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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
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**

**- INTRODUCTORY MATERIAL &
DISCUSSION POINTS -**

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

Implementing the Tunis Action Plan 2013 – 2020

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

INTRODUCTORY MATERIAL & DISCUSSION POINTS

This document, together with two others, seeks to provide background information and explain the approach and some proposals of the moderator and thereby set the scene for discussion. The second, separate, document analyses the replies to the Secretariat's Questionnaire on 'gravity factors'. Distributing these two in advance to participants allows them to read them beforehand. The third, analysing the moderator's Questionnaire on 'sentencing legislation', will be available either before or at the Working Session. This will remove the need for an introductory talk by the moderator thus allowing maximum time for others to contribute in the time allocated.

PART A. GRAVITY FACTORS

The TAP proposes that these be '**identified and standardised**'. Any consideration of this part needs to start by answering two basic questions which will allow us to understand the TAP as a whole:

1. What does the TAP seek to achieve?

Answer: To fulfil the aims of the Bern Convention, particularly but not exclusively, in relation to birds (birds are a good focus as, in terms of species and specimens, they are a particularly numerous variety of fauna with particularly obvious, substantial and persistent forms of illegality).

2. By what means?

Answers:

- a. It proposes a multi-disciplinary approach covering '**Biological and Institutional**', '**Awareness**' as well as '**Enforcement and Legal**' aspects to create an inter-connected three-pronged attack on wildlife crime.
- b. It proposes both *general objectives* which are capable of being achieved across a range of national jurisdictions and cultures, as well as *types of action* aimed at achieving the objectives: eg. under '**Awareness**' is listed '*Positive biodiversity education is put in place*' inter alia through '*Birds and Ecosystem knowledge, and importance of both to people and responsibility of people as 'guardians of nature', are integrated into school Curricula*'.
- c. This multi-disciplinary approach is to be used by *national institutions and authorities*.
- d. Precise methods for achieving the objectives or implementing the proposed actions are not specified, intentionally leaving plenty of scope for implementation through different jurisdictions.

- e. It is with this understanding of the TAP that we should approach the proposals for offence ‘Gravity Factors’ and ‘Sentencing Guidelines’.
- f. In respect of the proposal for Gravity Factors the ‘Objectives’ are: ‘Gravity Factors that may influence prosecution and sentencing decisions are identified and standardised’ and ‘Investigators and Judiciaries to be familiar with National wildlife crime priorities, the purpose of CISs and offence gravity factors, and Judiciaries be encouraged to use these to inform sentencing guidelines’.
- g. The explanatory comment above the list of gravity factors reads: ‘Development and agreement on a list of Gravity Factors **taking into account**....’
- h. The TAP list is thus a **basic list** of frequently encountered aspects of wildlife crime or points which flow from the analysis of wildlife crime as ‘sui generis’ because it is, uniquely, ‘species focussed’, to be found in the comments earlier in the ‘Enforcement and Legal Aspects’ section (eg. ‘Recognising that wildlife is to be conserved for both its own intrinsic value and its socio-economic benefits’ and ‘Recognising that the species comprising the ecosystem are the ‘beneficiary’ of wildlife conservation legislation, and thus that changes in human behaviour towards wildlife may have to occur’.) The list of factors was not intended to be full, complete and exclusive. It was intended to provide an objective, reasonably comprehensive, *preliminary basis or framework for both investigators and prosecutors, and also the judiciary*, to use to begin to evaluate, and thus understand, wildlife crime in a similar way.
- i. Each point on the TAP list of factors was intentionally short, intending to point out possible aspects to be found in bird or any wildlife crime. Because of the need for the TAP as a whole to be ‘user friendly’ within a wide range of (sometimes very different) national social structures and judicial systems, the factors were not defined in any detail. Nothing in the TAP is intended to be used without adaptation to local circumstances.

