

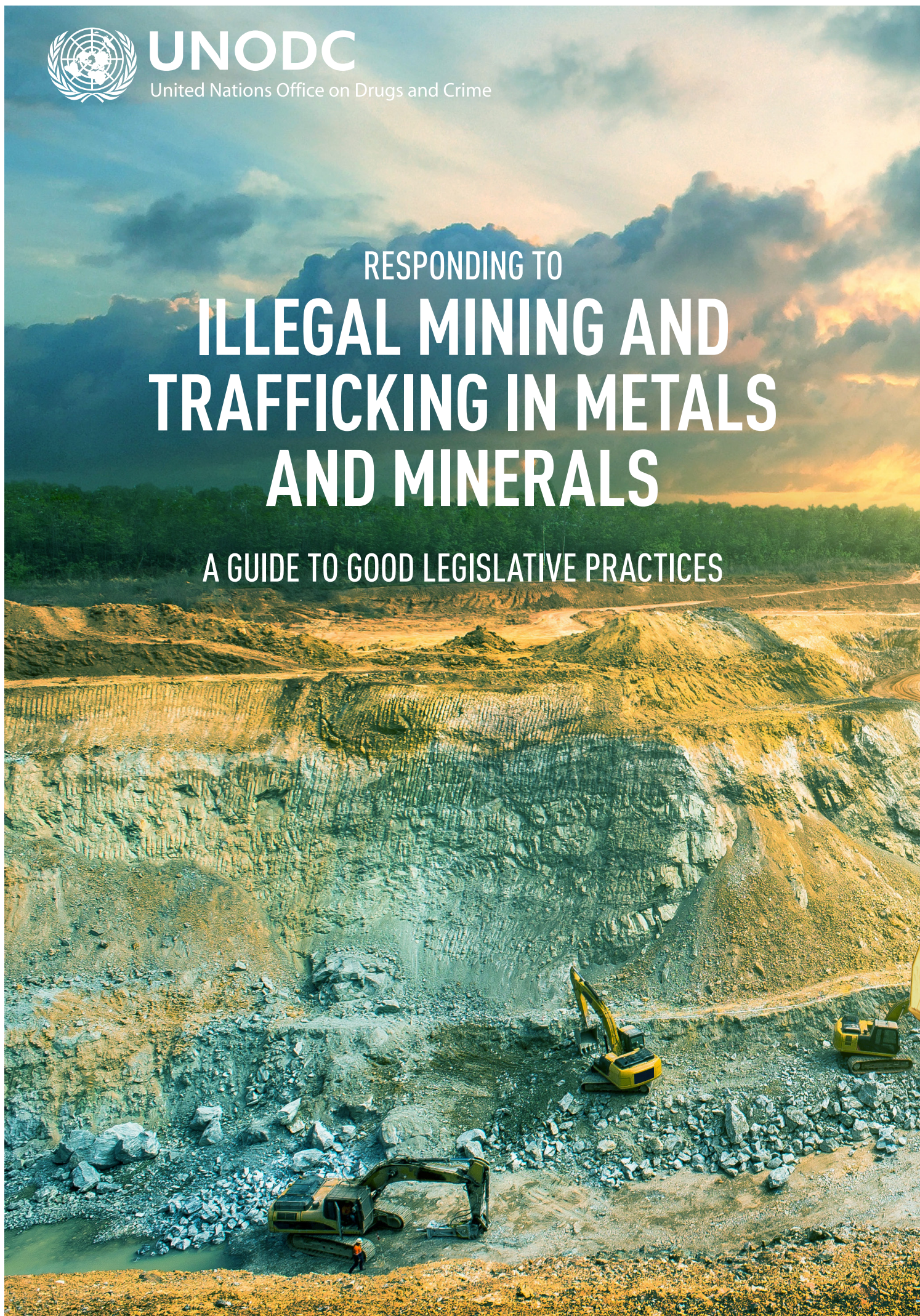


UNODC

United Nations Office on Drugs and Crime

RESPONDING TO
**ILLEGAL MINING AND
TRAFFICKING IN METALS
AND MINERALS**

A GUIDE TO GOOD LEGISLATIVE PRACTICES



UNITED NATIONS OFFICE ON DRUGS AND CRIME

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INTRODUCTION

BACKGROUND ON CRIMES THAT AFFECT THE ENVIRONMENT

Crimes that affect the environment cover a broad range of illegal activities that cause harm to the natural world, as a whole or in a particular geographical area.¹ They include wildlife crime, illicit trafficking in timber and timber products, crimes in the fisheries sector, trafficking in waste, including hazardous substances, and the subject of the present guide: illegal mining and trafficking in metals and minerals. Some ramifications of these crimes are irreversible and can be severe enough to destroy entire ecosystems and communities, undercutting legal and ecologically viable operations and diminishing future resource alternatives. They can also deprive local communities of vital resources and limit their access to legitimate income through traditional production activity, thus perpetuating impoverishment and armed violence.² The various negative consequences of crimes that affect the environment hinder the achievement of the Sustainable Development Goals, including Goal 3 (healthy lives and well-being for all at all ages), Goal 6 (availability and sustainable management of water and sanitation for all), Goal 12 (sustainable consumption and production patterns), Goal 15 (sustainable use of terrestrial ecosystems, sustainable management of forests and combating of desertification, land degradation and biodiversity loss) and Goal 16 (peaceful and inclusive societies for sustainable development, access to justice for all and effective, accountable and inclusive institutions at all levels).³

There are many drivers of crimes that affect the environment. Among the most notable are attractive financial revenues and high demand for the goods and services generated through those crimes. Poverty situations are also regarded as a prominent enabler of crimes that affect the environment because economic hardship facilitates the recruitment of low-level offenders into organized criminal groups.⁴ People may be pushed into crimes that affect the environment by their income needs, especially in places where employment alternatives are not available.

¹ United Nations Environment Programme (UNEP), *The State of Knowledge of Crimes that Have Serious Impacts on the Environment* (Nairobi, 2018), p. XVI.

² UNEP, *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment* (Nairobi, 2009); United Nations Interagency Framework Team for Preventive Action, *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflict: Land and Conflict* (Nairobi, 2012).

³ For more information on the Sustainable Development Goals, see <https://sdgs.un.org/goals>.

⁴ International Criminal Police Organization (INTERPOL) and UNEP, *Strategic Report: Environment, Peace and Security – A Convergence of Threats* (2016).

In its resolution 10/6, entitled “Preventing and combating crimes that affect the environment falling within the scope of the United Nations Convention against Transnational Organized Crime”, adopted in 2020, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime noted with concern that crimes that affect the environment had become some of the most lucrative transnational criminal activities and were closely interlinked with different forms of crime and corruption. Against that background, the Conference of the Parties reaffirmed 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 regard⁵

and asserted its resolve to protect the victims, expressing its deep concern about

all those killed, injured, threatened or exploited by organized criminal groups involved in or benefiting from crimes that affect the environment and about those whose living environment, safety, health or livelihoods are endangered or put at risk by those crimes.⁶

The Conference of the Parties called upon States parties to the Organized Crime Convention

to make crimes that affect the environment, in appropriate cases, serious crimes ... as defined in article 2, paragraph (b), of the Convention, in order to ensure that, where the offence is transnational in nature and involves an organized criminal group, effective international cooperation can be afforded under the Convention.⁷

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 States 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.⁸

Those recommendations of the Conference of the Parties to the Organized Crime Convention are aligned with resolution 8/12 of the Conference of the States Parties to the United Nations Convention against Corruption, entitled “Preventing and combating corruption as it relates to crimes that have an impact on the environment”, in which the Conference of the States Parties noted with concern the role that corruption can play in crimes that have an impact on the environment and 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. The Conference urged States parties to the Convention against Corruption to

implement the Convention in accordance with their domestic legislation and to ensure respect for its provisions, with a view to making best use of the Convention to prevent and combat corruption as it relates to crimes that have an impact on the environment and the recovery and return of proceeds of crimes that have an impact on the environment, in accordance with the Convention.⁹

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.¹⁰ It underscores the commitment of Member States to the adoption of effective measures to prevent and combat crimes that affect the environment, such as

⁵ CTOC/COP/2020/10, resolution 10/6, para. 1.

⁶ Ibid., tenth preambular paragraph.

⁷ Ibid., para. 4.

⁸ Ibid., para. 15.

⁹ CAC/COSP/2019/17, resolution 8/12, para. 3.

¹⁰ General Assembly resolution 76/181, annex.

illicit trafficking in wildlife, including, inter alia, flora and fauna as protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, in timber and timber products, in hazardous wastes and other wastes and in precious metals, stones and other minerals, as well as, inter alia, poaching, 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.¹¹

Most recently, in its resolution 76/185, adopted on 16 December 2021, the General Assembly called for a “balanced, integrated, comprehensive and multidisciplinary approach and response to address the complex and multifaceted challenges related to crimes that affect the environment”, acknowledging a need for long-term, comprehensive and sustainable development-oriented measures.

ILLEGAL MINING AND TRAFFICKING IN METALS AND MINERALS AS CRIMES THAT AFFECT THE ENVIRONMENT

Illegal mining and trafficking in metals and minerals fall into the conceptual range of crimes that affect the environment as discussed above. Although there is no universally accepted definition of illegal mining and the exact extent of the crime is difficult to estimate, the term refers to mining activity that is: (a) carried out by a person, natural or legal, or a group of people without complying with the requirements of applicable laws or administrative regulations that govern these activities; or (b) carried out in areas where the exercise of such activities is prohibited or using prohibited equipment, devices or chemicals.

Illegal mining occurs both on the surface and underground, in closed mines and abandoned mines, and sometimes even at operating mines. It is intertwined with trespassing on active or decommissioned mining sites, and it can take place in protected areas, in natural parks, at historical sites and on indigenous lands.¹² In some countries, when trespassing at operational mines, illegal miners are frequently heavily armed and set up ambushes and traps for employees, security personnel and competing organized criminal groups of illegal miners.¹³

Illegal mining causes a range of harmful impacts on the environment, habitats, human and animal life, indigenous communities and their livelihoods, public health, economies, development and the rule of law.¹⁴ Illegal miners often use environmentally dangerous equipment, devices and chemicals, not only putting their own health at risk but also causing severe environmental harm.

In addition to causing irreversible environmental damage, illegal mining has been cited as a contributing factor that escalates and sustains violent conflict, with the sale of illegally extracted minerals being an important source of revenue for militias, warlords,¹⁵ organized criminal groups¹⁶ and, in some cases, terrorist

¹¹ Ibid., para. 87.

¹² Patricia Quijano Vallejos and others, *Undermining Rights: Indigenous Lands and Mining in the Amazon* (Washington, D.C., World Resources Institute, 2020).

¹³ See www.mineralscouncil.org.za/work/illegal-mining.

¹⁴ Carmen Heck and Jaime Tranca, eds., *La realidad de la minería ilegal en países amazónicos* (Lima, Sociedad Peruana de Derecho Ambiental, 2014); Nino Schön-Blume and others, *The Impact of Gold: Sustainability Aspects in the Gold Supply-Chains and Switzerland's Role as a Gold Hub* (Zürich, Switzerland, World Wildlife Fund, 2021), pp. 25–39, and Yuliya Zabyelina and Daan van Uhm, eds., *Illegal Mining: Organized Crime, Corruption, and Ecocide in a Resource-Scarce World* (Cham, Switzerland, Palgrave Macmillan, 2020), pp. 14–17.

¹⁵ General Assembly resolution 61/28. See also Kimberley L. Thachuk, “Warlords and their black holes: the plunder of mining regions in Afghanistan and the Central African Republic by organized crime”, in *Illegal Mining*, Zabyelina and van Uhm, eds., pp. 205–237.

¹⁶ United Nations Interregional Crime and Justice Research Institute, *Strengthening the Security and Integrity of the Precious Metals Supply Chain: Technical Report* (Torino, Italy, 2016) and Daan van Uhm, “The diversification of organized crime into gold mining: domination, crime convergence, and ecocide in Darién, Colombia”, in *Illegal Mining*, Zabyelina and van Uhm, eds., pp. 05–146.

organizations.¹⁷ Criminal organizations also reap profits by illegally controlling access to mines, extorting payments for mining operations or owning beneficial or other interests in upstream companies.¹⁸

The connection between violent conflict and mineral resources is best illustrated using the example of conflict minerals, in particular diamonds.¹⁹ It is widely known that the civil wars in Africa in the 1990s and early 2000s were largely fought by insurgent groups that purchased firearms and ammunition with proceeds from the illegal exploitation of diamond mining fields and from illicit trade in diamonds.²⁰ Conflict minerals have fuelled and continue to perpetuate armed violence.

Illegal mining and trafficking in metals and minerals have emerged as a concern for the international community because of the involvement of organized criminal groups in those activities. By tapping into illegal mining and trafficking in metals and minerals, organized criminal groups gain access to hard-to-detect money-laundering techniques and the legitimate supply chains of mining businesses, which they abuse to their advantage.²¹ In its resolution 2019/23, the Economic and Social Council recalled its resolution 2013/38, in which it had underlined the need to develop comprehensive, multifaceted and coherent strategies and measures to counter trafficking in precious metals, and invited Member States to take appropriate measures to prevent and combat trafficking in precious metals by organized criminal groups, including through international cooperation provided for in the Organized Crime Convention and the Convention against Corruption. In 2020, in its resolution 75/196, the General Assembly underscored the substantial increase in the volume and range of criminal offences related to trafficking in precious metals and minerals, acknowledging their potential use as a source of funding for organized crime and terrorism. It called for appropriate and effective measures to prevent and combat trafficking in precious metals by organized criminal groups, including by adopting necessary legislation.

These and other high-level discussions clearly underscore the importance of taking appropriate and effective measures to prevent and combat illegal mining and trafficking in metals and minerals, and that those crimes have made their way onto the international agenda as an issue that requires the international community's most urgent attention.

PURPOSE, SCOPE AND TARGET AUDIENCE

Inconsistent and often inadequate legal frameworks, along with fragmented enforcement, are among the major obstacles to curtailing illegal mining and trafficking in metals and minerals. Some national laws have gaps in the criminalization of such illegal mining and trafficking, contain insufficient penalties for those crimes and do not reflect international recommendations and best practices.

The purpose of the present guide is to support Governments in adopting or improving national legislation related to the prevention, investigation and prosecution of illegal mining and trafficking in metals and minerals, through the legislative framework offered by the Organized Crime Convention. Accordingly, the primary target audience of the guide consists of policymakers, legislators and legislative drafters. It may also be of relevance to other stakeholders, such as those representing civil society organizations, academic institutions and the private sector.

¹⁷ Organization of American States (OAS), Department against Transnational Organized Crime, Secretariat for Multidimensional Security, *On the Trail of Illicit Gold Proceeds: Strengthening the Fight against Illegal Mining Finances – Colombia's Case* (Washington, D.C., 2022); and William A. Byrd and Javed Noorani, "Industrial-scale looting of Afghanistan's mineral resources", Special Report, No. 404 (Washington, D.C., United States Institute of Peace, 2014).

¹⁸ OAS, Department against Transnational Organized Crime, Secretariat for Multidimensional Security, *On the Trail of Illicit Gold Proceeds: Strengthening the Fight against Illegal Mining Finances – Peru's Case* (Washington, D.C., 2021), p. 5.

¹⁹ Philippe Le Billon, *Wars of Plunder: Conflicts, Profits and the Politics of Resources* (Oxford, Oxford University Press, 2014).

²⁰ See General Assembly resolution 55/56.

²¹ United Nations Interregional Crime and Justice Research Institute, *Strengthening the Security and Integrity of the Precious Metals Supply Chain*.

While the guide is focused on the implementation of the Organized Crime Convention with a view to countering illegal mining and trafficking in metals and minerals, it also takes into account other relevant international instruments, standards and documents. This is done to provide a holistic picture of the landscape of good practices and recommendations.

It should be noted that the guide approaches illegal mining and trafficking in metals and minerals from a criminal justice perspective. Broader topics such as the formalization of artisanal and small-scale mining and the development of rural mining communities are addressed only briefly. The extraction of hydrocarbons and related activities are excluded from the guide because they are usually regulated by a distinct set of laws that regulate the oil and gas industry.

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 illegal mining and trafficking in metals and minerals. Because national legislation must be tailored to each State's legal tradition and its particular social, economic, cultural and geographical context, the guide does not provide a "one size fits all" model law that is ready to be introduced into any and all domestic legal systems. Rather, States are advised to adapt the model provisions and recommendations provided in the guide to fit local conditions, constitutional principles, legal culture and structures, and existing regulatory and enforcement frameworks. Governments are advised to consult with all relevant stakeholders as they engage in the process of adopting or amending relevant legislation.

Throughout the model legislative provisions contained in the present guide, square brackets are used to indicate particular words or phrases that will need to be adapted to the specific State in question. For example, the guide uses such 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. Square brackets are also used to emphasize situations in which alternative wordings are provided.

Prior to the presentation of specific model legislative provisions for combating illegal mining and trafficking in metals and minerals, relevant aspects of international law with a focus on illegal mining are covered in chapter 1, entitled "General considerations", which also includes some overarching issues that should be considered by States prior to adopting or amending relevant laws.

Model legislative provisions are set out in boxes. Sample excerpts from national laws and regulations are also included in order to provide specific examples of relevant legislative approaches and practices. Care has been taken to ensure equitable geographical representation of domestic legislative examples and to reflect the diversity of legal traditions among States. Additional information, prevention points and case examples are set out in boxes that provide further insights and information about selected topics of interest.

The guide is divided into seven chapters. Chapter 1 sets out the context relating to international law and domestic legislation on mining. Chapters 2 to 7 provide guidance and, where relevant, offer model legislative provisions on which legislative drafters can build in amending or developing legislation to prevent and combat illegal mining and trafficking in metals and minerals. The guide closes with a few brief remarks on the anticipated contribution of the guide and its potential value to legislative drafters and other stakeholders.

Chapter 1.

GENERAL CONSIDERATIONS

INTERNATIONAL LAW

The present chapter addresses some broad legal and normative frameworks that States should take into consideration when adopting or amending national legislation on illegal mining and trafficking in metals and minerals. The obligations pertaining to States under international law necessitate that, in developing legislation to combat illegal mining and trafficking in metals and minerals, they take due account of the applicable international legal framework, including international conventions, customary international law and general principles of law.²²

Organized Crime Convention

Given the known involvement of organized criminal groups and the transnational nature of illegal mining and trafficking in metals and minerals, the present guide mainly draws upon the Organized Crime Convention and the second edition of the *Model Legislative Provisions against Organized Crime*, developed by UNODC and published in 2021, to facilitate and help systematize the provision of legislative assistance and improve the review and amendment of existing legislation and the adoption of new legislation by Member States themselves.

The Organized Crime Convention is the main international instrument in the fight 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 embraced treaties, with 190 parties at the time of writing. The Convention reflects the recognition by Member States of the severity of the problems caused by the activities of organized criminal groups and the need to promote and strengthen international cooperation to address those problems. States that ratify the Convention commit themselves to taking a series of measures against transnational organized crime, including: (a) establishing certain criminal offences in national law; (b) supporting extradition, mutual legal assistance and law enforcement cooperation; and (c) providing training and technical assistance to develop or improve the capacities required for national authorities.

²² The obligations of States under international law will necessarily differ depending, inter alia, on the international and regional treaties to which they are parties. Accordingly, in assessing the applicable international legal framework, States should consider, in addition to the guidance contained in the present chapter, their specific treaty obligations.

The scope of application of the Organized Crime Convention is defined in article 3. Under that provision, the measures contained in the Convention apply, unless provided otherwise, to the prevention, investigation, prosecution and adjudication of offences established in accordance with the criminalization provisions in the Convention and “serious crime”, where such offences are transnational in nature and involve an organized criminal group.²³

The Convention provides further detail as to the meanings of “organized criminal group” and “serious crime”, and when an offence is 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.²⁴

The term “structured group” is to be used in a broad sense, so as to include groups with a hierarchical or other elaborate structure, as well as non-hierarchical groups in which the roles of the members of the group are not formally specified. Under article 2 (c), a “structured group” is defined as

a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.²⁵

The concept of “serious crime” was discussed at length during the negotiation of the Convention. It was eventually agreed to include it and to define it as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.²⁶ That definition makes the Convention sufficiently flexible to apply to a broad range of offences.

The Convention is legally binding and obliges States parties to the Convention to criminalize the following four offences:

- (a) Participation in an organized criminal group (art. 5);
- (b) Money-laundering (art. 6);
- (c) Corruption (art. 8);
- (d) Obstruction of justice (art. 23).

The Convention sets out when an offence will be considered transnational in nature for the purpose of the application of the Convention.²⁷ The transnational element is defined in article 3 (2), which provides that an offence is transnational when it is:

- (a) Committed in more than one State;
- (b) Committed in only one State but substantially prepared, planned, directed or controlled in another;
- (c) Committed in one State with the involvement of an organized criminal group that engages in criminal activities in multiple States; or
- (d) Committed in one State but has substantial effects in another State.

Although the Organized Crime Convention explicitly deals with transnational organized crime, it also requires each State party to criminalize certain conduct even if there is no transnational element or organized criminal group involved. Pursuant to article 34 (2), the offences criminalized in accordance with articles 5, 6, 8 and 23

²³ Organized Crime Convention, art. 3, para. 1.

²⁴ Ibid., art. 2 (a).

²⁵ Ibid., art. 2 (c).

²⁶ Ibid., art. 2 (b).

²⁷ Ibid., art. 3, para. 2.

are to be established in the domestic law of each State party independently of the transnational nature or the involvement of an organized criminal group, except with respect to the offence of participation in an organized criminal group in article 5. In other words, criminalization must apply equally to domestic crimes and to transnational crimes carried out by an organized criminal group or an individual alone.

The Organized Crime Convention covers three types of corruption offences in the public sector, namely, active bribery (i.e. the giving of bribes), passive bribery (i.e. the acceptance of bribes) and participation as an accomplice to bribery.²⁸ In addition to those mandatory offences, States are also required to consider criminalizing other forms of corruption, including bribery of foreign officials. The Convention also requires the introduction of legislative and other measures designed to prevent, detect and punish corrupt practices and enhance accountability. Those offences are expanded and supplemented in the Convention against Corruption, a legally binding, universal anti-corruption instrument.

International environmental law

International environmental law encompasses customary norms and legally binding international agreements that cover a wide range of environment-related issue areas, including terrestrial, marine and atmospheric pollution and wildlife and biodiversity protection. It places environmental issues at the front of international concerns, consolidating State responses to environmental degradation and harm.²⁹

The United Nations Conference on the Human Environment, held in Stockholm in June 1972,³⁰ provided the groundwork for international environmental law. It was the first international meeting dedicated exclusively to discussing global environmental challenges. The Conference culminated with the adoption of a declaration of 26 environmental and development principles, known as the Stockholm Declaration, which laid the foundation for the international norms regulating the relationship between humans, other species on Earth and the ecosystem.

The United Nations Conference on Environment and Development, also known as the Earth Summit, was held in Rio de Janeiro, Brazil, in 1992, on the occasion of the twentieth anniversary of the Stockholm conference. The Earth Summit highlighted how different social, economic and environmental factors are interdependent and evolve together. One of its main achievements was the adoption of a comprehensive blueprint for international action on environmental and development issues which became known as the Rio Declaration on Environment and Development.³¹

In this context, it is also worth noting the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998, also known as the Aarhus Convention. That instrument establishes a number of rights of the public (individuals and their representative associations) with regard to the environment. For instance, it puts principle 10 of the Rio Declaration into practice by establishing the right of everyone to receive environmental information that is held by public authorities (i.e. access to environmental information) and establishes the right to participate in environmental decision-making (i.e. public participation in environmental decision-making) and the right to review procedures to challenge public decisions that have been made without respecting access to information or public participation rights.

As a result of these and other underlying multilateral environmental agreements, a set of principles has emerged in international environmental law that States should duly take into account when developing and amending legislation against illegal mining and trafficking in metals and minerals (see table below).

²⁸ Ibid., art. 8.

²⁹ Richard J. Lazarus, *The Making of Environmental Law* (Chicago, University of Chicago Press, 2008) and Thomas F.P. Sullivan, ed., *Environmental Law Handbook*, 21st ed. (Lanham, Maryland, United States, Government Institutes, 2011).

³⁰ Further information about the Stockholm conference is available at www.un.org/en/conferences/environment/stockholm1972.

³¹ *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

- | | |
|---|---|
| <ul style="list-style-type: none"> • Principle of sovereignty and responsibility | <p>Countries have the right to use their own natural resources in accordance with their own environmental and development policies, but that sovereign right is limited and conditioned by their responsibility to ensure that no harm to the environment of other States or areas outside of their national jurisdiction is caused^a</p> |
| <ul style="list-style-type: none"> • Principle of common but differentiated responsibility (and respective capabilities) | <p>States have a shared responsibility to protect the environment but differentiated responsibilities depending on their socioeconomic situations and their historical contributions to global environmental degradation. Developed States are generally expected to bear a greater environmental responsibility in view of the higher pressure that their societies place on the environment^b</p> |
| <ul style="list-style-type: none"> • “Polluter pays” principle | <p>Those who produce pollution should bear the costs of managing it in order to prevent damage to human health or the environment^c</p> |
| <ul style="list-style-type: none"> • Precautionary principle | <p>Where there are threats of serious or irreversible damage, a lack of full scientific certainty is not a reason for postponing cost-effective measures to prevent environmental degradation^d</p> |
| <ul style="list-style-type: none"> • Principle of cooperation | <p>Governments are required to take account of the interests and well-being of neighbouring States and of the world as a whole and to cooperate in a “spirit of global partnership” to conserve, protect and restore the environment^e</p> |
| <ul style="list-style-type: none"> • Principle of sustainable development | <p>Economic development is planned on the basis of the sustainable use of resources and the preservation of the environment for future generations^f</p> |
| <ul style="list-style-type: none"> • Principle of public participation | <p>Environmental issues are best handled with the participation of all concerned stakeholders and at all relevant levels^g</p> |

^a Stockholm Declaration, principle 21, and Rio Declaration, principle 2.

^b Rio Declaration, principle 7; also mentioned in the United Nations Framework Convention on Climate Change, art. 3, para. 1, and art. 4, para. 1.

^c Rio Declaration, principle 16.

^d Risk assessment, risk management and risk communication are all part of the precautionary principle. This principle is expressed in the Rio Declaration, principle 15, which places a general obligation on States to prevent environmental problems and requires them to take action in situations of uncertainty, lack of knowledge, and risk. This principle was also adopted in the United Nations Framework Convention on Climate Change, art. 3, para. 3.

^e Rio Declaration, principles 7, 14, 18–19 and 27.

^f The origins of the principle of sustainable development go back to the Stockholm Declaration, in which principle 13 promotes the balance between environmental preservation and economic development. It is also incorporated throughout the Rio Declaration. For instance, principle 1 places all human beings at the centre of concerns for sustainable development. Principle 3 promotes the right to development that equitably meets the developmental and environmental needs of present and future generations. In principle 5, States are called upon to eradicate poverty as an indispensable requirement for sustainable development. Principle 24 recognizes warfare as inherently destructive of sustainable development.

^g Rio Declaration, principle 10.

NATIONAL EXAMPLE

SOUTH AFRICA: CONSTITUTION OF 1996, WITH AMENDMENTS THROUGH 2012

24. Environment

Everyone has the right—

- (a) To an environment that is not harmful to their health or well-being; and
- (b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) Prevent pollution and ecological degradation;
 - (ii) Promote conservation; and
 - (iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

NATIONAL EXAMPLE

COLOMBIA: CONSTITUTION OF 1991, WITH AMENDMENTS THROUGH 2015

Article 79. Every individual has the right to enjoy a healthy environment. An Act shall guarantee the community's participation in the decisions that may affect it. It is the duty of the State to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance and to foster education for the achievement of these ends.

International legal instruments on waste management, water pollution, nature conservation and biodiversity

While few specific references to mining appear in international law, there are various instruments in international environmental law that are relevant to the environmental regulation of the mining industry. Those instruments include treaties on waste management, water pollution, nature conservation and biodiversity.

An international treaty that is directly relevant to the mining industry is the Minamata Convention on Mercury of 2013. The Convention promotes the reduction and progressive elimination of anthropogenic mercury releases, owing to their significant negative impacts on human health and the environment. It directly addresses mercury pollution caused by artisanal and small-scale gold mining in article 7, which requires States parties where mercury is used to take efforts to minimize and, where possible, eliminate the use of mercury. Because the artisanal and small-scale gold mining sector is inextricably linked to economic development and poverty challenges, the Convention provides for flexible, country-specific solutions that are implemented through national action plans. Although each country's approach is different in this context,³² annex C to the Convention lists the mandatory items to be included in each national action plan.³³

³² A list of national action plans is available at www.mercuryconvention.org/en/parties/national-action-plans.

³³ See also UNEP, Global Mercury Partnership and Minamata Convention on Mercury, *Guidance Document: Developing a National Action Plan to Reduce and, Where Feasible, Eliminate Mercury Use in Artisanal and Small-Scale Gold Mining* (2017).

One of the environmental problems associated with illegal mining is waste, which makes the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal of 1989 relevant to illegal mining.³⁴ The Convention, which enjoys near-universal adherence, makes hazardous waste transfers subject to protective requirements like notification, prior informed consent and the availability of adequate disposal facilities for the environmentally sound management of hazardous and other wastes.

As mining has an impact on fresh water and may cause water contamination from discharged wastewater and tailings, as well as from waste rock leaching, international and regional treaties related to the conservation of fresh water, international watercourses and water bodies should also be mentioned. One such international instrument is the Convention on the Protection and Use of Transboundary Watercourses and International Lakes,³⁵ which promotes cooperation towards the protection and sustainable management of transboundary surface and ground waters.

