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(eds.)

Wildlife Trafficking: the illicit trade in wildlife, animal parts, and derivatives

*Illegaler Handel mit Tieren,
Tierbestandteilen und Tierprodukten*

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Chapter Nine

Criminalisation of Wildlife Trafficking

GIAN EGE & GEORGINA HOWE

While it is widely accepted that criminal law plays an important role in combatting wildlife trafficking, the theoretical foundation of criminalisation is poor. Nonetheless, the ultima ratio character of criminal law calls for a sound theoretical justification of criminal offences. This chapter examines different theoretical approaches that could potentially justify the criminalisation of activities related to wildlife trafficking, provides an overview of relevant criminal offences, and identifies challenges to effective implementation.

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I. Introduction

The issue of wildlife trafficking is widely covered by news articles, reports by non-governmental organisations (NGOs), and academic literature. It is the target of a range of State responses. When discussing this subject, authors

tend to use the term ‘wildlife trafficking’ interchangeably with the term ‘wildlife crime’. The latter term is used to

refer to the taking, trading (supplying, selling or trafficking), importing, exporting, processing, possessing, obtaining and consumption of wild flora and fauna, including timber and other forest products, in contravention of national or international law. Broadly speaking, wildlife and forest crime is the illegal exploitation of the world’s wild flora and fauna.¹

There is no universally accepted definition of these terms and different jurisdictions and organisations employ different terminology.² The synonymous use of the terms wildlife trafficking and wildlife crime implies that the former refers to criminal actions; but does it really?

Laws for the protection of wildlife come in many forms, including conservation or wildlife management laws, species protection laws, and criminal laws.³ Criminal justice measures are an integral part of any strategy to prevent and combat wildlife trafficking. The criminal justice response to wildlife trafficking involves the detection, reporting, and investigation of criminal activities, together with the arrest, prosecution, conviction, and sentencing of offenders, as well as possible appeals. Criminal justice comprises the work of multiple State agencies and sometimes requires cross-border cooperation between States. Law enforcement is the most immediate and often the most visible way to suppress wildlife trafficking. It raises the ‘cost’ to perpetrators through the probability of being caught, the probability of conviction, and the sanctions applied if convicted.

Offences relating to wildlife trafficking, their elements, and penalties vary greatly between jurisdictions.⁴ International law does not provide an exact framework for the content and design of such offences. For instance, although the *Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)*⁵ makes express reference to forbidding the

1 UNODC, ‘Wildlife and Forest Crime: Overview’ (Web page, 2019).

2 See further Chapter One of this volume.

3 Angus Nurse, *Policing Wildlife: Perspectives on the Enforcement of Wildlife Legislation* (2015) 12.

4 UNODC, *Wildlife and Forest Crime Analytic Toolkit* (rev ed 2012) 23; Tanya Wyatt, *Wildlife Trafficking: A Deconstruction of the Crime, the Victims and the Offenders* (2013) 106.

5 Opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

international trade in endangered species, it does not contain provisions criminalising such activities.⁶ At the domestic level, most jurisdictions' offences relating to wildlife trafficking are set out in specific statutes relating to environmental law, wildlife, forests, endangered species, protected areas, conservation, or biodiversity. It is less common to find such offences in penal codes. Nevertheless, general rules relating to criminal responsibility, criminal procedure, and sentencing are relevant to wildlife trafficking offences as they determine the ways in which criminal offences are designed, criminal liability is established, and the degree to which liability extends to attempts and participation.⁷

Faced with international wildlife trafficking networks, criminal law often appears to States as the most obvious measure to combat the crime type. Particular emphasis is put on the implementation of the measures provided by criminal and criminal procedural laws, while the process of criminalisation itself receives less attention. Since criminal law is the most severe measure at a State's disposal, it should only be applied as a last resort. This *ultima ratio* character and need for sound justification of each criminal offence, however, may not always receive the necessary emphasis. Criminalisation of any kind calls for a coherent theoretical basis, since the end cannot justify the means. This chapter examines different theoretical approaches that can serve to justify the criminalisation of wildlife trafficking related activities and provides an overview of criminal offences concerning wildlife trafficking.

II. Criminalisation

1. Setting the paradigm

The relationship between human beings and the environment, and how this relationship informs the analysis of environmental harm, can best be viewed through the lens of three philosophical approaches: anthropocentrism, biocentrism, and ecocentrism. Each approach provides different perspectives on how environmental problems are conceived, the role of

6 See further Chapter Six of this volume.

7 UNODC (n 4) 25, 31.

human beings in creating these problems, and legislating around environmental issues.⁸ The discussion of these different theories is pivotal. Defining the extent to which harm to the environment is acceptable also defines the possible boundaries of the use of criminal law. Depending on the institutional and cultural context, a State's wildlife laws are determined by the primacy of anthropocentric, biocentric, or ecocentric views.⁹

Anthropocentric philosophy has for a long time dominated how human beings approached their relationships to other species and nature in general.¹⁰ This approach views human beings as fundamentally superior to all non-human nature. According to Robyn Eckersley, anthropocentrism implies 'that humankind is the only or principal source of value and meaning in the world, and that non-human nature is there for no other purpose but to serve humankind.'¹¹ Non-human nature should thus be utilised in a manner that is most beneficial to the self-interest and quest for maximum individual liberty of human beings. Environmental protection in the form of sustainable development strategies is only considered if relevant to immediate economic interests or longer-term economic prospects. Careful management of natural resources is favoured if their total destruction would come at an economic loss for human beings. Therefore, environmental laws facilitate, privilege and rationalise human benefits in accordance with liberalism and neo-classical political economy. Environmental protection through market regulation is generally preferred over the use of criminal law.¹² If taken, policy and enforcement measures are oriented towards human interest.¹³

Biocentrism focuses on moral equality between all living species. All non-human species have intrinsic value and all life-forms enjoy equal recognition. Where human and environmental interests conflict, the environment is prioritised over the human agenda. Therefore, the

8 Mark Halsey and Rob White, 'Crime, Ecophilosophy and Environmental Harm' (1998) 2(3) *Theoretical Criminology* 345, 347.

