



TRAINING MODULE

WILDLIFE AND CRIMINAL LAW

Strengthening Legal Mechanisms to Combat Illicit
Wildlife Trade

Workbook

PREFACE

This workbook provides a broad and generic background to using criminal law as a mechanism to combat illicit and unsustainable wildlife trade, with prosecutors and the judiciary as the main audience. The challenge of such a task is the differences in legal systems and differences in domestic legislation between countries. The intention, and hope, is that trainers will use this workbook as a basis and framework to develop more comprehensive and country-specific training modules for the prosecution of wildlife offences. Such modules can serve as capacity building materials in a training workshop, or as part of a university course.

With the above in mind, instructors and participants are encouraged throughout the workbook to provide country specific information, and to identify aspects that should be added or amended.

This workbook is designed for use with a seminar presentation and interactive exercises available at: www.wildlex.org. Additional materials and resources are also available on that website, as well as a database of wildlife related legislation and case law.

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LIST OF ACRONYMS

AEWA	African and Eurasian Waterbirds Agreement
ASEAN-WEN	Association of Southeast Asian Nations Wildlife Enforcement Network
CAWEN	Central American Wildlife Enforcement Network
CBD	Convention on Biological Diversity
CITES	Convention on the International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
EAC	East African Community
ECEC	Environmental Compliance and Enforcement Committee (ECEC)
ICCWC	International Consortium on Combating Wildlife Crime
INTERPOL	International Criminal Police Organisation
SADC	Southern African Development Community
SAWEN	South Asia Wildlife Enforcement Network
UNCC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Convention Against Transnational Organised Crime

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1 INTRODUCTION

1.1 DEFINING WILDLIFE CRIME

"Wildlife" can be defined as any animal which is now or historically has been found in the wild, i.e. in an uninhabited area in a natural state.¹ Wildlife crime can therefore be defined as any conduct relating to wildlife that has been criminalised by the legislature. Such criminalised conduct, or offences, usually relates to the following five categories:

- Offences relating to the illegal exploitation of wildlife;
- Offences relating to the illegal possession of wildlife or wildlife products;
- Offences relating to the illegal trade in wildlife or wildlife products;
- Offences relating to the illegal export of wildlife or wildlife products; and
- Offences relating to the illegal import of wildlife or wildlife products.

1.2 COMPLIANCE APPROACHES

The use of criminal sanctions to combat wildlife crime must be seen within the broader context of compliance with environmental legislation. While compliance refers to a particular state of adherence by the regulated community to a set of legal standards or requirements, enforcement refers to the actions taken in response to detected non-compliance, and includes criminal prosecution and administrative or civil measures taken to ensure that the wildlife resources are protected. This workbook focuses on criminal enforcement as a tool to combat wildlife crime.

The criminalisation of certain acts of non-compliance related to wildlife allows for prosecution as an enforcement tool. The main aims of prosecution in general are retribution, or punishment, and individual and general deterrence, but in this context also progressive elimination of any advantage gained by the commission of such an offence.

The more intricate cases require intensive investigation and case development, making the process quite resource intensive. The high burden of proof means that

¹ Chris Park, Oxford Dictionary of Environment and Conservation, Oxford University Press, 2007.

such cases are not always successful. Use of criminal law can however create a significant impact, for reasons that will be explored further below.

1.3 THE IMPORTANCE OF EFFECTIVELY ADDRESSING WILDLIFE CRIME

Does it really matter if a species becomes extinct, or if its numbers in the wild drop significantly?

"Biologists contend that it does because of the economic, medical, aesthetic, recreational, scientific and ecological values of all species. Some environmentalists go further and urge us to recognize that each species, as a unique and irreplaceable product of million years of evolution, has an inherent right to play its role in the ongoing evolution of life on earth without interference from humans. They believe that we have an ethical obligation to protect species from pre-mature extinction because of human activities"²

From a legal point of view, and this is true of almost all jurisdictions, wildlife itself does not have a right to be protected. However, some jurisdictions incorporate a human right to have the environment protected into their Constitution.³ Looking at it purely from the point of view of the practical necessity to protect wildlife, the following can be noted as the main motivation for protecting wildlife -

- Economic and medical importance of wildlife - wildlife that are actually or potentially useful to human beings are considered as wildlife resources;
- Scientific and ecological importance of wild species - this refers to the "biological library" of genetic information and the vital ecological services they provide, such as food and their role to maintain a healthy ecosystem;

² G. Tyler Miller, Jr, *Living in the Environment*, Wadsworth Publishing Company, Ninth Edition, 1996:635.

³ An example of such an anthropocentric right can be found in s 24 of the South African Constitution:

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.*

- Aesthetic and recreational Importance of wildlife - this includes observation, photography, hunting and fishing.⁴

Wildlife tourism, or ecotourism, generates huge amounts of revenue for countries that have the privilege of such a resource.⁵

Many people see nature as something they have inherited, and want to leave to their children. This is part of the ethical and moral aspect of the protection of the environment and incorporates values beyond that of physical survival and economic growth. While there is no ethical objection to the sustainable use of the environment, there is a serious ethical objection to the total depletion of a resource and the detrimental effect it will have on the ecosystem and the social and economic well-being of future generations. To be part of such exploitation or degradation, whether directly or indirectly, or to allow it to continue without hindrance, is not morally acceptable, nor does it make economic sense in the long term.

The objectives of effective wildlife prosecution are:

- To punish those who commit wildlife crimes;
- To make it impossible for the offender to commit the offence again, either by incarceration, or by taking away the means of continuing with that offence;
- To deter and discourage others from committing such offences; and thereby
 - to ensure the survival and well-being of all people; and
 - to fulfil our moral and ethical responsibility towards nature itself, our fellow man and future generations.

⁴ G. Tyler Miller, Jr, *Living in the Environment*, Wadsworth Publishing Company, Ninth Edition, 1996:635-638.

⁵ For a perspective on the economic value of ecotourism, see the World Tourism Organization (2016), *UNWTO Annual Report 2015*, UNWTO, Madrid:43 with specific reference to the UNWTO 2015 Briefing Paper *Towards Measuring the Economic Wildlife Watching Tourism in Africa*. The report found that wildlife watching represents 80% of the total annual sales of trips to Africa. According to the report species most threatened by poaching, such as elephants and rhinos, are among the most popular in wildlife watching tours. See http://cf.cdn.unwto.org/sites/all/files/pdf/annual_report_2015_lr.pdf, accessed on 4 July 2016.

Where a country's Constitution contains a human right that relates to the right of people to have the environment protected, one should probably add the protection of such a right as the main motivation for the necessity of effective wildlife prosecution from a legal point of view.

1.4 MOTIVATION FOR THE COMMISSION OF WILDLIFE CRIME....and its implications for criminal enforcement

Wildlife crime is almost always about making money. It is, in essence, a crime of greed. Small scale wildlife crime might be motivated by hunger or need, but for larger scale hunters and traffickers, the motivation is either to generate financial reward or to avoid financial expense, both being motivated by financial benefit. Financial gain is either direct, such as in the case of the illegal exploitation and trade in rhino horn, or indirect, such as in the case of avoidance of the cost for licensing or failure to pay tax or customs duty.

The above points have some very practical consequences:

- In some cases such crimes, as is the case with other money-making crimes, are committed within highly organised crime syndicates. This has implications for investigation and prosecution. It necessitates the involvement of parties such as the police force, and often specialised units within such a police force, and prosecution under legislation criminalising organised crime activities.⁶
- The commission of such crimes is often multinational due to lucrative overseas markets. This requires international co-operation in the combating and investigation of such offences. International agencies such as the International Criminal Police Organisation (INTERPOL), and international treaties and agreements such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), play a crucial role in addressing this challenge.

⁶ Sometimes referred to as the offence of "racketeering".

- Such crimes are usually deliberate, or intentional, acts, implying that sufficiently severe sentences are often appropriate.
- It necessitates the need for appropriate sentencing. A fine is often just another business expense. If a fine is the only appropriate measure, it needs to exceed the economic advantage gained by non-compliance.
- It necessitates the need for supplemental measures to forfeit the proceeds of crime, through legislation providing for such measures.

The practical implication of the above remarks will be revisited throughout this workbook.

Does your country's Constitution contain a human right on the protection of wildlife or the environment? If so, what tools are available to enforce such a right? If not, what might such a right provide?

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2 THE INTERNATIONAL AND REGIONAL DIMENSION

2.1 RELEVANCE OF INTERNATIONAL LAW

"Environmental crime often involves harm of a global nature, for the manifestations of environmental crime can be realized far beyond the crime site in both space and time. The crimes themselves may be done at an international level. Thus, international co-operation and consistent enforcement everywhere are necessary to combat environmental crime."⁷

Wildlife crime can be of an international nature where the offence is committed in one country (country of origin), but the product is exported to another country (country of destination), often via another country or countries (countries of transit). The international element can also arise from the nationality of the offender or the nationality of the victim (though the last mentioned aspect is rarely relevant in wildlife crime).

The importance of the international dimension, based on international, regional and bilateral agreements, in the combating of wildlife crime cannot be overestimated. It provides for a unified and uniform approach to dealing with cross border crimes. Because of the nature of wildlife crime, international co-operation in the investigation and prosecution of such crimes is required. In relation to wildlife crime, international law does two things:

1. It establishes or harmonises offences and penalties across jurisdictions: For example, CITES requires member States to establish offences relating to the import and export of wildlife and wildlife products in their domestic legislation. This makes it impossible for criminals to avoid liability by taking advantage of countries where their actions are not a crime.
2. It provides mechanisms for international cooperation in the investigation and prosecution of such crimes: For example, the UN Convention on Transnational Organized Crime provides for legal cooperation and mutual legal assistance in

⁷ Advocacy Memorandum: Arguments for Prosecutors of Environmental Crime, Interpol Pollution Crimes Working Group Penalties Project, Fifth Draft, 4 August 2016

addressing serious organized crime with a transnational element, including crime involving wildlife.

