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## Joint Meeting of the Bern Convention Network of Special Focal Points on Eradication of Illegal Killing, Trapping and Trade in Wild Birds and the CMS Intergovernmental Task Force on Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean

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### LEGISLATIVE GUIDANCE MATERIALS RELATING TO THE ILLEGAL KILLING, TAKING AND TRADE OF WILD BIRDS

*(Prepared by the Global Law Alliance for Animals and the Environment of the Lewis & Clark Law School on behalf of CMS Secretariat)*

#### Summary:

The present Legislative Guidance Materials Relating to the Illegal Killing, Taking and Trade of Wild Birds (Legislative Guidance) responds to Action 3.1 of the Rome Strategic Plan, furnishing countries with a set of legislative ideas and options, informed by best practices, that can be deployed to combat IKB.

MIKT members are encouraged to review, comment on and endorse the Legislative Guidance.

The Bern Convention Network of Special Focal Points on Eradication of Illegal Killing, Trapping and Trade in Wild Birds is invited to support the submission of the document to the Standing Committee at its 42<sup>nd</sup> meeting.



The European Union was recognized as Champion Plus for their generous support and commitment towards addressing Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean for the period 2018 - 2023. This activity has been funded with the contribution granted by the European Commission under the Migratory Species Champion Programme and through the Global Public Goods and Challenges (GPGC Programme) Cooperation Agreements with UNEP.



## LEGISLATIVE GUIDANCE MATERIALS RELATING TO THE ILLEGAL KILLING, TAKING AND TRADE OF WILD BIRDS

### Introduction

1. As part of its ongoing work related to the implementation of the [Rome Strategic Plan](#) (RSP) 2020-2030, the key strategic framework for the Intergovernmental Task Force on Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean (MIKT), the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (CMS Secretariat) is engaged in a series of efforts to assist countries in combatting illegal killing, taking and trade of wild birds (IKB).
2. While the specific measures needed to tackle IKB vary by country, the RSP establishes a common framework built around five result-oriented Objectives, with each Objective accompanied by a set of Indicators and time-bound Actions.
3. Objective No. 3—“[t]o ensure that the illegal killing of birds is addressed effectively and efficiently in national legislation”—lies at the heart of the present document. Specifically, Action 3.1 calls for, *inter alia*, the development of “guidelines on effective legislation including examples of model legislation on combating IKB that has proved effective.”
4. The present Legislative Guidance Materials Relating to the Illegal Killing, Taking and Trade of Wild Birds (Legislative Guidance) responds to Action 3.1, furnishing countries with a set of legislative ideas and options, informed by best practices, that can be deployed to combat IKB.
5. In addition, this Legislative Guidance offers further explanation and context for the Model Law on the Illegal Killing, Taking and Trade of Wild Birds (Model Law), which the CMS Secretariat developed in parallel to the Legislative Guidance under Action 3.1.
6. Although the CMS Secretariat has drafted the Legislative Guidance and the Model Law to be mutually reinforcing, the documents are likewise useful when read independently of each other. The present Legislative Guidance, in particular, is designed to provide insight on the suite of issues that countries may wish to consider when assessing, designing, or amending legislation related to IKB. The Model Law provides but one example of how this insight might be transposed into national law.

### CMS Obligations and IKB

1. Article III.5 of the CMS provides that “Parties that are Range States of a migratory Species listed in Appendix I shall prohibit the taking of animals belonging to such species.”
2. Article I.1(i) of the CMS defines “taking” to mean “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.” This is known as the “take prohibition” or the “prohibition against taking.”
3. The take prohibition of Article III.5 of the CMS applies throughout the entire span of migration of a species included in Appendix I unless the listing of that species explicitly indicates it only applies to specific populations.
4. Under Article III.5 of the CMS, exceptions to the take prohibition are limited to the following:
  - Scientific purposes
  - Enhancing the propagation or survival of the affected species
  - Traditional subsistence use

- Extraordinary circumstances
5. Under Article III.5, exceptions must be “precise as to content and limited in space and time,” suggesting that exceptions should be clearly drafted with terms that are precise and well-defined, geographically limited, and timebound.
  6. Note that, for purposes of these Legislative Guidelines, “exception” is used in a broad way to signify any departure from the otherwise applicable rules governing take and trade of wild birds. Thus, this document’s use of the term “exception” covers not only “exceptions” within the meaning of CMS Article III.5 but also “derogations” as used in Directive 2009/147/EC of the European Parliament and of the Council (EU Birds Directive). Further, “exception” as used in these Legislative Guidelines may include both deviations that are directly articulated in legislation or regulations without the need for further administrative permission (e.g., without the need for a permit) and deviations that are *potentially* authorized but that require additional administrative action. Stated differently, the term “exception” as used herein covers both (1) take and trade that would normally be prohibited but for a legislative or regulatory provision explicitly departing from, or creating an exception to, the baseline rule (e.g., a clause explaining that prohibitions do not apply to captive-bred birds, a regulation suspending bag limits for hunting a species that has become a nuisance through overpopulation), and (2) conduct that, while not explicitly authorized in legislation or regulations, may *become* authorized through the issuance of a special permit, the issuance of which is controlled through legislation or regulations.
  7. Drawing on the Second Conference on the Illegal Killing, Trapping and Trade of Wild Birds in Tunis (2013), [UNEP/CMS/Resolution 11.16 \(Rev.COP13\)](#) noted that the illegal killing, trapping, and trade of wild birds includes “activities which are illegal under national or regional law/regulations and involve the deliberate pursuit, killing, injuring or catching alive of wild birds or are aimed at illegal marketing live or dead specimens of wild birds, including their parts and derivatives.”<sup>1</sup>

### **Definitions Must be Precise and Comport with Agreed Language**

1. Legislation regulating hunting, trade, and associated activities involving wild birds (IKB Legislation) should define all operative terms, using language that is clear and unambiguous.
2. In most cases, IKB Legislation should define all or a subset of the following terms:
  - “Bird”: “Bird or birds” should be defined as individuals of the class *Aves*, occurring naturally in their wild state.
  - “Huntable bird” (or “Schedule I or Annex I bird”): Employing a “white-list” approach, “huntable bird” should be defined as those birds listed on the Schedule or Annex that identifies the species that may be hunted or collected with a license or permit. A bird that is not listed on the Schedule or Annex then automatically is a non-huntable bird. As explained in further detail below, a white-list approach effectively creates a default of protected or non-huntable status. Absent an exception, only by affirmative designation on a Schedule or Annex does a bird species become huntable.
  - “Non-huntable bird” (or “non-Schedule I bird” or “non-Annex I bird”): What constitutes a “non-huntable bird” informs the scope of the legislation, particularly as it relates to hunting and the prohibitions regarding “take” and “trade.” This term must be defined clearly, with specificity, and in accordance with how the legislation distinguishes between birds that are subject to the take and trade prohibitions and those that may be hunted and traded. Ideally,

<sup>1</sup> See UNEP/CMS/Resolution 11.16 (Rev.COP13), *The Prevention of Illegal Killing, Taking, and Trade of Migratory Birds*, at Preamble (noting the definition of “illegal killing, trapping and trade of birds” from the Second Conference on the Illegal Killing, Trapping and Trade of Wild Birds in Tunis).

legislation will employ a “white-list” approach, making “non-huntable birds” easily definable as those species not included in the Schedule or Annex that lists the species that may be hunted or collected with a license or permit.

