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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

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Proposals for informing the process for the imposition of sanctions in wildlife crime cases, especially the illegal killing, taking and trading of wild birds

- FINAL -

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SUMMARY

The ***Introduction*** explains the scope of this report as seeking to find ways of assisting national judiciaries to develop sentencing regimes that are sufficiently deterrent that they provide a proper contribution to the attainment of the aims of the Convention on the Conservation of European Wildlife and Natural Habitats (ETS. 104, Bern Convention).

Section 1 includes a brief consideration of the role of the judiciary; the scope and purpose of 'judicial independence; the process of providing courts with information from specialist areas of knowledge, and the extent to which prosecutors may seek to influence judicial sentencing decisions, especially where they are permitted or required to propose a level of sanction. It also provides one example of how sentencing in one area of wildlife crime has changed over time.

Section 2 discusses the use of administrative measures, their positive and negative points; the relationship between administrative measures and judicially imposed sanctions; and suggests the contribution they can properly make to enforcement at the lower end of offending, which in itself can be some initial guidance to the judiciary on the sanctions they should impose.

Section 3 seeks to explain what 'sentencing principles' are by identifying various forms. The European Convention on Human Rights (ECHR) requirement of proportionality, being a common factor across many jurisdictions, implies an objective process for determining sanctions. This, and the legislative provision of minimum fines or other sanctions, including details from the questionnaire of any minima as requested at the 2nd Meeting of the Special Focus Points, as a basis for guidance is discussed. A number of features from current legislation are identified which may assist in forming broad principles applicable internationally

Section 4 discusses the European Union's 'Environmental Crime Directive' as a possible model on which to base 'principles' that may assist in guiding judiciaries in several jurisdictions in imposing sanctions, together with Article 11 of the Bern Convention on co-operation among Parties. A number of requirements, components or aims of such 'guidance' are suggested. 21 possible principles are listed and explained, grouping them as requested at the 2nd Meeting of the Special Focus Points into two, a 'trans-national' group and a 'jurisdiction-focussed' group. These suggest the need for a shared or common vision with which to implement the Convention, which should include *'international judicial and enforcement mutuality'*. Self-contained judicial systems hermetically sealed from all outside influence, if they ever existed, are not 'fit for purpose' in the 21st century.

Section 5 identifies some additional implications for the implementation of the Tunis Action Plan that appear to flow from this these proposals, first, the possibility of case results to be usable across jurisdictions, building a *'wildlife crime sentencing jurisprudence'*, and secondly, the possible need to develop a single database for recording decisions and case results which would be accessible and admissible in all jurisdictions.

The ***Conclusions*** emphasise the need in involve current prosecutors and judges in this process.

INTRODUCTION

(i) This document deals with 'Expected Result 4', the final stage of the 'Enforcement and Legal Aspects' section ('ELA') of the Tunis Action Plan 2013 – 2020 ('TAP'), namely, ***the elaboration of sentencing guidelines to assist in the imposition of sanctions***. The scheme of the TAP and the ELA outlined in paragraph's 1 and 2 of the author's *'Analysis of gravity factors to be used to evaluate offences and a proposed list of standardized/harmonized gravity factors for the consideration of the Parties of the Standing Committee'* (draft) will not be repeated here, but this stage of the ELA depends on the proper use of earlier ones for its effectiveness.

Its purpose is not to create jurisdiction-based sentencing guidelines or guidance, but to explore the extent to which 'advice' or 'assistance', in the form of general principles, may provide both a necessary background and a possible form for such, which may properly be given to national judiciaries to help them to develop, to the extent allowed in each jurisdiction, a formalised process for imposing sanctions that are an effective contribution to achieving the aims of the Convention. Attention has been drawn, widely and frequently and across many jurisdictions, to

the twin problems of the inconsistent use of sanctions and the insufficient use of upper tariff sanctions, resulting in a sanctions regime across Parties which is apparently insufficient of a deterrent against a background of either rising crime levels, or the absence of crime reduction, and the persistent continuation of some types of (particularly bird-related) crime. Guidance of some sort in the imposition of sanctions across judiciaries may assist, if an acceptable form can be devised.

(ii) It should be made clear at this point that while the term 'sentencing guidelines' has a specific, somewhat narrow, meaning in some jurisdictions globally, the phrase as used in the TAP was intended to be interpreted widely, as referring also to 'guidance' or 'assistance' or any 'objective, recognised process' by which sanctions for wild bird crime, and wildlife crime generally, were decided on a case by case basis. The development of such a decision-making process is a judicial function and cannot be imposed from outside, unless a particular sanction for an offence is specifically provided in legislation. Such a process, whilst done individually by each Party, may however be assisted by referring to a common set of general principles.