9 Nurse (n 3) 18.

10 Wyatt (n 4) 62.

11 Robyn Eckersley, *Environmentalism and Political Theory: Toward an Economic Brown* (1992) 51.

12 Halsey and White (n 8) 349 – 352.

13 Nurse (n 3) 17.

realisation of any species' vital needs must not be impeded through the satisfaction of human desire.¹⁴ Conservation policies are favoured for equity between the species.¹⁵ Any strain on the environment should be reduced, for example through decentralisation of economic activity, redistribution of goods and services, valuing indigenous forms of knowledge, and reorientating modes of production for direct consumption rather than profit.¹⁶ Biocentric ecological management advocates for the mass preservation of wilderness, protection of species, and restoration of damaged environmental areas.¹⁷

Ecocentrism seeks to balance anthropocentric and biocentric approaches¹⁸ and

views humankind as part of a global ecosystem, and subject to ecological laws. These, and the demands of an ecologically based morality, constrain human action, particularly through imposing limits to economic and population growth. There is also a strong sense of respect for nature in its own right, as well as for pragmatic 'systems' reasons.¹⁹

Humanity and all other parts of nature are seen as equally important. Since human beings have developed in a way that allows them to deploy methods of production with global consequences, they have a unique responsibility not to exceed the ecospheric limits of the planet. The recognition of the dialectical relationship between human action and non-human processes leads to ecologically informed self-interest as an ideological basis for human production. Ecocentrism further highlights how certain ecological problems caused by human beings also impact human well-being. Issues of ecological justice are therefore intertwined with issues of social justice.²⁰ Ecocentric approaches focus on wildlife laws that seek to balance conflicting human and wildlife interests.²¹

14 Halsey and White (n 8) 352.

15 Nurse (n 3) 18.

16 Halsey and White (n 8) 352 – 355.

17 Bill Deval and George Sessions, *Deep Ecology* (1985) 131 – 159.

18 Wyatt (n 4) 63.

19 David Pepper, *Eco Socialism: From Deep Ecology to Social Justice* (1993) 33.

20 Halsey and White (n 8) 355 – 356.

21 Nurse (n 3) 18.

2. The harm principle and ‘Rechtsgutstheorie’

Anthropocentric, biocentric, and ecocentric approaches provide alternate bases for the notion of harm and the conception of (criminal) justice. In Anglo-American legal systems particularly, classic anthropocentric notions of criminal justice follow the ‘harm principle’ to define and restrict the legitimate scope of criminal laws.²² Its liberal pioneer John Stuart Mill argues ‘[t]hat the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. [...] The only part of the conduct of anyone, for which he is amenable to society, is that which he concerns others.’²³ This view allows only for the victimisation of human beings, while animals and other wildlife are not considered. Joel Feinberg, who further developed the Millian view, states that harm ‘refers to those states of set-back interests that are the consequences of wrongful acts or omissions by others’.²⁴ He differentiates between welfare and ulterior interests. The former relate to a person’s basic interests, ‘whose maintenance at a minimal level is a necessary condition for the advancement of any other interest at all’. The latter describe interests linked to one’s personal projects and goals.²⁵ While Feinberg proposes a more nuanced viewpoint, his approach still primarily focuses on harm inflicted upon human beings. Anthropocentric perspectives generally consider wildlife crimes to be ‘victimless’ crimes, which in turn dominates the way in which policy and policing discourse is approached.²⁶

Legal systems in German-speaking countries justify the criminalisation of conduct when ‘legally protected interests’ are unjustly violated or compromised. The so-called ‘*Rechtsgutstheorie*’ was developed by Johann

22 Andrew von Hirsch, ‘Der Rechtsgutbegriff und das “Harm Principle”’, in Roland Heffendehl, Andrew von Hirsch, and Wolfgang Wohlers (eds), *Die Rechtsgutstheorie – Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel* (2003) 13, 14.

23 John Stuart Mill, *On Liberty* (2001; originally published 1859) 13.

24 Joel Feinberg, *The Moral Limits of the Criminal Law, Volume 1: Harm to Others* (Oxford University Press, 1984) 215.

25 *Ibid* 112.