- “Specimen”: “Specimen” should be defined to include any individual, egg, or nest, or any part or derivative of any individual, egg, or nest of a bird that has been removed from the wild. The definition should cover living as well as dead specimens.
- “Taking”: “Taking” should be defined consistently with CMS to include “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.” Of course, countries may wish to adopt a broader definition of “taking.”
- “Harassing”: Depending upon national circumstances, countries may wish to define “harassing” as a particular form of “take.” Though not defined in the CMS treaty, consistent with the Legislative Guidance and Model Law for the Implementation of Article III.5, contained in Annexes 2 and 3, respectively, of [UNEP/CMS/COP13/Doc.22](#), developed by the Secretariat and of which the CMS Parties took note, “harassing” may be defined in legislation or regulations to mean “to disturb, pursue, injure, feed, or otherwise intentionally disrupt[.]” Focusing on deliberate disturbance also aligns with Directive 2009/147/EC of the European Parliament and of the Council (EU Birds Directive), which directs EU Member States to prohibit “deliberate disturbance of [certain] birds particularly during the period of breeding and rearing[.]”
- “Trade”: Consistent with the agreement of the Second Conference on the Illegal Killing, Trapping and Trade of Wild Birds in Tunis (2013), “trade” in the context of IKB may be defined to include “[a]ctivities which are illegal under national or regional law/regulations and . . . are aimed at illegal marketing live or dead specimens of wild birds, including their parts and derivatives.”<sup>2</sup> Regulated conduct should extend to “possession, donation, use, movement, transfer, offer for sale, advertisement, consumption, import, introduction from the sea, transit or export, of specimens.” This approach is also generally consistent with the EU Birds Directive, insofar as that instrument likewise directs EU Member States to prohibit commercial activity in most species of birds.<sup>3</sup>
- “Competent authority”: As in the Legislative Guidance and Model Law for the Implementation of Article III.5, contained in Annexes 2 and 3, respectively, of [UNEP/CMS/COP13/Doc.22](#), developed by the Secretariat and of which the CMS Parties took note, “competent authority” should be defined to mean “the [agency] [ministry] [minister] responsible for implementing and enforcing” the national legislation addressing IKB.
- “Enforcement officers”: To minimize disputes over enforcement jurisdiction, it may be helpful to define, with precision, the officers that have authority to inspect, search, seize, and make arrests relating to IKB. In many countries, all or a subset of this authority might be vested in multiple agencies (e.g., general national police, wildlife rangers, game wardens, protected-areas enforcement officers, customs agents, and so forth). When specified with precision in legislation, vesting enforcement authority in multiple agencies can ensure that all officers in a position to encounter IKB offenses are authorized to respond with enforcement actions. Note, however, that vesting enforcement authority in multiple agencies can in some cases lead to officers of a given agency shirking

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<sup>2</sup> See UNEP/CMS/Resolution 11.16 (Rev.COP13), *The Prevention of Illegal Killing, Taking, and Trade of Migratory Birds*, at Preamble (noting the definition of “illegal killing, trapping and trade of birds” from the Second Conference on the Illegal Killing, Trapping and Trade of Wild Birds in Tunis).

<sup>3</sup> See EU Birds Directive, Art. 6.1 (directing Member States to prohibit, with respect to the most protected class of birds, “the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognizable parts or derivatives of such birds”).

responsibility by characterizing the task as the duty of another agency. To mitigate this risk, the law should carefully define those responsibilities that are overlapping as between multiple authorities—and those responsibilities that are unique to a given authority—and further specify that all authorities have a mandatory duty to enforce even in the case of overlapping authority.

- “Person”: As in the Legislative Guidance and Model Law for the Implementation of Article III.5, contained in Annexes 2 and 3, respectively, of [UNEP/CMS/COP13/Doc.22](#), developed by the Secretariat and of which the CMS Parties took note, “person” should be defined broadly to encompass all national understandings of legal persons and natural persons.
  - “Prohibited gear”: This term should be defined to include non-selective gear, such as lime sticks, nets, snares, etc. A Schedule or Annex to the legislation may be used to enumerate prohibited gear with more specificity. Using a Schedule or Annex has the advantage of allowing authorities to add to the list of prohibited gear as circumstances warrant without the burden of legislative amendment, as the legislation may authorize the Competent Authority to modify the list administratively.
  - “Prohibited methods”: Depending on national circumstances, States may also wish to set forth hunting methods that are prohibited under all circumstances (e.g., hunting from a vehicle, hunting at night, hunting with the use of decoys, etc.). If such methods can be reduced to a small, closed universe of methods, defining such methods in the definitions section can be helpful to achieve clarity regarding hunting methods that are proscribed as a baseline feature of the IKB law. Alternatively, prohibited methods can be enumerated alongside prohibited gear in a Schedule or Annex. This is the approach taken by the EU Birds Directive.<sup>4</sup>
3. Of course, other terms may require definition depending upon the chosen legislative approach. The guiding principles are three-fold. First, it is better to err on the side of over-definition than under-definition. Second, definitions should be clear and coherent. Third, definitions should comport with the law’s operative provisions to create synergy as opposed to conflict, ambiguity, or confusion, all of which can challenge compliance, enforcement, and prosecution through counter-productive *ad hoc* interpretations.

### **Using a White-List Approach to Distinguish Hunttable Species from Non-Hunttable or Protected Species**

1. The scope of any legislation should clearly identify the species that are protected and subject to the take and trade prohibitions, barring an exception, and those that may be hunted or collected for certain purposes under the standard hunting rules.
2. A white-list approach may be the most efficient, useful, and clear way to distinguish hunttable species from protected ones.
3. Under a white-list approach, national legislation includes a Schedule or Annex that identifies the birds that may be hunted or collected, providing that licenses or permits have been acquired and all conditions complied with. All other birds are considered protected birds and subject to the take and trade prohibitions. With this approach, the legislation and/or regulations require amendment less often and take a more precautionary, inclusive approach to protection.
4. CMS Appendix I bird species would, of course, need to be categorically ineligible for inclusion in the white list of hunttable species. However, most countries will likely also want to exclude CMS Appendix II bird species and other bird species warranting protection from hunting or

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<sup>4</sup> See EU Birds Directive, Art. 8(1) (directing Member States to prohibit “large-scale” and “non-selective” means, arrangements, or methods as listed in a separate Annex); *id.* at Art. 8(2) (directing Member States to prohibit hunting from “the modes of transport and under the conditions” set forth in a separate Annex).

capture. Given the evolving nature of the CMS Appendices and other lists of species requiring protection (e.g., species listed as “threatened with extinction” on the IUCN Red List), a white-list approach has the benefit of keeping pace with such Appendices and lists by default.

5. Under a white-list approach, the ultimate criterion for inclusion on the Schedule or Annex of huntable birds should be a favorable conservation status. Thus, any species “threatened with extinction” according to the IUCN Red List (whether the international list, the national list, or both); listed or protected by national, regional, or international law; or otherwise facing conservation threats should, by definition, be excluded from the Schedule or Annex of huntable birds. Note that if inclusion in the Schedule or Annex requires an affirmative finding of “favorable conservation status” or similar, the universe of excluded species will normally be much broader than species “threatened with extinction” according to the IUCN Red List in order to maintain consistency with the broader precautionary logic of a white-list approach. For example, in the case of some IUCN “data deficient” species, it may not be possible to arrive at an affirmative finding of “favorable conservation status,” even though the species is not “threatened with extinction” per the IUCN.
6. In addition, identification as a huntable bird should rely on best available science, and species that may be hunted or captured should never include:
  - species where the best available science suggests that the species or the relevant population is in danger of extinction or extirpation;
  - species where the best available science suggests that the species or relevant population is vulnerable to changes in habitat; or
  - species where the best available science suggests that the species or relevant population consists of only small populations or restricted areas of distribution.
7. Note that some countries may want to include special treatment for birds bred in captivity for hunting. This could be accomplished through a scoping provision clarifying that the law does not apply to captive-bred birds. Alternatively, if a white list is employed, the Schedule or Appendix setting forth huntable birds could include captive-bred birds.
8. Israel’s Wildlife Protection Law (WPL) provides an instructive example of how a country might use a white-list approach to promote protection as a default. The Wildlife Protection Law is built on four categories of “wildlife.” Two of the categories, “Game” and “Pests,” are defined through an enumerated list in the law’s corresponding Wildlife Protection Regulations (WPR), while the third category, “Domesticated Wildlife,” is narrowly defined by the WPL itself. The final category of wildlife, “Protected Wildlife,” is defined as any wildlife that “is neither game, pest nor domesticated Wildlife.” As a result, the law effectively establishes protected status as a default until affirmative action has been taken to add it to one of the other categories.<sup>5</sup>

### **Prohibitions Should be Clear and Comprehensive**

1. IKB Legislation should clearly and comprehensively define prohibited conduct.
2. In the IKB context, there should normally be a set of prohibitions relating to protected or non-huntable species, on the one hand, and another set of prohibitions relating to huntable species.

