, and similar measures

Among the ancillary orders that may be appropriate for a court to order are those prohibiting a natural or legal person from holding a certain occupation or position or from carrying out certain activities. For example, it may be appropriate for a court to disqualify a natural person from acting as a company director for a specified period of time. It may also be appropriate for a court to order that a natural or legal person's permit or licence to carry out specified activities in relation to waste be cancelled and/or that that person be barred from applying for such a permit or licence for a specified period of time.

As with the other orders discussed in the present section, it may be appropriate for courts or competent authorities to issue disqualification orders, to cancel permits or licences and to bar a person from applying for a permit or licence, independently of any criminal proceedings against that person. Such orders could, for example, be made on the basis of breach of duties pertaining to company directors or breach of the conditions attaching to a permit or licence.

#### EXAMPLE: NETHERLANDS

##### District Court of Rotterdam, 15 March 2018, ECLI:NL:RBROT:2018:2108 ("Seatrade Case")

In this case, six companies in the Seatrade group and two of their directors were convicted of illegally transferring four ships from the European Union to other countries for scrapping. In addition to imposing fines of between €50,000 and €750,000 on the defendants, the two directors were banned from practising the profession of director, supervisory director, adviser or employee of a shipping company for a period of one year.<sup>a</sup>

<sup>a</sup> For further information, see UNODC, "SHERLOC", Case law database, Netherlands, Crimes that affect the environment, case No. NLDx007. Available at <https://sherloc.unodc.org>.

**EXAMPLE: NETHERLANDS****Criminal Code****Article 28**

1. The rights, from which the offender may be disqualified by judgment, in the cases prescribed by law, are:
  1. holding offices or certain offices;
  2. serving in the armed services;
  3. electing the members of general representative bodies and standing for election to these bodies;
  4. serving as a defence counsel or court-appointed administrator;
  5. practising certain professions.
2. Members of the judiciary who have been appointed either for life or for a definite term, or other civil servants who have been appointed for life, shall be disqualified from holding the office for which they are thus appointed, only in the cases and in the manner prescribed by law.
3. Disqualification from the right referred to in subsection (1)(3°) may be imposed only in the case of a sentence of at least one year's imprisonment.
4. The court may instruct a probation institution appointed by governmental decree to monitor the convicted person's compliance with the disqualification from holding office or from exercising certain professions.

*Sanctions for legal persons*

In the previous sections of the present guide, custodial and non-custodial penalties as well as ancillary orders were considered. Some of the sanctions considered in these sections, such as fines and ancillary orders, are applicable to natural and legal persons alike. Other sanctions, such as imprisonment, are only possible in relation to natural persons. Unlike a natural person, a company cannot be imprisoned. There are also sanctions that may only be ordered in relation to a legal person, such as an order for the legal person to be dissolved or wound up.

Model provision 24 sets out a non-exhaustive list of sanctions that may be imposed, individually or in combination, against legal persons found guilty of an offence. The types of sanctions listed in subparagraphs (a) to (n) range from monetary penalties, confiscation of proceeds of crime, adverse publicity, probation-style sanctions and disqualifications to the dissolution of the legal person.

**MODEL PROVISION 24: SANCTIONS FOR LEGAL PERSONS**

A legal person found guilty of an offence to which this [Act/Law/Chapter ...] applies shall be subject to one or more of the following sanctions:

- (a) A fine not exceeding:
  - (i) [maximum amount]; or
  - (ii) [x] times the total value of the benefit obtained or damage caused that is reasonably attributed to the offence; or
  - (iii) [If the court cannot determine the total value of the benefit or damage] [x] percent of the annual turnover of the legal person during the 12 months period prior to the commission of the offence;
- (b) Confiscation of proceeds of crime;
- (c) Order the legal person to publish the judgment by the court including, as appropriate, the particulars of the offence and the nature of any penalty imposed;
- (d) Order the legal person to do stated things or establish or carry out a stated project for the public benefit;
- (e) Order that the legal person be placed under judicial supervision for a maximum period of [x] years;
- (f) Subject the legal person to a review by an independent monitor appointed by the court for the purpose of reporting to the court on the legal person's efforts to implement a culture of lawfulness;
- (g) Prohibit the exercise, whether directly or indirectly, of one or more professional activities [permanently] [for a period not exceeding [x] years];
- (h) Order the cancellation of a [insert relevant terminology for permits, licences etc.] held by the legal person;
- (i) Order that the legal person be [temporarily] [permanently] disqualified from applying for a [insert relevant terminology for permits, licences etc.] to carry out certain activities;
- (j) Order the [temporary] [permanent] closure of the establishment, or one or more of the establishments, of the legal person that was used to commit the offences in question;
- (k) Order that the legal person be [temporarily] [permanently] disqualified from public bidding, from entitlement to public benefits or aid, [and/or] from participation in public procurement;
- (l) Disqualify the legal person [temporarily] [permanently] from the practice of other commercial activities [and/or] from the creation of another legal person;
- (m) If the activity of the legal person was entirely or predominantly used for the carrying out of criminal offences or if the legal person was created to commit an offence to which this [Act/Law/Chapter ...] applies, order that the legal person be dissolved; or
- (n) Further orders as the court considers just.