26 Nurse (n 3) 18.

Birnbaum.²⁷ The theory focuses on conditions and matters that are valued, including legitimate individual or public interests, as well as entities worth protecting. The range of legally protected interests is defined and legitimised by ethical concepts and the moral consensus of a society.²⁸ Acts or omissions that harm or endanger legally protected interests are sanctioned by criminal law.²⁹ The common denominator between the harm principle and legally protected interests can be constructed as follows: both theories build upon the damage to a resource a person is entitled to.³⁰

3. Implications for wildlife trafficking

3.1. Consequences for human beings

Wildlife trafficking victimises human beings primarily through the indirect negative effects it has on the environment and the economy. It disrupts the environment in a variety of ways. Biodiversity is lost both among animal and non-animal species, either through direct extinction, habitat destruction or limiting access to food sources. From an anthropocentric point of view, loss of biodiversity in plants can affect human survival in terms of food supply, air quality and soil erosion. Facilitated by the vacuum left by the species lost, invasive species spread more easily and further destroy the already weakened ecosystem. Trafficked non-native species released into a new environment may also cause great damage.³¹ Contact between animals from different parts of the world can lead to the transmission and spreading of diseases that were once isolated to certain

27 Johann Birnbaum, 'Über das Erfordernis einer Rechtsverletzung im Begriffe des Verbrechens mit besonderer Rücksicht auf den Begriff der Ehrenkränkung' [1834] *Archiv des Criminalrechts* 149 – 194.

28 Wolfgang Frisch, 'Rechtsgut, Recht, Deliktstruktur und Zurechnung im Rahmen der Legitimation staatlichen Strafens', in Roland Hefendehl, Andrew von Hirsch and Wolfgang Wohlers (eds), *Die Rechtsgutstheorie – Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel* (2003) 215, 216.

29 Günter Stratenwerth, *Schweizerisches Strafrecht, Allgemeiner Teil I: Die Straftat* (4th ed, 2011) 67.

30 Von Hirsch (n 22) 17.

31 Wyatt (n 4) 39 – 42.

species.³² These impacts have the potential to negatively affect the economy. If the natural resources a society relies upon are threatened by the loss of biodiversity, invasive species, or the spread of novel diseases, there are significant negative consequences for government tax revenues, the viability of eco-tourism, business profits and personal livelihoods, among other things.³³ A myriad of industries depend on a healthy environment. According to a 2007 UNEP report, half of the world's jobs are linked to agriculture, fishery, and forestry, all of which are heavily influenced by ecosystem stability.³⁴ Governments also lose taxes and customs duties if a species is trafficked through illegal channels instead of being traded on an existing legal market, as in the case of the illicit timber trade. Human beings ultimately pay the price of economic damage to government, business and industry. Human livelihoods may be endangered by the threat that environmental damage caused by wildlife trafficking poses to their jobs or by the overall weakening of the economy they are a part of. Not to be forgotten are rural villagers and other populations that are directly living off their land. Their survival depends on the integrity of an ecosystem that may find itself threatened by deforestation, diversity loss or disease.³⁵

Human beings can also find themselves directly harmed by wildlife trafficking. Due to its highly profitable nature and low risk of detection, wildlife trafficking has drawn the participation of sophisticated organised criminal groups. Violence incited by power dynamics between such groups, and the struggle for control in the illegal wildlife trade, creates physical danger to human life. The transmission of zoonotic diseases through unchecked wildlife trade may also menace individual human health.³⁶

3.2. Consequences for animals

The moral postulate of cross-species humanity, whereby the interests and needs of animals should be valued, has led to the universal recognition of

³² Ibid 44.

³³ Ibid 44 – 45.

³⁴ UNEP, *Global Environment Outlook GEO4: environment for development (2007)* 4, 17.

³⁵ Wyatt (n 4) 44 – 51.

³⁶ Ibid 46 – 53.

ethical animal protection.³⁷ The most important underlying premise is that animals primarily exist for their own sake and not solely for human interests.³⁸ Animal welfare laws enjoy widespread acceptance. Their doctrinal basis is found in the protection of the dignity of animals as a legally protected good. While this does not include an overall protection of animal life, the handling of animals should always occur in accordance with their well-being and intentional killings should inflict the least suffering possible.³⁹ Wildlife trafficking often incentivises the undignified treatment of animals. The methods of removing animals from their natural habitats, or the conditions in which they may be held in captivity and farmed, are often cruel. Many animals are killed in the process of harvesting or manufacturing the desired product. In cases where only a certain part of the animal is desired, the animal is often severely injured and subsequently left to a painful death. If not immediately killed, animals are covertly smuggled. Given the clandestine nature of the operations, the possibility for hazardous and harmful conditions is high. Even if animals are supposedly being transported legally with fraudulent documents, they are very likely to experience horrendous conditions given the highly profit-oriented nature of wildlife trafficking.⁴⁰ Animal cruelty laws already provide a precedent for expanding the traditional approach to harm to include more biocentric and ecocentric notions and recognising the intrinsic value of animal victims. There is no reason not to consider the same for wildlife trafficking. Those within the trafficking chain resorting to condemned methods in their treatment of animals are usually already covered by the scope of animal welfare laws. Criminally penalising the trafficking of animals as a whole on the basis of protecting the dignity of animals allows for the criminal prosecution of those links in the trafficking chain not directly inflicting but ultimately responsible for their mistreatment.

