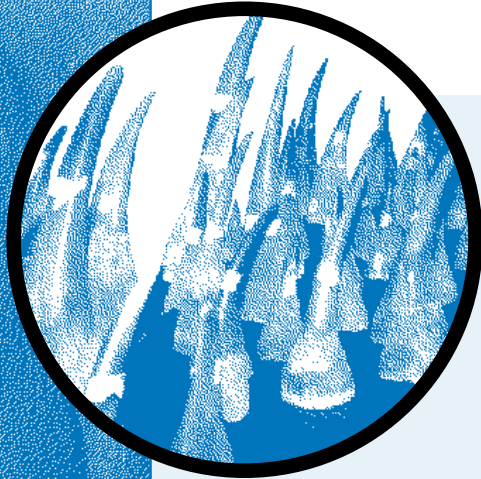


CRIME AND

PUNISHMENT

IN THE WILDLIFE TRADE



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Date:	8.05.02



A WWF / TRAFFIC REPORT

Crime and punishment in the wildlife trade

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May 2002

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ACKNOWLEDGEMENTS

We wish to acknowledge the assistance of David Cowdrey, Campaign Director, Wildlife Trade, and Kirsty Clough, the Campaign Coordinator. Thanks are also due to TRAFFIC International – especially Stephanie Pendry – for providing detailed information on wildlife prosecutions. HM Customs and Excise provided seizure information, and Charles MacKay, Anne-Marie Bamford and Chris Miller were patient in dealing with our confusions and misapprehensions around Customs seizures and prosecutions. Ann Flintham of the Magistrates Association helped to clarify the

perspective of the courts, and Sandra Cleva of the US FWS Office of Law Enforcement assisted with information on an American case.

The Global Wildlife Division at DEFRA agreed to our borrowing ideas from previous research undertaken by us on its behalf. We are grateful to DEFRA for its willingness to assist.

Finally, thanks go to our colleague Pete Jones who first suggested we look at due diligence schemes.

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Authors' note: The terms "European Community" and "European Union" are not interchangeable. The EC is a component of the wider concept of the EU that encompasses a number of treaties. The applicable legislative provisions enacted under the Treaty of Rome 1957 (as amended) are made under the auspices of the European Communities Treaty, so the term EC is used throughout when referring to secondary legislation enacted by virtue of powers granted by the Treaty of Rome.

Executive Summary

The attitude of the UK's legal system towards the ever-increasing illegal wildlife trade is inconsistent. It does not adequately reflect the nature and impact of the crimes, and it is erratic in its response. The result is that the courts perceive wildlife crime as low priority, even though it is on the increase.

Having said that, there are positive indications that change is taking place, thanks largely to increased political awareness of environmental issues, and increased lobbying by non-governmental organisations.

The United Kingdom's laws regulating the trade in wildlife reflect a tripartite system of control encompassing international, European Community (EC) and our own domestic legislation. Within each tier is the potential for difference in implementation, and while the EC is a strong centralising force, for the member states there remain discrepancies in implementation and practice.

While the UK has a legislative framework that is generally supportive of the fight against wildlife trade crime, it lacks effectiveness in some areas because it allows the imposition of low penalties in the majority of prosecuted cases. Not only that, but there are also only limited provisions for "joined-up" working between the principal agencies involved in bringing such cases to court.

This relative ineffectiveness does not derive from lack of effort on the part of the enforcing authorities, but rather by laws which, in theory and in practice, do not provide an appropriate deterrent to offenders. There is an apparent lack of seriousness attached to wildlife trade offences. This is surprising, given the potentially high rewards at stake for very little risk of detection and penalty, and because of the seriousness of their impact on species sustainability. Issues of seriousness and tolerance need to be examined, so that public and judicial attitudes towards such offences can be re-shaped.

One response to this challenge would be to make offences under the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES) arrestable. This change in the law would give the police increased powers and would enable enforcement agencies to take more effective action against wildlife criminals. At the same time it would rightfully acknowledge the seriousness of the illegal trade itself. This would not be out of line with offences committed under the Customs and Excise Management Act 1979 (CEMA) which *are* arrestable: indeed, it would incorporate an element of certainty into the law that is at present missing.