(iii) It is perhaps the most difficult of the four stages on the ELA to implement as it requires the co-operation of a part of the apparatus of governance of the state that is usually set apart from direct dialogue with the general public, namely the judiciary, and with whom most citizens will never have direct contact (and those that do will frequently do so with some trepidation). The matter is further complicated by an aspect, fundamental to the discharge of the judicial function and jealously guarded, that is 'judicial independence'. Before embarking on what may be seen by some as the slightly audacious task of seeking to influence national judiciaries in the exercise of their function, it is necessary to consider first, in general terms, the nature of that function and the role and limits of 'judicial independence', together with the role of prosecutors.

1. Judiciaries, judicial independence and the role of prosecutors

1.1) The *role of the judiciary* is to implement the law, applying it case by case. In doing so, many of the decisions will involve the exercise of the judge's discretion. But the exercise of judicial discretion is not purely personal or arbitrary: it is the exercise of a rational, informed and balanced judgement against objective criteria within the scope of what is allowed by law. That is particularly the case where sanctions or penalties are to be imposed for breaches of the law, except for a few very serious offences whose sanctions are fixed by law. Where the law provides for a wide range of sanctions, even if a minimum level is set in the legislation, there is wide range to that discretion. The exercise of that discretion must include using the upper ranges as well as the lower, and that requires a decision, based on objective criteria, to allocate each case to an appropriate point in the range.

Where the legislature has stipulated, particularly a wide range of, sanctions for an offence, judiciaries are not entitled simply to substitute their own personal opinion and decline to use either the top end of sanctions or the lower end. The duty fully to implement the law means, inter alia, using the full range of penalties in appropriate cases, and that requires objective criteria to be identified to assist in the fair and balanced analysis of case seriousness so as to be able to do so.

Where the law provides for sanctions to be imposed to prohibit or control a particular activity or social problem, and instances of breach repeatedly come to court and receive only lower tariff sanctions, it is entirely legitimate to ask whether the enforcement mechanism is working properly, and in particular whether the judiciary are properly fulfilling their role. The proper exercise of judicial discretion involves ensuring that its exercise is achieving the aims of the legislation.

1.2) The proper role for *judicial independence* is to allow the judicial function to be performed free from external influences or pressures brought to bear other than through the lawful use of 'due process'. In particular, it limits the extent to which judges may take into account matters not presented in accordance with the legal procedures governing the presentation of the case.

The ECHR principle of 'equality of arms' and the older principle of '*audi alteram partem*' ('hear the other side'), together with the maxim 'not only must justice be done, it must also be seen to be done', exist to ensure that each side knows what facts and material the other is presenting to the court and is able to challenge it. All jurisdictions will have procedural rules governing how the court may be informed about a case and how information relevant to it may be presented, and most if not all will

prevent judges from taking into account information they may have learnt outside court hearings from sources (eg. the media) other than the parties, and have limits placed on what material can be presented by requiring all material to be 'relevant' to the issue(s) to be decided. That places a burden on the party wishing to introduce it to show that it is 'relevant'.

1.3) This has a particular importance for those dealing with wildlife crime cases. It cannot be assumed that all judges have an interest in, let alone a good understanding of, biodiversity and problems relating to it. Most jurisdictions have procedures allowing courts to be informed about specialised areas of knowledge, in some referred to as 'Experts'. Knowledge of aspects of biodiversity and its complicated relationships fall well within this, provided the court can be satisfied that it is 'relevant' to matters it has to decide.

Providing that information and demonstrating its relevance is the purpose of the 'Conservation Impact Statements' referred to in 'Expected Result 2' of the ELA. Knowledge of the relevant procedures for introducing this type of material in the jurisdiction within which they are working is essential for both investigators and prosecutors.

1.4) The final part of this brief look at the role of the judiciary is to consider the relationship prosecutors have with the court and ask, 'can prosecutors seek to influence sentence, and if so how?' The answer is that it all depends on what each jurisdiction allows.

The principal division is between those which allow through a recognised procedure the prosecutor to suggest or request a particular level or type of sentence or sanction, and those which do not. In the former case, there is a ready-made mechanism for the prosecutor to form an opinion on how serious the case is, and obtain and provide arguments and information to justify that opinion, and seek to persuade the court to endorse it. In jurisdictions falling in the latter category, the matter is much more complicated. Commonly, forfeiture of items connected with the offence is requested, any automatic disqualifications or payments can be enumerated and any discretionary restrictions (eg. the withdrawal of a licence) requested. Further, to ensure that the court does at least consider all the options it may have, it may be possible 'to remind' the court of these. Otherwise, prosecutors are obliged to stay within the evidence or other admissible material that forms the case, which is where the conservation impact statement is crucial. It should then be possible to ensure the court is at least aware of the view of seriousness that the prosecutor may have formed.

1.5) The rights and/or duties of the prosecutor, within the law and the ethics of their professions, to provide information explaining the case to the judiciary by the material they put before the court and the written or oral arguments they present need to be fully understood and exploited by prosecutors. This is not only essential in jurisdictions which allow any kind of formal 'sentencing guidelines' (since the court needs to know where the present case might fit into such guidelines), but is itself a fundamentally important form of 'guidance to the judiciary', and should be fully utilised by prosecutors in jurisdictions allowing or requiring them to 'request' a particular level of sentence. The pattern, or sequence, of stages set out in the ELA is designed to provide maximum assistance to prosecutors to fulfil this role.