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<sup>5</sup> Wildlife Protection Law, 5715-1955, Dinim vol.8, 4365 (Apr. 5, 1998); Wildlife Protection Regulations, Dinim vol.8 pp. 4371, WPR §§ 1a, 2 (May 25, 1999).

3. Generally speaking, prohibitions relating to protected or non-huntable species will be categorical in nature: absent an exception, it is illegal to “take” or “trade” in specimens of such species.
4. In contrast, the prohibitions relating to huntable species are structured around compliance with licensing and other hunting rules. Accordingly, the IKB infractions that apply to huntable species are based on the failure to comply with licensing and other provisions designed to ensure that all hunting is lawful.

### **Absent an Exception, Legislation Should Prohibit “Take” and “Trade” of Non-Huntable (or Schedule I or Annex I) Birds**

1. With respect to protected or non-huntable species, most of the prohibited conduct will relate to either “take” or “trade” in specimens of such species. Under a white-list regime, those species will include all species not affirmatively listed as “huntable birds” in a separate Schedule or Annex.
2. Regarding take of non-huntable birds, legislation should prohibit, at a minimum, the CMS Article I.1(i) forms of take: “taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct.” In addition, States may wish to prohibit the keeping of specimens of non-huntable species, depending on the State practice regarding captive breeding and farming. For example, the EU Birds Directive directs Member States to prohibit the “keeping of birds of species the hunting and capture of which is prohibited.”<sup>6</sup>
3. Regarding trade, legislation should be broad in scope, prohibiting all activity involving specimens of non-huntable species that is or may be commercial in nature. Such an approach aligns with [UNEP/CMS/Resolution 11.16 \(Rev.COP13\)](#), wherein the Conference of the Parties noted the agreement from the Second Conference on the Illegal Killing, Trapping and Trade of Birds in Tunis (2013) that the illegal killing, trapping, and trade of birds includes “activities which are illegal under national or regional law/regulations and involve the deliberate pursuit, killing, injuring or catching alive of wild birds *or are aimed at the illegal marketing of live or dead specimens of wild birds, including their parts and derivatives.*”<sup>7</sup>
4. As such, the trade prohibition should include buying, selling, offering to buy or sell, importing, exporting, transporting, and marketing specimens of protected species.
5. Ideally, countries should also prohibit the “mere” possession and/or consumption of protected or non-huntable birds. Whether possession and consumption are defined as forms of “take” or as forms of “trade”—or simply treated separately as stand-alone activities—national legislation should prevent the scenario wherein a person might defend against a prosecution or other enforcement activity where the evidence establishes possession or consumption but does not clearly establish other prohibited activities (e.g., that the possessing individual was also responsible for the illegal take in the first instance).
6. As concerns the regulation of post-capture activities, the EU Birds Directive is instructive. If a bird is a member of a protected species, the EU Birds Directive law contemplates not only a complete ban on the intentional killing or capturing of such a bird, but also a prohibition on sale, transport for sale, retention for the purpose of sale, and offers to sell.<sup>8</sup> This prohibition extends to parts and derivatives, and it applies equally to dead and living specimens.

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<sup>6</sup> EU Birds Directive, Art. 5(e).

<sup>7</sup> See UNEP/CMS/Resolution 11.16 (Rev.COP13), *The Prevention of Illegal Killing, Taking, and Trade of Migratory Birds*, at Preamble (noting the definition of “illegal killing, trapping and trade of birds” from the Second Conference on the Illegal Killing, Trapping and Trade of Wild Birds in Tunis) (emphasis added).

<sup>8</sup> EU Birds Directive, Art. 6.1.

7. Legislation should also be clear as to the types of specimens subject to the take and trade prohibitions pertaining to non-huntable or non-Schedule I birds. Consistent with both the Second Conference on the Illegal Killing, Trapping and Trade of Wild Birds in Tunis (2013) and the EU Birds Directive, the prohibitions should extend not only to whole birds (whether dead or alive) but also to parts and derivatives (e.g., feathers), eggs, and nests. IKB Legislation should clearly prohibit deliberate destruction of or damage to nests and eggs, including removal of either. Note, in addition, that the prohibitions relating to nests and eggs should normally also extend to otherwise huntable birds, as indicated below.
8. The EU Birds Directive, in particular, contains instructive language on eggs and nests.<sup>9</sup> Again, these prohibitions should normally extend to huntable and non-huntable species alike.
9. Depending on national circumstances, it may be helpful to specifically enumerate the prohibitions in an action-by-action way, rather than simply relying on a general prohibition against “take” or “trade” that, in turn, relies on those terms’ definitions. Accordingly, the prohibitions section of a model IKB law could expressly prohibit the following conduct:
  - Hunting,
  - Capturing,
  - Retaining,
  - Collecting,
  - Deliberate killing,
  - Destruction or damage (particularly regarding nests and eggs),
  - Harassing,
  - Transportation,
  - Possession,
  - Consumption,
  - Offer for sale,
  - Purchase,
  - Export,
  - Import,
  - Transit,
  - Trafficking,
  - Trading,
  - Persecuting,
  - Disturbing, and
  - Attempts of any of the above.
10. At a minimum, for take of those non-huntable species that are also CMS Appendix I species, the prohibited forms of take should be consistent with the CMS definition of that term.
11. Many countries currently maintain legislation that enumerates prohibited conduct along the lines of paragraph 9, in lieu of simply stating that “take” is prohibited. For example, Spain’s Law 42/2007, regarding Natural Patrimony and Biodiversity, prohibits, with respect to specimens of protected species, (1) “any action made with the purpose of causing death, capture, pursuit, or harassment, as well as the destruction or deterioration of nests, dens, and places of reproduction, hibernation, or rest”; and (2) “possessing, domesticating, transporting, selling, commercializing, bartering, offering to sell or barter, importing or exporting[.]”<sup>10</sup>

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<sup>9</sup> See EU Birds Directive, Art. 5(b) (directing Member States to prohibit “deliberate destruction of, or damage to, their nests and eggs or removal of their nests”) & Art. 5(c) (directing Member States to prohibit “taking their eggs in the wild and keeping these eggs even if empty”).

<sup>10</sup> Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad, Art. 57(b)-(c).

12. Whether employing a broad definition of “take” (with a corresponding prohibition of “take”) or a prohibitions section that enumerates prohibited conduct in an action-by-action way, countries are encouraged to think expansively about the type of conduct they may wish to regulate. One example of a country regulating “take” in an expansive way can be found in Israel’s Nature Reserves Regulations, which broadly define “harm” so as to incorporate actions that might not traditionally be considered in a definition of “take.” To be sure, the definition of “harm” includes common actions such as injuring, holding, hunting and harassing, but it then goes further to cover “changing the form or natural position” and “harming . . . wellbeing or freedom.” Importantly, the definition retains an intent requirement by including the qualifying phrase, “with the intention of causing damage as such.”<sup>11</sup>
13. Regardless of the approach, special care should be taken to delineate whether the prohibitions reach unintended take. As a factual proposition, unintended or “incidental take” of protected or non-huntable birds may occur in a number of scenarios but perhaps most notably in connection with projects that alter habitat or flyways and hunting or trapping targeting other species. As noted in the Legislative Guidance for the Implementation of Article III.5, contained in Annex 3 of [UNEP/CMS/COP13/Doc.22](#), it does not appear that the CMS is meant to cover incidental or unintentional takes. As to “harassing” in particular, the Legislative Guidance for the Implementation of Article III.5 concluded from the textual context that “harassing” was not meant to reach incidental harassment occurring as a byproduct of activities undertaken for a different purpose. Of course, Parties can define harassing so as to prohibit or regulate such activities, if such is preferred from a national perspective.