Illegal mining and trafficking in metals and minerals undermine environmental protection and impede the preservation, management and restoration of animal habitats, plants and forests. There are various international legal instruments aimed at protecting wildlife and flora, as well as natural habitats and ecosystems, from the effects of human exploitation, including mining. The Convention on Wetlands of International Importance especially as Waterfowl Habitat, also called the Ramsar Convention, provides the framework for international cooperation in the conservation and use of wetland biomes. States parties to the Ramsar Convention are required to list and protect at least one wetland site of international importance, include wetland conservation in national land-use planning and promote the wise use and management of wetlands.

The negative impact of extractive operations on World Heritage sites is becoming an increasing issue, in particular in natural and mixed areas.^{36,37} Mineral prospecting and extraction can cause severe damage to protected areas if undertaken within or in the proximity of such sites. In this context, the Convention for the Protection of the World Cultural and Natural Heritage of 1972 is relevant for the protection of cultural heritage sites from illegal mining. The Convention defines the kinds of natural and cultural sites that can be considered for inclusion in the World Heritage List.³⁸ It also sets out the duties of States in identifying potential sites and their role in protecting and preserving those areas.

The preservation provisions of the Convention on Biological Diversity have the most immediate relevance to illegal mining. Illegal mining can negatively affect biodiversity, for example by causing declines in rare and threatened species and the destruction of ecosystems because of mercury bioaccumulation.³⁹ It is also the leading cause of deforestation in highly biodiverse regions in Latin America.⁴⁰ The Convention promotes “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources”⁴¹ and could be a starting point for mitigating the negative impact of illegal mining on biodiversity.⁴²

³⁴ Uyanga Gankhuyag and Fabrice Gregoire, *Managing Mining for Sustainable Development: A Sourcebook* (Bangkok, United Nations Development Programme and United Nations Environment Programme, 2018), p. 47.

³⁵ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, as amended, along with decision VI/3 clarifying the accession procedure. Adopted in 1992, entered into force in 1996.

³⁶ Natural heritage sites provide, inter alia, examples of ecological and biological evolutionary processes, contain natural phenomena that are rare, unique and of exceptional beauty, or provide a habitat for rare or endangered animals or plants, or are sites of exceptional biodiversity. Mixed heritage sites contain elements of both natural and cultural significance.

³⁷ Stephen D. Turner, *World Heritage Sites and the Extractive Industries* (Gland, Switzerland, International Union for Conservation of Nature, 2012).

³⁸ Available at <https://whc.unesco.org/en/list/>.

³⁹ Eric D. Harlow and others, *Small-Scale and Artisanal Mining Impacts on Biodiversity in Latin America* (Washington, D.C., United States Agency for International Development, 2019), p. vii.

⁴⁰ Ibid.

⁴¹ Convention on Biological Diversity, art. 1.

⁴² International Council on Mining and Minerals, *Good Practice Guidance for Mining and Biodiversity* (London, 2006).

International human rights law

International human rights law is another area of international law that States should consider and comply with when adopting or amending legislation against illegal mining and trafficking in metals and minerals.

When States become parties to international human rights treaties, they undertake certain duties and obligations under international law and commit to respecting, protecting and fulfilling human rights.⁴³

International human rights conventions, declarations and resolutions have reaffirmed the core principles of human rights first stated in the Universal Declaration of Human Rights. Those principles include universality, interdependence and indivisibility, equality and non-discrimination. Human rights are universal because everyone is born with and has the same rights, regardless of where they reside or their gender, race, religion or cultural or ethnic heritage. They are inalienable because they can never be taken away. Since all rights – political, civil, social, cultural and economic – are equal in significance and cannot be completely enjoyed without the others, they are indivisible. Human rights apply to everyone, without discrimination, and all people have the right to have a say in choices that impact their lives.

HUMAN RIGHTS PRINCIPLES^a

- | | |
|--|---|
| • Universality and inalienability | All people everywhere in the world are entitled to human rights |
| • Indivisibility | Human rights are inherent to the dignity of every person and have equal status. Denial of one right invariably impedes the enjoyment of other rights |
| • Interdependence and interrelatedness | The fulfilment of one right often depends, wholly or in part, on the fulfilment of others |
| • Equality and non-discrimination | All individuals are equal as human beings. No one, therefore, should suffer discrimination based on race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinions, national, social or geographical origin, disability, property, birth or other status |
| • Accountability and rule of law | States are duty bearers and have to comply with the legal norms and standards enshrined in international human rights instruments |

^a For a summary of these principles, see United Nations Population Fund, “Human rights principles”. Available at www.unfpa.org/resources/human-rights-principles.

Alongside the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights form what is often called the International Bill of Human Rights, which advances fundamental freedoms and protects the basic human rights of all people.

⁴³ The “duty to respect” means that States refrain from interfering with or restricting the enjoyment of human rights; the “duty to protect” requires States to safeguard persons and groups against human rights violations; and the “duty to fulfil” means that States take positive action to promote the enjoyment of human rights (Office of the United Nations High Commissioner for Human Rights (OHCHR), Instruments and mechanisms, “International human rights law”. Available at www.ohchr.org/; and Maximilian Spohr, *Human Rights Risks in Mining: A Baseline Study* (n.p., Max Planck Foundation for International Peace and the Rule of Law, 2016), pp. 13–15.

CORE INTERNATIONAL HUMAN RIGHTS TREATIES

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and 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 Disappearance

The special procedures of the Human Rights Council can offer legal avenues to practitioners working on cases related to illegal mining and trafficking in metals and minerals. There are three main procedures for bringing complaints of violations before the human rights treaty bodies: (a) individual communications; (b) State-to-State complaints; and (c) inquiries. Regarding individual communications, treaty bodies may accept individual complaints of human rights violations under specific conditions. Concerning State-to-State complaints, a number of treaties include provisions enabling a State to complain about alleged violations perpetrated by another State.⁴⁴

Human rights affected by illegal mining

The present section explains the broad impact of illegal mining and trafficking in metals and minerals on human rights and examines the links between those activities and the core international human rights instruments. Where applicable, other instruments of international law are also mentioned.

Illegal mining has far-reaching human rights consequences when it restricts access to clean water and food and threatens the general health and well-being of individuals. Water can be contaminated with mercury or other toxic chemicals, as well as mining tailings and waste. Mining activities may also result in the displacement of people from agricultural land, thus undermining their food security.

The right to clean water is acknowledged in several international human rights instruments. It was formally recognized as an essential component of human rights in General Assembly resolution 64/292 in 2010, and it was declared a human right by the Human Rights Council in its resolution 48/13 in 2021. Although article 11 (1) of the International Covenant on Economic, Social and Cultural Rights⁴⁵ does not explicitly address the right to water, the treaty lists the rights that are vital for maintaining adequate standards of living, which indirectly include water. Standards of living related to food, water and housing are also mentioned in article 12 (1) of the Covenant. That provision addresses the right to health, reaffirming the detrimental impact of contaminated water and poor sanitation on human well-being.

⁴⁴ Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted by the General Assembly in its resolution 66/138 of 19 December 2011. Entered into force on 14 April 2014. For instance, article 12 of the Optional Protocol sets out a procedure for the relevant committee to consider complaints between States on failure to observe provisions included in the Convention. See also United Nations Office on Drugs and Crime (UNODC), Issue Paper: The United Nations Convention against Transnational Organized Crime and International Human Rights Law (Vienna, 2022).

⁴⁵ See also Committee on Economic, Social and Cultural Rights, general comment No. 15 (2002) on the right to water (arts. 11–12 of the International Covenant on Economic, Social and Cultural Rights).

The rights to work, to receive fair pay and to work in favourable conditions are also relevant in this context. The Universal Declaration of Human Rights is straightforward in that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work.”⁴⁶ The first of the specific rights established by the International Covenant on Economic, Social and Cultural Rights is the right to work, which includes the right of everyone to the opportunity to gain a living by work.⁴⁷ The human right to work and receive wages that contribute to an adequate standard of living applies to all, including undocumented migrants. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990 was a major step forward in identifying and attempting to protect the human rights of migrants linked to their vulnerable status and regardless of their legal status. In some national contexts, illegal miners are often undocumented migrants from neighbouring countries.⁴⁸ They often have no protection or safety and are vulnerable to abuse, poverty and discrimination.⁴⁹

Labour practices in illegal mining are frequently associated with poor working conditions. Miners put their safety and health at risk to make a living and provide for their families. Children have also been reported to work in hazardous conditions in illegal mining.⁵⁰ Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights recognize the importance of safe work environments and conditions that are conducive to human well-being. Under those provisions, States are obliged to maintain favourable working conditions, protect the rights of workers and prevent third parties from enabling unsafe work conditions.

Other relevant human rights are linked to trafficking in persons. It is widely known that forced labour camps and sex trafficking rings may be rampant in and around illegal mining sites.⁵¹ International human rights law recognizes that certain groups, such as women and children, require special protection. For instance, the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly in 1979, imposes obligations on States parties to prevent and address trafficking in women and girls and provide support and protection to those affected. Article 6 provides that “States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women”.

As regards children’s rights, article 10 (3) of the International Covenant on Economic, Social and Cultural Rights stipulates that “special measures of protection and assistance should be taken on behalf of all children and young persons” and that “children and young persons should be protected from economic and social exploitation” and from “employment in work harmful to their morals or health or dangerous to life”. The Convention on the Rights of the Child also addresses child labour in article 32. It places specific requirements on States parties, making them responsible for taking measures against child labour. The Convention, through articles 11, 19, 20, 24, 27, 32–36 and 39, requires States parties to take action to prevent the illicit transfer and non-return of children, the abuse of children and any form of exploitation and trafficking, with special attention to the protection of children without families.

Indigenous peoples are among the most vulnerable groups when it comes to the negative effects of illegal mining, which has an adverse impact on the enjoyment of the individual and collective rights of indigenous peoples, for example owing to the destruction of their lands (e.g. through mercury poisoning, deforestation

⁴⁶ Art. 23, paras. 1–2.

⁴⁷ Art. 6, para. 1.

⁴⁸ According to Minerals Council South Africa, 70 per cent of all arrested illegal miners in South Africa are undocumented foreign nationals, predominantly from Lesotho.

⁴⁹ Mylène Coderre-Proulx, Bonnie Campbell and Issiaka Mandé, *International Migrant Workers in the Mining Sector* (Geneva, International Labour Organization, 2016).

⁵⁰ See, for example, Juliane Kippenberg, *A Poisonous Mix: Child Labor, Mercury, and Artisanal Gold Mining in Mali* (New York, Human Rights Watch, 2011) and Child Labour Platform and International Labour Organization, “Child labour in mining and global supply chains” (Geneva, 2019).

⁵¹ See, for example, Verité, “The nexus of illegal gold mining supply chains: lessons from Latin America” (Washington, D.C., 2016) and Human Rights Watch, “The hidden cost of jewelry: human rights in supply chains and the responsibility of jewelry companies” (New York, 2018) and A/HRC/44/54.

and displacement) or violent attacks by illegal miners.⁵² The United Nations Declaration on the Rights of Indigenous Peoples⁵³ states that

States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.⁵⁴

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.⁵⁵

The Declaration calls upon States to ensure that indigenous communities are protected from violence and that they can exercise the right to free, prior and informed consent⁵⁶ with respect to their participation in mining policy and decision-making processes. Article 19 explicitly provides that

States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

In a forerunner to the Declaration, the Indigenous and Tribal Peoples Convention, 1989 (No. 169), “recognizing the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live”, States parties are obliged to take “coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity”. The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights also articulate the importance of self-determination of all peoples in article 1 of both instruments, which for many indigenous peoples would mean the control of natural resources located on indigenous lands.

Ultimately, the human right to development, enshrined in the Declaration on the Right to Development,⁵⁷ guarantees the right of public participation for all peoples, making them “entitled to participate in, contribute to, and enjoy economic, social, cultural and political development”⁵⁸ The human right to development also infers the full realization of the right of peoples to self-determination, which includes the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.⁵⁹ That fundamental and inalienable right is designed to harmonize economic betterment and environmental, cultural and social protection for the current and succeeding generations, defining humans as the central subject of development and an active participant and beneficiary of development from natural wealth and resources.⁶⁰

NOTA BENE

A comprehensive examination of legislative issues relating to human rights in the mining sector would be beyond the scope of the present guide. For pertinent information, please refer to the United Nations Development Programme publication *Extracting Good Practices: A Guide for Governments and Partners to Integrate Environment and Human Rights into the Governance of the Mining Sector*.

⁵² OHCHR, “Brazil: UN experts deplore attacks by illegal miners on indigenous peoples; alarmed by mercury levels”, 2 June 2021.

⁵³ General Assembly resolution 61/295, annex.

⁵⁴ Ibid., art. 32, para. 3.

⁵⁵ Ibid., art. 29, para. 1.

⁵⁶ OHCHR, “Free, prior and informed consent of indigenous peoples” (September 2013).

⁵⁷ General Assembly resolution 41/128, annex.

⁵⁸ Ibid., art. 1, para. 1.

⁵⁹ Ibid., art. 1, para. 2.

⁶⁰ Ibid., art. 2, para. 1.

DOMESTIC LEGISLATION ON MINING

The legal basis for mining activity is usually established in constitutions, mining laws and regulations at the domestic level. While national constitutions generally lay out the general principles related to mineral resources, mining laws and regulations commonly provide specific information about the rights and responsibilities of mining operators related to all aspects of mining – from exploration to mine closure. In addition, other relevant laws and regulations include tax laws, environmental laws, laws on labour, health and safety, land laws, laws on the formalization of artisanal and small-scale mining,⁶¹ corporate and investment laws, and laws stipulating the roles and responsibilities of national and subnational governments with regard to indigenous and tribal communities. Legislation on illegal mining does not have a clearly designated niche in those laws. Some national legal systems place illegal mining provisions in their criminal codes, whereas other States include criminal provisions related to mining in their legislation on mining.

Land tenure and mineral rights

Every society has a system in place to control property rights, whether formally defined by legislation or informally established through customary norms. The relationship that individuals and groups have with land and land-based resources, such as trees, minerals, pastures and water, is referred to as land tenure.⁶² Mineral rights are ownership rights that grant the right to exploit an area's minerals. When drafting provisions relating to illegal mining and related offences, States must consider how their jurisdiction deals with issues of land tenure and mineral rights.

It is worth reiterating that the principle of permanent sovereignty over natural resources is a long-established general principle of international law. It dictates that States have the rights and responsibilities to legislate and regulate activities within their borders, including mining.⁶³ Accordingly, it is common that the legal basis for mining activity is established in national constitutions in addition to mining laws.

In most jurisdictions, mineral resources are considered the property of the State. The constitutions of many States explicitly establish who owns and manages mineral resources. Mineral resources often belong to the people, and the Government manages those resources on their behalf. In some systems, local and indigenous people may hold mineral resources under community ownership. “Customary tenure” – a set of rules and norms that govern community allocation, use, access and transfer of land and other natural resources, invoking the idea of traditional rights to land and natural resources – frequently coexists alongside statutory tenure.⁶⁴ Customary tenure is commonly associated with indigenous communities and their self-governance of their lands. States should consider a fair allocation of rights that balances historical practices with the contemporary principle of the efficient use of land and the equitable allocation of mineral rights.⁶⁵

⁶¹ Some States do not recognize artisanal and small-scale mining and thus lack appropriate legislation regulating subsistence mining.

⁶² Food and Agriculture Organization of the United Nations (FAO), *Land Tenure and Rural Development*, FAO Land Tenure Studies, No. 3 (Rome, 2002).

⁶³ Permanent sovereignty over natural resources (General Assembly resolution 1803 (XVII)).

⁶⁴ Terah U. De Jong and Titus Sauerwein, “State-owned minerals, village-owned land: how a shared property rights framework helped formalize artisanal diamond miners in Côte d’Ivoire between 1986 and 2016”, *Resources Policy*, vol. 70 (2021).

⁶⁵ Mark Freudenberger, “The future of customary tenure: options for policymakers”, USAID Issue Brief (n.p., United States Agency for International Development, 2013).

NATIONAL EXAMPLE

INDONESIA: CONSTITUTION OF 1945, REINSTATED IN 1959, WITH AMENDMENTS THROUGH 2002

Article 33

[...]

(3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.

[...]

NATIONAL EXAMPLE

BRAZIL: CONSTITUTION OF 1988, WITH AMENDMENTS THROUGH 2017

Article 176. Mineral deposits, whether being worked or not, and other mineral resources and hydraulic energy sites constitute property distinct from the soil for the effects of exploitation or use, and belong to the Union, guaranteeing to the concessionaire ownership of the output of the deposit. [...]

§ 2. The owner of the soil is ensured of participation in the results of the mining operation, in the manner and amount as the law shall establish.

§ 3. Prospecting authorization shall always be for a limited period, and the authorizations and concessions provided for in this article may not be assigned or transferred, either in whole or in part, without prior legal consent from the granting authority.

[...]

NATIONAL EXAMPLE

COLOMBIA: LAW NO. 70 OF 1993, ON THE RECOGNITION OF THE RIGHT OF THE AFRO-COLOMBIAN, BLACK, PALENQUERA AND RAIZAL COMMUNITIES TO COLLECTIVELY OWN AND OCCUPY THEIR ANCESTRAL LANDS

Article 26. The Ministry of Mines and Energy dutifully or by petition from the Afro-Colombian, Black, Palenquera and Raizal Communities to which this Law refers may choose to identify and delimit, in lands adjudicated to those communities, mining zones where the exploration and exploitation of non-renewable natural resources should be carried out under special technical conditions for their protection, and with the participation of the Afro-Colombian, Black, Palenquera and Raizal Communities for the purpose of preserving their particular economic and cultural characteristics, without prejudicing their acquired or constituted rights in favour of third parties.

The nature of mineral rights depends on the legal status of the land that contains mineral resources. In some jurisdictions (i.e. under the unified estate model), landowners possess both surface and mineral rights unless they choose to sell mineral rights⁶⁶ to a third party. Once mineral rights have been sold, the original owner retains only the rights to the surface land, while the other party may exploit the underground resources. In other jurisdictions (i.e. under the split estate model), title to mineral resources is separated (or “severed”) from title to the corresponding surface land. In other words, the mineral resources located in the subsoil and subsurface of private land are treated as the property of the State regardless of the ownership of the surface land.⁶⁷ In some States that follow the split estate model, the State’s ownership of subsoil resources excludes common minerals (e.g. sand and gravel), leaving landowners or land possessors the right to use common minerals from their land for non-commercial purposes. In a third model of mineral rights ownership, the rights to some minerals are owned by the State, but for other minerals there is no State monopoly (e.g. in the United Kingdom of Great Britain and Northern Ireland).

NATIONAL EXAMPLE

SOUTH AFRICA: MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT OF 2002, AS AMENDED IN 2008

Custodianship of nation’s mineral and petroleum resources

3. (1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

(2) As the custodian of the nation’s mineral and petroleum resources, the State, acting through the Minister, may—

(a) Grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical cooperation permit, reconnaissance permit, exploration right and production right; and

(b) In consultation with the Minister of Finance, prescribe and levy, any fee payable in terms of this Act.

(3) The Minister must ensure the sustainable development of South Africa’s mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.

[...]

⁶⁶ Mineral rights are the legal ownership of subsurface resources such as oil, natural gas, gold, silver, copper, iron, coal, uranium and other minerals. Sand, gravel, limestone and subsurface water are not considered mineral rights and are normally owned by the holder of the surface rights.

⁶⁷ Surface rights are, as the name indicates, the rights to a piece of land’s surface area, which includes any structures on the property, as well as the right to cultivate the land or use above-ground resources such as trees, plants or water in accordance with local laws and ordinances.

NATIONAL EXAMPLE

DEMOCRATIC REPUBLIC OF THE CONGO: MINING CODE OF 2002, AS AMENDED BY
LAW NO. 18/001 OF 2018

Article 3 (1)

The mineral deposits, including artificial deposits, underground water resources and geothermal deposits located on the surface of the ground, contained in the subsoil or found in the watercourses of the national territory are the exclusive, inalienable and imprescriptible property of the State, based on the State's sovereignty over its natural resources.

Many of the substantive offences in the present guide exclude from criminal liability conduct protected by a relevant mineral right. Some mineral rights are granted by a competent authority through a licence, permit, certificate or other like instrument. Other mineral rights may be recognized by the law of a State without the need for a licence, permit, certificate or other instrument. In this guide, the term “lawful authority” is used to address this distinction when drafting or amending illegal mining offences.

Licences, permits, certificates and other like instruments

Licences, permits, certificates and similar instruments provide one mechanism through which mining rights can be managed. Where a State has a regime for licences, permits or certificates, the holder of such an instrument may have a right recognized by law to perform certain activities in relation to particular mineral resources, to enter protected areas or to possess or use particular mining equipment, devices and methods. For example, a State may use a system of licences, permits or certificates to regulate the minerals to be extracted, the mining areas where such mining is allowed and the admissible mining quantities in a given time period. Such a system could also be used to allow particular activities to be carried out in relation to metals and minerals listed in specific schedules.

A licence, permit or certificate system can allow a State to tailor the boundaries of lawful conduct. Many of the offences contained in the present guide are defined to cover particular conduct by a person who does not hold a relevant licence, permit or certificate or who contravenes the conditions thereof. The reference to licences, permits and certificates is important to avoid criminalizing legitimate mining activity. When adopting and amending legislation on illegal mining, States should carefully consider the interdependences between the laws regulating land tenure, mining rights, illegal mining and any other relevant laws and regulations, in order to ensure harmonization and coherence. One way of achieving that end is to implement periodic reviews of the cadastre or land registry to ensure that licences, permits, certificates and other like instruments for the exploration and/or exploitation of minerals have been granted in an orderly manner. States are also recommended to assess the local capacity and means that will be needed by artisanal and small-scale miners to obtain permits. The requirements should be achievable to avoid pushing artisanal and small-scale miners into illegal mining.⁶⁸

⁶⁸ Somos Tesoro, “Legalización de la pequeña minería” (Envigado, Colombia, Alianza por la Minería Responsable, 2016).

PREVENTION POINT: MINING CADASTRES

States may benefit from creating free and accessible mining cadastres. A cadastre is a comprehensive register of real estate or land parcels within a country or its administrative subdivisions.^a It commonly includes details of the ownership, tenure, precise location, dimensions and value of individual areas. Mining cadastres can be useful in capturing information about various types of mineral licences and registering changes and updates to mineral titles whenever a title is granted or an owner changed. They can also facilitate the validation of licence or permit applications with regard to possible overlaps or fraud. The specific characteristics of mining cadastres are up to States to decide. Past practice suggests that country-specific circumstances must be taken into account when designing and administering such cadastres.

^a Enrique Ortega Girones, Alexandra Pugachevsky and Gotthard Walser, *Mineral Rights Cadastre: Promoting Transparent Access to Mineral Resources*, Extractive Industries for Development Series, No. 4 (Washington, D.C., World Bank, 2009), p. 4.

Various other terms, such as “concessions” and “authorizations”, may be used to describe instruments that confer mineral rights to the bearer. For the sake of simplicity, the phrase “licences, permits and certificates” is used below to refer to all such instruments, however described under domestic legislation. The phrase “licence, permit or certificate” is included in square brackets in all relevant model provisions to emphasize that a State must substitute this term with the appropriate language under its domestic legislation. The language chosen by each State must be tailored to the particular provision and cover all relevant licences, permits, certificates and other like instruments.

Different licence, permit and certificate regimes within a State may use different language to describe such instruments. For example, the instrument allowing a person to remove a particular mineral from the subsoil in a given country may be called a “licence”, but the instrument allowing a person to carry and use particular equipment may be called a “permit”. The terms “authorization” and “concession” are also common in this context. These differences in terminology need to be reflected in the relevant illegal mining provisions. States are encouraged to use consistent terminology to describe these instruments across their various laws.

The rights conferred by licences, permits or certificates are generally subject to specific conditions, which may be specific to the individual instrument granted or may be generally applicable to all licences, permits or certificates of a particular class. Licences, permits or certificates may cover specific types of activities, such as prospecting or exploration as opposed to the extraction and processing of metals and minerals. Licences, permits and certificates also differ in terms of the characteristics of the holder: the legislation in some countries provides for separate licences, permits or certificates for companies and cooperatives (legal persons) and for individuals (natural persons). For example, common conditions for a permit to extract mineral resources could relate to the identity of the permit holder (e.g. citizenship), the amount of royalties paid and/or taxes levied through a mineral lease, the area or location of the mineral to which the permit applies, the period of validity and the information to be provided to the relevant authorities about activities carried out under the permit (e.g. environmental monitoring). A permit holder may be required to meet additional conditions, such as restrictions on the quantity of mineral extraction or depth of extraction⁶⁹ and constraints on the trade in unwrought or beneficiated minerals (e.g. minerals extracted under an artisanal mining (semi-industrial or non-industrial) licence may only be sold to a specially designated agency). Mining laws also cover the transferability of mining rights, allowing, limiting or prohibiting the transfer of rights under specific conditions. Those conditions vary broadly across States.

⁶⁹ Some countries have restrictions based on production capacity (e.g. art. 134 of the Mining Law of 2009 of Ecuador, which establishes output limits for artisanal mining for metallic minerals at 10 tons per day in underground mining and 120 cubic meters per day in alluvial mining). Other countries use depth as a defining criterion (e.g. art. 1 of the Mines and Minerals Act, 2009, of Sierra Leone, in which artisanal mining is defined as mining operations that do not exceed a depth of 10 metres).

NATIONAL EXAMPLE

DEMOCRATIC REPUBLIC OF THE CONGO: MINING CODE OF 2002, AS AMENDED BY LAW NO. 18/001 OF 2018

Article 26 (1)

Without prejudice to the provisions of article 27 below, only adult natural persons of Congolese nationality who hold artisanal mining cards and are affiliated with authorized mining or quarry product cooperatives are eligible to engage in artisanal mining.

[...]

NATIONAL EXAMPLE

AFGHANISTAN: MINERALS LAW OF 2019

Article 16. Eligibility to obtain mineral rights

(1) The following persons are not eligible to participate in bidding processes initiated under article 41 to enter into mining concessions or to hold licences:

1. Natural persons who:
 - Have not attained the age of 18 years;
 - Are not residents of Afghanistan;
 - Are declared bankrupt;
 - Do not hold an investment licence;
 - Have been convicted of a contravention of this Law or had a licence cancelled for non-compliance within the previous 3 years;
 - Have been convicted of an offence in relation to bribery or corruption within the previous 10 years;
 - Are politically exposed persons; or
 - Are acting on behalf of a politically exposed person, whether formally or informally, including under a trust arrangement.

[...]

(2) The following persons are not eligible to hold small-scale mining licences:

1. Natural persons who are not citizens of Afghanistan; and
2. Legal entities that are not incorporated under the laws of Afghanistan; or
3. Legal entities that have a majority owner that is not a citizen of Afghanistan or incorporated under the laws of Afghanistan.

[...]

The scope of licences, permits and certificates and the circumstances under which they are granted is a policy decision for each State to make, preferably in consultation with all relevant stakeholders. The present guide does not mandate that States establish licence, permit or certificate regimes in respect of all activities covered.

Lawful authority

For the purposes of the present publication, lawful authority is distinguished from licences, permits and certificates because its exercise does not depend on a competent authority granting a relevant licence, permit or certificate. The circumstances in which a person should be able to exercise lawful authority in respect of mineral rights is a matter for each State to determine in accordance with its legal tradition and culture.

In this context, customary land tenure laws are particularly relevant to mining. Customary rules are used to regulate land tenure in many developing countries, as well as in territories of countries populated by indigenous peoples and tribal communities. Customary land tenure systems are governed by unwritten laws and practices followed by local communities and are influenced by the people's cultural and historical relationships with the land. Those rules govern land ownership, use, management and transfer. In some jurisdictions, the Government does not recognize customary land tenure. In other jurisdictions, such land tenure is recognized, though land rights based on customary rules may be insecure. Conflicts may arise between private mining companies seeking access to mineral resources through licences, permits and concessions from Governments and local communities that claim customary rights to the land and mineral resources contained therein.

Where customary land tenure systems (co-)exist, it is important that States fully acknowledge and take effective action to preserve the land and mineral rights of indigenous peoples and other relevant peoples. States should also ensure that the legislation countering illegal mining and trafficking in metals and minerals introduced under the present guide does not jeopardize indigenous populations and their rights to mineral resources situated on their land. States should include indigenous groups in the process of drafting such legislation and promote dialogue with traditional authorities, as well as public, private and community stakeholders.

NATIONAL EXAMPLE

PHILIPPINES: MINING ACT OF 1995

Section 16

Opening of ancestral lands for mining operations

No ancestral land shall be opened for mining operations without prior consent of the indigenous cultural community concerned.

Section 17

Royalty payments for indigenous cultural communities

In the event of an agreement with an indigenous cultural community pursuant to the preceding section, the royalty payment, upon utilization of the minerals, shall be agreed upon by the parties. The said royalty shall form part of a trust fund for the socioeconomic well-being of the indigenous cultural community.

NATIONAL EXAMPLE

COLOMBIA: LAW NO. 70 OF 1993, ON THE RECOGNITION OF THE RIGHT OF THE AFRO-COLOMBIAN, BLACK, PALENQUERA AND RAIZAL COMMUNITIES TO COLLECTIVELY OWN AND OCCUPY THEIR ANCESTRAL LANDS

Article 28. Should there be areas susceptible to be declared Indigenous mining zones and Afro-Colombian, Black, Palenquera and Raizal Communities' mining zones at the same time, the Ministry of Mines and Energy can declare said zones Joint Mining Zones, where the development of activities will be conducted with the understanding that the two ethnic groups will enjoy the same rights and responsibilities.

