

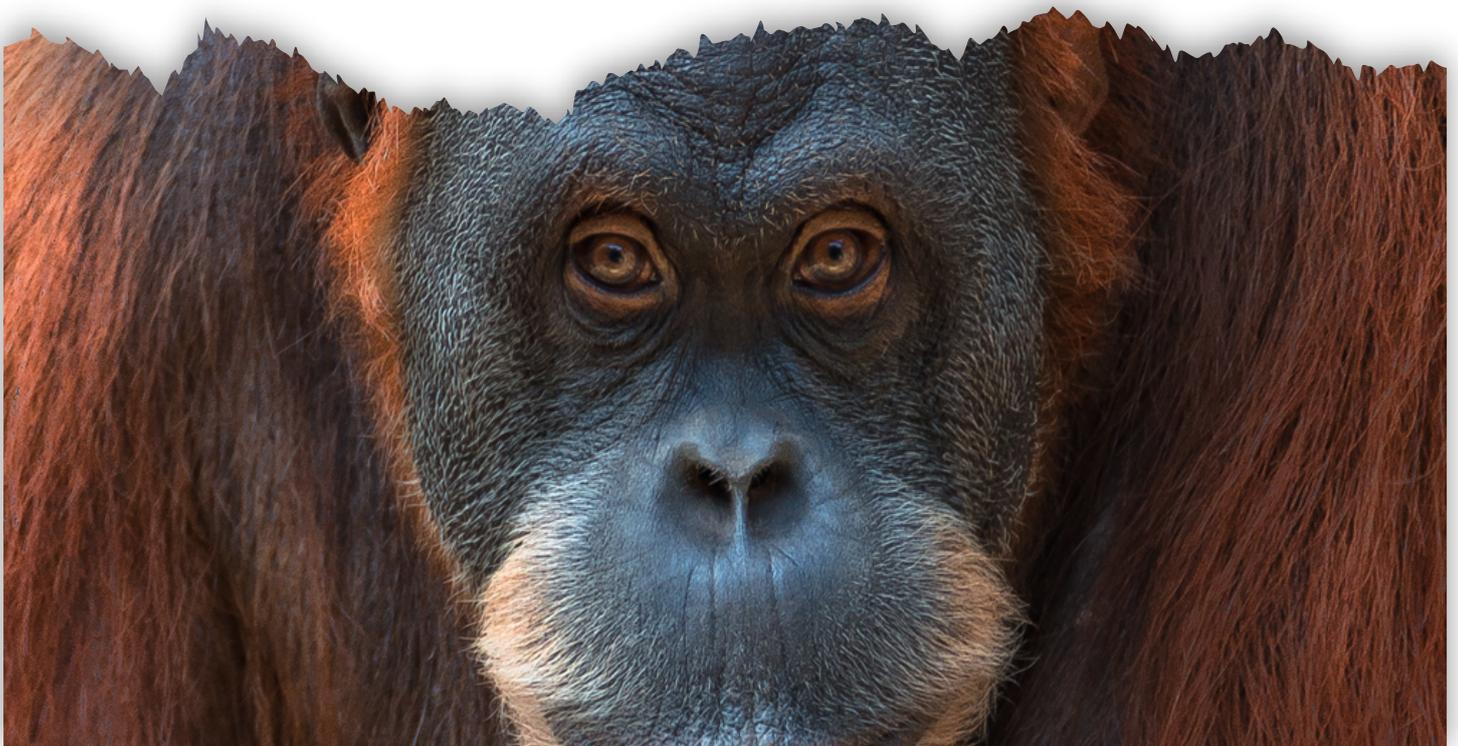


UNODC

United Nations Office on Drugs and Crime



GUIDE ON DRAFTING LEGISLATION TO COMBAT
WILDLIFE CRIME



C O M B A T I N G
W I L D L I F E A N D F O R E S T C R I M E



UNITED NATIONS OFFICE ON DRUGS AND CRIME

UNITED NATIONS OFFICE ON DRUGS AND CRIME

GUIDE ON
DRAFTING
LEGISLATION
TO COMBAT
WILDLIFE CRIME



UNITED NATIONS
Vienna, 2018

© United Nations, September 2018.

Acknowledgements

This study was conducted under the responsibility of the UNODC Conference Support Section (DTA/OCB/CSS), Division for Treaty Affairs and the UNODC Global Programme for Combating Wildlife and Forest Crime (DO/DHB/SLU), Division for Operations (DO).

Research and drafting

Colin Craig, Antonio De Vivo, Riikka Puttonen, Elisabeth Seidl.

Many individuals and organizations contributed to the preparation of the Guide on Drafting Legislation to Combat Wildlife Crime. The United Nations Office on Drugs and Crime (UNODC) extends its appreciation to all those who directly contributed through participation in the Expert Group Meetings and to those who have shared their knowledge, insights and experience in this field of work over the years. UNODC acknowledges the contribution of the following individuals and organizations:

Ana Maria Aldana, Marcus Asner, Giovanni Broussard, (UNODC), Steve Carmody, Ingrid Elliott, Sofie Hermann Flensburg (CITES), Wangui Gichuhi, Naomi Kenney (FAO), Karen Kramer (UNODC), Blaise Kuemlangan (FAO), Theodore Legget (UNODC), Teerat Limpayaraya, Maria Socorro Manguiat (UNEP), Reyneck Matemba, Joseph Munga Mutua (IUCN), James Nombi, Perrine Odier (EAGLE Network), Kevin Pretorius, Adrian Reuter Cortes (WCS), Jorge Rios (UNODC), Mark Romley, Eugenio Sartoretto (FAO), Lydia Slobodian (IUCN), Tim Steele, Stephen Thurlow (UNODC), Katharina Trump (WWF), Michiel Van Dyk (UNODC), Juan Vasquez Murillo (CITES), Wang Xiumei and Zhang Shaomin.

This publication was supported through the generous contribution of the United States Department of State, Bureau of International Narcotics & Law Enforcement Affairs with additional financial support of the European Union. The contents are the sole responsibility of UNODC and do not necessarily reflect the views of the United States Department of State, Bureau of International Narcotics & Law Enforcement Affairs or the European Union.



The designations employed and the presentation of material in this publication do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries. This publication may be reproduced in whole or in part and in any form for educational or non-profit purposes without special permission from the copyright holder, provided acknowledgement of the source is made. UNODC would appreciate receiving a copy of any publication that uses this publication as a source.

This publication has not been formally edited. Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

Photo credits cover: © iStock/Byrdyak, iStock/Neurobite, iStock/anankml, UNODC

CONTENTS

Introduction	1
How to use this Guide	2
Terminology	2
Legal framework	3
Chapter I General provisions.....	5
Schedules of wildlife; prohibited and regulated weapons, devices and methods; and protected areas	5
Schedules of wildlife.....	6
Schedules of prohibited and regulated weapons, devices and methods	7
Schedules of protected areas	8
Designation of a competent authority	9
Wildlife tenure.....	9
Permits, certificates and other like instruments	9
Lawful authority	10
Jurisdiction	10
Liability of legal persons	12
Glossary of terms	13
Chapter II Offences	17
Elements of criminal offences.....	17
Offences covered by this Guide	18
Section A Substantive offences	18
Subsection 1 Regulated and prohibited activities	18
Offences related to specimens of listed species	18
Offences related to prohibited and regulated weapons, devices and methods	20
Offences related to protected areas.....	22
Subsection 2 Document fraud.....	23

Offences related to permits, certificates and other like instruments	23
Subsection 3 Possession and trade-related offences.....	24
Illegal possession	24
Trafficking in wildlife	26
Electronic and distance selling.....	29
Section B Related offences.....	29
Conspiracy or criminal association.....	29
Secondary liability.....	31
Obstruction of justice.....	31
Money-laundering.....	32
Section C Defences	33
Section D Penalties, sentencing and other orders	34
Imprisonment.....	34
Non-custodial penalties and other orders.....	34
Additional penalties.....	35
Penalties for legal persons.....	35
Aggravating and mitigating circumstances.....	36
Compensation	38
Chapter III Mandates, investigation and national coordination.....	43
Mandates.....	43
National coordinating body.....	44
Investigations.....	44
Special investigative techniques	46
Chapter IV International cooperation	49
Mutual legal assistance	49
Extradition.....	50
Law enforcement cooperation.....	50
Joint investigations.....	51
Chapter V Prosecution of offences	55
Detention pending trial.....	55
Prosecutorial discretion	55
Alternatives to trial.....	55
Statute of limitations.....	56
Concluding remarks.....	57

Introduction

Despite considerable efforts in recent years, wildlife crime remains a growing problem worldwide. Once described as an emerging threat, wildlife crime has evolved into one of the most significant transnational criminal activities and has major economic, social and environmental impacts. Though it often is treated as a victimless crime, wildlife crime contributes to a broad range of harms, including the destruction of wildlife resources and ecosystems, desertification, environmental degradation as well as the reduction and elimination of species. Wildlife crime also threatens people's livelihoods, impacts national security and limits social and economic development. It remains challenging to quantify the full scale of the problem but it has become clear that the billions of dollars¹ generated by this illegal business are linked to corruption, money-laundering and violence. The international community increasingly has recognized the serious nature of wildlife crime and numerous calls to action have urged States to strengthen their legal responses and capacity to investigate, prosecute and adjudicate crimes against wild flora and fauna. The need to take urgent action to end poaching and trafficking of protected species of flora and fauna has been recognized in the United Nations Sustainable Development Goals.²

Criminal groups engaged in wildlife crime often use the same routes and techniques employed in the smuggling of other illicit commodities and are exploiting gaps and

discrepancies in national legislation and criminal justice systems. Criminal groups also are making use of new technologies and platforms to traffic wildlife specimens. At the same time, legal systems around the world are facing numerous challenges in effectively combating wildlife crime. These challenges include weak or inconsistent legal frameworks regulating sustainable wildlife use as well as ineffective criminal laws that fail to criminalize attempt, participation by accessories, and the possession and sale of illegally obtained wildlife specimens. Many wildlife-sector-specific laws are inadequate and not harmonized with other laws. Some laws lack definitions of "wildlife", contain insufficient penalties, and fail to designate wildlife offences as predicate offences in anti-money-laundering legislation.³

The primary objective of this *Guide on Drafting Legislation to Combat Wildlife Crime* ("the Guide") is to assist States in protecting wildlife by criminalizing serious wildlife offences, as defined in this Guide, thereby enhancing States' prosecution and criminal justice capacities. The Guide is intended as a technical assistance tool to assist States in reviewing and amending existing legislation and adopting new legislation against wildlife crime in line with the *United Nations Convention against Transnational Organized Crime* (Organized Crime Convention) and the *United Nations Convention against Corruption*. Through this, the Guide supports the achievement of two United Nations Sustainable Development Goals. Principally, the Guide relates to Target 15.7 and can be used by States to take urgent action to end poaching and trafficking of protected

¹ See, inter alia, WWF/Dalberg, *Fighting illicit wildlife trafficking: A consultation with governments* (WWF International, Gland, Switzerland, 2012) or Myburgh, J. in: Haken, J., *Transnational Crime in the Developing World* (Global Financial Integrity, Washington, D.C., 2011).

² See Target 15.7, available at: <https://sustainabledevelopment.un.org/sdg15>

³ Africa-Asia Pacific Symposium on Strengthening Legal Frameworks to Combat Wildlife Crime, United Nations Inter-Agency Task Force on Illicit Trade in Wildlife and Forest Products, Symposium Report (2017), p. 1.

species of flora and fauna. The Guide also supports the achievement of Target 16.3, promoting the rule of law at national and international levels and ensuring equal access to justice for all.⁴ In this regard it is important to highlight that the criminalization of wildlife offences is complementary to and must be built within the broader legal framework to ensure a balanced approach and avoid over-criminalization of minor offences.

Access to and trade of wild flora and fauna must be regulated by laws and regulations to, *inter alia*, ensure their protection. Establishing criminal, civil and/or administrative offences are one mechanism through which States can use laws and regulations to achieve these goals. The appropriate type of liability for each offence will necessarily vary according to the seriousness of the offence and the legal system and culture of the State in question, but States may be required to punish by criminal law serious violations of these wildlife laws and regulations. Grave offences include acts involving organized criminal groups that are unsustainable or injurious to biodiversity or public welfare. The principal internationally agreed and legally binding framework on the international trade in specimens of wild animals and plants is the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES). CITES distinguishes between licit and illicit trade of wildlife specimens and provides an international framework for ensuring that trade in wildlife specimens does not threaten their survival.⁵

How to use this Guide

States may use this Guide as a tool as they draft, amend or review relevant national legislation within their constitutional and legislative frameworks. The Guide does not provide a “one-size-fits-all” model law ready to be introduced into a States’ legal system. Rather, the Guide recognizes that relevant national legislation must be tailored to each States’ legal tradition and social, economic, cultural and geographic conditions. States should adapt the model provisions and guidance provided in this Guide to fit local conditions, constitutional principles, legal culture and structures, and existing enforcement arrangements. This Guide recommends that States consult with relevant stakeholders as they engage in the process of drafting, amending or reviewing wildlife legislation.

States have taken different approaches to criminalizing wildlife offences. Some States have introduced specialized legislation while others have incorporated wildlife offences into existing penal codes. States have also made use of a combination of criminal, civil and administrative offences in specialized wildlife legislation. Whichever

approach is taken, States should ensure that wildlife offences and related provisions are harmonized with the existing domestic legal system to avoid the inadvertent creation of loopholes, overlaps or contradictions that inhibit the effectiveness of legislation relating to wildlife crime.

Throughout the model legislative provisions contained in this Guide, square brackets are used to indicate particular words or phrases that will need to be specially adapted to the State in question. For example, the Guide uses square brackets where model provisions make reference to the name of the State, other provisions contained in this Guide, other domestic laws, and domestic courts, ministries and competent authorities. The Guide also uses square brackets to emphasize situations in which a State may select from a number of alternative wordings.

The Guide is structured into five chapters, each covering a category of legislative provisions necessary for effectively combating wildlife crime. These categories are:

- Chapter 1: General provisions
- Chapter 2: Offences
- Chapter 3: Mandates, investigation and national coordination
- Chapter 4: International cooperation
- Chapter 5: Prosecution of offences

Each chapter includes legislative guidance and model legislative provisions. Model legislative provisions are set out in blue boxes. Relevant examples from domestic legislation also are included.

Terminology

As the concept of wildlife is viewed differently in different parts of the world, this Guide does not attempt to exhaustively define the term. This is not to say that domestic legislation should not define the term. On the contrary, clearly defining the term “wildlife” is important for domestic legislation because this will define the scope of the legislation and hence its effectiveness. This Guide leaves the precise definition of “wildlife” to each State. However, the term “wildlife”, as used by this Guide, does refer to specimens of both wild plant and animal species. In some circumstances, States may wish to include certain captive-bred animals in their definition of wildlife to provide a wider scope of protection. It is important that States define the term “wildlife” precisely as the definition will determine the exact scope of application of their laws.

This Guide also does not exhaustively define “wildlife crime”. Rather, the Guide proposes that each State criminalize a number of specific acts relating to wild flora and fauna, including animals, birds and fish, as well as timber and non-timber forest products. Individual

⁴ See Target 16.3, available at: <https://sustainabledevelopment.un.org/sdg16>

⁵ There are currently 183 Parties to the Convention (182 States and the European Union).

States may elect to include additional sorts of activities in their concept of “wildlife crime”.

While this tool was not created to address crimes in the fisheries sector, the principles included in this Guide are intended to be consistent with legislative efforts in this area.

Legal framework

The complexity and global nature of wildlife crime necessitates a multidisciplinary and incremental legislative approach designed to build upon and complement existing initiatives of the international community. This Guide is based upon the following instruments:

2003: United Nations Convention against Corruption⁶

2000: United Nations Convention against Transnational Organized Crime⁷

⁶For information on the ratification status of the United Nations Convention against Corruption, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-14&chapter=18&lang=en

⁷For information on the ratification status of the United Nations Convention against Transnational Organized Crime, see: https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12&chapter=18&lang=en

1975: Convention on International Trade in Endangered Species of Wild Fauna and Flora⁸

This Guide also draws upon existing resources concerning wildlife crime and related issues, such as the *Model Law on International Trade in Wild Fauna and Flora*, developed by the CITES Secretariat; model laws, legislative guides and manuals on organized crime, extradition, mutual legal assistance and money-laundering developed by UNODC; and the processes and discussions undertaken during the *Africa-Asia Pacific Symposium on Strengthening Legal Frameworks to Combat Wildlife Crime*,⁹ organized by the United Nations Inter-Agency Task Force on Illicit Trade in Wildlife and Forest Products and held in Bangkok in July 2017.

⁸For information on the ratification status of the Convention on International Trade in Endangered Species of Wild Fauna and Flora see: <https://www.cites.org/eng/disc/parties/index.php>

⁹See <http://www.unodc.org/documents/southeastasiaandpacific/Publications/wildlife/Africa-AsiaPac-Wildlife-law-symposium-REPORT-FINAL-SHARE.PDF>

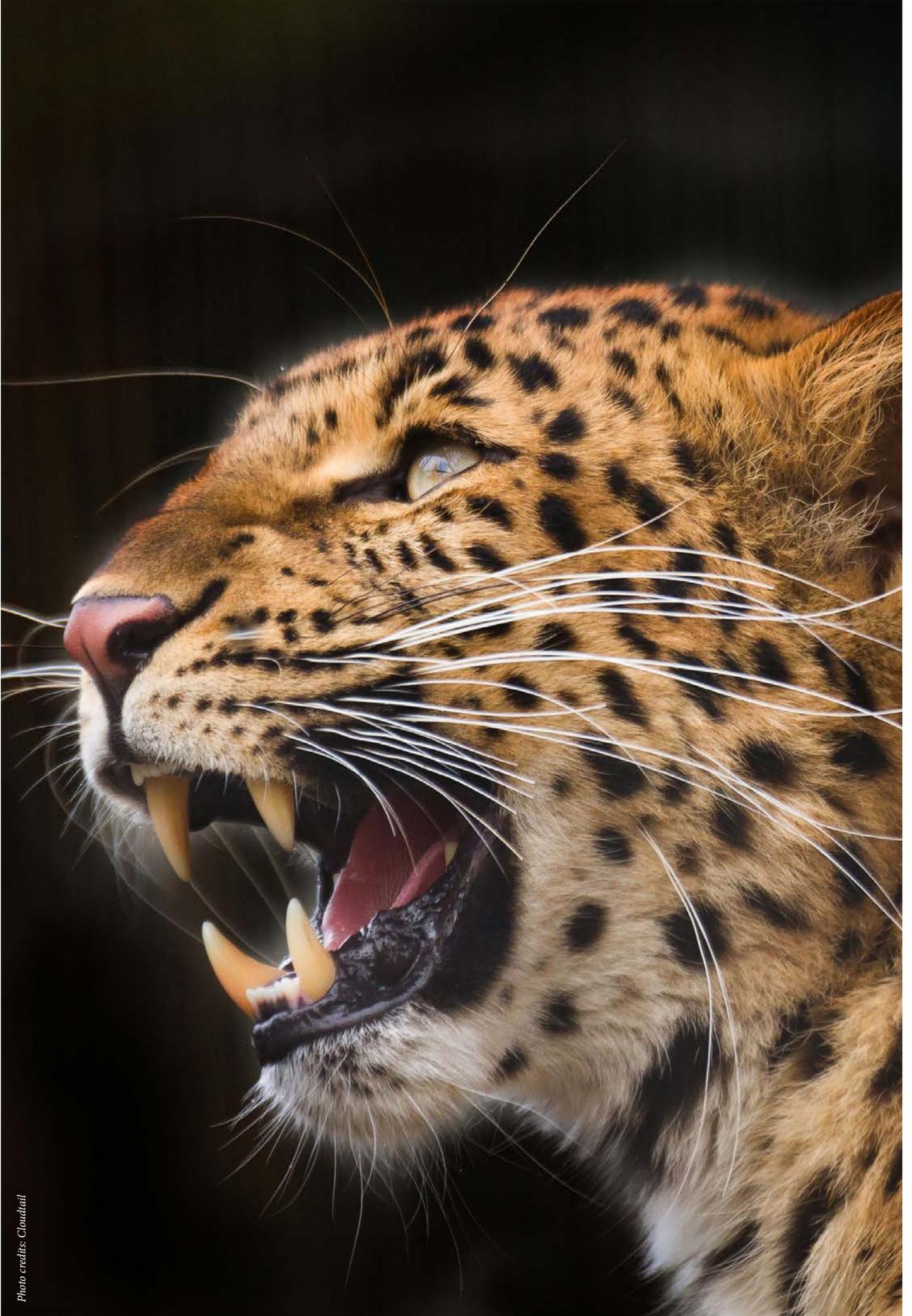


Photo credits: Cloudfail

Chapter I

GENERAL PROVISIONS

Schedules of wildlife; prohibited and regulated weapons, devices and methods; and protected areas

Wildlife crime may involve a broad range of plants, animals and protected areas. It also may involve the use of a broad range of weapons, devices and methods. Provisions of wildlife offences should be sufficiently clear and understandable to be used effectively by courts, prosecutors, and other relevant stakeholders without neglecting the complexity of the underlying issues. To achieve this balance, this Guide recommends the use of legislative schedules, which then may be referred to in specific legislative provisions. The three schedules are:

- schedules of wildlife
- schedules of prohibited and regulated weapons, devices and methods
- schedules of areas designated for protection

Legislative schedules are part and parcel of the legislative instruments to which they relate and draw their legal force through reference(s) contained in substantive provisions in the main body of the legislation. Schedules are used in legislation to provide for details that, for the purposes of usability, cannot be adequately addressed in the main body of the legislation. The appropriate legal form of these schedules is a matter for each State to determine. Depending on the legal system in question, the schedules could be included in primary legislative instruments such as statutes, or subordinate or delegated legislative instruments such as regulations. When deciding on the form of the legislative instrument for the schedules, States also should consider the applicable processes for amending that instrument. This is important because the conservation status of

wildlife species and the characteristics of wildlife crime are constantly changing. The areas in need of protection—or in need of different forms or levels of protection—change constantly and the weapons, devices and methods that criminals use to commit wildlife offences will continue to evolve. States must update their laws protecting wildlife, including the applicable schedules to keep up with these changes. A State's process for amending regulations or other subordinate legislation typically will be more streamlined than the process involved in amending legislation. Setting out the relevant schedules in regulations or other subordinate legislative instruments therefore may enable States to react more readily to developments. To the extent consistent with a State's legislative framework, this Guide also recommends that competent authorities be given a role in the process of enacting or initiating amendments to the schedules. Such powers will generally need to be delegated by the relevant legislature by legislation.