37 Gieri Bolliger et al, *Schweizer Tierschutzstrafrecht in Theorie und Praxis* (2nd ed, 2019) 30 – 31.

38 Gieri Bolliger, *Animal Dignity Protection in Swiss Law – Status Quo and Future Perspectives* (2016) 106.

39 Bolliger et al (n 37) 52 – 67.

40 Wyatt (n 4) 67 – 70.

3.3. A green criminology response

Expanded notions of harm set green criminology apart from mainstream and conventional criminology. Environmental victimisation, viewed through the lens of environmental justice, ecological justice and species justice, includes not only transgressions against human beings and animals, but increasingly plants and specific biospheres or environments.⁴¹ The ecological justice and green justice perspectives of green criminology advocate for justice systems that go beyond anthropocentric concepts and provide protection for nature in its entirety. Green criminology refers to the study by criminologists of environmental harms, environmental laws and environmental regulation with a key focus on environmental crime.⁴² It incorporates an environmental frame of reference to the traditional criminological approach, moving away from the narrow definition of criminal harms as harms caused by humans primarily against humans.⁴³ Environmental victimisation as a more ecocentric approach should, according to Matthew Hall, include 'those harmed by the adverse effects of environmental degradation perpetrated or brought about by individuals, corporations and states'.⁴⁴ Angus Nurse concludes that, therefore, 'punishment becomes justified for those who harm wildlife, a form of environmental degradation given that wildlife is integral to biodiversity and its removal or killing forms part of environmental harm'.⁴⁵

Typical anthropocentric notions construct a hierarchy of victimhood. They create a scale indicating the worthiness of protection of those harmed by a (wildlife) crime. Human beings are on top of the list, followed by the state, animals, plants and then the environment. For reasons of practicability, a prioritisation of victims when it comes to urgency of

41 Tanya Wyatt, Diane Solomon Westerhuis, and Rece Walters, 'Introduction' in Rece Walters, Diane Solomon Westerhuis, and Tanya Wyatt (eds), *Emerging Issues in Green Criminology: Exploring Power, Justice and Harm* (2013) 1, 4.

42 Rob White, 'The Conceptual Contours of Green Criminology' in Rece Walters, Diane Solomon Westerhuis, and Tanya Wyatt (eds), *Emerging Issues in Green Criminology: Exploring Power, Justice and Harm* (2013) 17, 19.

43 Nurse (n 3) 2 – 3.

44 Matthew Hall, 'Victims of Environmental Harm and Their Role in National and International Justice' in Rece Walters, Diane Solomon Westerhuis, and Tanya Wyatt (eds), *Emerging Issues in Green Criminology: Exploring Power, Justice and Harm* (2013) 216, 221.

45 Nurse (n 3) 87.

protection is often inevitable. However, given the power dynamics between human beings and the environment that have developed through modern means of production and the increasingly enormous potential of human destruction through technological advances, there is a moral obligation to expand the notion of what is considered harmful behaviour that is worth criminalising. Mill's principle provides a solid base, though adhering to his strictly anthropocentric approach is arguably outdated. Extending recognisable harm to include ecocentric and biocentric concepts justifies the use of criminal law to prioritise and combat forms of wildlife trafficking that at first glance cause no obvious harm to human beings. Law represents a societal moral compass. Hence, if it is accepted that environmental health is increasingly gaining weight as a global issue, a broader victimology of wildlife trafficking that includes anthropocentric, biocentric and ecocentric notions of harm should be explored. As has been demonstrated, the necessary theoretical basis for the criminalisation of wildlife trafficking can be established, be it under the premise of the harm principle or based on the *Rechtsgutstheorie*.

III. Effective implementation

1. Types of offences

Criminal offences designed to combat wildlife trafficking cover a wide range of conduct, circumstances and stages involved in the phenomenon. Some offences only apply to conduct that occurs inside a jurisdiction, while others cover cross-border activities.⁴⁶ While specific offences vary greatly between jurisdictions for several reasons, including differing realities in the illicit wildlife trade, the following remarks seek to capture the types of offences that are most commonly encountered in national laws, spanning from sourcing wildlife through to trade, sale, and consumption of plants and animals and related products. Rather than advocate for one, all-encompassing wildlife trafficking offence, this chapter highlights the different forms of conduct that may be criminalised.

⁴⁶ UNODC (n 4) 34.

Wildlife is usually poached, illegally logged or harvested. Poaching offences refer to the unlawful taking of wild animals.⁴⁷ This conduct may involve the killing or trapping of an animal, hunting in a protected area, or hunting without a hunting licence. In some jurisdictions, this also includes hunting above allocated quotas or the use of prohibited hunting methods or instruments.⁴⁸ Illegal logging and illegal harvesting captures a wide range of criminal activities associated with the felling of trees and the taking of plants. It may involve logging or taking of protected species, logging in protected areas, excessive logging, logging without permits or licences, the use of fraudulent permits, obtaining logging permits illegally, non-payment of taxes and other forest fees, and damaging forest or plant ecosystems.⁴⁹

Subsequent activities generally centre around the illegal processing of wildlife. This includes the milling of timber, the slaughtering of animals, and the manufacturing of products from animals or plants that have been obtained illegally. Processing may, in some cases, involve activities that serve to disguise the origin of the animal or plant, or conceal the species involved. The lack of a legally obtained, corresponding license may also lead to the illegality of processing activities.⁵⁰

Trafficking, sale and supply generally follow processing activities and cover a range of commercial acts involving animal or plant products.⁵¹ ‘Trafficking’, in relation to a specimen, refers to illegal acts by a person for their own benefit or that of someone else that may involve dispatching, transporting, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, or storing.⁵² These acts may occur absent legally obtained licences or other required documentation.

