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AND NATURAL HABITATS

Standing Committee

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**2ND MEETING OF THE SPECIAL FOCAL POINTS ON
ILLEGAL KILLING, TRAPPING AND TRADE OF WILD
BIRDS**

Madrid, Spain, 24-25 February 2015

**Working Session 3:
identification and standardisation of gravity factors, and
preparatory work for the elaboration of sentencing guidelines**

**- ANALYSIS OF RESPONSES BY 12 COUNTRIES TO
QUESTIONNAIRE ON GRAVITY FACTORS APPLICABLE
UNDER THE TUNIS ACTION PLAN 2013 – 2020-**

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ANALYSIS OF RESPONSES BY 12 COUNTRIES TO QUESTIONNAIRE ON GRAVITY FACTORS APPLICABLE UNDER THE TUNIS ACTION PLAN 2013 – 2020

INTRODUCTION

Following the formal adoption of the Tunis Action Plan 2013 – 2020 (TAP) by the Bern Convention Standing Committee in December 2013, the Secretariat took steps to assist Parties with implementation. In February 2014 the Secretariat circulated a questionnaire including questions on the gravity factors with a view to identifying existing practice and matters likely to influence the implementation of standardised factors under the TAP. In particular, Parties were asked to rank in order of importance those factors that they felt were important (something not specifically required under TAP). A number of issues arose from this exercise, including different interpretations of the listed factors, variation in the rankings of factors, and differences in enforcement depending on whether the legislation was ‘stand-alone’ or part of environmental legislation, and whether it provided for penal (criminal) sanctions or merely administrative measures.

The Standing Committee in December 2014 agreed that the group considering the above matters should meet in early 2015 in a bid to resolve issues surrounding the implementation of gravity factors and lay the groundwork for the development of sentencing guidance, whether as formal guidelines or as principles to assist offence evaluation. This meeting is planned for 24/25 February 2015 in Madrid.

This document seeks to begin the process of understanding the responses to the Questionnaire and of drawing conclusions by seeking to reconcile the views expressed.

Tables 1 – 3 analyse the replies, using a methodology of measuring all the replies indicating which factors were ‘essential’ or which ‘are or could be used’ against those where the rankings put each factor into the top three places of importance.

Table 4 seeks to combine the results of Tables 1 – 3 in the light of comments made in paragraphs 1.1 – 6.1 below.

Tables 5 and 6 identify factors either requiring further consideration or considered not suitable for inclusion as ‘gravity factors’.

Matters relating to the Questionnaire relating to the availability of sanctions under national legislation are dealt with in a separate document.

Notes to Tables 1 - 3:

1. Factors in **RED** are those most frequently in the ‘Top Three’.
2. Factors in **BLUE** – might have been expected to score better?

Table 1 – Gravity Factors ‘considered essential’ (Questionnaire section B Q1)

Gravity Factors listed in Tunis Action Plan	No. of Countries recording item as important	No. of Countries recording item in the top three	Comments
(1) Conservation status of species	12	12	Identical with factor (1) in section A Q2
(2) Impact risk for ecosystem	11	8	Deemed the same as factor (2) in section A Q2
(3) Legal obligation to protect under international legislation	8	3	
(4) Indiscriminate method used in committing offence	9	2	
(5) Commercial motivation	9	1	
(6) Illegal gain/quantum	9	2	
(7) Prevalence of offence and need for deterrence	-	-	NOT included in the list sent out
(8) Professional duty on defendant to avoid committing offence	8	1	
(9) Scale of offending (number of specimens involved)	7	4	
(10) Intent and recklessness by defendant	10	0	
(11) History/recidivism	10	1	

Table 2

Additional Gravity Factors included in BQ1	No. of Countries recording item as important	No. of Countries recording item in the top three	Comments
(1) Organised activity or crime	10	0	
(2) Value of the loss due to the crime	11	6	

Table 3 Gravity Factors which ‘are or could be used’ (section A Q2)

Factors listed in Section A Q2 of Questionnaire	No. of Countries recording item as important	No. of Countries recording item in the top three	Comments
(1) Conservation status of the species	12	12	Identical with factor (1) in section B Q1
(2) Possible damage to the ecological balance or to the habitat as a consequence of the offence	12	6	Deemed the same as factor (2) in section B Q1
(3) Nature of the area (e.g. hotspots of bird conservation)	11	6	

(4) Legal or administrative status of the area where the offence took place	12	10	
(5) Intrinsic value of wildlife	10	0	
(6) Socio-economic benefits of wildlife	9	0	
(7) Known regional blackspots	8	1	
(8) Level of penalties provided by the legislation	10	3	
(9) Public interest	9	2	
(10) Public perception of the seriousness of the offence	11	0	

COMMENTS

1.1 The questionnaire sought to invite Parties to identify factors currently used, or which might be acceptable, in enforcing wildlife conservation legislation within their jurisdiction(s) when evaluating the gravity of an offence. See Table 3. It invited them to rank these in order of importance, and then to provide a similar ranking for the factors listed in the Tunis Action Plan ('TAP'). See Table 1. However, one of the TAP factors was not included but two additional ones were added. See Table 2.

