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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

**Second Conference on the Illegal killing,
Trapping and Trade of Wild Birds**

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**Seconde Conférence sur la mise à mort,
le piégeage et le commerce illégaux d'oiseaux sauvages**

Tunis (31 May 2013)

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WORKING GROUP ON ENFORCEMENT ASPECTS

- A GUIDE TO THE DISCUSSION -

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WORKING GROUP ON ENFORCEMENT ASPECTS

A GUIDE TO THE DISCUSSION

The following is respectfully proposed as a guide for the Working Group to enable us to consider the alleged failure of wildlife crime to be effectively prosecuted in some jurisdictions. It is intended to assist NGOs to understand criminal justice processes and better contribute to them, as well as achieve practical outcomes in the form of actions which may assist practitioners to present these cases more effectively and enable judges to impose sentences which are a greater deterrent across a range of national jurisdictions. *Members of the Working Group are encouraged to use the points below as items for discussion and as opportunities to add relevant additional material, and in particular knowledge of national criminal justice jurisdictions as not all of these operate in the same way.* There will also be an opportunity to consider the use of other forms of sanctions.

1. *Has the Criminal Justice system failed to ‘work’ for wildlife, when other ‘interest groups’ appear to have been more successful in making it ‘work’ for their cause?*

- Other areas of human activity have seen an increase in judicial sanctions in recent decades – road traffic ‘death’ offences; child abuse/pornography; domestic violence.
- Have animal cruelty cases fared better than species protection ones? Why? Is it that judges can identify with the seriousness of inflicting pain?
- And CITES cases similarly? Why? Is it the presence of elements of dishonesty, cruelty or seen as part of ‘smuggling’?
- Why has it not worked for wildlife? Is the actual damage done per case seen as too small given the totality of the eco-system?
- Judiciaries do respond to changes in public concern – Judges are human.
- New laws are interpreted by principles found in ‘comparable’ legislation.
- What other legislation is ‘comparable’ to species protection laws?

2. *Why do we have ‘species protection’ laws? Who benefits?*

- Who benefits from other laws? Humanity!
- Whom do we see as benefiting from species protection laws?
- Religion, Science and the Environment Symposia – Eco-systems are ‘the other’ for which humanity as a whole has responsibility which is independent of any ‘benefit’ to us.
- If the ‘beneficiary’ is wildlife, then species conservation is based primarily on the ‘intrinsic value’ of the eco-system and not any perceived human benefit. Does this have consequences for enforcement?

3. *To what extent is ‘species protection’ legislation similar to or different from other laws? Is it ‘sui generis’?*

- Is it merely part of ‘Environmental’ protection legislation?
- Concern about the ‘Environment’ grew from the damage done during the Industrial Revolution which was causing problems to humans – clean air, clean water and urban overcrowding – not by concern for adverse effects on wildlife.
- Species protection legislation is a separate part of the criminal law because its ‘beneficiary is ‘other’ than humanity.

4. What are the consequences of any differences for the imposition of sanctions?

- Gravity ('seriousness') factors for any crime must relate to the adverse effect on the 'beneficiary' of the protection afforded by the legislation, eg. assaults – level of injury to the victim; theft – value of loss.
- 'effect' need not be only physical, eg. dwelling house burglary takes into account the effect on householders of insecurity, vulnerability.
- 'effect' need only be 'potential', ie. the offence is 'of a type' likely to cause injury or loss – eg. much of road traffic legislation.
- Therefore 'gravity factors' for wildlife crime must relate to the eco-system and arise from objectively established conservation concerns.
- Adverse 'effects' can include immediate loss, and directly consequential and potential losses – eg. mist netting is 'of a type' likely to cause potential loss as well as the actual birds caught, or killing migratory birds in spring will directly reduce the number of breeding pairs and thus chicks.
- Levels of sanctions for wildlife crime must therefore be directly related to adverse effects (actual, consequential or potential) on the eco-system.

5. What is the role of experts?

- Over-riding duty is to the court, not the party calling them.
- Putting science into the case as OBJECTIVE EVIDENCE.
- Interpreters of biological significance.
- Explain threats faced by the species – evaluate criminal activity.
- Explain conservation priorities and how the needs of the species in the case fit with these.
- Explain conservation activities undertaken relating to the species – local, national, international.
- 'Conservation Impact Statements' – scientific facts and opinions.
- Choose your expert carefully – independent species-specific biologists rather than from well-known conservation societies who may be viewed as 'biased'.

6. How can the different roles of Investigator, Prosecutor and Judge work harmoniously together?

- Identify *National policing/investigator priorities*, informed by scientifically based conservation concerns and intelligence/statistics on threats from criminal activity, and regularly reviewed.
- Use *Conservation Impact Statements* to evaluate the damage done.
- Identify *Gravity ('seriousness') factors* to inform the public interest criteria for prosecution and assist in determining the level of sentence.
- Develop *Sentencing guidelines* to identify when a wildlife case merits imprisonment.
- These four items must be consistent with one another, and can reinforce each other, creating a virtuous circle.
- Sources of information for investigators – intelligence; reports; observations. Monitor trends and volumes of criminal activity, then plan operations targeting particularly areas where criminality is doing most damage.
- Link wildlife crime to other criminality.

- What is the role of the Prosecutor in court? Give the facts – and any surrounding circumstances which are backed by evidence? Assist the court in making any of its decisions? Recommend sentences? Remind court of any additional orders it may make and show how they may be appropriate? Never overstate your case!

7. *If Judges must be independent, does this mean they are above the law? What are the constraints on their decision-making?*

- ‘Audi alteram partem’.
- Burden and standard of proof.
- Credit for guilty plea.
- Defendant’s mitigation – balanced against ‘public interest’ of punishment and deterrence.
- Previous convictions – ‘Recidivism’ a separate charge in some jurisdictions.
- ECHR considerations – actions by the state to be rational and proportionate. ‘Equal arms’ and duty of ‘fairness’ on courts.
- Balancing Reformation, Punishment and Deterrence.
- Reduced sentencing options for ‘companies’ or ‘legal persons’.
- Duty to use all the powers given to them by statute, but to do so proportionately.
- Appeals.
- Do low numbers of cases prevent sentencing pattern emerging?
- Relatively recent addition to criminal law – no historical pattern.
- Most likely comparators (eg. poaching, environmental pollution cases?) only had fines available?

8. *What other aspects are there to ‘Enforcement’?*

- Education – schools, general public.
- Media articles/programmes.
- All groups with an interest in the well-being or use of the eco-system working together.
- Other non-penal, non-criminal sanctions?
- Maximise voluntary compliance.

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