

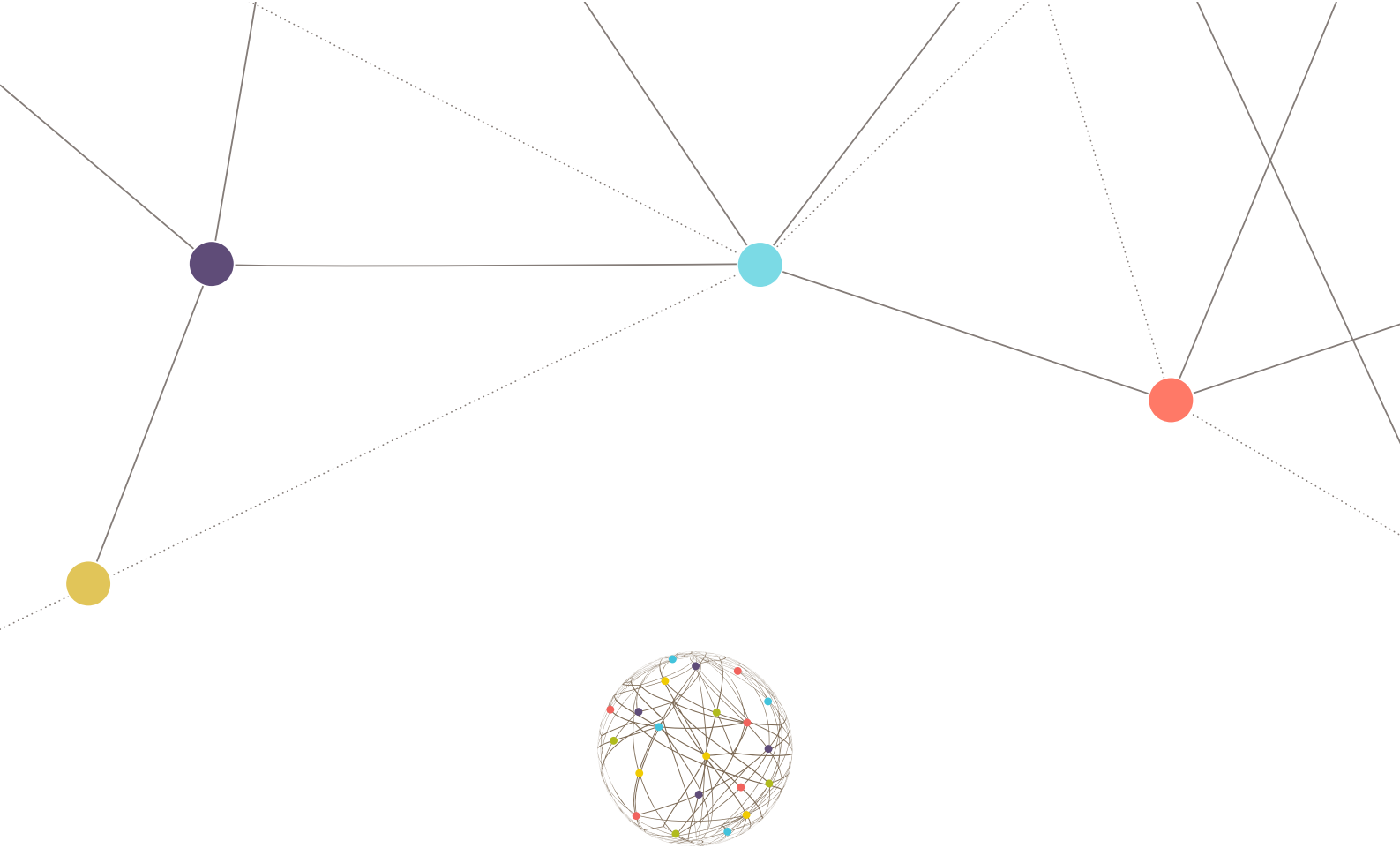
THE GLOBAL INITIATIVE
AGAINST TRANSNATIONAL
ORGANIZED CRIME

Tightening the Net:
Toward a Global Legal Framework on
Transnational Organized Environmental Crime



April 2015



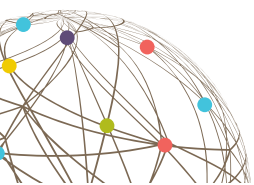


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April 2015

A collaborative project between
WWF
and
the Global Initiative Against Transnational Organized Crime



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Although the report has benefitted greatly from consultation with the aforementioned experts, the views expressed in this report are not necessarily representative of those individuals or their organisations.

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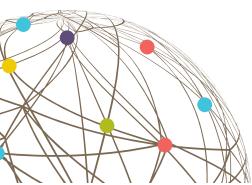


Table of Contents

Genesis of the report6

Executive Summary6

1. Introduction..... 10

2. Choosing the angle of approach: environmental crime versus wildlife crime 13

 2.1. The narrow focus: wildlife crime..... 13

 2.2. The broad focus: environmental crime 16

3. A patchwork of legal frameworks: from biological diversity to legal diversity 19

 3.1. Diversity of scope 19

 3.2. Diversity of scale..... 22

 3.3. Diversity of legal perspective 24

4. Addressing current flaws: what a global criminal law approach would improve 33

 4.1. Criminalization and harmonization..... 33

 4.2. Cooperation and Assistance in Enforcement..... 39

 4.3. Expansion of jurisdiction..... 41

5. Conclusion and Recommendations..... 44

Endnotes 46



Genesis of the report

This report has been commissioned in the context of a collaboration between WWF and the Global Initiative against Transnational Organized Crime. The two organizations joined forces as they are both convinced of the need to open a broad debate concerning legal strategies to address environmental crime as a form of transnational organized crime.

This report draws upon two previous research papers which highlighted the necessity to conduct a global legal review, exploring existing international legal frameworks and cutting-edge legal answers. The first paper was the Global Initiative's Baseline Assessment report ("The Global Response to Transnational Organized Environmental Crime", June 2014). The second paper was an internal paper prepared for WWF by the Environmental Law Centre of the International Union for Conservation of Nature (IUCN) written by Lydia Slobodian ("Addressing Transnational Wildlife Crime through a Protocol to the UN Convention against Transnational Organized Crime. A Scoping Paper", November 2014). Large extracts of this internal paper are incorporated into the present report.

In this context, a draft report was written by the lead author, Amanda Cabrejo le Roux, who is a legal consultant with the Global Initiative and a researcher in International and Comparative Criminal Law¹. An expert consultation meeting was then held in Geneva on 11 March 2015 to discuss preliminary findings presented in the draft report. This report benefits from this fruitful discussion and incorporates experts' comments.

To sum up, this report is the result of a cross-sectoral fertilization of ideas and it is envisioned as a thought-provoking starting point for examining legal frameworks currently available to combat transnational organized environmental crime, at the global, regional and national levels. The study seeks not to be prescriptive but to stimulate an open discussion and to explore potential avenues regarding means of moving this important dialogue forward.

Executive Summary

Transnational organized environmental crime constitutes a global and escalating threat. It allows international networks of individuals and corporations to thrive and eventually disturb not only biodiversity but also the global economy and security. In addition to severe environmental consequences, the laundered money generated by such activities disrupts the world's economies, fostering corruption and challenging political stability. Emblematic of the dark side of globalization, organized criminal groups engage in highly profitable illicit markets such as illegal trade in protected species of fauna and flora, illegal logging and fishing, unlawful transportation and dumping of hazardous waste, and illegal trade in ozone-depleting substances. For the purpose of this report, the types of environmental crime that don't have organized and transnational elements are not covered and the terms "environmental crime" and "transnational organized environmental crime" are used interchangeably.

An urgent need to reflect on current global legal frameworks

While the international community increasingly acknowledges the seriousness of the issue and multiple mechanisms and tools are being used to combat it, current strategies remain insufficient to tackle this escalating problem. This global and complex challenge can only be addressed via a holistic approach involving different stakeholders at multiple levels, including local communities, and fostering efforts on several fronts including political commitment, law enforcement, prevention and cultural change through education (especially to curb demand for wildlife products). Without losing sight of this broad context, this report focuses on a specific aspect: the analysis of the current legal approaches and their improvement.

Presenting a global legal review, this report analyses the international legal frameworks currently available to combat transnational organized environmental crime, and explores potential ways to strengthen the current situation. Indeed, extant legal tools appear as a loose net of international, national and local laws that often fail to work together efficiently. Inconsistencies and remaining loopholes create havens for organized criminal groups and transit hubs for their illicit activities.

The main legal weakness is the fact that international treaties still fail to address environmental crime as a form of transnational organized crime. Instead, they either focus on conservation or international trade aspects. The analysis highlights that the only global treaty that could provide the needed criminal perspective is the UN Convention against Transnational Organized Crime (UNTOC). However, many forms of environmental crime fall outside its scope because its application relies on national laws. Indeed, UNTOC is only applicable if national laws reach the UNTOC application threshold (which is the establishment by national laws of a maximum criminal penalty of at least four years of imprisonment) otherwise it is not applicable. Unfortunately many countries do not yet criminalize the activities that constitute forms of transnational organized environmental crime, they often prohibit them as illegal or unlawful but it is not the same as legally defining them as criminal. In addition, where the criminal approach does exist, the UNTOC application threshold is not always reached. These observations are a starting point for a much needed discussion on the potential improvement of global legal frameworks. This report also raises the possibility of a new international legal framework dedicated to transnational organized environmental crime.

Choosing the right angle of approach

The main forms of environmental crime taken into consideration are therefore wildlife crime -largely defined to include trafficking in specimens of protected species, forest products and marine living resources- and specific pollution crime such as illegal transportation and dumping of hazardous waste. After defining the main forms of transnational organized environmental crime, this report explains the reasons why they should be addressed collectively, the sector-specific approach being considered as too narrow. It is highlighted that they share a common configuration, as they all constitute “enterprise crime”. They are different forms of transnational illegal trade. All being transnational, they all involve more or less structured networks of individuals able to organize the movement of illicit commodities (either natural goods or polluting goods) across national borders. In addition, the transnational organized groups involved in different forms of environmental crime use similar *modus operandi* (such as transport by sea for wildlife, fish, timber and hazardous waste) it is pertinent to tailor common legal answers and law enforcement strategies (border and port controls, tracking and licensing measures, etc).

Moreover, all forms of environmental crime raise a common definitional challenge that it would be preferable to address in a unified manner. Trading in natural or polluting commodities is not under absolute prohibition (licit and illicit markets coexist) therefore the definition of what should be considered as environmental “crime” in the strict criminal law sense is dependant on a normative prerequisite which is the line drawn according to trade law between licit and illicit trade. Another common precondition is the role played by scientific expertise (for instance in identifying types of toxic substances to prohibit or assessing the threat of extinction to wildlife species).

Besides, the project to address all forms of transnational organized environmental crime together should not be discarded as presenting insurmountable legal and political challenges merely because no universal treaty on environmental crime currently exists. At the regional level it is possible to find examples of this inclusive approach.

A three-dimensional legal picture

In order to make sense of the complex legal landscape, this report points out three underlying parameters that are essential to understanding the global picture: diversity of scope, diversity of scale and diversity of legal perspective.

The extant legal instruments’ diversity of scope prevents us from seeing the forest for the trees. Legal frameworks designed to protect the environment are more often sector-specific than inclusive. This leads to a general

fragmentation and therefore weakens what could become a sound, global legal response to transnational organized environmental crime. Another difficulty that will have to be discussed is the diversity of scale, or layers, of legislation that accumulate from a (sub)national to a global level. Sadly, when it comes to environmental crime, the multiplicity of levels often results in legal confusion, loopholes or contradictions.

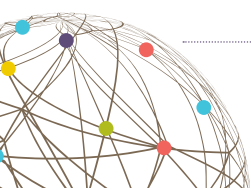
While the aforementioned diversity of legal perspectives is often overlooked, it actually constitutes the main challenge on the path toward a more comprehensive legal response. Indeed a complete legal answer to transnational organized environmental crime requires a better connection between the environmental law perspective, the trade law perspective and the criminal law perspective on the issue. One of the most urgent needs today is to acknowledge these activities as a true form of transnational organized crime in the full sense of the term – i.e. in criminal law – so as to reinforce the on-going political efforts to combat them. A particular emphasis is put on the UNTOC model perspective. The potential role of UNTOC in addressing transnational organized environmental crime was acknowledged from its inception. Under this perspective, UNTOC could be applied to environmental crime so as to identify it as an actionable “serious offence”. Under the convention’s terms, the national penalties would have to be harmonized in order to correspond to “a maximum deprivation of liberty of at least four years”. Though this perspective is so far considered the best option, UNTOC measures remain somewhat limited because of the national criminal definitions it relies on today. UNTOC could also be used as a model in two different ways: as an inspiration for shaping a new international instrument dedicated to transnational organized environmental crime or as a framework for a new UNTOC protocol dedicated to environmental crime. Whether or not a new UNTOC protocol would be feasible is discussed in this report, but the report’s main objective is to actively start a global dialogue on the best way to proceed.

Addressing current flaws: what a global criminal law approach would improve

The report argues that the issue of transnational organized environmental crime needs to be addressed from a global criminal law perspective, which could be implemented in various ways. The bottom-up approach would focus on fostering legal reform at the national level by encouraging wider criminalization and harmonization of national laws in order to make them reach the UNTOC application threshold. The top-down approach would instead focus on global legal frameworks impacting on national laws. A new global framework dedicated to transnational organized environmental crime could be put together or, using UNTOC as a reference, the possibility of a new protocol could be explored. The aim here would be to target and define criminal behaviours so as to focus on the ringleaders rather than applying disproportionate sanctions on low-level actors. Keeping in mind that criminal sanctions are more efficient when proportionate, this study does not promote extreme punishment but a more harmonized and globally acknowledged framework targeting transnational organized networks.

The importance of international cooperation and mutual assistance between organisations and authorities at the national and international level is another challenge this report addresses. Intelligence sharing is indeed paramount to tighten the net and tackle transnational organized environmental crime more efficiently on a global scale. Needless to say that transnational cooperation and even national law enforcement by police forces, prosecutors and judges are often insufficient because environmental issues are not enough recognized as a priority. Proper implementation requires strong political commitment. Whilst some states are fully cognisant of the threats to environmental security and have taken steps to address such threats, challenging situations exist in other states, including:

- states where generalized corruption prevents any effective application;
- states choosing to ignore environmental crime in order to protect their economic interests;
- states being indifferent to environmental crime because they believe it does not represent a significant threat within their borders, and thus there is little reason for its prioritization.



These situations could evolve if there were wider awareness that it is not just a “green issue” but a matter of transnational organized crime. Corruption is also a key challenge that needs to be addressed for any legal reform to have a concrete impact. Discussing the improvement of the international legal frameworks could help prioritize these issues in the national political agendas. This study also argues that states could be encouraged to establish extra-territorial jurisdiction to take on some of the enforcement burden when countries in which environmental crimes take place are unable or unwilling to investigate and prosecute.

The report offers a series of specific recommendations. The report proposes a number of options that would need to be considered as part of a participatory process.

1. Introduction

In recent decades, the international community has become increasingly aware of global environmental damage caused by human actions; international legal frameworks have been enacted and implemented to varying degrees to limit such damage. However, international treaties are not adequately addressing a global environmental threat that constitutes a growing challenge: transnational organized environmental crime. The current legal tools addressing environmental crime are insufficient to combat transnational networks of individuals and corporations engaged in activities that are prohibited because of their serious impact on the environment. These activities include illegal trade in protected species of fauna and flora, illegal logging and fishing, unlawful transportation and dumping of hazardous waste, and illegal trade in ozone-depleting substances.² For the purpose of this report, the types of environmental crime that don't have organized and transnational elements are not covered and the terms "environmental crime" and "transnational organized environmental crime" are used interchangeably.

Environmental crime: from a global issue to a criminal law concept

Since the purpose of this paper is to offer a clear analysis of the legal frameworks currently available to combat transnational organized environmental crime, it is critical to start with a semantic clarification. The term "environmental crime" can be used either as a political concept or as a criminal law concept.

Generally, the term "environmental crime" is used according to its political meaning. It is an umbrella category identifying a broad range of environmentally harmful activities that are often addressed separately through sector-specific measures. The choice to label this phenomenon as criminal is intended to put emphasis on the seriousness of the issue. This designation stems from a highly legitimate concern and wide moral disapproval rather than a legally admitted definition. Indeed the political concept does not reflect the diversity of ways that laws address the issue at the international and domestic levels. If several environmentally harmful activities tend to be recognized as illegal or unlawful, it does not mean that they are legally defined as criminal. There is a crucial difference between establishing regulatory offences that are subjected to administrative or civil law penalties (e.g. fines for licensing breaches in international trade of timber products) and prohibiting behaviours through criminal law. Arguably, tough administrative sanctions present advantages (in terms of rapidity and lower burden of proof) but the most serious behaviours should be legally defined as criminal offences to ensure stronger prevention and retribution via criminal penalties including deprivation of liberty. The establishment of criminal offences also triggers a criminal process involving police investigation (with specific investigative powers under judicial supervision such as wire tapping and searches), public prosecution and specific judicial proceedings.

This paper uses both the political and legal meanings of the term "environmental crime". It explores the different types of legal solutions to environmental crime understood as a global phenomenon. This paper also intends to fully address environmental crime as a criminal law concept. It will demonstrate that the current international legal frameworks are insufficient because they fail to recognize this criminal dimension. In order to tailor more adequate global legal answers it is essential to address environmental crime as a form of transnational organized crime.