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# Chapter 7.

## PROTECTION AND ASSISTANCE

In developing and amending legislation to prevent and combat waste trafficking, it is critical that legislators address not only the criminalization, investigation and prosecution of waste trafficking, but also the protection of witnesses, victims and persons cooperating with the authority and the provision of assistance to victims.

### PROTECTION OF WITNESSES, VICTIMS AND PERSONS COOPERATING WITH THE AUTHORITIES

Articles 24 to 26 of the Organized Crime Convention address, among other things, the protection of witnesses, victims and persons cooperating with the authorities. Article 24, paragraph 1, of the Organized Crime Convention provides the following:

Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.

This obligation to protect also applies to victims, insofar as they are also witnesses,<sup>186</sup> and to persons cooperating with the authorities.<sup>187</sup> The Organized Crime Convention does not define the term “witness”, but it is suggested that a broad notion of witnesses be applied when establishing measures for the protection of witnesses to best achieve the protective aims of article 24.<sup>188</sup> In that regard, legislators may wish to make protective measures available not only to persons who have actually testified but also to persons cooperating with the authorities. The protection of witnesses should also include the protection of expert witnesses.<sup>189</sup>

Article 24, paragraph 2, of the Organized Crime Convention provides that the measures envisaged in article 24, paragraph 1, may include, among others, measures for the physical protection of witnesses (such as relocation and measures restricting the disclosure of their identity or whereabouts) and evidentiary rules to permit witness testimony to be given in a manner that ensures their safety (such as through the use of video

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<sup>186</sup> Organized Crime Convention, art. 24, para. 4.

<sup>187</sup> Ibid., art. 26, para. 4.

<sup>188</sup> UNODC, *Legislative Guide*, para. 409.

<sup>189</sup> Convention against Corruption, art. 32.

links). The purpose of the measures envisaged by article 24 is to ensure the protection and safety of witnesses. As regards victims that are also witnesses, the protective measures also aim at avoiding revictimization and secondary victimization in the course of judicial proceedings. States should also consider the introduction of appropriate protective measures not expressly mentioned in the Organized Crime Convention.

As regards victims, it should be noted that States parties are also required to establish and provide protective measures to victims that are not witnesses. Article 25, paragraph 1, of the Convention provides that “[e]ach State party shall take appropriate measures, within its means to provide...protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation”. The Organized Crime Convention does not define the term “victims”, but it is suggested that this term be interpreted in the light of the larger body of international law on the rights of victims of crime. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines “victims” as follows:

Persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

A similar definition is included in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>190</sup>

Model provision 25 addresses the protection of witnesses and persons cooperating with law enforcement authorities. It also covers victims insofar as they are witnesses. Model provision 26 addresses the protection of victims, regardless of whether they are also witnesses. The terms of these model provisions are similar to each other, but they have been drafted as separate provisions in recognition of the special needs of victims and the special measures and programmes that they may have access to under domestic law.

Model provision 26 contains a definition of “victims” for the purposes of these model legislative provisions, adapted from the definitions included in the international instruments referred to above. The definition in model provision 26 covers persons who have suffered harm through an offence to which these model legislative provisions apply. States should also consider the extent to which domestic legislation adequately protects the rights of victims of labour abuses by waste traffickers, whether or not these persons have suffered harm through an offence to which these model legislative provisions apply.

For further information regarding the protection of witnesses, refer to UNODC publication *Good Practice for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime*.

<sup>190</sup> General Assembly resolution 60/147, annex, paras. 8–9.