2.2 ROLE OF INTERNATIONAL LAW

Once an international agreement has been signed and ratified by a country, it becomes binding on the country. However, typically international law applies only to States, and not to individuals. National implementing legislation therefore needs to be passed to give domestic effect to such agreements, where required.

In some countries, termed “monist” countries, certain forms of international law are considered “self-implementing”. This means that they automatically apply within the country and are enforceable in national courts without the need for implementing legislation. However, even in monist countries, substantive wildlife-related measures almost always need implementing legislation, e.g. to establish appropriate offences and penalties under national law.

International agreements can oblige countries to institute control measures and create offences, such as is the case of CITES. It obliges member countries to have control measures in place for the import and export of certain wildlife and wildlife products and to create offences for non-compliance. The flip side of such an obligation is the rights and advantages gained by a similar incorporation into the legislation of the other member countries.

International agreements can also require that certain sentences be prescribed (often in very general terms), or require that attempts must be made to harmonise sentences between countries.⁸ Such attempts at harmonisation serves a very real purpose: if a similar offence relating to a similar species is addressed with a much lower maximum penalty than in a neighbouring country, that will make the country a much more attractive proposition for criminals than the neighbouring country, or, differently put, “[c]ountries with comparatively lower penalties may be seen as soft

⁸ See e.g. Article (6)(2)(c) of the SADC Protocol on Wildlife Conservation and Law Enforcement that requires that states “shall endeavour to harmonise...measures governing the trade in wildlife and wildlife products and bringing the penalties for the illegal taking of wildlife and the illegal trade in wildlife and wildlife products to comparable deterrent levels”

targets and may thus be more vulnerable to illegal activity".⁹ Added to this is the role of the judiciary in handing down sufficiently severe sentences - the mere existence of a high maximum penalty provision will play little role in deterring would-be offenders if the judiciary fails to hand down such sentences in practice.

In addition to substantive provisions, international agreements can facilitate international cooperation in investigation and enforcement, by creating mechanisms and requirements for confiscation of evidence, sharing of information, and extradition. In certain countries, these types of provisions may be self-implementing – for example, the existence of an extradition treaty may be enough for a country to grant a request for extradition -- but in many they still require translation into national law to be enforceable in national courts.

There are numerous international agreements related to wildlife crime, described in the following sections. These include environmental agreements at the global, regional, and sub-regional levels, as well as agreements relating to other aspects of crime. Where it is necessary to prove the existence and contents of international agreements, e.g. when necessary to prove that a particular species is listed under one of the CITES appendices, the national department responsible for foreign affairs will usually act as the depositary; alternatively a representative of the governing body or secretariat of the agreement will have to attest.

2.3 MULTILATERAL ENVIRONMENTAL AGREEMENTS (MEAs)

Global environmental agreements are called Multilateral Environmental Agreements or MEAs. MEAs related to wildlife include:

- The **Convention on Biological Diversity (CBD)** deals with the conservation of biological diversity, including genetic diversity, the sustainable use of its components and the fair and equitable sharing of benefits. It came into force in 1993.¹⁰ It *inter alia* provides for *in situ* conservation by placing an obligation on

⁹ UNODC *Wildlife and Forest Crime Analytic Toolkit*, Revised Edition, 2012:45

¹⁰ The Cartagena Protocol on Biosafety is a protocol to the Biodiversity Convention and sets out procedures for the safe transfer, handling and use of any living modified organism that may have an adverse impact on the environment

parties to establish and manage a system of protected areas, thereby providing for the protection of ecosystems and natural habitats in which wildlife are protected.¹¹

- The **Convention on the Protection of the World Cultural and Natural Heritage (World Heritage Convention)** aims to protect designated cultural and natural sites, thereby indirectly contributing to the protection of wildlife species. It provides that certain natural and cultural sites, such as the Serengeti, constitute the "common heritage" of all humankind and are worthy of international co-operation for their protection.¹²
- The 1973 **Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)**¹³, referred to above, aims to control the import, export and trade in endangered species of both fauna and flora, and their products. Species are listed on three appendices. No commercial trade is allowed for species listed on Appendix I. Limited commercial trade is allowed for species on Appendix II and both an export and import permit is required. In the case of species on Appendix III, only an export permit and a certificate of origin are required. Whereas listing a species on Appendices I and II requires a decision by the member countries, an endemic species can be unilaterally placed on Appendix III, although certain requirements need to be followed.
- The main aim of the **Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention or CMS)**, which was adopted in 1979 and came into force in 1983, is the protection of migratory species, which includes wild animals, birds and marine species that migrate across borders. It provides for two categories of species. Species listed on Appendix 1- which are species in danger of extinction- are afforded the strongest protection, while species listed on Appendix 2 are those that are vulnerable and which will benefit from

¹¹ Article 8 of the CBD.

¹² Glazewski J & du Toit L (eds), *Environmental Law in South Africa*, Loose-Leaf Edition (Issue 1), 2013: 2A-38.

¹³ Also see <http://www.traffic.org/about/abt.htm>. TRAFFIC is a joint program of IUCN and WWF for monitoring wildlife trade.

international co-operation agreements, a number of which have been concluded between range states.¹⁴ An example of such a CMS agreement is the African and Eurasian Waterbirds Agreement (AEWA) which requires countries to implement measures to protect habitats, regulate or prohibit hunting, and control trade relating to listed migratory birds.

CITES is especially important in the context of the prosecution of wildlife crimes. Under CITES, species are listed on three appendices.

- No commercial trade is allowed for species listed on Appendix I.
- Limited commercial trade is allowed for species on Appendix II and both an export and import permit is required.
- In the case of species on Appendix III, only an export permit and a certificate of origin are required. Whereas listing a species on Appendices I and II requires a decision by the member countries, an endemic species can be unilaterally placed on Appendix 3, although certain requirements need to be followed.

CITES requires countries to take measures to prohibit and penalize trade in specimens of listed species. This is accomplished through implementing legislation. For example, in Tanzania, CITES is implemented primarily through the Wildlife Conservation Act of 2009, which states:

95.-(1) Any trade in violation of CITES provisions is prohibited under this Act and all specimens illegally traded shall be confiscated.

The Act also explicitly prohibits import or export of any trophy without a CITES permit, and provides requirements for issuing a permit in accordance with CITES.

2.4 REGIONAL AND SUBREGIONAL ENVIRONMENTAL AGREEMENTS

There are also many regional and subregional agreements pertaining to the environment in general, aspects related to wildlife crime, or specific species or sites. Some examples are listed here.

- One of the earliest regional environmental agreements is the 1968 **African Convention on the Conservation of Nature and Natural Resources (Algiers**

¹⁴ Adapted from Glazewski J & du Toit L (eds), *Environmental Law in South Africa*, Loose-Leaf Edition (Issue 1), 2013: 2A-33

Convention), The Convention was revised in 2003 (**Maputo Convention**), but the revised convention is not yet in force.¹⁵ The Maputo Convention contains a fundamental obligation in article 4, which states that "[t]he parties shall adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventative measures and the application of the precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in interest of present and future generations." The Convention *inter alia* addresses topics such as species and genetic diversity, protected species, trade in specimens and products thereof and conservation areas.

- The **Treaty for the Establishment of the East African Community (EAC)** contains a chapter on co-operation in tourism and wildlife management, which, *inter alia*, requires partner states to:
 - harmonise their policies for the conservation of wildlife;
 - co-ordinate efforts in controlling and monitoring encroachment and poaching activities; and
 - take measures to ratify and accede to, and, implement relevant international conventions¹⁶.

- The **SADC Protocol on Wildlife Conservation and Law Enforcement**, one of the instruments by which the 1982 Southern African Development Community (SADC) Treaty is implemented, came into force in 2003, and is highlighted here as an example of a more detailed regional agreement. The main aims of the Protocol are to ensure a common approach to conservation and use of wildlife resources and to assist countries with effective enforcement of wildlife legislation.¹⁷ Article 14(2) sets out the specific objectives of the Protocol to be to:
 - a) promote the sustainable use of wildlife;
 - b) facilitate the harmonisation of the legal instruments governing wildlife use and conservation;

¹⁵ See Glazewski J & du Toit L (eds), *Environmental Law in South Africa*, Loose-Leaf Edition (Issue 1), 2013: 2B-6

¹⁶ See Article 116 in Chapter 20 of the Treaty.

¹⁷ See Article 4(1) of the Protocol

- c) promote the enforcement of wildlife laws within, between and among States Parties;
- d) facilitate the exchange of information concerning wildlife management, utilisation and the enforcement of wildlife laws;
- e) assist in the building of national and regional capacity for wildlife management, conservation and enforcement of wildlife laws;
- f) promote the conservation of shared wildlife resources through the establishment of transfrontier conservation areas; and
- g) facilitate community-based natural resources management practices for management of wildlife resources.

- The **Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)** has as its main aims to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States, and to promote such co-operation. Particular emphasis is given to endangered and vulnerable species, including migratory species.¹⁸ The convention has 50 member states (and the European Union is also a member) covering most of the natural heritage of Europe, but extending to some states in Africa as well. The 1979 Convention came into force in 1982 and contains detailed provisions on the protection of wildlife species in the area. Articles 5 to 9 in Chapter III require contracting parties to take legislative and administrative measures "to ensure the special protection" of wild flora (listed in Appendix I) and wild fauna species (listed in Appendix II and III). Chapter IV contains special provisions for migratory species.¹⁹
- The **Convention for the Protection of Natural Resources and Environment of the South Pacific Region (Noumea Convention)** was adopted in 1986 and entered into force in 1990. Although its primary focus is the prevention of pollution and environmental degradation in the marine and coastal environment.²⁰ Article 14 provides that parties shall take appropriate measures to protect and preserve

¹⁸ Bern Convention, Art 1.