1.6) Judiciaries can be persuaded to begin to take types of offence more seriously, and offences of sexual violence and exploitation, especially of minors, is an example of how offences can result in heavier penalties than previously, for judiciaries are not immune from broad changes in social attitudes.

Wildlife crime can be a beneficiary of this, and records maintained by the CITES monitoring organisation TRAFFIC in the UK (where jurisdictions do not allow prosecutors to request levels of sentence) may be of interest – and an encouragement. They show a steady increase in the level of penalties imposed, with an increasing percentage of cases attracting sentences regarded as more serious than solely a financial penalty, as illustrated in the table below:

Analysis of sentencing in CITES prosecutions in the United Kingdom 1986 – 2012 Source: Traffic UK

Year	Number of Cases prosecuted	Number of sentences of either **Imprisonment or Community Penalty**	Percentage of cases of Imprisonment and Community Penalty over 5 year periods
1986	2	0	1 out of 16 cases, **6%**
1987	4	0	
1988	1	0	
1989	9	1	
1990	4	2	5 out of 20 cases, **25%**
1991	6	0	
1992	8	2	
1993	0	0	
1994	2	1	
1995	8	3	7 out of 27 cases, **26%**
1996	4	2	
1997	6	1	
1998	4	1	
1999	5	0	
2000	9	2	11 out of 37 cases **29%**
2001	11	4	
2002	7	1	
2003	6	2	
2004	4	2	
2005	2	1	9 out of 29 cases, **31%**
2006	9	2	
2007	3	0	
2008	6	1	
2009	9	5	
2010	13	9	18 out of 31 cases, **58%**
2011	6	3	
2012	12	6	

It would be instructive to know if other Parties' jurisdictions have similar statistics for any type of wildlife crime.

2. Administrative Measures – advantages, disadvantages and relationship with criminal proceedings

2.1) The next item we need to address is the relationship between 'administrative measures' and judicial proceedings as ways of imposing sanctions, since in many jurisdictions offences against wild birds and other 'environmental' offences are frequently, and in a few jurisdictions only, dealt with by means of the imposition of penalties without recourse to a judicial process.

These measures, usually of a financial nature, are often coupled with forfeiture of the '*corpus delicti*' and sometimes the cancellation of any permission which has been violated by the offence. The financial measures may include a punitive element and some form of 'compensation', sometimes graded depending on the species which can in at least a simple fashion reflect the 'seriousness' of the offence. In some jurisdictions 'on the spot' fines exist for specified offences regarded as minor.

2.2) The advantages of such measures is that they are immediate. In some jurisdictions judicial proceedings can take years to resolve, especially if there is an appeal, and the attraction of an immediate resolution to an offence is clear, to both the authorities (it's cheaper and quicker) and the accused (it's quicker, certain and with no chance of imprisonment if you can pay). In some jurisdictions there is the option of appealing to a court against the imposition of the administratively imposed penalties. A further advantage is that the penalties under these measures are clear and known in advance. Further in some jurisdictions the financial amounts are put towards conservation and/or the enforcement of legislation protecting such.

2.3) However, there are substantial negative aspects. First, in some jurisdictions the level of penalties, both 'administrative' and the maximum judicially imposed ones, is set taking into account the level of income of the population, ie. at a level seem by the authorities as 'reasonable' within that economy, which has a wide range. Trans-national criminal activity, and individuals minded to abuse 'hunting tourism', will readily identify locations with lower levels as 'easier' and be attracted to them. Such persons have available resources well able to 'pay' for their crimes. The deterrent effect is thus negligible; rather the system is an active encouragement.

Secondly, it is too rigid, and cannot distinguish the 'serious' from the 'not serious' in terms of an offender's culpability for the offence. Nor can the repeat offender be dealt with more seriously, unless the system has built in to it increased penalties for such.

Thirdly, record keeping may not be efficient or even possible so as to allow the repeat offender to be identified and dealt with more severely where such a course is possible, eg. by court proceedings. Such impositions are more in the nature of a 'tax', not a 'criminal record'. A serious aspect of this is that if the proceedings are not recorded as 'crime' it will not be registered on any international police database. Thus possible connections will never be identified.

Fourthly, it does not allow a detailed examination of the 'gain' the offender(s) have made or were expecting to make from the offence(s), and does not therefore tailor the penalty to remove all the benefits of the crime.

Fifthly, the range of sanctions is restricted, being unlikely to involve the imposition of substantial restrictions on liberty and certainly not any form of imprisonment.