### MODEL PROVISION 25. PROTECTION OF WITNESSES AND PERSONS COOPERATING WITH LAW ENFORCEMENT AUTHORITIES

1. This article shall apply to a witness, including a victim insofar as they are also a witness, and a person cooperating with law enforcement authorities.
2. For the purposes of this [Act/Law/Chapter...]:
  - (a) “witness” shall include any person that has given, has agreed to give or is required to give evidence or make a statement in investigation, prosecution or adjudication proceedings of an offence to which this [Act/Chapter/Law ...] applies.
  - (b) “person cooperating with law enforcement authorities” shall include a person that is cooperating with law enforcement authorities or another authority involved in the investigation or prosecution of an offence to which this [Act/Law/Chapter...] applies to:
    - (i) Supply information useful for investigative and evidentiary purposes on such matters as:
      - a. The identity, location or activities of a person that has committed or may commit an offence to which this [Act/Law/Chapter...] applies;
      - b. The identity, nature, composition, structure, location or activities of an organized criminal group or their links with other organized criminal groups; or
      - c. Offences that a person or an organized criminal group has committed or may commit; or
    - (ii) Provide factual, concrete help that may contribute to depriving an organized criminal group of their resources or of the proceeds of crime.
3. The [insert relevant authorities] shall take appropriate measures to ensure that a person to which this article applies is provided adequate protection if that person’s safety is at risk. This includes measures to protect that person from retaliation, intimidation or harm by suspects, offenders and their associates.
4. The [insert relevant authorities] shall, as appropriate, further take the measures specified in paragraph 3 in relation to the person’s relatives [and domestic or de facto partner, ...].
5. A person to which this article applies shall have access to any existing protection measures or programmes under [specify relevant Act/provisions/...].

### MODEL PROVISION 26. PROTECTION OF VICTIMS

1. For the purposes of this [Act/Law/Chapter...], “victims” shall mean persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through an offence to which this [Act/Law/Chapter...] applies.
2. The [insert relevant authorities] shall take appropriate measures to ensure that victims are provided adequate protection if their safety is at risk. This includes measures to protect victims from retaliation, intimidation or harm by suspects, offenders and their associates.
3. The [insert relevant authorities] shall, as appropriate, further take the measures specified in paragraph 2 in relation to victim’s relatives [and domestic or de facto partner, ...].
4. Victims shall have access to any existing protection measures or programmes under [specify relevant Act/provisions/...].

## Protection of witnesses during judicial proceedings

Participating as a witness in judicial proceedings can be intimidating in any case, but particularly so in proceedings against organized criminal groups, their participants and associates. The importance of protecting and supporting witnesses during the trial process is expressly recognized in article 24, paragraph 2, of the Organized Crime Convention. This can be accomplished in various ways, including through legislative provisions enabling witnesses to participate in judicial proceedings in a manner that takes into account their specific needs, supports the truth-seeking function of the courts and, importantly, does not compromise the rights of the defendant, which are expressly recognized in this provision of the Convention. Whatever procedural measures are used, due consideration should be given to balancing the legitimate expectation of physical safety of the witness against the defendant's right to a fair trial, which, in some jurisdictions, includes constitutional guarantees to the right of confrontation.

Model provision 27 identifies a number of areas in which legislation could be pursued; it is likely, however, that such areas will require more detailed legislative language, and national drafters need to consider and comply with any pre-existing domestic law relating to criminal procedure.

Procedural or in-court protections are actions aimed primarily at diminishing the fear of intimidation, of victim witnesses in particular, that can be taken by the court *sua sponte* (on its own motion) or at the request of the prosecutor or investigating officials. Measures to reduce fear through the avoidance of face-to-face confrontation with the defendant or the public may include the use of pretrial statements in lieu of in-court testimony; having the witness testify behind a screen or two-way mirror; and having the defendant view the witness's testimony via a video link in an adjacent room or having the witness provide testimony via audiovisual links.

### MODEL PROVISION 27: PROTECTION OF WITNESSES IN JUDICIAL PROCEEDINGS

A court hearing matters relating to an offence to which this [Act/Chapter/Law...] applies may, without prejudice to the rights of the defendant, make orders to protect a witness before, during and after the proceedings, including orders to:

- (a) Conduct proceedings in camera;
- (b) Permit evidence to be given from behind a screen or other barrier;
- (c) Permit evidence to be given via video link or other remote means;
- (d) Suppress the identity of the witness;
- (e) Distort the voice or disguise the face of the witness;
- (f) Permit the use of translators and interpreters;
- (g) Permit support persons of the witness to attend;
- (h) Provide professional support to the witness;
- (i) Seal records of the trial; and
- (j) Make any other arrangements the court considers appropriate in the circumstances for the purpose of witness protection.