¹⁹ <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078aff>, accessed on 7 July 2016.

²⁰ See the preamble to the Convention.

rare or fragile ecosystems and depleted, threatened or endangered flora and fauna as well as their habitat.²¹

2.5 INTERNATIONAL AGREEMENTS ON ASPECTS OF CRIME

As was pointed out in Part 1.3 above, wildlife crimes are often connected to transnational organised crimes and other forms of crime. International agreements on these subjects are therefore also relevant.

The **United Nations Convention against Transnational Organised Crime (UNTOC)** specifically notes the criminal activity of illicit "*trafficking in endangered species of wild fauna and flora*" in its preamble, and provides for measures to promote co-operation to prevent and combat transnational crime more effectively. It applies to particular offences of transnational organised crime nature, as well as all those offences which carry a maximum penalty of four years imprisonment.²² UNTOC is a relatively new convention that came into force in 2003 and has been widely ratified - there are currently 164 State Parties. The United Nations Office on Drugs and Crime (UNODC) is the guardian of UNTOC. Similarly, the **United Nations Convention against Corruption (UNCC)** provides an important legal basis for combating corruption.

Some regional agreements also make provision for co-operation in investigations and prosecutions. These provisions are generally described in broad terms, but some have more specific provisions on co-operation. Examples under the **SADC Protocols** are:

- **The SADC Protocol on Wildlife Conservation and Law Enforcement**, as discussed above, contains specific provisions on this subject in Article 9, which *inter alia* provides that parties shall co-ordinate enforcement through the designated Interpol National Central Bureaus and co-ordinate efforts between law enforcement authorities to combat illegal exploitation and trade in wildlife products.²³

²¹https://www.sprep.org/attachments/Legal/Files_updated_at_2014/NoumeaConvProtocols.pdf, accessed on 7 July 2016

²² See article 2 and 3 of the Convention.

²³ Article 9(3) of the Protocol.

- **The SADC Protocol on Mutual Legal Assistance in Criminal Matters** applies to investigations, prosecutions and other related proceedings, and requires parties to provide assistance with any such efforts, including search and seizure, the gathering of evidence and obtaining of statements and measures for the seizure of the proceeds of crime.²⁴

Most countries have **co-operation agreements** on investigation, prosecution and enforcement. These can include agreements on extradition, or mutual legal assistance.

On 30 July 2015 the United Nations General Assembly unanimously adopted a resolution that calls for firm and strengthened national measures and an enhanced regional and global response to prevent, combat and eradicate the illegal trade in wildlife. It is aimed at both areas of supply and demand and strengthening the legislation required for the prevention, investigation and prosecution of wildlife related offences. It provides for wildlife offences to be treated as predicate offences for anti-money laundering offences and supports the exchange of evidence between States and taking of steps to prohibit, prevent and counter corruption.²⁵

2.6 OTHER MECHANISMS FOR INTERNATIONAL COOPERATION IN COMBATING WILDLIFE CRIME

International assistance can take place via informal or formal methods. Informal person-to-person methods via telephone and e-mail are quick and can determine whether a formal request will be useful. However, information gathered in this way is not admissible in court, rules vary from country to country and the whole process is “unofficial”.

Formal methods, or “agency-to-agency” methods have the advantage of usually resulting in the gathering of admissible evidence, but can often be time consuming and extremely frustrating due to the red tape associated with such processes. It

²⁴ Article 2 of the Protocol.

²⁵ Resolution No A/RES/69/314.

mostly depends on whether there is a mutual assistance treaty in place between the requesting and receiving country. It also sometimes requires that the offence in question be an offence in both countries (the principle of "dual criminality"). Such mutual assistance agreements require the other country to assist in obtaining evidence, searches and seizures, forfeiture and extradition. This process has the advantage that assistance is usually obligatory, and that the request is between central authorities, and not courts. In some cases, UNTOC can function as a mutual legal assistance treaty for Parties, where the offence in question is transnational, involves an organized criminal group, and is subject to a penalty of 4 years imprisonment or more.

INTERPOL views environmental crimes as a serious and growing international concern. Accordingly, an Environmental Crime Programme (headed by Environmental Crime Committee) was established in 1992. This programme has since been replaced by the Environmental Compliance and Enforcement Programme. As of 2012, the programme is spearheaded by the Environmental Compliance and Enforcement Committee (ECEC).²⁶

The objective of the ECEC is to share information, trends, issues and experiences related to environmental crimes, such as methods of deterrence, prosecution, apprehension and enforcement. The aim is to enable each member state to effectively enforce national and international environmental laws and treaties.²⁷

The INTERPOL Wildlife Crime Working Group is one of the three working groups established to support the ECEC's objectives. It focuses on environmental crimes specifically related to the possession, trafficking and poaching of protected wild fauna and flora.²⁸ The Group aims to improve on existing methods to combat the aforementioned crimes by inviting enforcement officials of each member state to

²⁶ <http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-crime>, accessed on 3 August 2016.

²⁷ UNODC *Wildlife and Forest Crime Analytic Toolkit*, Revised Edition, 2012:104 -105.

²⁸ <http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-Compliance-and-Enforcement-Committee>, accessed on 3 August 2016 ; UNODC *Wildlife and Forest Crime Analytic Toolkit*, Revised Edition, 2012:104.

share their expertise and information of persons, organisations and methods involved in such crimes.

The INTERPOL Wildlife Crime Working Group also developed a system called *Ecomessage* as a standard format for reporting cases related to illegal trade in endangered species, infractions of CITES and other environmental crimes.²⁹

There are also numerous regional and international initiatives and networks aimed at combating wildlife crime, such as the -

- The Association of Southeast Asian Nations Wildlife Enforcement Network (ASEAN-WEN) is comprised of 10 countries in the Southeast Asian region³⁰ for the purposes of combating illegal trade in wildlife. It is an intergovernmental co-operation network of custom, enforcement and environmental officials, and operates at both regional and national level. The network seeks to combat wildlife crimes not only through collaboration of enforcement agencies, but also through holding annual meetings and workshops aimed at environmental law development, improving scientific decision-making, information sharing, and capacity building.³¹
- The Lusaka Agreement on Cooperative Enforcement Directed at Illegal Trade in Wild Fauna and Flora, of which the objective is to reduce and ultimately eliminate illegal trade in wild fauna and flora, and to establish a Task Force for Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora, for this purpose. The Task Force serves as an African wildlife crime fighting unit and is based in Nairobi, Kenya.
- The South Asian Wildlife Enforcement Network (SAWEN), has 8 member states in the South Asian region³² for the purposes of forming a strong cohesive network to implement joint strategies in order to combat illegal wildlife trade. The network hopes to achieve its mission through harmonisation of conservation laws and policies; by identifying and documenting threats and

²⁹ UNODC *Wildlife and Forest Crime Analytic Toolkit*, Revised Edition, 2012:104 -105.

³⁰ Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Vietnam and Thailand.

³¹ <http://www.asean-wen.org/index.php/about-us/what-is-asean-wen>;
<http://www.traffic.org/asean-wen/>, accessed on 3 August 2016.

³² Afghanistan; Bangladesh; Bhutan; India; Maldives; Nepal; Pakistan and Sri Lanka.

trends in illegal trade; by strengthening enforcement measures through sharing information and technical support, capacity building, education and collaboration; and by developing and implementing respective National Action Plans for illegal wildlife trade.³³

- The Central American Wildlife Enforcement Network (CAWEN) is an enforcement network in Central America aimed at regulating wildlife trade. It seeks to achieve its objectives through increased regional co-operation and increased partnerships between government and non-governmental organisations; harmonized training of officials; and formation of networks for effective enforcement measures.
- The International Consortium on Combating Wildlife Crime (ICWC), is a formidable alliance between five international organisations (CITES, INTERPOL, UNODC, World Bank and the World Customs Organization) aimed to bring about justice to wildlife criminals through the assistance of national enforcement mechanisms. It seeks to deliver its objectives through increased co-operation, information sharing, application of up-to-date technologies and enforcement mechanisms between the national states.³⁴

³³ <http://www.traffic.org/networks/>; <http://www.sawen.org/pages/details/places>, accessed on 3 August 2016.

³⁴ <http://www.traffic.org/networks/> and <http://inece.org/topics/biodiversity/wildlife/>, both accessed on 3 May 2016, and from the texts of the agreements or founding documents.

Is your country a member of CITES? If so, what legislation incorporates the provisions of CITES into your domestic legislation?

.....
.....

Is your country a member of INTERPOL? If so, where is the national central bureau or focal point situated?

.....
.....

Which other international or regional agreements relating to wildlife or the combating of organised and related crimes is your country a member to?

.....
.....

3 ASPECTS AND ELEMENTS OF CRIMINAL LIABILITY

3.1 WHAT IS CRIMINAL LAW

Criminal law consists of rules and principles that lay out evidence of criminal offences, rules regarding liability, general defences, burden of proof and penalties. Criminal law also includes a body of procedural law, that provides rules regarding choice of court, witnesses, collection, handling and presentation of evidence, and other procedural aspects.

Criminal offences are typically created via original legislation enacted by the legislature. This can be in the form of a single statute, or a set of laws. It is often complemented by regulations or other forms of delegated legislation that provide more detail. In the case of criminal law relating to wildlife, the description of wrongful conduct may be found in a wildlife law or general biodiversity law, while the criminal penalty may be found in a separate criminal code or act. In some cases, criminal law can be created or elaborated by case law.