Example – Lao People's Democratic Republic: Wildlife and Aquatic Law, art 22

Classification and listing of wildlife and aquatic is to divide the animals into different categories and different species with the reference to the situation and trend of animal population such as: Endangered species, rare species, and threatened species for their habitats and reproduction.

The government considers and approves on changing the prohibition and management category lists of animals by recommendation of the Ministry of Agriculture and Forestry. For the common or general category list of animals, the Ministry of Agriculture and Forestry is also authorized to change the list.

Schedules of wildlife

Schedules of wildlife form the basis of the offences related to specific specimens of listed species. States also could employ the schedules of wildlife in other provisions, such as provisions establishing measures for the protection of certain species. The content and categorization of each State's schedules of wildlife are a matter for those States based, at least in part, on each State's evaluation of what kinds of flora and fauna are in need of legislative protection. This Guide recommends that States draw upon existing international lists of wildlife in developing their schedules of wildlife but also adapt these schedules to local values and local realities. International lists relevant to developing domestic schedules include the CITES Appendices,¹⁰ the CMS Appendices¹¹ and the IUCN Red List.¹² As these lists are amended regularly, domestic legislation could establish mechanisms to regularly update and amend domestic schedules to incorporate such amendments. This is particularly relevant in the context of CITES and CMS. States parties to these conventions could provide, for example, that any amendments made by the respective Conference of the Parties to each Convention shall be deemed to be included in the relevant domestic schedules. The relationship between the IUCN Red List and domestic legislation is different because the IUCN Red List is not a legal instrument. Rather, it is a scientific assessment of conservation concern. As such, certain listings on the IUCN Red List may not be relevant or desirable for inclusion in domestic schedules. For instance, States may see valid reasons in not including in the domestic schedules a red listed species if it was an alien invasive species in their territories. The IUCN Red List is also based on the global conservation status of species, which may differ from the conservation status of a given species in a given State. For example, States might choose to apply the strictest protection to species that are not considered to be high risk at the global level, but are endangered in the State itself.

Schedules of wildlife should include both the scientific and common names of each species. Use of scientific names ensures that the schedules precisely identify the species covered by the schedules. Including the common names of each species can help make the schedules more accessible to criminal justice practitioners and members of the public. In some cases, States may wish to include in their schedules blanket, catch-all categories of species, subject to particular exceptions where appropriate (for example, “any

species of bird, except...”). States may also elect to introduce schedules covering specimens of species where certain additional conditions are met. These could include, for example, conditions relating to gender, age, pregnancy or seasonality. Specimens only would be covered by such schedules where the relevant condition(s) individual to each species is met. In some cases, States may also wish to create schedules of captive-bred animals of certain species. Finally, States also may decide to introduce schedules of invasive species, regulating their introduction and trade as well as other forms of conduct relating to such species.

States are free to categorize schedules of wildlife as they deem fit, but could make use of existing categories, such as those used in the IUCN Red List. Those categories could include:

- A (e.g. critically endangered species): any species facing an extremely high risk of extinction in the wild
- B (e.g. endangered species): any species facing a high risk of extinction in the wild
- C (e.g. vulnerable species): any species facing an extremely high risk of endangerment in the wild
- D (e.g. protected species): any species which are of high conservation value or national importance or require regulation to ensure that the species are managed in an ecologically sustainable manner

Example – Kenya: *Wildlife Conservation and Management Act 2013* schedule 6 (excerpt)

NATIONALLY LISTED CRITICALLY ENDANGERED, VULNERABLE, NEARLY THREATENED AND PROTECTED SPECIES

(A) MAMMALS

Category and species name	Common name
Critically Endangered	
<i>Cephalophus adersi</i>	Aders' duiker
<i>Diceros bicornis</i>	Black rhinoceros
<i>Beatragus hunter</i>	Hirola
<i>Procolobus rufomitratu</i>	Eastern red colobus
<i>Cercocebus galeritus</i>	Tana crested mangabey
<i>Hippotragus equines</i>	Roan antelope
<i>Hippotragus niger</i>	Sable antelope
Endangered	
<i>Ceratotherium simunz simum</i>	White rhino
<i>Balaenoptera borealis</i>	Coalfish whale
<i>Balaenoptera musculus</i>	Blue whale
<i>Equus grevyi</i>	Grevy's zebra
<i>Lycaon pictus</i>	African wild dog
[...]	[...]
[...]	[...]

¹⁰The appendices annexed to the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), concluded in Washington, D.C. on 3 March 1973, as amended in Bonn on 22 June 1979.

¹¹The appendices annexed to the *Convention on the Conservation of Migratory Species of Wild Animals* (CMS), as amended.

¹²Maintained by the International Union for Conservation of Nature and Natural Resources (IUCN), available at: <http://www.iucnredlist.org/about/introduction>

Schedules of prohibited and regulated weapons, devices and methods

This Guide recommends that States introduce schedules of prohibited and regulated weapons, devices and methods that would be applicable to a number of the recommended offences. In this Guide, the word “methods” refers to methods of shooting, taking, hunting, capturing, killing, injuring, harvesting, gathering, collecting, cutting, chopping off or destroying specimens. This definition should not be considered exhaustive, however, and States are free to determine which methods are covered in their schedules.

As with the other schedules discussed in this Guide, the number, form and content of schedules of weapons, devices and methods are matters for each State to determine. That being said, the Guide envisions that these schedules would draw on existing international norms and be adapted to the local values and realities of the individual State. The schedules are intended to cover both (1) prohibited weapons, devices and methods (for which permits or certificates would never be allowed—by reason, for example, of their indiscriminate nature or because they are particularly inhumane) and (2) regulated weapons devices and methods (use of which may be authorized by permit or certificate under certain circumstances). The schedules are intended to be specific to wildlife legislation, but the content of these schedules also could draw upon firearms legislation, where relevant. Some of the weapons, devices or methods prohibited or regulated in a wildlife context may be legal in

other contexts. For example, night-vision equipment, certain firearms, non-proscribed chemicals and traps could be legal to use for other purposes, but a State nevertheless could decide to criminalize the use of such weapons, devices and methods to hunt wildlife. Other weapons, devices or methods to be included on schedules would not have any legitimate uses, such as certain types of leg-hold traps. States may wish to consider prohibiting the sale of such weapons and devices in relevant legislation.

The term “weapons” as used in the model provisions in this Guide is not limited to firearms but instead encompasses other tools capable of inflicting bodily harm or physical damage. Schedules of prohibited and regulated weapons, devices and methods also should address home-made weapons and devices that do not lend themselves to easy itemization. This could be achieved, for example, by describing the material features of such weapons or devices. References to poisons or poisonous materials cover substances with primary purposes other than use as poisons but which nevertheless can have poisonous effects. This should include, for example, certain fertilizers which have been known to be used to contaminate meat or waterholes. Some of the methods that States include in schedules of prohibited or regulated methods should be classified according to the species to which they relate. That is to say, methods illegal with respect to some species may be legal with respect to others.

Some legislative examples of weapons, devices and methods that States could prohibit or regulate through schedules are set out below.

Example – United Republic of Tanzania: *The Wildlife Conservation Act, Part IV, 65, Unlawful methods of hunting*

- (1) No person shall, except by and in accordance with the written authority of the Director previously sought and obtained
- (a) use for the purpose of hunting any animal
 - (i) any mechanically propelled vehicle;
 - (ii) any poison, bait, poisoned bait, poisoned weapon, stakes, net, gin, trap, set gun, pitfall, missile, explosives, ball ammunition, snare, hide, fence or enclosure;
 - (iii) a dog or any domesticated animal;
 - (iv) any fire-arm capable of firing more than one cartridge as a result of one pressure of the trigger or of reloading itself more than once without further action by the operator;
 - (v) any device capable of reducing or designed to reduce the sound made by the discharge of any firearm;
 - (vi) any artificial light or flare; or
 - (vii) any anaesthetic dart capable of immobilisation;
 - (b) for the purpose of hunting any animal cause any grass or bush fire;
 - (c) hunt any animal
 - (i) from any mechanically propelled vehicle or within two hundred metres of such vehicle, except when hunting birds in water;

(continued)

Example – United Republic of Tanzania: *The Wildlife Conservation Act, Part IV, 65, Unlawful methods of hunting*

(continued)

- (ii) (other than a hippopotamus, otter, sitagunga, water-buck or bird) within five hundred metres of any permanent water, pool, waterhole or salt-lick;
- (iii) within a kilometre of a national park, a zoological garden, the Ngorongoro Conservation Area or an aerodrome;
- (iv) during the hours of darkness.

Example – European Union Council Directive, Categories

States may wish to group weapons, devices and methods into different categories. Based on the European Union Council Directive 91/477/EEC (1991), an example for such categories could look like this:

Category I: Prohibited weapons, devices and methods

This category should include any weapons, devices and methods capable of killing, capturing or wounding indiscriminately or in a particularly inhumane manner.

Category II: Weapons, devices and methods subject to authorization

This category should include those weapons, devices and methods which are only allowed to be used when holding corresponding permits or certificates or with lawful authority, in accordance with relevant legislation.

Category III: Weapons, devices and methods subject to declaration

This category should include those weapons, devices and methods which are allowed to be used upon declaration of their utilization, in accordance with relevant legislation.

Should States wish to adapt such categories, they would need to be adapted within States' constitutional and legislative frameworks as well as according to their legal traditions.

Schedules of protected areas

A protected area is “a clearly defined geographical space, recognized, dedicated and managed through legal or other effective means, to achieve long-term conservation of nature with associated ecosystem services and cultural values”.¹³ The term “protected area” includes a broad range of areas. States may elect to introduce multiple schedules relating to different categories of protected areas. Many States already will have designated a number of categories of protected areas under domestic legislation. This Guide recommends that States adopt a participatory process and engage with relevant stakeholders in the establishment, delineation, classification and declassification of protected areas. The particular categories of protected areas are a matter for each State to determine. States may decide to make use of existing international materials such as the IUCN Protected Area Categories when developing their own categories.

The IUCN Protected Area Categories are:

- Category Ia: Strict Nature Reserve
- Category Ib: Wilderness Area
- Category II: National Park
- Category III: Natural Monument or Feature
- Category IV: Habitat/Species Management Area
- Category V: Protected Landscape/Seascape
- Category VI: Protected Area with Sustainable Use of Natural Resources

Further information on the IUCN Protected Area Categories can be found on the IUCN website and in publications by the IUCN.¹⁴ States also may consider using buffer zones around protected areas.

¹³Nigel Dudley, *Guidelines for Applying Protected Area Management Categories* (Best Practice Protected Area Guidelines Series No. 21, IUCN, 2008).

¹⁴See Nigel Dudley, *Guidelines for Applying Protected Area Management Categories* (Best Practice Protected Area Guidelines Series No. 21, IUCN, 2008); see also <https://www.iucn.org/theme/protected-areas/about/protected-area-categories>

Example – South Africa: *Environmental Impact Assessment Regulations: Listing Notice 3 of 2014, reg 2(1)*

[...]

“buffer area” means, unless specifically defined, an area extending 10 kilometres from the proclaimed boundary of a world heritage site or national park and 5 kilometres from the proclaimed boundary of a nature reserve, respectively, or that defined as such for a biosphere;

[...]

Designation of a competent authority

A successful approach to combating wildlife crime involves more than new legislation. Establishing an effective institutional framework is crucial to ensure the effective implementation of wildlife legislation. This involves the designation of the State bodies responsible for carrying out particular functions relating to wildlife. The Guide uses the term “competent authority” to refer to such State bodies. Legislation should designate the State bodies responsible for:

- creating and maintaining schedules of wildlife, protected areas, and prohibited and regulated weapons, devices and methods
- granting and monitoring the use of permits and certificates
- detecting and investigating wildlife offences

It is up to each State to designate as competent authorities the bodies most appropriate for carrying out each function. Such competent authorities could include ministries of forestry, wildlife, environment, natural resources, tourism or the interior; specialized or independent agencies designated to the management and protection of wildlife; and law enforcement agencies with general competencies. There may be instances where, for institutional reasons, it may be desirable or necessary for a particular function to be exercised by more than one competent authority. For example, the authority issuing permits for aquatic species might be different from the authority issuing permits for terrestrial species. However, it may be advisable not to grant enforcement roles to management authorities that may lack of specific law enforcement skills.

Wildlife tenure

Tenure refers to the relationship between people—whether individually, in groups, or through the State—and land, flora and fauna, whether legally or customarily

defined.¹⁵ When drafting provisions relating to the protection and management of wildlife, States must consider how their jurisdiction deals with issues of tenure, including rights to use and control wildlife, the transferability of those rights, and associated responsibilities, obligations and restraints. In some jurisdictions, wildlife may be considered *res nullius*—that is, belonging to nobody. In other systems, the State may own the wildlife or local and indigenous people may hold wildlife under community management. The legal status of wildlife also may depend on the legal status of the land or forest on or in which it is located. These matters may have a significant influence on how wildlife legislation should be drafted, including both substantive offences and procedural provisions relating to matters such as compensation for acts of wildlife crime.

Many of the substantive offences in this Guide exclude from criminal liability conduct protected by a relevant tenure right. Two types of tenure rights are relevant for the purposes of these provisions. The first is rights granted by a competent authority through a permit, certificate or other like instrument. The second is rights recognized by the law of a State without the need for a permit, certificate or other like instrument. This Guide uses the term “lawful authority” to refer to such rights. Legislators need to consider how to address tenure rights in laws and regulations establishing wildlife offences. The following sections discuss each of these forms of wildlife tenure.

Permits, certificates and other like instruments

Permits, certificates and other like instruments provide one mechanism through which rights of tenure over wildlife can be managed. Where a State has a regime for permits or certificates, a holder of such an instrument may have a right recognized by law to perform certain activities in relation to specimens of species listed in the State’s wildlife schedules (“listed species”), to enter into protected areas, or to possess or use particular regulated weapons or devices. For example, a State may use a system of permits or certificates to regulate the number of specimens that can be hunted in a given time frame or to limit the hunting of certain species during breeding season. Such a system also could be used to allow particular activities to be carried out in relation to specimens of listed species for scientific purposes. A permit system can allow a State to tailor the boundaries of lawful conduct by taking into account the State’s geographical and ecological context. Many of the offences contained in this Guide are defined to cover particular conduct by a person who does *not* hold a relevant permit or certificate or who contravenes the conditions of such an instrument. The reference to permits and

¹⁵ See Food and Agriculture Organization of the United Nations, *Land tenure and rural development* (FAO Land Tenure Studies No 3, 2002) 7.

certificates is important to avoid criminalizing legitimate uses of wildlife and it will contribute to draw the boundaries between lawful and unlawful conduct.

The close interaction between legislation establishing wildlife offences and the laws regulating wildlife tenure also highlights the importance of ensuring these laws are harmonized. The importance of a comprehensive and well-developed legal framework is hereby manifested, as in the absence of a clear regulation of permits as well as other lawful authorities, the simple introduction of wildlife offences may create imbalances leaning towards an over-criminalization of conduct related to wildlife use.

Various other terms, such as “licences”, “concessions” and “authorizations”, may be used to describe instruments that confer such rights to the instrument-holder. For simplicity, this Guide uses the term “permits and certificates” to refer to all such instruments, however described under domestic legislation. The term “permit or certificate” is included in square brackets in all offences for which model provisions are contained in this Guide to emphasize that a State must substitute this term with the appropriate language under its domestic legislation. The language chosen by each State must be tailored to the particular provision and cover all relevant permits, certificates, and other like instruments. Different permit and certificate regimes within one State may use different language to describe these instruments. For example, the instrument allowing a person to remove a particular plant specimen in a given country may be called a licence, but the instrument allowing a person to carry a particular weapon may be called a permit. Other common terms include “authorization” and “concession”. These differences in terminology need to be reflected in the relevant wildlife provisions making reference to these instruments. This Guide encourages States to use consistent terminology to describe these instruments across their various laws.

Rights conferred by permits or certificates generally will be subject to particular conditions. These conditions may be specific to the individual permit or certificate granted or may be generally applicable to all permits or certificates of a particular class. For example, common conditions for a permit to hunt could relate to the identity of the permit-holder, the number and sex of the hunted specimens, the period of validity, the area and season to which the permit applies, and the information to be provided to the relevant authorities about activities carried out under the permit. There may also be conditions that a permit-holder mark the relevant specimen(s) subject to the permit in some way—for example through an indelible mark, a tag or a microchip—and to reference that mark in documentation provided to the competent authority so that the permit cannot be used for another specimen. It would be an offence for a permit-holder to contravene any of these conditions.

The scope of permits and certificates and the circumstances under which they will be granted is a policy

decision for each State to make, preferably in consultation with all relevant stakeholders. To be clear, this Guide does not mandate that States establish permit or certificate regimes in respect of all activities covered by this Guide. States may decide to prohibit outright certain activities, weapons, devices and methods. For example, States may decide that permits or certificates for particular weapons, devices and methods that cause indiscriminate death or destruction should not be available. In other cases, States may elect to allow for permits or certificates to be granted in particular circumstances but limit their availability. For instance, in cases where particular species need a high level of protection, a State could issue only a limited number of hunting permits in a given timespan. States also could decide to introduce a presumption that permits and certificates for hunting and harvesting of certain species of wildlife will not be granted.