## Protection of whistle-blowers and other reporting persons

Beyond the protection of persons who partake in judicial proceedings or collaborate with law enforcement, States should also consider other forms of protection for reporting persons. For the purposes of the present guide, "reporting persons" is understood as including any person who reports in good faith and on reasonable grounds to relevant authorities any facts concerning offences covered by this guide.<sup>191</sup> The Council of Europe

<sup>191</sup> Adapted from the Convention against Corruption, art. 33.

defines “whistle-blower” as “any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector”.<sup>192</sup>

Reporting persons often take on high personal risks when they collect, report or otherwise disclose instances of irregularity or crime. They may be dismissed from their employment, sued for breach of confidentiality, blacklisted, threatened, assaulted or, in some cases, killed. Protecting reporting persons from harm and retaliation is thus important to promote and facilitate the exposing of waste trafficking, improve its detection, enhance transparency and accountability and reduce the capacity of wrongdoers to rely on the silence of those around them. In turn, the absence of effective protection may mean that reporting persons are more vulnerable to intimidation and retaliation and may thus be less likely to disclose information to entities or individuals who are able to effect action.

The protection of reporting persons is not specifically addressed by the Organized Crime Convention, but article 33 of the Convention against Corruption requires each State party to consider incorporating appropriate measures to provide protection against unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the Convention. It is suggested that States consider introducing such measures in relation to all offences covered by the present guide, whether or not they involve corruption. This is also consistent with provisions of international environmental agreements concerning access to information, public participation in decision-making and access to justice in environmental matters. For example, article 3, paragraph 8, of the Aarhus Convention provides that “[e]ach Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement”. Moreover, article 9, paragraph 3, of the Escazú Agreement provides that:

Each Party shall ...take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.

In addition to whistle-blower protection legislation, it is also important that organizations involved in the waste management industry establish open and inclusive internal reporting channels for reporting suspected cases of waste trafficking.<sup>193</sup>

Whistle-blower protection legislation and policies often include a requirement of “good faith”, “reasonable grounds” or a “reasonable belief of wrongdoing”, such that disclosures shall be protected if they are made with a reasonable belief that the information is true at the time it is disclosed.<sup>194</sup> This also means that disclosures that are knowingly false should not be protected.

The kind of protection a person might require depends on many factors, such as the type of information reported, the position of the person and the level of threat a person faces due to the reporting. The protection measures should ensure that the reporting person is protected from all forms of retaliation, threat, disadvantage and discrimination linked to or resulting from the disclosure. Of importance in this respect are measures such as career protection, the provision of psychological support, institutional recognition of reporting, transfer within the organization and relocation to a different organization. The confidentiality of the reporting person needs to be preserved, and his or her identity may only be disclosed with the whistle-blower’s explicit consent.

Further information on the protection of reporting persons can be found in the UNODC publication *Resource Guide on Good Practices in the Protection of Reporting*.<sup>195</sup>

<sup>192</sup> Council of Europe, recommendation CM/Rec (2014)7 of the Committee of Ministers to member States on the protection of whistle-blowers, adopted by the Committee on 30 April 2014.

<sup>193</sup> See also UNODC, *Speak up for Health! Guidelines to Enable Whistle-Blower Protection in the Health-Care Sector* (Vienna, 2021), pp. 17–23.

<sup>194</sup> *Ibid.*, pp. 14–15.

<sup>195</sup> See also UNODC, *Speak up for Health!* and Marie Terracol, *A Best Practice Guide for Whistleblowing Legislation* (Berlin, Transparency International, 2018).

### EXAMPLE: REPUBLIC OF KOREA

#### Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission, 2008

##### Article 64 – Confidentiality of Whistle-blowers

(1) No person shall inform, disclose, or report to others, personal information on a whistle-blower or any facts from which the identity of a whistle-blower can be inferred, while knowing that he/she is the whistle-blower prescribed in this Act:

Provided, That this shall not apply where the whistle-blower under this Act consents thereto.

[...]

##### Article 64-2 – Measures to Protect Personal Safety

(1) A whistle-blower may request the Commission to take measures to protect personal safety, if such act of whistleblowing endangers his/her physical safety, or that of his/her relatives or cohabitants. [...]

[...]

##### Article 68 – Monetary Awards and Rewards

(1) If any whistleblowing on corruption to the Commission or a public agency has caused property gains of public institutions, prevents damage to such property, or enhances the public interest, the Commission may recommend that the relevant whistle-blower be granted a monetary award under the provisions of the Awards and Decorations Act and may grant a monetary reward, as prescribed by Presidential Decree: Provided, That if whistleblowing on corruption was filed with a public agency, this applies only when the concerned public agency recommends or requests provision of monetary reward.

(2) If a whistle-blower due to whistleblowing has contributed directly to recovery or increase of revenues or cutdown of costs to a public institution, or the legal relationship thereon is confirmed, the relevant whistle-blower may apply to the Commission for payment of monetary rewards therefor.

[...]