Scales of mining

The majority of national mining laws distinguish between large-scale mining and artisanal and small-scale mining. Large-scale mining refers to mining that is conducted by mining companies and requires large investment and a high level of mechanization. Large-scale mining companies often mine at one or two large sites and usually stay until the mineral or metal is completely excavated.

Artisanal and small-scale mining refers to formal or informal mining operations with predominantly simplified forms of exploration, extraction, processing and transportation.⁷⁰ It conventionally includes a broad range of mining-related activities performed by individuals, groups and cooperatives operating without formal oversight but not necessarily in contravention of legislation.⁷¹

Artisanal and small-scale mining is characterized by the extraction of metals and minerals with the simplest of tools, and it is usually performed by non-professional miners labouring as a way to survive. Artisanal and small-scale mineral extraction and processing are commonly labour-intensive and often incorporate non-mechanized technology.

NATIONAL EXAMPLE

COLOMBIA: DECREE NO. 1666 OF 2016

Article 2.2.5.1.5.3. Subsistence mining

Subsistence mining is mining activity carried out by natural persons or groups of individuals engaged in the open-pit extraction and collection, by manual means and using manual tools, of river sands and gravels for the construction industry, clays, precious metals and precious and semi-precious stones, without the use of any kind of mechanized equipment or machinery.

⁷⁰ Organisation for Economic Co-operation and Development (OECD), *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 3rd ed. (Paris, 2016), p. 65.

⁷¹ World Bank, *State of the Artisanal and Small-Scale Mining Sector* (Washington, D.C., 2020).

Without proper artisanal and small-scale mining formalization programmes,⁷² which build on progressive compliance incentives, the criminalization of illegal mining may further marginalize artisanal and small-scale miners by limiting not only their access to subsistence but also, more broadly, restricting their social, economic, cultural and political rights. A key consideration for the development of legislation to combat illegal mining is to draw clear distinctions in the mining laws between large-scale mining, artisanal and small-scale mining, and illegal mining. Doing so is necessary to ensure that artisanal and small-scale miners are not negatively affected by the criminalization of illegal mining. There is a need for a nuanced approach⁷³ in domestic laws: mining should be regulated in a way that makes it possible to distinguish between two categories, legal and illegal, but also includes various stages of infractions of the law and differentiates the severity of penalties.⁷⁴ It is important to ensure that the legislation treats the formalization of artisanal and small-scale mining as a process. In some contexts, it may take years for artisanal and small-scale miners to fully comply with mining laws and regulations.⁷⁵

States are encouraged to promote the formalization of artisanal and small-scale mining by offering incentives that orient miners towards the legalization of their mining activities and by providing training, start-up investment and equipment to build their capacity to mine responsibly. It is also advisable for States to foster dialogue between large-scale and artisanal and small-scale miners⁷⁶ and to involve public and community stakeholders when drafting or amending mining laws. For instance, large-scale mining companies could support the formalization of artisanal and small-scale mining by sharing geological data and technological innovation (in exchange for a share of artisanal and small-scale mining production), providing common smelting facilities on site and free-standing processing plants for use by local artisanal and small-scale miners and facilitating market access for responsibly produced metals and minerals.⁷⁷

PREVENTION POINT

Formalization programmes

One of the responses to illegal mining and trafficking in metals and minerals is to promote and support the formalization of the artisanal and small-scale mining sector. Doing so can break the link between the artisanal and small-scale mineral trade and criminal organizations. Formalization programmes can render the informal sector less vulnerable to organized criminal groups and armed formations. They can also introduce human rights protections, fair labour safeguards and environmentally sustainable mining practices.

States are encouraged to support artisanal and small-scale mining formalization with legal frameworks that remove barriers to formalization and are supportive and accessible rather than punitive. Formalization programmes need to be inclusive of miners' views and effective in monitoring and enforcing regulations. States should also integrate education and training as well as economic empowerment initiatives in such formalization programmes.

⁷² For more information about artisanal and small-scale mining formalization programmes, see chapter 3.

⁷³ Angela Jorns and Estelle Levin-Nally, "Are they all illegal? A more nuanced view to guide LSM engagement with ASM", Levin Sources, 3 April 2020.

⁷⁴ See chapter 7 for an in-depth analysis of penalties and sentencing related to illegal mining, including aggravating and mitigating factors.

⁷⁵ Jorden de Haan and Brandon Turner, *Handbook: Developing National ASGM Formalization Strategies within National Action Plans* (Geneva, United Nations Institute for Training and Research and United Nations Environment Programme Global Mercury Partnership, 2018), p. 10.

⁷⁶ International Council on Mining and Metals and World Bank, *Working Together: How Large-Scale Mining Can Engage with Artisanal and Small-Scale Miners* (2010).

⁷⁷ World Gold Council, *Lessons Learned on Managing the Interface between Large-Scale and Artisanal and Small-Scale Gold Mining* (London, 2022), p. 9.

INTERGOVERNMENTAL FORUM ON MINING, MINERALS, METALS AND SUSTAINABLE DEVELOPMENT: SIX KEY FACTORS FOR SUCCESSFUL ARTISANAL AND SMALL-SCALE MINING FORMALIZATION^a

Conducive and comprehensive legal frameworks

Comprehensive legislation specific to artisanal and small-scale mining is needed and should account for its diverse character in countries where such mining is illegal or where it is legal but unregulated. In countries where artisanal and small-scale mining is legal, reforms of existing legislation should prioritize the artisanal and small-scale mining sector for national development. Considerations should include licensing, access to land, gender equality, community participation and environmental, safety and labour standards.

Access to geological data

Without access to geological data, those working in the artisanal and small-scale mining sector are often left with little to drive their activities except guesswork or trial and error. This often results in low yields, loss of investment and increased environmental degradation. Mapping a country's potential reserves and land use, and providing access to those data, is crucial to determining appropriate locations for artisanal and small-scale mining. The potential benefits to small-scale miners include more efficiency and longevity at mining sites, minimized environmental degradation and improved profitability.

Access to capital

Debt and poverty are major concerns in artisanal and small-scale mining, as their informal work means that miners cannot access finance given their non-legal status. However, a certain level of capitalization is required to register and obtain a concession and to buy the equipment necessary to mine and process minerals. Methods of increasing access to credit and finance include microfinance credit and savings, grants and government loan facilities.

Access to equipment

Another major challenge for artisanal and small-scale miners is not having the equipment or resources to be able to replicate or adapt mining techniques. To increase access to equipment for those in the artisanal and small-scale mining sector, equipment should be simple in design and able to be produced locally, be affordable to individual miners and combine both manual and mechanized processing techniques. Hire purchase loan schemes and centralized processing centres can enable alternative access to equipment.

Capacity-building

In the past, a poor understanding of the dynamics of artisanal and small-scale mining communities led to inappropriate technologies and support services. Capacity-building can spur successful formalization within the artisanal and small-scale mining sector if training programmes promote best practices and focus on practical mining-related topics, are geared towards women and their integration into the mining sector, are tailored to the socioeconomic characteristics of the individual mining communities and provide education and resources on how to foster partnerships with stakeholders, including community organizations and the private sector.

Dialogue between the Government and artisanal and small-scale mining stakeholders

Individuals within the artisanal and small-scale mining sector must be involved throughout the formalization process to ensure that changes are in tune with realities on the ground. In order to create sustainable long-term formalization strategies, a number of things need to be considered, including: (a) creating a platform for positive and regular dialogue between artisanal and small-scale mining stakeholders and Governments to provide a conduit for consultation on changes; (b) informing dialogue based on research on mining communities to understand the complexities of the artisanal and small-scale mining sector; and (c) establishing a co-created road map outlining interventions with input from various stakeholders, including non-mining stakeholders, at all levels.

^a International Institute for Sustainable Development, "Six key factors in formalizing artisanal and small-scale mining", 22 January 2018.

NOTA BENE

Pertinent information on current artisanal and small-scale mining formalization practices and debates, which cannot be covered in sufficient detail in the present guide, can be found in the *Compendium on Best Practices in Small-Scale Mining in Africa*; *Global Trends in Artisanal and Small-Scale Mining (ASM): A Review of Key Numbers and Issues*; *Best Practices: Formalization and Due Diligence in Artisanal and Small-Scale Mining*; *Handbook: Developing National ASGM Formalization Strategies within National Action Plans*; and *IGF Guidance for Governments: Managing Artisanal and Small-Scale Mining*.

NATIONAL INSTITUTIONAL FRAMEWORK

The present publication is a legislative guide, not a guide to national institution-building. At the same time, it must be stressed that these two topics cannot be separated from each other entirely. Legislation is necessary for government institutions to be created and carry out their functions in line 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 guide is limited, with a focus on substantive legislation to address illegal mining and trafficking in metals and minerals. No attempt is made to provide comprehensive guidance on building effective national institutions to prevent and combat those crimes. Nevertheless, because these topics are closely interwoven, the guide is not silent on the issue of national institution-building.

The present section provides an overview of the types of powers and responsibilities that need to be allocated to domestic institutions to counter illegal mining and trafficking in metals and minerals. It also provides an overview of the conventional institutions in which those powers and responsibilities are vested. Subsequent chapters provide model provisions establishing relevant powers and responsibilities, such as those concerning investigation, international cooperation, prosecution and sentencing.

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 illegal mining and trafficking in metals and minerals to be legitimate and consistent with the rule of law.

National authorities involved in the prevention, investigation, prosecution and adjudication of illegal mining and trafficking in metals and minerals should be provided with clear responsibilities and appropriate powers to fulfil those mandates. The following is a non-exhaustive list of responsibilities and powers relating to preventing and combating illegal mining and trafficking in metals and minerals that should be delegated to relevant departments, agencies and public officers by legislation:

- Promulgate and amend subordinate or delegated legislation (e.g. regulations) concerning mining activity
- Issue licences, permits and/or certificates in relation to mining activity
- Monitor and evaluate the implementation of mining laws and regulations
- Collect, report and analyse relevant data
- Investigate, prosecute and adjudicate breaches of mining 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 across the mining industry and provide education to the general public about illegal mining and trafficking in metals and minerals

Those responsibilities and powers will necessarily be vested in different departments, agencies and public officers, allowing them to develop specialized competencies and expertise and thus carry out their functions more effectively. The separation of certain powers, such as the separation of judicial powers of adjudication from the exercise of executive and administrative powers, may also be required by national constitutions.

The typical organs, departments, agencies and public agencies involved in preventing and combating illegal mining and trafficking in metals and minerals are discussed in the next section.

PREVENTION POINT

Collection, exchange and analysis of information

Developing comprehensive and systematic knowledge about illicit markets and the ways in which they evolve over time is crucial for Governments to be able to develop sound legislation. Article 28 of the Organized Crime Convention recognizes the importance of data collection and the exchange of information for preventing and combating organized crime, including the assessment of the effectiveness and efficiency of policies, legislation and other measures to combat it.

For this purpose, States may decide to entrust responsibilities for data collection, exchange and analysis to a ministry or an independent authority, such as the scientific and academic communities. In other cases, it may be necessary to distribute such responsibilities among different institutions. It is, however, important to develop a coordinated system that allows for the collection of relevant data from different sources, such as law enforcement agencies, financial intelligence units, environmental protection agencies and other stakeholders.

PREVENTION POINT

Awareness-raising and crime reporting

Public-oriented awareness-raising campaigns are central to the achievement of responsible and environmentally sustainable mining. Such programmes should consider the local specifics of illegal mining and trafficking in metals and minerals (e.g. demographics of victims, types of minerals, presence of criminal organizations, etc.) and use appropriate means to reach the target audience (e.g. Internet, television, newspapers, social media, etc.). Engaging civil society organizations in providing training to relevant stakeholders, supporting awareness-raising campaigns and working closely with the media, environmental defenders and whistle-blowers can assist in achieving those goals.

Awareness-raising is closely tied to the ability of law enforcement to receive information about crimes from communities. The police rely on community members to report crime and suspicious behaviour when it happens, and to stay informed of environmental and public safety issues to help reduce illegal mining and trafficking in metals and minerals. Establishing reliable reporting mechanisms between criminal justice institutions and indigenous and artisanal and small-scale mining communities, where most illegal mining activities occur, should be arranged with the resources, equipment and facilities that best serve the needs of those communities.

NATIONAL EXAMPLE

AFGHANISTAN: MINERALS LAW OF 2019

Article 68. Reporting of incidents

(1) A licence holder shall immediately report to the Ministry any incident which:

1. Causes a loss of life or harm to the health of personnel; or
2. Involves a significant risk of loss of life or harm to the health of personnel.

Article 62. Community monitoring and compliance reporting

(1) The Ministry shall appoint an Ombudsman in accordance with the Regulations.

(2) The Ombudsman shall:

1. Comply with any procedures prescribed in the Regulations;
2. Invite and receive submissions from the local community in relation to any concerns in connection with the conduct of mineral activities;
3. Maintain a record of local community submissions; and
4. Refer any potential issues of non-compliance to the Compliance Officer.
5. The Ombudsman shall publish an annual report summarizing:
 1. Local community submissions received during the year; and
 2. Enforcement action taken under article 53 during the year.

Institutions involved in preventing and combating illegal mining and trafficking in metals and minerals

The previous section concerned responsibilities and powers that could be allocated by legislation to effectively address illegal mining and trafficking in metals and minerals. The present section considers the typical government organs, departments, agencies and public officers that are likely to be involved in addressing those offences.

How States allocate responsibilities and powers among relevant government organs, departments, agencies and public officers varies, and it is a subject for each specific State to decide. Whatever the mandates of the relevant institutions are, States are advised to ensure sufficient operational capacity for the responsibilities allocated and coordination and collaboration among those institutions to properly implement the legislation.

Some generic examples of the broad range of departments, agencies and public offices that may be involved in the prevention, detection and investigation of illegal mining and trafficking in metals and minerals are discussed below.

EXAMPLES OF DEPARTMENTS, AGENCIES AND PUBLIC OFFICES INVOLVED IN THE PREVENTION, DETECTION AND INVESTIGATION OF ILLEGAL MINING AND TRAFFICKING IN METALS AND MINERALS

Legislature

Under the separation of powers, it is the legislature that is responsible for passing legislation. Accordingly, domestic legislatures bear the responsibility for introducing and amending legislation concerning mining governance, including penal provisions. Powers to legislate are typically set out in domestic constitutions and will typically be broad enough to legislate in the realm of mining governance. Where, however, a State is obliged by an international agreement to which it is a party – such as the Organized Crime Convention, the Minamata Convention or the Kimberley Process – to establish legislation that is not within the powers of its legislature, it is the State's responsibility to ensure that the legislature is provided with appropriate powers to allow the State to comply with its treaty obligations.

Ministries of mining and mineral resources

Relevant government ministries, such as ministries of mining and mineral resources, will usually have particular functions and responsibilities dealing with illegal mining offences. Officers associated with those ministries, such as mining officers and inspectors, are typically involved in the detection and/or identification of illegal mining and related offences while undertaking patrols or inspections or carrying out other specific functions. Officers of this kind should be authorized by legislation, trained and empowered to conduct such investigations, collect and seize samples and evidence, question suspects and prepare case files.

Environmental authorities

Relevant government departments, ministries or agencies, such as departments of natural resources or the environment, will usually have particular functions and responsibilities concerning mining governance more generally and illegal mining and trafficking in metals and minerals specifically. Environmental authorities are involved in developing policy, updating subordinate legislation (e.g. schedules of protected areas or schedules of equipment, devices and chemicals) and taking executive action. Environmental authorities may review applications for and grant licences, permits and/or certificates relating to mining activity. Officers of environmental authorities are typically involved in monitoring compliance with mining laws and regulations, conducting inspections and detecting or identifying illegal mining, trafficking and other mining-related offences.

Police

The police may be involved in detecting and/or identifying illegal mining and related offences, or they may be called upon to carry out specialized and/or advanced investigative functions, which are generally beyond the mandates of mining officers and inspectors. Relevant police authorities may include national, regional and/or local police, as well as police departments with responsibilities for environmental crime, the handling of crime scenes and forensic investigations, telecommunications, undercover operations and general criminal investigations. Police may perform their functions in relation to illegal mining offences under a variety of national laws, directives and regulations, including laws relating to organized crime and money-laundering.

Customs administration

Customs administration agencies will mostly come into contact with trafficking in metals and minerals at ports, airports and land borders. They will generally be mandated to detect and/or identify illegally sourced metals and minerals at those locations in accordance with customs legislation and regulations. Customs administration officials are generally trained and empowered to conduct general investigations, file cases and collect and seize evidence. Customs administration officers often play important roles in special investigations, such as those involving controlled deliveries.

Prosecutorial authorities

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 crimes, supervising investigators' compliance with procedural rules, judicial interim release ("bail"), negotiating plea and sentence agreements, diverting offenders to alternatives to prosecution, supporting victims, issuing recommendations regarding sentences and supervising the execution of sentences and the treatment of persons in custody.^a

Judges and magistrates

Judges and magistrates may oversee aspects of the investigation of illegal mining and related offences, such as applications for warrants and the use of special investigative techniques. Investigating judges act at the core of the investigation and can direct the criminal prosecution phase. That can include interviewing the accused, victims and witnesses, determining what evidence will be heard at trial, and preparing and filing the case with the trial judge (magistrate). Investigating judges commonly have broader powers than prosecutors. In many jurisdictions, when a case is transferred to the investigating judge, prosecutors act according to his or her instructions.

Authorities responsible for international cooperation in criminal matters

Investigating, prosecuting and adjudicating cases of illegal mining and trafficking in metals and minerals may, in some cases, require cooperation with other States. This may be the case where offences are committed 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 of the 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.^b Article 18 (13) of the Organized Crime Convention requires States parties to designate a central authority with the responsibility and power to receive requests for mutual legal assistance and to either execute those requests or transmit them to the competent authorities for execution. This requirement is without prejudice to cooperation through diplomatic channels, through INTERPOL and through informal cooperation between authorities.

Other offices and specialized agencies

Certain other government officials, such as military personnel, may also be involved in responses to illegal mining and trafficking in metals and minerals. The role of such officers in investigations into illegal mining will typically depend to a great degree on specific domestic arrangements and preferences. Some specialized agencies, such as anti-money-laundering authorities, financial intelligence units and tax authorities, may also contribute to investigations of illegal mining and trafficking in metals and minerals on the basis of specialized laws granting them enforcement powers.

^a UNODC and International Association of Prosecutors, *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).

^b UNODC, *Manual on Mutual Legal Assistance and Extradition* (Vienna, 2012), pp. 29–39.

States may opt to divide the responsibilities and powers for investigating illegal mining and trafficking in metals and minerals between multiple agencies according to the stage of the investigation or the seriousness of the offences that appear to be involved. The seriousness of the offences could relate to the suspected activities of the offenders, the suspected involvement of an organized criminal group or a transnational element to the offence. The designation, number and competences of agencies involved in the investigation of illegal mining and trafficking in metals and minerals are a matter for each State to determine. For this reason, a model

provision on the mandates of relevant investigative agencies is not provided. Whatever division of competences a State adopts, the State should ensure that the respective mandates of each agency involved in preventing, detecting and investigating illegal mining and trafficking in metals and minerals, along with any other relevant offences, are clearly set out in domestic legislation. This is imperative not only for each agency to effectively carry out those functions, but also to ensure the legality and admissibility of evidence obtained by such agencies in subsequent prosecutions.

PREVENTION POINT

Regulating the metal and mineral supply chain

Regulatory authorities are the national bodies that have a legal mandate to set objectives and administer the full spectrum of regulatory activities related to the transparency of metal and mineral supply chains, including issuing licences and trade authorizations, establishing compliance mechanisms for downstream companies, refineries and wholesalers, tracing minerals, promoting the rational use of mineral resources and encouraging the formalization of small-scale mining.

States should ensure that they have the institutional structure necessary to effectively regulate mineral supply chains. The structure of a relevant regulatory authority or regulatory authorities for this purpose is a matter for each State to decide. Regulatory functions may be vested in a unit within an existing authority, or a State may create a separate authority to fulfil such functions. Each incident of illegal mining or incident involving illegally mined metals and minerals should be reviewed by regulatory authorities with a view to identifying weaknesses in the regulatory system and vulnerabilities in the supply chain and making appropriate changes to improve response mechanisms.

PREVENTION POINT

Multi-stakeholder partnerships

States are recommended to establish long-term partnerships not only with businesses but also with other stakeholders, in particular non-governmental organizations (NGOs). Doing so can improve social impact and environmental performance. For instance, NGOs can ensure effective access to remedies for communities and build their capacity to benefit from the grievance mechanism established by the *OECD Guidelines for Multinational Enterprises*.^a

OECD Watch

OECD Watch is a global network of civil society organizations with more than 130 members in over 50 countries. Its key aim is to inform and advise the global NGO community on how to use the *OECD Guidelines* and the associated grievance mechanism to achieve corporate accountability and gain access to remedies for individuals harmed by corporate misconduct.

The mission of OECD Watch is threefold: (a) to increase the effectiveness and reach of the *OECD Guidelines* as a standard for corporate conduct and a tool for accountability; (b) to strengthen national contact points so that they are accessible, impartial and equipped to provide meaningful access to remedies for victims of corporate harms; and (c) to build the capacity of civil society organizations to use the *OECD Guidelines* and the complaint mechanism to secure remedies for communities, workers and individuals negatively affected by business conduct.^b

^aA specific instance is a complaint regarding an enterprise's behaviour that is believed to be inconsistent with the *OECD Guidelines*. All complaints received by national contact points are to be considered, whether they are submitted by a community affected by a company's actions, a company's workers, members of a trade union, a non-governmental organization or an individual. For more details, see OECD, "Guide for national contact points on structures and activities, *OECD Guidelines for Multinational Enterprises*" (Paris, 2019).

^bAdapted from www.oecdwatch.org/about-us/.

Chapter 2.

GENERAL PROVISIONS

Chapter 2 offers some general provisions for combating illegal mining and trafficking in metals and minerals. Four topics are addressed in the present chapter: the legislative statement of purpose, jurisdiction, schedules and classifications, and the use of terms.

STATEMENT OF PURPOSE AND SCOPE

Given the known involvement of organized criminal groups in illegal mining and trafficking in metals and minerals and their ability to operate across borders, the primary objective of the proposed model legislative provisions is to support the criminalization of illegal mining and trafficking in metals and minerals, among other relevant offences, to propose effective, proportionate and dissuasive penalties, to promote international cooperation and to advance the prevention of those crimes, such as through regulatory improvements in supply chain due diligence and transparency.

Building on the Organized Crime Convention, model provision 1 is aimed at defining the most important objectives of legislation on illegal mining and trafficking in metals and minerals.

MODEL PROVISION 1

STATEMENT OF PURPOSE

The purpose of this [Act/Law/Chapter ...] is to:

- (a) Provide for the criminalization of certain acts;
- (b) Prevent and combat these acts;
- (c) Support the integrity of metal and mineral supply chains; and
- (d) Promote national and international cooperation in order to achieve these objectives [consistent with fundamental human rights and the rule of law/international legal obligations, including human rights obligations].

JURISDICTION

Jurisdiction refers to the power of a State, through its prosecutors, courts and other institutions, to exercise legal authority over a territory, person or assets. States should enact provisions establishing comprehensive jurisdiction for the prosecution and punishment of illegal mining and trafficking in metals and minerals. For instance, offenders may also move between States and exploit jurisdictional gaps in their laws to avoid apprehension and prosecution. Offenders may also smuggle and then trade metals and minerals outside of the State in which they were extracted illegally. It is therefore important to clearly articulate the jurisdictional bases upon which national courts can determine proceedings for illegal mining and trafficking in metals and minerals.

Most obviously, States may exercise jurisdiction over acts committed within their territories, including their territorial waters (territoriality principle). This includes the jurisdiction of a State over acts committed outside the State but intended to have a substantial effect within the territory of the State (objective territorial principle). The right of States to exercise extraterritorial jurisdiction in a number of circumstances is recognized in international law. While the precise scope of such circumstances remains unsettled, the international community has generally recognized the jurisdiction of a State over its nationals, even when outside its territory (active personality principle) and the jurisdiction of a State over acts injurious to its nationals (passive personality principle).⁷⁸ Moreover, the international community has also established universal jurisdiction, under which States are obliged either to extradite perpetrators arrested on their soil (or transfer them to an international court) or to prosecute and judge them themselves, allowing all the national courts in the world to prosecute and sentence perpetrators of serious international crimes (e.g. crimes against humanity), regardless of the location in which crimes are committed and the nationality of perpetrators or victims of the crimes. The obligation to extradite or prosecute (*aut dedere aut judicare*) places an obligation on States to cooperate in combating serious atrocities and can play an important role in combating impunity and guaranteeing that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any of those crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law.⁷⁹

As illegal mining and trafficking in metals and minerals can occur across borders, the present guide proposes that States enact provisions establishing jurisdiction over illegal mining and related 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 those jurisdictional bases.

⁷⁸ See Organized Crime Convention, art. 15, para. 2, and Convention against Corruption, art. 42, para. 2.

⁷⁹ For more details on best practices in the application of the obligation to extradite or prosecute, see the final report of the International Law Commission, adopted at its sixty-sixth session, *Yearbook of the International Law Commission, 2014*, vol. II (Part Two).

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 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].

Paragraph 1 of model provision 2 sets out the territorial jurisdiction for the judicial determination of illegal mining and trafficking in metals and minerals offences as follows:

- Subparagraphs 1 (a) and 1 (b) reflect the obligations of States parties under article 15 (1) of the Organized Crime Convention.
- Subparagraph 1 (c) reflects the “extradite or prosecute” principle⁸⁰ contained in articles 16 (10) and 15 (3) of the Organized Crime Convention. Article 16 (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 (3) requires States parties, for the purposes of article 16 (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.
- Subparagraph 1 (d) of model provision 2 reflects article 15 (4) of the Organized Crime Convention, which provides that a State party may also establish jurisdiction over offences covered by the Convention when the alleged offender is present in its territory and it does not extradite him or her on any ground.

If subparagraph 1 (d) of model provision 2 is adopted by a State and incorporated into domestic law, there is no need to include subparagraph 1 (c) because the former covers situations where extradition is refused for any reason, including nationality.

⁸⁰ UNODC, *Manual on Mutual Legal Assistance and Extradition* (Vienna, 2012), paras. 108–110.

Paragraph 2 of model provision 2 sets out four bases for the exercise of extraterritorial jurisdiction⁸¹ to judicially determine offences covered by the present guide:

- Paragraph 2 (a) establishes jurisdiction over cases where the victim of an offence is a national of the State, reflecting the passive personality principle and article 15 (2) (a) of the Organized Crime Convention. States may also choose to extend the jurisdictional ground in subparagraph 2 (a) of the model provision to permanent residents or habitual residents of the State.
- Paragraph 2 (b) establishes jurisdiction over offences committed by a national (or permanent or habitual resident) of the State, reflecting the active personality principle and article 15 (2) (b) of the Organized Crime Convention.
- Paragraph 2 (c) 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 (2) (c) of the Organized Crime Convention.
- Paragraph 2 (d) provides a basis for the judicial determination of cases for which jurisdiction has been conferred by an international agreement that is binding on the State. Such an agreement could include, for example, a binding resolution by the Security Council.

SCHEDULES AND CLASSIFICATIONS

Illegal mining and trafficking involve a wide range of metals and minerals. A metal is an element, and a mineral is a chemical compound. The majority of metals are found in nature as minerals.

MINERALS

Minerals are naturally occurring inorganic substances that exist in the Earth's crust.^a They are distinguished by their chemical composition and crystalline structure.

METALS

Metals are elements that naturally occur in minerals in the form of compounds. Minerals are native forms of metals that occur in the form of metallic ores. All ores are mineral concentrations in rock.^b The metals that are most essential to industry and trade, such as copper and iron, are commonly found in ore deposits.

Although most metals are processed from ores, some metals may be found in metallic form, either pure or as an alloy, in nature. Such natural or native metals include industrial metals such as aluminium, arsenic, iron, nickel, tantalum, tin, titanium, tungsten and zinc, as well as two groups of metals: (a) the gold group (e.g. copper, gold, lead and silver); and (b) the platinum group (e.g. platinum, iridium, palladium, rhodium and ruthenium).^c

^a McGraw Hill, *Dictionary of Geology and Mineralogy*, 2nd ed. (New York, 2003), p. 206.

^b *Ibid.*, p. 231.

^c *Ibid.*, p. 216.

⁸¹ UNODC, *Model Legislative Provisions against Organized Crime*, 2nd ed. (Vienna, 2021), pp. 24–28.

Illegal mining also commonly requires the use of a broad range of mining equipment, devices and chemicals. To facilitate the drafting of legislation to counter illegal mining and trafficking in metals and minerals, it is useful to classify different metals and minerals into broad categories, such as precious metals as opposed to other metals. To that end, the use of schedules is recommended.

A schedule is a list of metals and minerals belonging to a particular category. Schedules are cited in relevant legislative provisions as a shorthand way of referring to specific categories listed therein. This makes legislation not only easier to read, but also more convenient to update. Legislative schedules are integral parts of the legislative instruments to which they relate, and they draw their legal force from references contained in substantive provisions in the main body of the legislation. Schedules are used in legislation to provide details that, for the purposes of usability, cannot be adequately addressed in the main body of the legislation. Schedules of metals and minerals may be included in primary legislative instruments, such as statutes, or subordinate or delegated legislative instruments, such as regulations. Subordinate legislation has the advantage of being more easily amended and can provide additional flexibility. The appropriate legal form of schedules is a matter for each State to decide.