3.2 REQUIREMENTS FOR CRIMINAL LIABILITY

As with any other criminal case, to establish criminal liability, the state normally has to prove both wrongful conduct and culpable mental state. To prove wrongful conduct, the prosecutor must show:

- there was human conduct in the form of an act or an omission where there was a legal obligation to act;
- the conduct was voluntary, meaning that it was not the result of an involuntary muscle movement (seizure, stroke, twitch, etc.) or failure to act because of physical incapacitation;
- the conduct was recognized by law as a crime, and complied with the definitional elements of a crime; and
- there were no grounds of justification, meaning the conduct was unlawful;

For most crimes, the state must also prove culpable mental state, or *mens rea*. This will depend on the standard provided in the law that creates the offence. Some common standards include:

- intention – the prosecutor must show that the accused actually intended the outcome of the unlawful conduct.
- recklessness – this is defined by the law of the jurisdiction, but typically means that the accused acted (or failed to act) with complete disregard for the consequences of their conduct, despite knowing these consequences;
- criminal negligence – again is defined by the law of the jurisdiction, but typically refers to conduct (act or omission) that poses a substantial risk that a reasonable person would avoid.

Some legal systems provide for "strict liability" where conduct is criminalised irrespective of whether the accused intended the outcome, or subjectively willed the outcome. In these cases, there is no requirement to prove *mens rea*. In most jurisdictions however, strict liability is frowned upon, either by being not acceptable under criminal law, or by being contrary to a Bill of Rights contained in the Constitution of such country.

In wildlife crimes proving *mens rea* will therefore usually be a requirement. This can be difficult, as it is impossible to get in someone's mind and show what they were actually thinking. However, *mens rea* can be inferred from the factual circumstances of the case.

Even where prosecutors must show intent to commit the wrongful conduct, they do not necessarily need to show that the accused knew that the conduct was illegal. Many jurisdictions, including the United States and Canada, have a rule of *ignorantia juris non excusat* – literally, "ignorance of the law is no excuse". This means that someone does not need to know that an act is illegal to be held liable. It does *not* mean that there is no *mens rea* requirement. In these jurisdictions, the defendant must intend the outcome of their conduct (intent), or know or have reason to know that the outcome is likely (negligence, recklessness), even where they do not know that the conduct is illegal. For example, a person may not be excused for intentionally killing an elephant by claiming that they did not know that killing elephants was illegal.

In some jurisdictions, knowledge on the part of the accused of the unlawfulness of some part of his or her conduct can be a requirement of *mens rea*. This does not mean that the accused must have known the detailed requirements of the offence charged, but that they knew, or at least foresaw the possibility, that their actions were contrary to law in the broad sense. It is usually sufficient to show that the accused foresaw the possibility of such unlawfulness and proceeded recklessly as to whether such conduct was unlawful or not. A person who works in a particular sphere of activity however ought to know the law relating to that activity. It is therefore required from a person engaging in specific activities to familiarise him- or herself with the legal requirements governing such activities. Strong demands are placed on all those engaged in trades, occupations or activities which are legally regulated and known by them to be. They are expected to learn the rules and are obliged to make the effort.

3.3 LIABILITY OF CORPORATIONS

In some cases, it may be worthwhile to pursue prosecution of corporations and organizations, as well as individuals. Holding corporations and organizations (especially large companies) criminally liable can help change corporate culture and corporate behaviour. Companies usually have the necessary resources to pay fines and additional orders by a court on conviction. As the motivation for such crimes is usually financial gain and the result an increase in profits to the detriment of wildlife resources, such corporations ought to be charged, together with directors or employees in their personal capacity, where appropriate.

Liability of corporations for wildlife offences is based on their legal personality – their recognition as legal persons (or “juristic persons”) separate from their directors and employees. Requirements for prosecution of legal persons are usually contained in the criminal procedure legislation of a country. Some legal systems require that the legislature adopts, for each offence, a specific express provision allowing for criminal liability of corporations as juristic persons.

In practice it will often be the case that both the corporation or organization, as well as directors, managers or employees in their personal capacity are all prosecuted simultaneously (as co-accused). A related issue is therefore which persons to charge

in their personal capacity. Logic would dictate that the highest-ranking individual(s) who played a role in the commission of the offence should be prosecuted. There will be much less deterrent effect in general, and less influence on the future behaviour of a corporation, if only a low-level employee is prosecuted. There is often not much purpose in charging a low-level employee, unless of course, the particular situation dictates it and the employee has personally benefited from the offence. Very often such employees would however have little or no financial incentive in the crime, and were simply following orders and might have been concerned about losing their jobs.

The prosecution of employers and directors in their personal capacity, in addition to the prosecution of the corporation as a juristic person, broaden the scope of persons against whom such an action can be undertaken, and can substantially increase the effectiveness of a prosecution.

As far as civil liability is concerned, based on the principle of vicarious liability, an employer can be held liable for the actions of their employee if such an action was performed in the course and scope of the employee's employment. Criminal law however does not recognize a general rule of vicarious liability, and thus an employer cannot be held criminally liable simply based on an employee's conduct in the course and scope of employment. Of course the employer can be held criminally liable where he or she authorised its commission or took part in it, but not simply based on the employer/employee relationship. Such liability can however be created by legislation to ensure that employers do not evade their duties and responsibilities by hiding behind the wrongs committed by their employees.

Vicarious criminal liability is often frowned upon as it ignores the fundamental principle of fault required to establish criminal liability, but this can be overcome by providing that the employers will be personally criminally liable only where that employer failed to take reasonable steps to prevent the act or omission, in what seems to correspond with the requirement of fault in the form of either an intentional omission or negligence.³⁵

³⁵ See s 34(5) of the South African NEMA as an example of this

Personal criminal liability for directors, can be shown in a similar way. If a director was personally involved in the decision or execution of an action or omission that constitutes an offence, the director can of course be charged in his or her personal capacity, but in some jurisdictions personal criminal liability is created via either the criminal procedure law or via specific provisions in environmental or wildlife legislation. As with the provision discussed above relating to employers, it can provide for some element of fault, as to avoid the unacceptability, in many jurisdictions, of strict liability.³⁶ For example, the South African National Environmental Management Act (1998) states:

Any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision listed in schedule 3 shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law, including an order under subsection (2), (3) and (4), if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute prima facie evidence that the director is guilty under this subsection.

Does your country's legislation provide for the criminal liability of corporations, employers and directors? How would such liability support prosecution of wildlife crimes?

.....

.....

.....

.....

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³⁶ S 34(7) of SA NEMA.

4 WILDLIFE OFFENCES

4.1 INTRODUCTION

Wildlife law varies from country to country, jurisdiction to jurisdiction. However, in all jurisdictions, wildlife legislation typically addresses the following aspects:

- **Ownership of wildlife.** As mentioned in preceding chapters, most countries do not recognise the environment as having rights on its own. As such, harm to wildlife is legally conceptualized as harm to its recognized owner, which forms the legal basis for prosecution. The ownership or trusteeship³⁷ of wildlife will typically be held by the State, indigenous communities, and/or private individuals;
- **Establishment of governmental departments.** Appropriate institutions with authority related to wildlife is required for the successful implementation of wildlife legislation;
- **Designation of protected areas.** Protected areas include areas set aside to protect wildlife and their habitat, including parks, reserves, conservation areas, marine protected areas, etc.;
- **Permit systems.** Permits or licences with clearly outlined conditions are required to regulate access to certain activities, such as hunting, collection, trade and possession of wildlife. There also need to be systems in place to aid the application, renewal and cancellation of such permits or licences;
- **Regulation of transport and trade.** Clearly defined rules are required for national and trans-boundary movement, import and export of wildlife and wildlife products;
- **Defined offences and penalties:** The regulated community will not only require clear perimeters of what is permitted and prohibited in terms of wildlife legislation, but be made aware of the corresponding penalties for flouting such laws and enforcement measures.³⁸

³⁷ E.g. the Tanzanian Wildlife Conservation Act of 2009 states in s 4 that all animals shall continue to be public property and remain vested in the President as the trustee for and on behalf of the people of Tanzania.

³⁸ This part adapted from the UNODC Wildlife and Forest Crime Analytic Toolkit, Revised Edition, 2012:25.

These issues will typically be regulated by the national Ministry responsible for environmental affairs, but can also be regulated by other spheres of government, including regional or local government, depending on the structure of government in the country and the areas of legislative and executive competence allocated to them.

4.2 OFFENCES RELATING TO THE ILLEGAL EXPLOITATION OF WILDLIFE

Offences regarding the illegal exploitation of wildlife will typically criminalise the following actions:

- hunting, killing, catching, gathering or capturing of wildlife **without authorization**;
- hunting, killing, catching, gathering or capturing of wildlife **in a protected or restricted area**;
- hunting, killing, catching, gathering or capturing of **protected species**;
- **illegal methods** of hunting, killing, catching, gathering or capturing of wildlife or possession of prohibited gear; and
- hunting, killing, catching, gathering or capturing of wildlife **outside of a prescribed time or season**.

Offences regarding the illegal hunting, killing, catching, gathering or capturing of wildlife will contain either an absolute prohibition of such an action (often allowing hunting and capturing only where it is done for management or scientific purposes, such as research, translocation or culling) or will criminalise such an action where it is performed without some form of authorisation, such as a licence or permit.

The control of wildlife exploitation can be linked to a specific species requiring a certain level of protection based on its conservation status, or can be linked to a specific area, such as a protected area or protected ecosystem.

Where exploitation is controlled via species specific provisions, protected species are often listed in separate schedules or annexes, and can be elaborated by regulations or other delegated legislation. The IUCN Red List method of classification of threatened species into "critically endangered", "endangered" and "vulnerable" may

be adopted into domestic legislation.³⁹ Other legislation may reference Appendices of CMS or CITES or lists maintained under regional agreements. Alternatively, legislation may provide for listing of species for which hunting is *allowed* and prohibit hunting of all other species.⁴⁰

South African National Environmental Management: Biodiversity Act 10 of 2004

(1) A person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of this Act

"restricted activity", in relation to a specimen of a listed threatened or protected species, means-

(i) hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen;

(ii) gathering, collecting or plucking any specimen of a listed threatened or protected species;

(iii) picking parts of, or cutting, chopping off, uprooting, damaging or destroying, any specimen of a listed threatened or protected species

"listed threatened or protected species" means a species listed as such by the Minister in the Government Gazette;

Legislation can also create separate offences based on the purpose of the hunting of wildlife. For example, a distinction can be made between illegal sport hunting, hunting for the purpose of trading in bush meat and hunting for the purpose of subsistence, with different maximum penalties set for each in relation to the seriousness of the offence.⁴¹

³⁹ See <http://www.iucnredlist.org/>. An example of a jurisdiction that has adopted this classification system is the South African National Environmental Management: Biodiversity Act 10 of 2004. In addition to the three categories referred to here, section 56 of this Act creates a fourth category of "protected species", being species that do not fall within these three categories, but which are of such a high conservation value or national importance that they require national protection.