### EXAMPLE: EUROPEAN UNION

#### Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law

##### Article 2 – Material scope

1. This Directive lays down common minimum standards for the protection of persons reporting the following breaches of Union law:

(a) breaches falling within the scope of the Union acts set out in the Annex that concern the following areas:

- (i) public procurement;
- (ii) financial services, products and markets, and prevention of money laundering and terrorist financing;
- (iii) product safety and compliance;
- (iv) transport safety;

- (v) protection of the environment;
- (vi) radiation protection and nuclear safety;
- (vii) food and feed safety, animal health and welfare;
- (viii) public health;
- (ix) consumer protection;
- (x) protection of privacy and personal data, and security of network and information systems;

[...]

#### Article 6 – Conditions for protection of reporting persons

1. Reporting persons shall qualify for protection under this Directive provided that:
  - (a) they had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive; and
  - (b) they reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15.

[...]

## ASSISTANCE TO VICTIMS

In addition to requiring the protection of victims, article 25 of the Organized Crime Convention also requires that States take appropriate measures to provide assistance to victims of offences covered by the Convention.<sup>196</sup> Article 25, paragraphs 2 and 3, further require States parties to establish appropriate procedures to provide access to compensation and restitution for victims and to enable the views and concerns of victims to be presented during criminal proceedings. The present section further addresses each of these assistance measures and assistance measures not expressly mentioned in article 25.

None of the measures for assistance to victims considered in this section nor any other assistance measures should be conditioned upon victims' cooperation with law enforcement or other authorities.

### Restitution and compensation

Article 25, paragraph 2, of the Organized Crime Convention requires that States parties establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by the Convention. The Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights has also recommended that States establish domestic compensation funds to finance “the restoration of the environment and compensation of victims when the authors of offences are unknown, cannot be found or declare bankruptcy”.<sup>197</sup>

While domestic descriptions and definitions of restitution may vary, for the purposes of the present guide, restitution is understood to refer to measures that seek to restore a victim or victims to the situation they were in before the crime occurred, whereas compensation is understood to refer to payment to victims for damage, harm, injury or loss.

Model provision 28 is intended to provide guidance on the matters that States may wish to consider when developing laws on both restitution and compensation for victims of waste trafficking. Provisions on ensuring access to both restitution and compensation need to be included only if appropriate procedures for

<sup>196</sup> Organized Crime Convention, art. 25, para. 1.

<sup>197</sup> E/CN.4/2004/46, para. 114.

ensuring compensation and restitution in proceedings covered by the present guide are not already available under domestic laws.

Paragraph 1 of model provision 28 provides that courts may make an order for restitution or compensation when sentencing an accused person independently of a request being made by the prosecutor. While this model provision does not require the court to consider or order restitution or compensation, such approaches are possible. The model proposed in model provision 28 ensures that victims are not required to seek compensation through other legal proceedings, such as civil proceedings, which may not be viable for many victims.

Paragraphs 2 and 3 of model provision 28 state the different aims of restitution and compensation and provide non-exhaustive lists of the content of the court's restitution and compensation orders. These provisions reflect the spirit and content of paragraphs 8 to 13 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Paragraph 4 of model provision 28 seeks to ensure that the courts give due consideration to the means and ability of the convicted person when making a restitution or compensation order. Where the means of the offender are limited, priority should be given to the payment of compensation over payment of any other financial penalty. If the offender is unable to pay, paragraph 6 provides that a victim shall be eligible for State-funded compensation.

The model for restitution and compensation established in model provision 28 is contingent upon the criminal conviction of the offender. It should be noted, however, that conviction-based restitution and compensation is not the only model available. In some States, victims may also be able to obtain restitution or compensation independently of an offender being convicted. It may be recalled that the obligation contained in article 25, paragraph 2, of the Organized Crime Convention is a general obligation to establish appropriate procedures to provide access to restitution and compensation for victims of offences covered by the Convention. In establishing legislation to prevent and combat waste trafficking, States should consider whether the victims of waste trafficking are afforded effective access to restitution and compensation in cases where the offenders cannot be identified, located, extradited or prosecuted.

A related issue is the relationship between orders for restitution and compensation for victims and orders to clean up waste and remediate environmental harm. Like restitution, remediation seeks to make restoration for harm. While the use of terminology may vary between jurisdictions, for the purpose of the present guide, remediation is understood as acts to repair or mitigate harm that has been, may or will be caused to an environment, habitat or location, whereas restitution is understood as acts to repair harm to a victim. It is important that competent courts or environmental authorities have the power to make orders to clean up waste and remediate environmental harm, whether or not an offender has been convicted and whether or not harm has yet been caused. It may also be appropriate for courts to have the power to make ancillary orders for clean-up or remediation at the time of sentencing. States should also establish appropriate procedures to ensure the clean-up of waste and the remediation of environmental harm in cases where an offender cannot be identified or cannot effectively be ordered to clean up the waste and remediate the environmental harm because the offender is insolvent or is not located in the jurisdiction, or for any other reason. While clean-up and remediation is an important topic for legislators, it is not further addressed in the present legislative guide.