In the specific context of illegal mining and trafficking in metals and minerals, States are advised to consider several model schedules:

- Strategic, critical and/or high-value minerals (e.g. gold, diamonds and gems)
- Minerals under stricter regulation or a moratorium/ban (e.g. mercury, uranium, tantalum, tin and tungsten)
- Development minerals (e.g. gravel and sand)

NATIONAL EXAMPLE

LAO PEOPLE'S DEMOCRATIC REPUBLIC: LAW ON MINERALS, AMENDED VERSION OF 2017

Article 3 (amended). Definitions

The following terms being used in this Law shall have the meanings ascribed thereto below:

[...]

10. "Reserved minerals" means minerals for which the Government has prohibited or suspended prospecting, exploration, extraction and processing for economic, social, or environmental reasons, as issued by the Government from time to time, such as minor minerals, tungsten, titanium, cobalt and molybdenite;

11. "Prohibited minerals" means minerals in respect of which the Government has prohibited exploration, extraction and processing in order to ensure the health and safety of human beings and to preserve biodiversity, such as rare-earth minerals, radioactive minerals and poisonous minerals;

[...]

When deciding on the form of the legislative instrument for the schedules, States also should consider the applicable processes for amending that instrument. This is important because the equipment used for mining operations and the treatment of minerals and their beneficiation is constantly changing. States must update their laws, including the applicable schedules, regularly in order to keep up with those changes. The process for amending regulations or other subordinate legislation will typically be more streamlined than the process involved in amending legislation. Setting out the relevant schedules in regulations or other subordinate legislative instruments may therefore enable States to react more readily to such changes.

EXAMPLE

EUROPEAN UNION LIST OF “CONFLICT MINERALS” UNDER REGULATION (EU) 2017/821

Annex I

Part A. Minerals

<i>Description</i>	<i>Combined Nomenclature code</i>	<i>Integrated Tariff of the European Communities subdivision</i>	<i>Volume threshold (kg)</i>
Tin ores and concentrates	2609 00 00		5 000
Tungsten ores and concentrates	2611 00 00		250 000
Tantalum or niobium ores and concentrates	ex 2615 90 00	10	Article 1 (4) and article 18 apply
Gold ores and concentrates	ex 2616 90 00	10	Article 1 (4) and article 18 apply
Gold, unwrought or in semi-manufactured forms, or in powder with a gold concentration lower than 99.5% that has not passed the refining stage	ex 7108 (*1)		100

(*1) For the purpose of amending this threshold, the imported volume obtained by applying the methodology and criteria of article 18 shall be set as the threshold for both ex 7108 tariff lines included in annex I.

NATIONAL EXAMPLE

CÔTE D’IVOIRE: MINING CODE OF 2014

Article 17. For the purposes of this law, mined substances are classified according to the groups hereinafter:

- Group 1: precious metals (gold, silver and platinoids)
- Group 2: fine stones and precious stones (rough diamonds, emeralds, beryl, sapphires, rubies, garnets, topaz, citrines and zircons)
- Group 3: base metals (iron, nickel, cobalt, chrome, aluminium, copper, lead, zinc, manganese, rare-earth metals, tantalum, lithium and tin)
- Group 4: radioactive and energy substances (uranium, thorium, potassium, coal, bituminous coal, brown coal, turf and bituminous shale)
- Group 5: other substances not classified elsewhere

USE OF TERMS

The present section provides a list of terms and their definitions as they apply to the context of illegal mining and trafficking in metals and minerals. Some of the terms originate from the Organized Crime Convention or build on definitions adopted by regional or international organizations.

Model provision 3 sets out definitions for certain key terms used in the model provisions contained in the present guide. Legislative drafters should ensure that the terminology used is clear, precise and consistently used. The drafting of legislation on illegal mining and trafficking in metals and minerals should be undertaken in full cognizance of the existing domestic legal framework in order to avoid contradictions and gaps and to ensure, as far as possible, consistency in the use of terms between different laws. In drafting legislation pursuant to the guide, States should adapt the designations and meanings of all relevant terms, bearing in mind the intended scope of application of their provisions.

MODEL PROVISION 3 USE OF TERMS

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

“Mining activity” means any activity related to prospecting, exploration and surface or underground exploitation of mineral resources for commercial purposes;

“Prospecting” means various techniques of reconnaissance and geological survey employed to identify the existence of minerals and mineral resources;

“Protected area” means a clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values;^a

“Exploration” means the phase of mining during which accurate information on the location, form, dimension, spread, quality and quantity of mineral resources, as well as on the social conditions and the environment, is collected;

“Exploitation” means the phase of mining during which construction, extraction, processing, purification, transportation and sales of minerals take place;

“Mineral resource” means a naturally occurring non-renewable solid substance of economic value that is formed as a result of geological processes and could be removed from the ground, including metals and non-metals;^b

“Processing” means any activity that is necessary or expedient for the purpose of beneficiating metals and minerals to produce a product, including smelting and refining;^c

“Organized criminal group” means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more offences to which this [Act/Law/Chapter ...] applies, in order to obtain, directly or indirectly, a financial or other material benefit;^d

“Serious crime” means an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;^e

“Financial or other material benefit” means any type of financial or non-financial inducement, payment, bribe, reward or other advantage, including services.

^a Nigel Dudley, ed., *Guidelines for Applying Protected Area Management Categories* (Gland, Switzerland, International Union for Conservation of Nature, 2008), p. 8.

^b There are different definitions of mineral and metals. For the purposes of the present guide, metals are included in the category of mineral resources.

^c Metals and minerals may be of different levels of purity.

^d Adapted from the Organized Crime Convention, art. 2 (a).

^e Ibid., art. 2 (b).

Chapter 3.

OFFENCES AND LIABILITY

Chapter 3 concerns the criminalization of illegal mining and trafficking in metals and minerals. It begins with a general discussion of the elements of criminal offences. It is then broken down into four sections. Section A sets out mineral exploration and exploitation offences, including illegal mining, offences related to protected areas and offences related to prohibited and regulated equipment, devices and chemicals. Section B covers offences related to possession and trafficking. Section C contains legislative guidance on document fraud in connection with illegal mining and trafficking in metals and minerals, and section D covers ancillary offences, including participation in an organized criminal group, corruption, money-laundering and obstruction of justice. The chapter ends with a discussion and model legislative provisions on secondary liability and liability of legal persons.

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, criminal liability will be appropriate. In certain cases, States may wish to opt for civil or administrative liability. Some States may decide to include the penalty applicable to each offence within the provision establishing the offence. Other States may 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 sets out 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: physical/objective elements and 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), 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 in the criminal laws of various States and the terms used to describe those mental states vary significantly. 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. Elements of intention and knowledge are at the upper end of the scale, while elements of negligence are lower. At the bottom of the scale are offences of strict or absolute liability that do not require proof of any mental element. In general, offences subject to harsher penalties for breach will require proof of more stringent mental elements. Accordingly, criminal offences typically have more stringent requirements than civil or administrative offences.

Unless otherwise specified, the present guide contemplates that proof of a mental element or mental elements equivalent to intention or, in some jurisdictions, knowledge is to be required for a conviction of the offences contained in the guide. As the wording of mental elements may vary from country to country in accordance with legal traditions, the guide does not adopt a position on the wording States should use to establish the requirement of proof of the requisite mental state. This is reflected in the wording of the model legislative provisions, in which the phrase “with the requisite mental state” is included in square brackets to emphasize this choice for legislative drafters.

States may consider adopting stricter measures and may allow proof of less strict mental elements to suffice for a conviction. Those less strict mental elements could include recklessness and negligence. While lowering the requisite mental elements for a crime facilitates criminal convictions, States should exercise caution in lowering the threshold because of the prejudice to the rights of defendants that it may entail. Moreover, in some legal systems, the removal of the requisite mental element to create offences of strict liability is impermissible except in limited circumstances. The rights of defendants must always receive due consideration in the process of legal drafting, including in determining the requisite mental elements for offences covered by the guide. Some States may wish to reserve less strict mental elements for civil and administrative offences.

A. MINERAL EXPLORATION AND EXPLOITATION OFFENCES

Illegal mining

Model provision 4 criminalizes illegal mining with the requisite mental state. This offence focuses on the criminalization of any mining activity – be it intentional prospecting, exploration or exploitation of minerals – outside of the law.

MODEL PROVISION 4 ILLEGAL MINING

Any person who [with the requisite mental state] engages in any mining activity of a mineral resource [listed in *[insert relevant schedule(s)]*]:

- (a) Without lawful authority where such authority is required by law;
- (b) Without a [*insert relevant term for licence, permit, certificate, etc.*] granted by [*insert competent authorities*];
- (c) Contravening the conditions of said [*insert relevant term for licence, permit, certificate, etc.*]; or
- (d) In a manner that otherwise contravenes [*insert reference to relevant legislation*];

commits an offence.

States may wish to introduce several offences along the lines of the offence set out in model provision 4, with differing severity according to factors such as the kind of mineral mined in the offence and the seriousness of the offender's conduct.

Introducing different types of offences is one way in which legislative drafters can ensure that the penalties given for intentionally committing illegal mining are proportionate to the circumstances of each case. Another way in which that can be ensured is by providing the judiciary with adequate discretion for the determination of appropriate penalties.

NATIONAL EXAMPLE

ECUADOR: MINING LAW OF 2009, AS AMENDED IN 2020

Article 56. Illegal mining for minerals

Persons engaging in any stage of mining operations or activities without authorization to do so or without the necessary legal permit shall be liable for illegal mining.

NATIONAL EXAMPLE

COLOMBIA: MINING CODE OF 2001

Article 159. Illicit exploration and mining

The illicit exploration and mining of mineral deposits, which constitutes the offence established in article 244 of the Criminal Code, consists in the exploration, extraction or collection of State-owned or privately owned minerals without a valid mining permit or without the authorization of the owner of that property.

NATIONAL EXAMPLE

PERU: LEGISLATIVE DECREE NO. 1100 PROHIBITING ILLEGAL MINING THROUGHOUT THE REPUBLIC AND ESTABLISHING COMPLEMENTARY MEASURES, AS MODIFIED BY LEGISLATIVE DECREE NO. 1451

Article 3. Illegal mining

Mining activity carried out by a natural or legal person without the authorization of the competent administrative authority or without being part of the comprehensive mining formalization process promoted by the State. Without prejudice to the foregoing, any mining activity carried out in areas where it is prohibited shall be considered illegal.

NATIONAL EXAMPLE

LAO PEOPLE'S DEMOCRATIC REPUBLIC: LAW ON MINERALS, AMENDED VERSION OF 2017

Article 108 (amended). General prohibitions

Individuals, legal entities or organizations are prohibited from doing the following:

1. Destroying a mineral deposit by encroaching, mining, mineral panning or other actions in contravention of the laws and regulations;
2. Undertaking mining, trading, removing or recovering minerals without permission;
- [...]
5. Using violence or referring to another person's name to intimidate officers, mining inspectors or investors;
- [...]

Article 110 (amended). Prohibitions for investors

Domestic and foreign investors are prohibited from doing the following:

1. Prospecting, exploration, mining and mineral processing in areas reserved for forests and protected forests, natural tourism sites, and historical and cultural areas;
2. Prospecting, exploration, mining and mineral processing, or trading in minerals, without authorization;
3. Prospecting, exploration, mining and mineral processing that is not specified in the approved workplan, or conducting mineral business outside of the authorized areas;
4. Encroaching, destroying or damaging mineral deposits and mines;
5. Moving, changing the position of or destroying boundary markers of concession areas;
6. Importing foreign labour, vehicles, machinery and equipment for a mineral business operation without permission;
- [...]
12. Using violence or referring to another person's name to intimidate officers, mining inspectors or people;
- [...]

Additional provisions may be necessary in the context of the Kimberley Process, which requires participating States to satisfy a list of minimum requirements for controlling the production of and trade in rough diamonds.

THE KIMBERLEY PROCESS

The unprecedented mobilization of Governments, the diamond industry, civil society groups and the Security Council in the late 1990s led to the creation of the Kimberley Process in 2003 as a strategy to curb the flow of conflict diamonds.

The Kimberley Process Certification Scheme for Rough Diamonds sets stringent standards for participating States in order for them to certify raw diamond shipments as “conflict-free” and keep conflict diamonds out of the legitimate trade. For instance, the Certification Scheme requires that a Kimberley Process certificate accompany each shipment of rough diamonds for export and that the processes for issuing certificates meet the minimum standards of the Kimberley Process (e.g. description of the shipment, including unique numbers with the alpha-2 country code according to International Organization for Standardization (ISO) standard ISO 3166-1, requirements relating to translation and the detection of forgery, and relevant harmonized commodity description and coding system specifications).^a

Each participating State is also required to establish a system of internal controls designed to eliminate the presence of conflict diamonds from shipments of rough diamonds imported into and exported from its territory, designate an importing and an exporting authority or authorities, and amend or enact appropriate laws or regulations to implement and enforce the Certification Scheme and to maintain dissuasive and proportional penalties for transgressions.^b Participating States are also required to collect and maintain information about official production, import and export data on diamonds and meet cooperation and transparency requirements, such as exchanging experiences and best practices.^c

The Kimberley Process is open to any State for membership. With its 56 participants from 82 countries, with the European Union and its member States as a single participant, members of the Kimberley Process account for about 99.8 per cent of worldwide rough diamond output. The World Diamond Council, which represents the diamond industry, and civil society organizations, such as Partnership Africa Canada, are also involved in the Kimberley Process and have played an important role from its inception.

^a Kimberley Process Certification Scheme core document, annex I.

^b Ibid., sect. IV.

^c Ibid., sect. V.

NATIONAL EXAMPLE

CÔTE D’IVOIRE: MINING CODE OF 2014

Article 100. The production, possession, transport, trading and processing, as well as all transactions relating to rough diamonds, are subject to the standards of the Kimberley Process Certification Scheme.

Offences related to prohibited and regulated equipment, devices and chemicals

Illegal mining often involves the use of dangerous and harmful equipment, devices (e.g. dredges) and chemicals (e.g. mercury to extract gold from ore in a process of amalgamation and distillation).⁸² States are advised to introduce provisions that criminalize the use of environmentally harmful equipment and devices and

⁸² For more information on mercury contamination, see Louisa J. Esdaile and Justin M. Chalker, “The mercury problem in artisanal and small-scale gold mining”, *Chemistry: A European Journal*, vol. 24, No. 27 (May 2018), pp. 6905–6916; J. Mantey and others, “Mercury contamination of soil and water media from different illegal artisanal small-scale gold mining operations (galamsey)”, *Heliyon*, vol. 6, No. 6, art. No. e04312 (June 2020); and Abdourahamane Tankari Dan-Badjo and others, “Impacts of artisanal gold mining on soil, water and plant contamination by trace elements at Komabangou, Western Niger”, *Journal of Geochemical Exploration*, vol. 205, art. No. 106328 (2019).

chemicals, while gradually reducing miners' dependency on them.⁸³ Miners should be provided with alternative equipment, devices and chemicals. If that is not done, the criminalization approach is likely to be counterproductive and will only push miners further into informality, ultimately making them more vulnerable and dependent on illicit supply sources.⁸⁴

Model provision 5 establishes an offence of using prohibited or regulated equipment, devices or chemicals in the extraction or processing of minerals. As with other types of licences, permits or certificates discussed in the present guide, the circumstances in which a licence, permit or certificate for the use of regulated equipment, devices or chemicals may be granted are a matter for each State to determine. No licences, permits or certificates will be available for prohibited equipment, devices and chemicals, so the exemption in this model provision relating to holders of valid licences, permits or certificates could never arise in such cases.

MODEL PROVISION 5

OFFENCES RELATED TO EQUIPMENT, DEVICES AND CHEMICALS

Any person who, [with the requisite mental state,] for the purposes of any mining activity, uses any equipment, device or chemical [listed in *[insert relevant schedule(s) of prohibited or regulated equipment, devices and chemicals]*]:

- (a) Without lawful authority where such authority is required by law;
- (b) Without a *[insert relevant term for licence, permit, certificate, etc.]* granted by *[insert competent authorities]*;
- (c) Contravening the conditions of said *[insert relevant term for licence, permit, certificate, etc.]*; or
- (d) In a manner that otherwise contravenes *[insert reference to relevant legislation]*;

commits an offence.

States may elect to introduce several offences of the kind set out in model provision 5, each involving different types of equipment, devices or chemicals and having different maximum penalties as appropriate. A State also could establish separate offences to reflect the danger posed to the environment by certain types of equipment, devices or chemicals. Again, States could use multiple schedules to categorize equipment, devices and chemicals in these various ways.

Model provision 5 relates only to the use of certain types of equipment, devices and chemicals in the mining of mineral resources. States also may opt to introduce additional offences criminalizing the procurement of, possession of or trade in certain equipment, devices or chemicals without a licence, permit or certificate, as well as in other circumstances. Such offences could cover, for example, possession of certain explosive devices or mercury. They may also specify authorized dealers or traders, if applicable.

Subparagraph (d) of model provision 5 offers an option to include international law in relation to the offences related to equipment, devices and chemicals. This is done with a view to recognizing the commitment of States to the Minamata Convention, the aim of which is to protect human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds. Nevertheless, the subparagraph could also be applicable to the State's binding commitments under other international legal instruments.

⁸³ For a discussion of mercury-free alternatives, see UNEP, Global Mercury Partnership and Artisanal Gold Council, *Reducing Mercury Use in Artisanal and Small-Scale Gold Mining: A Practical Guide* (Nairobi, 2012).

⁸⁴ For instance, Law No. 1658 of 2013 of Colombia established a ban on the use of mercury in mining but granted a five-year transition period prior to fully prohibiting its use, thus enabling miners to develop alternative solutions and procure mercury-free technologies to mine gold. See OAS, Department against Transnational Organized Crime, Secretariat for Multidimensional Security, *On the Trail of Illicit Gold Proceeds: Colombia's Case*, p. 10.

NATIONAL EXAMPLE

UNITED STATES OF AMERICA: NEW MEXICO STATUTES OF 2014

30-30-1. Illegal possession of mercury

Illegal possession of mercury consists of possessing more than one pound of mercury without also possessing a bona fide bill of sale or other instrument in writing relating to the mercury in possession stating the name and address of the seller, the name and address of the purchaser, the date of the sale, the amount sold and the price paid therefor; provided however, this section shall not be applicable to any person engaged in the business of mining, processing mercury, or to any person using mercury as an integral part of a tool, instrument or device in his business, or to a law enforcement officer in discharge of his duties.

Whoever commits illegal possession of mercury is guilty of a fourth-degree felony.

NATIONAL EXAMPLE

GHANA: MINERALS AND MINING ACT OF 2006, AS AMENDED IN 2019

Use of explosives

95. A small-scale miner shall not without the written permission of the Minister on the recommendation of the Commission use explosives in the area of operation.

Purchase of mercury

96. A small-scale miner may purchase from an authorized mercury dealer the quantities of mercury that may be reasonably necessary for the mining operations of the small-scale miner.

NATIONAL EXAMPLE

CÔTE D'IVOIRE: MINING CODE OF 2014

Article 68. The use of explosive substances and chemical products in non-industrial exploitations is prohibited.

NATIONAL EXAMPLE

MALI: MINING CODE OF 2019

Article 50. The list of equipment and materials that may be used for artisanal mining shall be established by the decree implementing this Code.

The use of explosives and hazardous chemicals, including cyanide, mercury and acids, in artisanal mining activities is prohibited. [...]

NATIONAL EXAMPLE

PERU: LEGISLATIVE DECREE NO. 1100 PROHIBITING ILLEGAL MINING THROUGHOUT THE REPUBLIC AND ESTABLISHING COMPLEMENTARY MEASURES

Article 5. Prohibitions

The following is prohibited in small-scale and artisanal mining:

5.1. The use of dredges and other similar devices in all watercourses, rivers, lakes, lagoons, natural pools, ponds, wetlands and moriche swamps.

“Similar devices” means the following:

- (a) Mobile or portable units that suction materials from the beds of rivers, lakes and watercourses in order to extract gold or other minerals;
- (b) Hydraulic dredges, suction dredges, “gringo” platforms, “castle” platforms, dredger platforms, winches or suction pump systems;
- (c) Other devices that have a suction pump of any size, whether or not a sieve or chute forms part of them;
- (d) Any other device that has a similar effect or causes similar damage.

5.2. Goods, machinery, equipment and supplies used to carry out illegal mining activities, such as the use of front-end loaders, backhoe loaders, dump trucks, pneumatic compressors and drills, tanker trucks that provide fuel or water, and other equipment that, regardless of its power, size, volume or load capacity, is intended for the same purpose.

5.3. The installation and use of chutes, grinders, mills and cyanidation pools for ore processing, motor pumps and other equipment, regardless of their power, size, volume or load capacity, that are used in illegal mining activities. [...]

Offences related to mining in protected areas and on indigenous lands

The term “protected area” may include a broad range of areas, such as national parks, wildlife sanctuaries, biosphere reserves, reserved and protected forests, conservation and community reserves, communal forests, etc.⁸⁵ From a conservation standpoint, there is a growing fear that illegal mining, in particular when it is apparently linked to organized criminal groups, can bring about irreversible negative consequences for such areas. States are advised to introduce special offences for illegal mining in and in the proximity of designated protected areas. States may also restrict mining in specific areas, such as indigenous lands and areas where elements of critical infrastructure are located (e.g. bridges, railroads, etc.) or in the vicinity of areas of public significance (e.g. certain public and private buildings, cemeteries, etc.).

The identification of protected areas is left to each State to decide. States are advised to adopt a participatory process and engage with relevant domestic and international stakeholders in the establishment, delineation, classification and declassification of protected areas.

States should make use of existing international materials on protected areas, such as the International Union for Conservation of Nature (IUCN) protected area categories,⁸⁶ when developing their own classifications. States may also consider establishing buffer zones around protected areas to ensure a higher level of conservation efficiency.

⁸⁵ Barbara Lausche and Françoise Burhenne, *Guidelines for Protected Areas Legislation*, IUCN Environmental Policy and Law Paper, No. 81 (Gland, Switzerland, International Union for Conservation of Nature, 2011), pp. 11–12.

⁸⁶ Further information on the International Union for Conservation of Nature protected area categories can be found at www.iucn.org.

INTERNATIONAL UNION FOR CONSERVATION OF NATURE PROTECTED AREA CATEGORIES

- Category I a: strict nature reserve
- Category I b: wilderness area
- Category II: national park
- Category III: natural monument or feature
- Category IV: habitat/species management area
- Category V: protected landscape/seascape
- Category VI: protected area with sustainable use of natural resources

IUCN recommends that all exploration and extraction of mineral resources in protected areas corresponding to IUCN protected area categories I to IV be prohibited by law, and that projects in category V and VI areas undergo a thorough environmental impact assessment.⁸⁷

Model provision 6 below establishes offences for two categories of conduct within protected areas. Paragraph 1 establishes an offence of possession of prohibited or regulated equipment, devices and chemicals in a protected area. States should ensure that those provisions are harmonized with other applicable legislation and that the relationship between the different bodies of legislation is clarified. States may elect to prohibit the possession and use of particular types of equipment, devices and chemicals in designated protected areas, in accordance with particular schedules. The scope of equipment, devices and chemicals prohibited for use within a protected area may be broader than the scope of equipment, devices and chemicals prohibited for use in non-protected areas, and the applicable penalties for such offences may be higher.

The offence in paragraph 2 establishes liability for carrying out any mining activities for a mineral resource in a protected area. As with the other offences included in the present guide, it is up to each State to determine the circumstances under which conduct shall be within the scope of lawful authority and the circumstances under which a licence, permit or certificate may be available to applicants.

⁸⁷ An assessment of the environmental implications of a plan, policy, programme or project before a decision is made on whether or not to proceed with the planned activity. For more details on environmental impact assessments, see UNEP, *Assessing Environmental Impacts: A Global Review of Legislation* (Nairobi, 2018) and recommendation 2.82, entitled “Protection and conservation of biological diversity of protected areas from the negative impacts of mining and exploration”, adopted at the World Conservation Congress held in Amman from 4 to 11 October 2000.

MODEL PROVISION 6

OFFENCES RELATED TO PROTECTED AREAS

1. Any person who [with the requisite mental state] possesses a device, chemical or equipment listed in [insert relevant schedules of prohibited and regulated equipment, devices and chemicals] in [insert relevant schedule(s) of protected areas]:

- (a) Without lawful authority where such authority is required by law;
- (b) Without a [insert relevant term for licence, permit, certificate, etc.] granted by [insert competent authorities];
- (c) Contravening the conditions of said [insert relevant term for licence, permit, certificate, etc.]; or
- (d) In a manner that otherwise contravenes [insert reference to relevant legislation];

commits an offence.

2. Any person who [with the requisite mental state] engages in any mining activity of a mineral resource listed in [insert relevant schedule(s) of mineral resources] in [insert relevant schedule(s) of protected areas]:

- (a) Without lawful authority where such authority is required by law;
- (b) Without a [insert relevant term for licence, permit, certificate, etc.] granted by [insert competent authorities];
- (c) Contravening the conditions of said [insert relevant term for licence, permit, certificate, etc.]; or
- (d) In a manner that otherwise contravenes [insert reference to relevant legislation];

commits an offence.

NATIONAL EXAMPLE

PHILIPPINES: MINING ACT OF 1995

Section 19. Areas closed to mining applications

Mineral agreement or financial or technical assistance agreement applications shall not be allowed:

- (a) In military and other government reservations, except upon prior written clearance by the government agency concerned;
- (b) Near or under public or private buildings, cemeteries, archaeological and historic sites, bridges, highways, waterways, railroads, reservoirs, dams or other infrastructure projects, public or private works including plantations or valuable crops, except upon written consent of the government agency or private entity concerned;
- (c) In areas covered by valid and existing mining rights;
- (d) In areas expressly prohibited by law;
- (e) In areas covered by small-scale miners as defined by law unless with prior consent of the small-scale miners, in which case a royalty payment upon the utilization of minerals shall be agreed upon by the parties, said royalty forming a trust fund for the socioeconomic development of the community concerned; and
- (f) Old growth or virgin forests, proclaimed watershed forest reserves, wilderness areas, mangrove forests, mossy forests, national parks, provincial/municipal forests, parks, green belts, game refuge and bird sanctuaries as defined by law and in areas expressly prohibited under the National Integrated Protected Area System (NIPAS) under Republic Act No. 7586, Department Administrative Order No. 25, series of 1992 and other laws.

Indigenous lands may be treated as protected areas in the context of illegal mining. Governments should incorporate customary and indigenous tenure and resource use, and implement control systems as a means of enhancing protection from illegal mining practices on indigenous lands. In such contexts, indigenous communities should be recognized as rightful, equal partners in the drafting and implementation of laws that affect their lands.

NATIONAL EXAMPLE

GUYANA: AMERINDIAN ACT OF 2006

2. In this Act —

“Amerindian” means any citizen of Guyana who—

- (a) Belongs to any of the native or aboriginal peoples of Guyana; or
- (b) Is a descendant of any person mentioned in paragraph (a); [...]

“Village or Amerindian Village” means a group of Amerindians occupying or using Village lands;

“Village lands” means lands owned communally by a Village under title granted to a Village Council to hold for the benefit of the Village;

[...]

48. (1) A miner who wishes to carry out mining activities on Village lands or in any river, creek, stream or other source of water within the boundaries of Village lands shall —

- (a) Obtain any necessary permissions and comply with the requirements of the applicable written laws;
- (b) Make available to the Village any information which the Village Council or Village reasonably requests;
- (c) Give the Village Council a written summary of the proposed mining activities [...];
- (d) Attend any consultations which the Village Council or Village requests;
- (e) Negotiate with the Village Council on behalf of the Village in good faith all relevant issues;
- (f) Subject to section 51 reach agreement with the Village Council on the amount of tribute to be paid; and
- (g) Obtain the consent of at least two thirds of those present and entitled to vote at a Village general meeting.

(2) The Guyana Geology and Mines Commission may facilitate the consultations to be held under subsection (1) but may not take part in any negotiations.

[...]

B. OFFENCES RELATED TO POSSESSION AND TRAFFICKING

Illegal possession

It is recommended that States introduce offences related to the possession of and trafficking in metals and minerals of illicit origin. In this context, States should consider the vulnerabilities of artisanal and small-scale miners and the rights of indigenous people and local communities to possess and trade the minerals they extract on their land for subsistence purposes, as appropriate. Failing to do so may jeopardize the livelihoods of vulnerable groups.

Model provision 7 covers the offence of possession of metals or minerals of illicit origin with a view to dealing in them. It relates to possession of a metal or mineral in contravention of the State's legislation. It also contributes to the implementation of article 6 of the Organized Crime Convention, on criminalization of the laundering of proceeds of crime, which applies to situations when trade in metals and minerals is abused by criminal actors to launder the proceeds of not only illegal mining, but also narcotics, corruption and other crimes. The rationale behind the model provision is to avoid the proliferation of illicit markets by imposing liability on those who acquire illicit goods, thus addressing the demand side of the crime.

MODEL PROVISION 7

POSSESSION OF A METAL OR MINERAL EXTRACTED, TAKEN, POSSESSED, DISTRIBUTED, TRANSPORTED, PURCHASED OR SOLD UNLAWFULLY

Any person who [with the requisite mental state] possesses any metal or mineral extracted, taken, possessed, distributed, transported, purchased or sold in contravention of this [Act/Law/Chapter ...], knowing at the time of receipt that such metal or mineral has been extracted, taken, possessed, distributed, transported, purchased or sold in contravention of this [Act/Law/Chapter ...], commits an offence.

There are two mental elements for the offence in model provision 7. To be convicted of this offence, a defendant must have the requisite mental state (e.g. knowledge) in relation to the possession of the respective kind of metal or mineral in contravention of the State's mining-related legislation. In addition to the mental element regarding the fact of possession, there is also an express mental element of knowing that the metal or mineral was extracted, taken, possessed, distributed, transported, purchased or sold in contravention of the State's mining-related legislation.