⁴⁰ See, e.g., Basic Hunting Law of Portugal of 1999, Article 6 ("it is prohibited ... (b) to hunt all species not defined as game")

⁴¹ See e.g. section 96-98 of the Kenyan Wildlife Conservation and Management Act 47 of 2013.

Various methods of hunting, killing, catching, gathering or capturing of wildlife, as well as the possession of certain gear, are also controlled via legislation. This typically includes methods and gear that may fail to kill an animal instantly (e.g. small calibre firearms or bow hunting), might lead to unnecessary suffering (such as certain traps or hunting with dogs) or are indiscriminate as to its target (poison and certain snares and nets). Hunting is also often limited to certain seasons or times; hunting at night or with the use of artificial lighting may be prohibited.

Bulgaria, Law for hunting and protection of the Game, 2000 (amended 2002)

Art. 65. The use of the following means and methods shall be prohibited at hunting:

1. fire arms ...
2. traps, loops, nets, glues and pits (ditches), if they are applied for non selective hunting;
3. poisonous or anaesthetic substances, as well as baits with such substances;
4. (amend. SG 79/02) electric sound reproducing devices and artificial sources of light, as well as facilities for lighting the target;
5. mirrors and other blinding subjects;
6. electric appliances, able to kill or stun;
7. live animals, used as bait;
8. explosives, gas or smoke;
9. appliances for night shooting ...
10. motor vehicles;
11. aviation means;

4.3 OFFENCES RELATED TO PROTECTED AREAS

The hunting, killing, catching, gathering or capturing of wildlife in a protected or restricted area is governed by legislation dealing with protected areas, either combined with wildlife and biodiversity legislation, or contained in separate legislation. Protected areas legislation can also prohibit, *inter alia*:

- Unauthorized entry into a protected or restricted area;
- Possession of prohibited gear (firearms, poisons, traps, nets) within a protected area;
- Disturbance or destruction of habitat within a protected area

The IUCN Protected Areas Categories System classifies protected areas according to their management objectives into seven categories:

- Strict Nature Reserves (category Ia);
- Wilderness Areas (category Ib);
- National Parks (category II);
- Natural Monuments or Features (category III);
- Habitat/Species Management Areas (category IV);
- Protected Landscapes/Seascapes (category V); and
- Protected Area with sustainable use of natural resources (category VI).

These categories are increasingly being recognised as the global standard and incorporated into national legislation, though not necessarily using these exact terms.⁴² The level of regulation applicable to a protected area may depend on its category. In Category VI protected areas, sustainable hunting and other resource use may be allowed with appropriate permits and according to specified seasons, species restrictions, and quotas. In Category Ia protected areas, entry into the protected area may be a criminal offence.

Canadian Wildlife Area Regulations (C.R.C., c.1609):

3. Subject to subsection (2), no person shall, in any wildlife area,

(a) hunt or fish,

(b) be in possession of any firearm, slingshot, bow and arrow, shot other than non-toxic shot or any instrument that can be used for the purpose of hunting

...

hunt means to chase, pursue, worry, follow after or on the trail of, stalk or lie in wait for the purpose of taking animals, and includes molesting, trapping, attempting to trap or shooting at animals, whether or not the animal is then or subsequently captured, killed or injured

...

Canadian Wildlife Act (R.S.C., 1985,c.W-9)

⁴² See eg the South African National Environmental Management: Protected Areas Act 57 of 2003, that recognises similar, and some additional, protected areas.

13 (1) Every person who contravenes subsection 11(6) or any regulation ...
(b) is guilty of an indictable offence and is liable
(i) in the case of a corporation, to a fine not exceeding \$250,000, and
(ii) in the case of an individual, to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding five years, or to both.

4.4 OFFENCES RELATING TO THE ILLEGAL POSSESSION OF WILDLIFE AND WILDLIFE PRODUCTS

Offences regarding the illegal possession of wildlife and wildlife products will typically criminalise the illegal keeping, possession or control over wildlife or wildlife products, and can include, or have as a separate prohibition, the illegal processing of wildlife products or the illegal transport of wildlife or wildlife products. The possession or processing of wildlife trophies also falls within this category.⁴³

Possession of certain wildlife and wildlife products will require some sort of authorisation in the form of a licence or permit. Such authorisations will often stipulate various conditions, and non-compliance to such conditions will be criminalised.

Kenyan Wildlife Conservation and Management, 2013 (Act 47 of 2013):

95. Any person who keeps or is found in possession of a wildlife trophy ...or manufactures any item from a trophy without a permit issued under this Act....commits an offence..."

...

where "trophy" means "any wild species alive or dead and any bone, claw, egg, feather, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such"

⁴³ See e.g. section 95 of the Kenyan Wildlife Conservation and Management Act 47 of 2013. In a 2014 prosecution under this Act, a Kenyan court handed down a sentence of 20 million shillings (233 000 dollars) to Tang Yong Jian, or a term of imprisonment of 7 years, for being in possession of an ivory tusk weighing 3.4 kilograms.
Source: http://wwf.panda.org/wwf_news/?216350/Kenya-finally-gets-a-new-wildlife-law, accessed on 21 April 2016.

Namibian Nature Conservation Ordinance, 1975:

48(1)(a) No person shall transport game or game meat unless he is the holder of a permit, written authority, or written permission granted and issued in terms of this Ordinance....

86. Any person who contravenes or fails to comply with any provision of this Ordinance...shall be guilty of an offence...

where "game" means "specially protected game, protected game, huntable game, huntable game birds and exotic game"

Wildlife crime often involves the element of possession of wildlife products, as illustrated above. Offences such as illegal transportation of wildlife, illegal import or export of wildlife, or illegal trade in or smuggling of wildlife may all have an element related to possession. In such cases, possession means consciously exercising control over the article in question. If the person is unaware of the existence of the article, then he or she cannot be said to possess it.

With the *caveat* that there are different approaches to this in different legal systems, showing possession usually involves two elements: physical possession (*corpus*) and the intention to possess (*animus*). If you are travelling somewhere and someone puts a piece of a rhino horn in your luggage without your knowledge, you will indeed be in physical possession, but as you are not aware of the rhino horn, you have no intention to possess it. The lack of *animus* means that in law you are not in possession of the rhino horn.

Inspectors and investigators should ensure that sufficient evidence is gathered to prove possession, especially the element of "*animus*" or intention to possess. Prosecutors should provide the necessary guidance on this aspect to investigators.

4.5 OFFENCES RELATING TO THE ILLEGAL TRADE IN WILDLIFE AND WILDLIFE PRODUCTS

Offences regarding the illegal trade in wildlife and wildlife products will typically criminalise the following actions:

- selling;

- offering for sale;
- supplying;
- buying;
- bartering;
- trading; and
- donating of wildlife or wildlife products.

Tanzanian Wildlife Conservation Act, 2009 (Act 5 of 2009):

84(1) Any person who sells, buys, transfers, transports, acceptsany trophy in contravention of any of the provisions of this Part....commits an offence

where "trophy" means "any wild species alive or dead and any bone, claw, egg, feather, hoof, skin, tooth, tusk or other durable portion whatsoever of that animal whether processed, added to or changed by the work of man or not, which is recognizable as such"

It is important to note that "trade" is usually widely defined and does not necessarily require an exchange of product or money - simply offering a wildlife product for trade is usually sufficient to constitute the offence of trading in a wildlife product.

4.6 OFFENCES RELATING TO THE EXPORT AND IMPORT OF WILDLIFE AND WILDLIFE PRODUCTS

Finally, there are offences relating to the illegal export, meaning to take out or transfer from a place within the country to another country or to international waters, and offences relating to illegal import, meaning to land on, bring into or introduce to a country, and will include bringing it into the country with the purpose to re-export to another country.

The import or export of wildlife or wildlife products listed on CITES will be illegal, and typically criminalised in the legislation of member countries.

Mauritius Wildlife and National Parks Act 1993 (Act 13 of 1993)

17(1) Subject to subsection (2) no person shall, except with a permit issued by the authorised officer and subject to such conditions including the payment of such fees

as may be prescribed-

(c) export from Mauritius or import into Mauritius any prescribed species of wildlife or any product thereof,

(d) assist in, or facilitate, the export from Mauritius or import into Mauritius of any prescribed species of wildlife or any product thereof unless he has ascertained that a permit has been issued by the authorised officer in respect of such export or import.

26(1) Any person who contravenes any provision of this Act or any regulation made under it shall commit an offence.

(2) Any person who commits an offence shall on conviction -

(a) where the offence relates to a species of wildlife listed in the Fourth Schedule, be liable to a fine not extending 100,000 rupees and to imprisonment for a term not exceeding 5 years;

(b) in any other case, be liable to a fine not exceeding 50,000 rupees and to imprisonment for a term not exceeding 3 years.

In all of the above instances, an offence relating to the abuse of a licensing system or failure to comply with the conditions of a licence or permit can also be of relevance.