**MODEL PROVISION 28: RESTITUTION AND COMPENSATION OF VICTIMS**

1. Where an offender is convicted of an offence to which this [Act/Chapter/Law...] applies, the court may order the offender to pay restitution or compensation to the victims, in addition to or in lieu of any other punishment ordered by the court.
2. The aim of an order for restitution shall be the restoration of the victim to the position they were in prior to the commission of the offence. An order for restitution may include one or more of the following forms of restitution:
  - (a) The return to the victim of property taken by the convicted person;
  - (b) The return to the victim of the value of the wrongful gain taken by the convicted person; or
  - (c) Habitat restoration for damages caused to the environment.
3. The aim of an order for compensation shall be to compensate the victim for any injury, loss or damage caused by the offender. This may include payment for or towards:
  - (a) Costs of medical, physical, psychological or psychiatric treatment incurred or to be incurred by the victim;
  - (b) Costs of physical and occupational therapy or rehabilitation incurred or to be incurred by the victim;
  - (c) Costs of necessary transportation, temporary childcare, temporary housing or the movement of the victim to a place of temporary safe residence;
  - (d) Lost income and due wages incurred by the victim according to national law and regulations regarding wages;
  - (e) Legal fees and other costs or expenses incurred by the victim, including costs related to the participation of the victim in the criminal investigation and prosecution process;
  - (f) Physical or psychological injury, emotional distress, or pain and suffering endured by the victim as a result of the crime committed against him or her; and
  - (g) Any other costs or losses incurred by the victim as a direct result of the conduct of the offender and that the court considers to be reasonable in the circumstances.
4. When making an order for restitution or compensation, the court shall take into account the convicted person's means and ability to pay restitution or compensation and shall give priority to a restitution or compensation order over a fine.
5. The immigration status or the return of the victim to his or her country of nationality or habitual residence or other absence of the victim from the jurisdiction shall not prevent the payment of compensation and/or restitution under this article.
6. If the restitution or compensation cannot be paid by the sentenced person, the victim shall be eligible for compensation from [insert name of national compensation fund].
7. Where the convicted person is a public official whose actions constituting an offence to which this [Act/Chapter/Law...] applies were carried out under actual or apparent State authority, the court may order the State to pay restitution or compensation to the victim [in accordance with [insert relevant national legislation]]. An order for State compensation under this article may include payment for or towards any or all of the items under paragraph 3 subparagraphs (a)–(g).

## Access to and participation in criminal and other proceedings

Article 25, paragraph 3, of the Organized Crime Convention provides the following:

Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

The appropriate stages and means for the views and concerns of victims to be presented and considered may vary between legal systems, but, in general, may include the possibility of appearing as a witness during trial, providing a victim impact statement for consideration during sentencing, or other forms of participation during trial, sentencing or other stages of criminal proceedings. In introducing or amending legislation preventing and combating waste trafficking, States should ensure that appropriate measures for access to and participation in relevant proceedings are extended to the victims of waste trafficking. For further information on victims' rights to access and participation, see the UNODC issue paper entitled *The United Nations Convention against Transnational Organized Crime and International Human Rights Law*.<sup>198</sup>

## Other assistance measures

In addition to the measures expressly referred to in article 25, States legislating to provide assistance to the victims of waste trafficking should also have regard to the broader body of international law concerning assistance to victims. In this regard, it is relevant to note that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power envisages the following measures:

14. Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means.
15. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them.
16. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

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<sup>198</sup> Forthcoming.



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# Chapter 8.

## NATIONAL COORDINATION

In chapter 1 of the present guide, the national institutional framework was discussed as a general consideration that States must consider when drafting or amending legislation to combat waste trafficking.<sup>199</sup> Relevant responsibilities and powers were also discussed in chapter 1, as were typical institutions involved in preventing and combating waste trafficking. A closely related issue, set aside for discussion in the present chapter, is effectively ensuring that the various institutions working in this area effectively coordinate and cooperate with each other.

Effective coordination and cooperation is needed for national institutions to avoid duplication of efforts, to avoid inconsistencies and contradictions in approaches and to ensure that all institutions benefit from the knowledge, expertise and resources within each institution. For example, where there are multiple agencies that could potentially be responsible for investigating waste trafficking and related offences, States should ensure that there is a clear and appropriate division of responsibilities between them. Division of responsibilities could be arranged according to the stage of the investigation, the seriousness of the offence or the involvement of certain other crimes.