States should address whether the term "possess" includes permitting third parties to possess on the person's behalf. States also should consider whether there are circumstances in which possession for the purposes of personal consumption should be addressed through seizure, confiscation/forfeiture, civil penalties or other measures rather than through criminal liability.

NATIONAL EXAMPLE

PERU: LEGISLATIVE DECREE NO. 1106 ON THE EFFECTIVE COMBATING OF MONEY-LAUNDERING AND OTHER OFFENCES RELATED TO ILLEGAL MINING AND ORGANIZED CRIME, AS MODIFIED BY LAW NO. 31178

Article 2. Acts of concealment and possession

Any person who acquires, uses, possesses, holds in safekeeping, administers, keeps under his or her protection, receives, conceals or keeps in his or her possession money, property, effects or proceeds the illicit origin of which he or she is aware or should have suspected shall be punished with imprisonment for a term of not less than 8 and not more than 15 years, a fine of 120 to 350 day-fine units and deprivation of certain rights for 5 to 20 years in accordance with paragraphs 1, 2 and 8 of article 36 of the Criminal Code.

Trafficking in metals and minerals

The criminalization of domestic and cross-border trafficking is an essential component of any criminal law combating illegal mining. Model provision 8 below contains two offences of trafficking, a basic offence and an optional addendum establishing a stronger standard for criminalization.

In different legal systems and in different contexts, the term “trafficking” may be interpreted differently. Paragraph 1 takes a broad approach to the acts included in the offence of trafficking in metals and minerals, covering the following:

importing, exporting, re-exporting, dispatching, dispatching in transit, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, storing or transporting a metal or mineral, in a natural, processed, or manufactured form.

Paragraph 1 specifies the acts that constitute trafficking, including acts without lawful authority or without a licence, permit or certificate, or in breach of the conditions of such a licence, permit or certificate. The conditions pertaining to the granting of such lawful authority, or of such a licence, permit or certificate, may then be set out in other provisions of the same law or in a different law. With regard to subparagraph 1 (d), legislators may define trafficking as particular acts in breach of the law in question, in breach of a particular law or regulation, or in breach of specific provisions of a particular law or regulation.

Paragraph 2 criminalizes the trafficking of metals and minerals. This paragraph is to be interpreted together with paragraph 1, which defines the offence of trafficking. In addition to the basic offence of trafficking, the guide also offers a stronger option for the criminalization of trafficking in metals and minerals, as an optional addendum. That option serves to criminalize the importation of metals and minerals, in natural, processed or manufactured form, with the knowledge that such metals and minerals were obtained or exported illegally from another country. It must be emphasized that this approach does not require or imply that the State should enforce foreign laws. Rather, it is the applicable foreign law that informs the illegal status of the metals or minerals in question and renders their importation illegal under domestic law. The focus of the offence is on protecting the domestic market from the entry of contraband.

MODEL PROVISION 8 TRAFFICKING IN METALS AND MINERALS

1. For the purposes of this [Act/Law/Chapter ...], “trafficking” means importing, exporting, re-exporting, dispatching, dispatching in transit, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, storing or transporting a metal or mineral, in a natural, processed, or manufactured form:

- (a) Without lawful authority where such authority is required by law;
- (b) Without a [insert relevant term for licence, permit, certificate, etc.] granted by [insert competent authorities];
- (c) Contravening the conditions of said [insert relevant term for licence, permit, certificate, etc.]; or
- (d) In a manner that otherwise contravenes [insert reference to relevant legislation].

2. Any person who [intentionally/with the requisite mental state] traffics in any metal or mineral [listed in [insert relevant schedule(s)]], commits an offence.

Optional addendum

Any person who [intentionally/with the requisite mental state] imports any metal or mineral [listed in [insert relevant schedule(s)]], in a natural, processed, or manufactured form, knowing that it was obtained or exported illegally from another country, commits an offence.

States may elect to introduce a separate offence relating to trafficking in precious metals and minerals with appropriate penalties that take into account the specificities of each case, including higher maximum penalties, where appropriate. States can achieve such an enhancement by legislating a single offence but including an aggravated penalty or by working with the schedules and legislating different penalties for different schedules.

In addition to criminalizing trafficking in metals and minerals, States should consider criminalizing trafficking in equipment, devices and chemicals which could be used in illegal mining activities. It should also be noted that, pursuant to the approach taken in model provision 8, there is no requirement that the trafficking involve transboundary movement. While some of the acts constituting the offence may involve transboundary movement (e.g. importing and exporting), it is not required that the offence involves transboundary movement in all cases.

NATIONAL EXAMPLE

COLOMBIA: MINING CODE OF 2001

Article 160. Illicit exploitation

The illicit exploitation of mining resources consists in the beneficiation, trading or acquisition, in any form, of minerals extracted from areas not covered by a mining permit. In such cases, the perpetrator shall be penalized in accordance with the provisions of article 244 of the Criminal Code, except as provided for in this Code with respect to manual panning.

NATIONAL EXAMPLE

GHANA: MINERALS AND MINING ACT OF 2006, AS AMENDED IN 2019

Offences and penalties

99. (1) A person who buys or sells minerals without: (a) a licence in accordance with section 6, 82, 97, or 104; or (b) a valid authority granted under this Act or any other enactment; commits an offence and is liable on summary conviction to a fine of not less than ten thousand penalty units and not more than fifteen thousand penalty units, and to a term of imprisonment of not less than fifteen years and not more than twenty-five years.

Licence to buy and deal in minerals

104. Without limiting the effect of an enactment empowering a person or body to purchase and deal in a mineral, the Minister in consultation with the [Minerals] Commission may, in writing, license persons the Minister considers fit, to buy and deal in the types and forms of minerals and under terms and conditions specified in the licence.

NATIONAL EXAMPLE

PERU: LEGISLATIVE DECREE NO. 1106 ON THE EFFECTIVE COMBATING OF MONEY-LAUNDERING AND OTHER OFFENCES RELATED TO ILLEGAL MINING AND ORGANIZED CRIME, AS MODIFIED BY LAW NO. 31178

Article 3. Transportation, transfer, entry or exit through national territory of money or securities of illicit origin

Any individual who transports or carries on his or her person or by any other means, within the national territory, cash or negotiable bearer instruments the illicit origin of which he or she is aware or should have suspected, in

order to prevent identification of the origin of such cash or instruments or their seizure or confiscation, or who conveys such property into or out of the country on his or her person or by any other means for the same purpose, shall be punished with imprisonment for a term of not less than 8 and not more than 15 years, a fine of 120 to 350 day-fine units and deprivation of certain rights for 5 to 20 years in accordance with paragraphs 1, 2 and 8 of article 36 of the Criminal Code.

NATIONAL EXAMPLE

LAO PEOPLE'S DEMOCRATIC REPUBLIC: LAW ON MINERALS, AMENDED VERSION OF 2017

Article 110 (amended). Prohibitions for investors

Domestic and foreign investors are prohibited from doing the following:

[...]

6. Importing foreign labour, vehicles, machinery and equipment for a mineral business operation without permission;

7. Mining, trading, removing or transporting prohibited minerals;

8. Removing or transporting minerals exceeding the weight, quantity or size, or otherwise not in compliance with the proper documentation;

[...]

C. DOCUMENT FRAUD IN CONNECTION WITH ILLEGAL MINING AND TRAFFICKING IN METALS AND MINERALS

The authenticity of documents relating to mining activity is key to the ability of relevant authorities to trace and track illegally extracted minerals. A significant part of illegal mining and trafficking in metals and minerals takes place overtly using fraudulent licences, permits or certificates. Criminals use such licences, permits and certificates to cloak illegally sourced minerals as ostensibly legitimate. In doing so, they may conspire with disreputable businesses to generate fraudulent paperwork about the true origin and composition of metals and minerals. Criminals may use fraudulent documents to obtain licences, permits or certificates allowing entry into a protected area and allowing the possession and use of certain equipment, devices or chemicals. They may also benefit from fraudulent paperwork to export illegally sourced metals and minerals with a view to trading them in legal markets abroad.

Document fraud relating to licences, permits and certificates can be committed in a number of ways. In some cases, criminals will forge licences, permits and certificates outright. In other cases, traffickers will alter genuine licences, permits and certificates. Criminals may also obtain genuine licences, permits and certificates through fraudulent misrepresentations to issuing authorities or by bribing officials. Document fraud can also occur when persons other than the rightful holder use lawfully obtained genuine licences, permits or certificates for purposes of illegal mining and trafficking in metals and minerals. To combat those crimes effectively, States should tackle each of these forms of document fraud.

Model provisions 9 and 10 below include offences relating to document fraud. Model provision 9 criminalizes producing, offering, distributing, procuring, trading, exchanging, providing, selling, acquiring, buying, using

or possessing a fraudulent licence, permit or certificate, or a part thereof. The provision targets actors involved in all stages of the supply chain of fraudulent licences, permits and certificates, ranging from the producers and intermediaries of such fraudulent documents to the ultimate users or possessors. It also covers both forgery and the fraudulent alteration of licences, permits and certificates.

MODEL PROVISION 9

FRAUDULENT [LICENCES, PERMITS AND CERTIFICATES]

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 term for licence, permit, certificate, etc.*] or a part thereof commits an offence.

Model provision 10 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 is recommended that legislation establishing such an offence define an appropriate mental element to ensure that the offence does not criminalize purely accidental errors in the application for or use of licences, permits or certificates. In other words, it would be inappropriate to make model provision 10 a strict liability offence.

MODEL PROVISION 10

FRAUDULENT CONDUCT IN CONNECTION WITH [LICENCES, PERMITS AND CERTIFICATES]

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 term for licence, permit, certificate, etc.*],

commits an offence.

NATIONAL EXAMPLE

GHANA: MINERALS AND MINING ACT, 2006, AS AMENDED IN 2019

Offences

106. A person who

[...]

- (b) In making application for mineral right or renewal of mineral right, knowingly makes a statement which is false or misleading in any material particular;

(c) In a report, return or affidavit submitted in pursuance of the provisions of this Act, knowingly includes information which is false or misleading in a material particular;

[...]

(g) Mingles or causes to be mingled with samples or ore, substances which will enhance the value or in a way change the nature of the ore with the intention to cheat, deceive or defraud;

(h) Being engaged in the business of milling, leaching, sampling, concentrating, reducing, assaying, transporting or dealing in ores, metals or minerals, keeps or uses false or fraudulent scales or weights for weighing the ores, metals or minerals, or uses false or fraudulent assay scales or weights or enriched fluxes used for ascertaining the assay value of minerals, knowing them to be false or fraudulent;

[...]

Commits an offence and is liable on summary conviction to a fine [...].

NATIONAL EXAMPLE

GUYANA: MINING ACT OF 1989, AS AMENDED IN 2010

124. Penalty for giving false information, etc., in application for licence, etc.

Any person who—

- (a) In, or in connection with, any application for a licence or permit under this Act gives or permits to be given information which he knows or has reason to believe is false or misleading in a material particular;
- (b) In any report, return or affidavit, submitted in pursuance of this Act or his licence or permit, includes or permits to be included any information which he knows or has reason to believe is false or misleading in a material particular; or
- (c) Places or deposits, or is accessory to the placing or depositing of, any material or other substance in any place, with the intention of misleading, or knowing that it is likely to mislead, any other person as to the possibility of any material existing in that place;

Shall, on summary conviction, be liable –

- (i) In the case of an individual, to a fine of fifteen thousand dollars and imprisonment for one year; or
- (ii) In the case of a body corporate, to a fine of seventy-five thousand dollars and imprisonment for one year.

NATIONAL EXAMPLE

LAO PEOPLE'S DEMOCRATIC REPUBLIC: LAW ON MINERALS, AMENDED VERSION OF 2017

Article 108 (amended). General prohibitions

Individuals, legal entities or organizations are prohibited from doing the following:

[...]

- 4. Falsifying documents or seals related to minerals;

[...]

LAO PEOPLE'S DEMOCRATIC REPUBLIC: LAW ON MINERALS, AMENDED VERSION OF 2017 (CONTINUED)

Article 109. Prohibitions for officers and mining inspectors

Officers and mining inspectors are prohibited from doing the following:

[...]

6. Falsifying documents, such as signatures, seals, accounts and data of activities related to minerals;

[...]

Article 110 (amended). Prohibitions for investors

Investors are prohibited from doing the following:

[...]

13. Making false reports or falsifying documents or seals related to minerals;

[...]

D. ANCILLARY OFFENCES

Illegal mining and trafficking in metals and minerals are facilitated by a number of “ancillary” offences. The Organized Crime Convention requires that States parties criminalize money-laundering, corruption, obstruction of justice and either conspiracy or criminal association, or both. It is essential that States satisfy this requirement in order to address illegal mining and trafficking in metals and minerals. The present section provides guidance on criminalizing those forms of conduct.

It should also be noted that perpetrators of illegal mining and trafficking in metals and minerals – natural or legal persons – may also engage in tax evasion and avoidance of royalty payments, fees and other fiscal levies. While those crimes are not addressed in the present guide, States should take appropriate legislative and other measures to prevent and combat them.

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 (1) (a) gives States parties a choice of one or both of two different models for achieving that end. The models set out below 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 (1) (a) (i) reflects the conspiracy model traditionally taken by common-law jurisdictions, whereas the offence in article 5 (1) (a) (ii) reflects the criminal association model traditionally adopted in civil-law jurisdictions.

Model provisions 11 and 12 below reflect those two alternative models of criminalizing participation in an organized criminal group. The provisions are based on the wording of article 5 (1) (a) of the Organized Crime Convention but have been adapted to the context of illegal mining and trafficking in metals and minerals.

As is the case with the two models contained in the Organized Crime Convention, States have a choice of whether to introduce one or both of those offences. To establish criminal liability for the conspiracy offence in model provision 11, it must be proven that the accused agreed with one or more other persons to commit a serious crime (i.e. the physical/objective element of the offence). Paragraph 2 is provided as an option for those States that wish to 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 an additional 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;
- (b) The purpose of the agreement being to obtain a financial or other material benefit.

Model provision 11 does not expressly include the word “intention”. Nevertheless, the wording of the offence implies the mental element of intention. The act of agreement to commit an offence can be committed only intentionally.

MODEL PROVISION 11 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.
- [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 12 below contains two criminal association offences. The first 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 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 in 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 of 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*.⁸⁸

⁸⁸ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (Vienna, 2017).

MODEL PROVISION 12

PARTICIPATION 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.
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.

NATIONAL EXAMPLE

FRANCE: CRIMINAL CODE, AS AMENDED IN 2020

Article 450-1. Participation in a criminal association

A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment.

Where the offences contemplated are felonies or misdemeanours punished by 10 years' imprisonment, participation in a criminal association is punished by 10 years' imprisonment and a fine of 150,000 euros.

Where the offences contemplated are misdemeanours punished by at least five years' imprisonment, the participation in a criminal association is punished by five years' imprisonment and a fine of 75,000 euros.

CASE EXAMPLE: SOUTH AFRICA

Chaba and Others v. S. (A190/2017) [2019] ZAFSHC 108; [2019] 3 All SA 103 (FB) [22 March 2019]^a

Harmony Gold Mine (Pty) Limited is a mining company operating the Masimong Gold Mine in the district of Henneman in South Africa. Miners can legally enter the shafts if they are able to produce a mining identity card used to clock in and out when entering and exiting the mine. However, it was common knowledge that the clocking system could be breached, allowing illegal miners to enter the mine. Illegal mining operations inside the mine were a known phenomenon, and illegal processing or refinery plants had been found and subsequently destroyed in the past.

On 10 and 11 April 2014, an underground "clean-up" operation to expose illegal miners was carried out by a security agency. During the operation, makeshift gold processing plants, beds, letters, books, lists of names and other documents were discovered, together with large quantities of extracted ore. The documents included gold transaction notes and photographs pointing to the identities of the illegal miners.

The investigation brought to light that ore worth 125 million South African rand had been extracted using processing plants. Yet, on site, investigators only discovered material worth 41 million rand (1,211 tons of ore) that had been moved and made ready for further transport using canvas bags.

Twenty-two people were arrested, mostly on the mine's premises. One person, who was incriminated by documentary evidence encountered on site, was arrested outside the premises.

They were found guilty of racketeering, money-laundering and contravention of the Precious Metals Act and the Criminal Procedure Act. On 14 March 2017, the Virginia Circuit Court handed down prison sentences ranging from 3 to 20 years.

They appealed the judgment before the High Court of South Africa, Free State Division, Bloemfontein, but their appeal was rejected on 22 March 2019.

^a The text of the case has been borrowed from the UNODC knowledge management portal known as Sharing Electronic Resources and Laws on Crime (SHERLOC). Available at <https://sherloc.unodc.org/cld/en/st/home.html>.

Money-laundering

Illegal mining and trafficking in metals and minerals generate substantial illicit profits and invite money-laundering.⁸⁹ Unlike many other environmental crimes, criminals involved in those crimes use illegally sourced minerals to both generate criminal proceeds and launder proceeds from other crimes. For instance, gold can be traded anonymously, making market transactions difficult to trace and link back to its original source.⁹⁰ Gold can be easily turned into cash, and its high value-to-mass ratio makes it easy to conceal, thus making it an attractive commodity to smuggle across borders.⁹¹ For these and other reasons, the Financial Action Task Force (FATF) Standards identify environmental crimes as one of the designated categories of offences for money-laundering.⁹²

Article 6 of the Organized Crime Convention requires States parties to introduce measures to criminalize money-laundering.⁹³ Article 6 (1) contains a number of subparagraphs that require States parties to introduce criminal offences relating to various aspects of money-laundering. The first of them, article 6 (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”. Article 2 (h) of the Organized Crime Convention defines the term 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 (2) (a) requires that each State party seek to apply the offences in article 6 (1) to the widest range of predicate offences. Article 6 (2) (b) specifically requires that States parties include as predicate offences all

⁸⁹ Financial Action Task Force (FATF), *Money Laundering from Environmental Crime* (Paris, 2021); Shawn Blore and Marcena Hunter, “Dubai’s problematic gold trade”, in *Dubai’s Role in Facilitating Corruption and Global Illicit Financial Flows*, Matthew T. Page and Jodi Vittori, eds. (Washington D.C., Carnegie Endowment for International Peace, 2020), pp. 35–40; and Yuliya Zabyelina and Lilla Heins, “All that glitters: money laundering through precious metals and minerals” in *Illegal Mining*, Zabyelina and Daan van Uhm, eds., pp. 439–465.

⁹⁰ Marcena Hunter, Asher Smith and Estelle Levin-Nally, *Follow the Money: Financial Flows Linked to Artisanal and Small-Scale Gold Mining* (Geneva, Global Initiative against Transnational Organized Crime, 2017), p. 6.

⁹¹ Emmanuel Mathias and Bert Feys, “Implementing AML/CFT measures in the precious minerals sector: preventing crime while increasing revenue”, Technical Notes and Manuals, No. 14/01 (Washington, D.C., International Monetary Fund, 2014).

⁹² FATF, *Money Laundering from Environmental Crime*.

⁹³ A similar provision exists in the Convention against Corruption, art. 23.

serious crimes, as defined in article 2 (b) of the Convention, and the offences specifically provided for under the Convention.

States have taken different approaches to predicate offences. Some have defined “predicate offence” by reference to an exhaustive list of offences contained in legislation. Other States have defined the term broadly to include all crimes, all serious crimes or all crimes subject to a maximum penalty at or above a certain threshold. For those States that utilize a list of predicate offences, article 6 (2) (b) of the Organized Crime Convention requires that this list include, at a minimum, “a comprehensive range of offences associated with organized criminal groups”.

Pursuant to the provisions of article 6 of the Organized Crime Convention, States parties must include as predicate offences for the purposes of money-laundering all serious crimes, as defined in the Convention, that is, crimes that are punishable by a maximum penalty of at least four years of imprisonment. States may wish to criminalize illegal mining and trafficking in metals and minerals accordingly. Where that would not automatically be provided for under existing legislation, States may decide to expressly acknowledge in relevant legislation that all offences of illegal mining and trafficking in metals and minerals are predicate offences to money-laundering.

An example of a provision designating serious illegal mining offences as predicate offences for money-laundering is provided in model provision 13 below.

MODEL PROVISION 13

DESIGNATION OF PREDICATE OFFENCES FOR MONEY-LAUNDERING

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

Regardless of the way 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 constitutes the proceeds of crime. Some States may require no predicate offences for the offence of money-laundering, treating the latter as an autonomous offence. In that case, investigating a possible predicate offence as such is not the purpose of a stand-alone money-laundering investigation. Instead, proving that property is the proceeds of crime does not require, at any stage of the proceedings, that a person be convicted of a predicate offence.⁹⁴

NATIONAL EXAMPLE

PERU: LEGISLATIVE DECREE NO. 1106 ON THE EFFECTIVE COMBATING OF MONEY-LAUNDERING AND OTHER OFFENCES RELATED TO ILLEGAL MINING AND ORGANIZED CRIME, AS MODIFIED BY LEGISLATIVE DECREE NO. 1249

Article 10. Independence of the offence and circumstantial evidence

Money-laundering is an independent offence; therefore, for its investigation, prosecution and punishment, it is not necessary for the criminal activities that generated the money, property, effects or proceeds to have been discovered, to be under investigation, to be the subject of judicial proceedings or to have previously been proven or led to a conviction.

⁹⁴ Recommendation 3.5. in FATF, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (Paris, 2013), p. 27 (updated in October 2021).

It shall be presumed that a perpetrator of an offence covered by this Legislative Decree was aware of or should have suspected the illicit origin of proceeds in the case of criminal activities such as illegal mining, drug trafficking, terrorism, financing of terrorism, offences against the public administration, kidnapping, pimping, trafficking in persons, arms trafficking, migrant smuggling, tax offences, extortion, robbery, customs offences or any other offence capable of generating illegal proceeds, with the exception of the acts referred to in article 194 of the Criminal Code. The illicit origin of which the perpetrator of the offence was aware or which he or she should have suspected may be inferred from the evidence in each case.

Any person who carried out or participated in the criminal activities that generated the money, property, effects or proceeds in question may also be considered a perpetrator of the offence and thus subject to investigation and prosecution for money-laundering.

PREVENTION POINT

Countering illicit financial flows

In parallel to regulatory and professional requirements, such as licensing, the measures to counter money-laundering and the financing of terrorism also apply to the metals and minerals supply chain to prevent criminals from moving illicit funds through the sector or laundering proceeds of illegal mining and trafficking in metals and minerals.

The FATF recommendations set the international standard that countries should implement to combat money-laundering and the financing of terrorism.^a As member States are evaluated by FATF and FATF-style regional bodies on their compliance with and effectiveness on the basis of standards relating to money-laundering and countering the financing of terrorism, most dispositions of the FATF recommendations are transposed into national laws and regulations on those offences. Some of those recommendations cover preventive measures that States should apply to the financial sector and other designated sectors.

For instance, the supply chain for metals and minerals is covered under FATF recommendation 23, on designated non-financial businesses and professions, under the term “dealers in precious metals and stones”. The designation of such dealers can apply to a wide array of actors in the supply chain, ranging from brokers and refiners to jewellery manufacturers, traders and sellers.^b FATF recommends that dealers in precious metals and stones be placed under the requirement of customer due diligence measures and comply with record-keeping requirements in relation to money-laundering and countering the financing of terrorism. Such dealers are also required to report suspicious transactions when they engage in cash transactions above a certain threshold.

States are recommended to adopt or amend relevant legislation and regulations to promote compliance with requirements relating to money-laundering and countering the financing of terrorism among dealers in precious metals and stones and to empower regulators in their application of the risk-based approach to metal and mineral supply chains and the dealers’ activity.

States may also consider creating mining-specific beneficial ownership registries containing publicly accessible beneficial ownership information about companies and legal persons. Establishing a beneficial ownership registry has several potential benefits. The main advantage is that such registries facilitate timely access to information, thus eliminating the need to contact entities, corporate service providers or banks. At the same time, States should ensure they can accommodate the financial costs of those registries, confront privacy concerns and meet the bureaucratic demands of enacting legislative changes on the matter.^c

^a FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (Paris, 2012) (updated in March 2022).

^b FATF, “RBA guidance for dealers in precious metals and stones” (Paris, 2008).

^c OECD and Inter-American Development Bank, *A Beneficial Ownership Implementation Toolkit* (2019), p. 18.

Corruption

Organized criminal groups, including those involved in illegal mining and trafficking in metals and minerals, frequently make use of corruption in the course of their operations. Corruption poses significant threats globally; it weakens institutions, erodes trust and threatens the economy by undermining fair competition and discouraging investment and trade. Corruption disproportionately affects disadvantaged groups, specifically the poor, preventing social inclusion, promoting inequality and inhibiting prosperity. The fact that public officials become compromised and act against the public interest undermines the stability of governmental systems in general and public confidence in them.

With regard to the offences covered in the present guide, corruption may occur anywhere along the mineral supply chain: in the allocation of licences, permits and certificates, in the procurement of equipment, devices and chemicals, in the exportation and importation of illegally sourced metals and minerals, during the refining and manufacturing stages, and when final products are distributed to consumers. It may involve various stakeholders, including politicians, environmental authorities, police officers and customs officials, importers and exporters, refiners and smelters, manufacturers, and traders and brokers.⁹⁵ Preventing and combating illegal mining and trafficking in metals and minerals requires legislation that can effectively prevent and combat corruption. Accordingly, States should review their obligations under both the Organized Crime Convention and the Convention against Corruption concerning their anti-corruption commitments and implementation.⁹⁶

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

The Convention against Corruption is the only legally binding universal anti-corruption instrument. The far-reaching approach taken in the Convention 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. It also includes a specific chapter dealing with the recovery of assets, which is a major concern for countries that pursue the assets of former leaders and other officials accused of or found to have engaged in corruption.

Domestic legislation on corruption is diverse. Some States prevent politically exposed persons from receiving licences, permits or certificates and thus from practising, directly or indirectly, any mining-related activities. It is also common that States reiterate their commitment to the prevention of and fight against corruption in mining laws and regulations, reiterating the criminalization of both active and passive bribery. In many instances, the true owners of assets are difficult to identify because they can be hidden by a chain of shell companies. An inadequate legal framework on beneficial ownership of mining companies can be a particular challenge in the mining industry, in which knowing who has the rights to prospect for and exploit mineral resources is key to addressing risks of corruption or conflicts of interest.

⁹⁵ Luca Maiotti and Rashad Abelson, “Frequently asked questions: how to address bribery and corruption risks in mineral supply chains” (Paris, Organisation for Economic Co-operation and Development, 2021).

⁹⁶ See e.g. UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, 2nd ed. (Vienna, 2017); UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd ed. (Vienna, 2012); and UNODC, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 2nd ed. (Vienna, 2017).

NATIONAL EXAMPLE

AFGHANISTAN: MINERALS LAW OF 2019

Article 13. Conflicts of interest and corrupt practices

(1) If a public official has a direct or indirect pecuniary or other personal interest in the exercise of any responsibility or power under this Law which could impact the exercise of impartial judgment in relation to the exercise of that responsibility or power, the public official must immediately disclose the nature of that interest to the decision-making body and not participate in the exercise of that responsibility or power.

(2) A person shall not offer, promise or provide or cause to be offered, promised or provided to a public official any payment, benefit or any other advantage with the intention of improperly influencing the performance of a function under this Law.

(3) A public official shall not request, solicit, accept or cause to be requested, solicited or accepted a payment, benefit or any other advantage with the intention that the performance of a function under this Law is improperly influenced.

(4) A politically exposed person must not be an owner of a concession holder, a licence holder or the holder of a transitional licence.

(5) It shall be an offence, which may be referred for prosecution under article 61, to contravene this article 13.

NATIONAL EXAMPLE

CÔTE D'IVOIRE: MINING CODE OF 2014

Article 10. No natural person may hold a direct or indirect interest in a mining title or authorization or be the holder or beneficiary thereof if he/she does not enjoy his/her civil rights. [...]

No civil servant or official of the State working in the public administration, no official of State companies and no official of majority public financial participation companies may hold a direct or indirect interest in a mining activity or hold a mining title or be a beneficiary of an authorization.

NATIONAL EXAMPLE

LAO PEOPLE'S DEMOCRATIC REPUBLIC: LAW ON MINERALS, AMENDED VERSION OF 2017

Article 108 (amended). General prohibitions

Individuals, legal entities or organizations are prohibited from doing the following:

[...]

3. Colluding with an investor, officer or mining inspector in undertaking illegal mining, encroachment or destroying mineral resources or mines;

LAO PEOPLE'S DEMOCRATIC REPUBLIC: LAW ON MINERALS, AMENDED VERSION OF 2017 (*CONTINUED*)

Article 109. Prohibitions for officers and mining inspectors

Officers and mining inspectors are prohibited from doing the following:

[...]

2. Abusing duties and positions and receiving bribes for their own benefit;^a

[...]

5. Disclosing State and government secrets or trade and technical secrets related to minerals;

[...]

7. Participating in mineral business operations or allowing a family member to operate or engage in such business;

[...]

Article 110 (amended). Prohibitions for investors

Domestic and foreign investors are prohibited from doing the following:

[...]

10. Offering a commission or giving bribes to government officers or mining inspectors; or offering a commission to people to encroach, mine or pan for minerals by using different methods;

[...]

^a This is reflective of the original text, although it is not clear whether it intends to capture only bribes which directly benefit the officers and mining inspectors who receive the bribes or whether it would be more appropriate to translate the phrase simply as “bribes” and remove the phrase “for their own benefit”.