While also falling into the broader trafficking category, offences relating to export and import of wild flora and fauna specifically refer to illegal

47 Olga Biegus and Christian Bueger, ‘Poachers and pirates. Improving coordination of the global response to wildlife crime’ (2017) 60 *South African Crime Quarterly* 29, 30; UNODC (n 4) 39; Wyatt (n 4) 3.

48 UNODC (n 4) 39; UNODC, *Guide on Drafting Legislation to Combat Wildlife Crime* (September 2018) 19 – 20.

49 UNODC (n 4) 36 – 38.

50 *Ibid* 40.

51 *Ibid* 41; UNODC (n 48) 26 – 27; Wyatt (n 4) 2 – 5.

52 UNODC (n 51) 13.

activities across international borders. They include, inter alia, export/import without authorisation, proper documentation or with fraudulent documents, export/import of illegally obtained wildlife and forest products, export/import of protected species, false classification and labelling of exports and imports, as well as export and imports with illegally obtained documents.⁵³ Export and import above set quotas or against export/import bans are also targeted. Many national offences in the import/export category reflect the obligation arising from *CITES* to prohibit and penalise the trade in and possession of endangered species in violation of the treaty.⁵⁴

Offences may also be legislated to criminalise the illegal acquisition, possession and consumption of trafficked animals and plants (and products). They are aimed at criminalising demand, the main driver of wildlife trafficking. Notably, many jurisdictions have chosen not to create such offences due to hesitancy in criminalising and punishing consumers (regardless of whether they wittingly or unwittingly acquire a protected species or other animal or plant contraband). Although Article VIII(1) of *CITES* makes express reference to penalising the possession of *CITES*-protected species that are traded illegally, very few jurisdictions have criminalised, for instance, the purchase or possession of animals, plants, or products derived from an illegal source or a protected species.⁵⁵

The categories of offences discussed here are not exhaustive and some jurisdictions set out additional offences for particular activities or in relation to particular species, methods, results, or locations involved. Differences between offences found in national laws not only relate to the types of conduct, species, methods, et cetera that are criminalised, but also whether a mental element (*mens rea*) is required and what this element may be. Most jurisdictions require proof of purpose (direct intent) or knowledge as an element of their most serious offences. Apart from that, there is very little unanimity between jurisdictions in the criminalisation of other, less onerous states of minds such as recklessness and negligence. Offences may also differ in terms of the required physical elements (*actus reus*). For example, a particular action may be criminalised, or a specific

53 UNODC (n 4) 41–42.

54 Art VIII *CITES*; see further, Jacqueline L Schneider, *Sold into Extinction: The Global Trade in Endangered Species* (2012) 35; UNODC (n 4) 42.

55 UNODC (n 4) 43–44; EIA, *Time for Action: End the criminality and corruption fuelling wildlife crime* (November 2016) 6; UNODC (n 48) 24–25.

result that either endangers or harms wildlife. There are also significant variations between jurisdictions regarding extensions of criminal liability for offences in relation to attempts, participation, incitement and the like.⁵⁶ Some jurisdictions have also enacted specific defences that only apply in relation to wildlife and forest offences.⁵⁷

2. Penalties and sentencing

As with the offences, the types and severity of statutory penalties for wildlife trafficking differ considerably between jurisdictions. While some countries limit penalties to small fines, others provide for long terms of imprisonment. Although quite exceptional—and questionable in light of international human rights obligations—some jurisdictions use penalties involving corporal or capital punishment for serious offences pertaining to wildlife trafficking.⁵⁸ Within any one jurisdiction, statutory penalties for wildlife and forest offences vary depending on the type of conduct, the level of harm caused or damage done, the methods used, and type of species involved. Higher penalties generally apply to offences that involve more serious consequences or dangers. In some places, higher penalties are assigned to offences involving particularly endangered (or particularly charismatic) species.⁵⁹

Statutory provisions usually provide for a range of penalties within which sentences may be set. National penalties and sentencing laws or codes of criminal procedure commonly spell out a range of aggravating and mitigating factors that determine the sentence imposed in individual cases. The respective factors and their use vary between jurisdictions, legal systems and traditions.⁶⁰ Aggravating factors in relation to wildlife trafficking may include the gravity of the damage caused, the use of particularly cruel methods towards animals, the number or quantity of

56 See Nurse (n 3) 24; UNODC (n 48) 17; UNODC (n 4) 32–34.

57 UNODC (n 48) 33.

58 UNODC (n 4) 44; see also Cyrille de Klemm, *Guidelines for Legislation to Implement CITES*, IUCN Environmental Policy and Law Paper No 26 (1993) 65–65; Nurse (n 3) 71; WWF, *Tightening the Net: Toward a Global Legal Framework on Transnational Organized Environmental Crime* (2015) 36–38.

59 UNODC (n 4) 44.

60 UNODC (n 48) 36.

specimens or items involved, whether any animal involved in the offence was pregnant, incubating or caring for dependent offspring at the time of the offence, previous wildlife offences committed, the size of any financial or other material benefit, or the leadership or managerial role of the offender in an organised criminal group. Mitigating factors may include having had a lower or minor role in the offending, having no prior criminal record, showing remorse for the offence, or voluntary cooperation with law enforcement officials to investigate and prosecute other wildlife crime.⁶¹

Research into sentencing for offences related to wildlife trafficking tends to show that most defendants are punished with (small) fines. The fines are sometimes lower than the value of the commodity the defendant smuggled, sold, or acquired. Imprisonment generally appears rare in wildlife trafficking cases and several sources have pointed out that in this area of the law ‘the punishment does not adequately fit the crime’.⁶² Discrepancies between penalties provided by the law and adjudicated sentences for wildlife and forest offences in different jurisdictions can create obstacles for international cooperation.