### **Using a Permit System to Implement Exceptions to “Take” and “Trade” Prohibitions for Non-Huntable (or non-Schedule I or non-Annex I) Birds**

1. Under the CMS, exceptions are only authorized under limited circumstances. Specifically, under Article III.5, exceptions to the take prohibition for Appendix I species are only authorized if “a) the taking is for scientific purposes; b) the taking is for the purpose of enhancing the propagation or survival of the affected species; c) the taking is to accommodate the needs of traditional subsistence users of such species; or extraordinary circumstances so require[.]” In all events, any exceptions granted on the basis of one of the above grounds must be “precise as to content and limited in space and time,” and the resultant taking “should not operate to the disadvantage of the species.”
2. Key to ensuring that the exceptions are narrowly tailored, precise, and limited is articulation of a comprehensive set of criteria upon which the competent authority will issue permits, including ensuring that any permits or licenses issued will not disadvantage the species.
3. Legislation should provide that permits for take pursuant to any of the exceptions contain specifications, including the following:
  - time-limitations;
  - permissible hunting or capture areas and/or excluded areas; and
  - authorized species, specimens, means, and potential uses.
4. Legislation should establish a system to ensure strict supervision of compliance, monitoring, and reporting for each exception granted on an annual basis. This ensures that the competent authority has the necessary information to report to the CMS Secretariat and others the scale and scope of use of the exceptions as concerns Appendix I species of birds.<sup>12</sup> For EU Member States, a similar obligation exists in the EU Birds Directive. Under Article 9, EU Member States are to keep the European Commission apprised of derogations, allowing the Commission to

<sup>11</sup> Nature Reserves Regulations, 5739-1979, Dinim Vol. 6, p. 3549 (June 11, 1985).

<sup>12</sup> See CMS, Art. III.7 (“The Parties shall as soon as possible inform the Secretariat of any exceptions made pursuant to paragraph 5 of this Article.”).

ensure that derogation practice is not incompatible with the Birds Directive as a whole.<sup>13</sup> The relationship between EU Member States and the European Commission here is similar to the oversight envisaged by Article III.7 for the CMS Secretariat. At a minimum, national legislation should specify that the competent authority is required to submit annual reports to the CMS Secretariat regarding the use of exceptions for take of CMS Appendix I species.

5. In the interest of transparency and accountability, national legislation should establish a system to compile and make publicly available key information related to each exception granted, including “information on affected species, number of specimens, justification, the responsible authorities, permitting and licensing procedures, [and] compliance monitoring and supervision.”<sup>14</sup>
6. As concerns trade, national legislation may contain a simple prohibition on trade of specimens of non-huntable birds, unless lawfully taken under an exception and subject to any conditions included in the permit authorizing the take.
7. Countries have developed a range of approaches to authorizing and policing exceptions to the default prohibitions on take and trade. Spain, for example, generally prohibits take and trade of wild animals, with an important exception for huntable species. Yet, even for non-huntable species, found in Spain’s “List of Wild Species in [the] Special Protection Regime,” Spanish law contemplates lifting the take and trade prohibitions in certain circumstances. Again, this is fully consistent with both the CMS, and it is also consistent with the EU Birds Directive. In particular, Spanish law authorizes the competent authority to waive the default take and trade prohibitions (i.e., to grant an exception) under the following circumstances:

*a) If their application would have harmful effects on the health and safety of people.*

*b) To prevent significant damage to crops, livestock, forests, fisheries and water quality. Except in the case of birds, this exception may also be applied in the case of significant damage to other forms of property.*

*c) For imperative reasons of overriding public interest, including those of a socio-economic nature and beneficial consequences of primary importance for the environment. This exception shall not apply in the case of birds.*

*d) When it is necessary for reasons of research, education, repopulation or reintroduction, or when it is necessary for captive breeding for such purposes.*

*e) In the case of birds, to prevent accidents in relation to air safety.*

*f) To allow, under strictly controlled conditions and by means of selective methods, the capture, retention or any other prudent exploitation of certain species not included in the List of Wild Species under Special Protection Regime, in small quantities and with the necessary limitations to guarantee their conservation.*

*g) To protect wild flora and fauna and natural habitats.<sup>15</sup>*

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<sup>13</sup> See EU Birds Directive, Art. 9.3 (directing Member States to send an annual report to the European Commission for derogations from the general provisions governing take, hunting, and other regulated activities).

<sup>14</sup> Annex 1 to Resolution 11.16 (Rev.COP13), *Scoreboard to Assess the Progress in Combatting Illegal Killing, Taking and Trade of Wild Birds (IKB)*, at p. 28.

<sup>15</sup> Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad, at Art. 61.1. Note that the Spanish approach largely mirrors the EU Birds Directive “derogations” scheme. The EU Birds Directive contains a single Article authorizing derogations from (i.e., exceptions to) the rules that otherwise apply to both huntable and non-huntable birds. The Spanish approach is similar (as is to be expected in light of the obligation under the EU Birds Directive to transpose its substance to national law). In other words, both the EU Birds Directive and Spanish law contemplate departures from the otherwise applicable rules, with such departures authorized both in the case of protected birds (e.g., to authorize limited take) and in the case of huntable birds (e.g., to authorize out-of-season hunting, hunting beyond normal bag limits, etc.). For analytical purposes, this Legislative Guidance treats these situations separately, as does

8. However, the mere existence of one of the above circumstances is not sufficient, by itself, to warrant the granting of an exception permit in Spain. In order to issue an exception permit under Spanish law, the competent authority must also ensure that no satisfactory alternative solution exists and that the exceptional activity will not prejudice the maintenance of a favorable state of conservation for the population of species concerned.<sup>16</sup>
9. Finally, under the Spanish system, any issued permit must be justified, made publicly available, and specify:
  - the objective and justification of the action;
  - the species;
  - the means, facilities, systems, or methods to be used and their limits, as well as the reasons and qualified personnel authorized; and
  - the nature and conditions of risk, the circumstances of time and place, and, if applicable, the alternative solutions not adopted and the scientific data used.<sup>17</sup>
10. The Spanish approach, which flows from the EU Birds Directive, underscores the principles that ought to guide any exceptions to the take and trade prohibitions pertaining to non-hunttable or protected birds: the qualifying circumstances should be clearly defined, crafted in narrow terms, and in no case prejudice the conservation status of a non-hunttable bird.

### **Using a License System to Regulate Hunting for Hunttable Birds (or Schedule-I or Annex-I Birds)**

1. Under a white-list approach, only those species set forth as “hunttable” in a Schedule or Annex are eligible for hunting. Legislation should establish a licensing system and otherwise regulate all of the important variables necessary to ensure that hunting is conducted in a lawful and sustainable manner.
2. Many countries may already have hunting legislation that effectively regulates hunting for wild birds. In such a case, an IKB law that introduces a white-list of hunttable birds could simply make clear that the existing hunting legislation still applies, subject to the new list of hunttable (Schedule-I or Annex-I) birds and the other provisions in the IKB law that can be harmonized with existing hunting legislation (e.g., provisions around prohibited gear).
3. On the other hand, if countries so desire, they may combine in a single law all provisions relating to the protection of non-hunttable birds and all provisions regulating the hunting of hunttable birds.
4. The law should provide that, absent a license, it is unlawful to hunt for otherwise hunttable birds (i.e., Schedule-I or Annex-I birds).
5. The law should further make it illegal to hunt beyond the parameters of a license or in contravention of a license’s terms.
6. If an IKB law includes hunting provisions, this section of the legislation should establish the licensing process so that applicants are aware of the procedures for obtaining a license. Equally important, the section should identify the steps to be undertaken by the competent authority in issuing such licenses. In particular, this should include whether the issuance of a license depends on the availability of take relative to a national quota (recognizing that for

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the Model Law. However, we recognize that some countries may prefer to use a single “derogations” or “exceptions” rubric, as in the EU Birds Directive and Spanish legislation.

