



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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**RECOMMENDATION N° 177 (2015)
ON THE GRAVITY FACTORS AND SENTENCING PRINCIPLES FOR THE EVALUATION OF
OFFENCES AGAINST BIRDS, AND IN PARTICULAR
THE ILLEGAL KILLING, TRAPPING AND TRADE OF WILD BIRDS**



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CONVENTION ON THE CONSERVATION OF EUROPEAN WILDLIFE
AND NATURAL HABITATS

Standing Committee

35th meeting
Strasbourg, 1-4 December 2015

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*Document
prepared by
the Directorate of Democratic Governance*



Convention on the Conservation
of European Wildlife and Natural Habitats

Recommendation No. 177 (2015) of the Standing Committee, adopted on 4 December 2015, on the gravity factors and sentencing principles for the evaluation of offences against birds, and in particular the illegal killing, trapping and trade of wild birds

The Standing Committee to the Convention on the Conservation of European Wildlife and Natural Habitats, acting under the terms of Article 14 of the Convention,

Having regard to the aims of the Convention to conserve wild fauna and its natural habitats;

Recalling that Article 1, paragraph 2 of the Convention requires Parties to give particular emphasis to the conservation of endangered and vulnerable species, including endangered and vulnerable migratory species;

Recalling that Article 6 requires Parties to take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II, prohibiting in particular all forms of deliberate capture and keeping, and deliberate killing, as well as the possession and internal trade in these animals, alive or dead;

Recalling that Article 11, paragraph 1 of the Convention provides that, in implementing the Convention, Parties undertake to co-operate whenever appropriate and in particular where this would enhance the effectiveness of measures taken under the Convention;

Recalling its Recommendation No. 5 (1986) on the prosecution of persons illegally catching, killing or trading in protected birds, which encouraged Parties to ensure the prosecution of persons illegally catching or killing birds or establishments commercialising live and/or protected birds;

Recalling its Recommendation No. 155 (2011) on the illegal killing, trapping and trade of wild birds, identifying – among others, a series of urgent measures to enhance enforcement of existing legislation at each stage of the bird-crime chain through appropriate political, judicial, operational, scientific and technical support and cooperation;

Recalling its Recommendation No. 164 (2013) on the implementation of the Tunis Action Plan (TAP) 2013-2020 for the eradication of illegal killing, trapping and trade of wild birds, urging Parties to implement – without further delays – the measures foreseen in the TAP, including those addressing or involving the judiciary;

Further recalling its Recommendation No. 171 (2014) of the Standing Committee, adopted on 5 December 2014, on the setting-up of national policing/investigation priorities to tackle illegal killing, trapping and trade of wild birds, recommending Parties to improve efforts aimed at enhancing inter-sector cooperation at national level and involving all relevant Ministries, particularly the Ministries of Environment, Agriculture, Interior or Home Affairs, Justice and Education;

Recognising that the use of derogations and/or of exceptions is legitimate provided that they are implemented and enforced according to international law;

Highlighting however that the “Zero tolerance approach” may be undermined by the inappropriate use and/or implementation of specific derogation regimes and/or exceptions;

Acknowledging the benefits of the coordinated approach successfully followed at the international level, as well as of the excellent cooperation with the CMS and the EU on matters related to the eradication of illegal killing, trapping and trade of wild birds;

Welcoming the specific steps undertaken by the CMS for the setting-up of the intergovernmental Task Force to address illegal killing, taking and trade of migratory birds in the Mediterranean, in compliance with CMS of Resolution 11.16 and in conjunction with the Bern Convention Tunis Action Plan;

Aware that differences among Parties in their evaluation of bird and other wildlife crime could affect the results expected by the implementation of the TAP as well as by other measures to eradicate illegal killing, trapping and trade of birds, and put at risks the full achievement of the goals set under the Convention in this field;

Noting the urgent need for a better understanding both by all those involved in wildlife law enforcement and by the general public of the damage done by criminal activity to biodiversity;

Recalling documents [T-PVS/Inf \(2015\) 12](#) and [T-PVS \(2015\) 3](#), prepared by Mr Nicholas Crampton, presenting respectively an Analysis of gravity factors to be used to evaluate offences, and Proposals for informing the process for the imposition of sanctions in wildlife crime cases, especially the illegal killing, taking and trading of wild birds;

Aware that the role of the judiciary is to implement the law and that, in doing so, decisions will involve the exercise of judicial discretion, i.e. a non-arbitrary exercise of a rational, informed and balanced judgement against objective criteria within the scope of what is allowed by law;