Finally, States may also wish to consider introducing provisions regulating permits or certificates relating to keeping and breeding species in captivity. For instance, such a regime could be useful for species prone to mortality or difficult to breed, species that are rare in the territory of the State in question, species listed in Appendix I of CITES, or alien invasive species.

Lawful authority

Tenure rights over wildlife also may be exercised through authority conferred or recognized by law. Lawful authority is distinguished from permits and certificates because its exercise does not depend on a competent authority granting a relevant permit or certificate. The circumstances in which a person should be able to exercise lawful authority in respect of wildlife is a matter for each State to determine in accordance with its legal tradition and culture. Lawful authority should, however, be granted to law enforcement and wildlife officers carrying out activities for the purposes of investigating and prosecuting wildlife offences. States also should ensure that wildlife legislation introduced under this Guide takes into consideration the tenure rights of indigenous populations over wildlife. States preferably will include such groups in the drafting of wildlife legislation that potentially impacts their tenure rights. When drafting such legal frameworks regulating lawful authorities on the sustainable use of wildlife, it is important to consider the hunting practices of indigenous people and local communities.

Jurisdiction

States should enact provisions establishing comprehensive jurisdiction for the prosecution and punishment of wildlife crime. Jurisdiction refers to the power of a State, through its prosecutors, courts, and other institutions, to exercise legal authority over a territory, person or thing. Establishing comprehensive jurisdiction is particularly important in the context of wildlife crime because wildlife crime can occur across State borders.

Offenders also may move between States and exploit jurisdictional gaps in States' laws to avoid apprehension and prosecution. It therefore is important to articulate clearly the jurisdictional bases upon which national courts can determine proceedings for wildlife offences. Most obviously, States may exercise jurisdiction over acts committed within their territories, including their territorial waters (the territoriality principle). International law also recognizes the right of States to exercise extraterritorial jurisdiction in a number of circumstances. While the precise scope of these circumstances remains unsettled,¹⁶ the international community generally has recognized the jurisdiction of a State over its nationals, even when outside its territory (the active personality principle); the jurisdiction of a State over acts injurious to its nationals (the passive personality principle); and the jurisdiction of a State over acts committed outside the State but intended to have a substantial effect within the territory of the State (the objective territorial principle).¹⁷

Model provision 1: Jurisdiction

(1) [National Courts] shall have jurisdiction to determine proceedings for offences to which this [Act/Law/Chapter etc.] applies when the offence is committed:

(a) [wholly or partly] within the territory of [insert name of State]; or

(b) [wholly or partly] on board a vessel that is flying the flag of [insert name of State] or on an aircraft that is registered under the laws of [insert name of State] or an aircraft that is registered under the laws of [insert name of State] at the time that the offence was committed; or

(c) by a [insert name of State] national present in [insert name of State] territory whose extradition is refused solely on grounds of nationality.

(2) [National Courts] shall have jurisdiction to determine proceedings for offences committed outside the territory of [insert name of State] to which this [Act/Law/Chapter etc.] applies when:

(a) the [victim] is a national [or permanent resident] [or habitual resident] of [insert name of State];

(b) the offence is committed by a national [or permanent resident] [or habitual resident] of [insert name of State];

(c) the offence is committed with a view to the commission of a serious crime within the territory of [insert name of State]; or

(d) such jurisdiction is based on an international agreement binding on [insert name of State].

As wildlife crime can occur across borders, the Guide proposes that States enact provisions establishing jurisdiction over wildlife offences both on the basis of the territoriality principle as well as of recognized principles of extraterritorial jurisdiction. Model provision 1 below provides an example of how a State could establish these jurisdictional bases.

Paragraph (1) of model provision 1 sets out the territorial jurisdiction for the judicial determination of wildlife offences. Paragraph (1)(a) and (b) reflect the obligations of States parties under Article 15(1) of the Organized Crime Convention. Paragraph (1)(c) reflects the “extradite or prosecute” (*aut dedere aut judicare*)” principle contained in Article 15(3) of the Organized Crime Convention in cases where extradition of nationals is refused. The principle calls on States, in cases of concurring jurisdiction over a crime with other States, to either extradite or to prosecute the alleged offender.¹⁸ Paragraph (2) sets out four bases for the exercise of extraterritorial jurisdiction to judicially determine wildlife offences. Paragraph (2)(a) establishes jurisdiction over cases where the victim of an offence is a national of the State. Paragraph (2)(a) reflects the passive personality principle and Article 15(2)(a) of the Organized Crime Convention. States may also choose to extend the jurisdictional ground in paragraph (2)(a) to permanent residents or habitual residents of the State.¹⁹ Paragraph (2)(b) establishes jurisdiction over offences committed by a national (or permanent or habitual resident) of the State, reflecting the active personality principle and Article 15(2)(b) of the Organized Crime Convention. Paragraph (2)(c) provides for jurisdiction over offences committed outside the territory of the State but with a view to the commission of a serious crime within the territory of the State—that is, the objective territorial principle, as reflected in Article 15(2)(c) of the Organized Crime Convention.²⁰

Subparagraph (d) provides a basis for the judicial determination of cases for which jurisdiction has been conferred by an international agreement binding on the State. Such an agreement could be a binding resolution by the Security Council of the United Nations.

¹⁶ Cedric Ryngaert, *Jurisdiction in International Law*, 2nd ed. (Oxford, Oxford University Press, 2015) pp. 101, 110–113.

¹⁷ See Organized Crime Convention art 15(2); *United Nations Convention against Corruption* art 42(2); see also David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford, Oxford University Press, 2007) 164.

¹⁸ See also Organized Crime Convention, art 16(10); UNODC, *Model Legislative Provisions against Organized Crime* (2012), pp. 26–27.

¹⁹ See also UNODC, *Model Legislative Provisions against Organized Crime* (2012), p. 28.

²⁰ See also UNODC, *Model Legislative Provisions against Organized Crime* (2012), pp. 28–29.

Liability of legal persons

Wildlife crime can be committed by organizations with legal personality. Legal personality is a characteristic of those organizations that have some—but not necessarily all—of the rights and obligations of a natural person in a particular jurisdiction. Corporations are typically the classic example of an organization with legal personality, but legal persons also can include a range of other entities, depending on the law of a given State. Sophisticated organized criminal groups often use complex corporate structures to conceal the identities of human actors in wildlife crime, including both organizers and clients.

Effectively combating wildlife crime requires that legal persons be held responsible for their culpable actions and omissions. The Organized Crime Convention also requires States to establish a legal framework addressing the liability of legal persons. Article 10 requires that States parties adopt such measures as necessary to establish the liability of legal persons for participation in serious crimes involving an organized criminal group. The legal nature of their liability is left to each State to decide; Article 10(2) specifies that liability for legal persons may be criminal, civil or administrative. Two or indeed all of these forms of liability for legal persons may also exist under the one legal system.

Criminal liability is the most serious form of liability a State can impose on legal persons. It is generally associated with trials in criminal courts, high levels of potential sanctions and high levels of procedural protection for defendants. Criminal liability of a legal entity has the potential to cause costly reputational damage to the entity and may also deter legal persons from engaging in unlawful conduct.²¹

Civil and administrative liability for legal persons are options available for legal systems that do not recognize the capacity of legal persons to commit criminal offences. Each of these terms has a different meaning, but in some States they are used interchangeably. Civil liability refers to civil penalties imposed by courts or similar bodies. Administrative liability is generally associated with liability imposed by a regulator, but in some legal systems judicial bodies may impose administrative penalties. Like civil liability, administrative liability does not result in a criminal conviction. Civil and administrative liability are both generally associated with lower standards of proof than criminal liability.

Where criminal, civil or administrative liability for legal persons involved in wildlife crime is not already provided for under domestic law, States should include specific provisions establishing such liability. The choice whether to establish criminal, civil or administrative

liability should be made by each State, taking into account the legal tradition and culture of the country and whether the legal system recognizes the capacity for legal persons to commit criminal offences. Model provision 2 below provides a basic example of a specific provision establishing liability for legal persons in respect of wildlife offences covered by this Guide. Whatever form of liability a State selects, the State should ensure that the penalties and sanctions imposed provide a sufficient deterrent. Relevant penalties for legal persons are discussed in chapter II section D, below.

States should also consider the extent to which domestic legislation, including provisions relating to liability of legal persons, covers public bodies, if at all.²² These bodies could include government agencies, State-owned corporations and local authorities. Liability of legal persons shall be established without prejudice to the criminal or other liability of natural persons involved in the organization who also have committed offences.²³

Model provision 2: Liability of legal persons

Legal persons [other than the State] may be subject to [criminal/civil/administrative] liability for offences against this [Act/Law/Chapter etc.]. The liability of any legal person does not preclude that of a natural person.

[Option 1]

A legal person is guilty of an offence committed by a representative of the legal person acting within the scope of their authority and at least in part for the benefit of the legal person.

[Option 2]

For the purpose of imposing liability on a legal person, any conduct and associated state of mind of a representative is deemed to be that of the legal person where the conduct is within the authority of the representative and, at least in part, for the benefit of the legal person.

A representative means [a director, partner, employee, member, agent or contractor].

States also should consider whether a legal person's due diligence may serve as a defence or mitigating factor in a prosecution. Due diligence refers to the steps that a legal person takes to ensure compliance with a particular law. States have taken different approaches to the impact of a legal person's due diligence on its treatment in an enforcement action. In some States, proof of due diligence provides an absolute defence to the liability

²¹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2016)

²² UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2016), available at: <https://www.unodc.org/cld/v3/sherloc/legislative-guide/index.html>

²³ Organized Crime Convention, art 10(3).

for legal persons. In other States, due diligence may be a factor relevant to the exercise of prosecutorial discretion in bringing a case against a legal person or may provide a mitigating factor in sentencing. The party which bears the burden of proof of due diligence (or lack thereof) may also differ between States.

What constitutes due diligence will differ from State to State and from case to case. In general, the exercise of due diligence will involve a system of risk management to prevent and detect misconduct. An adequate risk management system generally will include systems for accessing information, assessing risk based on that information, and mitigating risk based on that assessment.²⁴ The mere existence of policies, procedures and systems to prevent and detect misconduct generally will not, however, be sufficient to absolve a legal person from liability.²⁵ Whether a legal person has exercised due diligence always will depend on the facts and circumstances of the individual case.

Glossary of terms

This glossary contains definitions of several terms used in the model provisions of this Guide. Many of the terms below are derived from the Organized Crime Convention, CITES, CITES Model Law, or model laws developed by UNODC.

Legislative drafters should ensure that the terminology used by wildlife legislation is clear, precise and consistently used. The drafting of wildlife laws should be undertaken in full cognizance of the existing domestic legal framework to avoid contradictions and gaps and to ensure, as far as possible, consistency in the use of terms between different laws.

Terms used in this Guide shall have the meaning assigned to them, unless the context otherwise requires. Words or expressions derived from defined terms should be considered to have corresponding meanings unless the context indicates otherwise. In drafting wildlife legislation, States should adapt the names and meanings of all relevant terms, bearing in mind the intended scope of application of their provisions.

“derivative” means any part, tissue, extract or biochemical compound of or from an animal, plant or other organism, whether fresh, preserved or processed;

“introducing from the sea” means transporting into the country specimens of any species which were taken from the marine environment not under the

jurisdiction of any State, including the airspace above the sea and the seabed and subsoil beneath the sea;²⁶

“organized criminal group” means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more offences in order to obtain, directly or indirectly, a financial or other material benefit;²⁷

“person” means a natural or legal person;

“proceeds of crime” means any property derived from or obtained, directly or indirectly, through the commission of an offence, whether such offence was committed within or outside the territory of the State;²⁸

“re-exporting” means exporting a specimen that has previously been imported;²⁹

“serious crime” means an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;³⁰

“species” includes:

- (a) any subspecies; and
- (b) any geographically separate population of the species or any subspecies;³¹

“specimen” [*means/includes, but is not limited to*]:

- (a) any living or dead animal, plant or other organism;
- (b) a seed, egg, gamete or propagule or part of an animal, plant or other organism capable of propagation or reproduction or in any way transferring genetic traits;
- (c) any derivative of any animal, plant or other organism; or
- (d) any goods which:
 - i) contain a derivative of an animal, plant or other organism; or
 - ii) from an accompanying document, from the packaging or mark or label, or from any other indications, appear to be or to contain a derivative of an animal, plant or other organism.

“trafficking”, in relation to a specimen, means illegal acts by a person, whether for the benefit of themselves or another person, for purposes of importing, exporting, re-exporting, introducing from the sea, dispatching, dispatching in transit, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, storing or transporting.

²⁴ See generally *Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market*, preamble, arts 4 and 6; United Kingdom, Ministry of Justice, *Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing* (section 9 of the Bribery Act 2010) (2011) pp. 27–28.

²⁵ United States, Department of Justice, *U.S. Attorneys’ Manual*, 9-28.800.

²⁶ CITES ML, p. 7.

²⁷ Organized Crime Convention, art. 2.

²⁸ Adapted from Organized Crime Convention art 2.

²⁹ CITES, art I(d).

³⁰ Organized Crime Convention, art 2.

³¹ See CITES art I(a).







Chapter II

OFFENCES

Elements of criminal offences

In general, criminal offences have two components: the physical elements (also known as the *actus reus*) and the mental elements (also known as the *mens rea*). These two types of elements may be referred to by other names in other jurisdictions. Most criminal offences require proof of both physical and mental elements to establish a conviction.

The physical elements of an offence are the acts that the accused person actually did. They may include, depending on the legal system, conduct (acts or omissions), results of conduct, and special circumstances relating to the conduct. The mental elements of an offence relate to the accused's state of mind at the time of the offence. For a given offence, proof of a mental element generally is required for each physical element of the offence. While mental elements require proof of the defendant's internal state of mind, this mental state may be inferred from objective factual circumstances.

The types of mental states recognized by the criminal laws of the various States and the terms used to describe these mental states vary significantly between jurisdictions. These differences in terminology and underlying legal principles make it difficult to make generalizations about mental elements across a spectrum of legal traditions and legal systems. It can, however, be said that mental elements generally differ according to the degree of intention or knowledge of facts, probabilities and risks on the part of the defendant or, in some circumstances, the knowledge that reasonably can be imputed to him or her. In some legal systems, some offences can be established without proof of any mental state on the part of the defendant. These offences are referred to as offences of strict or absolute liability.

Unless otherwise specified, the Guide contemplates that proof of a mental element or mental elements equivalent to intention or, in some jurisdictions, knowledge shall be required for a conviction of the offences contained in this Guide. As the wording of mental elements may vary from country to country in accordance with their legal traditions, this Guide does not adopt a position on the wording States should use to establish this requirement of proof of the requisite mental state. This is reflected in the wording of the model legislative provisions, where the phrase "with the requisite mental state" is included in square brackets to emphasize this choice to legislative drafters.

States may consider adopting stricter measures and also may allow proof of less strict mental elements to suffice for establishing a conviction for particular wildlife crimes.³² Those less strict mental elements could include recklessness and negligence. While lowering the requisite mental elements for a crime facilitates obtaining criminal convictions, States should exercise great caution in lowering the threshold because of the prejudice to the rights of defendants it may entail. Moreover, in some legal systems the removal of the requisite mental element to create offences of strict liability is impermissible except in limited circumstances. The rights of defendants must always receive due consideration in the process of legal drafting, including in determining the requisite mental elements for offences covered by this Guide. Some States may wish to reserve lesser mental elements for civil and administrative offences.

³² See also Organized Crime Convention art 34(3).

Offences covered by this Guide

Wildlife crime often involves a supply chain which runs from those involved in capturing, killing, or removing wildlife to the ultimate owners and consumers of the illicit wildlife products. Along this supply chain are a variety of actors engaging in activities harmful to wildlife. The term “wildlife crime” can include a wide array of activities, from illegal hunting and logging, to illegally acquiring, processing, trafficking, possessing and using wildlife. The broad range of activities involved in wildlife crime necessitates a broad criminal justice response.

Section A of this chapter sets out the substantive offences relating to wildlife crime covered by this Guide. These include:

- offences related to specimens of listed species
- offences related to prohibited and regulated weapons, devices and methods
- offences related to protected areas
- offences related to permits and certificates
- illegal possession
- trafficking in wildlife
- electronic or distance selling

Wildlife crime may also be related closely to a number of other serious criminal offences, such as participation in an organized criminal group, obstruction of justice, money-laundering, and corruption. A comprehensive examination of all possible offences related to wildlife crime is beyond the scope of this Guide.³³ Nevertheless, legislation establishing wildlife offences also should be crafted to criminalize certain related criminal activities. Section B of this chapter contains legislative guidance on several such offences, including participation in an organized criminal group, obstruction of justice, and money-laundering. Section B also contains guidance on establishing forms of secondary liability for the offences covered by this Guide.

The same criminal act may entail the breach of more than one of the criminal offences covered by this Guide. For instance, hunting using a prohibited method in a protected area could entail the breach of several provisions. This is deliberate. To help ensure that wildlife crime activities are punished when appropriate, the offences in this Guide seek to criminalize wildlife crime from a variety of angles. In taking such an approach, some overlap between offences is inevitable. How States deal with prosecuting offenders in the case of multiple partially overlapping offences is a matter for each State in accordance with its legal tradition. In some States, multiple partially overlapping

charges are possible on a criminal indictment. In other States, this would not be possible.

The model provisions contained in this chapter do not stipulate the applicable penalty for each offence. Determination of the appropriate penalties has been left to each State, in accordance with its legal system and culture. For most of the offences contained in this Guide, criminal liability will be appropriate. In certain cases, States may wish to also or instead provide for civil or administrative liability. How penalties should be structured within a given law is left to the individual State. Some States may elect to include the penalty applicable to each offence within the provision establishing the offence. Other States may decide to set out the applicable penalties for each offence within a special penalties provision, separate from the offences themselves. Section D of this chapter contains some general guidance on issues relevant to penalties and sentencing for the offences covered by this Guide.

Section A Substantive offences

Subsection 1 Regulated and prohibited activities

Offences related to specimens of listed species

The first category of offences relates to specimens of listed species—that is, specimens of species included on the State’s schedules of wildlife.³⁴ Offences—be they criminal or administrative in nature—against specimens of listed species inevitably will vary in severity according to, among other factors, the species in question and the nature of the conduct against it. Consistent with their legislative system, States should ensure that the penalties given for offences related to specimens of listed species are proportional to the facts and circumstances of each case.

States could introduce different offences for each schedule (or class of schedule, where relevant) or different types of conduct with varying penalties according to the seriousness of the offending against each schedule. For example, killing an animal listed in the schedule of the most protected species could result in a more serious penalty than killing an animal listed in other schedules, such as schedules of vulnerable species. States also could achieve this by legislating a single offence but drafting a separate penalty provision for different types of acts. Alternatively, discretion in penalties could be

³³ For further information on the criminalization of corruption, see the relevant UN publications at <https://www.unodc.org/unodc/en/corruption/publications.html> and https://www.unodc.org/documents/treaties/UNCAC/Publications/LegislativeGuide/UNCAC_Legislative_Guide_E.pdf.

³⁴ See chapter I above.

left to the judiciary, in accordance with a State's legal traditions. In certain cases, the identification and determination of species involved in wildlife offending can be a challenge, as it requires forensic capabilities, including expert opinion. States should consider how to deal with this challenge in their jurisdiction.

Model provision 3: Offences related to specimens of listed species

Any person who [*with the requisite mental state*] shoots, takes, hunts, captures, kills, injures, harvests, gathers, collects, cuts, chops off, uproots or destroys a specimen of a species included in [*insert relevant schedule(s)*]:

(a) without lawful authority or a [*insert relevant terminology for permits, certificates etc.*] granted by [*insert competent authority*]; or

(a) contravening the conditions of said [*insert relevant terminology for permits, certificates etc.*]; commits an offence.