A unique form of an import/export related provision is The US Lacey Act. This Act, initially adopted in the year 1900, creates an offence for the import of, and trade in, any wildlife or wildlife product into the United States, where such items have been taken, possessed, transported or sold in violation of any foreign law.⁴⁴

⁴⁴ Note that the US Lacey Act is not just an import/export provision, but also applies to transport, sale, receipt, purchase or acquisition of wildlife sourced in contravention of foreign law.

United States Lacey Act, 16 U.S.C. § 3372(a)(2)(A):

It is unlawful for any person . . . (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—

(A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.

This unique provision provides that where any such products were taken, possessed, transported or sold in contravention of another country's law, and then imported into the United States, it will be an offence in terms of U.S. law. The Act was recently used in a very successful prosecution in the United States on large scale imports of fish illegally caught from South African waters. The case resulted in sentences of direct imprisonment imposed on all three accused, as well as a combined forfeiture order against them amounting to \$7.4 million. In terms of the Mandatory Victims Restitution Act, the accused were ordered to pay restitution to South Africa of nearly 22.5 million USD in June 2013.⁴⁵

4.7 INCHOATE AND ANCILLARY OFFENCES

In addition to the wildlife offences discussed above, most jurisdictions criminalise an attempt to commit such crimes, conspiracy to commit such crimes, as well as incitement to commit such a crime. They may also criminalize other related offences, such as aiding and abetting, accessory, or procuring the commission of an offence. These types of offences are termed inchoate or ancillary offences.

It is particularly important to prosecute these offences in the context of wildlife crime. Defendants accused of illegal hunting, possession or trade in wildlife products, or illegal entry into protected areas, are often small time criminals who can be motivated by subsistence or necessity. Prosecution of these “small fish” may not effectively cut off wildlife crime – as it does not address the drivers of wildlife crime or the sources of funding available – and in some cases may even cause resentment in the community. Fully addressing the problem of wildlife crime requires going after

⁴⁵ See *United States Court of Appeals, For the Second Circuit, August Term, 2008, Docket No.07-4895-cr, United States of America (Plaintiff-Appellant) v Arnold Maurice Bengis, Jeffrey Noll and David Bengis (Defendants-Appellees)*. Decided January 4, 2011 before Feinberg, Cabranes, and Hall, Circuit Judges.

“big fish” – the organizers and directors of criminal activity.⁴⁶ Often, the criminal kingpin is not the one holding the gun. Therefore, it is important to fully utilize inchoate and ancillary offences, as well as related commercial and organized criminal offences discussed below.

What legislation in your country covers the following aspects of wildlife crime:

- Illegal exploitation?
.....
- Illegal possession?
.....
- Illegal trade?
.....
- Illegal export?
.....
- Illegal import?
.....
- Illegal transportation?
.....
- Abuse of the licensing system or non-compliance with the conditions of an authorisation?
.....

Does your country criminalize conspiracy, attempt, or incitement to commit offences related to wildlife? Where are these provisions found?
.....
.....

⁴⁶ See, e.g., The Global Initiative Against Transnational Organized Crime, The Global Response to Transnational Organized Environmental Crime, June 2014

Does your country or any destination countries (to which illegal wildlife from your country is trafficked) have a Lacey Act type provision? How could such a provision be helpful?

.....

.....

.....

5 RELATIONSHIP WITH OTHER CRIMES

5.1 INTRODUCTION

Wildlife crime will link to other offences under legislation dealing with the following areas:

- protected areas, as discussed above, including entering a protected area without permission, possessing or using a firearm or other weapon in a protected area, and hunting or killing wildlife in a protected area;
- firearms and ammunition, including possession or use of unlicensed firearms and ammunition, prohibited types of firearms or ammunition, or firearms and ammunition in areas where it is not permitted;
- customs and excise, including falsification of customs permits, mislabelling of shipments, and smuggling offences;
- narcotics, as wildlife and narcotics products can be smuggled together,⁴⁷ and exchanging wildlife products for drugs is a known payment method;
- public health, as transport of wildlife – particularly living specimens – can violate sanitary and phytosanitary regulations; and
- commercial and organised crime, as discussed in the following sections.

Legislation in these areas provides additional potential charges and approaches for addressing wildlife crime. Bringing charges based on different areas of legislation will mean that additional charges can be added without a fear of duplication and can substantially add to the combined maximum penalty available at sentencing. Some

⁴⁷ According to Schneider, "Various customs officials around the world seized 86 pounds (39 kg) of cocaine stuffed in condoms, which were found in 225 boa constrictors; elephant tusks filled with hashish, and exotic birds shipped with methamphetamine tablets." Jacqueline L. Schneider, *Sold into Extinction: The Global Trade in Endangered Species*, Praeger, 2012, p. 55.

of these offences – such as those involving firearms, narcotics, or commercial and organized crimes – may be taken more seriously by courts, and lead to higher conviction rates and higher available penalties. Two particular related crimes – commercial crime and organized crime – are discussed below.

5.2 RELATIONSHIP WITH COMMERCIAL CRIME

Wildlife crime is often linked with commercial crime, which can include both common law and statutory crime. This close connection has its origin in the motivation of almost all wildlife crimes: financial benefit, as was discussed above.

Greedy people commit wildlife crimes. Greedy people also pay bribes, falsify licences, permits or authorisations (referred to as "forgery" or "document fraud" in some jurisdictions) and commit fraud---all in an effort to ensure an income from their illegal activities. Wherever a wildlife crime was committed, it is good practice to investigate the possibility that some form of commercial crime was committed as well.

The proceeds of illegal trade are usually the subject of some form of money laundering as well as tax evasion. The huge income generated by some actors must be laundered in some way that does not show up on tax returns. Another unfortunate complication is that these circumstances where large amounts of money can be generated quickly and easily create a breeding ground for corruption.

5.3 RELATIONSHIP WITH ORGANISED CRIME

INTERPOL recognises that environmental crimes have evolved over the years to involve a network of organised criminal syndicates.⁴⁸ The challenge however is that environmental laws (which include wildlife legislation) mete out justice most often only to perpetrators who actually commit the crimes themselves, but are often only remotely connected to organised criminal syndicates, such as opportunistic poachers who then sell the trophies to others for processing and trade. Those who do not commit the actual crimes, but spearhead or fund such crimes often escape

⁴⁸ <http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-crime>

liability. The United Nations Convention against Transnational Organised Crime therefore seeks to address this issue, by requiring countries to criminalize the intentional participation in organised crimes. The primary legal requirement for such an offence is the intentional and active participation in the criminal organisation's activities. If the activity is non-criminal, the participant has to have knowledge that the activity would help achieve a criminal objective of the organisation.⁴⁹ Many countries have incorporated an offence for participation in organised crime into their domestic law. The offence is sometimes also referred to as "racketeering".

As mentioned above, the primary goal of laying a separate charge under organised crime offences, is to target those who mastermind or fund criminal activities. There are, however, the following additional advantages:

- Avoiding misjoinder and non-joinder issues: Often a problem arises in charging the accused on individual charges as parties and /or crimes are often included or sometimes left out. As all members are jointly charged for participation to the enterprise as a whole, misjoinder and non-joinder problems are avoided;
- Removing the need for details: The focus of the prosecution is placed on repeated conduct and overall contribution to the enterprise, rather than details and specifics of each act committed;
- Heavier weight of similar fact evidence: As one indictment covers all incidents, similar fact evidence covers all incidents and reliance thereon is made easier;
- Public exposure of the global enterprise: Due to the focus of prosecution being on the contribution to organised crime, the public is exposed to the context of how each crime is connected to the other crimes and the syndicate as a whole, as well as the blameworthiness of individual's participation to that end.⁵⁰

This link between wildlife crime and commercial and organised crime brings about the practical necessity of close co-operation between different enforcement agencies to combat what is in effect an environmental crime, with the tools usually

⁴⁹ See UNODC *Wildlife and Forest Crime Analytic Toolkit*, Revised Edition, 2012: 58-59

⁵⁰ Adapted from a presentation on the subject at the first national training course for prosecutors in South Africa: Prosecuting Environmental Crimes Helderfontein Estate, Midrand, July 2005, by Adv. W.C. Viljoen, Deputy Director, DSO, Western Cape.

reserved for commercial and organised crime, a subject investigated in the next part of this workbook.

Does your country have legislation criminalising participation in organised crime activities? Will such activities include wildlife crimes?

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6 ACTORS IN THE ENFORCEMENT OF WILDLIFE CRIME

6.1 INSPECTORATES AND INVESTIGATION AUTHORITIES

The monitoring and enforcement of wildlife crime is usually the responsibility of inspectorates within government that have the mandate and authority to monitor compliance, conduct inspections and to investigate wildlife crime. It is important to differentiate between inspections, a routine activity usually not requiring a search warrant to enter premises, and a search based on suspected non-compliance, usually requiring a search warrant to enter and search premises.

Inspectorates are usually supported by the police services in the investigation of offences, especially if they are of an organised or transnational nature. As was illustrated in Part 5 above, wildlife crime cannot be combated in isolation and requires the involvement of various additional actors, such as the management authorities of protected areas and the national departments responsible for revenue services and customs and excise.

Within the police services, various units will have a crucial role, such as -

- security services responsible for control at ports of entry and border posts;
- dog units;
- detective services;
- specialised units dealing with the combating of organised and commercial crime;
- crime intelligence; and

- forensic science services.

A close relationship, and effective co-operation, between the different agencies and the use of Multi Agency Teams (MATS) in investigations is crucial in the combating of wildlife crime.

6.2 THE ROLE OF THE PROSECUTOR

While the primary role of the prosecutor or state advocate, acting under delegation from a director of public prosecutions or an attorney general, is the prosecution of offences, the consultative and advisory role of prosecutors during the investigation phase should also be emphasised. Although prosecutors do issue instructions on further investigation to investigating officers, they do not as a rule, get actively involved in investigations. Reasons for this include the lack of time and opportunity and fear of becoming witnesses in their own case. This should however not prevent prosecutors from providing appropriate guidance and advice to environmental inspectors and police investigators---such an intervention can sometimes determine the difference between success and failure.