<sup>16</sup> Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad, at Art. 61.1. Note that this, too, follows from the EU Birds Directive.

<sup>17</sup> Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad, at Art. 61.5.

many huntable species there may be no quota, as opposed to daily bag limit), the criteria used for issuance of a license, the incorporation of conditions, deadlines and other time frames, fees, and situations giving rise to ineligibility—for example, when an applicant has been convicted in the past of violating the hunting law or another offense related to wildlife.

7. Further, the hunting law—whether as part of an IKB law, as a separate hunting law, or through administrative regulations—ought to address all of those variables critical to managing hunting of huntable birds in a way that is lawful and ecologically sustainable. Among these variables are the establishment of hunting seasons and hunting areas, the regulation of allowable take methods, bag limits and/or quotas, data collection and reporting, license-acquisition criteria (e.g., passing a hunting training course or exam), and use of specimens following capture.
8. Note that, in many jurisdictions, the hunting license itself will not enumerate all of the various conditions to which the license is subject; instead, these conditions may be set forth in a law or regulation, with a provision explaining that all licenses are subject to such conditions.
9. *Hunting Seasons and Hunting Areas:* Two of the most important variables to regulation of hunting are time and place. To promote sustainability, hunting regimes classically rely on the establishment of limited hunting seasons and designated hunting grounds. Seasons should be set in order to avoid prime mating, nesting, and migration cycles, for example. In many parts of the Mediterranean region, for example, it may be critical to prohibit hunting during the spring migration period, as hunting during this season often translates to the capture of parental birds prior to nesting. Depending upon the range of huntable species recognized in national legislation, countries should designate seasons and locations for each species that may be hunted or captured. An efficient approach may be for national legislation to direct the competent authority to develop hunting seasons and hunting areas for each huntable bird species, or a family or similar taxa of huntable birds, through separate regulations. Legislation should identify appropriate penalties for violations of seasonal and/or spatial restrictions. See “Penalties and Sanctions,” below.
10. *Permissible Hunting Methods and Gear:* The incidental and accidental take of wild birds related to use of non-selective hunting and collection methods remains an ongoing challenge for addressing IKB. Comprehensive national legislation should clearly identify prohibited methods of take, including specifically the use of non-selective methods, such as glue sticks/lime sticks, nets, traps, sound devices, etc. Ensuring that such methods are listed has the advantage of putting potential violators on notice of prohibited gear and methods. Again, to facilitate modifications to the list of prohibited gear and to eliminate ambiguity, a Schedule or Annex to legislation may be used to enumerate prohibited gear with more specificity. A similar Schedule or Annex can be used to identify prohibited methods (e.g., hunting from vehicles) that may not correspond to gear, as such. Note, too, that countries may take a “white-list” approach to hunting gear and methods, identifying only permitted gear and methods, with a provision indicating that all other gear and methods are prohibited by default. Finally, some countries may decide to develop two lists—one for authorized gear and methods and another for unauthorized gear and methods. This is essentially the approach Italy has taken. Its hunting legislation has a provision detailing the types of rifles allowed for hunting and another listing prohibited tools and weapons. The provision detailing prohibited gear includes several types of traps and poisons, as well as enhancements to accepted rifle models, like silencers.<sup>18</sup>
11. *Bag Limits and Quotas:* To ensure that authorized take of huntable species remains sustainable, national legislation should authorize or establish quotas and/or bag limits. Quotas can be established at several levels (e.g., national annual quotas for all hunters throughout the country, regional annual quotas for all hunters throughout a given region, or individual annual quotas setting a maximum yearly harvest limit for a single hunter). Bag limits, for their part,

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<sup>18</sup> L. n. 157/1992 art. 13.1-2, 21.1(u).

can be used to regulate the maximum number of individuals that a single hunter may take per day. National legislation may direct the competent authority to set quotas and bag limits every year or season through separate regulations.

12. *Data Collection and Reporting*: National legislation should require hunters to report all takes of huntable birds as a condition of the license. If a reporting mechanism does not already exist, national legislation may direct the competent authority to establish an appropriate reporting mechanism through separate regulations (and, ideally, implemented through a digital reporting platform). Reporting prevents license holders from engaging in excessive hunting (e.g., harvest in excess of a bag limit or quota), encourages hunter responsibility, and allows the competent authority to collect data critical to species management, including the quantity of specimens actually harvested by hunters. By way of example, Italian law requires that anyone who kills, captures, or finds a wild bird must report the same to the National Wildlife Institute. Along with other information, timely access to such data allows the National Wildlife Institute to satisfy its duty to study wildlife populations and to develop scientifically-supported intervention programs and policy recommendations.<sup>19</sup> To incentivize the provision of data regarding harvest under a hunting license, a system could automatically make recalcitrant hunters ineligible for the next season's hunting license or until the hunter has provided the required information.
13. *Use of the Specimen*: National legislation should describe the allowable uses of specimens taken with a hunting license under this section. For example, whether specimens may be used exclusively for non-commercial purposes (such as for personal consumption or home display) or whether specimens may be used for commercial purposes (such as the sale of meat or feathers or the sale of individuals preserved through taxidermy) should be delineated in national law with clear criteria and specific parameters. Depending on national circumstances and policy preferences, a certificate-of-ownership regime may be useful to implement and police allowable uses of huntable birds.

### **Exceptions to Otherwise Applicable Provisions Regulating Hunting for Huntable Birds (or Schedule-I or Annex-I Birds)**

1. Just as countries may wish to authorize exceptions to the take and trade prohibitions otherwise applicable to non-huntable birds, countries may also wish to allow exceptional activities otherwise not normally permitted with respect to huntable birds (i.e., Schedule-I or Annex-I birds). For example, if a particular species of huntable bird has experienced a population spike that renders the species a nuisance to crops, countries may wish to authorize out-of-season hunting, hunting free of bag limits (or subject to relaxed bag limits), or even the use of otherwise prohibited means. Likewise, countries may wish to authorize exceptional activities if a huntable bird has become a vector of a communicable disease harmful to other animals or humans. Of course, other examples can be imagined.
2. Similar to a system that contemplates exceptions to take and/or trade prohibitions for non-huntable birds (i.e., non-Schedule I or non-Annex I birds), an exceptions system for huntable birds allows the competent authority to waive license and other conditions that would otherwise apply.
3. By way of example, the EU Birds Directive contemplates derogations from the provisions that otherwise apply to both non-huntable and huntable birds. The EU Birds Directive begins with a general blanket directive to Member States to prohibit take and trade in wild birds naturally occurring in the European territory of a Member State. From this protective baseline, however, the EU Birds Directive contemplates several departures. The EU Birds Directive provides that Member States "may derogate" from prohibitions and conditions "where there is no other satisfactory solution," for any of the following reasons:

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<sup>19</sup> L. n. 157.1992, Art. 4.5, 7.3.