Highly harmful activities: acknowledging the multiple interests at stake

The phenomenon of transnational organized environmental crime is highly damaging as it causes multifaceted harm beyond its immediate destructive effect. First, it represents a substantial threat to global biodiversity. The illegal wildlife trade is bringing a number of species to the brink of extinction, illegal fishing is threatening to cause a collapse of the world's fish stocks, and illegal logging is contributing to the escalating deforestation of essential ecosystems such as the Amazon rainforest. The depletion of the ozone layer as a result of the illicit use of ozone depleting chemicals has broad impact on human health and the environment. Similarly, the dumping of hazardous waste can pollute waters and soils over wide areas. In the long run, what affects nature affects humankind threatening

livelihoods, health and food security. In the short run, environmental crime also has a direct impact on human lives since it is often linked to violence and severe human rights violations such as human trafficking and forced labour on vessels engaged in illegal fishing.³

The impact on national economies is also significant, as states are deprived of the legitimate revenues expected from controlled trade in natural resources. Such illicit economies represent a substantial loss of revenue and taxes that hinders economic development. Indeed, these activities are directly linked to economic crimes such as tax and customs fraud and money-laundering. Even if by definition the value of a transnational illicit market is beyond our capacity to assess accurately, transnational organized environmental crime is deemed to be one of the most profitable global illegal activities. To estimate the true scale of the problem remains extremely difficult and studies on the matter provide very different figures. The global value of illegal trade in protected species has been estimated 7-23 billion USD per year. The global value of illegal fishing is an estimated 10-30 billion USD per year. The illegal timber industry is worth an estimated 30-100 billion USD per year. The total value of illegal trade in ozone-depleting substances is estimated around 68 million USD per year.⁴ In addition to their negative impact on national economies, these activities also raise concerns about national governance since they are often intertwined with problems of corruption, conflict and political instability.

As the [Global Initiative baseline study on Transnational Organized Environmental Crime](#) demonstrated, environmental crime is increasingly taking on characteristics falling under the definition of transnational organized crime. Large-scale and sophisticated operations in one sector often involve criminal organizations from other sectors, such as narcotic and firearms trafficking⁵ or corporations systematically engaging in illegal logging or over-fishing. These transnational networks are evolving quickly; always looking for less controlled territories whilst developing innovative means of transport and new commodities to profit from.⁶ Environmental crime represents an attractive opportunity for criminal networks because it is relatively easy and rewarding: profits are generally high while penalties and enforcement rates are relatively low.⁷ As long as this situation persists, the phenomenon will continue to grow.⁸ Emblematic of the dark side of globalization, organized environmental crime is increasingly transnational by nature. The questions that might arise from local hunting, fishing or logging for subsistence fall beyond the scope of this paper.

An urgent need to reflect on the current global legal frameworks

Despite the multiple measures and mechanisms being currently used to combat transnational organized environmental crime, one cannot fail to observe that results at the scale needed are not forthcoming. Far from being contained, this global phenomenon is escalating. Many expert reports sound the alarm bell and conclude with a call for action. Solutions are urgently needed to prevent transnational organized environmental crime from causing irreversible damage. Yet, short term strategies are not enough, this global and complex challenge can only be addressed via a long-term and holistic approach involving different stakeholders at multiple levels and fostering efforts on several fronts including political commitment, law enforcement, prevention and cultural change through education (especially to curb the demand in wildlife products). This paper is intended as one step in this multifaceted process. Without losing sight of the broad context, this report focuses on a specific aspect: the analysis of the current legal approaches and their improvement.

The purpose of this study is to reflect on the global legal frameworks currently available to combat transnational organized environmental crime, and explore potential ways to strengthen the current situation. Presenting a global legal review, this paper explores the complex architecture of international legal instruments in order to locate inconsistencies and remaining loopholes. The main findings reveal that the current global instruments are highly fragmented and incomplete as far as transnational organized environmental crime is concerned, and they appear as a loose legal net (see figure 1).

Figure 1: The main international legal instruments currently available to address transnational organized environmental crime

International Legal Instruments	Subject Matter	Require Parties to prohibit activities related to transnational organized environmental crime	Require Parties to criminalize activities that constitute forms of transnational organized environmental crime
Ramsar Convention	Wetlands	✗	✗
World Heritage Convention	Cultural and natural heritage	✗	✗
CBD	Biological diversity	✗	✗
CMS	Migratory species	✓ ⁹	✗
CITES	Protected species of fauna and flora	✓ ¹⁰	✗
ITTA	Tropical timber	✗ ¹¹	✗
UNCLOS	Marine environment	✗	✗
UN Fish Stocks Agreement	Straddling/ migratory fish stocks	✗	✗
Basel Convention	Hazardous waste	✓	✓ ¹²
Montreal Protocol	Ozone-depleting Substances	✓ ¹³	✗
UNCAC	Corruption	✓ ¹⁴	✗
UNTOC	Transnational organized crime	✓	✓ ¹⁵

Current international treaties are insufficient because they do not address environmental crime as a form of transnational organized crime. Instead, they either focus on conservation or international trade aspects. The analysis highlights that the only global treaty that could provide the needed criminal perspective is the UNTOC. However too many forms of environmental crime fall outside its scope because its application relies on national laws. Indeed, UNTOC is only applicable if national laws reach the UNTOC application threshold (which is the establishment by national laws of a maximum criminal penalty of at least four years of imprisonment) otherwise it is not applicable. Unfortunately many countries do not yet criminalize the activities that constitute forms of transnational organized environmental crime, they often prohibit them as illegal or unlawful but it is not the same as legally defining them as criminal. In addition, where the criminal approach does exist, the UNTOC application threshold is not always reached. These observations are a starting point for a much needed discussion on the potential improvement of legal frameworks. This paper will also raise the possibility of a new international legal framework dedicated to transnational organized environmental crime.

A preliminary step consists of explaining the choice to address transnational organized environmental crime as a whole when legislation and studies tend to deal with the different forms of environmental crime separately, with a specific emphasis on wildlife crime. Section 2 discusses the merits and limits of a narrow focus versus a broad focus. Section 3 aims at offering an analysis of the legal frameworks currently available to combat transnational organized environmental crime. Instead of an exhaustive description, the purpose is to make sense of the complex legal landscape by explaining the three underlying parameters that are essential to understanding the global picture. The final section draws lessons from this analysis by expanding on the benefits of a more widespread criminal law approach that would fully recognize environmental crime as a form of transnational organized crime.

2. Choosing the angle of approach: environmental crime versus wildlife crime

This paper examines the global phenomenon of transnational organized environmental crime and the legal answers available to address it. An alternative choice could have been to focus instead on specific types of transnational organized environmental crime with an emphasis on wildlife crime. As this paper is intended as a basis for a widespread discussion on the improvement of legal frameworks, it is pertinent to start by outlining the two possible angles of approach and the reasons why a broader focus has been chosen for this legal review.

The concepts of “environmental crime” and “wildlife crime” discussed in this section do not benefit yet from precise legal definitions at the international level. These expressions are used in this section applying the perspective of criminology (focussing on the types of behaviours, *modus operandi* and the supply chain from source to transit and destination countries).

2.1 The narrow focus: wildlife crime

The term “wildlife crime” can itself be used in a narrow or broader manner. Its narrow meaning refers specifically to the trafficking of specimens of protected species of fauna and flora. A broader meaning on the other hand encompasses the taking and illegal trading of specimens or products of wildlife in general, whether or not the species are classified as protected. It covers terrestrial fauna, forest and marine resources. This inclusive approach is the most pertinent one for the purpose of this report in order to trigger a wide-reaching discussion on legal frameworks.

Following this second meaning, wildlife includes all form of living organisms that are not domesticated or cultivated by humans. Wildlife encompasses flora, fauna, fungi and other microorganisms, terrestrial, freshwater and marine. This definition includes plants, trees, freshwater and saltwater fish, molluscs, crustaceans, marine and terrestrial mammals, reptiles, amphibians and birds. Typically wildlife refers to species not domesticated by humans so it does not include crops, livestock or pets bred in captivity. However, plants and animals cultivated or bred in captivity can be closely connected to illegal wildlife activity, as illicit operators can use them as a means of “laundering” illegal wild specimens of species declared as bred in captivity or artificially propagated.¹⁶ Therefore it may also be relevant to consider activities involving these domesticated and cultivated flora and fauna, as related to wildlife crime.

Three types of activities can be targeted under the category of wildlife crime:

- The trafficking of specimens of protected species of fauna and flora (see Box 1)
- Illegal logging and trade of timber products (see Box 2)
- Illegal fishing (see Box 3)

Box 1: An illustration of the illegal trade in specimens of protected species: African Elephant Ivory

An estimated 22,000-25,000 African elephants are illegally killed each year. Many of these are killed by individual local poachers, often hired or supported by illegal traders or even criminal organizations. The poachers may be professionals, or even members of terrorist or militant groups, but they are often opportunists motivated by poverty, desire for bushmeat, or the need to protect their fields from elephant destruction. In these cases they may have only loose connections to prospective buyers.

Once the tusks are removed they typically pass through a series of middlemen, often crossing several national borders. Ultimately the ivory may be worked by African carvers and sold to tourists, foreign businessmen or expatriot residents in one of the growing unregulated markets in countries like the Democratic Republic of Congo, Egypt, Mozambique and Sudan. However, it is more likely that it will be exported as raw ivory from Kenya, Tanzania, or South Africa, on a ship or plane bound for Asia.

To avoid detection at the point of export, ivory may be cut into smaller pieces and smuggled on airlines, or carried by embassy staff not subject to search. However, increasingly, raw ivory is exported in large shipping containers, containing 500 kg or more. These large quantities indicate likely involvement of organized criminals. These shipments evade customs enforcement through fraud, forgery and bribery of officials as well as other tactics such as mixing ivory with other cargo to confuse electronic scans, or shipping aboard fishing vessels, which are less frequently inspected. The smuggling vessels often transit through Hong Kong, Malaysia, Philippines or Viet Nam, with many destined for China, the largest ivory market in the world. There the ivory may be worked and sold to domestic consumers or foreign tourists, or put for sale on online auction sites.

Sources: Nellemann, C., Henriksen, R., Raxter, P., Ash, N., Mrema, E. (Eds), The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources, A UNEP Rapid Response Assessment (UNEP and GRID-Arendal 2014); UNEP, CITES, IUCN, TRAFFIC, Elephants in the Dust – The African Elephant Crisis, A Rapid Response Assessment, (UNEP, GRID-Arendal 2013); Greg L. Warchol, “The Transnational Illegal Wildlife Trade”, in: Rob White (ed.) Transnational Environmental Crime, (Ashgate, 2013) pp. 379-395.

Box 2: Illegal logging of tropical timber

Between 50% and 90% of timber products originating in countries in the Amazon or South East Asia can be considered illegal. These include timber harvested without a permit, in excess of concession quotas, in protected areas, or during a logging moratorium, as well as harvesting of particular protected or regulated species, such as mahogany. In some cases, real or fictitious agricultural or palm oil operations are used to disguise timber operations and act as a cover for building roads and moving materials. These are used as a way to bypass logging moratoria. In many cases, timber is logged illegally alongside legal harvesting activities, either in excess of a quota or just outside the bounds of a concession. In all cases, illicit timber and forest products are frequently mixed with licit products throughout their journey along the supply chain.

Once logged, timber is either processed in-country or exported raw, often first to Singapore or Hong Kong or another transit country where it is mixed with legal forest products. From there, it might travel to China to be turned into woodchips, paper or pulp for export into the European Union or the United States. Once processed in this way, it is almost impossible to determine the origin of the wood or to distinguish between legal products and those that have been illegally sourced.

Along the journey, timber traffickers evade enforcement with falsified logging and transport permits and bribes to forest officials, police, the military and local authorities. Illegal logging is also associated with tax evasion and money laundering of proceeds. While small scale local groups and individuals do harvest forest products illegally, particularly for the domestic charcoal or fuelwood market, perpetrators of transnational timber crime are typically large and highly organized businesses, with strong international connections.

Source: Nellemann, C., Henriksen, R., Raxter, P., Ash, N., Mrema, E. (Eds), The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources, A UNEP Rapid Response Assessment (UNEP and GRID-Arendal 2014).

Box 3: Large scale illegal fishing

Illegal fishing is worth an estimated 10 to 30 billion USD each year, globally. Illegal fishing includes catching fish without a permit or in excess of quotas, fishing in protected areas or out of season, catching protected species, and fishing using prohibited methods or equipment. Some illegal fishing is attributable to bycatch or other permit violations by otherwise legal fishing operations. However, illegal fishing is also carried out by large scale highly organized and international operations that intentionally engage in illegal practices that target high value fish.

These operations involve fleets of ships often owned by front companies with complicated international structures and registered in flag states with weak laws or enforcement practices and generous privacy laws that impede tracing true ownership. The fishers themselves work for low wages and in bad conditions, and can be victims of human trafficking. Illegal fishing has also been linked to money laundering, tax evasion, corruption, piracy, forgery, fraud and smuggling of drugs, firearms and wildlife.

Vessels involved in illegal fishing can stay at sea for months or years at a time without coming to port. Other vessels in the fleet provide refueling and transshipment services. This allows illegal fishing operations to effectively evade enforcement mechanisms that rely on listing of ships suspected of illegal fishing: fish caught by listed vessels can be transferred to unlisted vessels at sea and mixed with legal catch before entering port. When they do eventually come to port, listed vessels can choose a port in a distant region that is less strict about inspection and enforcement, and avoid tracing by changing name or flag. A 2010 study by Flothmann *et al.* found that some listed vessels changed name up to 9 times or flag up to 7 times in a five year period. Because of the lack of an international fishing vessel monitoring system, these tactics can be extremely effective in avoiding enforcement.

Sources: United Nations Office on Drugs and Crime (UNODC), Transnational Organized Crime in the Fishing Industry (2011); Nellemann, C., Henriksen, R., Raxter, P., Ash, N., Mrema, E. (Eds), The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources, A UNEP Rapid Response Assessment (UNEP and GRID-Arendal 2014); TRAFFIC, Wildlife Trade in the European Union, Briefing Paper (2014); S. Flothmann, K. Kistowski, E. Dolan, E. Lee, F. Meere, and G. Album, "Closing Loopholes: Getting Illegal Fishing Under Control", 328(5982) Science 1235-1236 (2010).

This inclusive approach is debatable, many argue that wildlife crime (in its narrow meaning, focussing on protected species), forest crime and marine living resources crime are very different matters than can only be dealt with separately. However there are several potential benefits to addressing them together. Firstly, there is significant subject matter overlap: addressing threats from illegal trade in protected species involves many of the same tools, mechanisms and personnel as regulating illegal activities affecting non-protected marine and forest resources. Moreover, illegal logging and marine living resource crime pose a threat to both terrestrial and marine protected species through damage to habitat and by-catch. Also, there is evidence that some of the same operators may be involved in multiple sectors, as in cases of illegal fishing boats transporting elephant ivory and other products of protected species, as well as their cargo of (illegally caught) fish (see Box 3).¹⁷

In order to conduct a global discussion on legal frameworks, one could argue that it makes sense to focus on wildlife crime rather than environmental crime (which encompasses trafficking in wildlife, forest products, marine living resources but also pollution crimes as defined in section 2.2). Two main reasons could be advanced:

- From a technical point of view, having a narrower scope makes it easier to achieve comprehensive definitions of prohibited behaviours and to tailor appropriate legal solutions. Addressing the three types of wildlife crime together already constitute a theoretical and policy challenge because legal improvements are often focussing on protected species rather than illegal logging and fishing.
- The strategic dimension also needs to be taken into account: a discussion on renewing legal frameworks has more chance to be heard if it meets public concern and political will. Although, awareness of the significance of environmental crime is increasing among the international community, one could say that wildlife crime receives the lion's share of attention. The proliferation of initiatives worldwide to counter the threats posed by illicit trafficking in key charismatic species seems to imply that a discussion on wildlife crime – in its broadest sense - might benefit from stronger public support than environmental crime.

However the merits of a broader approach including all forms of transnational organized environmental crime should not be too hastily discarded, as the next sub-section contends.

2.2 The broad focus: environmental crime

The phenomenon of environmental crime encompasses wildlife crime as defined above as well as other types of environmentally harmful activities, and hence reflects a broader approach. Environmental crime can fit into two different categories: wildlife crime (in its broader sense) and pollution crime. The discriminating line is drawn according to the object of protection. Pollution crime refers to the protection of a-biotic elements of the environment such as soils, water and air. The three types of wildlife crime, on the other hand, aim at protecting biotic resources meaning living organisms. Pollution crime can itself be divided into different types according to the object of protection and the *modus operandi*. For the purpose of this study the focus is put on the two following types:¹⁸

- Illegal transportation and dumping of hazardous waste

Box 4: Hazardous Waste¹⁹

The disposal of electronic, hazardous and other polluting waste is a global issue and one that is increasing with population growth and ever-increasing demand for consumable goods. Whilst many countries may have introduced effective and appropriate measures for national disposal of some waste, the export of other waste and transportation over long distances raises challenges to monitor its disposal.

Criminals exploit these challenges by dumping waste in countries where monitoring and/or enforcement is ineffective. The consequences include: pollution to land as chemicals leach into soil and waterways; harm to people who come into contact with waste either deliberately or inadvertently; and damage to the atmosphere as a result of the release of chemicals as waste degrades or is burnt.

This practice takes place from developed to developing countries since the former have the means and wealth to collect and export waste, while poorer countries may inadvertently allow dumping of waste, especially where poor legislation, investigatory powers and enforcement facilitate such exploitation.

The inappropriate disposal of hazardous wastes, such as e-waste, are often conducted by unscrupulous companies, as well as by individuals and networks of criminals.

- Illegal production of and trade in ozone-depleting substances

Box 5: Ozone-depleting substances ²⁰

Ozone-depleting substances (ODS) are man-made chemicals used mainly as refrigerants but also for other purposes. They include chloro-flouro carbons, or CFCs, which gained notoriety in the 1970s when it was discovered that they contribute to the thinning of the ozone layer. Other ODS include halons, methyl bromide and hydrochlorofluorocarbons (HCFCs).

A Layer of gasses surrounding the planet, the ozone layer protects life from the sun's harmful rays, which in humans can cause cancers and cataracts, and is detrimental to crop-growth. The release of ODS damages the ozone layer allowing harmful radiation through to the earth's surface, affecting the atmosphere and global climate and therefore all human beings.