1.2 It is necessary to note is that the TAP did not contain any reference to or requirement for a ranking of the gravity factors it listed. The list was merely intended to be a basic list of factors, at least some of which were likely to be relevant in the majority of wildlife offences. There was no grading of importance, merely an invitation to consider each to see if it applied.

1.3 However the ranking exercise was a sensible one, for it allowed existing factors to be identified and produced some interesting results, not least in that it allows for a comparison between the two lists in sections A Q2 and B Q1 and the opportunity to seek to integrate them.

1.4 Important points from this exercise may be noted as follows:

1. Factors attracting most support

'*Conservation status of the species*' was not just the top ranking factor across both Questions. It was thus with all the returned questionnaires. '*Damage or risk to the ecosystem*' was in both questions and again scored very highly. There appears to be a remarkably high acceptance therefore that this legislation is 'wildlife focused', which supports the TAP concept that wildlife should be seen as the 'beneficiary' of this legislation, and thus the 'victim' when an offence occurs. This I find very encouraging as it gives an excellent basis for a common approach to enforcement. The low scoring of '*Socio-economic benefits of wildlife*' (6) Table 3 in section A Q2 supports this view.

2. The other factors attracting a good level of support

- (i) Table 1 (the TAP list): (9) '*Scale of offending nos. of specimens*'. Although identified as 'important' by only 7 Parties, it was put in the top three by 4 of them.
- (ii) Table 2 (factors added to B Q1): (2) '*Value of loss due to the crime*'. I assume this referred to the economic loss caused by the crime as measured by eg. remedial measures needed to redress the ecological damage, and thus to some extent this can be seen as an aspect of 'damage or risk to the ecosystem' discussed above.
- (iii) Table 3 (factors in A Q2): (4) '*Legal or administrative status of the area where offence took place*' and (3) '*Nature of the area (e.g. hotspots of bird conservation)*'. The second is interesting, as it appears to refer to areas specifically given over to conservation activity, eg. nature reserves.

In some countries offences committed in such areas attract higher penalties. It appears to be possible to see this as an aspect of 'Conservation status' (1) in Tables 1 and 3 given that the less favourable a species' status is the more important are the efforts to protect it. *Legal or administrative status of the area*, (4) in Table 3, refers to whether the area was governed by a legal regime with penal sanctions or one with purely administrative measures (which would be less severe than penal sanctions.) This appears to be linked to factor 8 in Table 3 'Level of penalties provided by the legislation'. See comments below.

3. Factors attracting less support

- (i) Table 1 these were 'Commercial motivation', and 'Professional duty on defendant to avoid committing offence'.
- (ii) Table 2 'Organised activity or crime'.
- (iii) Table 3 'Known regional blackspots'.

4.1 The failure of the first two of these to attract greater support is surprising and a measure of how the assessment of wildlife crime needs to change. Table 1 (5) 'Commercial motivation', and Table 2 (1) 'Organised activity or crime' should be seen as aspects of the same thing. Both imply a financial benefit as the reason for the crime and the intention in committing it, and are linked to 'Illegal gain/quantum' (6) in Table 1. That these should not be recognised as very important in the context of wildlife crime is somewhat alarming. The concept of 'Professional duty on defendant to avoid committing offence' (8) in Table 1 is in some ways connected to the above matters. The person trading in (legally traded) species and the property developer have as much a commercial reason for their activities as the gamekeeper on a shooting estate: all need to ensure they do not benefit themselves, or their employers, by treating protected wildlife illegally. Traders in particular have a duty to 'keep the market clean' and not sell illegal items to the public, which can be a form of deception. **These two factors are important.**

4.2 'Known regional blackspots' (7) in Table 3 would seem to be an aspect potentially of 'Prevalence of offence and need for deterrence' (7) in Table 1, the factor not included in the Questionnaire.

4. Other factors

4.3 'Level of penalties provided by the legislation' (8) in Table 3 does not I believe add much, because under any jurisdiction enforcement is limited by the level of penalties under the legislation. It is an inevitable consideration, and thus does not need specific mention, nor is it factor defining or evaluating the facts of an offence. What is important is that the full range of penalties be use by the judiciary in an objective manner, to which end the factors are geared and intended to assist. Accordingly, I am not convinced this needs a separate entry in the list of Gravity Factors in any revision to Table 1.