2.4) Despite these defects, it would be wrong to ignore 'administrative measures' as a weapon in the armoury. As a means of dealing with less serious offences they are perfectly sensible. They allow such to be resolved quickly and leave more resources to be targeted at the more serious offences. Three elements are essential, first, they should be restricted to less serious offences only, secondly the level of penalty must be such as to be a deterrent, thirdly they must be recorded against the individual for future use in enforcement purposes, and in such a way as can be registered on international police databases, not simply as a payment to national revenues.

2.5) The demarcation between administrative measures and court proceedings must be clear, as must the relationship between them be, so that their uses complement each other in a rational integrated whole. The same objective principles, the gravity factors, should determine which offence is dealt with administratively and which by court proceedings. They should not be used where there are reasonable grounds to suspect that the level of financial penalties would not remove all the benefit that the offender would have gained from committing the offence and escaping detection.

Where the same offence is capable of being dealt with under either procedure, it is obvious that a careful investigation is needed to enable the decision-maker to be sure that the offence is sufficiently minor to be able to properly dealt with by means of administrative measures. Finally, there needs to be a clear, and very small, limit on the number of times such measures can be imposed on the same offender, and that requires an efficient system of recording their use against each offender.

2.6) Provided that the entire sanctions regime is constructed as a whole, and properly enables less serious cases to be identified, and then filtered off for sanctions to be imposed administratively, and the more serious cases to go to court, administratively imposed sanctions and penalties can play a valuable role in enforcement across a range of offences, including those against birds and other wildlife. Not the least of the benefits is that they provide an important contribution towards the assessment of the sanctions regime as a whole. If they are clearly restricted to less serious offending, whatever their level or composition, they are a clear pointer that those offences excluded from their operation and taken to court are more serious and thus should receive heavier sanctions. They can, thus, be an initial form of guidance to the judiciary on sentencing.

3. Sentencing 'guidelines' or 'guidance' – judicial straight-jacket or pathway to proportionate sentencing?

3.1) Historically, the concept of 'sentencing guidelines' grew from the 1980s onwards in a number of 'common law' jurisdictions, particularly in the USA, to try and ensure that offences of similar seriousness received similar punishment, following the notion of 'just desserts'. In their strictest form, all, or a specified range of, crimes are allocated a level of gravity and arranged on one axis of a grid.

Offenders are similarly grouped in terms of their criminal history and the groups added to the other axis of the grid. The resulting intersections contain the range of sentences available. Judges are required to choose a sentence from that range, with limited discretion to depart from it. In some jurisdictions, departure from the grid triggers a right of appeal. The result is a degree of certainty about the punishment a crime will attract, but at a price of severely limiting the independence of judges to individualise the sentence to the circumstances of the offender and his/her role in the crime.

A public body within the jurisdiction is appointed to oversee the operation of the guidelines and make changes when this appears necessary, and may issue a report from time to time detailing the degree of judicial compliance. A particularly clear example may be found at http://mn.gov/sentencing-guidelines/images/Standard%2520Grid%25202014.pdf relating to the US State of Minnesota.

3.2) This concept has not found favour in 'civil law' jurisdictions, and I have been unable to find an example.

3.3) However, within the countries operating 'sentencing guidelines' there is considerable variation in the degree of 'strictness' which is demanded. Many build in qualifications which mitigate substantially the rigour demanded in eg. some USA jurisdictions. A 'softer' version exists in England and Wales in which the court is required to analyse the gravity of each case according to range of factors relevant to the type of offence, which then indicates the 'starting point' for considering sentence for the particular case. Each type of offence may have several 'starting points' depending on which gravity factors are present. These are arranged in a grid to indicate the (frequently very wide) range of 'expected' sentencing options. The court is then required to 'individualise' the sentence taking into account the offender's mitigation and criminal history. It is perhaps better described as a structured pathway to the sentence. A relevant example is the recent Guideline document, 24 pages long, dealing with environmental crime (excluding wildlife) from the Sentencing Council for England and Wales, to be found at http://www.sentencingcouncil.org.uk/wp-content/uploads/Final_Environmental_Offences_Definitive_Guideline_web1.pdf

3.4) Despite its use of the term 'guidelines', the latter approach may not be too far removed from the reality in some 'civil law' jurisdictions. In neither is sentence simply read from a pre-determined grid; in both there is a process for determining the outcome. Two factors in 'civil law' jurisdictions suggest this: first the frequent provision of both a minimum and a maximum penalty for an offence in the penal code, and secondly the permission or requirement for the prosecutor to recommend or request a particular level of sentence within that which the code provides. Prosecutors would thus need to have a degree of understanding of where judges have pitched the level of sentence in similar cases before, and some form of guidance for themselves. Indeed, there must be a process in both types of jurisdiction since both are subject to the ECHR requirement of proportionality in the imposition of sanctions at the requirement of the state.