Fully respectful of the principle of judicial independence, allowing the judicial function to be performed free from external influences or pressures;

Convinced that the use of standardised list of “gravity factors” that may inform prosecution and sentencing decisions, and be implemented across a range of different jurisdictions in a harmonised manner will be a major step towards an effective and coordinated response against wild bird crimes, and towards the implementation of the Convention,

Recommends contracting parties to the Convention and invites observer States to:

1. Systematically use the list of gravity factors appended (Appendix I) to this Recommendation for the evaluation of wild bird crimes/offences during investigation, prosecution and conviction of offenders;
2. Disseminate and encourage the use – in the full respect of the principle of judicial independence- of both the over-arching and jurisdiction-focussed principles appended (Appendix II) to this Recommendation to inform the process of imposition of sanctions in wildlife crime cases, especially those related to the illegal killing, taking and trading of wild birds;
3. Improve and enhance, as a matter of urgency inter-sector cooperation at national level, particularly between the authorities competent for biodiversity-related matters and the Ministries of Justice;
4. Keep the Standing Committee informed of the implementation of this Recommendation.

Appendix I

List of Gravity factors to be used to evaluate offences¹

Gravity Factors	Comments, any link to criteria for national priorities and any proposed expanded definition of TAP gravity factors
1. Conservation status of species	<p>‘Conservation status of species’ includes: consideration of any IUCN, Bern Convention, EU Nature Directives or other international listing or standards which evaluates conservation concern; whether the crime targets or impacts adversely local, national or international conservation measures or places of conservation activity.</p> <p>Listed as a criterion for national priorities, and cf. to ‘nature conservation hotspots’ criterion.</p>
2. Impact risk for ecosystem	<p>‘Impact risk for ecosystem’ includes an assessment of: (i) the actual or potential damage to habitat; if reparable, the cost of actual damage or loss eg. of restoration, restocking, or whether damage was irreparable; (ii) the actual or potential impact on local, national or regional population(s) of the species affected by the offence(s); (iii) the potential or actual damage the type of offence, the way it was committed, has previously caused or could have caused.</p> <p>Listed as a criterion for national priorities.</p>
3. Legal obligation to protect under international legislation	<p>Recognition should be given to ‘international solidarity’ in that the Convention objectives are sufficiently important to require binding commitments from national governments to achieve them and require mutually consistent enforcement across all Parties to be achieved.</p>
4. Indiscriminate method used in committing offence	<p>Consideration may be given to the actual damage to habitat or loss to populations or species the method has caused and any potential or actual damage or loss that method has previously caused.</p>
5. Commercial motivation	<p>‘Commercial motivation’ includes: any planned activity aiming for financial benefit whether of the offender or another person, as well as organised (especially serious) crime, particularly if trans-national.</p>
6. Illegal gain/quantum	<p>‘Illegal gain/quantum’: includes actual gain as well as potential gain had the offence been fully completed.</p>

¹ The full analysis of Gravity factors can be found in document [T-PVS/Inf \(2015\) 12](#)

<p>7. Prevalence of offence and need for deterrence</p>	<p>‘Prevalence of offence and the need for deterrence’ includes: whether the habitat or species is frequently targeted generally, or where the offence is prevalent in an area (‘black spot’). These suggest a particular need for stronger deterrence by way of heavier sanction.</p> <p>Cf. list of criteria for national priorities.</p>
<p>8. Professional duty on defendant to avoid committing offence</p>	<p>‘Professional duty on defendant to avoid committing offence’ includes: persons (whether natural or legal) in the course of trade or business committing offence(s) to assist the business (eg. pet shop owner, property developer), those employed to carry out tasks for another’s benefit who choose to do so in an illegal way against wildlife (eg. gamekeeper), as well as those granted licences, or exercising rights, to carry out activities in connection with wildlife which would otherwise be illegal (eg. licensed or other legal hunter) who commit offence(s) against wildlife.</p>
<p>9. Scale of offending (number of specimens involved)</p>	<p>Numbers can be assessed either in absolute terms, or relative to the species involved, ie. a small number of one species may have a greater impact on it (locally, nationally or internationally) than a greater number of a more numerous species, or if relevant, both can be used.</p>
<p>10. Intent and recklessness by defendant</p>	<p>This includes the culpability of the accused person, including the level of involvement in committing the offence and whether he/she was the ultimate ‘beneficiary’ of it.</p>
<p>11. History/recidivism</p>	<p>Consideration should always be given to whether the offender has committed wildlife offences previously and to the level of sanctions previously imposed. ‘Repeat offenders’ should usually receive heavier sanctions.</p>