Getting involved at an early stage means the prosecutor can ensure thorough investigation (including ensuring that sufficient, admissible evidence is gathered) and the prosecutor will acquire a broader perspective and know the case thoroughly by the time it goes to court. This does not imply that the prosecutor takes over the investigation from the investigating officer, but rather that the prosecutor will be available to enforcement officials and investigators should her or his assistance be needed. This is often based on an informal good working relationship between prosecutors and investigators on ground level, but co-operation can also be of a more formalised nature within forums or networks of wildlife crime inspectors, investigators and prosecutors, tasked to ensure such co-operation and assistance.

Units responsible for asset forfeiture - the confiscation and forfeiture of assets used in the commission of environmental crime, as well as assets that are the proceeds of such crime - usually also fall under the office of the directorate of public prosecutions or attorney-general.

Some countries have a dedicated environmental court and/or dedicated and specialised prosecutors to facilitate prosecution and adjudication of environmental crimes, including wildlife crimes. For about 3 years, between 2003 and 2006 South Africa had a dedicated Environmental Court (now replaced by a system of dedicated and specialised prosecutors). The prosecutors in this court became actively involved in providing a 24-hour helpline to inspectors and investigators; the setting up of systems to secure the integrity of exhibits, making recommendations for amendments to legislation and assisting with the training of inspectors and investigators. All of these measures contributed to a substantially higher conviction rate, specifically in abalone related cases. It was also noticeable how such assistance not only contributed to the knowledge of personnel, but also boosted the morale and self-confidence of inspectors and investigators.⁵¹

Such courts have the advantage of allowing the prosecutor and presiding officer to specialise and become experts in the field, with the additional benefit of giving priority to such crimes.

6.3 THE ROLE OF THE JUDICIARY

The judiciary plays a number of roles in protecting wildlife. Main functions include:

- To ensure that correct procedure is followed before, during and after the case – this includes ruling on motions, admissibility of evidence, and other procedural questions that arise;
- To pronounce judgment and, in case of conviction, sentence – this often involves a high degree of judicial discretion, but may be determined by sentencing guidelines or binding minimum or maximum penalties for specific offences;
- To interpret wildlife legislation – particularly in common law jurisdictions, the High Courts and/or Constitutional Courts play an important part in elaborating legislation through interpretation that creates binding or persuasive precedent;

⁵¹ Phil Snijman, *Teams and Role Players: Supporting Effective Investigation of Environmental Crime*, Presentation delivered at the first national training course for prosecutors Prosecuting Environmental Crimes Helderfontein Estate, Midrand, July 2005.

- To review executive decisions that threaten wildlife, and strike down legislation that is unconstitutional – again, this is typically the responsibility of High Courts or a Constitutional Court

The criminal court system usually has a hierarchy, created by the Constitution and/or other legislation, that determines where primary cases, appeals and judicial reviews will be heard. A case that is brought in the wrong jurisdiction may be subsequently nullified by a higher court.

The above is not unique to the prosecution of wildlife crimes, but serves merely as a reminder of the crucial role of the judiciary in such matters. The role extends beyond individual cases and can drastically influence effective enforcement by way of binding interpretations and the setting of precedents through appropriate sentences.

Which organs of state or other agencies in your country play a role in the monitoring, detection and investigation of wildlife crimes?

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Does your country have an environmental court, or specialised and dedicated wildlife/environmental prosecutors? If not, do you think such an institution or division of prosecutors will be beneficial?

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7 DECISION TO PROSECUTE

7.1 GUIDING FACTORS

The policies and directives of the prosecuting authority will apply equally to decisions on the prosecution of wildlife offences as in any other decision to prosecute. The three basic criteria are:

- Cases should only be prosecuted if there is evidence under oath that establishes the elements of the offence and links the accused to it;
- There must be sufficient admissible evidence to provide a reasonable prospect of a successful prosecution; and
- Prosecutors must make their decision in the interest of the community (and not necessarily in accordance with its wishes).

The decision to prosecute environmental crimes requires two additional factors, namely:

- The nature and extent of the environmental harm; and
- Culpable conduct.

The two criteria do not need to be equally present for a matter to be worthy of prosecution. Rather, they are to be balanced against each other. There may be instances whereby there is substantial environmental harm and low culpable conduct (or vice versa), which may still be worthy of prosecution. Generally, culpability increases when there is blatant disregard for the law, repeated illegal conduct or involvement in organised crime syndicates.⁵²

7.2 ALTERNATIVES TO PROSECUTION

Although the decision to prosecute lies at the discretion of the prosecutor, other enforcement options are available to enforcement institutions in responding to non-compliance with wildlife legislation. These range from informal warnings, suspension

⁵² This paragraph adapted from presentations by Andrew Lauterback, US Environmental Protection Agency and Bruce Pasfield, US Department of Justice, presented at Prosecuting Environmental Crimes- A training Course for South African Prosecutors, July 2005, Midrand and 1994 memo of the Environmental Protection Agency's Office of Criminal Enforcement titled The Exercise of Investigative Discretion. See www.epa.gov.

or withdrawal of permits (e.g. where the conditions were not met) and the issuing of administrative notices or directives. These options however rarely apply to the wildlife crime environment.

Compounding is an option used in some jurisdictions where an accused may pay compounding charges to settle a charge without appearing in court. Compounding is a process that is carefully set out in each country's legislation, and thus the process will differ from country to country.

A related tool is an admission of guilt fine. If the accused chooses to pay the fine, they do not have to appear in court, but they will still be considered guilty. Such fines, usually limited to a fairly low amount, are only suitable in the case of minor offences and in certain circumstances. The non-commercial illegal hunting of one specimen of a non-protected species for consumptive purposes may be a good example of where the issuing of such a fine may be appropriate. It is important to note that payment of an admission of guilt fine is still considered a successful prosecution.

7.3 EXAMPLES: WHEN TO PROSECUTE?

Prosecution will be appropriate when the following circumstances are present:

- Deliberate or grossly negligent conduct, irrespective of the extent of the environmental damage or harm;
- Significant environmental damage or potential significant environmental damage;
- Where the wildlife offence is part of an organised crime;
- Connection to, or presence of, other serious crimes;
- Repeat offenders;
- Abuse of licensing system;
- Failure to provide correct or required information;
- Assaulting, intimidating, bribing or impersonating environmental enforcement officials;
- Defeating the ends of justice by obstructing the duties of wildlife enforcement officials.

Are wildlife crimes seen in a sufficiently serious light by the prosecution and judiciary in your country?

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What are the most common reasons, in your experience, prosecutors decline to prosecute? Are these reasons appropriate?

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8 ASPECTS OF THE TRIAL

8.1 DRAFTING OF CHARGE SHEETS

The importance of an accurate and comprehensive charge sheet cannot be overemphasised. All essential elements should be included. These elements are the following:

- **Preamble:** Where appropriate, preambles should be used to set out the facts. Especially in wildlife offences of an organised or otherwise complicated nature, an extensive preamble setting out the relevant facts concisely is very valuable in informing the presiding officer of the factual background of the case.
- **Relevant sections/regulations:** The charge sheet must refer to sections/regulations creating the offence. In addition, it should refer to related sections/regulations such as those:
 - creating definitions;
 - creating presumptions on which the prosecution might rely;
 - containing particular evidential rules;
 - prescribing maximum or minimum penalties; and
 - containing supplemental or additional orders available on conviction.

Senior prosecutors are encouraged to draft some basic pro forma charge sheets that can be used by less experienced prosecutors, such as the example provided below.

Example Charge Sheet for Restricted Activity Involving Protected Species:⁵³

CASE NUMBER: _____

COUNT NUMBER: _____

THE STATE VERSUS: _____

(Hereafter called the accused)

⁵³ The formulation of the offence is based on the wording used in the South African National Environmental Management: Biodiversity Act 10 of 2004.

Restricted Activity Involving Listed Threatened or Protected Species without a Permit

PREAMBLE

WHEREAS

- [short description of the events and facts on which the State will rely]

NOW THEREFORE it is alleged that the accused is/are guilty of a contravention of Section 1 of the [Act], read with section 2 [creation of offence], as well as section 4 [section containing definitions] and section 3 [setting the maximum penalty], also read with Government Notice [notice that lists threatened and protected species] and further read with section [any other relevant sections, including those that may contain provisions from the criminal procedure legislation, provisions on burden of proof or other evidentiary provisions]

In that the accused on or about [date of offence]

and at or near [place where offence was committed]

in the district of [jurisdictional area of offence]

intentionally and unlawfully carried out a restricted activity involving a specimen of a threatened or protected species by -

hunting / catching / capturing / killing / gathering / collecting / plucking / picking / cutting / chopping off / uprooting / damaging / destroying / importing / exporting / having in possession / exercising physical control over / growing / breeding / propagating / conveying / moving / translocating / selling / trading in / buying / receiving / giving / donating / accepting / acquiring / disposing

of [name of species], being a listed threatened or protected species, without a permit issued in terms of the Act.

Penalty provision: Fine or period of imprisonment not exceeding ten (10) years, or to both such fine and period of imprisonment.

Other applicable provisions at conviction:

- [provisions on forfeiture and additional orders that may be available on conviction]

8.2 PREPARING FOR TRIAL

As with all trials, and even more so in wildlife crimes due to the sometimes technical nature of the evidence, preparation is of paramount importance. In preparing for wildlife cases, prosecutors should:

- Prepare and index photographs, maps, plans and reports;
- Establish the availability of all witnesses, consult with the witnesses and prepare them for cross-examination;
- Ensure that affidavits from expert witnesses are complete and correct, and that you can prove the reliability of their methodology;
- Thoroughly consult with and prepare any expert witnesses you might want to use;
- Where laboratory analysis was utilised, ensure that all instruments were calibrated and that the necessary controls were in place;
- Prepare and plan for a site (*in loco*) inspection, wherever possible;
- Research the defence evidence where any version is available, or possible defences or evidence expected from the defence.