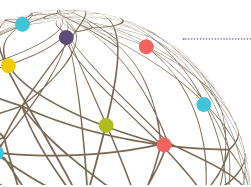
International agreements have seen the phase-out of the production and use of CFCs and more recently their harmful replacement, HCFCs. But these chemicals are still produced and traded around the world. Sophisticated methods of mass smuggling have been adopted by industrial criminals, including counterfeiting of legitimate brands by rogue producers. The most direct effect of this illicit industry has been seen where legitimate chemicals are mixed with banned ones. In 2011 explosions took place following the servicing of refrigerated containers in Viet Nam. As a result of deliberate contamination of refrigerant, three people died in the explosions that occurred in Viet Nam and Brazil.

While the trade in ODS should be diminishing, it continues to be detected regularly on a significant scale, with little monitoring to determine how extensive it actually is. Trade takes place from producing countries, mainly China and India, to all consuming countries but particularly less wealthy countries where equipment is less frequently or affordably replaced, and where repair of equipment rather than disposal, is more likely.

The scale of illegal ODS production and distribution, along with the technology involved, are indicators of corporate criminality. There is a need for robust industry regulation and enforcement to introduce greater oversight of practices, ensuring they are ethical and legal. If States are to sign up to international agreements, compliance measures should be present to ensure that signature and ratification ensures response.

Despite their diversity, all types of environmental crime share common features making it relevant to address them collectively when reviewing and questioning the adequacy of the current legal frameworks. Wildlife crime and pollution crime both threaten the environment, causing more or less diffuse harm. One can argue, for example, that any effort focusing solely on the protection of species is doomed to failure if it overlooks the ecosystems in which they live, the synergies between living organisms and their non-living habitats. No efficient protection of living organisms will be achieved where soil, water and air are irreversibly polluted.

From a technical perspective, the added complexity that a broad approach entails is balanced by the fact that common legal definitions and measures are always conceivable when similar behaviour patterns and *modus operandi* exist. Without losing sight of the specificity of each type of wildlife crime and pollution crime it is possible to perceive a common configuration as they all constitute forms of transnational illegal trade. They are "enterprise crime" meaning criminal activities "conducted as a business would be conducted, meeting a demand with an illegal supply".²¹ All being transnational, they all involve more or less structured networks of individuals able to organize the movement of illicit commodities (either natural goods or polluting goods) across national borders. In addition, the transnational organized groups involved in different forms of environmental crime use similar *modus operandi* (such as transport by sea for wildlife, fish, timber and hazardous waste) it is pertinent to tailor common legal answers



and law enforcement strategies (border and port controls, tracking and licensing measures, etc). Because of these characteristics transnational environmental crime is part of a web of illicit economies, it is one of the many forms of transnational organized crime.

Moreover, all forms of environmental crime raise a common definitional challenge that it would be preferable to address in a unified manner. The legal difficulty is that trading in natural or polluting commodities is not under absolute prohibition: licit and illicit markets coexist. For instance, the international trade in timber products is licit as long as the laws regulating this market are respected (including declaration and licensing obligations), otherwise it becomes illicit. Therefore, in order to conceptualise the types of environmental crime it is not enough to look at the object of protection and the underlying behaviour. The definition of what should be considered as environmental "crime" in the strict criminal law sense is also dependant on a normative prerequisite which is the line drawn according to trade law between licit and illicit trade. This legal precondition is complex due to the assessment of its evolving and hybrid nature passing from legal experts to scientific authorities (for instance in identifying types of toxic substances to prohibit or assessing the threat of extinction to wildlife species). This complex structure, which piles up layers of different legal branches and scientific expertise, is inherent to every type of transnational organized environmental crime and it warrants an integrated discussion.

Finally, in terms of strategy, opening a discussion on legal frameworks with the broad focus of environmental crime might be counter-intuitive as the narrower focus of wildlife crime may seem less ambitious but more likely to get the type of support needed for successful change. However, a review of current global instruments gives ground to argue otherwise. Legal policies targeting wildlife crime might actually benefit from a deeper connection with pollution crime as this field has seen some strong examples of global commitment. It is especially worth noting that the Vienna Convention for the Protection of the Ozone Layer (the Vienna Convention)²² became, in 2009, the first convention of any kind to achieve universal ratification. This universal legal framework, together with its related Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol)²³ has succeeded in dramatically reducing the production of ozone depleting substances. Likewise the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (the Basel Convention)²⁴ is the only global instrument expressly defining an environmentally harmful activity as not only illicit but also criminal.²⁵

Besides, the project to address all forms of environmental crime together should not be discarded as presenting insurmountable legal and political challenges merely because no universal treaty on environmental crime currently exists. At the regional level it is possible to find encouraging examples of this broad approach. If the Council of Europe's intent in 1998 to give birth to the Convention on the Protection of the Environment through Criminal Law²⁶ has not been successful for lack of ratification, it inspired the adoption of an identically named European Directive²⁷ ten years later. The Directive 2008/99/EC of 19 November 2008 became the common legal basis for the member states of the European Union to address all types of environmental crime together from a criminal law perspective.

For all the reasons mentioned above, this paper will take the more inclusive approach with the next section offering an analysis of the legal frameworks available to address transnational organized environmental crime as a whole.

3. A patchwork of legal frameworks: from biological diversity to legal diversity

There are countless legal instruments that can be partly relevant in addressing environmentally harmful activities. Since the beginning of the 1970s, more than 250 international and regional environmental agreements have been concluded²⁸ and every country has been adopting legislation of varying degrees of comprehensiveness on the matter. This section does not provide an exhaustive description of each of these legislative approaches. Instead, it aims to offer a clearer picture of this complex legal landscape which at first sight takes the shape of a disorganised patchwork rather than a comprehensive system.

This section intends to deconstruct the legal picture into three dimensions that need to be understood in order to comprehend the complexity of the current legal landscape and thereby identify its deficiencies and opportunities for improvement. These three factors of variation are the diversity of scope, the diversity of scale and the diversity of legal perspective.

3.1 Diversity of scope

The multiplicity of legal instruments can be largely explained by the variation of scope. Few legal frameworks assume the protection of the environment as a whole, the majority target specific elements. This situation leads to a general fragmentation and results in the fact that the different forms of transnational organized environmental crime are legally addressed as separate matters rather than one widespread issue.

The diversity of scope of the current legal frameworks, from the eco-system or inclusive approach to the sector-specific approach is represented in Figure 2, below, and examples focussing on emblematic global instruments are discussed afterwards.

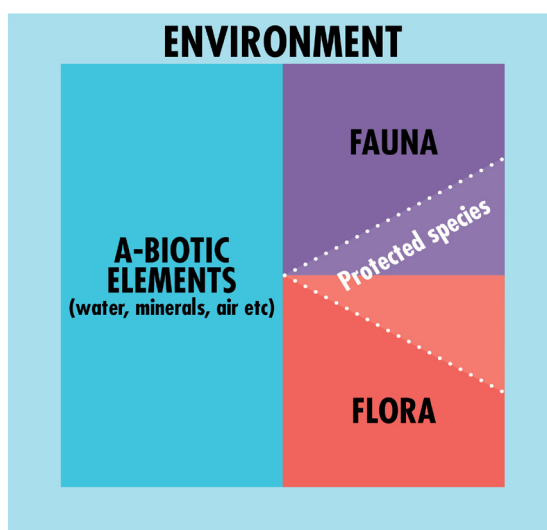
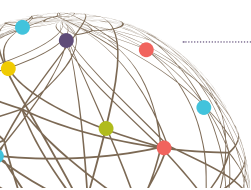


Figure 2: Diversity of legal instruments depending on the scope parameter



The eco-system or inclusive approach

Relatively few global legal frameworks have envisioned an inclusive approach to the protection of the environment.

The Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention)

The Ramsar Convention was a pioneer among multilateral environmental agreements (MEAs). It was negotiated throughout the 1960s, leading to its adoption in the Iranian city of Ramsar in 1971 and it came into force in 1975. The Ramsar Convention currently includes 168 States Parties. Its broad purpose is the protection of water birds and their natural habitat, the wetlands, which are defined broadly in the first article of the convention:

Wetlands are areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.

Because the Ramsar Convention stresses the need to protect the waterfowl and their habitat together it is a precursor to assuming an eco-system approach.

The Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention)

The World Heritage Convention was signed in 1972, entered into force in 1975, and currently has 191 States Parties. The protection of the environment is broadly envisioned as the World Heritage Convention coined the concept of “natural heritage” defined in article 2 as:

Natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;
Geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;
Natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty.

The comprehensive approach is evident as “physical and biological formations” are taken into consideration and specific attention is given to the link between threatened species of animals and plants and their habitat.

The Convention on Biological Diversity (CBD)

The Convention on biological diversity was opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development (the Rio “Earth Summit”) and it entered into force in 1993. The Convention has 194 States Parties. It was the first international instrument introducing the term “biological diversity” which it defines in article 2, jointly with the concept of “ecosystem”:

“Biological diversity” means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

“Ecosystem” means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

The Convention on Biological Diversity offers the best illustration of an inclusive approach as its focus embraces the protection and sustainable use of biological diversity as a whole.

The sector-specific approach

At the international and domestic level, legal instruments around the world generally apply a sector-specific approach to protect the environment. The issue of environmental crime is therefore addressed in a very fragmented way and relevant legal measures must be searched for in different legal instruments depending on sectorial divisions. A few global instruments are mentioned here to illustrate this sector-specific approach.

The main global instruments focussing on the protection of a-topic elements of the environment (see Figure 2) are the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)²⁹ and the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention).³⁰ Both treaties intend to prevent adverse effects on human health and the environment by reducing the production and trade of polluting substances. The Montreal Protocol focuses on ozone-depleting substances and the Basel Convention targets hazardous waste whose uncontrolled disposal directly pollutes waters, soils and the air. It is also worth mentioning the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam Convention or PIC)³¹ and the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention or POPs).³²

Numerous international instruments focus on topic elements of the environment, considering either species of fauna or flora. The Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention or CMS),³³ as its name indicates, focuses on the protection of migratory wild animals. The Convention then establishes three categories of species depending of their “status of conservation” that can be “favourable”, “unfavourable” or “endangered” and measures are tailored accordingly. The Bonn Convention is also a framework encouraging the negotiation of more specific multilateral agreements. For instance in 2008 the Agreement on the Conservation of Gorillas and their Habitats entered into force. It is the first dedicated agreement for conserving gorillas across all ten range states in Africa and it mentions the need for coordinated measures against poaching.³⁴ Several older treaties also have very precise scope by being dedicated to the protection of one specific taxonomic group, for instance, the International Convention for the Regulation of Whaling (ICRW).³⁵

A major global instrument that specifically protects wild fauna and flora, is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).³⁶ CITES aims to ensure that international trade in specimens of wild species does not threaten their survival. Measures of control are more or less complex depending on the Appendix in which the species is listed. Species covered by CITES are listed in three Appendices, according to the degree they are threatened by international trade and therefore the level of protection they require. They include some whole groups, such as primates and cetaceans, corals, cacti and orchids, but in some cases include only a subspecies or geographically separate population of a species (for example the population of just one country). CITES, as its name suggests, is concerned only with international trade: all import, export, re-export and introduction from the sea of species listed in the Appendices of the Convention has to be authorized through a licensing system. The name of the Convention is slightly misleading since it does not focus only on endangered species. Appendix II focuses on species that may become endangered if trade is not regulated and Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade.

Regarding forest products, there is no really global instrument but one important international instrument is the International Tropical Timber Agreement (ITTA).³⁷ It provides a legal framework for the international trade in tropical timber in order to ensure a sustainable management of forests. There is also a non-legally binding instrument on all types of forests, which establishes international guidelines and frameworks for sustainable forest management.³⁸

Finally, it is worth mentioning specific international instruments dedicated to the protection of marine living resources. The United Nations Convention on the Law of the Sea (UNCLOS)³⁹ is an overall framework dealing with all uses of the oceans and commonly referred to as the “constitution of the oceans”. UNCLOS addresses separately the protection of

the marine environment from pollution⁴⁰ and the conservation of living resources. The measures for the protection of living resources depend on their location. If located in an Exclusive Economic Zone (EEZ), the coastal state has rights and duties to ensure proper conservation and management measures for the living resources.⁴¹ If located in the high seas a less strict system applies.⁴² Specific provisions on fishing are established by an implementation agreement to UNCLOS, the 1995 UN Fish Stocks Agreement.⁴³ This agreement only applies to highly migratory and straddling fish stocks, not to fish stocks located entirely within the EEZ of one State. The specific question of fishing in the high seas is also at the core of the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement).⁴⁴ A more comprehensive look at the issue of transnational organized crime in the fishing industry, and the status of current responses, can be found in the Global Initiative's 2015 publication, *"The IUU Fishing and Organized Crime Nexus: illegal, unregulated and unreported fishing as transnational organized crime"*.

The global instruments mentioned above are but a few illustrations of the widespread trend in addressing environmental issues, including environmental crime, with sector-specific legislation. The diversity of scope appears to be a key parameter in understanding the fragmentation of the current legal landscape. Another crucial parameter is the diversity of scale.

3.2 Diversity of scale

The diversity of scale is the second parameter that allows a better understanding of the current legal landscape. Layers of legislation accumulate from the national (or even sub-national) level to the global level. Laws are sometimes logically articulated with one another. This is the case if an international treaty is perfectly implemented by a specific national legislation, which is itself fully implemented by local regulations. Unfortunately this ideal scenario is not always applied; the insufficient national implementation of international texts is a constant challenge in many countries. The multiplicity of levels often results in legal confusion, loopholes or even contradictions between the various legal instruments relative to environmental crime.

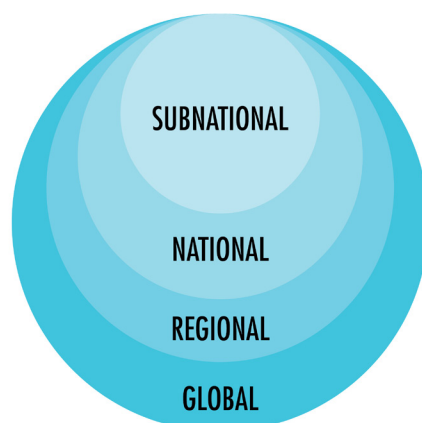
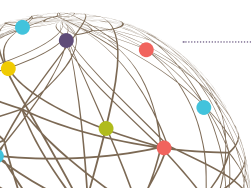


Figure 3: Diversity of legal instruments depending on the scale parameter

Figure 3, above, schematically represents the diversity of relevant legal instruments in the fight against transnational organized environmental crime depending on the scale parameter. A brief presentation of the different levels is given afterwards.

The national and sub-national level

The way to address the phenomenon of environmental crime can significantly vary from one country to another, depending on the legal perspective applied by national lawmakers (see section 3.3). Even if two countries address



environmental crime from the criminal law perspective, the sanctions can critically differ as well as the levels of enforcement reflecting higher or lower levels of priority among other national concerns (see section 4.1).

The heterogeneity of national laws is very advantageous for transnational organized groups and corporations engaged in environmental crime. For instance they know where to operate in order to face the lowest penalties and enforcement rates, and they take advantage of legal “safe havens” for the organization and transit of their illicit commodities. National responses need improvement in various countries to close loopholes, and better coordination between states is urgently needed to really address organized environmental crime as a transnational issue.

The regional level

States can use multiple legal instruments to enhance international cooperation. The first option is to sign bi-lateral agreements reinforcing the cooperation between two states. The bi-lateral approach allows addressing specific issues directly, especially between source and destination countries. A good example of bilateral agreements (even if not between two states but between the European Union and a timber-producing country outside the EU) are the Voluntary Partnership Agreements (VPAs) signed in the context of the EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan. They are legally binding agreements aiming to reduce illegal logging by promoting trade in legally produced timber. The regional level is also crucial. Important legal frameworks have been put in place at this level between various neighbour states, European, Asian and African examples of which are presented below.

The European region presents the widest set of relevant regional instruments in the fight against transnational organized environmental crime. Although the Council of Europe was not successful with its Convention on the Protection of the Environment through Criminal Law (see 3.3), the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)⁴⁵ is considered as an important framework. In the context of the European Union, numerous legal instruments have been adopted on the basis that the protection of the environment is one of the objectives recognized in the Treaty on the functioning of the European Union.⁴⁶ A few relevant instruments are:

- Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (discussed in 3.3),
- Council Directive 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora (Directive Habitat) which was inspired by the Bern Convention,
- Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein. This Regulation is in compliance with CITES and it established the UE CITES Enforcement Group that can be considered as the UE equivalent of the Wildlife Enforcement Networks (WENs).
- Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market. This Regulation, known as the Illegal Timber Regulation, specifically addresses illegal logging.
- Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing.
- Regulation (EC) No 1013/2006 of 14 June 2006 on shipments of waste which implements the Basel Convention. This regulation was recently amended through Regulation (EU) No 660/2014 of the European Parliament and of the Council of 15 May 2014 in order to strengthen inspections on waste shipments.