- (a) – *in the interests of public health and safety,*
    - *in the interests of air safety,*
    - *to prevent serious damage to crops, livestock, forests, fisheries, and water,*
    - *for the protection of flora and fauna;*
  - (b) *for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;*
  - (c) *to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.*<sup>20</sup>
4. If a country wishes to authorize departures from the rules that would otherwise apply for huntable birds (i.e., Schedule-I or Annex-I birds), this could be accomplished in at least two ways, neither of which is mutually exclusive. First, the country might include a provision in its hunting law authorizing exceptional hunting under certain circumstances (e.g., like those identified in the EU Birds Directive), with the precise nature of the exception to be defined through regulation, decree, or other administrative instrument. Exceptions issued in such a manner would normally announce broad exceptions applicable to all hunters of a given species in a given year or season (e.g., suspending bag limits for a given species that has experienced a spike in population and, as a result, threatens crops). As long as the hunter possesses an appropriate hunting license, the hunter could take advantage of such an exception without further procedural requirements. Alternatively, or in complementary fashion, a country might wish to authorize exceptional hunting as above but *also* require that the hunter obtain a special permit or license to take advantage of the exception. This additional step could be particularly useful if a country is unsure of the effects of the exception or concerned that hunting activity under the exception may expand beyond reasonable limits. Requiring a special permit may allow the country to better monitor use of the exception—and, if desired, introduce finer controls (e.g., issuing a limited number of permits for exceptional hunting, made available on a “first come, first served” basis).
5. Regardless of a country’s approach, information regarding the authorization of exceptional hunting should be made publicly available, both as a way to increase transparency and, more specifically, to reduce the risk of excessive use of exceptions. One way to accomplish this legislatively is to require the competent authority to publish an annual report describing all exceptions authorized over the previous year. Legislation might also direct the authority to analyze the ecological impacts of exceptions over the past year and to take such analysis into account when granting exceptions in the future.

#### **Ancillary Provisions: Prohibition of Trade in Certain Gear and Evidentiary Presumptions**

1. Recognizing that illegal take and trade of wild birds is often facilitated through the availability, use, and possession of illegal or unauthorized gear (e.g., limesticks, mist nets), legislation should explicitly prohibit the import, export, manufacture, sale, purchase, and possession of hunting and trapping equipment that the State wishes to ban altogether. As in other areas, regulation of such activity might be accomplished through ancillary laws (e.g., laws regulating the import and export of merchandise and other goods), as opposed to through hunting legislation or wildlife legislation, as such.
2. As discussed above, hunting legislation will normally identify the use of certain gear as prohibited in otherwise lawful hunting activities. See “Using a License System to Regulate

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<sup>20</sup> EU Birds Directive, Art. 9. Again, the EU Birds Directive contains a single Article authorizing derogations from (i.e., exceptions to) the rules that otherwise apply to both huntable and non-huntable birds. The Article 9 text quoted above generally applies to all wild birds, not just huntable species, encompassed within the EU Birds Directive.

Hunting for Hunttable Birds (or Schedule I Birds),” at para. 10, “Permissible Hunting Methods and Gear.”

3. However, simply prohibiting the *use* of certain gear (e.g., limesticks, mist nets, digital bird-calling devices) in hunting operations may not be sufficient. In such cases, States may include in legislation (whether hunting legislation or otherwise) a prohibition on the import, export, manufacture, sale, offer to sell, purchase, offer to purchase, and possession of such gear. Compared to a mere prohibition on use, prohibiting such activities has the advantage of facilitating enforcement actions when there may be no evidence of use, as such.
4. Relatedly, countries may also consider including evidentiary presumptions in connection with prohibitions. For example, if authorities detect a person carrying certain gear (e.g., limesticks) in a protected area or even simply in any area outside of the person’s home, this could be classified through legislation as both (1) an offense in and of itself (possession of illegal gear) and (2) a *presumptive* attempt to engage in illegal hunting. Evidentiary presumptions, when codified, can assist prosecutors in cases where direct evidence of the conduct in question is lacking. To account for due process concerns, the presumptions can be rebuttable, i.e., the accused can overcome the presumption through an evidentiary showing that he or she was not, in fact, engaged in the presumptive offense.

### **Identification and Articulation of Enforcement Authorities**

1. Legislation should clearly identify both the authorized actions that the government may take to enforce the IKB law and the bodies or officers invested with such powers.
2. In general, enforcement powers can be grouped into one of three categories: (1) interdiction and investigation powers; (2) administrative sanction powers; and (3) criminal prosecution powers.
3. In the area of interdiction and investigation, legislation should ensure that all officers in a position to encounter IKB have the authority to verify licenses and permits; to search persons, vehicles, electronic devices, and buildings and dwellings; to seize specimens, gear, money, and evidence; and to make arrests. Depending upon the national context, this could mean investing such interdiction powers in park rangers, game wardens, police officers, and customs officials, for example.
4. In some national contexts, particularly if officers’ baseline authority to conduct searches and seizures is less than clear, countries may find it helpful to enumerate such authority in terms tailored to IKB enforcement. In Italy, for example, the law provides that enforcement officers may request the gun and hunting permits from any person in possession of “weapons or implements suitable for hunting,” and consequently can confiscate any weapons which are prohibited or that do not match the possessor’s gun permit.<sup>21</sup> Compared to a general criminal-enforcement provision authorizing search and seizure in the event of a reasonable suspicion or probable cause (or some other standard) to believe that a crime has been committed, contextualizing enforcement authority in IKB terms, as the Italian provision does, can provide clearer guidance for enforcement officers and the regulated community alike. Again, the advantages of such an approach will vary greatly from country to country.
5. Further, at least in some IKB cases, such as in cases involving organized crime or the involvement of a criminal association, appropriate authorities should have the ability to use special investigation techniques, including interception of telephone and internet communication, access to financial records, and undercover investigations.

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<sup>21</sup> L. n. 157/1992 art. 28.1-2.

6. IKB Legislation should clarify (a) which bodies are charged with enforcement and (b) the nature and extent of the enforcement authority they hold. Depending upon national context and the particulars of any given incident, enforcement authority could be held by several different agencies or bodies in overlapping ways. For example, national police and national wildlife authorities could conceivably have enforcement authority in all cases and in all areas, while park rangers may have equal authority but only within parks or other protected areas. Customs authorities may have limited but nevertheless critical enforcement authority to the extent specimens or prohibited gear enter Customs zones. To ensure that enforcement personnel are fully informed of their responsibilities and powers vis-a-vis IKB, legislation should address these issues in explicit terms. As noted above, vesting enforcement authority in multiple agencies can at times create a risk of underenforcement, as each agency might characterize enforcement as the duty of another agency. To counteract this possibility, legislation might specify that all authorities have a mandatory duty to enforce even in the case of overlapping jurisdiction.
7. For example, Italian legislation assigns hunting enforcement responsibilities to both the national-level State Forestry Corps and to regional and local forestry police bodies. Each of these authorities is empowered to verify hunting licenses and confiscate illegally-acquired specimens.<sup>22</sup>
8. As another example, Israel's Wildlife Protection Law, along with its National Parks, Nature Reserves, National Sites and Memorial Sites Law, accomplish the goal of securing robust enforcement authority by granting broad police powers to special investigators who are appointed by the governmental body charged with implementing the act. Within the scope of executing the duties required to enforce the act, investigators have authority concerning arrest, search, seizure of objects, and interrogation equivalent to that normally granted to police officers.<sup>23</sup>
9. National legislation should also clarify, as needed, how enforcement authorities work together. For example, it may be appropriate to direct administrative authorities to notify the criminal prosecutorial authority of all cases that have resulted, or may result, in an administrative sanction, thus providing the prosecutorial authority with a timely opportunity to file criminal charges.

### **Complementary Approaches: Task Forces and Working Groups**

1. In some instances, countries may find it helpful to establish multi-agency task forces or working groups. Task forces are ideal mechanisms to facilitate coordination across enforcement agencies. They serve as vehicles to share intelligence, to form standard operating procedures in line with best practices, and to divide labor according to relative competency, expertise, and resources.
2. Working groups, for their part, can be particularly useful in response to emerging IKB phenomena or problems that may require further study prior to fashioning a policy or legislative approach. Here, the Spanish experience is instructive. After identifying poisoning as simultaneously a leading cause of death for wildlife but also the least likely to be traced to a violator, Spain's General Director for Biodiversity, within the Ministry of the Environment, promoted the creation of a Working Group on Ecotoxicology. Comprising members of each Autonomous Community and experienced NGOs, the Working Group on Ecotoxicology first conducted a study to understand the nature of the problem. The study confirmed the impression that rates of death caused by bait poisoning are high, and it further identified the regions in Spain where the issue is most prominent. The study also identified the main

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<sup>22</sup> L. n. 157.1992, Art. 27.1-2, 28.1-2, 29.1-2; L. n. 150/1992 Art. 8-ter.4, 8-quin.3-bis.