Compared with other jurisdictions, the UK has a relatively well-developed system of laws. However, it does not compare favourably with the US, where custodial sentences are often imposed for wildlife trade offences and levels of fines are higher. The UK has the potential to impose higher penalties, but chooses not to. Now, our membership of the EU and the free market without borders offers important opportunities to frame effective law, but presents a challenge in terms of greater internal control.

The illegal wildlife trade has immeasurable impacts that can potentially affect biodiversity through the loss of endangered species. These impacts are not adequately taken into account by the courts when cases are prosecuted. One way of addressing this would be to develop and issue

effective sentencing guidelines. At present, no specialised guidance or awareness training is given to judges or magistrates, many of whom will rarely come across wildlife trade offences because prosecutions are so infrequent. In addition, the present system of precedent-based guidance in the UK is insufficient, given the very few cases that reach the higher courts

It would therefore be useful for those who impose sentences to have guidelines at their disposal. These could be along the lines of those already developed for certain environmental offences, such as water pollution, where issues affect human quality of life. These have succeeded in raising the perception of the seriousness of environmental offences, and there is no reason why similar guidelines may not be successful in relation to wildlife trade offences.

Overall, there are varying and inconsistent approaches to the law by enforcement and other agencies, as there are in terms of the imposition of penalties for illegal wildlife trade. This raises doubts about any deterrent value. Of course, the fear of a severe penalty is not a sufficient deterrent in itself – the potential offender must realise at the outset that there is a certainty of detection and arrest, and that the authorities will prosecute. At present, this is unlikely. The risks that wildlife offenders take are minimal, and the rewards extremely high, when balanced against the chance of getting caught and the likely penalty that would be imposed.

RECOMMENDATIONS

As a result of the issues raised in this report, we recommend that the following actions be taken by the appropriate agencies:

- 1 Seek to reduce the disparity between the maximum penalties available under CEMA (seven years imprisonment) and COTES (two years imprisonment) by raising the maximum penalty for COTES offences to five years. This will send a more consistent message to all concerned about the seriousness of the illegal wildlife trade.
- 2 Make arrestable offences consistent across UK wildlife legislation so that the powers of arrest under the Wildlife and Countryside Act 1981 (WCA) for domestic wildlife offences are mirrored in COTES trade offences. This could effectively be accomplished by implementing recommendation 1.
- 3 Give judges and magistrates additional information and training about the wider environmental, social, economic and cultural impacts of wildlife trade offences.
- 4 Encourage judges and magistrates to use the full range of appropriate penalties available to them in order to provide a just, consistent and deterrent response to serious wildlife trade offences.
- 5 In order to provide even greater consistency and effectiveness, key frontline enforcement agencies should work towards developing shared prosecution principles and criteria concerning offences committed under COTES and CEMA.
- 6 Consider developing and/or adapting the sentencing guidelines for environmental offences in the context of combating the illegal wildlife trade¹.

¹ While these two types of offences clearly differ, there are significant areas of shared concern – particularly in relation to environmental and wildlife trade crimes impact on 'quality of life', in addition to low penalties imposed by the courts and overall lack of experience and knowledge on such cases

- 7 Promote deterrence of illegal wildlife trade through:
 - increasing the risks of detection through increased resources directed to enforcement;
 - encouraging speedier processing of cases;
 - seeking to reduce rewards of the illicit trade through disrupting markets for illegally traded goods – particularly by raising awareness of the threat the illegal wildlife trade poses to endangered species; and
 - lowering the threshold of tolerance of the illegal trade, through education and campaigning (see also 8 below).

- 8 Consider introducing a due diligence scheme and code of conduct for the legal wildlife trade, drawing legal traders into more effective partnerships with regulators, and enhancing their role in intelligence-gathering to challenge illegal traders.