The importance of regional frameworks is also increasing elsewhere. In the context of the Association of Southeast Asian Nations (ASEAN) a regional approach to the protection of the environment is emerging.⁴⁷ During the 14th ASEAN Summit that was held in 2009, the ASEAN Socio-Cultural Community (ASCC) Blueprint was adopted as

part of the plan to establish the ASEAN Community by 2015. One of the ASCC Blueprint purposes is to ensure environmental sustainability. Global environmental issues are targeted and it is proposed, *inter alia*:

to “intensify regional cooperation to enhance and strengthen national and regional capacities to address issues and commitments to relevant Multilateral Environmental Agreements (MEAs) through regional research, promoting awareness, capacity building programmes and informed policy choices”.⁴⁸

Cooperation is especially promoted regarding the issue of illegal trafficking in hazardous waste, one goal being:

to “establish effective and fully functioning regional mechanisms to address transboundary hazardous wastes, including illegal traffic of hazardous wastes, in line with the Basel Convention Procedures and Modalities”.⁴⁹

Already in 2005, the ASEAN Wildlife Enforcement Network (ASEAN-WEN) was created as a regional inter-agency and inter-governmental initiative. It is an important wildlife law enforcement network as it involves police, customs and environment agencies of all 10 ASEAN countries.⁵⁰ In addition, the Asian Judges Network on Environment was created in 2010; it is an information and experience-sharing arrangement among senior judges of the ASEAN and the South Asian Association for Regional Cooperation (SAARC). With the support of the Asian Development Bank, this informal network provides judicial experience exchange and capacity building on environmental cases.⁵¹

Regarding the African continent, various instruments exist. In the context of the African Union (AU), the African Convention on the Conservation of Nature and Natural Resources⁵² was adopted in 1968 (and the revised version was adopted in 2003 but it has not yet entered into force due to lack of ratifications). The Bamako Convention on the Ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Bamako Convention) is also an important regional treaty.⁵³ The Bamako Convention goes further than the Basel Convention because it prohibits and criminalizes the import of hazardous waste without allowing any exception.⁵⁴

Specific instruments have been adopted in the context of the Southern African Development Community (SADC), which comprises 15 Member States. Various protocols to the SADC treaty can be partly relevant to environmental crime including the Protocol on Wildlife Conservation and Law Enforcement (1999); the Protocol on Fisheries (2001); the Protocol on Forestry (2002) and the Protocol against Corruption (2001). The question of the harmonization of national laws is mentioned by the Protocol on Wildlife Conservation and Law Enforcement which states *inter alia* that “such harmonization shall relate to [...] measures governing the trade in wildlife and wildlife products and bringing the penalties for the illegal taking of wildlife and the illegal trade in wildlife and wildlife products to comparable deterrent levels.”⁵⁵

It is also worth mentioning non-binding instruments (or soft law) such as the African Elephant Action Plan which was adopted in March 2010 at the 15th meeting of the Conference of the Parties to CITES. It is linked with CITES but this plan is fully owned and managed by the African Elephant Range States. Its “priority objective 1” is to “reduce illegal killing of elephants and illegal trade in elephant products”. The strategy aims to “strengthen the capacity of law enforcement authorities/agencies to combat poaching and illegal trade in ivory and other elephant products” and to “Harmonize national policies and laws relevant to conservation and management of African elephants within and across range States where possible”.

As these few examples show, innovative and encouraging legal frameworks can emerge at the regional level. Compared to the international level, it is often easier to agree on common legal strategies and further binding instruments among a smaller number of states sharing regional concerns. Positive regional experiences have the potential to inspire discussions on the improvement of legal frameworks at the global level.

Global level

Since the 1970s, the protection of the environment has become a privileged field for the adoption of multilateral legal instruments, the so-called MEAs (Multi-lateral Environmental Agreements). They can partially be relevant to addressing transnational organized environmental crime (see section 3.3). Criminal law related treaties can also be pertinent to a certain extent: the UNTOC and the UN Convention against Corruption (UNCAC) will be discussed in section 3.3.

It is essential to stress here that, despite the existence of numerous global frameworks, none is specifically dedicated to the issue of transnational organized environmental crime as a whole. On the contrary, the approach to environmental crime is fragmented among various global instruments. For certain forms of environmental crime it is possible to identify a main global instrument: the Montreal Protocol deals with ozone-depleting substances, the Basel Convention is the main reference for illegal trade in hazardous substances. Conversely, the focus of CITES is ensuring that trade in specimens of species listed in its Appendices is sustainable, legal and traceable. By default – and importantly not its primary purpose – this requires mechanisms and procedures to prevent illegal trade, including the requirement that national implementing legislation includes sanctions for violation of the Convention's provisions. Regarding illegal logging and fishing the picture is far more blurry. There is no global legally binding instrument on forests, but a series of agreements on tropical timber. Likewise, illegal fishing is not dealt with comprehensively by one instrument but partially addressed by several global instruments (see section 3.1).

To sum up, the scale parameter reveals that at least three levels of legal instruments (national, regional and global) have to be taken into account. These three layers are themselves highly fragmented as there are wide discrepancies between national laws, regional frameworks and even between the multiple but only partially applicable global frameworks as far as the issue of transnational organized environmental crime is concerned.

This brings us to the third parameter: the diversity of legal perspective. It is another essential factor in understanding the complexity of the current legal landscape yet it is rarely analysed.

3.3 Diversity of legal perspective

The legal instruments relevant to address transnational organized environmental crime are diverse by their very nature. Indeed they belong to three different legal perspectives that coexist at the national and international levels: environmental law, trade law and criminal law. Overlaps do exist regarding specific legal instruments but, in general, the legal instruments mainly adopt one of these three viewpoints. Understanding the chosen legal perspective is crucial because each legal perspective entails specific concerns and types of answers to the phenomenon of environmental crime as this section explains. The analysis is primarily focused on global legal frameworks, but regional and national examples are also discussed when especially relevant.

In order to fully address transnational organized environmental crime a better connection between the three legal perspectives is required. Figure 4, below, represents this conceptual and policy need.

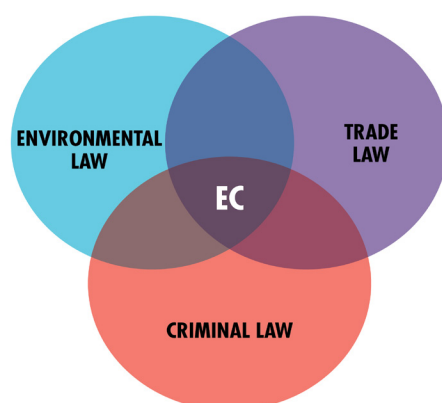


Figure 4: Environmental crime (EC): at the intersection of three legal perspectives

Environmental Law: environmental crime as a threat to conservation

Environmental crime has, in the first place, been addressed from the perspective of environmental law, which focuses on the concepts of “protection” and “conservation” of the environment.

At the international level, this approach could be traced back to the United Nations Conference on the Human Environment held in Stockholm in 1972. No international organ was dedicated to environment issues before this Conference so the creation of the United Nations Environment Programme (UNEP) is considered its main achievement. Also, even if it is not a binding text, it is important to mention the Stockholm Declaration which has shaped the core principles that have been developed by legal instruments of international environmental law since its signing. Its preamble argues for the need to protect nature because it is the “human’s environment”, it is essential to his wellbeing and to the enjoyment of the most basic human right: the right to life itself. The protection of the environment is perceived as crucial for mankind, with a pioneering concern for the legacy left to “future generations”. The Declaration strongly links two challenges: the protection of the environment and economic development.⁵⁶ It refers to the “wise use” of natural resources, an expression that can also be found in the Ramsar Convention adopted in the same period, it prefigured the recent concept of “sustainable development”.

The purpose of legislation following the environmental perspective is first of all to put in place systems to identify, monitor and research conservation issues. International cooperation can be established with this primary goal. For instance the Conservation of Migratory Species of Wild Animals (CMS) lists as one of its “fundamental principles” the fact that “the Parties should promote, co-operate in and support research relating to migratory species”.⁵⁷ The CMS is also a legal framework encouraging States Parties to conclude multilateral agreements with strong attention on monitoring, research and exchange of information on the migratory species concerned.⁵⁸

A second type of legal measures targets the “*in-situ* conservation” which, according to the definition of the Convention on Biological Diversity, refers to “the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings”.⁵⁹ The establishment of protected areas and natural reserves is emblematic of this. However, this can be particularly challenging when the area of concern extends over the territories of more than one state and in such a case adequate protection requires the involvement of different states through advanced cooperation. The Ramsar Convention is a remarkable illustration of the establishment of protected areas as the designation of at least one wetland to be included in a list of “Wetlands of International Importance” was a requirement for States to become Parties to the Convention.⁶⁰ By focusing on the creation of protected areas, the Convention has been very successful in fostering improved conservation of wetlands. The Convention also paved the way for sophisticated cooperation between States to ensure the protection of shared wetlands.⁶¹

The goal to regulate sustainable use and management of natural resources is also central to the environmental law perspective. Following the definition of the Convention on Biological Diversity:

“Sustainable use” means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.⁶²

International instruments tend to establish measures of sustainable use in very broad terms since strict measures would appear as conflicting with national sovereignty. Each State has the sovereign right to exploit its natural resources and the correlative duty to regulate such use.⁶³ States define what types of use they consider illegal on their territory taking into account the issue of sustainability but also other concerns. If activities defined as illegal or criminal often constitute unsustainable use of natural resources, it does not mean that all the unsustainable activities are made illegal. The debate on environmental crime does only partly overlap with the challenging debate on the definition of sustainability and the legal responses to achieve it.

The environmental law perspective is undoubtedly central in addressing environmental threats caused by human actions, including negligence. However it appears to be ill-equipped to prevent and stop individuals engaged in transnational organized environmental crime.. Environmental law and trade law partly overlap as they both face the challenge of the sustainable use of natural resources. Trade law offers a complementary perspective and set of measures when the exploitation of natural resources is undertaken for commercial purposes. For this reason trade law is also one of the legal perspectives that plays an important role in addressing transnational organized environmental crime.

Trade Law: environmental crime as a form of international illegal trade

Trade law addresses transnational organized environmental crime as a form of international illegal trade. Relevant legal instruments representing the trade law perspective define natural resources and polluting substances as commodities and regulate the commercial transactions in such commodities either at the national or international level. As explained above (see section 2.2.) trade law traces the essential line between legal and illegal trade. Trading is closely controlled to ensure that natural resources are not depleted by over-exploitation or destroyed by polluting activities.

CITES is emblematic of the trade-related MEAs as it regulates the international trade in specimens of species listed in its Appendices. It establishes three sets of rules regarding the export and import of specimens depending on the assessment of the level of risk for the survival to the species. Regarding species threatened with extinction, which represent only 3% of the species protected by the Convention (species listed in Appendix I), international trade is highly restricted since trade for “primarily commercial purposes” is prohibited (article III). Regarding the other 97% of species covered by CITES the conservative goal is inseparable from the goal to ensure the sustainability of the international market. In the context of CITES, illegal trade in protected species is defined as trading activities that do not respect the formalities set out in the Convention. Forests and marine living resources are partly covered by CITES and they are also protected as valuable commodities in other agreements. Diverse legal frameworks regulate their exploitation to ensure the sustainability and development of these international markets. For instance the objectives of ITTA are “to promote the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests and to promote the sustainable management of tropical timber producing forests.”⁶⁴

Regarding polluting substances such as ozone-depleting substances and hazardous waste, the trade law perspective also applies but with a different final goal. Indeed international instruments regulating this sector do not pursue the sustainability of international trade; to the contrary their aim is the ending of these markets. As a clear illustration, the preamble of the Basel Convention explains that its fundamental purpose is that “enhanced control of transboundary movement of hazardous wastes and other wastes will act as an incentive for their environmentally sound management and for the reduction of the volume of such transboundary movement.” Transnational movement is allowed only on exceptional grounds.⁶⁵ Likewise, the Montreal Protocol organized the phasing-out of the production of ozone-depleting substances meaning that its measures on international trade target the total ban of the import and export of such substances.⁶⁶

Whether the goal is the control, the sustainability or the ban of international trade, the legal instruments applying the trade law perspective offer similar types of measures. International legal instruments provide frameworks for cooperation between producing and consuming countries, or fishing states and coastal states in the case of fisheries resources.⁶⁷ Regarding wildlife markets, the first concern is to assess and monitor adequately the stocks of natural resources (terrestrial fauna, forest products and marine living resources) in order to establish quotas or other limitations to the quantities that can be subject to exploitation and trade. In addition to these quantitative measures, similar formalities are established for international trade in natural resources and polluting substances. These measures include notifications, licensing systems, certifications, export, re-export and import permits granted only when specific criteria have been met. For instance, CITES requires for species listed in its Appendix II that export permits shall only be granted after double scrutiny: the national Scientific Authority of the country

of export has advised that export will not be detrimental to the survival of the species, and the Management Authority of the state of export has confirmed that the specimen was not obtained in contravention of wild fauna and flora protection laws of that State, and that living specimens will be transported in adequate conditions. Furthermore, import requires the prior presentation of an export permit (or re-export certificate) from the exporting country before import may take place.⁶⁸ Another system is established by the Basel Convention regarding the transboundary movement of hazardous waste. In short, the state of export must notify the state of import of the proposed movement and the state of import can consent with or without conditions. If the State of import denies its permission the movement will not be allowed.⁶⁹ In its article 9, the Basel Convention precisely defines the types of infringements that constitute illegal traffic.

If a case of international trade in natural resources or polluting commodities does not respect the established regulations then it constitutes illegal trade. The phenomenon of environmental crime is addressed through this legal definition and specific measures can be established from the trade law perspective. CITES offers the best illustration as it establishes that:

- The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:
- (a) to penalize trade in, or possession of, such specimens, or both; and
 - (b) to provide for the confiscation or return to the State of export of such specimens.⁷⁰

To address illegal international trade in protected species, states parties are encouraged to implement confiscation measures and sanctions. The type of sanctions required is not specified; they do not have to be criminal penalties. Typical sanctions from the trade law perspective are rather civil or administrative fines or cancellation of license for instance. Confiscation and seizure are also important tools to address illegal trade. It is worth noting that national Customs Laws can be used in addition to or in lieu of CITES-implementing legislation. Customs laws may carry criminal penalties even if CITES implementing legislation does not. The key role of Customs authorities in the fight against transnational organized environmental crime is enhanced by capacity building initiatives such as the Green Customs Initiative.⁷¹

Unfortunately, this way of dealing with the phenomenon of transnational organized environmental crime, both in terms of legal definitions and applicable sanctions, appears unsatisfactory. The trade law perspective does not fully recognize the seriousness and multifaceted harm that environmental crime entails. The affirmation of a legal prohibition and the specific measures established accordingly are insufficient to deter organized groups and corporations from carrying out their illicit lucrative activities. The responses envisioned, such as confiscations and fines, and the limited enforcement tools available are far from having a substantial impact on the growth of the phenomenon. The application of the criminal law perspective appears fundamental to comprehensively address transnational organized environmental crime.

Criminal law: environmental crime as a form of transnational organized crime

From the criminal law perspective, the concept of “environmental crime” takes an additional meaning that goes beyond the trade law definition of infringement of international trade regulations. The criminal law perspective implies that environmentally harmful behaviours are defined as criminal offences punishable by criminal penalties. The criminal law approach also entails that specific law enforcement mechanisms and processes apply.

As a general principle, democratic countries choose the criminal law approach to address a particular issue only as a last resort, or *ultima ratio*. Because criminal law is the toughest form of legal intervention, involving the most invasive forms of punishment and proceedings, it should always be used in a balanced and reasoned way. Lawmakers have to decide on the necessity of the criminal law approach when they consider that the seriousness of the behaviour compels such intervention and that the other types of legal responses are insufficient.⁷² Criminal policies vary noticeably in time and space reflecting the values and priorities of each society.

It is not unusual that specific sectors appear mainly regulated via other legal branches but require the establishment of criminal law prohibitions and sanctions to address the most harmful behaviours. For instance, working relationships are mainly regulated by labour law but the criminal law approach can be used to address the most serious issues such as discriminations, sexual harassment or cases of forced labour. The same logic applies regarding the phenomenon of environmental crime; different branches of law need to be combined. As explained above (see section 2.2.) the criminal law concept of environmental crime has to be constructed building upon the trade law definition which itself partly overlaps with environmental law concerns. At the international level, it would make no sense to discuss a new legal instrument that would establish a definition of transnational organized environment crime without articulating it with the various global instruments expressing the environmental law perspective and those defining legal and illegal forms of international trade in natural resources and polluting commodities.

Examples of legislation implementing the criminal law approach to address forms of environmental crime can be found in numerous countries. This approach can be domestically implemented in a wide range of ways. Indeed national laws don't necessarily define all activities included in the phenomenon of transnational organized environmental crime as criminal offences. For instance transboundary movements of hazardous waste and illegal trade in protected species are more often criminalized than illegal logging and fishing. Where specific criminalization is missing, proactive law enforcement strategies can still be carried out using criminal legislation on ancillary crimes such as document forgery, tax and customs fraud. The severity of criminal penalties and law enforcement measures vary from one country to another, reflecting very diverse levels of prioritization (see section 4.1).

At the international level only a few legal instruments can be described as offering a criminal law perspective on the phenomenon of transnational organized environmental crime. The Basel Convention, already mentioned as an illustration of the trade law perspective, is currently the only global framework addressing an environmentally harmful activity as criminal. While the Convention regulates the international trade in hazardous waste, delineating both legal and illegal trade, it also goes further by establishing that "the Parties consider that illegal traffic in hazardous wastes or other wastes is criminal."⁷³ The Convention compels States Parties to introduce "appropriate national/domestic legislation to prevent and punish illegal traffic."⁷⁴

If the Basel Convention stands alone among global instruments specifically dedicated to environmentally harmful activities, it is also worth mentioning regional legal frameworks that also apply the criminal law perspective. The European experience is especially instructive as it shows an evolution from failed attempts to more successful legal frameworks. In 1998, the Council of Europe adopted the Convention on the protection of the environment through criminal law (COE Convention)⁷⁵ but this legal framework never entered into force due to lack of ratifications⁷⁶. This attempt was probably too ambitious at that time. There was a lack of political will to agree on a binding instrument that would force states to put environmental crime in the agenda of their national criminal policies. Indeed, the COE Convention required states to establish criminal offences to address various environmentally harmful activities and it promoted criminal sanctions including imprisonment, pecuniary sanctions and reinstatement of the environment.⁷⁷ It also promoted advanced cooperation and the expansion of jurisdiction.