The designation of competencies among relevant institutions is a matter for each State to determine for itself. Accordingly, the present guide does not provide a model provision on the mandates of relevant agencies. Instead, model provision 29 provides for the establishment of a body responsible for national coordination. This provision is intended primarily for States that do not already have appropriate mechanisms for national coordination with respect to waste trafficking. The provision is not intended for use where the establishment of an additional national coordinating body would be redundant or would duplicate existing structures or coordination efforts.

Whatever division of competencies a State adopts, the State should ensure that the respective mandates of each agency involved in preventing, detecting, investigating, prosecuting and adjudicating waste offences are clearly set out in legislation. This is imperative not only for each agency to effectively carry out these functions, but also to ensure the legality and admissibility of evidence obtained by such agencies in subsequent waste trafficking prosecutions.

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<sup>199</sup> See “National institutional framework”, above.

**MODEL PROVISION 29: NATIONAL COORDINATING BODY**

- (1) The [insert relevant Minister] shall establish a national coordinating committee to be comprised of officials from [insert relevant agencies] and representatives from [insert other relevant organizations and non-governmental organizations and/or service providers].
- (2) The national coordinating committee shall develop, coordinate, monitor and evaluate the national response to preventing all forms of organized crime, including through data collection, analysis and exchange, the development of prevention programmes, training and facilitate inter-agency and multidisciplinary cooperation between the various government agencies, international organizations, and relevant non-governmental organizations.
- (3) The national coordinating committee will report annually to [the relevant Minister/Parliament] on its activities.

States should also consider the use of legislative provisions or memorandums of understanding between relevant authorities as tools to effectively delineate the responsibilities of various authorities and establish mechanisms for effective cooperation. Memorandums of understanding could address matters that include the following:

- The purpose of the memorandum of understanding
- Information about the parties to the memorandum of understanding and the persons or agencies responsible for overseeing its implementation
- The functions of each institution in relation to waste transport controls
- The responsibilities and powers applicable to each institution
- A statement of how each institution will exercise those responsibilities and powers
- Agreed joint working relationships
- Information exchange procedures
- Points of contact
- A process for review of the memorandum of understanding, including regular review meetings at a high level
- The period of validity for the memorandum of understanding<sup>200</sup>

<sup>200</sup> Institute for European Environmental Policy, Bio Intelligence Service and Ecologic, *Study on Inspection Requirements for Waste Shipments* (2008), p. 118.

**EXAMPLE: INTERPOL****National environmental security task forces**

The Environmental Security Sub-Directorate of INTERPOL recommends that member countries establish national environmental security task forces. National environmental security task forces are designed to address organized environmental crime that is transnational in nature through national and international collaboration and coordination. National environmental security task forces bring together all agencies responsible for national environmental law enforcement, including police, customs, environmental agencies, prosecution and the judiciary. States may also wish to include representatives of relevant international and regional organizations, civil society, research institutions and the private sector.

A publication by the INTERPOL Environmental Security Sub-Directorate provides a guide on establishing a national environmental security task force and addresses matters such as who should participate, how to host a national environmental security seminar, how to form a national environmental security steering committee and how to set up and structure a national environmental security task force.<sup>a</sup>

<sup>a</sup> INTERPOL, Environmental Security Sub-directorate, *National Environmental Security Task Force: Bringing Compliance and Enforcement Agencies Together to Maintain Environmental Security* (Lyon, France, 2014).

**EXAMPLE: FRANCE****Central Office Against Environment and Public Health Crimes (OCLAESP)**

The French inter-ministerial office OCLAESP, created in 2004, is one of the central offices of the Sub-Directorate of the Judicial Police within the Gendarmerie. It is responsible for leading and coordinating investigations in the fields of the environment and public health under the direction and supervision of prosecutors or judges, assisting investigators and other officials in the conduct of investigations, monitoring and analysing crimes against the environment and public health and their perpetrators, participating in training and capacity-building at the national and international levels and handling requests for international cooperation.<sup>a</sup>

<sup>a</sup> For further information, see [www.gendarmerie.interieur.gouv.fr](http://www.gendarmerie.interieur.gouv.fr).



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# CONCLUDING REMARKS

The purpose of the present guide is to support States in enacting or strengthening domestic legislation to prevent and combat waste trafficking through, in particular, the implementation of the Organized Crime Convention. To that end, the guide outlined a range of issues that States will need to consider when enacting or strengthening such legislation and provided model legislative provisions and relevant national and regional examples for consideration during that process.

At the outset, a number of general considerations for States were outlined, including the international legal framework, not only with reference to international environmental law and the international legal framework to combat serious crime but also with reference to international human rights law. In chapter 1, consideration was also given to the relevance of domestic waste management legislation to legislation addressing waste trafficking and the importance of an effective national institutional framework to implement the legislation envisaged in the guide.