Variation among countries regarding the penalties imposed for wildlife trafficking offences can impede cooperation efforts to combat wildlife and forest crime. Accordingly, UNODC has expressed a desire to achieve a certain degree of harmony between penalties in different jurisdictions.⁶³ This does not necessarily entail the toughening of sanctions; severe penalties should be reserved for serious offences that are committed intentionally, for second or multiple offences, and for offences that cause harm or death to another person.⁶⁴ The level of punishment available for offences also has significant consequences under the *United Nations*

61 Ibid 37.

62 Nurse (n 3) 150–151; Wyatt (n 4) 103; see also Erika Alacs and Arthur Georges, ‘Wildlife across our borders: a review of the illegal trade in Australia’ (2008) 40(2) *Australian Journal of Forensic Sciences* 147, 154–155; European Parliament, Directorate-General for Internal Policies, *Wildlife Crime* (March 2016) 73–84; Victoria May et al., *A Review of Wildlife Crime Court Cases in Malawi, 2010–2017* (November 2017) 11; Rebekka Runhovde, ‘Taking the Path of Least Resistance? Decision-Making in Police Investigations of Illegal Wildlife Trade’ (2016) 11(1) *Policing* 87, 98.

63 UNODC (n 4) 45.

64 Ibid.

Convention against Transnational Organised Crime (UNTOC).⁶⁵ The Convention only applies to offences set out in its provisions (corruption,⁶⁶ money-laundering,⁶⁷ obstruction of justice,⁶⁸ and participation in an organised criminal group),⁶⁹ offences in Protocols to the Convention (covering trafficking in persons,⁷⁰ smuggling of migrants,⁷¹ and illegal manufacture and trafficking in firearms),⁷² and ‘serious crimes’. According to Article 2(a) of *UNTOC*, an organised criminal group acts in concert with the aim of committing one or more serious crimes. Article 2(b) defines a ‘serious crime’ as an offence punishable by a maximum deprivation of liberty of at least four years. Domestic offences with lesser penalties are not covered by the Convention. For example, Article 26 of the *Swiss Federal Law on the Commerce of Protected Species*⁷³ states a maximum threat of punishment of three years deprivation of liberty. As a result, violations of this offence are not treated as ‘serious crimes’ for the purposes of *UNTOC*. Furthermore, Article 260^{ter} of the *Swiss Criminal Code*⁷⁴ criminalises the participation in an organised criminal groups that commits offences punishable by a minimum deprivation of liberty of more than three years. Hence under Swiss criminal law, groups that commit wildlife trafficking offences cannot be treated as organised crime. Neither are provision under *UNTOC* applicable. Even though colloquially such syndicates may be referred to as organised criminal groups, States Parties can only apply its measures if their threat of punishment of wildlife trafficking offences meets the mandatory threshold. In this context, several scholars and organisations argue in favour of the handling of severe

65 Opened for signature 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003).

66 *UNTOC* art 8.

67 *UNTOC* art 6.

68 *UNTOC* art 23.

69 *UNTOC* art 5.

70 *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003).

71 *Protocol against the Smuggling of Migrants by Land, Sea, and Air*, opened for signature 12 December 2000, 2241 UNTS 507 (entered into force 28 January 2004).

72 *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, opened for signature 31 May 2001, 2326 UNTS 208 (entered into force 3 July 2005).

73 SR 453.

74 SR 331.o.

wildlife and forest offences as ‘serious crimes’ according to *UNTOC*, punishable with imprisonment of at least four years.⁷⁵ The example further shows that not only the legislation of the offences but also the appointment of the respective statutory penalties require a coherent approach. The Swiss legislator has recognised this issue and has vowed to intensify the sanctions that apply to wildlife trafficking.⁷⁶

3. Related offences

In addition to offences specifically associated with wildlife trafficking and other forms of wildlife crime, other, more general offences under environmental laws, animal protection laws, or under the general criminal law can play an important role in the suppression of wildlife trafficking. If there is evidence that a wildlife trafficking offence and a related offence have been committed, both should be punished.

Animal cruelty offences, as found in many jurisdictions, can serve to punish the way in which living animals are captured, transported, traded, poached, or slaughtered.⁷⁷

Fraudulent documents are frequently produced or genuine documents altered to disguise the authenticity, illegality, quantity, volume, origin, or destination of wildlife and wildlife products. This can involve the removal, alteration, defacing, or erasure of customs stamps or labels, or of marks affixed to animals, plants and parts thereof.⁷⁸ Some jurisdictions have

75 EIA (n 55) 6; Lydia Slobodian, *Addressing Transnational Wildlife Crime through a Protocol to the UN Convention against Transnational Organized Crime: A Scoping Paper*, IUCN Environmental Law Centre (13 October 2014) 28; UNODC (n 48) 34; UN, General Assembly resolution 69/314, Tackling illicit trafficking in wildlife, A/RES/69/314 (30 July 2015), Mara E Zimmerman, ‘The Black Market for Wildlife: Combating Transnational Organized Crime in the Illegal Wildlife Trade’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1657, 1684; see also Hennie Strydom, ‘Transnational Organised Crime and the Illegal Trade in Endangered Species of Wild Fauna and Flora’ in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime* (2016) 264, 277 – 278.