The definition of “specimen” used in this Guide, set out in the glossary of terms above, is cast broadly to include derivatives and products of wildlife. By using the word “specimen”, model provision 3 thus extends to offences involving derivatives and products. States that employ a narrower definition of “specimen” nevertheless should

ensure that products and derivatives are covered by the applicable legislation.

Model provision 3 contains exclusions from criminal liability for conduct undertaken with lawful authority or within the conditions of a permit or certificate granted by the competent authority. The scope of each of these exclusions is a matter for each State to decide through prescribing the circumstances of lawful authority and determining the availability of permits and certificates. For example, some States may decide to introduce a complete ban on hunting of specimens of listed species. Other States may decide to permit sustainable use hunting of certain listed species through granting permits or certificates in certain circumstances.

Model provision 3 refers to a number of activities (shoots, takes, hunts, captures, kills, injures, harvests, gathers, collects, cuts, chops off, uproots or destroys) which are repeated in the offences relating to prohibited and regulated methods, weapons and devices (model provision 4, below) and the offences relating to protected areas (model provision 6, below). An alternative approach to drafting these offences could be for legislators to define each of these activities through terms such as “restricted activity” or “prohibited activity” and then incorporate these terms into the offences introduced pursuant to this Guide. An example of such an approach is included below.

Example – South Africa: *National Environmental Management: Biodiversity Act of 2004, s 1(1)*

[...]

“restricted activity”—

- (a) in relation to a specimen of a listed threatened or protected species, means—
- (i) hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen;
 - (ii) gathering, collecting or plucking any specimen of a listed threatened or protected species;
 - (iii) picking parts of, or cutting, chopping off, uprooting, damaging or destroying, any specimen of a listed threatened or protected species;
 - (iv) importing into the Republic, including introducing from the sea, any specimen of a listed threatened or protected species;
 - (v) exporting from the Republic, including re-exporting from the Republic, any specimen of a listed threatened or protected species;
 - (vi) having in possession or exercising physical control over any specimen of a listed threatened or protected species;
 - (vii) growing, breeding or in any other way propagating any specimen of a listed threatened or protected species, or causing it to multiply;
 - (viii) conveying, moving or otherwise translocating any specimen of a listed threatened or protected species;
 - (ix) selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species; or
 - (x) any other prescribed activity which involves a specimen of a listed threatened or protected species; [...]

Offences related to prohibited and regulated weapons, devices and methods

Wildlife crime often involves the use of dangerous and harmful weapons, devices and methods. This Guide recommends that States introduce provisions that criminalize the use of particular weapons, devices and methods to capture or harvest wildlife. These weapons, devices and methods would be listed in schedules created and maintained by each State.

Model provision 4 below establishes an offence of using a prohibited or regulated weapon, device or method to take, hunt, capture, kill, harvest, gather, collect, cut, chop off, uproot or destroy any specimen without lawful authority or a permit or certificate granted by the competent authority, or exceeding the conditions of such a permit or certificate. Unlike model provision 3, model provision 4 is not limited to specimens of listed species. As with other types of permits and certificates discussed in this Guide, the circumstances in which a permit or certificate for use of a regulated weapon, device or method may be granted are a matter for each State to determine. No permits or certificates would be available for prohibited weapons, devices and methods, so the exemption in model provision 4 relating to holders of valid permits or certificates could never arise in such cases. While model provision 4 combines offences relating to both prohibited and regulated weapons, devices and methods for simplicity's sake, States also could elect to separate such offences.

Model provision 4: Offences related to weapons, devices and methods

Any person who [*with the requisite mental state*] shoots, takes, hunts, captures, kills, injures, harvests, gathers, collects, cuts, chops off, uproots or destroys any specimen by using any weapon, device or method listed in [*insert relevant schedules of prohibited and regulated weapons, devices and methods*]:

(a) without lawful authority or a [*insert relevant terminology for permits, certificates etc.*] granted by [*insert competent authority*]; or

(b) contravening the conditions of said [*insert relevant terminology for permits, certificates etc.*];

commits an offence.

States may elect to introduce several offences of the kind set out in model provision 4, each involving different types of weapons, devices or methods and having different maximum penalties as appropriate. A State also could establish separate offences to reflect the danger posed to wildlife or the environment by particular weapons, devices or methods. States also could enact

different maximum penalties for offences relating to different types of weapons, devices and methods by creating a single offence but drafting a separate penalty provision containing different levels of penalties for the different types. Again, States could use multiple schedules to categorize weapons, devices and methods in these various ways.

Model provision 4 relates only to the *use* of particular weapons, devices and methods in hunting, capturing or harvesting wildlife specimens. States also may elect to introduce additional offences criminalizing the possession or trade of certain weapons or devices, either without a permit or certificate or in all circumstances. Such offences would be appropriate in situations in which weapons and devices have no legitimate uses. These offences could cover, for example, gin traps and other types of leg-hold traps.

States may elect to prohibit the use of particular weapons, devices and methods and the possession of particular weapons or devices in designated protected areas, in accordance with particular schedules. The scope of weapons, devices and methods prohibited for use within a protected area may be broader than the scope of weapons, devices and methods prohibited for use in non-protected areas, and the applicable penalties for such offences may be higher. Offences of possession of a prohibited or regulated weapon or device in a protected area are discussed further below. Model provision 5 contains an example of such an offence.

States also may decide to introduce additional offences prohibiting the use of particular weapons, devices and methods against specimens of particular species. These offences would cover weapons, devices and methods the use of which is not illegal in and of itself, but which would become illegal when used against specimens of particular species taking into account the cruelty of such use against such species.

In introducing legislative provisions prohibiting the use or possession of certain weapons associated with wildlife crime, States should ensure that the legislation is harmonized with other laws regulating the use of firearms and other weapons. The two types of legislation should be complementary. Wildlife provisions and those provisions relating to general firearms and weapons legislation may be contained in a different legislative instrument. In such cases, legislative drafters should consider including cross references to firearms and weapons legislation in provisions regulating the use of certain weapons in the context of wildlife crime, and vice versa, to better clarify the relationship between the different laws. Such cross-referencing will assist not only in establishing the scope of the respective criminal offences but also in setting out the respective responsibilities of the competent authority responsible for the investigation and/or prosecution of offences under each law.

Example – Mozambique: Law No. 5/2017: Alteration and Republication of Law No. 16/2014, art 61

1. Any person who carries out illegal activity in a conservation area using prohibited weapons as defined in the Penal Code and in specific legislation shall be sentenced to long-term imprisonment of twelve to sixteen years and a corresponding fine, if a more serious penalty does not apply.
2. Any person who engages in illegal activity using mechanical or any other kind of trap is sentenced to the same penalty as the one from the preceding paragraph.

Example – South Africa: Threatened or Protected Species Regulations, reg 71

- (1) A person may not hunt a specimen of a listed threatened or protected species—
 - (a) in a controlled environment;
 - (b) while such specimen is under the influence of any tranquilizing, narcotic, immobilizing or similar agent;
 - (c) by making use of a gin trap, pit fall, cage, enclosure, snare or any other method or device wherein or whereby such specimen is intended to be captured before it is killed;
 - (d) by means of poison;
 - (e) by means of darting;
 - (f) by means of the following fire arms—
 - (i) an air gun;
 - (ii) a fire arm discharging a rim firing cartridge of .22 of an inch or smaller caliber, except for a coup-de-grace;
 - (iii) a fire arm which, after it has been discharged, automatically reloads and fires when the trigger thereof is pulled or is held in a discharged position; or
 - (iv) a shot gun, except for the hunting of birds;
 - (g) by means of bait, sound, smell or any other luring method, except for the hunting by means of dead bait, of—
 - (i) leopard and hyena; or
 - (ii) lion, in which case such lion—
 - aa) may be hunted by means of dead bait on an extensive wildlife system with a minimum size of 15 000 ha only; and
 - bb) may not have been bred in captivity;
 - (h) by means of dogs, except to
 - (i) track a wounded animal; or
 - (ii) flush, point and retrieve a specimen;
 - (i) by means of flood or spot lights, except for the hunting of leopard, hyena or serval;
 - (j) by means of a motorized vehicle, except
 - (i) for the tracking of such specimen over long ranges; or
 - (ii) to allow a physically disabled or elderly person to hunt; or
 - (k) by means of an aircraft, except for the tracking of such specimen over long ranges.
- (2) In addition to the prohibitions contemplated in subregulation (1), a person may not hunt a specimen of a listed large predator but excluding a lion (*Panthera leo*), white rhinoceros (*Ceratotherium simum simum*), black rhinoceros (*Diceros bicornis*), Nile crocodile (*Crocodylus niloticus*) or African elephant (*Loxodonta africana*) by means of or by the use of a bow and arrow.
- (3) In addition to the prohibitions contemplated in subregulation (1) and (2), a person may not hunt a specimen of a listed large predator that has been released in an area adjacent to a captive holding facility for listed large predators.

Offences related to protected areas

This Guide recommends that States introduce special offences for particular conduct within designated protected areas. To facilitate this, States should use schedules setting out different categories of protected areas. Further guidance on the types of categories of protected areas that could potentially be developed by States is outlined in chapter I, above.

Model provision 5 below establishes offences for three categories of conduct within protected areas. Paragraph (1) establishes an offence relating to unlawful entry into a protected area. Paragraph (2) establishes an offence for possession of a prohibited or regulated weapon or device. The offence in paragraph (3) establishes liability for carrying out certain restricted activities in a protected area. These activities are the same as those covered by model provision 3. As with the other offences contained in this Guide, it is up to each State to determine the circumstances under which conduct shall be within the scope of lawful authority and the circumstances under which a permit or certificate may be available to applicants.

Offences of unlawfully entering a protected area, such as the offence contained in paragraph (1) of model provision 5, in some circumstances could be linked to particular time periods. For example, entry into certain areas could be unlawful during published nesting or

breeding periods but lawful at other times. Regarding this offence of entry, States also may consider relying upon non-criminal responses in minor cases. A State may decide, for example that the mere access to a protected area could be sanctioned effectively through fines or other administrative measures rather than criminal liability. This would not only ensure that offenders do not receive excessive, disproportionate sentences but would also allow for more streamlined procedures for issuing penalties and more effective deterrents. The type of liability and the types of penalties desirable for a particular offence will also depend on the level of protection a State wants to assign to the areas in question. In general, criminal liability should be imposed only when conduct involves a higher level of harm.

Paragraph (2) of model provision 5 covers possession of two broad categories of weapons and devices in protected areas: weapons or devices possessed in contravention of the State's weapons and firearms legislation, and weapons or devices listed in schedules introduced under the State's wildlife legislation. States should ensure that provisions in wildlife legislation regulating the possession of particular weapons or devices in particular geographical areas are harmonized with the more generally applicable firearms legislation and ensure that the relationship between the two types of legislation is clarified.

Model provision 5: Offences related to protected areas

(1) Any person who [*with the requisite mental state*], enters into a [*insert relevant terminology for protected areas*]:

- (a) without lawful authority or a [*insert relevant terminology for permits, certificates etc.*] granted by [*insert competent authority*]; or
- (b) contravening the conditions of said [*insert relevant terminology for permits, certificates etc.*];

commits an offence.

(2) Any person who [*with the requisite mental state*] possesses a weapon or device listed in [*insert relevant schedules of prohibited and regulated weapons and devices*] in a [*insert relevant terminology for protected areas*]:

- (a) in contravention of [*insert relevant weapons or firearms legislation*]
- (b) without lawful authority or a [*insert relevant terminology for permits, certificates etc.*] granted by [*insert competent authority*]; or
- (c) contravening the conditions of said [*insert relevant terminology for permits, certificates etc.*];

commits an offence.

(3) Any person who [*with the requisite mental state*] shoots, takes, hunts, captures, kills, injures, harvests, gathers, collects, cuts, chops off, uproots or destroys a specimen in or translocates a specimen from a [*insert relevant terminology for protected areas*]:

- (a) without lawful authority or a [*insert relevant terminology for permits, certificates etc.*] granted by [*insert competent authority*]; or
- (b) contravening the conditions of said [*insert relevant terminology for permits, certificates etc.*];

commits an offence.

Like the offence in model provision 4, the conduct governed by paragraph (3) of model provision 5 is not limited to specimens of listed species. In this respect, it is broader than the offence in model provision 3. The conduct prohibited by paragraph (3) of model provision 5 would cover various forms of destruction of habitat. Besides direct forms of destruction, even indirect forms such as hoeing or planting a species may injure or destroy an ecosystem and would therefore fall under the scope of paragraph (3) of model provision 5. States may also elect to include additional language expressly outlawing activities such as cultivation of land in a protected area or introduce more general destruction of habitat offences. States may also wish to introduce specific offences for introducing animals or plants not indigenous to a protected area. Paragraph (3) also covers the conduct of translocating wildlife specimens from protected areas. To the extent that this provision applies, translocation can include the act of chasing, herding or moving an animal or a group of animals from one designated area to another. Typically, poachers try to circumvent hunting restrictions by translocating animals outside of protected areas to subsequently hunt them. In addition, acts to chase, herd or move animals to a hunting reserve for the purposes of legalizing an otherwise unlawful act of hunting may also require the attention of legislators.

The range of protected areas covered under each of the three types of offences in model provision 5 likely will vary. The range of protected areas covered by the offence of illegal entry in paragraph (1) generally will be narrower than the range of protected areas covered under the offences described in paragraphs (2) and (3). For example, in some protected areas such as national parks, entry will be lawful, but undertaking certain prohibited activities in those areas would attract liability. While each of the offences in model provision 5 were drafted with government-owned protected areas in mind, States are free to decide to what extent the offences in model provision 5 should extend to privately owned or community-owned protected areas.

**Example – United Republic of Tanzania:
Wildlife Conservation Act, 2009 s 15**

(1) Any person other than a person travelling through the reserve along a highway or designated waterway shall not enter a game reserve except by and in accordance with the written authority of the Director previously sought and obtained.

(2) Any person who contravenes any provision of this section or any condition attached to any authority granted under subsection (1), commits an offence and on conviction shall be liable to a fine of not less than one hundred thousand shillings, but not exceeding five hundred thousand shillings or to imprisonment for a term of not less than one year but not exceeding three years or to both.

States may elect to introduce several such offences, with each offence covering a different category of protected area, and potentially carrying a different maximum penalty. As an alternative, States also could create a single offence but include a separate penalty provision with different levels of penalties for different categories of protected areas.

When designating certain areas as protected, States also should evaluate the impact upon local indigenous populations with customary or traditional relationships with land within the area. Legislation regulating conduct within protected areas should take into account the rights of such peoples and balance those rights with the need to protect endangered wildlife. The appropriate balance between each of these two interests is a matter for each State to determine for itself.

**Example – United Republic of Tanzania:
Wildlife Conservation Act, 2009 s 45**

(1) The Minister may, by order in the Gazette, declare any community to be traditional community for the purpose of this Act and prescribe conditions to regulate the utilization of wildlife.

(2) The Director may grant a traditional community a licence to hunt such number of specified animals subject to such terms and conditions for such period as may be specified in the licence.

(3) The Minister may, by order in the Gazette, designate areas of land for resident hunting and the modalities of hunting of animals by residents in such areas.

Subsection 2 Document fraud

Offences related to permits, certificates and other like instruments

Permits, certificates and other related documents are susceptible to being used fraudulently by criminals involved in wildlife trafficking. A significant portion of the world's wildlife crime takes place overtly using fraudulent permits or certificates.³⁵ Criminals use fraudulent permits and certificates to cloak illegal contraband as ostensibly legitimate merchandise.³⁶ Criminals may use fraudulent documents to obtain permits or certificates allowing entry into a protected area, the possession or use of certain weapons, devices

³⁵ UNODC, *World Wildlife Crime Report: Trafficking in protected species* (2016) p. 19.

³⁶ UNODC, *World Wildlife Crime Report: Trafficking in protected species* (2016) p. 23.

or methods, and activities related to hunting, harvesting, taking, possessing or trading wildlife. Criminals may commit document fraud relating to permits and certificates in a number of ways. In some cases, criminals will forge outright permits and certificates. In other cases, traffickers will alter genuine permits and certificates. Criminals also may obtain genuine permits and certificates through fraudulent misrepresentations to issuing authorities. Document fraud can occur when persons other than the rightful holder use lawfully obtained genuine permits or certificates. To combat wildlife crime effectively, States must tackle each of these forms of document fraud.

Model provisions 6 and 7 below include offences addressing each of these aspects of document fraud. Model provision 6 criminalizes producing, offering, distributing, procuring, providing, selling, acquiring, buying, using or possessing a fraudulent permit, certificate or part thereof. It targets actors involved at all stages of the supply chain of fraudulent permits and certificates, from the producers and intermediaries of such fraudulent documents, through to the ultimate users or possessors. It covers both forgery and fraudulent alteration of permits and certificates.

Model provision 6: Fraudulent [permits and certificates]

Any person who [with the requisite mental state] produces, offers, distributes, procures, trades, exchanges, provides, sells, acquires, buys, uses or possesses a fraudulent [insert relevant terminology for permits, certificates etc.] or a part thereof, commits an offence.

Model provision 7: Fraudulent conduct in connection with [permits and certificates]

Any person who [with the requisite mental state]:

- (a) makes a false or misleading statement or representation; or
- (b) submits a fraudulent document;

to [insert competent authorities] in, or in connection with, an application for or the use of a [insert relevant terminology for permits, certificates etc.], commits an offence.

Model provision 7 criminalizes making false or misleading statements or representations and submitting fraudulent documents to a competent authority in connection with an application for or the use of a permit or certificate. The competent authorities covered by this offence should include those bodies responsible for processing applications for permits and certificates as well as bodies responsible for inspecting permits and certificates.

Model provision 7 covers the use of false labels or markings in connection with the use of a permit or certificate, but States also may elect to introduce dedicated provisions targeting false labelling and marking of wildlife specimens. States should ensure that all provisions concerning fraud in relation to permits, certificates, labels and markings are coherent with general offences of fraud under the State's criminal law, as well as general customs legislation. States also should review the extent to which corruption laws would cover officials complicit in unlawfully providing criminals with genuine permits and certificates.

Example – Kenya: *Wildlife Conservation and Management Act 2013 s 91*

Any person who, for the purpose of obtaining, whether for himself or another, the issue of a license or permit—

- (a) knowingly or recklessly makes a statement or representation which is false in a material particular; or
- (b) knowingly or recklessly furnishes a document or information which is false in a material particular; or
- (c) for any purpose in connection with this Act, knowingly or recklessly uses or furnishes a false, falsified or invalid license or permit or one is altered without authorization; or
- (d) knowingly contravenes any condition or requirement of a licence or permit,

commits an offence and shall be liable upon conviction, to a fine of not less than two hundred thousand shillings or to imprisonment of not less than one year or to both such fine and imprisonment.

Subsection 3 Possession and trade-related offences

Illegal possession

This Guide recommends that States introduce offences relating to possession of protected and illegally obtained wildlife specimens. To prevent gaps in the legislation, this Guide recommends that these offences cover both illegal possession of specimens of listed species and possession of illegally obtained specimens. In this context, States should consider the rights of indigenous people and local communities to possess and trade wildlife for subsistence purposes, as appropriate. Failing to do so may jeopardize the livelihoods of indigenous people and communities. Model provisions 8 and 9 below set out two offences of illegal possession. The offence in model provision 8 relates to illegal possession

of a specimen listed in particular wildlife schedules. The offence in model provision 9 relates to possession of a specimen obtained in contravention of the State's wildlife legislation. The two offences are complementary to each other. Model provision 9 contributes to the implementation of Article 6 of the Organized Crime Convention on criminalization of the laundering of proceeds of crime. Article 6(1)(b)(i) of the Organized Crime Convention requires States parties, subject to the basic concepts of their legal systems, to criminalize the acquisition, possession or use of property knowing, at the time of receipt, the illegal origin of said property. The rationale behind this model provision is to avoid the proliferation of illicit markets by addressing the side of the demand, imposing liability on recipients who acquire illicit property.