<sup>23</sup> Wildlife Protection Law, 5715-1955, Dinim vol.8, 4365 (Jan. 1, 1955, consolidated Apr. 5, 1998), sections 10-11; National Parks, Nature Reserves, National Sites and Memorial Sites Law, 5758-1998, Dinim Vol. 6 pp.3505 (Apr. 5, 1998), sections 58-60.

chemicals used in poisoned bait and determined that poisoning is a popular method because of the difficulty in tracing the poison to the violator. As a result of this and other factors, the study identified low conviction rates in poisoning cases. With this information in hand, the Working Group drew up a policy response plan specifically designed to reduce IKB through poisoning. The Working Group's recommendations included funding community education, incentivizing citizen denouncement of poisoning events, prohibiting the sale of pesticides or other products classified as toxic or very toxic without a permit or prescription, prohibiting distribution of such products save by trained professionals, and creating a database to trace purchases.<sup>24</sup>

## Penalties and Sanctions

1. Legislation should clearly identify the authorized sanctions for violation of any of the various rules related to IKB.
2. Legislation should establish a sanction for every violation, ensuring that the public is on notice regarding the consequences of unlawful activities and that enforcement officers, prosecutors, and the judiciary have clear guidelines regarding sanctions.
3. Legislation should provide for a full range of criminal and administrative sanctions, including fines, imprisonment, license/permit suspensions, and confiscation of specimens. Ideally, however, legislation should go beyond the foregoing "standard" remedies to include confiscation of any instruments and proceeds of crime, temporary or permanent revocation of eligibility for permits/licenses, restitution or restoration orders (e.g., in the case of extraordinary damage to a nesting or breeding area), community service, and any other relevant sanctions.
4. Administrative sanction powers may include the power to issue a fine, to order the forfeiture of specimens and other items (e.g., prohibited gear), to revoke a license or other currently enjoyed privileges, and to ban a person or entity from engaging in otherwise permissible conduct in the future. Where allowed elsewhere under national law, IKB Legislation may provide that these administrative sanctions may be imposed at the scene of a violation through an "on-the-spot" ticket system. While in some national legal systems, such an opportunity may be prejudicial to certain due process rights, as long as the administrative sanction may be appealed, the immediate issuance of such sanctions can save both the time and money of involving the court system in all cases, even minor infractions.
5. Criminal sanctions should also be available under the law. The potential outcomes of a criminal prosecution will vary from country to country, with typical outcomes including incarceration, monetary fines, forfeiture, and, frequently, many of the same remedies available through administrative processes.
6. Depending upon the national context, it may be important for IKB Legislation to clarify that an administrative process does not preclude a criminal process, and vice-versa. Such clarification puts offenders on notice of their potential liability under both processes, signals the same to administrative and prosecutorial authorities, and precludes arguments of immunity in the context of a criminal prosecution subsequent to an administrative sanction, and vice-versa.
7. Because some IKB offenses can produce significant ecological damage—damage beyond the death or removal of the directly impacted specimens—national legislation should authorize the imposition of restitution, environmental restoration, or similar obligations in appropriate cases. For instance, if a person litters an entire breeding or feeding area with poison traps, the competent authority might incur a number of expenses to mitigate the ecological harm flowing from this illegal conduct. Such expenses could include surveying the area to find and remove the traps, soil or water testing to determine leakage into the surrounding environment,

<sup>24</sup> See Dirección General para la Biodiversidad, *Estrategia Nacional Contra el Uso Ilegal de Cebos Envenenados en el Medio Natural* (2004), available at [https://www.miteco.gob.es/es/biodiversidad/publicaciones/pbl\\_estrategia\\_venenos\\_tcm30-197274.pdf](https://www.miteco.gob.es/es/biodiversidad/publicaciones/pbl_estrategia_venenos_tcm30-197274.pdf)

monitoring of at least a limited duration to detect injury or harm to animals that may have ingested the poison, and clean-up measures or similar restorative work to return the area to its prior state. In such cases, the State should possess the legal authority to shift these costs to the offender. To cite just one example of how this can be accomplished in law, Spanish legislation empowers courts to “order the adoption, at the expense of the perpetrator of the act, of the necessary measures aimed at restoring the disturbed ecological balance, as well as any other precautionary measure” that may be necessary for the protection of the public, fauna and flora, water and air quality.<sup>25</sup>

8. In most cases, the law should stipulate both the minimum and maximum penalty authorized for each offense. Italian law, for example, sets forth the minimum and maximum penalties for a series of IKB-related offenses as follows:<sup>26</sup>

<b>Violation</b>	<b>Custodial Penalty Range</b>	<b>License Suspension Range</b>	<b>Fine Range (in Euros)</b>
Violation of EC No. 338/97 for Annex A species	6 months-2 years		15,000-150,000
Recidivism violations of EC No. 338/97 for Annex A species	1-3 years		30,000-300,000
Recidivism violations of EC No. 338/97 for Annex A species committed in the exercise of activities of a company		6 months-2 years	
Import, export, or re-export in violation of EC No. 338/97 for Annex A species			6,000-30,000
Violation of EC No. 338/97 for Annex B and C species	6 months-1 year		20,000-200,000
Recidivism violations of EC No. 338/97 for Annex B and C species	6-18 months		20,000-200,000
Recidivism violations of EC No. 338/97 for Annex B and C species committed in the exercise of activities of a company		6-18 months	

<sup>25</sup> Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, Art. 326(1) & 339.

<sup>26</sup> See Legge N. 150/1992, Art 1.1-3, 2.1-3.

Import, export, or re-export in violation of EC No. 338/97 for Annex B and C species			3,000-15,000
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9. All sanctions should be designed with efficiency, fairness, and deterrence in mind.
10. To this end, it can be helpful to group offenses according to their severity. Absent aggravating or mitigating circumstances, a subset of IKB offenses might be classified as “minor,” another as “serious,” and a final subset as “very serious.”
11. Spain has effectively taken this approach in designing its administrative penalties. Specifically, in the case of administrative penalties in Spain, “very serious” administrative infractions include, *inter alia*, the “destruction, killing, deterioration, collection, trade or exchange, capture and offer for the purpose of unauthorized sale or exchange or naturalization of a species of flora or fauna catalogued as in danger of extinction” if the damages exceed 100.000 euros and/or if the violation produces illegal gains of more than 100.000 euros. Yet this same offense drops to the level of a “serious” offense if the incident does not reach the monetary threshold necessary for classification as “very serious.” Finally, “minor” offenses include, for example, the intentional disturbance, killing, capture, or retention of a bird during breeding, rearing, or migrating season, as well as the use and possession of ammunition containing lead for purposes of hunting in protected wetlands, if the harm does not exceed 100.000 euros.<sup>27</sup>
12. While a similar degree of proportionality can be achieved through legislation or regulations fixing the penalty on an offense-by-offense basis, the grouping approach employed by Spain (categorizing offenses as “minor,” “serious,” and “very serious”) tends to promote consistency and forces the legislature or regulatory authority to carefully consider whether a particular offense is, relative to other offenses, deserving of heightened punishment.
13. Legislation may also include a set of gravity factors to ensure proportionality between the case specifics of any given offense, as opposed to the offense as codified in the abstract, and the resulting sanction. Bern Convention Recommendation N° 177 (2015) on the Gravity Factors and Sentencing Principles for the Evaluation of Offenses Against Birds, and in Particular the Illegal Killing, Trapping and Trade of Wild Birds, provides an instructive list of gravity factors that all States, including non-EU States, should consider when fashioning their legislation. Those factors include the “conservation status of the species,” the “impact risk for ecosystem,” the “legal obligation to protect under international obligations,” the presence of a “commercial motivation,” any “illegal gain/quantum,” the “prevalence of offense/need for deterrence,” any “professional duty on defendant to avoid committing offense,” the “scale of offending [conduct] (number of specimens involved),” evidence of “intent and recklessness by defendant,” and any relevant “history/recidivism” on the part of the defendant. Including gravity factors like these, in the context of both administrative and criminal penalties, promotes consistent outcomes in line with the principle that similar cases ought to receive similar treatment. Moreover, use of gravity factors fosters deterrence by ensuring that more serious offenses lead to heavier penalties.
14. Spanish legislation also provides a helpful example of the use of gravity factors. After identifying a series of administrative offenses—and further categorizing them as “minor,” “serious,” or “very serious,” as described above—Law 42/2007 on National Patrimony and Biodiversity provides as follows:

<sup>27</sup> See Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad, Art. 80-81.