3.5) Two further approaches specifically relating to birds and wildlife came to light during the 2nd Meeting of Special Focus Points and deserve to be mentioned. The first is a report from 2005 by the

Finnish Environment Institute entitled 'Assessing the conservation value of wet-land birdlife', the second is the Turkish Central Hunting Commission's handbook produced annually. Both are means of dealing with the first stage under the ELA, the assessment of conservation status and attributing to it a 'value', and thus being a substantial contribution to guiding the imposition of sanctions: neither, however, contains the refinement resulting from the application of the other 'gravity factors' under the TAP. As approaches they appear to have much to commend them and could be models providing guidance and are worth considering as models for use in other jurisdictions.

3.6) The Finnish Environment Institute's report (in English) entitled 'Assessing the conservation value of wet-land birdlife', available as a pdf. (download at https://helda.helsinki.fi/bitstream/handle/10138/40540/FE_596en.pdf), was an attempt to inform conservation priorities by using an objective assessment by reference to the ability of the wild population to replace itself through natural regeneration, the threatened status of a species in Finland, in Europe or globally and the species' total breeding population in Finland. The result gave an arithmetical number to each species.

The range of these numerical values was approximately x300, ie. the highest value was about 300 times larger than the smallest. Whilst created as a conservation tool, such an approach has an obvious use as a guide to the gravity of an incident of illegal killing, taking or trading and thus could have a direct link to the sanctions imposed by creating a sanctions regime around it. It is understood from an enquiry made during the 2nd Meeting of the Special Focus Points that no formal use in that regard has been made, though prosecutors have been aware of it both in Finland and other jurisdictions.

3.7) The Turkish Central Hunting Commission's handbook (in Turkish), apparently produced annually, is a slim, 200 page book that slips easily into a hunter's jacket pocket. It contains not only details of which species may be killed or taken in which areas of the country, and at what periods of the year, but also the level of fines for each type of offence, as well as the financial 'compensation values' for each species based on its rarity or 'attraction' for illegal killing or taking. It is reviewed regularly by a panel which includes biodiversity experts and hunters representatives and is well integrated into the enforcement regime.

3.8) In an attempt to see if there was any common ground across jurisdictions which might provide a basis for building or identifying a common approach, the request was made at the 2nd meeting of the Special Focus Points for the replies by Parties to the questionnaire on legislation and sanctions to be checked to identify some examples of minimum sanctions. The initial reason for the questionnaire had been to identify maximum sanctions, but some replies had included details of minimum ones as well. The following table is produced from those replies: it does not imply that only these countries have minimum sanction levels enacted in legislation.

Country	**Offence**	**Minimum sanction(s)**
Albania	Illegal killing wild bird/protected animal, using prohibited device. Illegal trafficking (non CITES). CITES offences.	570 € 215€ 500€
Cyprus	Use of sound device to attract game species	850 € 'on the spot fine'
Czech Republic	Killing or importing 25+ specimens, or long term damage to population or habitat, of protected species for 'substantial' profit or as organised group. The above, re critically endangered species for 'extensive' profit or by international organised group.	6 months imprisonment 2 years imprisonment

Country	Offence	Minimum sanction(s)
Georgia	Illegal killing wild bird/protected animal Using prohibited device Trafficking (non CITES)	300 € - administrative fine 870 € - ditto 130 €, 370€ red list species - ditto
Italy	Killing specified mammals Killing wild birds Trafficking (non-CITES) Trafficking CITES	1032€ and 3 months imprisonment 774 € 516€ or 2 months imprisonment (2 years if act done without hunting licence) 7746 € (10329 € if recidivist) and 3 months imprisonment
'the Former Yugoslav Republic of Macedonia"	Killing wild bird/protected animal Using prohibited device Trafficking inc. CITES	500 € (3300€ for legal person) 500 € 3300 € for legal person
Malta	Using sound device to attract game species Using prohibited device (when prosecuted)	250 € administrative penalty 1st offence - 2 year suspension of hunting licence: 2nd offence – 6 months imprisonment.
Romania	Killing wild bird/protected animal Using prohibited device	3 months imprisonment 6 months imprisonment
Slovak Republic	Killing wild bird/protected animal, using prohibited device, trafficking (non-CITES) – if 'social value' exceeds 2660€, act done for large benefit or on large scale. The same, for game species on large scale. Trafficking CITES - if 'social value' exceeds 2660€, act done for large benefit or on large scale.	3 years imprisonment. 4 years imprisonment. 3 years imprisonment.
Turkey	Killing wild bird/protected animal Using prohibited device Trafficking (non-CITES) Trafficking CITES – import - export	If causing extinction of species or affects ecological balance – 2 years imprisonment. Otherwise, administrative fines and compensatory fines are set out per species in the Central Hunting Commission's annual handbook. c.75 € administrative fine. **c.**100 € administrative fine plus compensatory fine as above. 2 years imprisonment + c.200 € fine 1 year imprisonment + c.200 € fine.

3.9) The above table, together with all of the full replies to be found in document T-PVS/Inf(2015)07, reveal that there is a wide variation in both the type and the range of sanctions across the Parties.