Money-laundering legislation usually covers both the demand and supply side, by criminalizing also the

Model provision 8: Illegal possession of a specimen of a listed species

Any person who [*with the requisite mental state*] and:

- (a) without lawful authority or a [*insert relevant terminology for permits, certificates etc.*] granted by [*insert competent authority*]; or
- (b) contravening the conditions of a [*insert relevant terminology for permits, certificates etc.*] granted by [*insert competent authority*];

possesses any specimen of a species listed in [*insert relevant schedule(s) of wildlife*] commits an offence.

Model provision 9: Possession of a specimen taken, possessed, transported, purchased or sold unlawfully

Any person who [*with the requisite mental state*] possesses any specimen taken, possessed, distributed, transported, purchased or sold in contravention of this [*Act/Law/Chapter etc.*], knowing at the time of receipt, that such specimen has been taken, possessed, transported, purchased or sold in contravention of this [*Act/Law/Chapter etc.*] commits an offence.

providers of illicit proceeds. When considering introducing an offence such as that included in model provision 9, States should ensure that the offence is consistent with their money-laundering legislation.

As with other provisions contained in this Guide, the wording for the mental elements of the offences in model provisions 8 and 9 are left to each State. There are two mental elements for the offence in model provision 8. To be convicted of this offence, a defendant must have the requisite mental state (such as knowledge) in relation to both the fact of possession and the fact that the possession was of the kind of specimen in fact possessed. It is not necessary for a defendant to have had any mental element in respect of the status of the species of the specimen possessed. That is, if the requisite mental element is knowledge, it is not necessary for the prosecution to prove that the defendant knew that the specimen was of a species listed in one of the relevant wildlife schedules, only that the defendant knew that he or she possessed the specimen and that he or she knew what kind of specimen was possessed. For the offence in

Example – United States of America: 16 US Code § 3372(a)

It is unlawful for any person—

[...]

(3) within the special maritime and territorial jurisdiction of the United States (as defined in section 7 of title 18)—

- (A) to possess any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law or Indian tribal law, or
- (B) to possess any plant—
 - (i) taken, possessed, transported, or sold in violation of any law or regulation of any State, or any foreign law, that protects plants or that regulates—
 - (I) the theft of plants;
 - (II) the taking of plants from a park, forest reserve, or other officially protected area;
 - (III) the taking of plants from an officially designated area; or
 - (IV) the taking of plants without, or contrary to, required authorization;
 - (ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or any foreign law; or
 - (iii) taken, possessed, transported, or sold in violation of any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants; [...]

model provision 9, in addition to the mental element regarding the fact of possession, there is also an express mental element of knowing that the specimen was taken, possessed, distributed, transported, purchased or sold in contravention of the State's wildlife legislation. States should also address whether the term "possess" includes permitting third parties to possess on the person's behalf.

States also should consider whether there are circumstances in which possession for the purposes of personal consumption should be addressed through seizure, confiscation/forfeiture, civil penalties or other measures, rather than through criminal liability.

States also may decide to establish exemptions to criminal liability in specified circumstances. For example, States may wish to introduce legislative exemptions allowing the fulfilment of basic human rights, such as cases in which food security depends upon use of listed species. Exemptions for wildlife use where this is necessary for the fulfilment of rights to take part in cultural life could also be introduced. Legislative exemptions may also be required for parts and derivatives that are personal or household effects, and specimens of listed species acquired prior to the listing of that species in that State.³⁷ In this regard, States should also consider and determine the status of antiquities such as antique ivory.

Trafficking in wildlife

Criminalization of domestic and cross-border trafficking is an essential component of any criminal law combating wildlife crime. Model provision 10 below contains two offences of trafficking, a basic offence and an optional addendum establishing a stronger standard for criminalization. Paragraph (a) of the basic offence criminalizes the trafficking of specimens listed in particular wildlife schedules without lawful authority or a relevant permit or certificate or in contravention of the conditions of such a permit or certificate. Paragraph (b) of the basic offence criminalizes the trafficking of specimens taken, possessed, distributed, transported, purchased or sold in contravention of the State's wildlife legislation. The potential contents of these wildlife schedules have been discussed above in chapter I.

In addition to this basic offence of trafficking, the Guide also presents two stronger options for States' consideration. These options serve to criminalize either: (a) the import or trafficking of any specimen taken, possessed, distributed, transported, purchased or sold in contravention of any binding international agreement; or (b) any applicable foreign law concerning the protection and management of wildlife. Binding international agreements could include CITES and the Convention on the Conservation of Migratory Species of Wild Animals, as well as other applicable international and

regional agreements concerning the protection and management of wildlife. The term "applicable foreign law" imports into the offence a requirement of a jurisdictional nexus between the foreign law and the act of taking, possessing, distributing, transporting, purchasing or selling.³⁸ It must be emphasized that neither approach requires or involves States enforcing foreign laws. Rather, it is the applicable foreign law that informs the illegal status of the specimen and renders the import or trafficking in the specimen illegal under domestic law. The focus of the offence is on protecting the domestic market from the entry of contraband. Both of the stronger approaches go beyond the basic offence of trafficking, immediately above the addendum. The addendum has two options: to criminalize the mere import of any specimen or criminalize trafficking in any specimen. The second option of trafficking is the broader of the two approaches as the definition of trafficking used by this Guide is broad and includes importing among a number of other activities.³⁹ In other words, trafficking would encompass the act of import, while import represents only one possible act of trafficking. States may wish to introduce one of the stronger standards contained in the addendum because they can serve as a powerful tool in combating cross-border trafficking, disrupting criminal organizations and protecting domestic markets. At the same time, enforcing these stronger provisions often will require law enforcement and prosecutorial authorities to obtain evidence from foreign authorities and to obtain and understand relevant foreign legislation.

All of the offences of trafficking contained in model provision 10 below, including the optional addendum, make use of the definition of "trafficking" contained in the glossary of terms, above. The glossary of terms defines "trafficking", in relation to a specimen, as "illegal acts by a person, whether for the benefit of themselves or another person, for purposes of importing, exporting, re-exporting, introducing from the sea, dispatching, dispatching in transit, distributing, brokering, offering, keeping for offer, dealing, processing, purchasing, selling, supplying, storing or transporting". Unlike the trade in wildlife specimens, which may be licit or illicit, the definition of "trafficking" makes it clear that "trafficking" always refers to illegal acts. In the case of paragraph (a) of the basic offence of trafficking, below, for example, this element of illegality is particularly important to exclude liability for the licit trade in wildlife. What the term "illegal acts" means for the purposes of the definition of trafficking will vary from State to State. It may include acts without lawful authority and acts without or in contravention of the terms of a relevant permit or certificate, where such authority or instrument would be necessary for legally undertaking the rights in question. In the case of paragraph (b) of

³⁷ See CITES art VII; CITES ML, pp. 15–16.

³⁸ See chapter I, "Jurisdiction", above.

³⁹ See the definition of "trafficking" in the glossary of terms, above.

the basic offence of trafficking as well as the offences in the optional addendum, there are also additional elements of illegality which relate to the circumstances in which the specimen was taken, possessed, distributed, transported, purchased or sold.

Model provision 10: Trafficking in wildlife

Any person who [*intentionally/with the requisite mental state*] traffics in any specimen:

- (a) of a species listed in [*insert relevant schedule(s) of wildlife*];
- (b) knowing that the specimen was taken, possessed, distributed, transported, purchased or sold in contravention of any law of [*insert name of the State*] concerning the protection or management of wild fauna or flora;

commits an offence.

Optional addendum:

Any person who [*intentionally/with the requisite mental state*] [*imports/traffics in*] any specimen, knowing that the specimen was taken, possessed, distributed, transported, purchased or sold in contravention of:

- (a) any international agreement binding on [*insert name of the State*]; or
- (b) any applicable foreign law concerning the protection or management of wild fauna or flora;

commits an offence.

Example – Canada: *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act, S.C. 1992, c. 52, s 6(1)*

No person shall import into Canada any animal or plant that was taken, or any animal or plant, or any part or derivative of an animal or plant, that was possessed, distributed or transported in contravention of any law of any foreign state.

Example – Australia: *Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 303GQ*

(1) A person must not intentionally import a specimen if the person knows that:

- (a) the specimen was exported from a foreign country; and
- (b) at the time the specimen was exported, the export of the specimen was prohibited by a law of the foreign country that corresponds to this Part.

Penalty: Imprisonment for 5 years.

(2) A prosecution must not be instituted for an offence against this section unless a relevant CITES authority of the foreign country has requested:

- (a) the investigation of the offence; or
- (b) assistance in relation to a class of offences in which the offence is included.

States should note that this Guide defines the term “specimen” in broad terms.⁴⁰ It also includes any goods which, from an accompanying document, from the packaging or mark or label, or from any other indications, appear to be or to contain a derivative of an animal, plant or other organism. Because of the broad scope of application of this offence, States may wish to require proof of a mental element equivalent to intention for the offence of trafficking.

The following examples of legislation from Canada, Australia and the United States of America demonstrate how one of the stronger standards in the optional addendum can be realized in practice.

States may elect to introduce a separate offence relating to the trafficking of live animal specimens with appropriate penalties that take into account the specificities of each case, including higher maximum penalties where appropriate. States also could achieve such an enhancement by legislating a single offence but including an aggravated penalty in situations where the trafficking relates to a live animal specimen.

States also may decide to establish exemptions to criminal liability for conduct that would otherwise constitute domestic or cross-border trafficking. For example, States may choose to introduce legislative exemptions relating to non-commercial loans, donations and exchanges between scientific institutions, travelling exhibitions of zoos and similar organizations, dead specimens, parts and derivatives that are personal or household effects, and specimens of listed species acquired prior to the listing of that species in that State.⁴¹ States also could regulate such circumstances through a system of permits or certificates. In the following example an exemption of worked specimens that were acquired more than 50 years previously is included.

⁴⁰See the glossary of terms, above.

⁴¹CITES ML, pp. 15–16.

Example – United States of America: 16 U.S. Code § 3372

(a) Offenses other than marking offenses

It is unlawful for any person—

- (1) to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law;
- (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—
 - (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law;
 - (B) any plant—
 - (i) taken, possessed, transported, or sold in violation of any law or regulation of any State, or any foreign law, that protects plants or that regulates—
 - (I) the theft of plants;
 - (II) the taking of plants from a park, forest reserve, or other officially protected area;
 - (III) the taking of plants from an officially designated area; or
 - (IV) the taking of plants without, or contrary to, required authorization;
 - (ii) taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or any foreign law; or
 - (iii) taken, possessed, transported, or sold in violation of any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants; or
 - (C) any prohibited wildlife species (subject to subsection (e));

[...]

Example – European Union: Council Regulation (EC) No 338/97 (1996) on the protection of species of wild fauna and flora by regulating trade therein, art. 8

- (1) The purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited.
- (2) Member States may prohibit the holding of specimens, in particular live animals of the species listed in Annex A.
- (3) In accordance with the requirements of other Community legislation on the conservation of wild fauna and flora, exemption from the prohibitions referred to in paragraph 1 may be granted by issuance of a certificate to that effect by a management authority of the Member State in which the specimens are located, on a case-by-case basis where the specimens:
 - (a) were acquired in, or were introduced into, the Community before the provisions relating to species listed in Appendix I to the Convention or in Annex CI to Regulation (EEC) No 3626/82 or in Annex A became applicable to the specimens; or
 - (b) are worked specimens that were acquired more than 50 years previously...

Note: this measure only applies for intra-European Union trade, whereas trade to and from the European Union is generally not permitted.

Electronic and distance selling

Buyers and sellers are increasingly using electronic venues, including the dark web, to arrange the sale of illicit wildlife specimens.⁴² Legislation combating wildlife crime must keep pace with the changing nature of wildlife crime in a digital age, including by adequately addressing illicit electronic and distance selling of wildlife.

The sale of illicitly acquired wildlife specimens using electronic means ordinarily will be regulated by general provisions covering the sale or trafficking. In this Guide, model provision 10 criminalizes trafficking in wildlife, and “trafficking” is defined in the glossary of terms to include selling. Selling, for the purposes of this Guide, includes selling by electronic means. In some jurisdictions, selling may not automatically include selling by electronic means. Where this is the case, States may introduce specific provisions stating that wildlife trafficking includes sales by electronic means.

Electronic and distance selling often will be facilitated by a number of natural or legal persons, including electronic payment service providers; providers of banking, finance, payment and money transfer services, providers of transport, mail and logistical delivery services; Internet service providers (ISPs) and providers of web-hosting services; and owners of and persons operating on social media and other internet sites. Model provision 11 below is intended to cover the variety of different natural and legal persons that provide services necessary for electronic and distance selling of wildlife. Model provision 11 creates an offence for any person to provide services to another person where they know or are aware that the service is being utilized for electronic or distance trafficking in wildlife. Provisions establishing appropriate penalties for this offence should take into account the broad range of service providers that potentially could be in breach of this offence. Penalties for legal persons should both reflect the seriousness of the crime and be adequate to act as an effective deterrent.

Model provision 11: Electronic and distance selling

Any service provider who, knowing that a service provided by it is being directly or indirectly used for electronic or distance trafficking in wildlife, fails to take reasonable steps to prevent the service being used in such a manner, commits an offence.

The omission criminalized by model provision 11 is limited to circumstances in which a service provider has actual knowledge or awareness that a service provided by

⁴² Anita Lavorgna, “Wildlife trafficking in the Internet age” (2014) 3 *Crime Science* 1; UNODC, *World Wildlife Crime Report: Trafficking in protected species* (2016), p. 46.

it is being used for electronic or distance trafficking. Model provision 11 does not impose any general obligation on service providers to monitor the use of its services to detect electronic or distance trafficking in wildlife. Knowledge or awareness in provision 11 relates the *use* of a particular service provided by the service provider. To do otherwise would be to impose a de facto duty on large service providers to take steps to monitor and detect electronic or distance trafficking in wildlife. For the purposes of model provision 11, the use of the service for electronic or distance trafficking can be direct or indirect. This would include situations in which the electronic or distance trafficking is being carried out by a person other than the person in whose name the service is being provided, such as situations in which traffickers register services in the names of middlemen.

Section B Related offences

Conspiracy or criminal association

Article 5 of the Organized Crime Convention requires that States parties adopt legislative measures to criminalize participation in an organized criminal group. Article 5(1)(a) gives States parties a choice of one or both of two different models for achieving this. These models reflect the differing approaches traditionally taken by common-law jurisdictions and civil law jurisdictions to criminalize participation in organized criminal groups. The agreement-type offence in Article 5(1)(a)(i) reflects the conspiracy model traditionally taken by common-law jurisdictions, whereas the offence in Article 5(1)(a)(ii) reflects the criminal association model traditionally taken by civil law jurisdictions.⁴³

Model provisions 12 and 13 below reflect these two alternative models of criminalizing participation in an organized criminal group. The provisions are based on the wording of Article 5(1)(a) of the Organized Crime Convention but have been adapted to relate to the wildlife crime offences contained in this Guide. As with the two models contained in the Organized Crime Convention, States have a choice of whether to introduce one or both of these offences.

To establish criminal liability for the conspiracy offence in model provision 12, the following physical elements must be proven:

- (a) an agreement to commit an offence contained in this Guide;

⁴³ See further UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2016), available at: <https://www.unodc.org/cld/v3/sherloc/legislative-guide/index.html>; David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford, Oxford University Press, 2007) pp. 62–64.

- (b) the agreement was between the accused and at least one other person; and
- (c) where required by domestic law, an overt act in furtherance of the agreement.

States may choose to include an additional physical element, namely, that the agreement involved an organized criminal group.

There are two mental elements for this offence:

- (a) an intention to agree with one or more other persons to commit the offence; and
- (b) the purpose of the agreement being to obtain a financial or other material benefit.

Model provision 12 does not expressly include the word “intention”. Nevertheless, the wording of the offence implies a mental element (a) of intention. The act of agreement to commit an offence can only be committed intentionally.

Model provision 13 contains two criminal association offences. The first of these offences concerns participation in the criminal activities of an organized criminal group whereas the second relates to participation in other activities of the organized criminal group. The physical element of the offence in paragraph (1) is the accused taking an active part in criminal activities of an organized criminal group. The mental elements of the offence in paragraph (1) are:

- (a) an intention to take an active part; and
- (b) knowledge of either:
 - (i) the aim and general criminal activity of the organized criminal group; or
 - (ii) the intention of the organized criminal group to commit one or more offences against this Guide.

The physical element of the offence in paragraph (2) is the accused taking an active part in any other activities of an organized criminal group. The mental elements of the offence in paragraph (2) are:

- (a) an intention to take an active part;
- (b) knowledge of either:
 - (i) the aim and general criminal activity of the organized criminal group; or
 - (ii) its intention to commit the crimes in question; and
- (c) knowledge that the acts or omissions of the accused will contribute to the achievement of the criminal aim described above.

The “other” activities for the purposes of the offence in paragraph (2) need not otherwise be illegal for the elements of the offence to be met. States may wish to clarify this fact in their legislation. Further information

about each model of criminalizing participation in an organized criminal group can be found in the legislative guide to the Organized Crime Convention, published by UNODC.⁴⁴

Model provision 12: Conspiracy

Any person who agrees with one or more other persons to commit any [serious] offence contained in this [Act/Law/Chapter etc.] [involving an organized criminal group] in order to obtain, directly or indirectly, a financial or other material benefit, commits an offence.

[To be included if required by domestic law] For a person to be convicted under this section, an act other than the making of the agreement must be undertaken by one of the participants in furtherance of the agreement.

Model provision 13: Criminal association

(1) Any person who intentionally takes an active part in criminal activities of an organized criminal group, knowing either the aim and general activity of the organized criminal group, or its intention to commit one or more offences against this [Act/Law/Chapter etc.], commits an offence.

(2) Any person who intentionally takes an active part in [any other] activities of an organized criminal group in relation to this [Act/Law/Chapter etc.]:

- a) with knowledge of either the aim and general activity of the organized criminal group, or its intention to commit the crimes in question; and
- b) knowing that their acts or omissions will contribute to the achievement of the criminal aim described above;

commits an offence.

(3) For the purpose of establishing criminal liability under [paragraph (2)], the acts or omissions engaged in need not otherwise be illegal.

⁴⁴ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2016), available at: <https://www.unodc.org/cld/v3/sherloc/legislative-guide/index.html>

Secondary liability

In addition to principal offenders, there are a number of actors involved in wildlife crime who organize, direct, aid and abet the commission of offences. Legislation combating wildlife crime should criminalize the conduct of these secondary offenders. In many jurisdictions, secondary liability is established for all criminal offences by provisions of the general criminal law. In such jurisdictions, specific provisions on secondary liability in wildlife legislation may not be necessary. Where this is not the case, wildlife legislation should expressly establish secondary liability.

Model provisions 14 and 15 below contain two offences which extend liability for involvement in wildlife crime to secondary offenders. These provisions are based on Article 5(1)(b) of the Organized Crime Convention, which requires that States parties criminalize the organizing, directing, aiding, abetting, facilitating, or counselling of the commission of a serious crime involving an organized criminal group.

Model provision 14 establishes secondary liability for organizing, directing, promoting, supervising or managing the commission of any offence contained in this Guide. Model provision 15 establishes secondary liability for aiding or abetting the commission of any offence contained in this Guide. Both offences require proof of a particular mental state, so model provision 15, for example, would not cover involuntary or inadvertent assistance. These provisions enable the prosecution of leaders, organizers and accomplices, as well as persons involved in wildlife crime at lower levels.

States also may opt to combine the two provisions. Whatever the approach taken, States may elect to establish higher penalties for organizing or directing than for aiding, abetting, facilitating or counselling because of the higher-level nature of this conduct. In some cases, it may be appropriate for the penalties for organizers and directors to be higher than those given to principal offenders.