8.3 PLEA AND SENTENCE AGREEMENTS

The legislation governing criminal procedure of some countries provides for plea and sentence agreements (often informally referred to as “plea bargains”) which are an extremely valuable tool in the prosecution of wildlife offences. Such agreements require negotiation between the prosecutor and the accused’s legal representative. Once an agreement is reached on the counts to which the accused will plead guilty, and what an appropriate sentence is, this agreement is put in writing and then confirmed by the court, after which a formal conviction follows.

In addition to the general advantages of ensuring a conviction and avoiding a trial that might take months to complete, such agreements also have other advantages. Plea and sentence agreements can make a huge contribution to the rate of disposal of cases on overburdened court rolls, and also allow for the swift disposal of cases where circumstances dictate this.

In the context of organised wildlife crimes, they further allow for accommodating the disposal of cases against certain members of a syndicate in order to use them as

witnesses against other members of the syndicate, by including the furnishing of such evidence as a condition of a suspended sentence. Lower ranking syndicate members can via this method be used as witnesses against high ranking syndicate members, providing a way to catch the "big fish".

What aspects distinguish wildlife crimes from other prosecutions?

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9 SENTENCING, FORFEITURE AND OTHER ORDERS

9.1 ISSUES TO BE CONSIDERED IN SENTENCING IN WILDLIFE CRIMES

It is crucial for prosecutors to prepare for argument on sentence and place evidence in aggravation before the court, in order to obtain appropriate sentences. Argument should include a reference to all of the following:

- factors to be taken in consideration;
- aims of sentencing;
- penalty provisions and options; and
- case law as it applies to the particular case.

Evidence in aggravation may include:

- statistics on the prevalence and extent of wildlife crime;
- expert testimony as to the effect on the environment or wildlife resource;
- expert testimony on the economic effect of wildlife crime;
- testimony from individuals or community groups on the effect of the particular crime on such individuals or community groups.

The general factors to be considered in sentencing include:

- The personal circumstances of the accused;
- The seriousness of the offence; and
- The interests of society.

Other relevant factors include the following:

- the effects of wildlife offences on the environment (both short-term and long-term), and the ultimate effect on the well-being of people and the economy;
- The species of wildlife impacted, and their degree of abundance; and
- The accused's conduct during and after the offence.

The aims of sentencing need to be considered as well before an appropriate sentence can be imposed. The aims of a sentence are to:

- Serve as a deterrent
- Be preventative
- Be retributive

- Be reformative

Circumstances may dictate that a specific aim comes to the fore more than others. Perpetual offenders, for instance, require heavier sentences than first time offenders. In systems where restorative justice applies, courts usually try to rehabilitate first offenders out of prison by, for instance, imposing correctional supervision or a suspended sentence or a fine. It is, however, not always possible to keep first offenders out of prison and it will depend on the weight attached by the court to different interests in a particular case. Where a specific type of offence has become prevalent to the extent that the authorities can no longer effectively combat it or the court rolls are overloaded with similar offences, imprisonment is often the only appropriate sentence, even for first offenders.

In order for deterrence to be effective, the penalties should be sufficiently severe such that it outweighs the benefits reaped from the commission of the wildlife crime. Deterrence is a greater consideration in preventing wildlife (and other environmental) crimes compared to crimes, generally. This is due to the fact that many such crimes are committed in the moment or driven by factors such as emotions. Therefore the consequences (no matter how severe) may not be considered as deterrence by the perpetrators before partaking in such crimes. In contrast, environmental crimes are calculated in advance and motivated solely by rational factors. If therefore the punishment was significant, or penalties severe, this would be factored in by the perpetrator before the commission of environmental crimes. However, severe penalties will only be an effective deterrent if there is effective enforcement.

Domestic environmental legislation often arises out of state's obligation as a signatory of negotiated international and regional treaties and agreements. As such, flouting of national legislation is tantamount to violation of obligations under such international or regional treaties and agreements.⁵⁴

⁵⁴ Advocacy Memorandum: Arguments for Prosecutors of Environmental Crime, Interpol Pollution Crimes Working Group Penalties Project, Fifth Draft, 4 August 2016.

9.2 FORFEITURE ORDERS REGARDING THE INSTRUMENTALITIES OF A CRIME

In some cases, wildlife legislation has specific provisions on forfeiture of the instrumentalities of the crime. Alternatively, such provisions may be contained in the criminal procedure legislation.

Forfeiture is a legal penalty where the item used in the commission of the offence, the instrumentality of the crime, is forfeited, usually to the state.

The aims of forfeiture of the instrumentalities of crime are:

- Removing the incentives to commit crime;
- Deterring persons from using property to commit crime;
- Neutralising property previously used to commit crime; and
- Advancing the ends of justice by depriving those involved in crimes of the use of that property.

In achieving these objectives, the focus is not on the guilty state of mind of the wrongdoer, but on the role played by the property in the commission of the crime; and the question is whether a functional relationship has been established between the property and the crime. In most instances, the court will only forfeit property belonging to a third party after it is established that she or he willingly and knowingly made the property available for illegal use - a difficult and sometimes impossible task for a prosecutor.

9.3 OTHER ADDITIONAL OR SUPPLEMENTARY ORDERS

Some additional or supplementary orders may include:

- Orders regarding the proceeds of crime or advantage gained through the commission of the crime: some countries have legislation that allows for forfeiture orders regarding the proceeds of crime. This can be contained in separate legislation and/or in environmental or wildlife legislation.⁵⁵
- Orders regarding the cancellation of licenses or other authorisations: the cancellation of licenses and other authorisations are usually reserved for administrative enquiries and actions. In some countries however the

⁵⁵ See eg s 34(3), read with Schedule 3, of the South African National Environmental Management Act 107 of 1998.

environmental or wildlife legislation provides for a court to cancel or suspend a license or permit on conviction.⁵⁶

- Orders affecting the status of the accused: environmental legislation may provide for orders affecting the status of the accused after conviction.⁵⁷ Such orders may take the form of banning the accused from applying for wildlife related permits or licences either permanently or for a specified period.
- Orders regarding the payment of damage, cost of rehabilitation and compensation: some environmental legislation determines that such an order can be made, also in the case of wildlife offences.⁵⁸
- Orders regarding the payment of the costs of investigation and prosecution: some environmental legislation allows for such an order, also in the case of wildlife offences.⁵⁹

These additional orders can add substantially to the liability on conviction of a wildlife crime, and in addition to serving as an additional deterrent, can have a direct benefit to the resource, or to people affected by the crime.

⁵⁶See eg s 34(C)(a) of the South African National Environmental Management Act 107 of 1998.

⁵⁷ See eg s 34(C)(b) of the South African National Environmental Management Act 107 of 1998..

⁵⁸ See eg s 34(1) and (2), read with Schedule 3, of the South African National Environmental Management Act 107 of 1998.

⁵⁹ See eg s 34(4), read with Schedule 3, of the South African National Environmental Management Act 107 of 1998.

Does your criminal procedure or environmental or wildlife legislation allow for the following additional or supplementary orders on conviction of serious wildlife offences:

- orders regarding the proceeds of crime or monetary advantage gained through the commission of the offence?

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- orders regarding the cancellation of licences or other authorisations?

.....

- orders affecting the status of the accused?

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- orders on the payment of damages, costs, rehabilitation or compensation?

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- orders on the payment of the costs of investigation and prosecution?

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10 CONCLUSION

Over the years, due to technological advancement, growing population and globalisation, wildlife crimes have increased and have become more sophisticated and often interlinked to international crime organisations.

The same conditions which lead to more sophisticated wildlife crimes have however also produced more effective responses to such crimes. Various international and intergovernmental organisations have been established to combat wildlife crimes. We are seeing a sharing of technical know-how and expertise, sharing of information on criminal trends and creative responses thereto, and co-ordination and co-operation of efforts to effectively address wildlife crimes.

The obvious shortfall is that criminal sanctions are reactionary, and addresses problems only after the detrimental environmental impact has occurred (which is sometimes irreversible, such as the extinction of a species). However, there is undeniable value in criminal sanctions as a tool for deterrence, and the effectiveness of this requires the following factors to be present:

- Legislation which clearly outlines permitted and prohibited activities as well as offences and appropriate sanctions related to such activities. Such legislation would also need to provide for comprehensive powers to enforcement officials to allow for effective measures to monitor and detect wildlife crimes, to investigate such crimes and to bring offenders to court;
- Effective and visible monitoring and detection of wildlife crimes, apprehension of criminals and a thorough investigation that will produce sufficient admissible evidence to prove the guilt of the offender;
- Prosecutors with specialised knowledge and awareness of the importance of combating wildlife crimes in order to prosecute effectively;
- A judiciary that hands down just, equitable and appropriately severe sentences;
- Publication of the outcome of successful wildlife prosecutions to act as deterrence for perpetrators.

In other words, perpetrators should be made aware that apprehension and a successful prosecution is a real and definite possibility, and once convicted, that the sentence will be appropriately severe.

In addition to appropriate sentences in wildlife crimes, which usually consist of monetary penalties or incarceration, or a combination of the two, many jurisdictions now also make provision for liability for damages caused by such crimes, and the forfeiture of the proceeds and instrumentalities of the crime following on a conviction. This serves not only as a deterrent, but also removes the incentive to commit such crimes and neutralises the use of such property in the commission of offences.

Where comprehensive powers are given to enforcement officials, effective use of such powers can break up organised syndicates by arrests, seizure of the instrumentalities of crime and, in appropriate cases, the incarceration of offenders awaiting trial, or where such offenders are granted bail, the imposition of strict conditions.

Wildlife crimes pose a serious threat to the environment and the economy. It is the task of all actors to ensure that such crime does not pay.