*In the imposition of the sanctions, due adequacy shall be kept between the seriousness of the fact constituting the infringement and the sanction applied, taking into account the following criteria:*

- *the magnitude of the risk involved in the infringing conduct and its repercussion;*
- *the amount, if any, of the damage caused;*
- *its transcendence with regard to the safety of persons or property protected by this law;*
- *the circumstances of the person responsible;*
- *the degree of intentionality appreciable in the offender or offenders;*
- *or the benefit unlawfully obtained as a consequence of the infringing conduct, as well as the irreversibility of the damage or deterioration produced.*<sup>28</sup>

As a result, the Spanish approach tracks the essence of Bern Convention Recommendation N° 177 (2015) on the Gravity Factors and Sentencing Principles for the Evaluation of Offenses Against Birds, and in Particular the Illegal Killing, Trapping and Trade of Wild Birds.

15. If the offender in question has committed a similar offense in the past, the offender is a recidivist and should, all else being equal, receive a stiffer penalty than a first-time offender. This has led some countries to codify, with specificity, the higher penalties that apply in cases of recidivism. For example, Italy's Law No. 150/1992 authorizes incarceration of six months to two years and a fine as the baseline penalty. However, in cases of recidivism, the incarceration penalty jumps to one to three years, along with a fine range double that of the range corresponding to a first-time violation. Of course, countries may decide to specify an increased range of penalties for recidivism while, in combination, directing judicial or administrative authorities to consider other relevant gravity factors when fixing the precise penalty within the higher authorized range.
16. An additional way to allow for fine-tuning of penalties is to (a) set general penalty ranges, but (b) allow for the judge or other penalizing authority to exceed the default range in particularly egregious cases. In Italy, Law No. 150/1992 essentially takes this approach, articulating penalty ranges for offenses but then, with respect to select offenses, noting that the range may be exceeded if the violation "constitutes a more serious offense."<sup>29</sup> Although the law does not define the precise circumstances that qualify to trigger a penalty in excess of the default range, one can imagine this authority being helpful in cases involving especially reprehensible or damaging conduct, where sending a message to society and other would-be offenders may demand more than authorized by the default penalty range.
17. Legislation should indicate whether the sanctions in question are administrative, civil, or criminal in nature. Moreover, when both administrative and criminal penalties are available under the law, clear criteria are necessary for choosing which type of penalty to assess. This could be by the nature of the violation or by the nature of the violator's mental state, or other circumstances, depending on national law.
18. In some cases, sanctions for regulated conduct may already exist in other laws, such as a criminal code, environmental legislation, or wildlife law. The drafters of national IKB Legislation should review such ancillary laws with an eye to eliminating any possibility of conflict. In the event of potential conflict, the IKB Legislation should contain a clause providing that the IKB law prevails as to its subject matter.

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<sup>28</sup> Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad, at Art. 81(2).

<sup>29</sup> Legge N. 150/1992, at Art. 1-2.

19. Finally, legislation should enable authorities to treat wildlife crimes, including IKB, that involve organized criminal groups as “serious crime” within the meaning of the [United Nations Convention against Transnational Organized Crime](#).

### **Competent Authority Responsibilities**

1. The Competent Authority plays a key role in the implementation of IKB Legislation, and as such, its role should be well defined and its responsibilities clearly articulated.
2. Among these responsibilities are supporting the development and endorsement of a national IKB action plan or similar document; establishing quotas and identifying appropriate seasons and locations for hunting and capturing; issuing permits and licenses; updating and maintaining any Schedules/Annexes listing species, gear, and so forth; collecting data regarding actual takes, permits and licenses issued, and impacts on species, including updated population estimates; and reporting as necessary to the CMS Secretariat and other relevant national and/or international bodies.
3. While the Competent Authority will always play the key administrative role in making IKB Legislation functional through the activities described in the previous paragraph, enforcement, as such, may or may not rest with the Competent Authority. Enforcement of IKB norms—including detection of violations, making arrests and seizures, and the initiation of penalty proceedings—constitutes a suite of activities distinct from the core administrative work of the Competent Authority.
4. To be sure, national legislation may assign to the same body or agency the responsibilities described in paragraph 2, on the one hand, and enforcement responsibilities, on the other. For instance, one can imagine a national wildlife agency serving as both the Competent Authority and, at the same time, officers of that agency possessing authority to make arrests. One can also imagine the same agency bearing authority to levy administrative sanctions (indeed, this would be the natural province of the Competent Authority) and to initiate criminal proceedings (whether via referral to the State prosecution service or otherwise).
5. Nevertheless, because enforcement responsibilities are (a) unique from the core administrative responsibilities described in paragraph 2 and (b) often involve other actors in addition to the Competent Authority, such enforcement responsibilities are treated separately, above. See “Identification and Articulation of Enforcement Authorities,” above.

### **National IKB Action Plan**

1. While IKB Legislation can define prohibited and permitted conduct—and establish associated enforcement authority and penalties for transgressions—both regulatory and enforcement authorities can benefit from a complementary “action plan” or similar strategic orientation document.
2. Because enforcement decisions frequently depend upon the exercise of discretion in the face of dynamic situations, finite resources, and competing responsibilities, an IKB action plan can help to remind authorities that IKB is a priority.
3. Similarly, an IKB action plan can outline strategies, establish metrics, promote adaptive management, and generally foster accountability, providing a framework for decisions regarding quotas, take and trade exceptions, and any hunting restrictions necessary to ensure a positive conservation status for both game and protected species.

4. By way of example, Italy approved a National Action Plan in 2017, which focused on increasing IKB enforcement capacities at “black spots,” areas where crimes against wild birds happen more frequently. Recommendations included improving monitoring equipment, increasing the volume of staff and anti-poison dog units, and training more judges and prosecutors in handling crimes against wildlife.<sup>30</sup>

### **Support through Subsidiary Legislation and/or Regulations**

1. Comprehensive national legislation on IKB should be supported by regulations or accompanying policies and other domestic measures, as appropriate to national circumstances, that provide greater detail regarding decision-making, license and permit application processes, and other details that facilitate robust implementation, compliance, and enforcement.
2. Compared to a higher-level law, subsidiary legislation and/or regulations are frequently nimbler in responding to changing circumstances. Depending on national context, this can operate advantageously to adaptive management.
3. Accordingly, national legislation on IKB should contemplate and facilitate the promulgation of subsidiary legislation and/or regulations through a clause investing the Competent Authority with power to issue regulations.

### **Citizen Suits**

1. Administrative personnel and prosecutors often lack the time and resources to pursue every offense involving IKB. To fill the gap, national legislation can authorize private citizens to bring lawsuits against offenders when government authorities have, for whatever reason, failed to act. Known as a “citizen suit,” this mechanism allows citizens to effectively become “private attorney generals,” typically for the limited purpose of enjoining an ongoing violation. (Legislation can also authorize citizens to sue the government for illegal agency action. While distinct from the “private attorney general” concept, such actions are also sometimes termed “citizen suits.”)
2. To incentivize citizen suits, legislation may authorize a prevailing citizen to collect attorney’s fees and costs from the losing party.

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<sup>30</sup> See Decreto Presidente del Consiglio dei Ministri, 30 marzo 2017, 37 CSR 16 (It.), at pp. 19, 21, 23-25.