The intent of the Council of Europe was however not completely in vain as it paved the way for a fruitful project inside of the other major European regional organization, the European Union (EU). Requiring the merging of criminal law and environmental policies, two fields separated until then and entrusted to different institutions of the EU, this was a long and challenging process which ended up triggering an unprecedented institutional debate.⁷⁸ Finally in 2008 the Directive on the protection of the environment through criminal law⁷⁹ was adopted. The Directive is a legal framework⁸⁰ requiring Member States to define various behaviours as criminal offences "when unlawful and committed intentionally or with at least serious negligence". Therefore the criminal definitions are not autonomous; the underlying criterion is that the behaviours must be unlawful, meaning that they infringe one of the pre-existent European legal texts which are listed in the Annexes. The list of behaviours established in article 3 includes activities related to waste (especially the shipment of waste), activities involving hazardous nuclear

substances, ozone-depleting substances and also the “the killing, destruction, possession or taking” and “trading” of specimens of protected wild fauna or flora species. The only forms of the phenomenon of transnational organized environmental crime that are not taken into account are illegal logging and illegal fishing activities. Member States had until December 2010 to transpose the Directive by adapting their national legislation, an obligation to which they complied more or less effectively (see section 4.1).

In addition to these few international and regional specific legal frameworks, global criminal law related agreements can currently apply to transnational organized environmental crime to a certain extent. The UNCAC⁸¹ and the UNTOC⁸² do not specifically refer to environmental crime, but they can partially be applied to the issue. UNCAC cannot be used directly to address the commission of environmental crimes as it focuses exclusively on corruption, as its name suggests, but it could and should be applied to corruption in the environmental crime arena. Likewise, UNTOC provisions can be applied to ancillary crimes (for instance money laundering and corruption) committed in the context of environmental crime. UNTOC can also be directly relevant as the criminal law approach compels to define environmental crime as a form of transnational organized crime.

The potential role of UNTOC in addressing environmental crime was acknowledged from its inception. In its resolution adopting UNTOC in 2000, the General Assembly asserted that it was:

Strongly convinced that the United Nations Convention against Transnational Organized Crime will constitute an effective tool and the necessary legal framework for international cooperation in combating, inter alia, such criminal activities as money-laundering, corruption, *illicit trafficking in endangered species of wild flora and fauna*, offences against cultural heritage and the growing links between transnational organized crime and terrorist crimes.⁷⁷

Given that the “illicit trafficking in endangered species” is specifically mentioned as a form of transnational organized crime that can be addressed through UNTOC, it is possible to argue by logical extension that UNTOC can be used to combat all forms of transnational organized environmental crime. However UNTOC uses very specific definitions that result in it being currently inapplicable to many cases of environmental crime. Indeed, UNTOC’s scope of application is limited to “offences established in accordance with this Convention” and “serious crimes”, “when the offence is transnational in nature and involves an organized criminal group”.⁸³ This gives two different options that have in common a transnational nature and the involvement of an organized criminal group defined in article 2 as follows:

“Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Apart from these common elements, the offences included in the scope of application are divided into two types. Firstly there are the “offences established by the convention”, meaning the participation in an organized criminal group (article 5), money laundering (article 6), corruption (article 8) and obstruction of justice (article 23). This category also includes the offences established in the UNTOC Protocols: trafficking in persons,⁸⁵ smuggling of migrants and related offences⁸⁶ and illicit manufacturing of firearms and related offences.⁸⁷ Secondly, UNTOC applies to “serious offences” which are defined as conducts “constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”.

Taking into account these two categories of offences, there is currently only one way to apply UNTOC to environmental crime: under the second category of “serious crime”. The difficulty is that this category relies on national criminal definitions. Hence a specific conduct enters into the scope of the convention only if national criminal laws recognize this conduct as a criminal offence and apply a maximum penalty of at least four years of imprisonment. The problem is that national laws take very diverse stances on environmental crime, several laws do

not recognize it as criminal at all and the ones doing so do not always reach the required penalty threshold. For this reason, depending on national legal diversity, UNTOC is not yet applicable to all cases of transnational organized environmental crime.

To sum up, except for a few counter-exceptions, a review of the current legal landscape reveals a weak application of the criminal law perspective in addressing the phenomenon of transnational organized environmental crime, despite the increasing body of evidence that would suggest it is warranted. This is concerning because unfortunately the two other legal perspectives in place (i.e. environmental and trade law perspectives) are insufficient in addressing this severe issue. To get out of this legal deadlock, renewing legal frameworks to fully address environmental crime as a form of transnational organized crime appears to be a necessary step. This viewpoint is a trend gaining momentum. Interestingly enough, intergovernmental organs, even the ones traditionally involved in the protection of the environment from the environmental and trade law perspectives, have started calling for a global criminal law approach. A few examples of this global trend can be found in recent resolutions of UN institutions:

- The UN Economic and Social Council (ECOSOC) adopted in July 2013 the Resolution 2013/40 on “Crime prevention and criminal justice responses to illicit trafficking in protected species of wild fauna and flora” which, *inter alia*:

Encourages Member States to make illicit trafficking in protected species of wild fauna and flora involving organized criminal groups a serious crime, as defined in article 2, paragraph (b), of the United Nations Convention against Transnational Organized Crime, in order to ensure that adequate and effective means of international cooperation can be afforded under the Convention in the investigation and prosecution of those engaged in illicit trafficking in protected species of wild fauna and flora;

Strongly encourages Member States to strengthen, where necessary, their national legal and criminal regimes and law enforcement and judicial capacity, consistent with international legal obligations, to ensure that relevant criminal laws, including appropriate penalties and sanctions, are available to address illicit trafficking in protected species of wild fauna and flora.”⁸⁸

- In December 2013, the UN General Assembly also mentioned the issue of environmental crime in its Resolution 68/193:

Expressing deep concern about environmental crimes, including trafficking in endangered and, where applicable, protected species of wild fauna and flora, and emphasizing the need to combat such crimes by strengthening international cooperation, capacity-building, criminal justice responses and law enforcement efforts,

Emphasizing that coordinated action is critical to eliminate corruption and disrupt the illicit networks that drive and enable trafficking in wildlife, timber and timber products harvested in contravention of national laws.⁸⁹

- The UN Commission on Crime Prevention and Criminal Justice (CCPCJ) adopted in May 2014 a resolution regarding trafficking in forest products. It is Resolution 23/1 on “Strengthening a targeted crime prevention and criminal justice response to combat illicit trafficking in forest products, including timber”, which, *inter alia*:

Encourages Member States to make illicit trafficking in forest products, including timber, involving organized criminal groups a serious crime, as defined in article 2, paragraph (b), of the United Nations Convention against Transnational Organized Crime, where appropriate, in order to ensure that adequate and effective means of international cooperation can be afforded under the Convention in the investigation and prosecution of those engaged in illicit trafficking in forest products, including timber.”⁹⁰

- In June 2014, UNEP organized the first United Nations Environment Assembly (UNEA). The issue of illegal trade in wildlife including timber and marine products was the subject of resolution 1/3 which, *inter alia*:

Strongly encourages member States and regional economic integration organizations to: (a) Implement their commitments to fighting illegal trade in wildlife already taken in other forums [...] (d) Support work to reinforce the legal framework, including through deterrent measures, where necessary, and to strengthen capacity throughout the entire enforcement chain.⁹¹

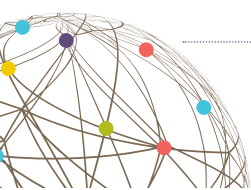
- In November 2014 the Conference of the Parties of the Bonn Convention (CMS) adopted Resolution 11/31 “Fighting wildlife crime and offences within and beyond borders” which, *inter alia*:

Urges Parties to take appropriate measures to ensure that their legislative framework provides for penalties for wildlife crime that are effective, act as a deterrent and reflect the gravity of the offence and provide for the confiscation of specimens taken in violation of the Convention.⁹²

- In December 2014, the UN General Assembly adopted Resolution 69/197 “Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity” which points out the involvement of organized criminal groups in the transnational trafficking in wildlife and timber products:

Strongly encourages Member States to take appropriate measures, consistent with their domestic legislation and legal frameworks, to strengthen law enforcement and related efforts to combat individuals and groups, including organized criminal groups, operating within their borders, with a view to preventing, combating and eradicating international trafficking in wildlife, forest products, including timber, and other forest biological resources harvested in contravention of national laws and relevant international instruments.⁹³

This list of resolutions is far from being exhaustive and the volume of similar international and regional statements and declarations⁹⁴ is exponentially increasing. Better legal instruments are needed to combat transnational organized environmental crime and a global criminal law approach is now increasingly perceived as the way forward. The next section explores the benefits that a global criminal law approach would offer.



4. Addressing current flaws: what a global criminal law approach would improve

The purpose of this section is to offer a general overview of the improvements that could be expected if the issue of transnational organized environmental crime were addressed from a global criminal law perspective. Various ways of implementing a global criminal law perspective can be envisioned at this stage. The bottom-up approach would focus on fostering renewed legal frameworks at the national level. That is to say, if all national laws would criminalize environmental crime and stipulate maximum penalties of four years of imprisonment or more, it would mean that environmental crime would be fully included in the scope of application of UNTOC. Environmental crime would then be addressed in the same way as other forms of transnational organized crime. The top-down approach would instead focus on global legal frameworks impacting on national laws. A new global framework dedicated to transnational organized environmental crime could be put together or, using UNTOC as a reference, the possibility of a new protocol could be explored.⁹⁵ A new international framework would place obligations on States parties that they would have to implement through their national legislation. The choice of the best way to proceed is open to discussion, what is clear for now is the urgent need to start this global conversation.

In any case, a global criminal law approach would entail: wider criminalization of the issue; harmonization of national laws; reinforced international cooperation; and expansion of national jurisdictions.

4.1 Criminalization and harmonization

Inconsistent criminalization at the national level

National laws are very heterogeneous and they don't necessarily address environmental crime through criminal law. They may also recognize specific forms of environmental crime as criminal but not others. Where specific criminalization is missing, law enforcement strategies can still be carried out using criminal legislation on ancillary crimes such as document forgery, tax crime⁹⁶ and customs fraud or focussing on the key issue of corruption.⁹⁷ But the lack of specific criminalization remains an obstacle even for those proactive strategies. For instance, to investigate and prosecute cases of money laundering, a predicate or underlying offence is required. Therefore if the activities constituting environmental crime are not defined as criminal by the national legislation or are not listed as an underlying offence in the anti-money laundering laws, there is no legal basis allowing to go after the proceeds of the crime.⁹⁸

When a product or activity is criminalized in one country but legal in its neighbour, it can be easy to launder the product or escape enforcement simply by crossing a border.⁹⁹ Both legally and practically, transnational law enforcement cooperation typically requires a common definition of crime. Countries may be unwilling to extradite for an activity they do not consider criminal, and perpetrators can take advantage of this situation, evading criminal prosecutions by hiding in more lenient states. Discrepancies in criminalization can also create port and market shopping, where traffickers choose the most convenient transit and sales points for their products. This is particularly problematic in regional customs unions and common markets, such as the European Union, the Common Market for Eastern and Southern Africa (COMESA), and the planned ASEAN Economic Community, where customs barriers between countries are reduced or eliminated, facilitating internal movement of illicit products. In these situations, the state with the weakest laws can provide an easy and low risk entry or exit point for illegal wildlife products.¹⁰⁰

Wider criminalization of the issue would represent a huge progress in reducing national discrepancies and reducing legal loopholes. A broad study of national laws is needed to properly assess the reasons why certain countries do not yet address environmental crime as a criminal matter and what type of measures are being used. This in-depth comparative law research falls beyond the scope of this paper which is intended as a global overview to start a wider discussion on the matter.

Lack of harmonization

Significant inconsistencies exist between national laws already criminalizing the issue. The problem is that different standards of criminalization can create havens for criminals, and transit hubs for traffickers. The lack of harmonization also makes enforcement and compliance more difficult. Discrepancies in criminal laws can result from the differences in definitions (more or less specific behaviours being defined as criminal), differences in sanctions and differences in procedural measures.

Another essential factor is the diversity in the application of laws. Indeed, comparing national criminal laws addressing transnational organized environmental crime only gives a partial picture of national legal responses. A national criminal legislation could appear complete on paper but it is worthless if it is not applied. Proper implementation requires strong political commitment. Different challenging situations exist, including:

- states where generalized corruption prevents any effective application;
- states choosing to ignore transnational organized environmental crime (all types or in specific sectors) in order to protect their economic policies;
- states being indifferent to transnational organized environmental crime because they believe it does not represent a significant threat within their borders, and thus there is little reason for its prioritization.

The different levels of awareness and prioritization are reflected by the means allocated to police forces to combat environmental crime, the prosecutorial priorities and judicial application.¹⁰¹ Police forces, prosecutors and judges should play a key role. Too often, however, their role is limited because environmental crime is not enough recognized as a priority by national criminal policies, and the associated criminal offences are not recognised. The reverse scenario of a law weak on paper but with an extensive impact in practice could also occur (for instance through broad judicial interpretation). A comprehensive study of national criminal laws, criminal policies and case law is necessary to get a complete understanding but such a study goes beyond the ambition of this section.

Overall some national laws are too weak to be effective, while others can seem draconian by international standards. A global criminal law approach should aim at harmonizing national laws by promoting internationally agreed definitions, requiring specific legislative and other measures, creating guidelines or requirements for harmonized and appropriate penalties, and providing for harmonized treatment of ancillary offences.

Toward harmonized criminal definitions

Regarding the diversity of definitions, a global criminal law approach would have to foster standardized definitions of transnational organized environmental crime as a key first step towards harmonizing national legislation. While most states may already have laws criminalizing illegal movement of hazardous waste and certain aspects of wildlife crime, standardised definitions could help close loopholes, expand coverage to all aspects of environmental crime including forest and marine crime, and bring all states up to the same standard.¹⁰² For example, while most states have laws regulating trade in protected species, one state may criminalize mere possession of an illegally sourced wildlife product while another may criminalize only import or export.

The harmonization of definitions raises many political and technical challenges that could be addressed in different ways. One conceivable approach would be the discussion of common definitions as part of a new UNTOC protocol. Despite potential political reluctance to discuss a new binding instrument, this approach could be highly beneficial. Following the pattern of the other protocols, an environmental crime protocol would stipulate that offences meeting the standardized definition of environmental crime would be regarded as "offences established in accordance with the Convention."¹⁰³ This would bring them within the overall scope of UNTOC even if they do not carry a maximum penalty of four years imprisonment or more. A protocol would help encourage and harmonize criminalization of environmental crime. It would also establish the relationship between environmental crime and the UNTOC provisions on ancillary offences and participation in an organized criminal group. This could be crucial since organizers and

controllers of environmental crime are often not the direct perpetrators of primary offences, such as illegal fishing or smuggling of timber, but they are typically involved in ancillary offences, such as money laundering, corruption and obstruction to justice and they participate by inciting, organizing or facilitating the primary offences.¹⁰⁴

By defining the scope of activities considered criminal, an environmental crime protocol could encourage national enforcement to target organizers and controllers. There is indeed an inherent danger that must be dealt with sensitively: too broad national criminalization of illegal hunting, fishing or logging could disproportionately affect individual local actors and communities whose activities are best addressed through other mechanisms. On the demand side, extending criminalization beyond taking and trafficking in illegally sourced wildlife to include purchase and possession could result in the over-criminalization of activities of end users, such as musicians whose instruments contain small amounts of ivory,¹⁰⁵ or tourists who transport over 125 grams of caviar.¹⁰⁶ Defining criminal behaviours to target controllers and organizers while not disproportionately impacting low level and inadvertent buyers and poachers with few livelihood options is clearly possible in the context of an UNTOC protocol as the focus will be limited to offenses that are both organized and transnational. In that sense, discussing an UNTOC protocol would help focusing attention – both political attention and the criminal justice response– to target controllers and organizers. It would also mean that ancillary offences and participation could be criminalized even if national laws addressing environmental crime do not reach the UNTOC application threshold for “serious crime” (a maximum penalty of at least four years of imprisonment). Indeed this requirement does not apply to the crimes defined in the UNTOC protocols.

A crucial technical challenge for a protocol or another new global instrument would be to take into account international definitions already set by environmental and international trade treaties. Rather than defining purely new standards, the incorporation and references to these previous instruments would be necessary to articulate comprehensive criminal concepts (see section 3.3.).

In any case, harmonized definitions should take into account various factors, *inter alia*,

- 1) environmental impact, such as the vulnerability of the ecosystem or population, the level of extinction threat to the species involved;
- 2) social or financial impact, including public revenue lost because of the criminal activity and impacts on livelihoods and food security;
- 3) criminal intent or intent to profit;
- 4) breach of public trust, through corruption or involvement of political figures;
- 5) breach of phytosanitary or veterinary rules leading to a significant risk or actual harm to public health and the environment;
- 6) involvement of organized criminal groups.

By establishing standards of criminal intent, it is possible to choose to cover a more or less wide range of behaviours. It is noteworthy that the offences established by UNTOC and its existing three protocols stipulate that defined activities should be established as criminal offences only “when committed intentionally”.¹⁰⁷ The European Directive on the protection of the environment through criminal law sets a broader criterion for *mens rea* (criminal intent) since it requires criminalization of certain activities when “committed intentionally or with at least serious negligence.”¹⁰⁸ It may be useful to specify additional intent or knowledge requirements, such as intent to profit or real or constructed knowledge of the illegal source of wildlife or wildlife related products, in order to ensure appropriate targeting of the most serious situations. The discussion of a new global instrument could also give the opportunity to debate the complex issue of the criminal liability of corporations. On this point the UNTOC model is evasive since it establishes that “subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative”(article 10.2). However, an essential characteristic of transnational environmental crime is the involvement of transnational corporations, so effective long-term solutions require addressing the impunity they too often benefit from.¹⁰⁹

Another definitional challenge is the level of specificity or vagueness appropriate to delineate environmental offences. Transnational organized environmental crime is a complex and multifaceted field including a large number of existing and possible primary offences, some more controversial than others. For example, illegal logging could include logging of protected species, logging in protected areas, excessive logging, logging without a permit or with a fraudulent permit, obtaining logging permits illegally, non-payment of taxes or forest fees, or logging in a way that damages forest ecosystems. Any or all of these could be criminalized to varying extents.¹¹⁰ A potential risk is that a wide consensus would be agreed upon only on the basis of vague common definitions that may not be as effective as detailed and specific offences. One way to envision the discussion of a global instrument would be to foster agreement on a broad definition of the scope of transnational organized environmental crime and include a list of specific offences in a separate annex, developed and/or maintained by a designated institution. Establishing such a list of criminal offences through a separately negotiated annex could facilitate the detailed definition of offences while making it easier to negotiate the core wildlife crime definition in the body of the protocol. This technical solution might however be politically challenging since states would be reluctant to entrust the definition of criminal offences to a separate organ. This type of approach exists for environmental treaties but it is more difficult to put in place for matters of criminal law as this is considered a privileged field of expression of national sovereignty.