Appendix II

Guiding principles for informing the process for the imposition of sanctions in wildlife crime cases, especially the illegal killing, taking and trading of wild birds²

'Trans-national' principles

1. That the beneficiary of the legislation is biodiversity and its ecosystem and the species that comprise it.
2. That these are transnational and therefore require a multi-national approach to their conservation.
3. That these require a guardian and Governments having signed the Bern Convention acknowledging this need to defend it, ie. to fulfil practically the commitment that they made.
4. That as each national legislation seeks to implement the same international Convention, it should adopt the same aims as the Convention, as should the investigatory and prosecutorial authorities and the judiciary in implementing and enforcing it.
5. That *'international judicial or enforcement mutuality'* should be a relevant factor in seeking to implement an international Convention with a common vision to ensure its aims are met across Convention Parties. This means having regard to sanction levels or approaches in other jurisdictions to ensure a degree of harmonisation or similarity of outcomes for similar cases, without infringing judicial independence.
6. That ineffective enforcement or markedly lower sanctions in one Party defeat the intention of the whole Convention.
7. That all Parties should enact legislation providing for similar penal or criminal sanctions, including both financial impositions and deprivation of liberty (imprisonment) in respect of offences relating to: (i) prohibited acts in relation to species listed in the Bern Convention as 'strictly protected' (Article 6 and Appendix II), and (ii) prohibited means methods of killing or capture (Appendix IV).

'Jurisdiction-focussed' principles

8. That relevant biological and ecological information, including conservation activities, concerning the species or habitats in respect of which the offence(s) were committed ('Conservation Impact Statements') from an objective source(s) be made available in a legally admissible form to the tribunal or person imposing sanctions.
9. That a common list of basic factors to assess the seriousness of each case has been appended to Recommendation No. 177 (2015) of the Standing Committee to the Bern Convention to be considered and applied across all and within each jurisdiction. This list should not be seen as exhaustive.
10. That the gravity of an offence should be determined by both the 'damage' (actual or potential) done and the 'culpability' of the offender for that damage/harm.
11. That the type of offence, i.e. how it was committed, may be more important than the actual number of specimens caught or involved in a specific case (eg. if the method used was indiscriminate or widespread).
12. That the full range of sanction options under the legislation should be used objectively according to the gravity of the offence and culpability of the offender.
13. That the use of heavier sanctions should be triggered by the type of offence, and not geared solely to repeat offending.

² The full proposals for informing the process for the imposition of sanctions in wildlife crime cases, especially the illegal killing, taking and trading of wild birds can be found in document [T-PVS \(2015\) 3](#).

14. That the threshold for the use of imprisonment (for individuals) should be at a broadly similar level and on a broadly similar basis, having regard to the same list of basic 'gravity factors' across Convention jurisdictions.
15. That the levels of financial penalty for corporations (legal persons) should be based upon their size as measured by turnover or assets value and not by declared profit/loss or taxation.
16. That the sanctions applied should remove all gain or financial benefit that the offender achieved from the offence(s) or would have achieved had it been completed.
17. That the sanctions applied should oblige the offender to make good all damage done by the offence(s), either directly or (where possible) by an equivalent replacement.
18. That where both administrative measures and criminal/penal sanctions are available following a breach of the legislation, there should be a clear, objective and published method of assessment, based solely on the gravity of the incident or breach, to determine which course is to be adopted, and applying the principle that administrative measures alone should only be used for the least serious offences.
19. That the judiciaries of jurisdictions within each Party, adopting if required any procedure so to permit or facilitate, should allow reliable information to be provided concerning the levels of sanctions imposed within other Parties' jurisdictions, with the aim of ensuring that sanctions in respect of offences relating to: (i) prohibited acts in relation to species listed in the Convention as 'strictly protected' (Article 6 and Appendix II), and (ii) prohibited means methods of killing or capture (Appendix IV) are broadly similar, proportionate and dissuasive.
20. That the sanction regime be informed by research to obtain the advice or responses from interested and knowledgeable persons/groups within both relevant scientific bodies and civil society and be reviewed from time to time.
21. That where incidents or offences involving persons under the age of 18 years occur, the above must be modified *mutatis mutandis* so as to comply with the legal regime for dealing with minors accused of offences.