1 Introduction

The attitude of the UK's legal system towards the ever-increasing illegal wildlife trade is inconsistent. It does not adequately reflect the nature and impact of the crime involved, and it is erratic in its response. This is because offences are frequently regarded as low priority (even though they are on the increase); because wildlife law enforcement is ad hoc; and because of the often derisory penalties imposed upon the few wildlife offenders who are brought to justice.

It is against this backdrop that the UK's enforcement agencies – the police and HM Customs and Excise (HM C&E) – have secured year on year increases in their detection and seizure rates. Customs officers and police wildlife liaison officers form the front line in the fight against the illegal trade. Resources are allocated according to enforcement priorities which may or may not be underpinned by performance targets: it is not surprising that wildlife trade offences are relegated in terms of importance. Further, the attitude of judges and magistrates to such offences seems, with the odd exception, to be out of step with the determined efforts of the enforcing authorities and those developing policy responses.

There are, however, some positive signs of change. These may be shaped by international laws, increased political lobbying around environmental, sustainable development and biodiversity issues, and a growing public awareness brought about by the work of non-government organisations (NGOs) and government policy-makers. Even so, much remains to be done to protect the most endangered species and those at risk from the illicit international wildlife trade.

Whether undertaken for profit, collection or obsession, this illegal trade has a serious effect on biodiversity, the survival of species and the protection of habitat. It is particularly important that developed countries take effective and rigorous legislative action to combat the trade, because they provide the mainstay of the markets that sustain most legal and illegal trade in wildlife.

Although there are no substantiated estimates of the market, and little hard evidence of the extent of the illegal wildlife trade, it is hugely significant in terms of financial gain and its impact upon the world's increasingly pressured wildlife. It has been suggested that the value of illegal trade represents nearly a quarter of the total worldwide trade in wildlife, and is reported to come second only to the illegal drugs trade in terms of its monetary value².

The problems faced in tackling such an enormous illegal trade are compounded by the fact that, unlike many other illegally-traded commodities, a large legitimate trade in wildlife runs in parallel. In situations such as the CITES COP 10³ agreement to sell a limited stock of ivory to Japan, concerns have been raised about increases in elephant poaching⁴. Some fear the growth of an illegal parallel trade,⁵ arguing that it will always piggy-back on a legal one. There are clear examples of this parallel trade, not least in bird breeding circles, where notorious cases of illegal wildlife trading have involved established bird breeders holding licences for the legal trade⁶.

² Ong, DM, The Convention on International trade in Endangered Species (CITES 1973): implications of recent developments in international and EC law (1998) *Journal of Environmental Law*, 10(2).

³ Convention on the International Trade in Endangered Species, Conference of the Parties 10

⁴ Favre, D (2000): CITES Round-up. *Yearbook of International Environmental Law 11*. Oxford: OUP. p303.

⁵ Matthews, P (1996): Problems Related to the Convention on the International Trade in Endangered Species. *International and Comparative Law Quarterly*, 45, p421.

⁶ Harold Sissen, Robert Brastock and (in the US) Tony Silva. For more details see Case Studies, Annex 1.

Part of the answer may be the introduction of some version of a “due diligence” approach, whereby the expertise and good practice of reputable traders who could identify and isolate examples of illegal trading is harnessed. Those legitimate traders, using an appropriate code of conduct, could also be involved in intelligence gathering. This aspect is further discussed on page 26.

Over time, the law has evolved to offer an increasing level of protection to wildlife and the environment. The law in the UK is currently shaped by the country’s membership of the European Union. Regulations developed by the European Community⁷, and directly applicable in all member states, set out a control scheme that implements and strengthens the principal international legal instrument, the Convention on International Trade in Endangered Species of Wild Flora and Fauna 1973 (CITES). The legal responses that have been adopted to counter the illegal wildlife trade will be explained in detail in Section 2 of this report and, along with reflections in subsequent sections on the efficacy and limitations of the law as it currently stands, will form the basis of its recommendations.