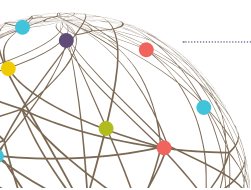
The issues discussed above exemplify some of the technical and political challenges to the development of internationally agreed definitions of environmental crime. The 1998 Council of Europe Convention on the Protection of the Environment through Criminal Law demonstrates some of the possibilities for overcoming these challenges. Though the Convention never entered into force, lessons could be drawn from it to discuss a basis for the formulation of harmonized definitions. The question of the harmonization of criminal penalties is also crucial to achieve a better global legal response against environmental crime.

Towards harmonized criminal penalties

Currently, penalties relating to environmental crimes vary widely between jurisdictions. In Europe, even with the strong level of integration of the European Union and the existence of common legal frameworks, the harmonization of national laws has been far from satisfying. As an illustration, it is noticeable that maximum penalties for CITES-related violations range from 10 years to 6 months.¹¹¹ Some European states have strong legislation fully implementing the EU Timber Regulation and the EU Illegal, Unreported and Unregulated Fishing regulation yet many do not.¹¹² Similar variations can be found among many wildlife exporting countries.¹¹³ Discrepancies can also exist at the subnational level, with laws and penalties varying by sub-national state or province.¹¹⁴ Figure 5, below, gives an illustration of national criminal penalties for wildlife crime. It shows a broad spectrum of penalties and it reveals that many countries do not reach the UNTOC application threshold (a maximum penalty of at least four years of imprisonment).

Figure 5: National penalties for illegal wildlife taking and trade ¹¹⁵

Country	Region	Legislation	Max sentence (years of imprisonment)	Max fine (USD, rounded)
Australia	Oceania	Environmental Protection and Biodiversity Conservation Act 1999	10	500,000
Austria	Europe	Species Trade Act 1998	2	2,400,000
Belgium	Europe	Law of 28 July 1981	5	400,000
Bulgaria	Europe	Biodiversity Act 2002	5	13,000
Cambodia	Asia	Law on Forestry 2002	10	910,000
Cameroon	Africa	Forestry, Wildlife and Fisheries Law 1994	3	20,000
Canada	North America	Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act 1992	5	140,000



China	Asia	Wildlife Protection Law 1988, Ch. IV; Criminal Law 1997	Life	Variable
Cyprus	Europe	Law on the Protection and Management of Nature and Wildlife (No. 153(I)/2003)	3	2,000
Czech Republic	Europe	Act No. 100/2004 Coll., on the Trade in Species; Act No. 40/2009 Coll., the Criminal Code (2009)	8	80,000
Denmark	Europe	Nature Protection Act 1997	1	Variable
DRC	Africa	Ordinance-Law 69-041 (1969); Order no. 056 (2000)	10	20
Estonia	Europe	Reg. of the Government 08.04.2005 No. 69; Nature Conservation Law; Penal Code (2004)	5	90,000
Finland	Europe	Nature Conservation Act 1096/1996	2	Variable
France	Europe	Environmental Code (Consolidated 2010), Art. L415-6	7	200,000
Germany	Europe	Federal Nature Conservation Act 2009	5	2,400,000
Greece	Europe	Law 4042/2012 (Directive 2008/99/EC)	10	700,000
Hungary	Europe	Government Decree No. 292/2008 (XII. 10.); Criminal Code	3	400
Ireland	Europe	Wildlife Act 1976 – 2012	2	130,000
Italy	Europe	Law 150/92	1	140,000
Kenya	Africa	Wildlife Conservation and Management Act 2013	Life	230,000
Latvia	Europe	Criminal Law 1998, amendment, Art. 115	2	40,000
Lithuania	Europe	Criminal Code (2000)	4	50,000
Luxemburg	Europe	Law of 21 April 1989, amending Law 19 Feb 1975; Law on Protection of Nature and Natural Resources 1982	0.5	30,000
Malaysia	Asia	International Trade in Species Act 2008; Wildlife Conservation Act 2010	10	300,000
Malta	Europe	Environment Protection Act 2001; Trade in Species of Fauna and Flora Regulations 2004	2	6,000
Nepal	Asia	National Parks and Wildlife Conservation Act 1973	15	1,000
Netherlands	Europe	Flora and Fauna Act 2002; Penal Code 1881 (amended 1994)	6	100,000
Philippines	Asia	Wildlife Resources Conservation and Protection Act 2001	12	22,000
Poland	Europe	Nature Conservation Act 2004	5	230,000
Portugal	Europe	Law Decree 211/2009, Art. 25; Penal Code Law	3	3,000
Romania	Europe	Governmental Ordinance No. 57/2007; Penal Code	3	5,000
Slovakia	Europe	Criminal Code No. 300/2005	8	440,000
Slovenia	Europe	Nature Conservation Act 2004; Criminal Code (2008)	3	30,000
South Africa	Africa	Natural Environmental Management Biodiversity Act 2004	10	930,000
Spain	Europe	Organic Law 6/2011	5	Unlimited
Sweden	Europe	Environmental Code 1998, Ch. 29; Act on Penalties in Connection with Smuggling 2000	6	Variable
Tanzania	Africa	Wildlife Conservation Act 2009, Part. XV	5 ¹¹⁶	Variable
Thailand	Asia	Wild Animal Preservation and Protection Act 1992	7	3,000
Uganda	Africa	Wildlife Act 1996, Ch. XII	7 ⁹⁵	4,000
UK	Europe	Control of Trade in Species (Enforcement) Regulations 1997	5	Unlimited
Vietnam	Asia	Penal Code (No. 15/1999/QH10); Decree 179/2013/ND-CP	7	47,000

In some cases, national penalties are simply too weak to be effective as penalties may be too low to deter organized criminals.¹¹⁷ The other extreme also exists, with a few countries applying very severe criminal penalties. In China, wildlife related crimes considered as “extraordinarily serious” can be punishable by life imprisonment or, until the



late 1990s, death.¹¹⁸ Both life imprisonment and a death sentence have been imposed in cases of illegal hunting of pandas.¹¹⁹ In several countries wildlife related criminal laws are also applied to punish members of local communities engaging in illegal activities for the purpose of subsistence or in response to animal-human conflict. These examples are problematic as they represent disproportionate uses of criminal sanctions. It is important to stress that arguing for a wider criminal law approach does not mean calling for extreme punishment. Criminal sanctions are more efficient when proportionate and tailored according to criteria of culpability, the seriousness of the harm done and taking into account the involvement in an organized criminal group. A comprehensive review on criminal penalties and sentencing practices would be needed to determine the existing range of penalties, potential factors to inform penalization, and discrepancies in their application.

Harmonized sentencing standards are complex to design and if an international instrument were to be discussed, this would be a key issue to address. Instead of a binding requirement, the structure of criminal penalties could be dealt with by international sentencing guidelines. They could contribute to minimizing forum shopping and eliminating havens where criminals can evade serious punishment. They could also help to ensure that national criminal laws appropriately target and penalize large organized operators with high environmental impact rather than small scale local individuals or communities. One way to proceed would be to incorporate aggravating factors that characterize more professional and organized commercial operations, or to stipulate higher penalties for ancillary and inchoate offences typical of organizers and controllers of transnational organized operations. Finally, sentencing guidelines could establish a recommended penalty of four years or more for crimes that should appropriately be established as “serious” under UNTOC.

The content of sentencing guidelines would need to be informed by a number of factors. These would include all factors discussed above in relation to harmonized criminal definitions, as well as aggravating factors that could help target more large scale and organized activities. Such aggravating factors could include, *inter alia*:¹²⁰

- 1) multiple repetitions of the offence;¹²¹
- 2) involvement of large quantities of wildlife products¹²² or polluting products;
- 3) significant profit;
- 4) involvement of organized groups
- 5) use of certain equipment such as firearms.

Aggravating factors could draw on or refer to standards set by relevant international organizations. For example, CITES defines a “large scale seizure” of elephant ivory as one of more than 500 kg.¹²³ Such a quantity strongly indicates involvement of an organized criminal group.¹²⁴ A sentencing guideline related to ivory smuggling could specifically refer to this standard in its list of aggravating factors, or stipulate that what constitutes a “large quantity” is to be determined with reference to the relevant international standards.

Both imprisonment and financial penalties should be considered in developing a set of sentencing guidelines. Financial penalties can be more effective in penalizing corporate entities, to the point of dismantling criminal structures by confiscating financial resources. Financial penalties can also serve the purposes of compensation and restitution. Recently, the directors of an international operation involved in illegally smuggling rock lobster from South Africa to the United States were ordered to pay restitution to South Africa of almost 30,000,000 USD, the calculated value of the rock lobster illegally removed from the country.¹²⁵ Such payments could be used for environmental restoration, improved preventive measures, or other pressing environmental or social needs.

A global criminal law approach would entail a wider criminalization and the harmonisation of national criminal laws. On these bases, international cooperation in the fight against transnational organized environmental crime would improve.

4.2 Cooperation and Assistance in Enforcement

Transnational organized environmental crime is extensive and sophisticated and unfortunately specialized environmental or international trade agencies do not have the necessary capacity to properly address the phenomenon. A multitude of inter-governmental agencies are involved in addressing environmental crime to a certain extent, including those specializing in forestry, fisheries, protected species, or customs. But international cooperation is still limited due to the insufficient application of a global criminal law perspective. On the basis of wide criminalization and harmonisation of national laws it would be possible to enhance existing measures of international enforcement cooperation including: global intelligence-sharing systems; mutual assistance in police investigations; cooperation in confiscations and seizures; technical assistance and capacity building; extradition agreements and better judicial cooperation.

Challenges of national inter-agency coordination and international cooperation

Currently, law enforcement agencies face coordination problems both internationally and domestically. At the national level there is clearly a need for strong inter-agency collaboration. For instance, a customs agency may be charged with detecting import of illicit wildlife products, but may lack the authority to confiscate evidence or detain suspects beyond a certain amount of time, requiring intervention of police authorities. In other cases, a customs or port unit may lack the technical expertise or mandate to distinguish specimens of particular species; expertise that may be found in a specialized environmental agency. Miscommunication and competition between agencies can constitute strong obstacles. Some countries have set up specialized environmental crime units to bring together the necessary inter-agency capacity. These include the UK National Wildlife Crime Unit, the New Zealand Wildlife Enforcement Group, and India's Wildlife Crime Bureau. INTERPOL's National Environmental Task Forces (NESTs) initiative has developed guidance on establishment of such multi-agency cooperative groups.¹²⁶ Regarding wildlife crime, national CITES Management authorities can be focal points for national coordination.¹²⁷ However, specialized inter-agency cooperation programs are not always well implemented or effective. Many national environmental crime inter-agency units are untested, or not active in practice. Those that are active typically have limited access to resources, and may leave out important agencies or involve so many agencies as to make it difficult to act swiftly and effectively.¹²⁸

National agencies charged with addressing environmental crime often lack sufficient resources and capacity, as well as the will and awareness to prioritize environmental crime. Customs officers, rangers and police may lack the technical capacity to identify protected species, such as DNA profiling, or to collect and interpret the necessary evidence for arrest and conviction.¹²⁹ Also they may not be familiar with relevant environmental laws and standards.¹³⁰ Enforcement in the marine sector raises particular capacity issues, because of the difficulty of effectively patrolling large marine areas and the need for expensive vessels and equipment.¹³¹ Environmental crime is often not a priority for law enforcement or for prosecutors and judges. Prosecutors may lack necessary experience in this area, particularly in using ancillary legislation to try environmental crimes.¹³² This may add to their reluctance to pursue environmental crime related cases, particularly given typically limited prosecutorial resources.

International law enforcement cooperation is especially needed to address transnational movement of illicit natural or polluting products. International law enforcement cooperation includes intelligence sharing, mutual assistance in collecting evidence, cooperation in arrests, extradition and seizure of stolen assets, and sharing organizational resources. For example, to track a shipment of illegally sourced timber, an importing country's enforcement agencies need to know about the exporting country's exports, and also specific individuals, organizations and vessels suspected of participating in this sort of trade.¹³³ Such international enforcement cooperation is traditionally done through *ad hoc* diplomatic channels, or through individually negotiated agreements on mutual legal assistance, but these mechanisms can be too slow or unwieldy to usefully address environmental crime as and when it is happening.¹³⁴ Regional enforcement networks could provide more efficient mechanisms to coordinate regional responses.¹³⁵ However, these networks are often neither effective nor active and require a significant investment of resources.¹³⁶

Potential benefits of a new framework in improving international cooperation

UNTOC could be used as a model for better international cooperation in enforcement regarding transnational organized environmental crime. That is to say, as an inspiration for an original global instrument dedicated to transnational organized environmental crime or in an UNTOC protocol on environmental crime. Indeed, UNTOC provisions deal with: mutual legal assistance; promote taking and sharing of evidence, information and relevant documents and records; and tracing proceeds or instrumentalities of crime (art. 18.3). The same article provides that the competent authorities of a state party may transmit information on criminal matters directly to an authority in another state party without prior request, provided that this is in accordance with domestic law (art. 18.4). It provides further detailed procedures for mutual legal assistance, in the absence of an applicable equivalent treaty (art. 18.7-18.29). Article 27 goes even further and requires parties to adopt effective measures to establish or strengthen channels of communication and coordination between competent authorities or agencies, and to exchange specific information on criminal groups, and proceeds and instrumentalities of crime (art. 27.1).

UNTOC also includes specific provisions on extradition. Article 16 requires states to recognize as extraditable offences all offences covered by the Convention, as well as offences established by the Convention that involve an organized criminal group but are not transnational in nature, as long as the offence is punishable under the law of both the requesting state and the requested state (art. 16.1). Where states only extradite on the basis of a treaty, the Convention itself acts as an extradition treaty with respect to the covered offences (art. 16.4).

Extradition can play an important role in addressing transnational organized environmental crime, particularly in prosecuting organizers and controllers who may not themselves carry out smuggling activities that take them across borders. In 2014, Kenya arrested and extradited to China a Chinese citizen suspected of organizing a large scale international ivory smuggling operation. Chinese authorities tracked the suspected organizer to Kenya through a member of his smuggling ring, who was arrested trying to smuggle 1,200 ivory beads into China in 2013.¹³⁷ The suspected organizer himself may never have travelled to China, and in the absence of extradition, would have evaded Chinese enforcement. In this case, extradition was possible because of the relationship between the countries and the facts of the case; in other situations extradition may be impeded by lack of an applicable extradition arrangement or inconsistencies in the laws of the countries involved.

With regards to confiscation and seizure, UNTOC provides that Parties adopt “such measures as may be necessary” to enable confiscation (art. 12.1). At the request of a Party with jurisdiction over an offence, Parties must take measures to “identify, trace and freeze or seize” proceeds, property equipment or instrumentalities related to offences covered by the Convention (art. 13.2). These provisions could be useful to inspire better cooperation. Measures on criminal confiscations and seizures would have to address specific issues of environmental crime such as the treatment of live animals. This could be done by including references to other relevant global instruments such as CITES which contains provisions on confiscation.¹³⁸

International enforcement mechanisms

In addition to law enforcement cooperation, specific international mechanisms could be developed to facilitate and coordinate enforcement of environmental crime law. Such enforcement mechanisms could take many forms. They could involve existing institutions, or create new institutions. In all cases, they should draw on and support existing networks and channels of communication.

International mechanisms for sharing information on specific crimes, illicit products, vessels, individuals, and organized groups to facilitate enforcement and prosecution could operate through national focal points or designated agencies for communication. They could include mechanisms for coordinating financial institutions to monitor money laundering and facilitate asset confiscation and recovery. They could include mechanisms for collecting data and statistics on enforcement rates, to inform the focus of future efforts. They could incorporate means to take into account third party evidence in identifying, investigating and prosecuting those involved in transnational organized environmental crime.

Certain channels of communication already exist for sharing information on environmental processes and impacts; practices and lessons for environmental management; enforcement of environmental crime laws. However, these channels may not be yet sufficiently developed to constitute the needed global response. INTERPOL's Working Groups on Wildlife and Fisheries Crime support the creation of channels of communication between member countries, and could provide a home for an expanded database of information on transnational organized environmental crime. The role of the International Consortium on Combating Wildlife Crime (ICWC) could also be enhanced. This initiative was launched in 2010 as a collaborative effort of five inter-governmental organizations: CITES, INTERPOL, UNODC, the World Bank and the World Customs Organization (WCO). Its purpose is to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks. Other existing international institutions and networks could provide interesting models such as the Environmental Network for Optimizing Regulatory Compliance on Illegal Traffic (ENFORCE) which was established in 2011 by the eleventh meeting of the Conference of the Parties to the Basel Convention.¹³⁹ In addition, the role of regional agencies is essential. For instance EUROPOL, whose mandate includes the fight against different forms of environmental crime,¹⁴⁰ created EnviCrimeNet in 2011. It is an informal network of practitioners sharing information, best practices and methods and covering wildlife crime as well as pollution crime.¹⁴¹ Likewise, INTERPOL is currently in the process of developing Regional Environmental Security Task Forces "to consider the complexity and diversity of environmental crime and encompass disciplines such as wildlife, pollution, fisheries, forestry, natural resources and climate change."¹⁴² The expertise of sector-specific regional mechanisms such as the Regional fisheries management organizations (RFMO) should also be taken into account. Lessons should be drawn from these different initiatives in order to go further in fostering international cooperation with a focus on law enforcement and the environment.