In subsequent chapters of the guide, consideration was given to topics, issues and provisions that should be addressed in waste trafficking legislation or considered in the process of its development. In chapter 2, some general provisions were outlined that are useful for waste trafficking legislation: the principles of environmental law, definitions, waste schedules and provisions concerning jurisdiction.

In chapter 3, the important topics of offences and liability were considered, providing an introduction to the elements of criminal offences, before moving to a discussion on waste-specific offences, such as waste trafficking and document fraud in connection with waste management, as well as the ancillary offences that support these criminal activities. Further consideration was given to related issues such as secondary liability, liability for attempt, liability of legal persons and defences.

In chapter 4, issues relating to the investigation of waste trafficking were examined, including model legislative provisions for seizure and several special investigative techniques, as well as a discussion of issues concerning the collection, handling and admissibility of evidence. Chapter 5 was devoted to addressing several forms of international cooperation relevant to investigating, prosecuting and adjudicating cases of waste trafficking: mutual legal assistance, extradition, law enforcement cooperation and joint investigations.

In chapter 6, consideration turned to issues relating to the prosecution of waste trafficking offences and penalties and to sentencing for such offences. In the section on prosecution, consideration was given to prosecutorial discretion and guidelines used in prosecution and enforcement, pretrial detention, alternatives to trial and limitation periods. In the section on penalties and sentencing, the fundamental considerations underlying

sentencing for waste trafficking offences were addressed, as were some of the types of sanctions that may be appropriate for natural and legal persons found guilty of offences relating to waste trafficking, including several types of ancillary orders.

In chapter 7, topics were addressed relating to the protection of and assistance to witnesses, victims, persons collaborating with authorities and whistle-blowers. Finally, in chapter 8, the issue of national coordination was examined and a model legislative provision for a national coordinating body was included.

In sum, in the present guide, an attempt has been made to provide readers with a broad (but not exhaustive) overview of the issues relevant to developing legislation to prevent and combat waste trafficking from a criminal justice perspective and the basic tools for legislators to enact or strengthen such legislation.

In summarizing what has been covered by the present guide, it is also useful to identify what has not been covered. In particular, it should be recalled that the primary target audience of the guide is policymakers, legislators and legislative drafters. Accordingly, while the guide has also touched upon a number of issues relating to the investigation, prosecution and adjudication of waste trafficking offences, its content is not a comprehensive examination of the issues relevant to investigators, prosecutors and judges.

In addition, it must be stressed that the approach taken in the present guide to preventing and combating waste trafficking is from a criminal justice perspective, in particular through the implementation of the Organized Crime Convention. However, it is critical for policymakers and legislators to understand that waste trafficking cannot be solved through criminal justice approaches alone. Rather, a holistic policy response that combines criminal justice approaches with broader regulatory approaches to waste management is needed. Moreover, the concept of waste trafficking, as discussed in the guide, is inherently linked to legislative or regulatory provisions relating to domestic waste management frameworks. One example is in the determination of the occasions in which certain acts are contrary to a legal duty or a condition of a permit or licence. In other words, the criminal justice approach offered by the legislative guide is also dependent on the effective frameworks for waste management.

Further resources relevant to preventing and combating waste trafficking are set out below.

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# FURTHER RESOURCES

## Resources concerning waste trafficking

- UNEP, *Guide for the Development of National Legal Frameworks to Implement the Basel Convention* (2019)
- UNEP, *Manual for the Implementation of the Basel Convention* (2016)
- UNEP, *Guidance on the Implementation of the Basel Convention Provisions Dealing with Illegal Traffic (paragraphs 2, 3 and 4 of article 9)* (2019)
- UNEP, *Instruction Manual on the Prosecution of Illegal Traffic of Hazardous Wastes or Other Wastes* (2012)
- UNEP, *Basel Convention Training Manual on Illegal Traffic for Customs and Enforcement Agencies* (2006)
- Conference of the Parties to the Basel Convention, decision VI/16, *Guidance Elements for Detection, Prevention and Control of Illegal Traffic in Hazardous Wastes*
- WasteForce, *Guidance for Prosecutors of Waste Crime* (2020)

## UNODC publications

- UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (2017)
- UNODC, *Model Legislative Provisions against Organized Crime*, 2nd ed. (2022)
- UNODC, *The United Nations Convention against Transnational Organized Crime and International Human Rights Law* (2022)
- UNODC, *Manual on Mutual Legal Assistance and Extradition* (2012)
- UNODC, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (2012)







# UNODC

United Nations Office on Drugs and Crime