There is no one obvious thread uniting most or even some jurisdictions on which direct guidance could be built. Some legislative regimes are quite complex and use several pieces of legislation. Some seek to identify the more serious offences in innovative ways. However, a number of legislative features may be found in the replies which it may be useful to note and have in mind in attempting to identify principles which might be able to assist in enforcement across the range of jurisdictions. These include:

1. The extremely wide range in maximum financial sanctions for natural persons– do these reflect the levels of national wages/incomes
2. Substantial increases in maximum financial sanctions for legal persons.
3. The wide use made of administrative measures, fixed or 'on the spot' fines.
4. Generally sanctions for CITES are higher than for other wildlife offences.
5. Some attempts at grading sanctions to conservation status of species.
6. In some jurisdictions sanctions for 'hunting offences' are higher than for 'conservation offences'.
7. Some recognition of the role of 'organised crime groups' and the trans-national nature of offending, and higher penalties for this.
8. High levels of maximum prison terms, generally 2 – 5 years.
9. Widespread availability of suspended prison terms (this allows the potential for additional orders restricting liberty to be imposed).
10. Orders restricting liberty as sanctions are not fully available in the majority of jurisdictions.
11. Forfeiture and some form of compensation are almost always possible.
12. Some use of additional civil prohibitions and disqualifications.
13. Very limited use of any form of 'judicial guidance'.

3.10) Finally, in considering guidance in its broadest sense, we should note connections with the other parts of the TAP. In the 'Awareness Aspects' section, 'Expected Result 2', refers to publicising case results and the sanctions imposed. The possibility of creating a compendium of results which could be consulted by judges is discussed below (para 5.3). The 'Biological and Institutional Aspects' section, 'Expected Result 1' refers to the creation of a 'toolkit' for judges and prosecutors. In terms of providing relevant information the TAP contains therefore a number of linked actions. However, guidance to be effective needs to deal not only with the 'what' in terms of information, but the 'how' ie. how should it be used? Under the ELA we need to seek a way of doing that.

3.11) Having considered the various models or approaches above it is therefore very clear that, whatever form it may take and whatever it is called, the process of deciding a sentence has to remain firmly within each jurisdiction. 'Sentencing guidelines' covering and applicable within a range of national jurisdictions are impossible. Equally, each jurisdiction will have its own process by which the sentencing decision is made: in no jurisdiction is it purely arbitrary.

This however need not prevent a consideration of whether there are any general principles which could be applicable across a range of jurisdictions and which, without violating their independence and integrity, could assist in allowing similar offences, especially at the most serious end of the spectrum, to receive sanctions of a broadly similar level of severity across a range of jurisdictions. When dealing with a problem which is trans-national and which has resulted in individual countries agreeing to an international convention to achieve commonly agreed aims, it seems not unreasonable to suggest that enforcement, including the contribution from judiciaries, should be broadly similar across those jurisdictions.

4. Possible principles that may assist in guiding judiciaries in several jurisdictions in imposing sanctions to assist the implementation of the Bern Convention.

4.1) Although not applicable to all Parties the principles of the European Union's 'Environmental Crime Directive' (*Directive 2008/99/EC on the protection of the environment through criminal law*) may provide a suitable place to begin. It applies (inter alia) to all listed protected wild fauna and flora species and to any habitat within a protected site. Art 3 requires that conduct which damages such should constitute a criminal offence *'when…committed intentionally or with at least serious negligence'*, while Art 5 stipulates that such offences should be *'punishable by effective, proportionate and dissuasive criminal penalties'*. It is an attempt to provide some over-arching, guiding principles to the enforcement of an international agreement (here the EU's Nature Directives amongst others) that is firmly ECHR compliant.

Two items in the preamble should be noted in particular: viz. *'(2)* refers to concern at '*the rise in environmental offences and at their effects, which are increasingly extending beyond the borders of the States'* and *'(3) Experience has shown that the existing systems of penalties have not been sufficient to achieve complete compliance with the laws for the protection of the environment. Such compliance can and should be strengthened by the availability of criminal penalties, which demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law.'* These concerns apply also to non-EU Parties which might read item (3) as *'…to achieve complete compliance with the aims of the Convention for…'*. They provide a precedent and a particularly relevant one for the concept of independent jurisdictions operating in a similar way to achieve common international goals by reference to specified general principles.

4.2) In the Convention, Article 11 has a potentially useful commitment which states that:

'*1. In carrying out the provisions of this Convention, the Contracting Parties undertake:*

a. *to co-operate whenever appropriate and in particular where this would enhance the effectiveness of measures taken under other articles of this Convention;*'

The neither the degree nor the type of 'co-operation' is specified, and the use of co-ordinated enforcement strategies and processes is not excluded. A co-ordinated judicial approach would seem to be important, if not fundamental, to securing compliance and thus *'enhance the effectiveness of measures'* taken to implement the Convention.