Technical assistance to build enforcement capacity

One of the most difficult problems associated with transnational organized environmental crime is the lack of capacity among enforcement officials to deal with often extremely technical problems. Technical assistance in building enforcement capacity is essential, especially in order to strengthen the capacity of developing countries through financial and material assistance. Specialized training needs to be provided and states with relevant expertise should be encouraged to provide technical assistance and equipment to other states. International organizations and civil society could be involved in supporting such training. Mobilizing financial flows to support capacity building and technical assistance for developing countries is also an important step in improving international cooperation.

4.3 Expansion of jurisdiction

Cooperation in enforcement and harmonization of national laws do not solve all problems related to environmental crime enforcement. Corruption or lack of capacity may impede prosecution in a country where a primary offence occurs, or operators may be able to escape enforcement by moving themselves or illicit products out of effective reach of national law enforcement forces. In these cases, extraterritorial mechanisms may allow enforcement of criminal laws related to environmental crime by countries other than the country in which the primary offence occurs. Such measures involve establishment of jurisdiction beyond national borders, which raises questions of sovereignty. Nevertheless, states could be encouraged to establish extra-territorial jurisdiction in certain circumstances.

Persistent jurisdictional issues

Many countries in which environmental crime takes place are unable or unwilling to prosecute. In some cases this is a problem of capacity, which technical assistance and capacity building, discussed above, could help solve. In others, it is a more intractable problem of lack of political will and sufficient governance. Enforcement assistance will not necessarily help in cases where corrupt officials are impeding investigations or selling permits and land rights to, at least superficially, legalize some parts of otherwise illegal operations. In the latter case, these inappropriately

obtained permits may ultimately be considered invalid, but only if a strong and unbiased court system is able to make that determination. In cases of endemic corruption, strong anti-corruption laws are fundamental to achieve long-term results. In the immediate term, these provisions may not help if they depend on implementation by a national court, which itself may suffer from corruption.

Even in the best jurisdictions, not all illegal environmental activity will be detected before the point of export. Once beyond the range of the source country's enforcement, the operator may effectively be free to illegally trade wildlife products and polluting substances with impunity. For example, in 2002-2003, China's records show import of almost ten times the volume of timber products from Tanzania than appear on Tanzania's own export records. Apparently over 40,000 cubic meters of logs illicitly exported from Tanzania were legally imported into China, representing lost revenue to Tanzania of over 58 million USD.¹⁴³ Similarly in 2013, 235,500 cubic meters of logs legally imported into China from Mozambique were unlicensed on export.¹⁴⁴

In other cases, environmental crime may take place in areas beyond national jurisdiction, such as illegal fishing on the high seas. Regional fisheries management organizations can provide some standards for regulation in these cases, but lack direct enforcement power.¹⁴⁵ Moreover, their coverage of the high seas is not comprehensive. This means that sole reliance on enforcement at the point of capture is ineffective and inappropriate.

The benefits of extra-territorial jurisdiction

Expanding jurisdiction of capable countries can contribute to addressing each of the problems discussed above. Where countries are unable to effectively exercise jurisdiction to control environmental crime within their borders, extra-territorial jurisdiction can allow more capable countries to directly take on some of the enforcement burden. This can create space for improvement of national governance quality and enforcement capacity in the long term, while providing a degree of international oversight to drive and facilitate such improvement. In all cases, extraterritorial jurisdiction can create an additional point of enforcement, improving the likelihood of detection and prosecution of illegal activity. Where environmental crime occurs in areas beyond national jurisdiction, extra-territorial jurisdiction can be the only way to enable enforcement, in the absence of competent international bodies.¹⁴⁶

A state uses territorial jurisdiction when it prosecutes a criminal offence that was committed entirely or in part within its territory. Extra-territorial jurisdiction refers to a state's ability to make and enforce criminal laws beyond its borders. Under international law, a state can typically only exercise jurisdiction when it can establish some link to the criminal offence, or jurisdictional hook. A jurisdictional hook exists where:

- 1) the offence was committed by nationals of the state;
- 2) the offence was committed against nationals of the state;
- 3) the offence was committed on board a vessel that is flying the flag of that state or an aircraft that is registered under the laws of that state; or
- 4) the offence impacted or threatened the state's territory, population or interests.

The exception to the requirement for a jurisdictional hook is universal jurisdiction, reserved for international crimes that shock the global conscience. The only traditionally and widely accepted international crime subject to universal jurisdiction is piracy whilst genocide, war crimes and torture have also been proposed and accepted in some jurisdictions. Achieving widespread recognition of new international crimes subject to universal jurisdiction would be exceedingly difficult, if not impossible.¹⁴⁷

Current examples of extra-territorial jurisdiction can be found regarding illegal fishing. Several states have established criminal offences for fishing on the high seas or in other countries' jurisdictions in violation of international standards or laws of relevant coastal states.¹⁴⁸ These include Norway, New Zealand, Australia and South Africa.¹⁴⁹ In 2008 the European Union adopted a regulation on IUU fishing that covers all fishing conducted by operators of EU nationality, as well as vessels flying flags of EU Member states. The regulation also establishes sanctions for fishing in national

and international waters in a manner inconsistent with RFMO rules and/or “state responsibilities for the conservation of fisheries resources under international law.”¹⁵⁰

In a notable case, Arnold Bengis, director of Hout Bay Fishing Industries in South Africa, was prosecuted by the United States under the Lacey Act for catching and smuggling rock lobster in violation of the South African Marine Living Resources Act of 1998 and the Convention on the Conservation of Antarctic Marine Living Resources. According to the US Court of Appeals, “Although South African authorities obtained arrest warrants for defendants, after concluding that defendants financial resources and presence outside of South Africa rendered them ‘beyond the reach of South African authorities,’ South Africa declined to charge, much less prosecute them.”¹⁵¹ Instead, the US convicted Bengis and one of his associates, and sentenced them to imprisonment, forfeiture of \$13,300,000 USD to the United States, and payment of almost \$30,000,000 USD in restitution to South Africa.¹⁵² This case illustrates the power of extraterritorial jurisdiction to allow one country to take judicial action, when the country where the crime was committed is unwilling or unable to do so.

The Lacey Act has been recommended as a model by the OECD High Seas Task Force, and similar provisions have been used in fisheries legislation in Papua New Guinea, Nauru and the Solomon Islands.¹⁵³ Similar provisions are also included in legislation adopted in Canada and Australia. Notably, the Canadian and Australian laws as well as the Lacey Act itself establish import of wildlife products in contravention of the laws of the source country as a crime carrying a maximum penalty of more than 4 years of imprisonment. They therefore qualify as serious crimes for the purposes of UNTOC, and trigger its provisions on extradition, law enforcement cooperation, and confiscation and seizure, where they are transnational in nature and involve an organized criminal group.

Strengthening these forms of extra-territorial jurisdiction and expanding their use could be a powerful mechanism for addressing transnational organized environmental crime despite lack of capacity among several countries. Another interesting mechanism to develop would be the principle *aut dedere aut judicare*. It means that if a state refuses to extradite an alleged offender who is present in its territory, the state must establish jurisdiction and prosecute that person. The state can either extradite or prosecute. In this line, the Council of Europe Environmental Crime Convention (not in force) provides that “Each Party shall adopt such appropriate measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with this Convention, in cases where an alleged offender is present in its territory and it does not extradite him to another Party after a request for extradition.”¹⁵⁴

In addition to sovereignty concerns, extra-territorial jurisdiction raises various questions of jurisdictional overlap and equity that would have to be addressed carefully. Transnational organized environmental crime typically occurs in and involves actors from multiple countries. For example, in the case of illegal logging, the origin country, the country of incorporation of the logging company, the countries passed through for the purposes of timber laundering, transit hubs, the country of processing and the country of final consumption could all have bases to assert jurisdiction. In these cases, offenders could forum shop to try to find the most lenient, or least capable, jurisdiction for prosecution. Extra-territorial jurisdiction also raises causation and evidentiary problems, particularly where the place where the underlying crime was committed is far from the jurisdiction where it is prosecuted. Mutual legal assistance is crucial to solve those cases. Overlapping extra-territorial jurisdiction could also create political issues, for example where the citizen of one country is tried in another under procedural or substantive laws that the home country finds inappropriate.

Despite these concerns, promotion of legal mechanisms that take advantage of extra-territorial jurisdiction could greatly contribute to addressing environmental crime as a form of transnational organized crime.

5. Conclusion and Recommendations

This paper reveals that the phenomenon of transnational organized environmental crime is currently addressed through highly fragmented legal frameworks and laws. In particular, the diversity of legal perspectives is often overlooked even though it constitutes the main obstacle on the path toward a more comprehensive legal response to environmental crime. A better understanding of the complex legal landscape, its structure, trends and deficiencies, is the necessary basis from which to start a global conversation on renewing legal frameworks. The analysis shows a need for a global criminal law approach since legal frameworks applying the environmental law and trade law perspectives are insufficient to combat transnational organized environmental crime.

The analysis of the potential benefits of a global criminal law approach leads us to several specific recommendations. The primary recommendation is for a cross-sectoral dialogue process to explore, through an open and non-prescriptive approach, possible types of and approaches concerning a global legal response to environmental crime. Such a dialogue process is not contingent upon further research – there is sufficient and abundant information to inform the debate. However, there are research areas which could support the debate as it moves forward. The secondary recommendations of this report focus on those areas of research.

Dialogue process

1. Initiate a participatory process with governments, international organizations and stakeholders to consider the possibility of a new global legal framework. Starting an informal international conversation would place transnational organized environmental crime on the international agenda and help shape discussion on issues related to environmental crime. Specific definitions, mechanisms and other components would benefit from informed discussion drawing upon now-established legal tools such as the EU Crime Directive and existing UNTOC Protocols. The process should involve engagement with experts in law, enforcement, conservation, and other relevant fields, to develop and refine ideas on specific tools that could be established. Consideration of such tools would contribute to an informed determination regarding whether the discussion of a new global instrument should be pursued.

Supportive research areas

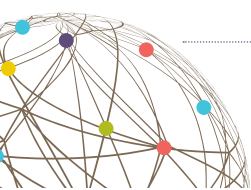
2. Conduct a comprehensive survey of national laws to precisely evaluate what types or national legal responses have been put into place. This mapping should include a survey of national criminal laws related to environmental crime and associated penalties. It would allow understanding if and when specific types of environmental crime are more criminalized than others. The worldwide comparison of criminal penalties would show where the UNTOC application threshold is already met (maximum penalty of four years or imprisonment or more). To be put into perspective, penalties for environmental crime should be compared with penalties for other behaviours (such as murder and theft), this will give an indication of the level of seriousness associated to environmental crime in the context of each national scale of penalties. It would also identify if specific proceedings are established to deal with environmental crime and where specific law enforcement agencies exist (dedicated police units, prosecutors and judges). The survey could also reveal if the transnational nature of environmental crime is taken into account and if the involvement of an organized criminal group is dealt with specifically through establishment of aggravating circumstances and/or through specific proceedings. The survey should also delineate which countries do not address environmental crime through criminal law and what are the legal responses in place. This would help understand why there is not yet a wider criminalization of environmental crime (for instance by showing if the alternative approaches are chosen because they are deemed to be locally successful or if the lack of criminalization is rather the result of collusion between political leaders and economic interests involved in environmentally harmful activities, or whether there is a lack of criminalization due to lack of understanding / capacity).

3. Gather information and data on national criminal policies and case law, including information on rates of prosecution of environment related offences and if specific law enforcement mechanisms are being used in cases involving the environment. Beyond understanding law on the books, it is important to understand how law is being used. Statistics on prosecutions can shine light on gaps in law application. Information on cases and convictions can demonstrate what laws are most effective in securing convictions which can indicate what laws prosecutors and judges are most comfortable with as well as what laws could form models for international criminal standards. Information on cases can also show what profiles of defendants are being prosecuted and convicted, and whether laws are appropriately targeting organizers and controllers as opposed to low level criminals. This in turn can inform design of mechanisms to encourage more appropriate and effective targeting.

4. Investigate specific law enforcement needs in relation to transnational organized environmental crime through engagement with enforcement units throughout the world. To improve law enforcement it is necessary to fully understand the challenges and issues faced by law enforcement practitioners. This must go beyond basic information on law enforcement problems to include comprehensive information on specific challenges in coordinating law enforcement operations across national borders. Gathering such information will require engagement with law enforcement professionals and practitioners in multiple countries and international organizations.

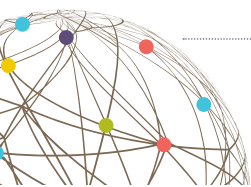
Endnotes

- ¹ Doctoral candidate at the Sorbonne Law School and visiting academic at the Centre of Criminology, University of Cape Town.
- ² This list is not exhaustive, many other environmentally harmful activities could be included as long as they share the same transnational and organized nature (illegal extraction and trafficking in minerals and precious metals, trafficking in counterfeit pesticides, etc). For the purpose of this paper it was decided to focus on the five types of activities that are considered the most emblematic forms of transnational organized environmental crime following the analysis of the Global Initiative's 2014 Baseline Assessment: The Global Response to Transnational Organized Environmental Crime (2014).
- ³ United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in the Fishing Industry* (2011).
- ⁴ Global Initiative Against Transnational Organized Crime, *The Global Response to Transnational Organized Environmental Crime* (2014); C. Nellemann, R. Henriksen, P. Raxter, N. Ash, and E. Mrema (Eds.), *The Environmental Crime Crisis – Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources*, A UNEP Rapid Response Assessment (UNEP and GRID-Arendal 2014); UNODC, *supra* note 3.
- ⁵ Nellemann, et al., *supra* note 4.
- ⁶ J.M. Sellar, *Policing the Trafficking of Wildlife: Is there anything to learn from law enforcement responses to drug and firearms trafficking?* (Global Initiative 2014).
- ⁷ Nellemann, et al., *supra* note 4.
- ⁸ S. F. Pires and W. D. Moreto, "Preventing Wildlife Crimes: Solutions that can Overcome the 'Tragedy of the Commons'", 17(2) *European Journal of Criminal Policy Research* 101-123 (2011); OECD, *Why Fish Piracy Persists: The Economics of Illegal, Unreported and Unregulated Fishing* (OECD Publishing 2005).
- ⁹ Regarding endangered migratory species, CMS requires States parties to "prohibit the taking of animals belonging to such species" (article III.5) and CMS encourages the negotiation of more specific multilateral agreements that can, inter alia, set "procedures for co-ordinating action to suppress illegal taking" (article V.5.k).
- ¹⁰ While CITES, article VIII.1 requires parties to penalise illegal trade in specimens of protected species, it does not require that this penalty be criminal.
- ¹¹ ITTA does not require states to establish a prohibition but is worth noting that one of ITTA's objectives is: "Strengthening the capacity of members to improve forest law enforcement and governance, and address illegal logging and related trade in tropical timber" (article1).
- ¹² Basel Convention, article 4.3: "The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal."
- ¹³ The Montreal Protocol bans international trade in ozone-depleting substances (articles 4 and 4A).
- ¹⁴ UNAC does not specifically refer to environmental crime, but it criminalizes associated offenses such as money laundering, corruption, etc.
- ¹⁵ UNTOC does not specifically refer to environmental crime, but it is applicable to certain forms of transnational organized environmental crime (when national laws criminalize the behaviours and establish a maximum penalty of 4 years or imprisonment or more).
- ¹⁶ See, e.g., *TRAFFIC, Captive Bred, or Wild Taken?* (TRAFFIC 2012).
- ¹⁷ UNODC, *supra* note 3; UNEP, CITES, IUCN, *TRAFFIC, Elephants in the Dust – The African Elephant Crisis, A Rapid Response Assessment*, (UNEP, GRID-Arendal 2013).
- ¹⁸ The list is not exhaustive, see *supra* note 1 for the choice to describe only a few examples of transnational organized environmental crime.
- ¹⁹ Box 4 is an extract of: *Global Initiative Against Transnational Organized Crime, The Global Response to Transnational Organized Environmental Crime* (2014).
- ²⁰ Box 5 is an extract of: *Global Initiative Against Transnational Organized Crime, The Global Response to Transnational Organized Environmental Crime* (2014).
- ²¹ Glen Wright, "Conceptualising and combating transnational environmental crime", in: Rob White (ed.) *Transnational Environmental Crime*, (Ashgate, 2013) at 336.
- ²² The Vienna Convention for the Protection of the Ozone Layer was adopted on 22 March 1985 and entered into force on 22 September 1988. It has 197 Parties which includes 196 states and the European Union.
- ²³ The Montreal Protocol on Substances that Deplete the Ozone Layer was adopted on 16 September 1987 and entered into force on 1 January 1989. It has 197 Parties.
- ²⁴ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on 22 March 1989 and entered into force on 5 May 1992. The Convention currently has 181 Parties.
- ²⁵ Basel Convention, Article 4.3: "The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal."
- ²⁶ Convention on the Protection of the Environment through Criminal Law, CETS No.: 172 (Strasbourg, 4 November 1998).
- ²⁷ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.
- ²⁸ Glen Wright, "Conceptualising and combating transnational environmental crime", in: Rob White (ed.) *Transnational Environmental Crime*, (Ashgate, 2013) at 337.
- ²⁹ The Montreal Protocol on Substances that Deplete the Ozone Layer was adopted on 16 September 1987 and entered into force on 1 January 1989. It has 197 Parties.
- ³⁰ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on 22 March 1989 and entered into force on 5 May 1992. The Convention currently has 181 Parties.