THEREFORE, following the comments in the Replies to the Secretariat’s Questionnaire to Parties on implementation, whilst those attending are welcome to raise others, the following three questions appear to arise for us to consider:

- (1) *Does the list of factors need any additions? If so, what?*
- (2) *Does any of the list need amplification, clarification or re-definition? If so how?*
- (3) *Is acceptance and implementation of the TAP better served by restricting it to general objectives and actions or by detailed and prescriptive requirements?*

It is proposed that the Working Session focusses initially on these three questions as a means of promoting discussion on ‘identified and standardised’ offence ‘Gravity factors’ to achieve the implementation of the TAP, and that it considers the analysis of the Replies by Parties to the Secretariat’s Questionnaire, together with the possible synthesis that it contains - see separate document.

PART B. SENTENCING GUIDANCE

1. Introduction

1.1 This part seeks to focus on the task of ‘*prepar(ing) guidance for sentencing, with the aim of giving the judiciary the necessary background for taking informed decisions*’. Perhaps a suitable place to begin to consider sentencing for any type of crime is to ask the question, ‘**Is judicial guidance on sentencing useful**’? In attempting to answer this there are at least three considerations.

1.2 *First*, what are the main **criticisms** in the media **of criminal/penal sentences imposed by the judiciary**? I suggest two often occur (*are there others?*):

- a. **Inconsistency** – imposing substantially different sentences for apparently similar offences, and,

- b. **Undue leniency** – including imposing sentences which rarely or never use the upper range of penalties provided in the legislation.

1.3 Results of these criticisms include:

- a. Lack of understanding of or respect for both judiciary and the legislation by the public at large.
- b. Difficulties for defence lawyers in advising clients charged with such offences on possible outcomes.
- c. Difficulties in achieving the social benefit sought by the legislators.
- d. Uncertainty and inconsistency in attitude adopted by enforcers – police, prosecutors.

1.4 The cause of both of these criticisms is essentially the same: different judges within a jurisdiction using different criteria, or giving different weight to similar facts, when assessing the seriousness of broadly similar cases, or similar types, of a particular crime.

1.5 *All jurisdictions have to deal with this problem, and different solutions are attempted. All have to respect the principle of judicial independence, whilst providing the judiciary with the means of seeking to avoid the twin problems of inconsistency and undue leniency. Finding a way to achieve this, which is acceptable across a wide range of judicial systems, is the bold task the TAP seeks to achieve.*

1.6 *Secondly*, we should consider what the **aims of imposing (criminal) sanctions** (and thus also of a prosecution) should be. These are commonly identified as including:

- a. Punishment – expressing disapproval,
- b. Deterrence – for public protection through crime reduction,
- c. Removal of gain – including making practical reparation by the offender,
- d. Reform or rehabilitation of the offender

1.7 *Thirdly*, we should consider the **purpose of guidelines**, what we might hope to achieve through their use. I suggest the following, which is based on the approach in England and Wales for any crime:

- a. Provide structured approach using objective criteria,
- b. Promote consistency of approach and outcome,
- c. Promote proportionality of sentences (ECHR compliant),
- d. Increase transparency of sentencing process for public understanding.

2. Implementing the Tunis Action Plan 2013 - 2020

2.1 The TAP called for each jurisdiction to create its own ‘guidelines’ (assuming such are lawful within that jurisdiction, as in some they are not.) It was not envisaged that there would be a single set of these, applicable across all Parties, but a series of such within each jurisdiction where such are allowed. Thus the TAP stated aim was that: *‘Sentencing is more consistent and transparent through the establishment of Sentencing Guidelines enabling that serious wildlife crimes receive substantial sanctions, using the full range of sentencing options, thereby implementing ‘zero tolerance’ of wildlife crime through adopting the approach of ‘proportionate intolerance’ which is ECHR compliant and based on National Priorities and gravity factors.’*

2.2 Sentencing practice or guidelines are *only possible within a criminal jurisdiction vis a vis specific legislation which has a range within the penalties provided by that legislation*, regardless of the type of crime involved. The principle of judicial independence within each jurisdiction is absolute, and the legal principles of each jurisdiction will determine what judges may take into account when considering how to decide cases. Usually, international treaties need to be ratified or in some way incorporated into national law before judges will be able to take note of them. *It follows that ‘international sentencing guidelines’ are impossible.*

2.3 However, if we consider the **identified criticisms**, the **aims of sentencing** and the **purposes of guidelines**, and apply to them the **gravity factors** agreed (as amended?) under the TAP, it might be

possible to identify a set of principles and objective criteria which could assist in developing **comparable sanction regimes**, with the view to implementing a common vision, eg. that the provisions of an international treaty or convention should be upheld in a similar manner and degree within a number of jurisdictions, whose governments have signed such a treaty or convention, with the aim of preventing one or more signatory countries from becoming a 'loophole' in its implementation by being lax in the enforcement of legislation giving effect to it. This may be seen as a form of **'international judicial or enforcement mutuality'**.