76 Swiss Confederation, Federal Department of Home Affairs, *Amendment to the Swiss Federal Law on the Commerce of Protected Species* (2019) 5.

77 Global Animal Law Project, ‘Animal Legislations in the World at National Level’ (Web page, undated).

78 UNODC (n 48) 23 – 24; UNODC (n 4) 46.

specific offences for the use of fraudulent documents in the context of wildlife trafficking. Offences for obtaining or issuing fraudulent licences or obtaining licences or other permits by way of corruption are also included.⁷⁹ In the absence of specific offences, general offences relating to document fraud, bribery, and abuse of office can also apply in cases involving wildlife trafficking.⁸⁰

In many places, corruption is one of the main enablers and facilitators of wildlife trafficking. This involves the whole spectrum from petty corruption of low-ranking officers to grand corruption of senior government representatives. Corruption frequently occurs in the process of applying for licences, permits, or other documents, as well as at border controls or other inspection points where officials may be bribed. In the wildlife, forestry and fisheries sectors, corruption also involves bribery of government officials or politicians for preferential treatment and extortion by and of officials to sign off on illegal operations and official decisions that favour certain groups.⁸¹ Most of these activities, both active and passive bribery, are criminalised under national laws; some jurisdictions have specific offences for corruption and bribery in the wildlife, forestry, and fisheries sectors. This can also extend to corruption in the private sector.

Wildlife trafficking is often driven by greed and the desire to obtain financial or other material benefits. For this reason, a further important tool to criminalise and fight wildlife trafficking are offences relating to the laundering of proceeds of such crime and to the financing of wildlife trafficking.⁸² Today, nearly every jurisdiction worldwide has offences relating to money laundering that enable the confiscation and seizure of proceeds of crime. In some jurisdictions, special offences for money laundering and financial crime in the wildlife, forestry, and fisheries sector have been enacted.

79 For further suggestions see UNODC (n 48) 24.

80 See de Klemm (n 58) 63.

81 Biegus and Bueger (n 47) 34–35; INTERPOL and UNEP, *Strategic Report: Environment, Peace and Security, A Convergence of Threats* (December 2016) 56; UNODC (n 4) 53–54; see also Ranee Khooshie Lal Panjabi, 'For Trinkets, Tonics, and Terrorism: International Wildlife Poaching in the Twenty-First Century' (2014) 43 *Georgia Journal of International and Comparative Law* 1, 13.

82 IFAW, *Criminal Nature: The global security implications of the illegal wildlife trade* (June 2013) 15; Panjabi (n 80) 13; UNODC (n 48) 32–33; UNODC (n 4) 48.

Some instances of wildlife trafficking are committed by or associated with organised criminal groups.⁸³ The prosecution of members of such groups and of the directors and ‘masterminds’ has historically been quite difficult and few jurisdictions had offences for persons who are not themselves physically involved (and caught) in the commission of the crime. Following the entry into force of *UNTOC*, more and more jurisdictions have enacted specific offences criminalising participation in an organised criminal group as stipulated by Article 5 of the Convention. Such offences can be important tools to target offenders who lead, direct, finance or help in other capacities criminal organisations involved in wildlife trafficking.⁸⁴ However, in order to do so, the wildlife trafficking offences must meet the threshold level of punishment necessary for *UNTOC* to apply, as elaborated before.

Last but not least, wildlife traffickers sometimes use violence, threats, or even murder to facilitate their actions.⁸⁵ In such cases, criminal offences such as homicide, assault, coercion, or the making of threats may apply.

4. Enforcement challenges

A myriad of challenges and obstacles impede the effective enforcement of wildlife and forest offences. Furthermore, combating wildlife trafficking is currently not a priority in many countries.⁸⁶ Policy makers, police,

83 See further Chapter One of this volume.

84 UNODC (n 4) 59; see also UNODC (n 48) 29 – 30; Slobodian (n 75) 12 – 15; WWF (n 58) 30; UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, *Implementation of the United Nations Convention against Transnational Organized Crime: consolidated information received from States for the first reporting cycle, Report of the Secretariat*, UN Doc CTOC/COP.2005/2/Rev.2 (25 August 2008) 4 – 5.

85 Daniela Kleinschmit et al (eds), *Illegal Logging and Related Timber Trade – Dimensions, Drivers, Impacts and Responses*, IUFRO World Series Volume 35 (2016) 83 – 86; C Nellemann and INTERPROL (eds), *Green Carbon, Black Trade: Illegal Logging, Tax Fraud and Laundering the World’s Tropical Forests*, A UNEP Rapid Response Assessment (2012) 7, 14.