Model provision 14: Organizing or directing

A person who [*with the requisite mental state*] organizes or directs the commission of any of the offences provided for in this [*Act/Law/Chapter etc.*], involving an organized criminal group, commits an offence.

Model provision 15: Aiding, abetting, facilitating or counselling

A person who [*with the requisite mental state*] aids, abets, facilitates or counsels the commission of any of the offences provided for in this [*Act/Law/Chapter etc.*], involving an organized criminal group, commits an offence.

In addition to these forms of secondary liability, States should ensure that liability for attempt for the offences contemplated by this Guide is established under domestic law. The general criminal law of many States provides for liability for attempt automatically. Where this is not the case, States should introduce specific provisions in wildlife legislation to achieve this. In addition to liability for criminal attempt, States should also review the extent to which the existing law provides for liability for attempt for administrative offences.

Obstruction of justice

Trafficking in wildlife is a profitable enterprise for organized criminal groups. To maintain and expand their criminal operations, organized criminal groups attempt to pervert the course of justice by using threats, coercion and violence against judges, prosecutors, law enforcement officers, wildlife officers and other officials, jurors and witnesses. To effectively tackle wildlife crime, States need adequate provisions criminalizing the obstruction of justice. The offence contained in model provision 16 below criminalizes attempts to obstruct justice in relation to a proceeding for any offence contained in this Guide. The offence extends the scope of protected personnel to officers such as wildlife rangers in national parks.

States should assess their need to include in their wildlife legislation a specific provision criminalizing the obstruction of justice by reference to existing obstruction of justice offences. Whether attempts to obstruct justice in relation to wildlife rangers and other like officers would be covered by existing offences is of particular importance in this regard. Some States already have comprehensive provisions that extend protection to such officers and would cover the conduct criminalized by model provision 16. States that have instead opted to include specialized obstruction of justice provisions in specific laws may wish to consider including in their wildlife legislation an offence like that contained in model provision 16.

In jurisdictions in which enforcement powers are exercised by competent authorities other than police, States should ensure that specialized obstruction of justice provisions cover officers acting on behalf of these authorities.

Example – South Africa: *National Environmental Management Act 107 of 1998, s 49A*

1) A person is guilty of an offence if that person—

[...]

(m) hinders or interferes with an environmental management inspector in the execution of that inspector's official duties;

[...]

Model provision 16: Obstruction of justice

Any person who, in a proceeding in relation to any offence provided for in this [Act/Law/Chapter etc.], uses force, threats or intimidation or offers, promises or gives any gift, concession or other advantage in order to:

- (a) induce false testimony;
- (b) interfere in the giving of testimony or production of evidence; or
- (c) interfere with the duties or performance of judicial or other competent authorities, including those responsible for preventing and combatting wildlife crime;

commits an offence.

Money-laundering

Wildlife crime is a lucrative enterprise for high-level offenders. Money earned from wildlife crime is often laundered in an attempt to conceal its illicit origins. States should ensure that measures are in place to criminalize the laundering of money obtained from wildlife crime. Article 6 of the Organized Crime Convention requires States parties to introduce measures to criminalize money-laundering. Article 6(1) contains a number of subsections that require States parties to introduce criminal offences relating to various aspects of money-laundering. The first of these, Article 6(1)(a) (i) requires that States parties criminalize the intentional

conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

The link between this offence and other forms of organized crime is provided in the term “predicate offence”. The concept of predicate offences is essential to criminalization in many jurisdictions. Article 2(h) of the Organized Crime Convention defines “predicate offence” as “any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in Article 6 of this Convention”. Article 6(2)(a) requires that each State Party seek to apply the offences in Article 6(1) to “the widest range of predicate offences”. Article 6(2)(b) specifically requires that States parties include as predicate offences all serious crimes, as defined in Article 2 of the Convention, and the offences specifically provided for under the Convention.⁴⁵

States have taken different approaches to defining the term “predicate offence”. Some States have defined “predicate offence” by reference to an exhaustive list of offences contained in legislation. Other States have defined “predicate offence” broadly, as including all crimes, all serious crimes, or all crimes subject to a maximum penalty at or above a certain threshold. For those States utilizing a list of predicate offences, Article 6(2)(b) of the Organized Crime Convention requires that this list include, at a minimum, “a comprehensive range of offences associated with organized criminal groups”.

As per the provisions of Article 6 of the Organized Crime Convention, States parties shall include as predicate offences for the purposes of money-laundering legislation all wildlife crime offences covered by this Guide that are deemed to be serious crimes. In 2017, a resolution adopted by the General Assembly called upon Member States to review and amend national legislation, as necessary and appropriate, to ensure that offences connected to trafficking in wildlife are treated as predicate offences for the purposes of domestic money-laundering legislation.⁴⁶ Where this would not automatically be provided for under existing legislation, States may decide to expressly state in wildlife legislation introduced pursuant to this Guide that either all wildlife offences are predicate offences to money-laundering or that wildlife offences constituting serious crimes are predicate offences. Not all of the offences contemplated by this Guide are serious enough to be considered serious crimes. An example of a provision designating serious wildlife offences as predicate offences for money-laundering is provided in model provision 17 below.

Model provision 17: Money-laundering

Offences contained in this [Act/Law/Chapter etc.] [punishable by a maximum penalty of [insert maximum penalty] or greater] are to be considered predicate offences for money-laundering.

Regardless of the manner in which States parties choose to identify predicate offences, it should not be necessary that a person be convicted of a predicate offence when proving that property is the proceeds of crime.

Comprehensive guidance on money-laundering legislation is beyond the scope of this Guide, but reference is made to other publications of UNODC for further guidance on this matter. UNODC has previously published two sets of model money-laundering provisions. In 2005, UNODC and the International Monetary Fund (IMF) published *Model Legislation on Money Laundering and Financing of Terrorism*, for use by

⁴⁵ See Organized Crime Convention, arts 5, 8 and 23.

⁴⁶ A/RES/71/326 para. 7.

legislative drafters in civil law jurisdictions.⁴⁷ In 2016, UNODC, the Commonwealth Secretariat and the IMF published *Model Provisions on Money Laundering, Terrorist Financing, Preventive Measures and Proceeds of Crime*, for use by legislative drafters in common-law jurisdictions.⁴⁸ Both of these documents contain detailed model legislative provisions on money-laundering, confiscation and international cooperation in relation to the proceeds of crime.

Section C Defences

States may consider it desirable for certain partial or complete defences to be available for particular offences outlined in this Guide. Defences are to be distinguished from exemptions. Whereas a defence excuses or justifies conduct that otherwise would constitute an offence, an exemption excludes certain conduct from the offence itself. Many of the offences contained in this Guide contain exemptions for lawful authority and for holders of relevant permits or certificates. These types of exemptions are discussed in chapter I, above. In chapter II, a number of potential further exemptions in relation to the offences of possession and trafficking in wildlife also are noted.

States may wish to make available several defences for the offences outlined in this Guide. These include actions taken in self-defence, defence of others, or defence of property (including livestock) and actions taken out of necessity (or “sudden and extraordinary emergency”). In many States, these defences will already exist as defences of general application under the general part of the criminal law. Where such defences do not exist as defences of general application, or specific defences are otherwise desirable, State may wish to introduce these defences into wildlife legislation. In some jurisdictions, actions taken to protect human life or property have been protected by provisions framed in terms of dangerous animals, problem animals, or damage-causing animals. An example of such a provision is set out below.

Example – Kenya: *Wildlife Conservation and Management Act, 2013, s 78*

(1) Notwithstanding anything in this Act, it shall not be unlawful for any person to kill or wound any wild animal in the defense of himself or any other person if immediately and absolutely necessary.

(2) The burden of proving that a wild animal has been killed or wounded in accordance with subsection (1) shall lie with the person who killed or wounded the wild animal.

Example – South Africa: *Threatened or Protected Species Regulations, regs 1(1) and 86(5)–(7)*

Reg 1(1)

[...]

“damage-causing animal” means an individual specimen or group of specimens, as the case may be, of a listed threatened or protected animal species that, when in conflict with human activities, there is proof that it—

(a) causes excessive loss to stock or to wild animals;

(b) causes damage that has a substantial detrimental effect on cultivated trees, crops or other property; or

(c) presents an imminent threat to human life;

[...]

Reg 86(5)–(7)

[...]

(5) Notwithstanding the provisions of subregulation (2)(a) and regulation 4 of these Regulations a person may kill a damage-causing specimen of a listed threatened or protected species without a permit in an emergency or life-threatening situation.

(6) If a person kills a damage-causing animal in the circumstances contemplated in subregulation (5), such person must, within 24 hours after the damage-causing animal has been killed—

(a) inform the issuing authority of the incident; and

(b) surrender the remains of the damage-causing animal to the issuing authority to be disposed of in an appropriate manner.

(7) The issuing authority must evaluate the evidence in the circumstances contemplated in subregulation (5) and—

(a) consider whether or not in the circumstances of such incident, to institute criminal proceedings; and

(b) take appropriate steps to institute criminal proceedings where relevant.

[...]

Not all defences will apply to all wildlife offences. For example, in the circumstances of a particular case, it may be lawful for a person to kill an animal of a listed species in self-defence, but the same circumstances could not provide the same defence to trafficking in wildlife. It is up to States to determine whether the availability of particular defences to particular offences is set out in legislation or left to judicial interpretation. States may also wish to provide that certain defences do not apply to conduct within protected areas.

⁴⁷ Available at: http://www.unodc.org/documents/legal-tools/AML_MLawEnglish.pdf

⁴⁸ Available at: http://www.imolin.org/pdf/Common_Law_Model_provisions_on_AMLCFT_and_Recovery_of_Proceeds_of_Crime.pdf

Section D

Penalties, sentencing and other orders

Legislation introducing wildlife offences should include appropriate penalties and sentences for breach of those offences. As approaches to setting penalties and sentencing offenders vary greatly between States according to their legal tradition, this Guide does not provide any model provisions on penalties and sentencing. Rather, this section sets out a number of relevant issues for consideration by States in drafting legislative provisions relating to penalties and sentencing for wildlife crime.

The overriding considerations in determining appropriate penalties for the offences contained in this Guide are that the penalties should be proportional, effective and dissuasive. Many of the offences contained in this Guide are serious crimes. These offences are not only severely damaging for the environment but also for the rule of law and stability within States. It is imperative that the penalties for these offences reflect their serious nature and be comparable to sanctions for other serious crimes.⁴⁹ At the same time, not all of the offences contained in this Guide are equally grave. For example, the offence of entering into a protected area is less serious than the offence of trafficking wildlife. The penalty for each offence must be proportionate to its seriousness. Furthermore, the circumstances of each offence and of each offender are infinitely variable. Sentences available to judges need to be flexible enough to take into account the individual circumstances of each case.

This section first examines a number of considerations appropriate to setting maximum sentences of imprisonment in wildlife legislation. After that, non-custodial alternatives to imprisonment are discussed, as well as several further penalties that could be imposed on offenders in addition to these penalties, such as confiscation and disqualification orders. This section then examines penalties for legal persons, aggravating and mitigating circumstances relevant to sentencing and provisions relating to compensation.

Imprisonment

The most serious offences contained in this Guide should be punishable by sentences of imprisonment proportional to the seriousness of the offence and high enough to serve as effective deterrents. Beyond proportionality and deterrence, there are several considerations States should take into account in setting maximum sentences of imprisonment for wildlife offences.

First, the Organized Crime Convention contains a number of tools of international cooperation available to States parties in relation to the prevention, investigation

and prosecution of “serious crime”. Article 3 of the Convention provides that the Convention shall apply to “serious crime”. Article 2 of the Convention defines “serious crime” as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”. In other words, for the Organized Crime Convention to apply to the most serious wildlife offences set out in this Guide, States should provide for penalties of at least four years’ imprisonment for each of these serious offences.

Second, in some States, designation of predicate offences for the purpose of money-laundering legislation is determined by reference to the maximum penalty of the offence in question. In such States, legislative drafters should ensure that the maximum penalties for wildlife offences intended for designation as predicate offences are sufficiently high to meet this threshold.⁵⁰

Finally, in some States, eligibility of an offence as a basis for extradition is determined by reference to the maximum penalty of the offence in question. Where this is the case, legislative drafters should ensure that the maximum penalties for wildlife offences serious enough to warrant extradition are sufficiently high for extradition to be possible under the State’s extradition treaties and domestic legislation.⁵¹

Non-custodial penalties and other orders

Legislation introducing wildlife offences pursuant to this Guide also should take into consideration the desirability of alternatives to custodial sentences in certain circumstances. The types of non-custodial sentences capable of being given to wildlife crime offenders and the availability of each type of non-custodial sentence are matters for each State to determine in accordance with their legal framework for sentencing. Guidance on alternatives to imprisonment can be found in the *United Nations Standard Minimum Rules for Non-custodial Measures* (the Tokyo Rules)⁵² and in rules 57 to 66 of the *United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (the Bangkok Rules),⁵³ as well as in the UNODC handbooks on basic principles and promising practices on alternatives to imprisonment and on strategies to reduce overcrowding in prisons.⁵⁴

Under the Tokyo Rules, domestic law should provide for a wide range of non-custodial measures for persons convicted, from pre-trial to post-sentencing provisions.⁵⁵

⁵⁰ See also the discussion of money-laundering in chapter II, section B, above.

⁵¹ See also the discussion of extradition in chapter IV, below.

⁵² General Assembly resolution 45/110, annex.

⁵³ General Assembly resolution 65/229, annex.

⁵⁴ Available at <http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html>

⁵⁵ Rules 2.3 and 3.1 of the Tokyo Rules.

⁴⁹ See Organized Crime Convention art 11(1).

In particular, the authorities investigating or prosecuting criminal cases should be empowered to discharge the offender in appropriate circumstances and to impose non-custodial measures for minor cases.⁵⁶ Non-custodial penalties may include verbal sanctions, such as admonition, reprimands, or warnings; conditional discharge; status penalties; economic sanctions and monetary penalties, such as fines and day fines; confiscation or expropriation orders; compensation to the victim or compensation orders; suspended and deferred sentences; probation and judicial supervision; community service orders; referral to an attendance centre; house arrest; any other mode of non-institutional treatment; and any combination of such measures.⁵⁷

Like other penalties for wildlife offences, maximum fines must adequately reflect the seriousness of the offences and be high enough to act as effective deterrents. In determining the appropriate value for maximum fines for offences under this Guide, legislators should keep in mind that wildlife crime can be an extremely lucrative business for offenders. If fines are not high enough, there is a danger that they simply become incorporated into the operating costs of organized criminal groups without deterring their offending. In some cases, a fine alone will not serve as an effective deterrent without confiscation of the proceeds of crime (a tool included in both the Organized Crime Convention and CITES) as well as the offender being ordered to pay compensation to their victims.

In determining the appropriate fine in a given case, courts also should consider the value of the specimens involved in the offence, the financial or material benefit obtained by the offender and the damage to or loss of any specimen or ecosystem. In cases of trafficking of live animals, the cost of rehabilitating any specimens involved also should be taken into consideration. States should also consider implementing measures to prevent the real value of fines being reduced over time by inflation. One approach could be to tether fine values to penalty units, which then can be adjusted in step with inflation.

Additional penalties

Depending on the circumstances of the case, a sentence of imprisonment or a non-custodial alternative to imprisonment alone may be insufficient. It may be necessary for a court to impose additional penalties. Additional penalties could include, but are not limited to, orders confiscating proceeds of crime or property, equipment or other instrumentalities used in or destined for use in offences;⁵⁸

orders disqualifying or prohibiting a person from exercising one or more social, commercial or professional activities; orders excluding a person from public bidding or from entitlement to public benefits or aid; orders disqualifying a person from participation in public procurement; and orders disqualifying the person from applying for or being granted a permit or a certificate from a relevant competent authority.

Penalties for legal persons

Establishing liability for legal persons requires States to also introduce penalties and sanctions appropriate for legal persons. Penalties associated with criminal liability of legal persons may include orders that a legal person be dissolved, excluded from public bidding or entitlement to public benefits or aid, disqualified or prohibited from participating in public procurement or the practice of particular commercial, social or professional activities, disqualified from creating another legal person, required to publish the judgment of the court, or required to close one or more of the legal person's establishments. A number of different orders that could be made upon the conviction of a legal person are set out in model provision 18 below.

⁵⁶ Rule 5.1 of the Tokyo Rules.

⁵⁷ Rule 8.2 of the Tokyo Rules.

⁵⁸ See UNODC, *Manual on International Cooperation for the Purposes of Confiscation of Proceeds of Crime* (2012), available at: http://www.unodc.org/res/cld/bibliography/manual-on-international-cooperation-for-the-purposes-of-confiscation-of-proceeds-of-crime_html/Confiscation_Manual_Ebook_E.pdf; see also definition of "confiscation" in Organized Crime Convention, art 2.

Model provision 18: Sanctions for legal persons

Upon convicting a legal person for an offence under this [Act/Law/Chapter etc.], a judge may make an order in relation to any of the following sanctions:

- (a) a fine up to a maximum of:
 - (i) [maximum amount]; or
 - (ii) [x] times the total value of the benefit obtained or damage caused that is reasonably attributable to the offence; or
 - (iii) [if the court cannot determine the total value of the benefit or damage]—[x]% of the annual turnover of the legal person during the period 12 months prior to the commission of the offence;
- (b) confiscation of proceeds of crime or property, equipment or other instrumentalities used in or destined for use in offences covered by this [Act/Law/Chapter etc.];
- (c) an order requiring the legal person to publish the judgment by the court including, as appropriate, the particulars of the offence and the nature of any penalty imposed;
- (d) an order requiring the legal person to do stated things or establish or carry out a stated project for the public benefit;
- (e) an order that the legal person be placed under judicial supervision for a maximum period of [x] years;
- (f) an order prohibiting the exercise, whether directly or indirectly, of one or more social or professional activities [permanently] [for a maximum period of [x] years], including with regard to occupying a public office;
- (g) an order for the [temporary] [permanent] closure of one or more establishments of the legal person used to commit the offence(s) in question;
- (h) an order excluding the legal person from public bidding;
- (i) an order excluding the legal person from entitlement to public benefits or aid;
- (j) an order disqualifying the legal person from participation in public procurement whether on a temporary or permanent basis;
- (k) an order disqualifying the legal person from applying for or being granted a [insert relevant terminology for permits, certificates, etc.] from [insert competent authority];
- (l) an order disqualifying the legal person from the practice of other commercial activities or from the creation of another legal person;
- (m) if the activity of the legal person was entirely or predominantly used for the carrying out of criminal offences or if the legal person was created to commit an offence under this Guide, an order that the legal person be dissolved; and
- (n) [any such further order the court considers just.]

Aggravating and mitigating circumstances

The circumstances in which any two offences occur inevitably will differ. It follows from the requirement that sentences be proportional to the seriousness of the offending that sentences must take into account the material circumstances of the offending. Circumstances which tend to raise the culpability of the offender or otherwise warrant higher sentences are known as aggravating circumstances. Circumstances which tend to lower the culpability of the offender or otherwise warrant lower sentences are known as mitigating circumstances.

Different approaches to aggravating and mitigating circumstances are taken in different jurisdictions. In some jurisdictions, legislative provisions require stricter

penalties such as higher minimum and/or maximum sentences where particular aggravating circumstances are present. In other jurisdictions, statutory provisions set out relevant factors to be taken into account by sentencing judges in deciding upon the appropriate sentence. In some cases, specific lists of aggravating and mitigating circumstances will be legislated for particular offences. In other cases, sentencing judges will rely upon general lists of factors relevant to sentencing for all criminal offences. Some jurisdictions use a mix of these approaches, depending on the legislation and the offence in question. The approach each State takes to aggravating and mitigating circumstances in relation to wildlife offences is a matter for each State to determine, taking into account its own legal tradition. Should a

State choose to establish statutory aggravations or legislate wildlife-crime-specific lists of factors for use by sentencing judges, a number of suggested aggravating and mitigating circumstances are set out below.