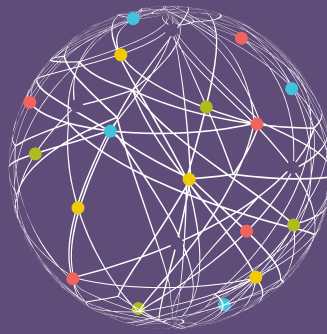
- ³¹ The Rotterdam Convention was adopted on 10 September 1998 and entered into force on 24 February 2004. It has 154 States parties.
- ³² The Stockholm Convention was adopted on 22 May 2001. The Convention entered into force on 17 May 2004. It currently has 152 States parties.
- ³³ CMS was adopted in 1979 and entered into force in 1983. It currently has 120 States parties.
- ³⁴ Article III: "1. The Parties shall take measures to conserve all populations of gorilla. 2. To this end, the Parties shall: [...] (d) coordinate their efforts to eradicate activities related to poaching, and to take concerted, energetic measures to control and monitor them, particularly in transboundary habitats in the States concerned by the present Agreement."
- ³⁵ ICRW was signed on 2 December 1946 and entered into force in 1948. It currently has 89 States parties.
- ³⁶ CITES was adopted on 3 March 1973 and entered into force on 1st July 1975. It currently has 180 States parties. It is worth noting that States parties can enter reservations with regard to any species listed in the three appendices, this mechanism allow them to effectively opt-out or act as non-parties regarding these species. For references to arguments in favor and against this mechanism, see UNODC, *Wildlife and Forest Crime Analytic Toolkit* (2012), at 16.
- ³⁷ ITTA was signed on 1st February 2006 and entered into force on 7 December 2011 replacing the former ITTA adopted in 1994. It currently has 69 States parties.
- ³⁸ Non-legally binding instrument on all forms of forests, A/RES/62/98, adopted by UNFF 28 April 2007, adopted by UN General Assembly 17 December 2007.
- ³⁹ UNCLOS was adopted on 10 December 1982 after nine years of negotiations and previous failed attempts carried out since 1958. UNCLOS entered into force in 1984 and it currently has 166 Member States.
- ⁴⁰ UNCLOS, Part XII: "Protection and preservation of the marine environment".
- ⁴¹ UNCLOS, article 61 and following.
- ⁴² UNCLOS, Part VII, Section 2: « Conservation and management of the living resources of the high seas »
- ⁴³ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement), 2167 UNTS 3 (New York, 4 August 1995). This agreement entered into force on 11 December 2001 and it currently has 82 States parties.
- ⁴⁴ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (FAO Compliance Agreement), FAO Res. 15/93, (24 Nov. 1993).
- ⁴⁵ Convention on the Conservation of European Wildlife and Natural Habitats, CETS No.: 104 (Bern, 19 September 1979). The Convention entered into force on 1st June 1982, it currently has 51 parties (including five states non-member of the Council of Europe: Belarus, Burkina Faso, Morocco, Senegal and Tunisia).
- ⁴⁶ TFEU, articles 191-193.
- ⁴⁷ For instance, the 9th East Asia Summit Declaration on Combatting Wildlife Trafficking did "request the ASEAN Ministers' Meeting on Transnational Crime (AMMTC) to consider recognizing environmental crime as a serious transnational crime and include it as an area of cooperation in the ASEAN Plan of Action to Combat Transnational Crime", 13 November 2014.
- ⁴⁸ ASEAN Socio-Cultural Community (ASCC) Blueprint, D1.1.(i)
- ⁴⁹ ASEAN Socio-Cultural Community (ASCC) Blueprint, D2.2.(iii)
- ⁵⁰ For more information: www.asean-wen.org
- ⁵¹ For more information: www.asianjudges.org
- ⁵² African Convention on the Conservation of Nature and Natural Resources (Algiers, 15 September 1968). The Convention entered into force on 16 June 1969, it has 31 Parties.
- ⁵³ The Bamako Convention was adopted on 30 January 1991 and came into force in 1998. It has 25 States parties.
- ⁵⁴ Bamako Convention, article 4.1: "Hazardous Waste Import Ban: All Parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties. Such import shall be deemed illegal and a criminal act".
- ⁵⁵ Protocol on Wildlife Conservation and Law Enforcement, article 6.2.c).
- ⁵⁶ Stockholm Declaration, Principle 4: "Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development".
- ⁵⁷ CMS, article II: "Fundamental principles".
- ⁵⁸ CMS, article V: "Guidelines for agreements".
- ⁵⁹ Convention on Biological Diversity, article 2.
- ⁶⁰ Ramsar Convention, article 2.
- ⁶¹ Ramsar Convention, article 5: "The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna."
- ⁶² Convention on Biological Diversity, article 2.

- ⁶³ Regarding this matter, the Stockholm Declaration is often referred to. Its Principle 21 states that: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."
- ⁶⁴ ITTA, article 1.
- ⁶⁵ Basel Convention, article 4.9: "Parties shall take the appropriate measures to ensure that the transboundary movement of hazardous wastes and other wastes only be allowed if: (a) The State of export does not have the technical capacity and the necessary facilities, capacity or suitable disposal sites in order to dispose of the wastes in question in an environmentally sound and efficient manner; or (b) The wastes in question are required as a raw material for recycling or recovery industries in the State of import; or (c) The transboundary movement in question is in accordance with other criteria to be decided by the Parties, provided those criteria do not differ from the objectives of this Convention."
- ⁶⁶ Montreal Protocol, articles 4 ("Control of Trade with non-Parties") and article 4A ("Control of Trade with Parties").
- ⁶⁷ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement), 2167 UNTS 3 (New York, 4 August 1995), article 8.
- ⁶⁸ CITES, article IV.2 and IV.4.
- ⁶⁹ Basel Convention, articles 6 and 7.
- ⁷⁰ CITES, article VIII.1
- ⁷¹ For more information: www.greencustoms.org
- ⁷² For a reflection on the legal concepts that could guide the choice between the criminal law approach and other legal responses in addressing the different forms of environmental crime: Mireille Delmas-Marty, "Perspectives ouvertes par le droit de l'environnement", *Revue juridique de l'environnement* (Vol. 39, N° HS 2014) 7-13.
- ⁷³ Basel Convention, article 4.3.
- ⁷⁴ Basel Convention, article 9.5.
- ⁷⁵ Convention on the Protection of the Environment through Criminal Law, CETS No.: 172 (Strasbourg, 4 November 1998).
- ⁷⁶ This treaty received only 14 signatures (out of the 47 states parties to the Council of Europe) and the condition for its entry into force was the ratification by a minimum of three states but Estonia is the only state that has ratified it.
- ⁷⁷ COE Convention, article 6.
- ⁷⁸ In short, competing proposals were presented by the Council of the EU on the one side (a Framework Decision based on the articles on cooperation in criminal matters of the EU Treaty) and by the European Commission on the other side (a proposal for a Directive based on the competence to take measures regarding environmental policies). The European Parliament got involved and the institutional dispute was finally taken before the European Court of justice, which decided to annul the Framework Decision. For more details: http://ec.europa.eu/environment/legal/crime/docs_en.htm
- ⁷⁹ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.
- ⁸⁰ A Directive is a legislative act that sets out a goal that all EU countries must achieve without dictating the means of achieving that result, it leaves important leeway to Member States. It can be distinguished from regulations which are self-executing and do not require any implementing measures.
- ⁸¹ United Nations Convention Against Corruption, A/RES/58/4 (31 Oct. 2003). UNCAC entered into force on 14 December 2005 and it currently has 173 Parties.
- ⁸² United Convention against Transnational Organized Crime, A/RES/55/25 (15 November 2000), Annex I. UNTOC entered into force on 29 September 2003 and it currently has 185 Parties.
- ⁸³ A/RES/55/25 (15 November 2000), emphasis added.
- ⁸⁴ UNTOC, article 3.
- ⁸⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, A/RES/55/25 (15 November 2000), Annex II.
- ⁸⁶ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, A/RES/55/25 (15 November 2000), Annex III.
- ⁸⁷ Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, A/RES/55/255 (31 May 2001), Annex.
- ⁸⁸ Crime prevention and criminal justice responses to illicit trafficking in protected species of wild fauna and flora, E/Res/2013/40 (25 July. 2013).
- ⁸⁹ Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity, A/RES/68/193 (18 December 2013).
- ⁹⁰ Strengthening a targeted crime prevention and criminal justice response to combat illicit trafficking in forest products, including timber, CCPCJ Resolution 23/1 (12-16 May 2014).
- ⁹¹ Illegal Trade in Wildlife, UNEP/EA. 1/3 (27 June 2014).



- ⁹² Fighting wildlife crime and offences within and beyond borders, UNEP/CMS/Resolution 11.31, (9 November 2014).
- ⁹³ Strengthening the United Nations crime prevention and criminal justice programme, in particular its technical cooperation capacity, A/RES/69/197, (18 December 2014).
- ⁹⁴ For recent declarations calling for the criminal law approach see for instance : the East Asia Summit Declaration on combating wildlife trafficking, (Nay Pyi Taw, Myanmar, 13 November 2014), the Declaration of the London Conference on the Illegal Wildlife Trade (12-13 February 2014), the Urgent Measures adopted by the African Elephant Summit (Gaborone, Botswana 3 December 2013).
- ⁹⁵ For instances of declarations mentioning the possibility of a new Protocol with a more or less wide scope see: Statement of the UN Deputy Secretary General in New York, 26 September 2014 at Event on Poaching and Illicit Wildlife Trafficking (available at: www.un.org/sg/dsg/statements/index.asp?nid=565, viewed 24 March 2015; Communication from the Commission to the Council and the European Parliament on the EU Approach Against Wildlife Trafficking (COM/2014/64 FINAL, Brussels, 7 February 2014); Global Initiative, The Global Response, supra note 2; G. Rose and M. Tsamenyi, Universalizing Jurisdiction over Marine Living Resources Crimes (WWF 2013).
- ⁹⁶ See, OECD, Evading the Net: Tax Crime in the Fisheries Sector, 2013.
- ⁹⁷ For an insightful study of the links between corruption and environmental crime in the context of South African fisheries: Aksel Sundström, "Covenants with broken swords: Corruption and law enforcement in governance of the commons", Global Environmental Change 31 (2015) 253–262.
- ⁹⁸ The Prince's Charities' International Sustainability Unit, Experts Group on Wildlife Crime and Money Laundering, How Governments, Financial Institutions and Others Can Contribute to a More Effective Response to Wildlife Crimes And Related Financial Flows (12 March 2015).
- ⁹⁹ G. Wright, "Conceptualising and combating transnational environmental crime", *Trends in Organised Crime*, 14 (2011) 332–346.
- ¹⁰⁰ TRAFFIC, Wildlife Trade in the European Union, Briefing Paper (2014).
- ¹⁰¹ DLA Piper, Empty Threat: Does the Law Combat Illegal Wildlife Trade: A Ten-Country Review of Legislative and Judicial Approaches, Report Commissioned by Royal Foundation on behalf of United for Wildlife Partnership (2014).
- ¹⁰² See, e.g., Rose and Tsamenyi, supra note 95, arguing that universal criminalization of marine living resource crimes is necessary to close loopholes and enable effective global enforcement.
- ¹⁰³ E.g., Human Trafficking Protocol, art. 1.3.
- ¹⁰⁴ Global Initiative, supra note 2.
- ¹⁰⁵ The 2013 CITES Conference of the Parties tried to address this issue by recommending Parties to issue musical instrument certificates (Resolution Conf. 16.8 "Frequent cross-border non-commercial movements of musical instruments"). Recently an order by the US Fish and Wildlife Service in February 2014 banned transport of any product containing ivory which was purchased by its current owner after 1976, including musical instruments containing small amounts of ivory, such as violin bows. In response to appeals from, inter alia, musicians groups claiming that the ban would prevent musicians from travelling internationally with their instruments for performances and auditions, the US FWS revised the law to allow transport of ivory products purchased prior to February 25, 2014. This still greatly limits international trade in antique musical instruments. US Fish and Wildlife Service, Ivory Ban Questions and Answers, www.fws.gov/international/travel-and-trade/ivory-ban-questions-and-answers.html (accessed 24 March 2015); League of American Orchestras, Ivory Ban Impact on Orchestras, americanorchestras.org/advocacy-government/travel-with-instruments/endangered-species-material/ivory-ban-impact-on-orchestras.html (accessed 24 March 2015).
- ¹⁰⁶ Sellar, supra note 6.
- ¹⁰⁷ E.g. UNTOC arts. 5.1, 6.1, 8.1, 23.1; Firearms Protocol art. 5.1.
- ¹⁰⁸ Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, art. 3.
- ¹⁰⁹ For insightful legal propositions on this matter: Geneviève Giudicelli-Delage, "Propos conclusifs", *Revue juridique de l'environnement*, 39(2014) 241-253; Adán Nieto Martín, "Eléments pour un droit international pénal de l'environnement", *Revue de science criminelle et de droit pénal comparé* 1(2012) 69-88.
- ¹¹⁰ See, UNODC, Wildlife and Forest Crime Analytic Toolkit (2012).
- ¹¹¹ TRAFFIC, supra note 100.
- ¹¹² For example, according to a 2014 TRAFFIC report, one year after the EU Timber Regulation entered into force, twenty countries were not fully implementing the regulation and eight countries had no implementing legislation. TRAFFIC, supra note 100.
- ¹¹³ DLA Piper, supra note 101.
- ¹¹⁵ This table is a mere illustration, with the collaboration of Legal Atlas, the Global Initiative is currently gathering updated and more comprehensive data on national penalties. Data adapted from TRAFFIC, supra note 100; DLA Piper, supra note 101; Australia National Parks and Wildlife Conservation Act 1975 (Commonwealth), 13 March 1975; Cambodia Law on Forestry 2002, 31 August 2002; Canada Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (S.C. 1992, c. 52), 17 December 1992; Nepal National Parks and Wild Life Conservation (Fourth Amendment) Act 1993, 9 June 1993; South Africa National Environmental Management Biodiversity Act, 2004 (No. 10 of 2004), 31 May 2004.
- ¹¹⁶ Minimum sentence; maximum not specified in law.
- ¹¹⁷ Wright, supra note 99.
- ¹¹⁸ Criminal Law of the People's Republic of China (amended by the Fifth Session of the Eighth National People's Congress on March 14, 1997), art. 151; amended to eliminate death penalty by Eighth Amendment to the Criminal Law of the People's Republic of China Order of the President of the People's Republic of China No. 41.

- ¹¹⁹ DLA Piper, *supra* note 101.
- ¹²⁰ This list is based in part on that of former CITES Chief of Enforcement John Sellar, who identifies several indicators of organized crime, including use of modern firearms, significant profit, threat of violence, forgery and altering of documents, significant financial support, and detailed planning. Global Initiative, *supra* note 6.
- ¹²¹ Global Initiative characterizes organized environmental crimes as “series” crimes, involving repeated use of similar routes and *modus operandi*. Global Initiative, *supra* note 1. However, local poaching or illegal resource use can also be repeated, either out of desperation or continued proximity to the resource in question.
- ¹²² For example, a large-scale shipment of ivory strongly indicates involvement of an organized criminal group. UNEP et al., *supra* note 4.
- ¹²³ CITES now defines a “large scale” seizure as more than 500 kg. 16th Meeting of the Conference of the Parties to CITES, Decision 16.83 (Bangkok, 3-14 March 2013).
- ¹²⁴ UNEP et al., *supra* note 4.
- ¹²⁵ *US v. Bengis*, Case S1 03 Crim. 0308 (LAK) (SDNY 2013).
- ¹²⁶ This initiative was officially launched by INTERPOL on 18 September 2012, for more information: <http://www.interpol.int/fr/Crime-areas/Environmental-crime/Task-forces>
- ¹²⁷ CITES Resolution Conf.11.3 “Compliance and enforcement”.
- ¹²⁸ Sellar, *supra* note 6.
- ¹²⁹ Wright, *supra* note 99; Sellar, *supra* note 5.
- ¹³⁰ Sellar, *supra* note 6.
- ¹³¹ OECD, *supra* note 8.
- ¹³² DLA Piper, *supra* note 101.
- ¹³³ Sellar, *supra* note 6; Wright, *supra* note 99.
- ¹³⁴ Rose and Tsamenyi, *supra* note 95; Sellar, *supra* note 6.
- ¹³⁵ UNODC, *Wildlife and Forest Crime Analytic Toolkit* (2012); Wright, *supra* note 99; Global Initiative, *supra* note 2.
- ¹³⁶ Sellar, *supra* note 6.
- ¹³⁷ Kaiman, “China helps arrest suspected ivory smuggler in Kenya”, *The Guardian*, 10 Feb. 2014, www.theguardian.com/world/2014/feb/10/china-helps-arrest-suspected-ivory-smuggler-nairobi-kenya (accessed 24 March 2015).
- ¹³⁸ CITES, art. VIII.
- ¹³⁹ Committee for Administering the Mechanism for Promoting Implementation and Compliance of the Basel Convention, BC-11/8.
- ¹⁴⁰ Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA), article 4 and Annex.
- ¹⁴¹ For more information : envicrimenet.com
- ¹⁴² INTERPOL, Resolution AG-2014-RES-03.
- ¹⁴³ S.A.H. Milledge, I.K. Gelvas and A. Ahrends, *Forestry, Governance and National Development: Lessons Learned from a Logging Boom in Southern Tanzania* (TRAFFIC 2007).
- ¹⁴⁴ Environmental Investigation Agency (EIA), *First Class Crisis, China’s Criminal and Unsustainable Intervention in Mozambique’s Miombo Forests* (EIA 2014).
- ¹⁴⁵ OECD, *supra* note 8.
- ¹⁴⁶ See Rose and Tsamenyi, *supra* note 95, for a comprehensive discussion of jurisdiction over wildlife crimes on the high seas.
- ¹⁴⁷ See *ibid*, for a thorough description of extra-territorial jurisdiction, including universal jurisdiction, in the context of marine living resource crime.
- ¹⁴⁸ Rose and Tsamenyi, *supra* note 95.
- ¹⁴⁹ *Ibid*.
- ¹⁵⁰ EC Regulation 1005/2008 to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing, 29 Sept 2008, [2008] OJ L286/1, art. 3. Sanctions include fines of up to eight times the value of the fishery products in the case of repeat offences (art. 44).
- ¹⁵¹ *US v. Bengis*, 631 F.3d 33, 2nd Cir. 2011.
- ¹⁵² *US v. Bengis*, Case S1 03 Crim. 0308 (LAK) (SDNY 2013).
- ¹⁵³ Rose and Tsamenyi, *supra* note 95.
- ¹⁵⁴ *Convention on the Protection of the Environment through Criminal Law* (Strasbourg, 4 Nov. 1998), art. 5.2.



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