86 Elizabeth L Bennett, ‘Another inconvenient truth: the failure of enforcement systems to save charismatic species’ (2011) 45(4) *Fauna & Flora International* 476, 477; DLA Piper, *Empty Threat 2015: Does The Law Combat Illegal Wildlife Trade? A Review of Legislative and Judicial Approaches in Fifteen Jurisdictions* (May 2015) 4; Nurse (n 3) 113; Angus Nurse, ‘Privatising the green police: the role of NGOs in wildlife law enforcement’ (2013) 59 *Crime, Law and Social Change* 305, 305; UNODC (n 4) 3; Wyatt (n 4) 108; Melanie

prosecutors, and the judiciary often do not consider wildlife and forest offences as serious offences warranting special consideration and prioritisation.⁸⁷ This is not limited to developing countries but has also been reported in countries such as Norway⁸⁸ and the United Kingdom.⁸⁹ While in some places there are some signs that the 'status' of wildlife trafficking is rising, many countries still afford negligible attention to these crimes.⁹⁰

In many jurisdictions, laws and regulations pertaining to wildlife trafficking and to other aspects of the wildlife and forest sector remain poorly developed and frequently suffer from significant gaps. Elements of criminal offences may lack clear articulation and definition. This often hinders effective investigation and prosecution. In some jurisdictions, relevant offences, if they do exist, are poorly drafted, leaving ambiguities and uncertainties that can obstruct prosecutions and be exploited by defendants.⁹¹ Where state officials are involved in wildlife trafficking, diplomatic immunity can hinder their prosecution and conviction. Furthermore, in some jurisdictions, authorities and officers responsible for enforcing wildlife trafficking offences lack the necessary investigative and coercive powers.

Enforcement of offences relating to wildlife trafficking is often hampered by inadequate resourcing and training.⁹² In many countries, this relates to budget appropriation rather than to a lack of resources. General law enforcement authorities often have little experience and competence in dealing with wildlife trafficking.⁹³ Specialised agencies may be understaffed, poorly trained, and under-funded. Poor prosecutorial and judicial practices hinder a proper response to wildlife trafficking.⁹⁴ This often leads to environments in which poachers, smugglers and others involved in

Wellsmith, 'Wildlife Crime: The Problems of Enforcement' (2011) 17 *European Journal on Criminal Policy Research* 125, 134; WWF (n 58) 34.

87 Anita Sundari Akella and Crawford Allan, *Dismantling Wildlife Crime: Executive Summary* (November 2012) 8; Wellsmith (n 86) 137.

88 Runhovde (n 62) 98.

89 Wellsmith (n 86) 137 – 138.

90 INTERPOL and UNEP (n 81) 21 – 25.

91 UNODC (n 4) 23; Biegus and Bueger (n 47) 30; Nurse (n 3) 113.

92 Bennett (n 86) 477; Nurse (n 3) 113 – 114; see also Akella & Allan (n 87) 8.

93 See Runhovde (n 62) 89.

94 UNODC (n 4) 118, 125.

wildlife trafficking can operate with relative impunity.⁹⁵ A lack of integrity of involved authorities and officials enables corruption and further exacerbates this problem. National coordination and international cooperation are crucial in combating wildlife trafficking. Individual officials and enforcement agencies unable or unwilling to coordinate impede the sharing of relevant information, available resources and know-how.⁹⁶

Since there is no uniform international environmental criminal law, the enforcement of wildlife and forest crimes remains largely in the hands of state agencies and is subject to state sovereignty.⁹⁷ As a result, the criminal justice response to wildlife and forest crime usually involves various government sectors and agencies. Often several institutions are involved and have to work together. Hence, it is important to know 'who is who' and 'who does what'.⁹⁸ Several countries divide the responsibilities for investigating wildlife and forest offences between multiple agencies according to the stage of the investigation or the kind or the seriousness of the offences that appear to be involved.⁹⁹ Furthermore, the investigation of wildlife and forest crime is not limited to law enforcement agencies. It frequently involves a great variety of government departments, as well as actors from the private sector and civil society.¹⁰⁰ The success of law enforcement depends heavily on close collaboration between key stakeholders.¹⁰¹ It is, therefore, crucial that the different actors involved in a state's effort to combat wildlife trafficking know the relevant legislation and enforce it in a coordinated and consistent manner.

95 Biegus and Bueger (n 47) 34.

96 Akella & Allan (n 87) 10; see also EIA (n 55) 11.

97 Nurse (n 3) 56.

98 UNODC (n 4) 67–68; UNODC (n 48) 43; see also INTERPOL, *Global Wildlife Enforcement: Strengthening Law Enforcement Cooperation Against Wildlife Crime* (2018) 12.

99 UNODC (n 48) 44.

100 Nurse (n 3) 7; Nurse (n 86) 306; DLA Piper (n 86) 4; UNODC (n 4) 73.

101 UNODC (n 4) 73; Kevin Tomkins, 'Police, Law Enforcement and the Environment' (2005) 16(3) *Current Issues in Criminal Justice* 295, 301–304.

IV. Conclusion

This chapter has shown that the criminalisation of wildlife trafficking is not merely a means to an end, but can and should have a principled foundation. The harm principle and the *'Rechtsgutstheorie'* provide a basis for wildlife trafficking offences. These offences must be effectively articulated and enforced, cognisant of the actualities of wildlife trafficking in different jurisdictions. Some countries typically serve as the origin of trafficked wildlife, while others serve as processing, transit or destination countries. National laws should reflect that. The power of judicial measures enabled by the use of criminal law should not be underestimated. They equip a state's executive with effective and swift tools for the detection and investigation of wildlife trafficking. The more serious the offence, the more judicial measures are usually permitted by a state's criminal procedure laws.

Finally, criminalisation should not be regarded as the only solution to wildlife trafficking. While the use of criminal law is an important aspect of a holistic approach to the phenomenon, it should ideally be employed in combination with other approaches and strategies. Other areas of law and policy, including economic development, animal welfare rules, and customs regulations to name a few, all have a role to play.

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