Factors which may be considered to increase the culpability of an offender and warrant higher penalties may include:

- (a) where the offence caused a serious impact on a species, environment, ecosystem, biodiversity, heritage, culture, tourism, society or economy
- (b) where the offence involved particular cruelty to an animal
- (c) the number or quantity of specimens or items involved in the offending
- (d) where the offence involved a specimen listed in a schedule
- (e) where the offence involved the use of a prohibited or restricted weapon, device or method
- (f) where the offence took place, in whole or in part, in a protected area
- (g) whether any animal involved in the offence was pregnant, gravid, incubating or caring for dependent offspring at the time of the offence
- (h) whether the offender had previously committed any wildlife offence, whether or not the offender was charged or convicted in relation to such offence
- (i) the size of any financial or other material benefit to the offender or any other person as a result of the offence
- (j) the size of any financial or other material loss to another person caused by the offence
- (k) where the offence was committed as part of an activity of an organized criminal group
- (l) the leadership or managerial role of the offender in the organized criminal group
- (m) whether the offence was part of a pattern of ongoing criminal activity
- (n) the time and money spent by enforcement agencies to investigate and bring the offender to trial
- (o) whether the offender attempted to obstruct the administration of justice during the investigation, prosecution or sentencing of the offence
- (p) where the offence was committed by a government official

- (q) where the offence was committed by a person in a position of trust or authority, including the holder of a relevant permit or certificate

Where an aggravating circumstance is already an element of the offence, or an element of another offence for which the accused has been convicted arising from the same offence, it should not also be regarded as an aggravating factor for the instant offence. Several of the aggravating circumstances are elements of offences set out in this Guide and thus would not be appropriate to be used to enhance the offender's sentence in circumstances where an offender has been or is being sentenced for such an offence. For example, the aggravating circumstance of commission as part of the activity of an organized criminal group should not apply where the offender also has been convicted of the offence of participation in an organized criminal group. A second example would be that an offender could not both be liable for organizing or directing the commission of an offence and be given an even higher sentence because of their leadership or managerial role within the organized criminal group.

Factors which may be considered to reduce the culpability of an offender or otherwise warrant lower penalties may include:

- (a) where the offender had a lower or minor role in the offending
- (b) where the offender had no prior criminal record
- (c) where the offender was otherwise of prior good character
- (d) where the offender showed remorse for the offending
- (e) where the person voluntarily cooperated by providing information or otherwise assisted competent authorities, including to investigate and prosecute wildlife crime
- (f) where the offending involved no or a very limited financial or other material benefit to the offender or any other person, or caused no or did not cause a significant financial or other material loss to any person
- (g) the number or quantity of specimens or items involved in the offending
- (h) the age of the offender at the time of the offending or at the time of sentencing
- (i) whether the offender was or is suffering from reduced mental capacity at the time of the offending or the time of sentencing

Example – Canada: *Canada Wildlife Act, R.S.C., 1985, c. W-9, s 13.09*

(1) In addition to the principles and factors that the court is otherwise required to consider, including those set out in sections 718.1 to 718.21 of the Criminal Code, the court shall consider the following principles when sentencing a person who is convicted of an offence under this Act:

(a) the amount of the fine should be increased to account for every aggravating factor associated with the offence, including the aggravating factors set out in subsection (2); and

(b) the amount of the fine should reflect the gravity of each aggravating factor associated with the offence.

Aggravating factors

(2) The aggravating factors are the following:

(a) the offence caused damage or risk of damage to wildlife or wildlife habitat;

(b) the offence caused damage or risk of damage to any unique, rare, particularly important or vulnerable wildlife or wildlife habitat;

(c) the damage caused by the offence is extensive, persistent or irreparable;

(d) the offender committed the offence intentionally or recklessly;

(e) the offender failed to take reasonable steps to prevent the commission of the offence despite having the financial means to do so;

(f) by committing the offence or failing to take action to prevent its commission, the offender increased revenue or decreased costs or intended to increase revenue or decrease costs;

(g) the offender committed the offence despite having been warned by a wildlife officer of the circumstances that subsequently became the subject of the offence;

(h) the offender has a history of non-compliance with federal or provincial legislation that relates to environmental or wildlife conservation or protection; and

(i) after the commission of the offence, the offender

(i) attempted to conceal its commission,

(ii) failed to take prompt action to prevent, mitigate or remediate its effects, or

(iii) failed to take prompt action to reduce the risk of committing similar offences in the future.

Absence of aggravating factor

(3) The absence of an aggravating factor set out in subsection (2) is not a mitigating factor.

Compensation

States may also elect to introduce provisions establishing a system of compensation for owners of as well as people holding a lawful right to wildlife damaged, injured, killed or destroyed in the commission of an offence contained in this Guide. The term “compensation” is used in this Guide to refer to a legal mechanism by which persons, communities and entities suffering material or otherwise relevant loss as a result of wildlife crime can receive recompense from offenders for damage or losses suffered. In some legal systems, other terms, such as “restitution” or “damages”, may be used to refer to such a mechanism. In other legal systems, the terms “compensation” and “restitution” may refer to different mechanisms of redress for victims of crime.

Model provision 19 below is intended to assist States in establishing appropriate procedures to provide access to compensation for persons, communities and entities falling victim to crimes against wildlife. While the word

“compensation” has been used in this model provision, legislative drafters may choose another word more appropriate for describing this kind of mechanism within their legal system.

Paragraph (1) of model provision 19 provides that, upon convicting a person of an offence covered by this Guide resulting in damage, injury, loss, destruction or death to a specimen, species or ecosystem, a court may (or shall, depending on the choice taken by the legislator) make an order for the return of the specimen, the restoration of the species, the restoration of the ecosystem and/or payment of compensation. Return of a specimen under paragraph (1)(a) shall be made to the most appropriate right holder or a person designated by such person. The identity of the most appropriate right holder is a matter for each State to determine under its domestic law. Where damage, injury, loss, destruction or death relates to a particular specimen or specimens, the most appropriate right holder often will be the

Model provision 19: Compensation

- (1) Upon convicting a person for an offence against this [Act/Law/Chapter etc.] resulting in damage, injury, loss, destruction or death to a specimen, species or ecosystem, the [court] [shall/may] make an order requiring the person to:
- (a) return the specimen to the [most appropriate right holder] in respect of the specimen or a person designated by such person; and/or
 - (b) restore the species to its state prior to the commission of the offence; and/or
 - (c) restore the ecosystem to its state prior to the commission of the offence; and/or
 - (d) pay to [any other appropriate right holders] of the specimen or a person designated by each such right holder an amount equal to the value of the loss to that right holder.
- (2) An order made under [paragraph (1)] shall be without prejudice to the payment of any additional damages for consequential loss to any person.
- (3) Unless [the court] otherwise orders, return of a specimen under [paragraph (1)(a)] shall be considered inadequate for the purposes of compensation under this [provision] if
- (a) the specimen is not alive at the time of the making of an order under this [provision]; and
 - (b) the specimen was alive prior to the offending.
- (4) For the purposes of [paragraph (3)(b)], offending shall be construed broadly to include acts and omissions of persons other than the person the subject of an order under this [provision].

specimen's owner. The words "most appropriate right holder" are intended to be broad enough to cover situations where a specimen does not have an owner under the law of a State or where the owner is not identifiable. In such situations, the most appropriate right holder could be the State or it could be communities or persons with other interests in the specimen that are protected by law, for instance in the case of community-based wildlife tourism. Restoration of a species or ecosystem under paragraph (1)(b) and (c) shall be to the satisfaction of the relevant competent authority. Any other appropriate right holders may be compensated by monetary payment under paragraph (1)(d).

Paragraph (3) provides that return of a specimen shall be considered inadequate for the purposes of providing compensation where the specimen is not alive and the specimen had been alive prior to the offending. Paragraph (4) construes "offending" broadly to include acts and omissions of persons other than the offender in the instant case. The rationale behind the inclusion of paragraph (4) is to ensure the operative effect of paragraph (3) in situations where a specimen was killed by a person other than the offender in the instant case. For example, paragraph (4) would ensure that a person convicted of possessing or trafficking a specimen could not avoid the operation of paragraph (3) by arguing that the specimen was not alive at the time of the offending because it had earlier been hunted and killed by another person. Paragraph (2) provides that an order made under paragraphs (1) or (2) shall be without prejudice to the payment of any additional damages for consequential loss to any person.

The power to order compensation contained in model provision 19 is contingent upon the conviction of an

offender. The wording of the provision leaves a choice to States as to whether to make this power mandatory upon the registering of a conviction, or a discretionary power available to the court in sentencing the offender. Rights holders affected by wildlife offences may also have means of civil redress under the law of a State.

Provisions in wildlife legislation establishing access to compensation such as model provision 19 are only necessary if general procedures for compensation are not already available, or where States consider it desirable to have a separate, tailored system for compensation for cases of wildlife crime.

The procedural requirements for eligibility for payment of compensation under model provision 19 may vary from State to State. In some legal systems, a victim of an offence may need to make a special application or be joined as a party to criminal proceedings to be eligible for compensation.

In some cases, compensation simply may not be possible. For example, where a specimen has been killed or destroyed and the offender is impecunious or insolvent, both the return of the specimen and a payment as compensation may be impossible, impracticable or inadequate. To ensure that persons falling victim to wildlife crime are compensated for their losses, States may consider alternative methods of restoring the loss or damage or compensating victims, as appropriate in particular cases. For example, a fund could be established by the State for providing payments of compensation to victims of wildlife crime directly. Payments from this fund could be made without a conviction of an offender to ensure that victims of wildlife crime receive compensation in cases where offenders cannot be prosecuted, such as where the offender is outside the jurisdiction of the courts.

Where payments of compensation ordered by a court are to be made to the State, the State may opt to ensure that these compensation payments are made to funds dedicated to purposes related to conservation or management of wildlife or to funds for making compensation payments to affected communities or individual victims of wildlife crime, rather than to general State funds.

When drafting provisions relating to compensation, States also should take into account how their jurisdiction deals

with the legal status and ownership of wild flora and fauna. In some jurisdictions, wildlife may be considered *res nullius*—that is, belonging to nobody. In other systems, ownership of wildlife may be attributed directly to the State. In still other systems, wildlife ecosystems may be considered *republicae* or owned by the State as a public trust. These matters will influence how provisions relating to compensation should be drafted.





Photo credits: iStock/coffeekat

Chapter III

MANDATES, INVESTIGATION AND NATIONAL COORDINATION

Mandates

The enforcement of wildlife legislation commonly involves multiple government departments and agencies with responsibilities for the prevention, detection and investigation of wildlife offences. It is critical for the effective operation of wildlife legislation that the respective roles and responsibilities of these departments and

agencies are clearly set out in the legislation. The following are some examples of the broad range of departments and agencies and public officers that may be involved in the prevention, detection and investigation of wildlife crime.

Ministries of forestry, agriculture, natural resources or the environment

Relevant government ministries, such as ministries of forestry, agriculture, natural resources or the environment will usually have particular functions and responsibilities dealing with wildlife offences. Officers associated with these ministries—such as park rangers, forestry inspectors, wildlife officers, fishery inspectors, environment inspectors, and quarantine officers—are typically involved in the detection and/or identification of wildlife offences while undertaking patrols or inspections or carrying out other specific functions. Officers of this kind should be legislatively authorized, trained and empowered to conduct general investigations, collect and seize evidence, question suspects, and prepare case files.

Police

Police may be involved in detecting and/or identifying wildlife offences or they may be called upon to conduct specialized and/or advanced investigative functions, which generally fall beyond the mandate of wildlife officers. Relevant police may include national, regional and/or local police, as well as police departments having responsibilities for wildlife and forestry crime, economic and financial crime, the handling of crime scenes and forensic investigations, telecommunications, undercover operations and general criminal investigations. In some jurisdictions, it will be essential for police to be involved in complex cases of wildlife crime. Police may perform their functions in relation to wildlife crime under a variety of national laws, directives and regulations, including laws relating to organized crime, money-laundering and corruption.

Customs administration

Customs administration agencies will also come into contact with wildlife trafficking at ports, airports and land borders. They will generally be mandated to detect and/or identify wildlife trafficking at these locations in accordance with customs legislation. Customs administration officials are generally trained and empowered to conduct general investigations, file cases and collect and seize evidence. Customs administration officers often play important roles in special investigations such as investigations involving controlled deliveries.

(continued)

(continued)

Judges and magistrates

Judges and magistrates may oversee aspects of the investigation of wildlife offences, such as applications for warrants and the use of special investigative techniques. In some jurisdictions, judges may have powers to assign cases to the most relevant agency, taking into account the designation, mandates and powers of various government agencies with investigative roles.

Other officers

Certain other government officers such as military personnel are also likely to come across wildlife crimes. The role of such officers in investigations into wildlife crime will depend to a great degree on specific domestic arrangements. Other specialized agencies such as anti-money-laundering officers, financial investigation units, anti-corruption commissions, and tax revenue authorities, may also contribute to investigations of wildlife crime on the basis of specialized laws granting them enforcement powers.

States may opt to divide the responsibilities for investigating wildlife offences between multiple agencies according to the stage of the investigation or the seriousness of the offences that appear to be involved. The seriousness of the offences could relate to the suspected activities of the offenders or the suspected involvement of an organized criminal group or a transnational element to the offending. The designation, number, and competencies of agencies involved in the investigation of wildlife offences are a matter for each State to determine for itself. For this reason, this Guide does not provide a model provision on the mandates of relevant investigative agencies. Whatever division of competencies a State adopts, the State should ensure that the respective mandates of each agency involved in preventing, detecting and investigating wildlife offences are clearly set out in legislation. This is imperative not only for each agency to effectively carry out these functions, but also to ensure the legality and admissibility of evidence obtained by such agencies in subsequent wildlife prosecutions.

National coordinating body

As discussed above, the investigation of the offences described in this Guide may involve a number of different agencies within a single State, each with different roles, designations and investigatory powers. Investigations may also involve interactions with CITES management and scientific authorities; accredited, specialized laboratories; civil society organizations; and private sector organizations. The involvement of prosecutors or judicial authorities also may be required at the investigation stage, depending on the legal system and legislation of the State.

Given the potentially large number of government agencies and other bodies that may be involved in the investigation of wildlife crime, it is crucial that wildlife legislation contain provisions establishing procedures and responsibilities for inter-agency cooperation. It is

recommended that States each establish a national coordinating body with responsibility for the development, coordination, implementation, monitoring and evaluation of a national response to preventing wildlife crime, developing prevention and awareness-raising programmes, training, and technical cooperation with other agencies and States in identifying, preventing and investigating wildlife crime. Model provision 20 below provides an example of how a State could establish a national coordinating body with these responsibilities.

Model provision 20: National coordinating body

The [*relevant Minister(s)*] shall establish a national coordinating [*committee/body*] responsible for the development, coordination, implementation, monitoring and evaluation of the national response to preventing wildlife crime, including through data collection, analysis and exchange, the development of training and prevention and awareness-raising programmes, and other matters such as technical cooperation with other agencies and States in the identification, prevention and investigation of wildlife crime.

Investigations

Penalties reflecting the seriousness of wildlife offences cannot serve as effective deterrents if the offences are not enforced. It is critical that States establish an effective regime for investigating wildlife offences for wildlife legislation to be effective in achieving its goals. This includes empowering investigative officers with the powers necessary to carry out their functions in combating wildlife crime. Officers involved in investigating wildlife crime and related offences may include law enforcement officers, wildlife officers, and officers of financial intelligence units and multi-agency task forces. The appropriate powers for each such officer necessarily will differ, but may include powers to:

- stop and search persons, vehicles, vessels or other conveyances
- enter and search premises
- seize any weapon, device or means suspected of being involved in the commission of an offence covered by this Guide
- seize specimens suspected of being involved in the commission of an offence covered by this Guide
- question witnesses, suspected offenders and other persons of interest
- require the inspection or production of documents
- take photographs or make audiovisual recordings of a thing or place suspected of being involved in the commission of an offence covered by this Guide
- carry and, where necessary, use specified firearms and ammunition for the purposes of executing their duties
- manage crime scenes
- seize and analyse phones, computers and like devices found in the possession of suspected offenders
- issue summons requiring attendance in court
- request forensic information from specialized laboratories
- where appropriate, compel persons to answer questions and/or produce documents relevant to the investigation of an offence covered by this Guide
- access bank and financial records
- access telecommunications records
- use special investigative techniques, such as wiretapping, controlled delivery and undercover investigations⁵⁹
- suspend, vary and revoke permits or certificates held by suspected offenders
- disqualify suspected offenders from holding permits or certificates
- exchange information with foreign law enforcement agencies⁶⁰
- coordinate joint investigations⁶¹
- freeze assets

The procedures for the exercise of such powers may vary between States. It may be appropriate or necessary for States to restrict some such powers to being exercised only under the supervision of a judge or magistrate or, in some cases, a senior law enforcement officer. For example, a warrant or another order of a judge or magistrate may be necessary to exercise certain powers of search, entry and seizure, powers to freeze assets, as well as powers to use special investigative techniques, such as wiretapping, controlled delivery and undercover investigations.

⁵⁹ See Organized Crime Convention, art 20. See also the discussion of special investigative techniques below.

⁶⁰ Law enforcement cooperation is discussed below in chapter IV.

⁶¹ Joint investigations are discussed below in chapter IV.

Example – India: *Wildlife (Protection) Act, 1972, s 50*

(1) Notwithstanding anything contained in any other law for the time being in force, the Director or any other authorised by him in this behalf or the Chief Wildlife Warden or the authorised officer or any forest officer or any police officer not below the rank of a sub-inspector may, if he has reasonable grounds for believing that any person has committed an offence against this Act,

(a) require any such person to produce for inspection any captive animal, wild animal, animal article, meat, trophy, uncured trophy, or any specified plant or part or derivative thereof in his control, custody or possession, or any licence, permit or any other document granted to him or required to be kept by him under the provisions of this Act;

(b) stop any vehicle or vessel in order to conduct search or inquiry or enter upon and search any premises, land, vehicle, or vessel in the occupation of such person, and open and search any baggage or other things in his possession;

(c) seize any captive animal, wild animal, animal article, meat, trophy or uncured trophy, or any specified plant or part or derivative thereof in respect of which an offence against this Act appears to have been committed, in the possession of any person together with any trap, tool, vehicle, vessel, or weapon used for committing any such offence and unless he is satisfied that such person will appear and answer any charge which may be preferred against him arrest him without warrant and detain him. Provided that where a fisherman, residing within ten kilometres of a sanctuary or National Park, inadvertently enters on a boat not used for commercial fishing, in the territorial waters in that sanctuary or National Park, a fishing tackle or net on such boat shall not be seized.

[...]

(continued)

Example – India: *Wildlife (Protection) Act, 1972, s 50*

(continued)

(3) It shall be lawful for any of the officers referred to in sub-section (1) to stop and detain any person, whom he sees doing any act for which a licence or permit is required under the provisions of this Act, for the purposes of requiring such person to produce the licence or permit and if such person fails to produce the licence or permit, as the case may be, he may be arrested without warrant, unless he furnishes his name and address, and otherwise satisfies the officer arresting him that he will duly answer any summons or other proceedings which may be taken against him.

(3A) Any officer of a rank not inferior to that of an Assistant Director of Wildlife Preservation or Wildlife Warden, who, or whose subordinate, has seized any captive animal or wild animal under clause (c) of sub-section (1) may give the same for custody on the execution by any person of a bond for the production of such animal if and when so required, before the magistrate having jurisdiction to try the offence on account of which the seizure has been made.

[...]

8) Notwithstanding anything contained in any other law for the time being in force, any officer not below the rank of an Assistant Director of Wildlife Preservation or Wildlife Warden shall have the powers, for the purpose of making investigation into any offence against any provision of this Act.