Obstruction of justice

Offenders often thrive because they can avoid detection and prosecution. They can obstruct justice by threatening witnesses, using physical force against police officers and intimidating judges and prosecutors. Many individuals have died or been seriously injured in their efforts to bring organized criminal groups and members of criminal organizations to justice.

Article 23 of the Organized Crime Convention requires States parties to criminalize conduct involving the obstruction of justice. The reference to a “proceeding” in article 23 (a) is intended to cover all official governmental proceedings, which may include the pretrial stage of a case. In other words, States parties are under an obligation to criminalize conduct that involves obstructing justice in both the trial phase and the pretrial phase, which could include obstructing an investigation or arrest. States parties to the Convention are required to ensure that national laws giving effect to article 23 apply to obstructing the course of justice in all proceedings related to offences covered by the Convention.

States should assess their needs to include in their mining legislation a specific provision criminalizing the obstruction of justice by reference to existing obstruction of justice offences. As noted above, 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 14 below, in which attempts to obstruct justice are criminalized. States that have instead opted to include specialized obstruction of justice provisions in specific laws may wish to consider including in their mining legislation an offence such as the one contained in model provision 14.

In jurisdictions in which enforcement powers are exercised by competent authorities other than the police, States should ensure that specialized obstruction of justice provisions cover all officers responsible for checking compliance, conducting inspections and carrying out enforcement actions in relation to illegal mining and trafficking in metals and minerals.

MODEL PROVISION 14 OBSTRUCTION OF JUSTICE

1. Any person who, in relation to the commission of any offence under this [Act/Law/Chapter ...], 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.

2. Any person who, in relation to the commission of any offence under this [Act/Law/Chapter ...], uses force, threats or intimidation in order to interfere with the exercise of the duties of [insert relevant authority] commits an offence.

NATIONAL EXAMPLE

PHILIPPINES: MINING ACT OF 1995

Section 109

Illegal obstruction to government officials

Any person who illegally prevents or obstructs the Secretary, the Director or any of their representatives in the performance of their duties under the provisions of this Act and of the regulations promulgated hereunder shall be punished upon conviction, by the appropriate court, by a fine not exceeding five thousand pesos (P5,000.00) or by imprisonment not exceeding one (1) year, or both, at the discretion of the court.

NATIONAL EXAMPLE

PERU: LEGISLATIVE DECREE NO. 1106 ON THE EFFECTIVE COMBATING OF MONEY-LAUNDERING AND OTHER OFFENCES RELATED TO ILLEGAL MINING AND ORGANIZED CRIME

Article 6. Refusal, delay and misrepresentation in providing information

Any person who refuses to provide or delays providing to the competent authority economic, financial, accounting, commercial or business information that is requested of that person in connection with an investigation or trial relating to the offence of money-laundering, or who deliberately provides information in an imprecise manner or provides false information, shall be punished with imprisonment for a term of not less than two and not more than four years, a fine of 50 to 80 day-fine units and deprivation of certain rights for not more than three years in accordance with paragraphs 1, 2 and 4 of article 36 of the Criminal Code. [...]

NATIONAL EXAMPLE

GHANA: MINERALS AND MINING ACT OF 2006, AS AMENDED IN 2019

Offences

106. A person who

[...]

- (i) Fails, neglects or refuses to comply with a direction lawfully given under this Act;
- (j) Fails, neglects or refuses to allow or provide reasonable facilities and assistance to an officer exercising a power under this Act;
- (k) Obstructs, hinders or delays an authorized officer in the performance of the officer's duties under this Act; or

[...]

Commits an offence and is liable on summary conviction to a fine [...].

SECONDARY LIABILITY

In addition to principal offenders, there are actors involved in illegal mining and trafficking in metals and minerals who organize, direct, aid, abet, facilitate or counsel the commission of these crimes. Legislation combating illegal mining and trafficking in metals and minerals should establish secondary liability for such conduct.

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

Model provision 15 below contains an offence that extends liability for involvement in illegal mining to secondary offenders. This provision, which reflects obligations under article 5 (1) (b) of the Organized Crime Convention, establishes liability for persons taking a leading role in such offences (i.e. “intentionally organizing or directing”) (para. 1) on the one hand, and, on the other, for persons taking a supporting role, such as “aiding, abetting, facilitating, counselling or procuring” the commission of such offences (para. 2).

States may also opt to establish higher penalties for organizing or directing than for aiding, abetting, facilitating or counselling because of the higher-level nature of that 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 15

AIDING, ABETTING, ORGANIZING OR DIRECTING 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.
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.

LIABILITY OF LEGAL PERSONS

Illegal mining and trafficking in metals and minerals have close links to the legitimate mining industry. On the one hand, organized criminal groups may abuse legal supply chains and infiltrate legitimate businesses to secure and facilitate illicit enterprises. For instance, gold refiners and smelters have been reported to engage with dubious suppliers (with connections to organized crime) and to procure gold from them without sufficient information about its provenance.⁹⁷ On the other hand, private companies may – knowingly or unknowingly – contravene their legal obligations and act in violation of the law to reduce the costs of running the business or to pursue greater profits.

Effectively combating illegal mining and trafficking in metals and minerals requires that legal persons are held responsible for their culpable actions and omissions. The Organized Crime Convention requires States parties to establish a legal framework addressing the liability of legal persons. More specifically, article 10 requires that States parties adopt the measures that are necessary to establish the liability of legal persons for participation in serious crimes involving an organized criminal group. Article 10 (2) specifies that liability for legal persons may be criminal, civil or administrative. Two or all of those forms of liability for legal persons may also exist under a single legal system. Article 10 (3) notes that such liability must be without prejudice to the criminal liability of natural persons involved in the offences.

Criminal liability is the most serious form of liability imposed on legal persons. It is generally associated with potentially severe sanctions and higher levels of procedural protection for defendants. Criminal liability of legal persons has the potential to cause costly reputational damage to the offending entity and may deter legal persons from engaging in unlawful conduct.⁹⁸

Civil and administrative liability for legal persons are options available in legal systems that do not recognize the capacity of legal persons to commit criminal offences. The two terms have different meanings, but in some States they are 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 illegal mining and trafficking in metals and minerals is not already provided for under domestic law, States should include specific provisions establishing it. The choice whether to establish criminal, civil or administrative liability is left to each State, taking into account the legal tradition and culture of the country and whether the legal system recognizes the capacity of 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 to meet the requirement of article 10 (4) of the Organized Crime Convention. Relevant sanctions for legal persons are discussed in chapter 7.

Model provision 16 below provides a basic example of a provision establishing criminal liability for legal persons in respect of offences covered in the present guide. Paragraph 1 provides that legal persons may be criminally liable for illegal mining and trafficking in metals and minerals.

Paragraph 2 of model provision 16 reflects the obligation in article 10 (3) of the Organized Crime Convention for States parties to ensure that the liability of legal persons is without prejudice to the criminal liability of the natural persons who have committed the offences.

⁹⁷ Livia Wagner, *Organized Crime and Illegally Mined Gold in Latin America* (Geneva, Global Initiative against Transnational Organized Crime, 2016), p. 16, and Blore and Hunter, “Dubai’s problematic gold trade”.

⁹⁸ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, para. 270.

Paragraph 3 (a) provides a model definition of legal persons for the purposes of the present 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 legislative drafters in this regard is the extent to which provisions relating to the liability of legal persons should cover public bodies, if at all. Public bodies could include government agencies, State-owned corporations and local authorities.

A clear understanding of the categories of individuals who are “senior officers” is important in situations where a private company is being charged with a criminal offence, and the question of who bears responsibility for the acts of the corporation becomes an issue. The definition in paragraph 3 (b) of model legislative provision 16 states that, to constitute a senior officer, the individual in question must be responsible for the legal person’s policy. Thus, the key factor in determining whether an individual is a senior officer for the purposes of a criminal prosecution is the degree to which that individual has decision-making power with respect to the legal person’s policy. Most commonly, directors and chief executive officers are granted the powers to decide the company’s policy and thus constitute senior officers for the purposes of a criminal prosecution.⁹⁹ Individuals who work for a company but have no management or decision-making authority are unlikely to be considered senior officers. In the definition of “senior officer”, States may choose to include individuals who have de facto management or control. That is usually done to ensure that the responsibilities and potential liabilities of individuals who manage or control a legal person are not avoided simply because those individuals are not registered as bearers of those functions in formal terms. In that case, persons exercising de facto management or control would be subject to the same legal obligations, responsibilities and potential liabilities as de jure senior officers.¹⁰⁰

An important part of establishing 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 liable. As explained further below, paragraph 4 of model provision 16 provides that a legal person may be liable for the conduct of a senior officer of that legal person or, optionally, the conduct of persons under a senior officer’s supervision or management. 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.

Paragraph 4 sets out the circumstances in which a legal person becomes liable for offences associated with its senior officers. It sets out three different ways in which the legal person can be liable for the conduct of senior officers (or, if desired, persons under the senior officer’s supervision or management). First, the legal person may be liable when senior officers (or persons under their supervision or management) themselves 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. The mental state, if any, required for attribution of the senior officer’s conduct to the legal person in paragraph 4 (b) and (c) is left open by the inclusion of the language “with the requisite mental state” in square brackets. As noted above,¹⁰¹ mental elements and the terminology used to refer to them vary between jurisdictions, but could include intention, knowledge, wilful blindness, recklessness and negligence. The present guide leaves those choices to legislators.

Paragraph 5 clarifies that reasonable steps to prevent the commission of an offence, referred to in paragraph 4 (c), must include the adoption and effective implementation of an appropriate organizational and managerial model.

⁹⁹ Todd Archibald, Ken Jull and Kent Roach, “Critical developments in corporate criminal liability: senior officers, wilful blindness, and agents in foreign jurisdictions”, *Criminal Law Quarterly*, vol. 60 (2013), p. 92.

¹⁰⁰ Brian Studniberg, “The uncertain scope of the de facto director doctrine”, *University of Toronto Faculty of Law Review*, vol. 75, No. 2 (January 2017), p. 69.

¹⁰¹ See the section entitled “Elements of criminal offences” in chapter 3.

MODEL PROVISION 16

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, companies, firms, associations, societies, partnerships, local governments, trade unions, municipalities and public bodies];
 - (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] authorizes 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.

NATIONAL EXAMPLE

INDIA: MINES AND MINERALS (DEVELOPMENT AND REGULATION) ACT, 1957, AS AMENDED IN 2021

23. Offences by companies

(1) If the person committing an offence under this Act or any rules made thereunder is a company, every person who at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this subsection shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in subsection (1), where an offence under this Act has been committed with the consent or connivance of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. For the purposes of this section,

- (a) “Company” means any body corporate and includes a firm or other association of individuals;
- (b) “Director” in relation to a firm means a partner in the firm.

NATIONAL EXAMPLE

GHANA: MINERALS AND MINING ACT OF 2006, AS AMENDED IN 2015

Offences by bodies of persons

107. (1) Where an offence is committed under this Act or under regulations made under this Act by a body of persons,

(a) In the case of a body corporate, other than a partnership, each director or an officer of the body shall also be considered to have committed the offence,

and

(b) In the case of a partnership, each partner or officer of that body shall be considered to have committed that offence.

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. 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 on the basis of that information, and mitigating risk on the basis of that assessment. Inadequate corporate management, control or supervision, or failure to establish 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, however, will not generally be sufficient to absolve a legal person from liability. Whether a legal person has exercised due diligence will always depend on the facts and circumstances of each specific case.

When introducing or amending provisions on the liability of legal persons, States are recommended to consider how the law should address situations 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 considered in relation to the liability of legal persons. It is common that prosecutors will approach due diligence by a legal person as a way to determine criminal intent (*mens rea*). In some States, due diligence may also 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. Due diligence on the part of the legal person may exclude a finding of liability (e.g. statutory defence). For example, where proof of an offence requires proof of a lack of due diligence, the fact that a legal person has exercised due diligence will mean that the legal person cannot be found liable. The burden of proof for that defence may be placed on the defendant.

States are advised to consider whether due diligence is to be made an obligation for legal persons by law. In most States, due diligence implies a voluntary obligation for legal persons. In some States, however, due diligence is a legal duty imposed on certain categories of legal persons, which requires that businesses conduct a comprehensive appraisal of the risks they may be posing to human rights, health, safety and the environment. That requirement may exclude companies that do not meet certain thresholds in terms of size or years of registration.

NATIONAL EXAMPLES OF DUE DILIGENCE LEGISLATION RELATED TO MINERAL RESOURCE SUPPLY CHAINS

IMPORTING COUNTRIES

European Union

In May 2017, the European Union adopted Regulation (EU) 2017/821, which lays down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas in accordance with the five steps of the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*. The regulation entered into force in January 2021.

United States

In July 2010, the United States Congress included a provision (section 1502) in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)^a pertaining to trade in tantalum, tin, tungsten and gold produced in the Democratic Republic of the Congo and adjoining countries. More specifically, section 1502 requests the United States Securities and Exchange Commission to develop rules that oblige the companies covered by the Act to undertake efforts to ascertain the origin of the designated minerals in their supply chains. If the minerals are considered to come from the Democratic Republic of the Congo or adjoining countries, or if the provenance of the minerals is unknown, the issuers are required to undertake due diligence and file additional disclosures.

PROCESSING COUNTRIES

China

The China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters and OECD jointly developed the Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains in 2015.^b The Guidelines are designed to align due diligence for Chinese companies with international standards and to allow for mutual recognition with existing international initiatives and legislation.

PRODUCING COUNTRIES

Democratic Republic of the Congo

Over the past decade, the efforts of the Democratic Republic of the Congo to eliminate “conflict minerals” have focused on denying access to world markets and global supply chains for illegally sourced tantalum, tin, tungsten and gold. In September 2011, the Government of the Democratic Republic of Congo issued a *note circulaire*^c requiring all mining and mineral trading entities dealing in those metals to implement due diligence in accordance with the *OECD Due Diligence Guidance* and the due diligence guidelines of the Group of Experts on the Democratic Republic of the Congo and to submit annual reports on their due diligence to the Ministry of Mines.

Rwanda

The Government of Rwanda has taken measures to ensure that all tantalum, tin, tungsten and gold minerals leaving the country are tagged for mineral traceability. It has also made significant efforts to implement the Mineral Certification Scheme of the International Conference on the Great Lakes Region,^d which has been part of the legal framework of Rwanda since March 2012. The Certificate for Designated Minerals of the International Conference functions in a very similar way to the Kimberley Process certificates for diamond exports: only those mineral shipments that can demonstrate the “conflict-free” origin, transport and processing of designated minerals receive a certificate. The certification became obligatory for all exports of designated minerals leaving Rwanda as at 15 December 2012.

^a United States, Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, H.R. 4173 (21 July 2010).

^b Available at <https://mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm>.

^c *Note circulaire* No. 002/CAB.MIN/MINES/01/2011 of 6 September 2011.

^d See www.oecd.org/investment/mne/49111368.pdf.

PREVENTION POINT

Due diligence and certification schemes

Illegal mining and trafficking in metals and minerals are less likely to occur in a well-regulated and transparent mineral supply chain.^a A mineral supply chain typically includes the extraction, transport, handling, trading, processing, smelting, refining and alloying, manufacturing and sale of the end product. Downstream^b companies that source minerals through their suppliers are frequently unable to trace the origins of the mineral at the extraction point. Traceability concerns are often a result of the informality and complexity of supply networks. For instance, as refineries tend to blend unwrought metals from several sources, tracing the origin of components becomes practically impossible after processing, which is a problem if one or more of the sources are illegal. Considering that a typical mineral supply chain has downstream, midstream and upstream^c stakeholders, all of them are to bear the costs of tackling illegal mining and trafficking in metals and minerals and to contribute to traceability and due diligence processes.^d

Due diligence and risk management

Mineral supply chain due diligence means processes through which companies take steps to identify, prevent and mitigate actual and potential adverse impacts and ensure that they respect human rights and do not contribute to conflict through their activities in the supply chain.

Competent regulatory authorities should take steps to verify that due diligence checks are conducted by all actors in the supply chain. This can ensure that actors supplying and receiving metals and minerals, unwrought or manufactured into products, are entitled to supply or receive them, as appropriate, in accordance with domestic law. Due diligence checks should include inspections of both the metals and minerals and the associated documentation to confirm their authenticity and provenance. Competent regulatory authorities should also establish a risk mitigation process that typically includes the identification, evaluation, mitigation, monitoring and reporting of risks. Activities with higher risks will require more thorough due diligence and monitoring.

The leading international standard for due diligence in the mineral supply chain is offered in the *OECD Due Diligence Guidance*. It involves a practical five-step process that companies are advised to take in order to “prevent or mitigate adverse impacts associated with their activities or sourcing decisions”.^e The five suggested steps are:

1. Establish strong company management systems.
2. Identify and assess risk in the supply chain.
3. Design and implement a strategy to respond to identified risks.
4. Carry out independent third-party audits of supply chain due diligence at identified points in the supply chain.
5. Report on supply chain due diligence.

The aim of the OECD guidance is to improve knowledge of due diligence for responsible corporate behaviour in the mineral supply chain among Governments, private businesses and other relevant stakeholders. Companies are expected to make good-faith efforts to conduct due diligence in their supply chains and to take reasonable steps to mitigate risks, in accordance with existing laws and internationally recognized best practices.

The OECD guidance is a component of the broader *OECD Guidelines for Multinational Enterprises*, the purpose of which is to promote responsible business conduct beyond mineral supply chains. Although the *OECD Guidelines* are not legally binding, OECD requires adhering Governments to establish national contact points with a dual mandate to make due diligence recommendations and to address referrals submitted through the grievance mechanism.

Another noteworthy supply chain due diligence mechanism is the Extractive Industries Transparency Initiative. The Initiative mainly works with large-scale extractive companies, placing them under the obligation to disclose information about their entire supply chains – from the point of extraction to how revenues make their way

through the Government and how they contribute to the economy and society. Every participating State must go through a quality assurance process known as “validation” at least every three years. The validation process is used to assess progress towards meeting the Extractive Industries Transparency Initiative Standard and to foster dialogue and the exchange of best practices at the national level.^f

The human rights component should be an integral part of companies’ due diligence and risk management. Mining industry businesses have a responsibility to avoid harming the environment and communities and to address the possible adverse impacts of their activities. The Voluntary Principles on Security and Human Rights^g assist businesses in better understanding their operating environment, identifying security-related human rights risks and taking action to mitigate them. The Voluntary Principles were established in 2000 to address the issues encountered by oil and mining companies in maintaining the safety and security of their operations while also protecting human rights. Having served business communities for over 20 years, the Principles have a promising record of human rights due diligence and risk monitoring in the mining sector. Where appropriate, mining industry companies should include them as contractual provisions in agreements with private security providers and ensure that private security personnel are adequately trained to respect the rights of employees and local communities.

Certification schemes and risk mitigation codes

Certification schemes and standards have been utilized to enhance the transparency of supply chains. They can provide consumers with an opportunity to guarantee that their purchasing behaviour does not disregard human rights, contribute to conflict or jeopardize sustainable development. States are encouraged to develop new and support existing certification schemes for metals and minerals and encourage artisanal and small-scale miners to join them.

Some of the leaders in this field are the Fairmined and Fairtrade standards^{h,i} for gold, the aim of which is to foster responsible mining practices and support artisanal and small-scale miners through the formalization and professionalization of the sector and its integration into the legitimate global trade.^j Participating artisanal and small-scale miners enjoy a better price for the metals they sell owing to direct export, which bypasses intermediaries and provides tax benefits.^k In return, certified organizations of artisanal and small-scale miners commit to following legal, safe and socially and ecologically responsible mining practices and can collectively decide how to spend the premium they receive for the sale of their certified metals.^l

^a For the purposes of the present guide, the term “mineral supply chain” is defined as the system of activities, organizations, actors, technology, information, resources and services involved in moving the mineral from the extraction site downstream to its incorporation in the final product for end consumers (adapted from OECD, *OECD Due Diligence Guidance*, p. 14).

^b “Downstream” means any part of the mineral supply chain relating to the processing of minerals collected during the upstream stage into a finished product and delivering it to retailers.

^c “Upstream” means any part of the mineral supply chain relating to the extraction of metals and minerals.

^d Marissa Ooms, “Risk-based due diligence reporting in global mineral supply chains and the rule through transparency”, *The Theory and Practice of Legislation*, vol. 10, No. 1 (January 2022), pp. 48–66.

^e OECD, *OECD Due Diligence Guidance*, p. 13.

^f Extractive Industries Transparency Initiative, EITI Factsheet, “The global standard for the good governance of oil, gas and mineral resources” (March 2022).

^g Available at www.voluntaryprinciples.org/.

^h Available at <https://fairmined.org/>.

ⁱ Available at <https://fairgold.org/>.

^j Morgane Fritz and others, *Global Trends in Artisanal and Small-Scale Mining (ASM): A Review of Key Numbers and Issues*, report prepared for the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (n.p., International Institute for Environment and Development, 2018), p. 44.

^k Natalia Uribe Martínez, Jim Sanchez Gonzalez and Lorenzo Pellegrini, “The impact of the Fairmined certification on the well-being of small-scale miners: evidence from Colombia and Peru”, *The Extractive Industries and Society*, vol. 8, No. 4, art. 100997 (December 2021); Peter Oakley, “Searching for pure gold: the impact of ethical gold sourcing certification programmes in the UK and Switzerland”, *Environmental Science and Policy*, vol. 132 (2022), pp. 101–108.

^l Oakley, “Searching for pure gold”, p. 103.

NATIONAL EXAMPLE

COLOMBIA: DECREE 1400 OF 2012

Article 1. Establishment

The National Contact Point of Colombia (“National Contact Point”) shall be established as part of the Directorate for Services and Foreign Investment of the Ministry of Trade, Industry and Tourism.

The actions of the National Contact Point shall be governed by the provisions of the OECD Guidelines and by this Decree.

Article 2. Purpose

The National Contact Point shall promote awareness and application of the Guidelines among State entities and bodies, the business sector, trade unions, non-governmental organizations and other stakeholders.

Article 3. Functions

The National Contact Point shall be responsible for the following:

- (a) Publicizing and disseminating the Guidelines among State entities and bodies, the business sector, trade unions, non-governmental organizations and other stakeholders;
- (b) Examining specific instances arising in connection with the application of the Guidelines by a multinational enterprise in Colombia, in accordance with the procedure established in section II of this Decree;
- (c) Contributing to the resolution of specific instances arising in connection with the application of the Guidelines, in a manner that is impartial, predictable, equitable and consistent with the principles and standards established by the Guidelines;
- (d) Serving as a forum for discussion, helping stakeholders to resolve issues raised in specific instances, in an effective and timely manner and in accordance with the Guidelines;
- (e) Cooperating with the National Contact Points of other countries that are adherents to the Guidelines;
- (f) Preparing and submitting the annual report on the activities of the National Contact Point to the OECD Investment Committee;
- (g) Notifying the OECD Investment Committee in a timely manner of the outcome of specific procedures it has implemented in order to settle a case;
- (h) Responding in a timely manner to queries about the Guidelines from other National Contact Points, the business sector, trade unions, non-governmental organizations, Governments of countries that have not signed the Guidelines and other interested parties;
- (i) Participating as National Contact Point of Colombia in all instances in which such participation is necessary;
- (j) Other functions in line with the role and objectives of the National Contact Point.

The National Contact Point shall exercise its functions in accordance with the requirements of impartiality, visibility, accessibility, transparency and accountability, as established in the Guidelines.

NATIONAL EXAMPLE

MALI: MINING CODE OF 2019

Article 6. Mali reaffirms its commitment to good governance initiatives in the mining sector, including the Kimberley Process, the Extractive Industries Transparency Initiative and the Minamata Convention.

Article 24. All mining permit holders must comply with the principles and requirements of ethics and good governance as established by the Extractive Industries Transparency Initiative and the Kimberley Process and the best practices established by the Minamata Convention.

NATIONAL EXAMPLE

PERU: LEGISLATIVE DECREE NO. 1336 ESTABLISHING PROVISIONS FOR THE COMPREHENSIVE MINING FORMALIZATION PROCESS

Article 22. Creation of the “Formal Gold, Peruvian Gold” seal

22.1 A “Formal Gold, Peruvian Gold” seal shall be created for the purposes of encouraging the purchase of gold from entities that are part of the present process of comprehensive mining formalization and ensuring the traceability of extracted gold ore.

22.2 The administration of the “Formal Gold, Peruvian Gold” seal shall be the responsibility of the Ministry of Energy and Mining.

22.3 The regulations governing the use of the “Formal Gold, Peruvian Gold” seal shall be established by means of a supreme decree signed by the Ministry of Energy and Mining and the Ministry of Economic Affairs and Finance.

PREVENTION POINT

Code of Risk Mitigation for Artisanal and Small-Scale Miners Engaging in Formal Trade

The Alliance for Responsible Mining and the non-governmental organization RESOLVE developed a code to encourage more responsible sourcing from artisanal miners, while also contributing to improving the social and environmental performance of the sector. The Code of Risk Mitigation for Artisanal and Small-Scale Miners Engaging in Formal Trade (CRAFT)^a is aligned with prioritized risks in terms of respect for human rights and the avoidance of conflict financing at every stage of the supply chain and helps legitimate artisanal and small-scale producers implementing the Code to understand market expectations regarding due diligence, as well as to adopt a risk management system as they commit to responsible mineral and metal production in accordance with the *OECD Due Diligence Guidance* and best efforts and practices in the industry.

As part of the CRAFT requirements, miners conduct regular evaluations on the presence of torture, forced labour, widespread sexual violence, the influence of armed actors on supply chains, extortion, war crimes and other gross violations of international humanitarian law. This is applicable to mine sites, processing plants, transportation routes and local business partners.

^a Available at www.craftmines.org/en/. See also Natalia Uribe, “Due diligence risk management needs through CRAFT and Fairmined”, Alliance for Responsible Mining, 12 November 2021.

Challenges to establishing liability of legal persons

Establishing the liability of legal persons for crimes, including illegal mining and trafficking in metals and minerals, can be challenging. The present section briefly considers some of the most common problems associated with the liability of legal persons.

One of the central challenges in imposing criminal liability on legal persons is the need to attribute responsibility to a collective entity. As a legal person can act only through individuals, it is necessary to develop mechanisms whereby 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 complicated. Broadly speaking, two models of liability for legal persons can be distinguished: nominalist (or derivative) liability and organizational fault.

The nominalist theory of liability holds that, as a legal person is a legal construct that can act only through individuals, the liability of the entity is dependent upon the liability of individuals (i.e. natural persons). For example, a company may be held liable for a criminal offence committed by one of its officers or employees. Such liability is said to be “derivative” because it links the liability of the legal person to the liability of the individual; it does not seek to attribute fault to the organization itself. Derivative liability has the advantage of relative simplicity. It fits well within the traditional criminal law model, focusing on the acts and mental states of an individual as a proxy for the fault of the legal entity. Under this model, a legal person will, however, escape liability if fault cannot be established in relation to a relevant individual. This is particularly problematic in large organizations, where responsibility is diffuse and individual responsibility may be difficult to prove.

Under the “organizational fault” doctrine, rather than considering the legal person to be liable through its employees, thus maintaining the principle of personal responsibility for legal persons, this approach involves attribution of fault to legal persons as bearers of liability in their own right, both for organizational failures and misconduct on the part of their agents. This approach is based on the *respondeat superior* (“let the principal answer”) principle, which renders a legal person criminally liable for the illegal conduct of its individual employees or agents acting within the scope of their employment or agency. States should consider adopting legislative provisions that establish the liability of legal persons in a manner that combines both the need for effective enforcement and the need to attribute organizational fault.

Another challenge is that of determining the “nationality” of a legal person for the purpose of asserting jurisdiction. As a legal person cannot be extradited, the home jurisdiction arguably has a special responsibility to prosecute a legal person. 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 (i.e. the active personality principle).¹⁰² Although there is no universal basis for determining the nationality of legal persons, two common bases are the place of incorporation and the principal place of business. In the first approach, the domicile or residence of the individuals controlling the enterprise is used to determine the nationality of a legal person. The second approach dictates that the nationality of a legal person is to be determined on the basis of such criteria as the law under which a company was incorporated, the place where its meetings of shareholders or directors took place, and the location of principal business operations or the central office(s).

A further challenge to establishing the liability of legal persons concerns the use of complex corporate structures. In many cases, legal persons make use of such structures and act through subsidiaries and other related entities, each of which may have a legal personality of its own. Where those complex structures are used to commit a crime, the predicament may be not only to investigate the offence but also to identify the appropriate defendant(s). Those challenges are compounded when corporate structures span multiple jurisdictions. Legal persons are known to have taken advantage of jurisdictional gaps to evade prosecution. Legislators should therefore consider how legal persons may be held liable for their role in offences committed by related organizations. For example, an investigation into trafficking in metals or minerals may implicate a parent company

¹⁰² See the section entitled “Jurisdiction” in chapter 2.

in criminal acts carried out by a 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. An alternative is to impose liability on the parent company on the basis of its control of the other entity. Liability could also be established on the basis of a legal person knowing that an offence was committed on its behalf or for its benefit, or where the company failed to adopt and effectively implement due diligence to prevent the commission of an offence by a subsidiary or another related entity. The legislation of France, an excerpt of which is set out below, provides one example of how acts of subsidiaries can be included in provisions establishing liability of legal persons.

NATIONAL EXAMPLE

FRANCE: CRIMINAL CODE, 1992

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 to 121-7.

However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities that 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.

Chapter 4.

INVESTIGATION

The criminalization of illegal mining and trafficking in metals and minerals alone cannot serve as an effective deterrent. To effectively prevent and combat these crimes, States must establish an effective regime for investigation. This includes equipping law enforcement officers responsible for the investigation of illegal mining and trafficking in metals and minerals with the powers they need to carry out their functions effectively and in a timely manner. The present chapter addresses four topics relating to the investigation of the crimes covered in the present guide: (a) general investigative powers; (b) special investigative techniques; (c) seizure and confiscation; and (d) evidence.