2.4 Could this assist national jurisdictions, either to create formal 'sentencing guidelines', where such are lawful, or to develop judicially agreed guidance or other mechanisms of a more informal nature aimed at (i) better consistency in sentencing and (ii) the full use of the sanctions made available under legislation, without infringing the principle of judicial independence? The 'legislation' Questionnaire is intended to reveal both similarities and differences in the sanction options available to enforcers and judiciaries in a range of countries.

Accordingly, it is proposed that the Working Session considers whether there are principles which can be applied to wildlife crime enforcement to assist in the development of 'comparable sanction regimes'? Possible 'Principles' are set out below. Discussion may be informed by the analysis of the Replies to the 'legislation' Questionnaire on currently available national sanctions and penalties, set out in a separate document.

3. Possible 'Principles' applicable to the imposition of national sanctions for wildlife crime. (Are there any others?)

1. That the beneficiary of the legislation is the ecosystem and the species that comprise it.
2. That the ecosystem is transnational and therefore requires a multi-national approach to its conservation.
3. That as each national legislation seeks to implement the same international convention, it should adopt the same aims as the convention, as should the judiciary in implementing and enforcing it.
4. That all Parties should enact legislation with similar maximum sanctions, and/or provide for a similar range of sanction options.
5. That 'international judicial or enforcement mutuality' should be a relevant factor in seeking to implement an international Convention to ensure its aims are met across Convention Parties. This means having regard to sanction levels or approaches in other jurisdictions to ensure a degree of harmonisation or similarity of outcomes for similar cases, without infringing judicial independence.
6. That ineffective enforcement or markedly lower sanctions in one Party defeat the intention of the whole Convention.
7. That relevant biological and ecological information, including conservation activities, concerning the species or habitats involved in the offence(s) ('Conservation Impact Statements') from an objective source(s) be available in a legally admissible form to the tribunal or person imposing sanctions.
8. That a common list of basic factors to assess the seriousness of each case should be considered and applied across all and within each jurisdiction. This list should not be seen as exhaustive.
9. That gravity of an offence should be determined by both the 'damage' (actual or potential) done and the 'culpability' of the offender for that damage/harm.
10. That the full range of sanction options under the legislation should be used objectively according to the gravity of the offence. (Is it possible to identify 'trigger points' for specific types of sanction, using a list of gravity factors to be used across a number of jurisdictions?)

11. That the use of heavier sanctions should be triggered by the type of offence, and not geared solely to repeat offending.
12. That the threshold for the use of imprisonment (for individuals) should be at a broadly similar level and on a broadly similar basis, having regard to the same list of basic 'gravity factors' across Convention jurisdictions.
13. That the levels of financial penalty for corporations (legal persons) should be based upon their size as measured by turnover or assets value and not by declared profit/loss or taxation.
14. That the sanctions applied should remove all gain or financial benefit that the offender achieved from the offence(s).
15. That the sanctions applied should oblige the offender to make good all damage done by the offence(s), either directly or by an equivalent replacement.
16. That the sanction regime be informed by research to obtain the comments or responses from interested and knowledgeable persons/groups within society and be reviewed from time to time.
17. That where both administrative measures and criminal/penal sanctions are available following a breach of the legislation, there should be a clear, objective and published method of assessment, based solely on the gravity of the incident or breach, to determine which course is to be adopted. Administrative measures alone should only be used for the least serious incidents.
18. That where incidents or offences involving persons under the age of 18 years occur, the above must be modified so as to comply with the legal regime for dealing with minors accused of offences.

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