- (a) to issue a search warrant;
- (b) to enforce the attendance of witness;
- (c) to compel the discovery and production of documents and material objects, and;
- (d) to receive and record evidence.

[...]

Special investigative techniques

Special investigative techniques are covert techniques used for gathering information in such a way as not to alert the target person, used by law enforcement officials for the purpose of detecting and investigating crimes and suspects.⁶² Article 20(1) of the Organized Crime Convention requires States parties to, if permitted by the basic principles of their domestic legal systems, take the necessary measures to allow for the appropriate use of controlled delivery and, where appropriate, other special investigative techniques such as electronic or other forms of surveillance and undercover operations.

Where compatible and to the extent possible with the basic principles of their legal systems, States should ensure that the special investigative techniques extend to investigations of serious wildlife crimes. Where special investigative techniques would not be available to law enforcement agencies investigating serious wildlife crimes under existing domestic laws, States should consider including such provisions within wildlife legislation.

The term “special investigative techniques” refers to a number of discrete investigative techniques, each of which involves different levels of risk and potentially raises different issues. For example, it may be appropriate that a controlled delivery be authorized by senior law enforcement officials, whereas electronic surveillance usually requires judicial authorization and supervision. Accordingly, domestic legislation should address each major type of special investigative technique separately giving adequate consideration to the relevant issues arising from each type of technique. Practice managing the risk and issues involved in the use of special investigative techniques may vary from jurisdiction to jurisdiction.

A comprehensive examination of legislative issues relating to special investigative techniques is beyond the scope of this Guide. For further information on special investigative techniques, please refer to chapter IV, “Investigations” of the *Model Legislative Provisions against Organized Crime* (2012).⁶³

⁶² UNODC *Model Legislative Provisions against Organized Crime* (2012), p. 59.

⁶³ UNODC, *Model Legislative Provisions against Organized Crime* (2012), p. 59, available at: http://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf





Photo credits: Simon Robertson

Chapter IV

INTERNATIONAL COOPERATION

Wildlife crime is a transnational phenomenon. Supply chains of illicitly acquired wildlife specimens extend around the globe. Effective international cooperation between the agencies of different States is essential to prevent and combat wildlife crime. International cooperation refers to the sharing of information, resources, and personnel and affording one another assistance to achieve common goals. Cooperation between States may occur formally or informally. Formal cooperation may be based on the Organized Crime Convention or other multilateral or bilateral treaties.

The Organized Crime Convention requires States to take steps or consider taking steps to implement a number of measures to enable and facilitate international cooperation. These measures include extradition (Article 16), mutual legal assistance, (Article 18), joint investigations (Article 19), law enforcement cooperation (Article 27), transfer of sentenced persons (Article 17) and transfer of criminal proceedings (Article 21).

The following sections of this Guide provide legislative guidance for establishing methods of international cooperation in the context of wildlife crime. As with other chapters of this Guide, model provisions are included to assist with the implementation of these principles.

Mutual legal assistance

Mutual legal assistance in criminal matters is a process by which States can seek and provide assistance in gathering evidence for use in criminal cases.⁶⁴ For example, through mutual legal assistance, witnesses can be

summoned, persons can be located, evidence can be produced and warrants can be issued in foreign jurisdictions.⁶⁵ Article 18 of the Organized Crime Convention establishes a framework for mutual legal assistance between States parties in relation to serious crimes and offences established under the Convention and Protocols.

States should ensure that domestic mutual legal assistance regimes established under bilateral and multilateral treaties apply to investigations, prosecutions and judicial proceedings in relation to the offences provided for in this Guide. Model provision 21 below provides an example of a provision a State could include in wildlife legislation introduced pursuant to this Guide to this effect.

Model provision 21: Mutual legal assistance

The provisions on mutual legal assistance contained [insert national legislation on mutual legal assistance] and in any bilateral or multilateral treaty to which [insert name of the State] is a party shall apply to investigations, prosecutions and judicial proceedings in relation to the offences established under this [Act/Law/Chapter etc.].

⁶⁴ UNODC, *Manual on Mutual Legal Assistance and Extradition* (2012) 19, available at: https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf

⁶⁵ See further UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2016), chapter V section B: Mutual legal assistance in criminal matters, available at: <https://www.unodc.org/cld/v3/sherloc/legislative-guide/index.html>

An extensive examination of the Organized Crime Convention's framework for mutual legal assistance is beyond the scope of this Guide. Further information on this framework can be found in previous publications by UNODC.⁶⁶

Extradition

Extradition refers to the formal process by which persons charged with offences in a foreign jurisdiction may be returned or transferred to that jurisdiction to stand trial for such charges or by which convicted persons may be so returned or transferred to serve imposed sentences. Extradition is generally dealt with under bilateral or multilateral treaties. Arrangements for extradition are critical for the effective prosecution of wildlife offenders, given the often transnational nature of wildlife crime. Extradition is addressed by Article 16 of the Organized Crime Convention. Article 16 of the Organized Crime Convention applies to cases where the offence for which extradition is sought is punishable under the domestic law of both the requesting and requested State.

Extradition is a necessarily complex area of law. Most States have existing frameworks for extradition relying on multilateral or bilateral treaties with other States. It would be neither possible nor desirable for this Guide to provide a comprehensive examination of legal issues relating to extradition or model legislative provisions for establishing a complete legal framework for extradition. This Guide does, however, address some of the basic legal issues relating to extradition that a State will have to consider when introducing wildlife legislation.

The key legal issue with respect to extradition for the purposes of this Guide is the designation of wildlife offences as extraditable offences. Some of the offences contained in this Guide may not be deemed by a State to be sufficiently serious to warrant extradition. This is a matter for each State to determine in accordance with its legal system and values. For those offences potentially warranting extradition, States should take care to ensure that they are considered as such under the domestic law of the State and under its bilateral and multilateral extradition treaties. How this can be implemented will depend on the method for designation of extraditable offences used by the State in question. Two approaches have historically been used for designating offences as extraditable offences: the "list approach" and the "minimum penalty approach". Under the list approach, whether an offence is extraditable is

determined by reference to a list of extraditable offences contained in the extradition treaty and implementing legislation. Under the minimum penalty approach, whether an offence is extraditable is determined by reference to the maximum penalty applicable to the offence. Any offence with a maximum penalty at or above a certain threshold is liable to be an extraditable offence.

States using the minimum penalty approach should ensure that wildlife offences legislated under this Guide meet the minimum requirements for extradition under their bilateral and multilateral extradition treaties. States using the list approach should take steps to ensure that offences legislated pursuant to this Guide are included in lists of extraditable offences in relevant bilateral and multilateral extradition treaties and in any relevant implementing legislation.

States also should ensure that extradition legislation applying to wildlife offenders is consistent with the "extradite or prosecute" principle outlined in Article 16(10) of the Organized Crime Convention. Article 16(10) provides that, in relation to an offence covered by the Convention, a State Party shall, at the request of a State Party seeking extradition of an alleged offender, submit the case to its competent authorities for the purpose of prosecution where it refuses to extradite the alleged offender solely on the basis that he or she is a national of that State.

Law enforcement cooperation

International cooperation of law enforcement agencies is addressed by Article 27 of the Organized Crime Convention. Article 27(1) requires States parties to closely cooperate with each other, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat serious crime involving organized criminal groups and other offences covered by the Convention. The particular measures required by Article 27 include establishing channels of communication between competent authorities, agencies and services for the secure and rapid exchange of information related to organized crime, exchanging such information, cooperation with other States parties in investigating persons, property, and proceeds involved in organized crime, sharing of items and substances for analytical and investigative purposes, and posting liaison officers.

A model for legislating for such forms of international law enforcement cooperation is provided in model provision 22 below. Model provision 22 is primarily relevant to those States in which a legal mandate is required for investigative agencies to cooperate with international counterparts. In other States, such a provision may not be necessary, but could be desirable for clarifying and enhancing existing mechanisms for law enforcement cooperation.

⁶⁶ See UNODC, *Manual on Mutual Legal Assistance and Extradition* (2012), available at: https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf; UNODC, *Legislative Guide on the United Nations Convention against Transnational Organized Crime* (2016), chapter V section B: Mutual legal assistance in criminal matters, available at: <https://www.unodc.org/cld/v3/sherloc/legislative-guide/index.html>

Model provision 22: Law enforcement cooperation

- (1) The functions of [*insert names of designated investigative agencies and authorities*] include assisting and cooperating, consistent with domestic legal and administrative systems, with foreign law enforcement or other investigative agencies and authorities and competent international and regional organizations to prevent, identify and combat offences criminalized by this [*Act/Law/Chapter etc.*].
- (2) In accordance with [*insert relevant legislation on privacy etc.*], the [*insert names of designated investigative agencies and authorities*] may cooperate and provide and exchange personal or other information or data with another foreign law enforcement or other investigative agencies and authorities of another State and, where relevant, and competent international and regional organizations, for the purpose of:
- (a) preventing, identifying and combating offences under this [*Act/Law/Chapter etc.*]; and
 - (b) providing specimens, documents or records for analytical or investigative purposes.
- (3) The [*insert names of designated investigative agencies and authorities*] may cooperate with a foreign law enforcement or other investigative agencies and authorities of another State, or international and regional organizations, with regard to:
- (a) seconding or exchanging personnel, including by making experts available and the posting of liaison officers;
 - (b) conducting joint investigations;
 - (c) witness protection, including relocation of the protected witness; and
 - (d) other administrative assistance.
- (4) The [*insert names of designated investigative agencies and authorities*] may negotiate and conclude agreements with foreign law enforcement or other investigative agencies and authorities of another State, or international and regional organizations for the purpose of enhancing law enforcement cooperation to prevent, identify and combat the offences criminalized by this [*Act/Law/Chapter etc.*].

Care also should be taken to ensure that the evidence of law of States is adequately adapted to deal with evidential issues that may arise from international cooperation in cases of wildlife crime. These include, among other possible issues, the admissibility of evidence obtained from foreign law enforcement agencies through mutual legal assistance and international cooperation and the transmission of evidence to forensic services located in foreign jurisdictions.

Joint investigations

As wildlife crime often involves transnational offence, joint investigations between law enforcement agencies of two or more States sometimes can prove to be more effective in dismantling organized criminal groups, especially in complex cases. Joint investigations are a form of law enforcement cooperation but involve a greater degree of cooperation than the individual measures of law enforcement cooperation outlined above. Article 19 of the Organized Crime Convention requires that States parties consider concluding agreements or arrangements with other States to establish frameworks for conducting joint investigations. Article 19 provides that, in the absence of such frameworks, joint investigations may be undertaken on a case-by-case basis, though this will depend on whether in the absence of such a framework agreement, joint investigations are possible under the laws of the States in question.

Model provision 23 below empowers the relevant law enforcement agency of a State to conclude arrangements with foreign law enforcement agencies and relevant international and regional organizations regarding the establishment of joint investigative bodies and the prevention, investigation and prosecution of offences to which this Guide applies in one or more States.

Model provision 23: Joint investigations

- (1) This [*provision*] applies to the investigation of offences against this [*Act/Law/Chapter etc.*].
- (2) The [*insert name of law enforcement authority*] may, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, conclude agreements or arrangements with one or more foreign law enforcement agencies and/or relevant international and regional organizations regarding either or both of the following:
- (a) the establishment of a joint investigative body; and
 - (b) the undertaking of joint investigations on a case-by-case basis.
- (3) The [*insert name of law enforcement authority*] may engage in a joint investigation which is the subject of an agreement or arrangement under [*paragraph*] (1).

Member States may also elect to authorize, by legislation, the undertaking of joint investigations on a case-by-case basis even in the absence of an agreement with a relevant foreign law enforcement agency or international or regional organization.⁶⁷

Previous work of UNODC has identified several legal impediments relating to the establishment of joint investigations. These include a lack of a clear framework or

specific legislation dealing with the establishment of joint investigations, a lack of clarity regarding control of operations, and a lack of clarity regarding liability for the costs of joint investigations. Legislation providing for joint investigations in the context of wildlife crime must ensure that each of these issues is clearly addressed in order for joint investigations to operate effectively.⁶⁸

⁶⁷ See UNODC, *Model Legislative Provisions against Organized Crime* (2012), p. 87, available at http://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf

⁶⁸ See UNODC, *Model Legislative Provisions against Organized Crime* (2012), pp. 87–93, available at http://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf





Chapter V

PROSECUTION OF OFFENCES

Combating wildlife crime requires not only substantive criminal offences but also effective criminal procedures. This chapter briefly addresses some of the key procedural issues that may arise in the prosecution of offences covered by this Guide. These include detention pending trial, prosecutorial discretion, alternatives to trial and issues relating to statutes of limitation.

Detention pending trial

Wildlife offenders cannot be brought to justice if they evade the jurisdiction of prosecuting and judicial authorities. Wildlife crime is sometimes committed by foreign nationals or persons who may otherwise be at risk of absconding. It is imperative that States take steps to prevent wildlife offenders from fleeing the country prior to trial or sentencing, within their constitutional and human rights frameworks. In some cases, the flight risk of an offender may require that the offender be detained pending trial. In other cases, measures such as the confiscation of an offender's passport may be sufficient to mitigate flight risk.

Prosecutorial discretion

In some States, prosecutors are afforded discretion as to whether to prosecute offences, either by law or through administrative procedures. Conditions on the exercise of this discretion may include the community interest in prosecuting or not prosecuting an offence and the need to bring offenders to justice and deter the commission of like offences. Prosecutorial discretion may relate not only to the decision to initiate and continue a prosecution but also to decisions to accept plea bargaining arrangements. Plea bargaining can be a useful tool for prosecutors and can allow prosecutors to bring cases

against high-level offenders by securing testimony from lower-level offenders. In other States, prosecutors do not exercise such discretion. Given the differences in legal traditions with respect to prosecutorial discretion, this Guide does not contain any recommendations of model provisions relating to the inclusion of prosecutorial discretion. For States that do afford prosecutors discretion as to whether to initiate and continue prosecutions, there is a need to ensure consistency in prosecutorial decision-making as to when to initiate prosecutions, maintain or drop prosecutions, and accept plea bargains. Where applicable, States should adopt appropriate measures to this effect.

Alternatives to trial

In some jurisdictions, prosecutors may exercise discretion to resolve cases through alternatives to trial, such as through deferred prosecution agreements, diversion programmes, and other alternative forms of dispute resolution. In relation to wildlife crime, deferred prosecution agreements may be offered to defendants that agree to fulfil certain conditions such as paying compensation for and repairing environmental damage caused and making payments of veterinary expenses and pre-arranged fees for the maintenance of live animals involved in the offending.

Giving full consideration to the variety of legal traditions of States, this Guide adopts no position on prosecutorial discretion to conclude cases through alternatives to trial such as deferred prosecution agreements. For jurisdictions in which such alternatives to trial do exist, laws or guidelines regulating their use should prohibit or discourage agreements to close cases solely involving monetary payments, in whatever form.

Monetary payments from members of organized criminal groups or legal persons involved in wildlife crime are at high risk of having an illicit origin, particularly when charges relate to trafficking in wild flora and fauna. There is also a danger that such payments under deferred prosecution agreements and other alternatives to trial will be simply incorporated by organized criminal groups as an operating cost of involvement in wildlife crime without having any deterrent effect on criminal conduct.

Statute of limitations

In some jurisdictions, the commencement of a prosecution is limited by periods of time known as “limitation periods” under laws known as “statutes of limitation”. States handle limitation periods in a number of different ways. In some jurisdictions, limitation periods do not apply to criminal offences. Article 11(5) of the Organized Crime Convention requires States parties that do impose limitation periods on the prosecution of criminal offences to ensure that the limitation periods applying to offences covered by the Convention are sufficiently long, particularly where the alleged offender has deliberately sought to evade the administration of justice.⁶⁹

⁶⁹ UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (2016), p. 135, available at: http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf

States should ensure that the legislative provisions implementing this obligation under the Organized Crime Convention also extend to the offences covered by this Guide. In some States, the running of time on a limitation period can be suspended while evidence is gathered from abroad. States should consider whether such a provision would be desirable in their legal system, taking into account the length of any limitation periods applicable to wildlife offences and potential difficulties in gathering evidence from abroad. Model provisions on limitation period are available in the *Model Legislative Provisions against Organized Crime*.⁷⁰ Whatever approaches to limitation periods are taken by a State, the State should ensure that its prosecutorial process is sufficiently streamlined to bring prosecutions to trial in a timely fashion.

⁷⁰ UNODC, *Model Legislative Provisions against Organized Crime* (2012) 101–103, available at: http://www.unodc.org/documents/organized-crime/Publications/Model_Legislative_Provisions_UNTOC_Ebook.pdf

CONCLUDING REMARKS

This Guide seeks to provide readers with the basic tools for criminalizing wildlife offences. The Guide has provided guidance and, where relevant, model provisions for introducing offences covering some of the main forms of wildlife crime and related offences, as well as for introducing provisions relating to investigations, national mandates, international cooperation, prosecution of offenders, jurisdiction of courts, and penalties and sentencing. The Guide is not, however, exhaustive as to the myriad of possible issues relevant to the development of wildlife legislation. Beyond the issues considered by this Guide, States also may decide to consider introducing offences relating to ecosystems, damage to habitat, knowingly introducing invasive alien species, and biopiracy. States also may wish to consider introducing offences aimed at activities prohibited in relation to all species, such as torture and indiscriminate destruction. In addition, there are further types of procedural provisions relevant to wildlife crime that States may wish to introduce. For example, given the links between wildlife offences and organized crime, it is important to have provisions ensuring the safety of witnesses. States also may elect to introduce provisions protecting whistle-blowers who expose wildlife crime.

The criminal justice response to wildlife crime advocated by this Guide is just one part of an inventory of measures designed to assist States in combating and deterring wildlife crime. Criminal law can be an effective tool to shape behaviour, but it cannot stand alone in addressing the problem. This Guide serves as a tool to strengthen judicial capacity and responses and should be used alongside the variety of technical assistance tools made available to States.

These include the *Wildlife and Forest Crime Analytic Toolkit*⁷¹ and *Indicator Framework for Combating Wildlife and Forest Crime*⁷² published by the International Consortium on Combating Wildlife Crime (ICWC), the *World Wildlife Crime Report*⁷³ (UNODC), the *Manual on Mutual Legal Assistance and Extradition*⁷⁴ (UNODC), the *Manual on Wildlife and Forest Crime for Frontline Officers*⁷⁵ (UNODC), the *Best Practice Guide for Forensic Timber Identification*⁷⁶ (ICWC), the *Methods and Procedures for Ivory Sampling and Laboratory Analysis*⁷⁷ (ICWC), *Evaluating Effectiveness: A framework for assessing management effectiveness of protected areas*⁷⁸ (IUCN) and the *Wildlife Consumer Behaviour Change Toolkit*⁷⁹ (TRAFFIC/GIZ).

⁷¹ http://www.unodc.org/documents/Wildlife/Toolkit_e.pdf

⁷² <https://cites.org/sites/default/files/eng/prog/icwc/ICCWC-Ind-FW-ASSESSMENT-GUIDELINES-FINAL.pdf>

⁷³ https://www.unodc.org/documents/data-and-analysis/wildlife/World_Wildlife_Crime_Report_2016_final.pdf

⁷⁴ https://www.unodc.org/documents/organized-crime/Publications/Mutual_Legal_Assistance_Ebook_E.pdf

⁷⁵ <https://www.unodc.org/southeastasiaandpacific/en/resources/toc/border-management.html>

⁷⁶ http://www.unodc.org/documents/Wildlife/Guide_Timber.pdf

⁷⁷ http://www.unodc.org/documents/Wildlife/Guidelines_Ivory.pdf

⁷⁸ <https://portals.iucn.org/library/efiles/documents/pag-014.pdf>

⁷⁹ <http://www.changewildlifeconsumers.org/>





UNODC

United Nations Office on Drugs and Crime

Vienna International Centre,
P.O. Box 500, 1400 Vienna, Austria
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-3389
www.unodc.org



V.18-05317