GENERAL INVESTIGATIVE POWERS

Officers involved in investigating illegal mining and trafficking in metals and minerals may include law enforcement officers, wildlife officers, and officers of financial intelligence units and multi-agency task forces. The appropriate powers for each officer will necessarily differ, but may include powers to:

- Stop and search persons, vehicles, vessels or other conveyances
- Enter and search premises
- Seize any weapon, equipment, device or chemical suspected of being involved in the commission of offences
- Seize mineral resources suspected of being involved in the commission of an offence
- 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 and analyse phones, computers and similar devices found in the possession of suspected offenders
- Request forensic information from specialized laboratories
- Where appropriate, compel persons to answer questions and/or produce documents relevant to the investigation of an offence

- Request access to bank and financial records
- Request access to telecommunications records
- Request the use of special investigative techniques, such as wiretapping, controlled deliveries and undercover investigations
- Request the suspension, variation or revocation of licences, permits, certificates or other relevant documents held by suspected offenders
- Exchange information with foreign law enforcement agencies
- Coordinate joint investigations
- Request the freezing of assets

The procedures for the exercise of such powers may vary between States. It may be appropriate or necessary for States to restrict those 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 deliveries and undercover investigations. In addition, the establishment of an appropriate framework to facilitate coordination at the regional, national and international levels may be necessary for the effective implementation of the aforementioned powers, mandates and competences, as they may be vested in a wide range of institutions.

SPECIAL INVESTIGATIVE TECHNIQUES

Article 20 (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 and to the extent possible given the basic principles of their legal systems, States should ensure that special investigative techniques extend to investigations of serious cases of illegal mining and trafficking in metals and minerals. Where special investigative techniques would not be available to law enforcement agencies investigating serious crimes covered in the present guide under their existing domestic laws, States should consider including such provisions in mining legislation.

There are many different types of special investigative techniques. Article 20 of the Organized Crime Convention specifically lists controlled deliveries, undercover operations and electronic or other forms of surveillance by the competent authorities of a State in its territory for the purpose of effectively combating organized crime.

Controlled delivery is a useful tool when contraband is detected or intercepted in transit and then delivered under the surveillance of a competent authority in order to identify the intended recipients or trace distribution channels across entire criminal organizations. Legislative provisions are frequently required to permit such a course of action because the distribution of contraband by a law enforcement agency or another individual may constitute a criminal offence under domestic law.¹⁰³

A law enforcement agent or another individual can infiltrate a criminal organization as part of an undercover operation and obtain evidence that can favourably affect the course of an investigation. Finally, electronic surveillance in the form of listening devices or communication interception is preferable where there is a close-knit criminal group that cannot be infiltrated by an outsider or when physical infiltration or surveillance would pose an unacceptable risk to the investigation or the safety of an undercover agent. Owing to its

¹⁰³ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, para. 443.

intrusiveness, electronic monitoring is often subject to strong judicial oversight and statutory protections in order to avoid misuse.¹⁰⁴

The present section elaborates on model legislative provisions pertinent to different special investigative techniques that could be used to counter illegal mining offences. The techniques discussed will typically require a legislative basis, without which they may not be authorized by law. In addition, the provisions should fully take into account the rights of suspects and third parties. The decisions of international human rights bodies and courts on the permissibility of special investigative techniques and the parameters of such measures should be taken into consideration when drafting relevant provisions. In this light, most jurisdictions require a number of strict safeguards against abuse, including the requirement that the offence be of a serious nature, 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 set out below thus 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.

Overall, for each type of special investigative technique, legislative drafters will need to consider the following issues:

- The mechanism for approving the technique
- The threshold for the granting of approval
- Conditions on use of the technique
- The extent to which officials using special investigative techniques are protected from civil and criminal liability
- The use of evidence obtained through the technique
- The extent to which the information obtained can be disseminated
- Supervision, review and oversight mechanisms
- International cooperation
- The possible impact on third parties

A comprehensive examination of legislative issues relating to special investigative techniques would be beyond the scope of the present guide. For further information on the topic, please refer to chapter III of the *Model Legislative Provisions against Organized Crime* (2nd ed., 2021).

Controlled delivery

Under article 20 (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 17 covers the use of controlled deliveries in investigations of illegal mining and trafficking in metals and minerals.

¹⁰⁴ Ibid., para. 445.

MODEL PROVISION 17

CONTROLLED DELIVERY

1. For the purpose of this [Act/Law/Chapter ...], “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 the 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;
 - (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, etc.] 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 operations

Under article 20 (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 18 regulates the use of undercover investigations. In addition to the process of applying for and authorizing undercover investigations set out in the provision, it is vital for legislative drafters to consider the issue of whether evidence obtained through undercover investigations can be presented 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.

MODEL PROVISION 18 UNDERCOVER OPERATIONS

1. For the purpose of this [Act/Law/Chapter ...], “undercover operation” 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 the 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;

UNDERCOVER OPERATIONS (*CONTINUED*)

- (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 subject to criminal or civil liability 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 on the respective numbers of authorizations that were approved, refused, revoked and cancelled under this article.

Assumed identities

Under article 20 (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, which may include the use of assumed identities. Model provision 19 below covers the use of assumed identities for investigation purposes.

It is worth noting that legislative drafters should give consideration to how law enforcement officials or other authorized persons using an assumed identity can provide testimony in criminal trials. In particular, the procedure regarding the giving of testimony should ensure that testimony can be given in a manner that provides appropriate protection to 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 19
ASSUMED IDENTITIES

1. For the purpose of this [Act/Law/Chapter ...], “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 establish contact and build a relationship of trust with another person or infiltrate a criminal network for the purpose of investigating an offence to which this [Act/Law/Chapter ...] applies.
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 the 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 means of *[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;
 - (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 (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, including electronic surveillance, for the purpose of combating organized crime.

Model provision 20 below regulates the use of surveillance of persons.

MODEL PROVISION 20 SURVEILLANCE OF PERSONS

1. For the purpose of this [Act/Law/Chapter ...], “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 the 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 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 the 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

- With respect to electronic surveillance, States parties are required, if permitted by the basic principles of their national legal systems and where appropriate, to allow for the use of this special investigative technique 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 and listening devices)
- Video and visual surveillance (e.g. hidden video surveillance devices, in-car video systems, body-worn video devices, thermal imaging/forward-looking infrared, closed circuit television, satellite imagery and automatic licence plate recognition systems)
- Tracking surveillance (e.g. satellite navigation systems/transponders, silent text messages and other mobile phone tracking technologies, radio frequency identification devices and biometric information technology, such as retina scans)
- Data surveillance (including both the interception of content and traffic data and the use of means such as computer/Internet spyware/cookies, mobile phones and keystroke monitoring)

Model provision 21 regulates the use of electronic surveillance.

MODEL PROVISION 21 ELECTRONIC SURVEILLANCE

1. For the purpose of this [Act/Law/Chapter ...], “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 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 the 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 surveillance 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.

ELECTRONIC SURVEILLANCE (CONTINUED)

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.
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 (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 confiscation of both proceeds of crime derived from offences covered by the Convention and property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention. Under article 12 (2), States parties are 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 this is not already adequately provided for under other laws, legislation on combating illegal mining and trafficking in metals and minerals should provide for the seizure and confiscation of such property and proceeds, as well as evidence of the commission of an offence. In addition, States need to consider appropriate channels for the disposal of seized and confiscated items, including minerals, equipment and chemicals. In many countries, mercury is seized continually, but criminal justice institutions often have no capacity for its safe storage and disposal. States need to develop detailed guidelines for law enforcement regarding their actions in cases of discovery and seizure of hazardous chemicals or waste. It is a common practice for law enforcement not to bring hazardous materials to a police station (unless they are needed for an investigation or as evidence), but to ship them to specially designated sites and facilities that can store, utilize or dispose of those materials safely.

Model provision 22 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 (f), but goes further than the Convention by also addressing seizures of evidence that would not otherwise fall within the categories liable to seizure under the Convention.

Paragraph 1 of model provision 22 sets out a definition of “seize” that was adapted from the definition of “seizure” in the Organized Crime Convention. Paragraph 2 then provides that a law enforcement or other relevant officer may seize an item reasonably suspected of being evidence of the commission of an offence covered by the present guide. Paragraph 3 concerns the seizure of property, equipment, instrumentalities and proceeds covered by article 12 of the Convention. Optional language is included to restrict the use of such powers of seizure to situations where it has been ordered by a relevant court or authorized by a relevant official. In determining who may order or authorize the seizure of items, 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 illegal mining and related offences. On the other hand, if investigators’ powers of seizure are too broad and exercised without supervision and accountability, there is a risk that those powers may be abused.

Model provision 22 is to be used as the basis for the seizure of any mineral or metal, unwrought or refined and merchandised for commercialization, that has been illegally extracted or otherwise illegally obtained, possessed, transported and distributed, along with any accompanying documentation and any ancillary instrumentalities, such as equipment, devices or chemicals. The provision addresses only the seizure of evidence, property, instrumentalities and proceeds. It does not address its confiscation. Confiscation is considered under chapter 7 as an ancillary order to sentencing.

MODEL PROVISION 22

SEIZURE

(1) For the purpose of this [Act/Law/Chapter ...], “seize” shall mean to temporarily prohibit the transfer, conversion, disposition or movement of a thing, or to temporarily assume custody or control of the thing on the basis of an order issued by a court or other competent authority.

(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 issued by [insert reference to relevant court] or an authorization issued by [insert reference to relevant official]] seize:

- (a) Property, equipment or another instrumentality used in or destined for use in an offence 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, regardless of 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 proceeds or property referred to in subparagraph (b).

NATIONAL EXAMPLE

COLOMBIA: MINING CODE OF 2001

Article 161. Confiscation

Mayors shall provisionally confiscate minerals that are transported or traded without a bill of sale or proof of the mines from which they originate. If the minerals are proved to be of illicit origin, they shall also be placed at the disposal of the criminal prosecution authority that has been seized of the case. The provisions of this article shall not apply to manual panning.

EVIDENCE

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

- Oral evidence (testimony)
- Documentary evidence (e.g. copies of contracts, invoices and declarations, as well as photographs and videos)
- Real evidence (relevant objects, such as samples)

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 an increasingly important role in criminal investigations and

prosecutions.¹⁰⁵ From the perspective of investigators and prosecutors, successful prosecutions can be carried out only on the basis of admissible evidence. Evidence must therefore be collected and handled in compliance with applicable laws, which vary greatly between different jurisdictions.

While the present legislative 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, as outlined above), the present section provides some basic guidance on these topics.

Evidence collection can be a time-consuming and expensive undertaking. It is important that investigators and prosecutors work together to ensure that the collection of evidence is carried out effectively and efficiently. The collection of evidence through the use of special investigative techniques, such as controlled deliveries, undercover investigations, assumed identities, surveillance of persons and electronic surveillance, is addressed above. Model provisions are also provided for each of those special investigative techniques.¹⁰⁶

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

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

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 illegal mining and related offences. These include, among other possible issues, the transmission of evidence to forensic services located in foreign jurisdictions, the admissibility of evidence obtained from foreign law enforcement agencies through mutual legal assistance and international cooperation, evidence obtained through joint investigations, and electronic evidence, including such evidence obtained from foreign-based service providers.

¹⁰⁵ 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 that 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>.

¹⁰⁶ See the section entitled “Special investigative techniques” in the present chapter.

PREVENTION POINT: TRADE DISCREPANCY ANALYSIS

States are recommended to collect and utilize data on mineral extraction and exports/imports. A trade discrepancy analysis could then be conducted to check for any discrepancies in the international trade of designated minerals. For instance, a discrepancy characterized by large export figures and insignificant extraction rates can indicate illegal mining activities. In the reverse scenario, high extraction rates and low export figures would be a sign of smuggling activities. Such discrepancies may be caused by reporting errors, but consistent value gaps may also represent important red flags indicating illegal activity and should be carefully analysed by regulatory authorities.^a Additionally, a trade discrepancy analysis should take into account relevant tax rates on exports to and imports from countries in order to understand the criminogenic incentives for trafficking in certain metals and minerals.

States may benefit from the Harmonized Commodity Description and Coding System (known as the “Harmonized System”), a universal nomenclature source managed by the World Customs Organization (WCO). The Harmonized System comprises more than 5,000 commodity groups, with each group identified by a six-digit code.^b It is used by more than 200 countries and economies as a basis for their customs tariffs and for the collection of international trade statistics.^c The widespread adoption of that system can help States to prevent the mislabelling of commodities at customs clearance, including for the purposes of trafficking in metals and minerals, and to promote the application of due diligence regulations with regard to high-risk commodities (e.g. gold).

Proposal by Switzerland to update the World Customs Organization Harmonization System to improve the traceability of gold

In September 2020, the Government of Switzerland submitted a proposal to WCO in which it suggested an amendment to the international customs duty classification for gold with a view to improving transparency and traceability in the international gold trade.^d

In the proposal, it was noted that because the Harmonized System nomenclature used a single code for different types of traded unwrought gold, differentiating between refined and unrefined gold or between bank-grade gold and gold alloys was not possible. A greater distinction was needed between different categories of unwrought gold in the nomenclature to be able to improve the traceability of supply chains and to obtain more accurate statistics on mined gold.

The Government of Switzerland decided to implement those changes at the national level at the beginning of 2021. Since then, importers of gold to Switzerland have been required to provide additional information regarding types of gold on import declaration forms.

^a For an example of trade discrepancy analysis in international trade in wood and wood products coming out of Peru, see Camilo Pardo-Herrera, “The international links of Peruvian illegal timber: a trade discrepancy analysis” (May 2021).

^b World Customs Organization, Topics, Nomenclature and classification of goods, Overview, “What is the Harmonized System (HS)?”. Available at www.wcoomd.org/en/.

^c Ibid.

^d Switzerland, State Secretariat for Economic Affairs, “Raw materials: Switzerland calls for greater transparency in international gold trade”, 24 September 2020.

Chapter 5.

INTERNATIONAL COOPERATION

Illegal mining and trafficking in metals and minerals constitute a multi-billion-dollar illicit industry that has adverse social, economic and environmental consequences. In many States, the profits generated by those crimes have outgrown the profits associated with drug trafficking.¹⁰⁷ Organized criminal groups have demonstrated the ability to use elaborate criminal schemes to sell illegally extracted metals and minerals, in particular precious metals, to international dealers and to launder the proceeds of the crime without detection.¹⁰⁸ Comprehensive, multi-agency and flexible cross-border cooperation is essential to ensuring the appropriate investigation and prosecution of those crimes.

International cooperation refers to the sharing of information, resources and personnel and affording one another assistance to achieve common goals. Cooperation between States may occur formally or informally. Formal cooperation may be based on the Organized Crime Convention or other multilateral or bilateral treaties and agreements. Informal cooperation generally involves direct officer-to-officer or agency-to-agency contact and exchange across borders. Generally, such cooperation is not dealt with in legislation but may sometimes be based on a memorandum of understanding between the cooperating States or their competent agencies.

The Organized Crime Convention requires States parties to cooperate with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of responses to the offences covered by the Convention. The specific measures of international cooperation covered by the Convention include extradition (art. 16), mutual legal assistance (art. 18), joint investigations (art. 19), law enforcement cooperation (art. 27), the transfer of sentenced persons (art. 17) and the transfer of criminal proceedings (art. 21). Provisions relating to international cooperation are also included in a number of other articles of the Convention.¹⁰⁹

¹⁰⁷ OAS, Department against Transnational Organized Crime, Secretariat for Multidimensional Security, *On the Trail of Illicit Gold Proceeds: Colombia's Case*, pp. 7 and 43.

¹⁰⁸ Wagner, *Organized Crime and Illegally Mined Gold in Latin America*.

¹⁰⁹ These include the articles of the Organized Crime Convention relating to measures to combat money-laundering (art. 7 (1) (b) and (4)), disposal of confiscated proceeds of crime or property (art. 14 (2) and (3)), jurisdiction (art. 15 (5)), special investigative techniques (art. 20 (2)–(4)), protection of witnesses (art. 24 (3)), measures to enhance cooperation with law enforcement authorities (art. 26 (5)), the collection, exchange and analysis of information on the nature of organized crime (art. 28 (2)), training and technical assistance (art. 29 (2) and (4)), the implementation of the Convention through economic development and technical assistance (art. 30) and prevention (art. 31 (7)).

The present chapter provides legislative guidance for establishing avenues for international cooperation in the context of illegal mining and trafficking in metals and minerals. It covers mutual legal assistance, extradition, law enforcement cooperation and joint investigations.

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. It usually relies on bilateral or multilateral agreements, although some States provide such assistance without any underlying agreement, purely on the basis of the goodwill principles of reciprocity and comity.

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 Convention. Under that provision, States parties should ensure that domestic mutual legal assistance systems established under bilateral and multilateral treaties apply to investigations, prosecutions and judicial proceedings in relation to illegal mining and trafficking in metals and minerals. Model provision 23 can be used for the purposes of mutual legal assistance against illegal mining and trafficking in metals and minerals.

MODEL PROVISION 23 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 State]* is a party shall apply to investigations, prosecutions and judicial proceedings in relation to the offences established under this [Act/Law/Chapter ...].

NOTA BENE

An extensive examination of the framework for mutual legal assistance set out in the Organized Crime Convention would be beyond the scope of the present guide. Further information on the topic can be found in the UNODC *Manual on Mutual Legal Assistance and Extradition* and in the UNODC Model Law on Mutual Assistance in Criminal Matters, which also includes provisions on the use of special investigative techniques and the gathering of electronic evidence.^a

^a See UNODC, Model Law on Mutual Assistance in Criminal Matters (2007), as amended with provisions on electronic evidence and the use of special investigative techniques (2022).

EXTRADITION

Extradition refers to the formal process by which persons charged with offences in a foreign jurisdiction may be returned or transferred to that jurisdiction to stand trial for such charges or by which convicted persons may be so returned or transferred to serve imposed sentences. Extradition is generally dealt with under bilateral or multilateral treaties. Arrangements for extradition are critical for the effective prosecution of offenders of illegal mining and trafficking in metals and minerals, as those crimes are often transnational in nature.

Extradition is addressed under article 16 of the Organized Crime Convention. This provision applies to cases in which the offence for which extradition is sought is punishable under the domestic law of both the requesting and requested State. In this 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.¹¹⁰

Extradition is a complex area of law. Most States have existing frameworks for extradition based on multilateral or bilateral treaties with other States. In the present guide, it would be neither possible nor desirable 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 would have to consider when introducing mining legislation.

The key legal issue with respect to extradition for the purposes of the present guide is the designation of illegal mining and trafficking in metals and minerals 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 decision is a matter for each State to determine in accordance with its legal system and values. For those 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. How that can be implemented will depend on the method for 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 implementing legislation. Under the minimum penalty approach, whether an offence is extraditable is determined by reference to the minimum or, in some cases, the maximum penalty applicable to the offence. Any offence with a minimum (or maximum, as appropriate) penalty at or above a certain threshold is liable to be an extraditable offence.

States using the list approach should take steps to include the offences legislated pursuant to the present guide 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 the offences legislated under the guide meet the minimum requirements for extradition under their bilateral and multilateral extradition treaties.

States should also guarantee that extradition legislation applying to the offences covered in the present guide are consistent with the “extradite or prosecute” (*aut dedere aut judicare*) principle outlined in article 16 (10) of the Organized Crime Convention. Under that provision, in relation to an offence covered by the Convention, a State party shall, at the request of a State party seeking extradition of an alleged offender, submit the case to its competent authorities for the purpose of prosecution where it 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 among law enforcement agencies is addressed in article 27 of the Organized Crime Convention. Article 27 (1) requires States parties to cooperate closely with each other, 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 parties in investigating persons, property, and proceeds involved in organized crime, sharing items and substances for analytical and investigative purposes, and posting liaison officers.

¹¹⁰ UNODC, *Manual on Mutual Legal Assistance and Extradition*, para. 103.

A model for legislation on such forms of international law enforcement cooperation is provided in model provision 24. This 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 the sake of clarifying and enhancing existing mechanisms for law enforcement cooperation.

MODEL PROVISION 24

INTERNATIONAL LAW ENFORCEMENT COOPERATION

1. [Notwithstanding any other law,] the [*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 suspected 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 the 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 involving the offences covered by the present guide. Those 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.

ANDEAN COMMITTEE AGAINST ILLEGAL MINING

The Andean Community is a subregional organization that aims to improve the ability of Andean States, specifically Bolivia (Plurinational State of), Colombia, Ecuador and Peru, to solve region-specific problems.

With a view to promoting coordinated action against illegal mining and its negative effects on the environment and Andean communities, the Andean Community, in its decision 774,^a required participating States to take action to facilitate cooperation against money-laundering associated with illegal mining, to strengthen control mechanisms for and the traceability of machinery, equipment and chemicals used in mining, to plan and execute operations against illegal mining through coordinated actions in border areas and to collaborate in the identification and prosecution of those who participate in criminal organizations that carry out illegal mining and related crimes, among other matters of international law enforcement cooperation (art. 4).

The participating States of the Andean Community were also called upon to adopt: (a) legislative, administrative and operational measures necessary to guarantee the prevention and control of illegal mining, such as the formalization of artisanal and small-scale mining and traditional mining; (b) sufficiently dissuasive sanctions for those who carry out illegal mining and related illegal activities and for those who support and finance them; and (c) control and supervision of the import, export, transportation, distribution and commercialization of machinery, its parts and accessories, equipment, chemicals and hydrocarbon supplies that can be used in illegal mining (art. 5). To that end, decision 774 established the Andean Committee against Illegal Mining (art. 9) and mandated it with coordinating functions in the implementation of the operational provisions announced in the decision.

^a Decision 774, adopted at the thirty-fifth meeting of the Andean Council of Ministers of Foreign Affairs before the Commission of the Andean Community on 3 May 2012.

INTERNATIONAL CRIMINAL POLICE ORGANIZATION RESPONSE TO ILLEGAL MINING

International organizations such as INTERPOL play a role in creating the transnational momentum to combat illegal mining and trafficking in metals and minerals, and they encourage police data-sharing in a timely manner through secure communication channels. INTERPOL facilitates law enforcement operations targeting crimes that affect the environment on a regular basis and encourages its member countries to collect and share police information with its General Secretariat.^a The General Secretariat drafts and disseminates intelligence products to national authorities in support of cross-border investigations, encouraging the publication of INTERPOL Notices targeting illegal mining.

^a INTERPOL, Crimes, Environmental Crime, "Our response to environmental crime". Available at www.interpol.int/.

JOINT INVESTIGATIONS

Joint investigations carried out by law enforcement agencies of two or more States can prove to be more effective in dismantling illegal mining and trafficking in metals and minerals, especially in complex cases that involve several jurisdictions. Joint investigations are a form of law enforcement cooperation that involves a greater degree of cooperation than the forms outlined above. Article 19 of the Organized Crime Convention requires that States parties consider concluding agreements or arrangements with other States to establish frameworks for conducting joint investigations. That article provides that, in the absence of such frameworks, joint investigations may be undertaken on a case-by-case basis, although that will depend on whether joint investigations are possible under the laws of individual States in the absence of such a framework agreement.¹¹¹

Model provision 25 is intended to provide the legal basis for a relevant national authority to conclude 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 permit them, this provision will be a sufficient source of legal authority for case-by-case cooperation in this regard.

MODEL PROVISION 25 JOINT INVESTIGATIONS

1. For the purpose of investigating offences to which this [Act/Law/Chapter ...] applies, the *[insert 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]*.

There are some noteworthy legal impediments relating to the establishment of joint investigations. Those impediments include a lack of a clear framework or specific legislation dealing with the establishment of joint investigations and a lack of clarity regarding control of operations and regarding liability for the costs of joint investigations. Legislation providing for joint investigations in the context of illegal mining and trafficking in metals and minerals must ensure that each of those issues is clearly addressed in order for such investigations to function effectively.

While it is not strictly required by article 19 of the Organized Crime Convention, as a practical matter, States interested in engaging in joint investigations may need to consider a way of ensuring that foreign law enforcement officials or, where appropriate, public prosecutors and investigative judges, can lawfully participate in local operations. Conferring powers for a short period of time may be a useful option. This is reflected in model provision 26.

¹¹¹ An identical provision is contained in art. 49 of the Convention against Corruption.

MODEL PROVISION 26

CONFERRAL OF POWERS ON FOREIGN OFFICIALS IN JOINT INVESTIGATIONS

1. Where *[insert name of State]* has an agreement covering the 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 conferred shall be entitled to the same protections as an equivalent official of *[insert name of State]* under *[insert name of State]* law.

Another issue is whether officials who engage in conduct authorized for a joint investigation are criminally or civilly liable for that conduct. Legislative drafters should take account of this by conferring on seconded foreign officers certain protections equivalent to those enjoyed by locally engaged law enforcement officials.

OPERATION DIEZ CONDORES^a

Operation Diez Condores was initiated in January 2016 as a joint investigation between the Federal Bureau of Investigation (FBI) and the Investigative Police of Chile to disrupt a Chilean transnational criminal organization involved in the trafficking of gold. The operation culminated in an international investigation that involved multiple United States federal law enforcement agencies and foreign law enforcement agencies and resulted in the prosecution of a multi-billion-dollar money-laundering scheme involving illegally mined gold from South America. The investigation uncovered a conspiracy responsible for the importation of more than \$3.5 billion in gold derived from numerous illicit activities, including narcotics trafficking, illegal gold mining, foreign bribery, foreign smuggling and United States customs violations.

It was discovered that the perpetrators procured gold from various illicit sources in Chile and generated fraudulent paperwork about the true origin and composition of the gold. Couriers hand-carried the gold on commercial aircraft from Chile to the United States, where they presented the fraudulent paperwork to customs officials in Miami. The couriers would then deliver the gold to a refinery in the United States, which paid for the gold by wire transfer back to Chile. Intelligence obtained during the investigation helped to identify inconsistencies in the refinery's practices and key information on its illegal activities. This led to a spin-off investigation in conjunction with the Lima office of the United States Drug Enforcement Administration and the Miami office of United States Immigration and Customs Enforcement Homeland Security Investigations (HSI) that identified a link to an ongoing investigation by the FBI/HSI Organized Crime Drug Enforcement Task Force.

In August 2016, members of the Chilean criminal organization were arrested in Chile after the investigation documented \$80 million in gold shipments to the refinery in the United States. The members of the organized criminal group were charged and convicted of racketeering, smuggling, customs fraud, tax evasion and money-laundering in Chile. In January 2018, the members of the Miami-based sales team of the refinery were sentenced to six to seven years in prison after pleading guilty to one count of money-laundering for their involvement in the \$3.6 billion money-laundering scheme.

^a Adapted from Regina Thompson, Deputy Assistant Director, Criminal Investigative Division, Federal Bureau of Investigation, "Illicit mining: threats to U.S. national security and international human rights", statement before the Senate Foreign Relations Committee, Subcommittee on Western Hemisphere, Transnational Crime, Civilian Security, Democracy, Human Rights and Global Women's Issues, Washington D.C., 5 December 2019.

Chapter 6.

PROSECUTION OF OFFENCES

Combating illegal mining and trafficking in metals and minerals requires not only substantive criminal offences but also effective criminal procedures. The present chapter briefly addresses some of the key procedural issues that may arise in the prosecution of those offences.

PRETRIAL DETENTION

Perpetrators of illegal mining and trafficking in metals and minerals cannot be brought to justice if they evade the jurisdiction of prosecuting and judicial authorities. This type of crime is sometimes committed by foreign nationals or persons who may otherwise be at risk of absconding. It is imperative that States take steps, within their constitutional and human rights frameworks, 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 identification document may be sufficient to mitigate that risk.

Article 11 (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 conditions imposed in connection with decisions on release pending trial take into consideration the possibility that suspects and accused persons may abscond.

Model provision 27 covers the detaining of a person until their trial once the person has been arrested and charged with an offence.

MODEL PROVISION 27**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 person'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 of 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.

PROSECUTORIAL DISCRETION

In some States, prosecutors are afforded discretion as to whether to prosecute offences, either by law or through administrative procedures. Conditions for 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 similar offences. Prosecutorial discretion may relate not only to the decision to initiate and continue a prosecution, but also to decisions to accept plea bargaining arrangements. Plea bargaining can be a useful tool for prosecutors and can allow them to bring cases against high-level offenders by securing testimony from lower-level offenders. In other States, however, prosecutors do not exercise such discretion.

There are a number of considerations that legislative drafters should bear in mind when considering the issue of immunity from prosecution. In most countries where immunity from prosecution is granted to a person, the immunity is conditional or confined in some way. For example, there may be a requirement that the cooperation given should reflect honestly the views held by the person cooperating, even if the information supplied turns out to be incorrect, or a requirement that a link be identified between the crime for which the immunity is granted and the crime for which the suspect testifies. Different responses may be needed depending on the value of the suspect's evidence and its actual impact (e.g. where the evidence prevents or stops a

crime from occurring). Some States allow for transactional immunity on the condition that truthful and complete testimony is given. This should be regarded as distinct from the mitigation of sentencing.

Given the differences in legal traditions with respect to prosecutorial discretion, model provisions relating to the inclusion of prosecutorial discretion are not provided. It is, however, recommended that prosecutorial discretion be clearly described in the prosecution policy or prosecution guidelines.

ALTERNATIVES TO TRIAL

In some jurisdictions, law enforcement agencies, environmental authorities or prosecutors may exercise discretion in resolving 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 offences and may be inappropriate in relation to significant or repeat offences. 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 towards the offence and the extent to which they have cooperated during the investigation, the actions of the offender to remediate the impacts of the offence 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 sections below. States may also wish to consider other alternatives, such as environmental remediation and other restorative justice-based approaches.