4.4 'Legal or administrative status of the area', (4) in Table 3, is a crucial aspect of how the legislation protects wildlife and habitat, since it determines in effect the level of 'penalty' that the offender will 'pay' for failing to comply with it. Possibly this can be linked to 'Legal obligation to protect under international legislation' (3) in Table 1 by re-phrasing this to identify 'levels' of legislation.

4.5 'Public interest' (9) in Table 3, again, does not a separate listing. ALL factors are part of the 'public interest', which is itself a sine qua non of any public prosecution or state action penalising a citizen. Again, this does not need a separate entry in the list of Gravity Factors in any revision to Table 1.

4.6 'Public perception of the seriousness of the offence' (10) in Table 3 is interesting, in that it scores highly as 'important' but is never in the top 3. What is not clear is whether Parties intend to convey that the public perception is not taken by the judiciary as a very important matter (ie. that the judiciary are rightly using their own judicially considered criteria when assessing gravity and are not thus unduly influenced by public opinion) or that the public perception of wildlife crime as very important is not very high (ie. that public education and awareness-raising are needed). Some clarification and

further consideration of this is needed.

4.7 *'Socio-economic benefits of wildlife'* (8) in Table 3 may influence public perception of the seriousness of the crime. There have been attempts to quantify this, but there is no common measure and would have to be done country by country, or by a regional block with reliable data eg. the European Union. It would be difficult to achieve a reliable measure capable of being used by judiciaries. This may explain why it does not score highly in responses to the Questionnaire. However, some further consideration of this may be justified.

4.8 *'Intrinsic value of wildlife'*, a phrase from TAP, was not intended to be a separate gravity factor but defined a way of looking at the legislation and the desire to conserve wildlife as a whole. It was an attempt to provide a unifying way of understanding the reason for any conservation legislation. To that extent it is fundamental to the whole of the conservation effort, including enforcement of legislation, and not a specific gravity factor in respect of an offence. As it is already referred to in TAP I am not convinced it needs listing as a factor.

5. Conclusions

5.1 I believe that it is possible to create a synthesis of the factors listed in the three Tables above, mainly by adding to the definitions of the factors in Table 1, or by grouping some factors as aspects of another. The following synthesis is thus suggested – Table 4 below. In addition, the factors at 4.6, 4.7 above should be further considered, see Table 5 below.

Table 4

Original Gravity Factors listed in Tunis Action Plan	Additions from Table 2	Additions from Table 3	Proposed expanded definition of TAP factors: 'Amplified Version'
1. Conservation status of species		(1) Conservation status (3) conservation hotspot	'Conservation status of species, including whether crime targets measures or places of conservation activity'
2. Impact risk for ecosystem	(2) Value of loss to ecosystem from crime	(2) Damage to ecosystem or habitat	'Impact risk for ecosystem, including actual or potential damage to habitat and cost of actual damage or loss eg. restoration, restocking'
3. Legal obligation to protect under international legislation		(4) Legal or administrative status	'The level of the conservation legislation including whether (i) there is an international treaty obligation to protect, (ii) it imposes penal sanctions or administrative measures'
4. Indiscriminate method used in committing offence			
5. Commercial motivation	(1) Organised activity or crime		'Commercial motivation, including planned activity and organised (especially serious) crime, aiming for financial benefit'
6. Illegal gain/quantum			
7. Prevalence of offence and need for deterrence (<i>NOT included in Questionnaire section B Q1</i>)		(7) Known regional blackspot	'Prevalence of offence, including whether the area is frequently targeted, and the need for deterrence'
8. Professional duty on defendant to avoid committing offence			'Professional duty on defendant to avoid committing offence, including in the course of trade or business'
9. Scale of offending (number of specimens involved)			
10. Intent and recklessness by defendant			
11. History/recidivism			

Table 5

Factor	Origin	Comment
1. Public perception of the seriousness of the offence	Table 3 factor 10	See para 4.6
2. Socio-economic benefits of wildlife	Table 3 factor 6	See para 4.7

5.2 Three items included as factors in Table 3 are proposed as not suitable for separate listing as 'gravity factors'. They are set out in Table 6 below:

Table 6

Factor	Origin	Comment
1. Level of penalties provided by the legislation	Table 3 factor 8	See para 4.3
2. Public interest	Table 3 factor 9	See para 4.5
3. Intrinsic value of wildlife	Table 3 factor 5	See para 4.8

5.3 This document is therefore offered as a start to the discussion at the Meeting. The fundamental consideration that needs to be remembered is that the TAP is intended to improve enforcement as it is one of the conservation tools needed to achieve the aims of the Convention. This means that changes to enforcement, including judicial, attitudes and practices are inevitable because they are necessary. The task is to manage this, beginning where the enforcement mechanism is within each jurisdiction, and seek to influence change where there appears to be no or insufficient mechanism for offence evaluation or no use of the full range of penalties provided in that legislation. The task may also involve changes to existing national legislation to provide a wider range of sanctions.

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