4.3) The question that naturally follows is thus: How detailed can such principles be before they become unacceptable as too intrusive? Any 'guidance' needs to be workable in the sense that it needs to acknowledge that resources will not be available to achieve perfect compliance in any country. The best use of available resources requires the correct distinguishing between conduct that is 'less serious' from that which is 'most serious', and is thus essential for any enforcement regime. Here the connection between the use of administrative measures vis a vis penal or criminal proceedings is one important issue. Another is the consistency with which upper tariff sanctions, especially imprisonment in relation to natural persons, are employed in relation to those species (and habitats) which are most threatened or in respect of conduct which is of a particularly damaging type. Seeking to achieve a broadly similar range of 'expected outcomes', particularly at the most serious end of offending, is a goal that is reasonable, logical and should be achievable without infringing national jurisdictional independence.

4.4) Indeed, I would respectfully suggest that the proper exercise of the judicial role is precisely that. It is ECHR compliant, with the principles of which national judiciaries are already obliged to comply, and do so without compromising judicial independence. The precedent of compliance with international principles thus already exists. Judicial independence ensures that judges are free to have regard to internationally agreed legal principles, not that they are barred from doing so.

4.5) The answer to the question posed above is thus not precisely clear, but an attempt at one must be made. A number of 'principles' were suggested to or proposed at the 2nd Meeting of Special Focus Points, which also suggested that they be arranged into two groups, one of over-arching 'general', 'trans-national' principles and the other of more specific 'jurisdiction-focussed' ones. The following is

a slightly revised version, which takes into account matters discussed above, and which aims to set out a method of approach and not any form of rigid grid.

'Trans-national' principles

1. That the beneficiary of the legislation is biodiversity and its ecosystem and the species that comprise it.
2. That these are transnational and therefore require a multi-national approach to their conservation.
3. That these require a guardian and Governments having signed an international Convention acknowledging this need to defend it, ie. to fulfil practically the commitment that they made.
4. That as each national legislation seeks to implement the same international Convention, it should adopt the same aims as the Convention, as should the investigatory and prosecutorial authorities and the judiciary in implementing and enforcing it.
5. That *'international judicial or enforcement mutuality'* should be a relevant factor in seeking to implement an international Convention with a common vision 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 all Parties should enact legislation providing for similar penal or criminal sanctions, including both financial impositions and deprivation of liberty (imprisonment) in respect of offences relating to: (i) prohibited acts in relation to species listed in the Convention as 'strictly protected' (Articles 5, 6 and Appendices I and II), and (ii) prohibited means methods of killing or capture (Appendix IV).

'Jurisdiction-focussed' principles

8. That relevant biological and ecological information, including conservation activities, concerning the species or habitats in respect of which the offence(s) were committed ('Conservation Impact Statements') from an objective source(s) be made available in a legally admissible form to the tribunal or person imposing sanctions.
9. 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.
10. That the 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.
11. That the type of offence, ie. how it was committed, may be more important that the actual number of specimens caught or involved in a specific case (eg. if the method used was indiscriminate or widespread).
12. That the full range of sanction options under the legislation should be used objectively according to the gravity of the offence and culpability of the offender.
13. That the use of heavier sanctions should be triggered by the type of offence, and not geared solely to repeat offending.
14. 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.
15. 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.
16. That the sanctions applied should remove all gain or financial benefit that the offender achieved from the offence(s) or would have achieved had it been completed.

17. That the sanctions applied should oblige the offender to make good all damage done by the offence(s), either directly or (where possible) by an equivalent replacement.

18. 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, and applying the principle that administrative measures alone should only be used for the least serious offences.

19. That the judiciaries of jurisdictions within each Party, adopting if required any procedure so to permit or facilitate, should allow reliable information to be provided concerning the levels of sanctions imposed within other Parties' jurisdictions, with the aim of ensuring that sanctions in respect of offences relating to: (i) prohibited acts in relation to species listed in the Convention as 'strictly protected' (Articles 5,6 and Appendices I and II), and (ii) prohibited means methods of killing or capture (Appendix IV) are broadly similar, proportionate and dissuasive.

20. That the sanction regime be informed by research to obtain the advice or responses from interested and knowledgeable persons/groups within both relevant scientific bodies and civil society and be reviewed from time to time.

21. That where incidents or offences involving persons under the age of 18 years occur, the above must be modified mutatis mutandis so as to comply with the legal regime for dealing with minors accused of offences.

Comments on the above 'principles'

4.6) Whilst most of the above are reasonably self-explanatory, some comment may be helpful.

Items 1 – 4 identify the need for and the aims of the Convention and those responsible for implementing and enforcing it.

Items 5, 7 and 19 are connected, and contain perhaps the most far-reaching proposals. The idea connecting them is that as the aims of the Convention are common to all Parties, the legislation in each Party on which enforcement is based should not only prohibit the same activities that the Convention requires, but treat those prohibited activities with a similar degree of seriousness by providing broadly similar penalties.