Enforcement notices

Enforcement notices can typically be issued by competent environmental authorities. They can be issued when the authority believes that a natural or legal person is breaching or will breach an environmental law or regulation or a condition of a licence, permit, certificate or authorization that they hold. Such 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 issuance of enforcement notices. Failure to comply with an enforcement notice may constitute an offence.

NATIONAL EXAMPLE

UNITED KINGDOM: 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 authorization is contravening any condition of the authorization, 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;

UNITED KINGDOM: ENVIRONMENTAL PROTECTION ACT, 1990 (CONTINUED)

(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^a

(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.

[...]

^a The excerpt from this legislative provision applies to England and Wales. The text of section 23 (2) (a) of the Environmental Protection Act 1990 is different in so far as it applies to Scotland. See also www.legislation.gov.uk/ukpga/1990/43/section/23.

Deferred prosecution agreements

In relation to environmental offences, 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 illegal mining and related offences should ensure that the laws or guidelines regulating their use should 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 illegal mining or related offences are very likely to be of 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 illegal mining or related offences without those payments having any deterrent effect on their criminal conduct.

LIMITATION PERIODS

In some jurisdictions, the commencement of a prosecution is limited by periods of time, known as limitation periods, under statutes of limitations. In other jurisdictions, limitation periods do not apply to criminal offences. Article 11 (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.¹¹² States should ensure that the legislative provisions implementing this obligation under the Organized Crime Convention also extend to the offences covered by the present guide. Where limitation periods apply to offences covered by the guide, it should also be clear when the period starts, for example based on the discovery of the crime or the start of the crime, and the circumstances in which the running of time on a limitation period may be suspended (e.g. when 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 systems, considering the length of any limitation periods applicable to illegal mining and trafficking in metals and minerals and potential difficulties in gathering evidence from abroad. Whatever approaches to limitation periods are preferred, the State should ensure that its prosecutorial process is sufficiently streamlined to bring prosecutions to trial in a timely fashion.

Model provision 28, on the limitation period, is set out below.

MODEL PROVISION 28 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.

¹¹² UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime*, paras. 322–327.

Chapter 7.

PENALTIES AND SENTENCING

Legislation introducing the offences covered by the present guide should include appropriate penalties and sentences for breaching those offences. As approaches to setting penalties and sentencing offenders vary greatly between States according to their legal traditions, the guide does not provide any model provisions on penalties and sentencing. Rather, the present chapter sets out some relevant issues for consideration by States in drafting legislative provisions relating to penalties and sentencing for illegal mining and trafficking in metals and minerals. The chapter first examines some of the most pertinent considerations underlying sentencing, before considering specific types of sanctions.

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. Those principles are reflected in the text of the Organized Crime Convention. Article 11 (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 the gravity of the offence. Article 11 (2) refers to the need to deter the commission of such offences. Article 10 (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”.

The principle of proportionality of sentences is a general principle of criminal law common to many national legal systems. It is also 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)¹¹³ and the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules).¹¹⁴

Many of the offences contained in the present guide are serious crimes. They are not only severely damaging to the environment but also to the rule of law and the security and economic prosperity of States. It is imperative that the penalties for those offences reflect their serious nature and be comparable to sanctions for other

¹¹³ General Assembly resolution 40/33, annex, rules 5.1 and 17.1.

¹¹⁴ General Assembly resolution 45/110, annex, rules 2.3 and 3.2.

serious crimes.¹¹⁵ At the same time, not all offences contained in the guide are equally grave. For example, the offence of possession is less serious than the offence of trafficking in metals and minerals. The penalty for each offence must be proportionate to its seriousness. Furthermore, the circumstances of each offence and of each offender are infinitely variable. Sentences available to judges need to be flexible enough to take into account the individual circumstances of each case. States should consider adopting sentencing guidelines for the crimes covered in the guide to provide structure at the criminal sentencing stage by detailing offences and offender elements that should be considered against consistent sentencing ranges in each case.

Aggravating and mitigating factors

A corollary of the requirement that sentences be proportionate to the seriousness of the offence is the requirement that sentences must take into account the relevant circumstances of the offence. Circumstances that tend to increase the culpability of the offender or otherwise warrant higher sentences are known as aggravating factors. Those that tend to lower 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 provided in the legislation for particular offences. In other cases, sentencing judges will rely upon general lists of factors relevant to sentencing for all criminal offences. Some jurisdictions use a mix of those approaches, depending on the legislation and the offence in question. The approach to aggravating and mitigating factors in relation to illegal mining and trafficking in metals and minerals is a matter for each State to determine, taking into account its own legal tradition and obligations under international law, including international human rights law.

Aggravating factors

Circumstances which may be considered as aggravating factors warranting higher penalties for an offence covered by the present guide may include:

- (a) Any injury or death caused by the offence;
- (b) Any harm caused or likely to be caused by the offence;
- (c) Any serious impact caused by the offence on public health or a society, community or economy;
- (d) Any severe human rights violations or harm to vulnerable groups caused by the offence;
- (e) The use of firearms to commit the offence;
- (f) A large quantity or volume of metals and minerals to which the offence related;
- (g) The size of any direct or indirect financial or other material benefit to the offender as a result of the offence;
- (h) 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;
- (i) Commission of the offence as part of the activity of an organized criminal group;
- (j) The offender exercising a leadership or managerial role in an organized criminal group;
- (k) Whether the offence was part of a pattern of ongoing criminal activity;

¹¹⁵ See Organized Crime Convention, art. 11, para. 1.

- (l) Whether the offender had previously committed any related offence or similar offence;
- (m) Whether the offence was committed while on bail, where applicable;
- (n) Whether the offender had a history of non-compliance with warnings by a relevant government regulator;
- (o) Whether the offender attempted to conceal the offence or obstruct the administration of justice during the investigation, prosecution or sentencing of the offence;
- (p) Commission of the offence by a government official;
- (q) Commission of the offence by a person in a position of trust or authority, including the holder of a relevant licence, permit or certificate.

If 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 be regarded as an aggravating factor for the offence in question. Several of the aggravating factors listed above are elements of the offences covered by the present guide; it would not be appropriate to use them to enhance 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 of the offence as part of the activity of an organized criminal group should not apply where the offender has also 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 at the same time be given an even higher sentence because of his or her leadership or managerial role within the organized criminal group.

NATIONAL EXAMPLE

CÔTE D'IVOIRE: MINING CODE OF 2014

Article 185. In the event of a repeat violation, the fine may be doubled and a prison sentence not longer than 10 years may be handed down.

Mitigating factors

Circumstances which may be considered as mitigating factors warranting lower penalties for an offence covered by the present guide may include:

- (a) Cases in which the offence did not cause or risk any discernible harm;
- (b) Cases in which the offence was not committed for a financial or other material benefit;
- (c) Cases in which the offender obtained little or no financial or other material benefit from the offence;
- (d) Cases in which the offender had a lower or minor role in the offence;
- (e) Cases in which the offender had limited awareness or understanding of the offence;
- (f) Cases in which the offender committed the offence under the influence of coercion, intimidation or exploitation;
- (g) Whether the offender was or is suffering from reduced mental capacity at the time of the offence or the time of sentencing;
- (h) Steps taken by the offender to rectify or mitigate the impacts of the offence;

- (i) Cases in which the offender has shown remorse for the offence;
- (j) Cases in which the offender voluntarily cooperated by providing information or otherwise assisted competent authorities, including in the investigation and prosecution of illegal mining and trafficking in metals and minerals;
- (k) Cases in which the offender pleaded guilty, especially where the defendant entered an early guilty plea;
- (l) Cases in which the offender had no or no relevant prior criminal record or no recent convictions;
- (m) Cases in which the offender was otherwise of prior good character;
- (n) Age of the offender at the time of offending or at the time of sentencing;
- (o) Whether the offender is a sole or primary caregiver for dependent relatives;
- (p) A physical disability or serious medical condition of the offender requiring urgent, intensive or long-term treatment;
- (q) A mental disorder, developmental disorder or neurological impairment of the offender.

NATIONAL EXAMPLE

AFGHANISTAN: MINERALS LAW OF 2019

Article 4. Definitions

For the purposes of this Law the following terms have the meanings as set forth below:

[...]

18. “Small-scale mining licence” means a licence granted under article 29, which authorizes exploration and exploitation in respect of small-scale mining projects, including artisanal operations, in accordance with this Law;

19. “Transitional licence” means any licence granted or contract entered into by the Ministry in respect of mineral rights prior to the commencement of this Law; and any licence granted or contract entered into by the Ministry in respect of mineral rights pursuant to a bidding process initiated prior to but not completed prior to the commencement of this Law;

[...]

Article 75. Artisanal and illegal mining

[...]

(3) If, prior to commencement of this Law, a person was undertaking mineral activities without a transitional licence, and that person applies for one or more small-scale mining licences in respect of the land that is the subject of those mineral activities within 12 months of the declaration of a small-scale mining area in respect of that land, that person shall not be prosecuted for undertaking those mineral activities prior to the granting of the small-scale mining licence.

CASE EXAMPLE: SOUTH AFRICA

S. v. Mothisi (293/08) [2008] ZAFSHC 34 [5 June 2008]^a

The accused entered a mine without permission for the purpose of illegal mining. He was, however, caught before he could engage in any extraction of ore. The accused pleaded guilty to contravening the Trespass Act, No. 6 of 1959, and was sentenced to 28 months' imprisonment, wholly suspended for five years on conditions. Nevertheless, the initial sentence was appealed, as the magistrate noted that the maximum sentence stipulated in the relevant legal provision is an imprisonment of not more than 24 months. Hence, the initial sentence was in excess of the legally allowed term.

The appeal confirmed the conviction but lowered the sentence to imprisonment of one year wholly suspended for five years on condition that the accused was not convicted of contravention of section 1 of the Trespass Act. The sentence was lowered by the High Court of South Africa, Orange Free State Provincial Division, owing to the fact that the accused was a first-time offender.

^a The text of the case has been borrowed from the SHERLOC case law database. Available at <https://sherloc.unodc.org/cld/en/st/home.html>.

CASE EXAMPLE: ZIMBABWE

S. v. Moyo (CRB Mt 144/14) [2015] ZWHHC 452 [11 May 2015]^a

The accused was found guilty of illegal gold mining in the district of Mudzi in contravention of section 368 (1) of the Mines and Minerals Act. At the initial trial, the accused claimed that he was trying to get gold to pay for a bus ride to pick up his sister after her husband had passed away. The court of first trial established that poverty desperation could not be used as an excuse for crime. Hence, it did not count the situation of the accused as a mitigating circumstance and consequently sentenced him to two years' imprisonment. That decision was appealed.

During the appeal proceedings, the judge established that, in fact, the economic environment that led the accused to commit the crime should have been taken into account. It was found that the judge in the initial trial had not made sufficient efforts to verify the defendant's story and was not right to simply discard it as a made-up excuse.

Therefore, the initial sentence was replaced by 12 months' imprisonment, of which 8 months were to be set aside for five years on probation. The gold was forfeited to the State.

^a Available at <https://sherloc.unodc.org/cld/en/st/home.html>.

TYPES OF SANCTIONS

The previous section outlined some of the most pertinent considerations underlying sentencing for illegal mining and trafficking in metals or minerals. The present section now turns to consider specific types of sanctions that may be ordered when these and other relevant considerations are synthesized. It first considers imprisonment and non-custodial penalties before turning to what are known as "ancillary orders". Finally, it includes a specific section on sanctions for legal persons, which includes a model legislative provision.

Custodial penalties (imprisonment)

The most serious offences covered by the present guide should be punishable by sentences of imprisonment proportional to the seriousness of the offence and severe enough to serve as effective deterrents. Beyond proportionality and deterrence, there are several considerations that States should take into account in setting maximum sentences of imprisonment for those offences.

First, the Organized Crime Convention provides States parties with a number of tools in relation to the prevention, investigation and prosecution of serious crimes. Article 3 (1) (b) of the Convention provides that the Convention shall apply to serious crime. Article 2 (b) of the Convention defines “serious crime” as conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty. In other words, for the Convention to apply to the most serious offences covered in the present guide, States should provide for maximum penalties of at least four years’ imprisonment for each of those 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, legislative drafters should ensure that the maximum penalties for offences intended for designation as predicate offences are sufficiently high to meet that threshold.

Lastly, 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 that 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. Some of the offences covered by the present guide may not be deemed by a State to be sufficiently serious to warrant extradition. The offence of possession of illegally extracted minerals set out in model provision 7 above may be one such offence.

Non-custodial penalties

Legislation on offences covered by the present guide should also take into consideration the desirability of alternatives to custodial sentences in certain circumstances. The types of non-custodial sentences that may be given to offenders and the availability of each type of non-custodial sentence are matters for each State to determine in accordance with its legal framework for sentencing.

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Guidance on alternatives to imprisonment can be found in rule 8 of the Tokyo Rules, 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),^a in rules 5.1 and 17.1 of the Beijing Rules, as well as in the UNODC publications *Handbook of Basic Principles and Promising Practices on Alternatives to Imprisonment* and *Handbook on Strategies to Reduce Overcrowding in Prisons*.

^a General Assembly resolution 65/229, annex.

Under rules 2.3 and 3.1 of the Tokyo Rules, the criminal justice system should provide for a wide range of non-custodial measures, from pretrial to post-sentencing provisions, and the introduction, definition and application of non-custodial measures is to be prescribed by law. Under rule 5.1, the authorities dealing with criminal cases should be empowered to discharge the offender in appropriate circumstances and to impose non-custodial measures for minor cases. As set out in rule 8.2, non-custodial penalties may include verbal sanctions, such as admonitions, 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 or deferred sentences; probation and judicial supervision; community service orders; referral to an attendance centre; house arrest; any other mode of non-institutional treatment; and any combination of such measures.

Fines

Like other penalties for illegal mining and trafficking in metals and minerals, 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 by the present guide, legislators should bear in mind that illegal mining and trafficking in metals and minerals can be an extremely lucrative business for offenders. If fines are not sufficiently substantial, there is a risk that they will simply be absorbed into the operational costs of running a criminal activity, thus failing to disincentivize criminal conduct. 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 in order 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 proceeds of crime and 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 the sentencing of an offender for illegal mining 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.

In determining the appropriate fine in a given case, courts should also consider the value of the metals and minerals involved in the offence, the financial or material benefit obtained by the offender, the involvement of organized criminal groups, damage and harm caused to the environment, society or individuals, and recidivism. 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 could then be adjusted in step with inflation. States also may wish to provide courts with powers to make compensation orders to offenders, requiring them to repair or recompense for damage and harm.

Community service orders

In some cases, community service orders may be an appropriate sentencing option. Such orders have traditionally been given to natural persons convicted of crimes but may also be used for sentencing legal persons. They are a form of punishment intended to benefit the community that has been harmed by an offender's crime and 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 be ordered only in favour of victims of the crime for which the sentence is handed down, whereas community service orders do not have such a limitation.¹¹⁶ In other jurisdictions, the distinction between these types of orders may be less clear.

A community service order may be inappropriate if the defendant cannot be trusted to comply with 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 to give community service orders only in addition to other criminal sanctions, such as fines and imprisonment, including suspended sentences of imprisonment.

¹¹⁶ Kris Dighe, "Organizational community service in environmental crimes cases", *United States Attorneys' Bulletin*, vol. 60, No. 4 (July 2012), p. 100.

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 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 (e.g. a sentence of imprisonment, a fine or another non-custodial penalty).¹¹⁷ In this sense, the orders are ancillary (or additional) to the main penalty. This is not to suggest that such orders are somehow not important or may not have serious consequences for the offender. On the contrary, orders for restitution or compensation, for example, should be given priority over fines, as discussed above. Moreover, orders disqualifying a natural or legal person from exercising an occupation, carrying out an activity or holding a licence, permit or certificate 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 illegal mining and trafficking in metals and minerals. These orders include restitution and compensation orders, orders for confiscation and disposal, and disqualification orders.

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

In addition, while the measures described in the present 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. For example, in some jurisdictions, procedures for non-conviction-based confiscation or forfeiture (also known as “civil forfeiture” or “*in rem* forfeiture”) are possible.¹¹⁸ Orders for restitution and compensation may also be made independently of a criminal conviction in some jurisdictions. States may consider, where appropriate, establishing procedures for such measures to be ordered in the absence of a criminal conviction.

Restitution, compensation and remediation orders

Article 25 (2) of the Organized Crime Convention requires that States parties establish appropriate procedures to provide access to restitution and compensation for 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 issuance 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 illegal mining.

Although domestic descriptions and definitions may vary, for the purposes of the present guide, restitution is understood to refer to measures aimed at restoring a victim or victims to the situation in which they found themselves before the crime occurred, whereas compensation is understood to refer to payment to victims for damage, harm, injury or loss.

¹¹⁷ Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (London, Bloomsbury Publishing, 2021), p. 348.

¹¹⁸ 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).

Model provision 29 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 illegal mining and trafficking in metals and minerals. Provisions on ensuring access to both restitution and compensation need to be included only if appropriate procedures for ensuring compensation and restitution in proceedings covered by the present guide are not already available under domestic law.

Paragraph 1 of model provision 29 provides that courts may order restitution or compensation when sentencing an accused person, regardless of whether a request has been 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 by model provision 29 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 this model provision state the different aims of restitution and compensation and provide non-exhaustive lists of the content of court orders for restitution and compensation. Those 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.¹¹⁹

The aim of paragraph 4 is 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 by model provision 29 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 independent of an offender being convicted. It may be recalled that the obligation contained in article 25 (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 illegal mining and trafficking in metals and minerals, States should consider whether victims are afforded effective access to restitution and compensation in cases where the offenders cannot be identified, located, extradited or prosecuted.

¹¹⁹ General Assembly resolution 40/34, annex.

MODEL PROVISION 29

RESTITUTION AND COMPENSATION OF VICTIMS

1. Where an offender is convicted of an offence to which this [Act/Law/Chapter ...] 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 he or she was 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 damage 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/Law/Chapter ...] 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 3 (a)–(g).

NATIONAL EXAMPLE

INDONESIA: MINERAL AND COAL MINING LAW 2009, AS AMENDED IN 2020

Article 145

(1) Community members who are directly exposed to the negative impact of mining business activities shall have the right to:

- (a) Obtain fair compensation as a result of the mismanagement of mining activities in accordance with the legislation.
- (b) File a lawsuit with the court against the losses resulting from the mismanagement of mining businesses.

[...]

A related issue is the relationship of orders for restitution of victims and orders to remediate environmental damage caused by illegal mining and trafficking in metals and minerals. Like restitution, remediation also seeks to restore harm. While the use of terminology may vary between jurisdictions, for the purposes 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 remediate environmental damage regardless of whether or not an offender has been convicted and whether or not harm has yet been caused. It may also be appropriate for States to consider whether environmental liabilities that cannot be attributed to a responsible party can be treated and mitigated by the State. States should also establish appropriate procedures to ensure the remediation of environmental harm caused by illegal mining in cases where an offender cannot be identified or cannot be effectively ordered to remediate the environmental harm caused because they are insolvent or not located in the jurisdiction, or for any other reason.

NATIONAL EXAMPLE

PERU: LEGISLATIVE DECREE NO. 1100 PROHIBITING ILLEGAL MINING THROUGHOUT THE REPUBLIC AND ESTABLISHING COMPLEMENTARY MEASURES

Article 9. State measures to regulate small-scale mining

[...]

9.3. The State shall promote the recovery of areas degraded by illegal mining. To that end, a plan for recovery from environmental impacts caused by illegal mining and by small-scale and artisanal mining shall be prepared and approved by means of a supreme decree signed by the Ministry of Energy and Mining and the Ministry of the Environment as part of the process of recovery of areas degraded by illegal mining, for which purpose the necessary actions shall be taken and, if applicable, the necessary resources shall be made available. In cases where illegal mining activity has resulted in deforestation, the plan for recovery from environmental impacts shall necessarily include a reforestation plan.

[...]

PERU: LEGISLATIVE DECREE NO. 1100 PROHIBITING ILLEGAL MINING THROUGHOUT THE REPUBLIC AND ESTABLISHING COMPLEMENTARY MEASURES (*CONTINUED*)

Article 11. State activities aimed at environmental remediation

The State shall promote the participation of the State-owned enterprise Activos Mineros S.A.C. in remediating mining-related environmental liabilities caused by illegal mining activities. Activos Mineros S.A.C. may also participate in remediating the liabilities referred to in article 20 of the Regulations on Environmental Liabilities Relating to Mining Activity, approved by Supreme Decree No. 059-2005-EM and its amendments, exercising, as appropriate, the right of recovery referred to in article 22 of the same Regulations. For this purpose, an environmental remediation fund shall be established under the responsibility of Activos Mineros S.A.C.

Confiscation orders

The issue of seizure and confiscation under the Organized Crime Convention was considered in chapter 4. As noted in that chapter, article 12 (1) of the Convention requires States parties to adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of both proceeds of crime derived from offences covered by the Convention and 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 the present guide. Where that is not already adequately provided for under other laws, such orders should be addressed in legislation on combating illegal mining and trafficking in metals and minerals.

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

States should consider the storage, utilization or disposition of confiscated items. For diamonds and gold, for instance, a good practice is to arrange for public auctions, with the revenues collected to be allocated to a public cause. On some occasions, States may assign confiscated items to relevant institutions or agencies for purposes of evaluation, scientific discovery and training.

Disqualification orders and cancellation of licences, permits or certificates

Among the other orders that may be appropriate for a court to issue in response to illegal mining and trafficking in metals and minerals are orders prohibiting a natural or legal person from carrying out certain activities. For example, it may be appropriate for a court to disqualify a natural person from mining activity for a specified period of time. In doing so, it may be appropriate for a court to order that a natural or legal person's licence, permit or certificate to carry out specified activities in relation to mining be cancelled and/or that that person be barred from applying for such a licence, permit or certificate 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 licences, permits or certificates and to bar a person from applying for a licence, permit or certificate regardless of any criminal proceedings against that person. Such orders could, for example, be made on the basis of a breach of duties pertaining to company directors or a breach of the conditions attaching to a licence, permit or certificate.

States should establish clear mechanisms and procedures for the suspension, revocation or cancellation of licences, permits or certificates in appropriate circumstances. The circumstances in which a licence, permit or certificate may or should be revoked or cancelled are a matter for each State to determine. The conditions for the revocation or cancellation of licences, permits or certificates vary broadly. They may include

non-compliance with mining laws and/or regulations or specific conditions of the licence, permit or certificate; conviction of the holder of the licence, permit or certificate of an offence or in an event of falsehood or omission of facts; failure to pay taxes, royalties and/or fees; human rights violations; or revocation of a licence, permit or certificate in the public interest (e.g. prohibition of mining in a protected area).

NATIONAL EXAMPLE

COLOMBIA: MINING CODE OF 2001

Article 163. Special incapacitation

A person who has been convicted of illicit use or of the illicit exploration or exploitation of mineral resources shall be disqualified from obtaining mining concessions for a term of five (5) years. [...]

NATIONAL EXAMPLE

DEMOCRATIC REPUBLIC OF THE CONGO: MINING CODE OF 2002, AS AMENDED BY LAW NO. 18/001 OF 2018

Article 27. The following persons are not eligible to apply for or obtain artisanal miner's cards, trader's cards, authorization as a mining or quarry products cooperative or authorization as a trader of minerals obtained through artisanal mining:

[...]

- (c) Any person who is prohibited from doing so, including:
 - a. Persons who have been convicted, by means of a final judgment having the force of res judicata, for violations of mining and quarrying laws or those relating to the economic activities connected with the person's mining and quarrying rights and affiliated companies, for a period of 10 years;
 - b. Persons whose artisanal mining or trader's cards have been revoked, for a period of three years;
 - c. Persons whose authorization as traders of minerals obtained through artisanal mining has been revoked, for a period of five years.

NATIONAL EXAMPLE

MALI: MINING CODE OF 2019

Article 189. Mining permits granted under this Code shall be revoked in accordance with the provisions of this chapter, without reimbursement or compensation, on any of the following grounds:

[...]

B. In the case of artisanal mining permits or semi-mechanized mining permits:

- (a) Failure to commence work within six (6) months of the date of issuance of the permit without a valid reason;
- (b) Suspension of mining activities by the permit holder for more than one (1) year without a valid reason;
- (c) Non-payment, within the prescribed period, of the special tax on tradable mining products that have been extracted and sold;
- (d) Trafficking in minerals originating from an area other than the one to which the authorization applies, or money-laundering;
- (e) Use of unauthorized methods or processes, including the use of mercury or explosives without authorization;
- (f) Use of child labour in mining operations or in any mining activity that violates the human rights recognized by the Republic of Mali;
- (g) Operations that adversely affect the living conditions of a riparian community;
- (h) Serious breach of obligations relating to hygiene, safety, public health or environmental protection.

Sanctions for legal persons

The previous sections considered custodial and non-custodial penalties as well as ancillary orders. Some of the sanctions considered in those sections, such as fines and ancillary orders, are applicable to natural and legal persons alike. Other sanctions, such as imprisonment, are possible only in relation to natural persons. Unlike a natural person, a company cannot be imprisoned. There are also sanctions that may be ordered only in relation to a legal person, such as an order for the legal person to be dissolved or wound up. A number of examples of orders that could be made upon the conviction of a legal person are set out in model provision 30 below.

MODEL PROVISION 30

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] per cent of the annual turnover of the legal person during the 12-month period prior to the commission of the offence;
- (b) Confiscation of proceeds and instrumentalities of crime;
- (c) An order that the legal person publish the judgment by the court including, as appropriate, the particulars of the offence and the nature of any penalty imposed;
- (d) An order that the legal person conduct specified activities or establish or carry out a stated project for the public benefit;
- (e) An order that the legal person be placed under judicial supervision for a maximum period of [x] years;
- (f) 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) Prohibition of the exercise, whether directly or indirectly, of one or more professional activities [permanently] [for a period not exceeding [x] years];
- (h) An order for the cancellation of a [*insert relevant term for licence, permit, certificate, etc.*] held by the legal person;
- (i) An order that the legal person be [temporarily] [permanently] disqualified from applying for a [*insert relevant term for licence, permit, certificate, etc.*] to carry out certain activities;
- (j) An order for the [temporary] [permanent] closure of the establishment, or one or more of the establishments, of the legal person that was or were used to commit the offences in question;
- (k) An 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) Disqualification of 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, an order that the legal person be dissolved; or
- (n) Further orders as the court considers just.

NATIONAL EXAMPLE

PERU: LAW NO. 30424/2016 REGULATING THE ADMINISTRATIVE LIABILITY OF LEGAL PERSONS FOR THE OFFENCE OF TRANSNATIONAL ACTIVE BRIBERY, AS AMENDED BY LEGISLATIVE DECREE NO. 1352

Article 5. Applicable administrative measures

At the request of the Public Prosecution Service, the judge may impose on legal persons found liable for the commission of the offences established in article 1 the following administrative measures, as appropriate:

- (a) A fine of not less than twice and not more than six times the benefit obtained or expected to be obtained from the commission of the offence, without prejudice to the provisions of article 7;
- (b) Deprivation of certain rights, in any of the following forms:
 - (i) Suspension of business activities for a period of not less than six months and not more than two years;
 - (ii) Prohibition from carrying out, in the future, activities of the same kind or nature as those through which the offence has been committed, facilitated or concealed. The prohibition may be temporary or permanent. Temporary prohibition shall apply for not less than one year and not more than five years;
 - (iii) Permanent disqualification from entering into contracts with the State;
- (c) Revocation of licences, concessions, rights and other administrative or municipal authorizations;
- (d) Temporary or permanent closure of its premises or establishments. Temporary closure shall be imposed for not less than one year and not more than five years;
- (e) Liquidation.

CONCLUDING REMARKS

The aim of the present guide is to provide readers with the basic tools for establishing legislative frameworks to investigate, prosecute and punish illegal mining and trafficking in metals and minerals. At the outset, several general considerations for States were outlined, including the international legal framework, with reference not only to the Organized Crime Convention and the Convention against Corruption, but also to international environmental law and international human rights law. In subsequent chapters of the guide, consideration was given to topics, issues and provisions that should be addressed in legislation related to illegal mining and trafficking in metals and minerals or considered in the process of its development. To that end, the guide provided guidance and, where relevant, model legislative provisions for introducing offences covering those and other related crimes, as well as model legislative provisions relating to investigations, national mandates, international cooperation, the prosecution of offenders, the jurisdiction of courts, and penalties and sentencing. It also covered prevention mechanisms, international standards and existing national regulations relating to due diligence and transparency in mineral supply chains. In sum, the present guide represents an attempt to provide readers with a broad overview of the issues relevant to developing legislation to prevent and combat illegal mining and trafficking in metals and minerals from a criminal justice perspective and the basic tools for legislators to enact or strengthen such legislation.

However, the guide is not exhaustive. It should be recalled that its primary target audience comprises policy-makers, legislators and legislative drafters. Accordingly, while the guide has also touched upon a number of issues relating to the investigation, prosecution and adjudication of illegal mining and trafficking in metals and minerals, its content is not a comprehensive examination of the issues relevant to law enforcement agencies, prosecutors and judges. It must also be stressed that the approach taken in the present guide is based on a criminal justice perspective, in particular the implementation of the Organized Crime Convention. In that regard, it is important to highlight that the problem of illegal mining and trafficking in metals and minerals cannot be solved through criminal justice approaches alone. Rather, such approaches need to be part of a comprehensive solution, rooted in a regulatory system, accompanied by a significant emphasis on preventing those crimes from occurring in the first place, and involving a partnership among multiple segments of society in order to leave no one behind.



UNODC

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