Items 7 and 19 specify the most damaging acts under the Convention, which should be reflected in legislation by the most serious sanctions – see item 7. Judiciaries should thus adopt the same approach, by imposing broadly similar penalties for similar offences. Successfully achieving this requires more than 'education' or 'awareness', that is a form of one-sided imparting of information, or even an 'exchange of information', which requires merely dialogue, though these may be important.

Beyond these is required an acknowledgement of *'mutuality'*, which suggests *an active and conscious interaction based on a shared outlook or objective*. That has been accepted by Governments when becoming Parties by signing the Convention, and thus should be followed through, not just in the scope of the legislation and the level of penalties provided, but also in the attitude of judiciaries and the level of penalties actually used.

Items 8, 9 and 10 simply reflect the earlier sections of the ELA.

Items 11 and 13 emphasise the need for the initial assessment of the seriousness of the offence to be done on the basis of the type of offence, not simply the actual consequences.

Items 12, 14 and 15 emphasise that full range of sanctions should be employed objectively.

Items 16 and 17 refer to the (originally Roman Law) maxim '*commodum ex injuria sua non habere debet*' (no-one should retain profit from their wrong-doing), and that the perpetrator of any damage should repair it.

Item 18 refers to the need for administrative measures and penal sanctions to fit together in a logical sequence, and one that is easily able to be understood and followed by those charged with the duty of deciding which procedure should be applied to which case.

Item 20 refers to the need to keep procedures and penalties under review, and the need to involve society in that process for it to have relevance, objectivity, effectiveness and legitimacy.

5. The TAP – additional implications for implementation

5.1) A few comments are offered on the two Objectives specific to 'Expected Result 4' of the ELA, the elaboration of sentencing guidelines, which are:

(i) '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.'

(ii) 'Mechanism for recording and reporting results of wildlife prosecutions is set up'.

5.2) The concept of a set of principles which reflect and respect the core values, aims and traditions of a number of jurisdictions would seem to be a balanced and careful way to support the achievement of the first Objective, without violating judicial independence. Such would be an informative background to the choice of sanctions, but would also allow comparison of case outcomes among jurisdictions, and thus the development of such into a 'wildlife crime sentencing jurisprudence' which would be helpful to all Parties.

5.3) The proposed 'principle' 19 above, concerning *'reliable information to be provided concerning the levels of sanctions imposed within other Parties' jurisdictions'* reflects the second Objective, but is wider than merely recording previous convictions for a specific person and allowing that record to be admissible in another jurisdiction, something for which there is already a procedure within the EU. It requires some form of compendium of results to be compiled and maintained in a manner which is reliable, accurate and trustworthy, perhaps an internet database.

The proposed 'Action' to implement this objective reads: *'Prosecutors or investigators undertake to provide short report of the facts and of offences proved and sentences imposed to a national focal point appointed for recording, the records of such to be made available to investigators and prosecutors.'* The perspective of this appears to be within each jurisdiction, but some mechanism to allow such reports to be accessible to, and be used ie. 'admissible' within, other jurisdictions is needed. (See also para 3.10 above.)

6. Conclusions

As this is a draft report, to be circulated to Parties to invite their responses, and to be reviewed in the light of such, I draw only a few conclusions, which are more in the form of prompts to suggest areas where particular consideration may helpfully be given.

(i) The need to understand the process by which prosecutors currently decide the level of sentence which they propose to the court, for example, official 'policy' documents or other 'guidance', and thus the need to involve prosecutors in the process of implementing the TAP. The importance of identifying 'current practice' in the area of requesting or suggesting sanctions has only become apparent following the 2nd Meeting of Special Focus points. There has not been time in preparing of this document to undertake a survey of Parties in this regard. It is something that would be helpful. The involvement of and contribution from legal professionals is essential if the TAP is to achieve its enforcement goals.

(ii) The importance of creating *'international judicial or enforcement mutuality'* or a shared vision on implementation across judiciaries – it is essential for this to be 'organic', to grow from within, as it cannot be imposed on them from without. *Thus there is a need to involve judiciaries in this process*. Their willingness even to consider an external influence on their decision-making process is vital. As with prosecutors, judges have to be involved in the creation of any set of 'principles' which they are to be asked to use. Parties need to take steps to ensure that this is done as part of the review of this draft report.

(iii) *The importance of finding the level of sanctions that is needed for the effective deterrence of the majority of those who are minded to break the law*, bearing in mind that the majority of citizens

will generally comply voluntarily, or at least will deliberately break the law rarely, for voluntary (albeit reluctant) compliance is the most effective form of 'enforcement'. This, perhaps, sums up what implementation of the TAP is seeking to achieve.

REFERENCES

Whilst all documents consulted in this report are described or referred to in the text, it is also informed by the documents prepared for the Tunis Action Plan 2013 – 2020 and subsequent steps taken to achieve its implementation such as are available on the Council of Europe website.

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