⁷ The terms EU and EC are not interchangeable. The EC is but one component of a wider concept of European Union that encompasses more than just the ECSC Treaty, the Euratom Treaty and the European Community Treaty (Treaty of Rome 1957). The applicable legislative provisions enacted under the Treaty of Rome (as amended) are made under the auspices of the EC Treaty, hence Regulation 338/97/EC, and thus the term EC will be used throughout when referring to secondary legislation enacted by virtue of powers granted by the Treaty of Rome.

2 Regulating the global wildlife trade

In the UK, legal controls over what we may term the wildlife trade follow a tripartite model involving international, EC and UK regulatory measures. But this simple division is not the whole picture. A range of domestic legislation extending to specific species has been developed in a piecemeal fashion in response to concerns which have been dealt with as they have arisen. As this report is concerned solely with illegal wildlife trade, these other concerns are not considered here.

UK law operates at two distinct levels which both reflect higher level (EC and international) regulations on:

- the prohibition on the trade in certain species; and
- the regulation of trade in other defined species.

INTERNATIONAL LAW

Legal fora throughout the world have been comparatively successful in pushing the agenda for increased protection for wildlife through international treaties. The principal international control on trade is CITES, one of the greater successes of the international community in terms of its membership and the measures it has implemented to govern wildlife trade. A considerable range of academic literature has analysed the workings and implementation of CITES, and the broad view of commentators is one of cautious optimism⁸.

CITES prescribes a system of joint control which is split between the states which export and those which import wildlife species and products. This legal trade is governed by the use of permits and certificates to trade in particular species, and divided between three listings (appendices) depending on the species' vulnerability to trade and its conservation status. In practice CITES:

- **prohibits all commercial international trade** in plant and animal species (and derivatives) that are threatened with extinction and that are, or may be, affected by trade⁹.
- **regulates approved non-commercial trade** in the species and specimens listed in Appendix I to the Convention. For these species (including the tiger, all marine turtle species, and some orchid and cactus species), the only approved trade would be for scientific or conservation purposes.
- **regulates, through a system of permits**, the trade in other less immediately endangered species listed in Appendix II, where those species are not currently threatened with extinction, but could become so if trade were not strictly regulated.¹⁰
- **collaboratively regulates** Appendix III species, in a way that allows parties to list specimens as being subject to control in their own jurisdiction so as to enable their protection from over-exploitation through cooperation from other parties to facilitate trade controls.

⁸ Ong, *supra.*, Also, Birnie, P and Boyle A, *International Law and the Environment*, (2nd Edition), 2002, Oxford, p625.

⁹ As set out in Appendix I and referred to as Appendix I species.

¹⁰ The system of permits is also used for artificially propagated and captive-bred specimens.

EUROPEAN COMMUNITY REGULATION

The primary source of law in the UK has arisen from EC common regulations applying to all member states in relation to the trade in endangered species. The principal regulation¹¹ seeks to govern the trade in species of fauna and flora or derivatives listed in four Annexes (A-D). Like its predecessor¹² it implements CITES, but is much stricter, reflecting the realities of the single European market's lack of controls at internal borders. Compensatory measures are needed to fortify the trade control measures at the EC's external borders and the regulation does this. The rules contained in relation to import authorisations are tightened and contain more species than previous forms of legislation on the issue¹³.

Important provisions on a minimum level of criminal sanctions which should be "appropriate to the nature and gravity of the infringement"¹⁴ are provided for in the principal regulation.¹⁵ That said, commentators have observed that there is no EC-wide system of inspection and enforcement, and that "practical problems posed by variable implementation and enforcement remain"¹⁶. Within the member states themselves, the regulations require the establishment of management and scientific authorities¹⁷ to ensure proper implementation of the requirements. As with CITES, there is a reporting requirement and a representative of the management authority reports to a committee established by Article 18. The UK's management authority is within the Department for Environment Food and Rural Affairs (DEFRA), and the scientific authorities are the Joint Nature Conservation Committee (fauna) and the Royal Botanic Gardens, Kew (flora)¹⁸.

The Annexes set out in the regulation provide a stricter regime than CITES itself. They provide for:

- Annex A: prohibition on commercial trade from, to and within the Community for Annex A species. Any external trading of these species is regulated in a way similar to that applying to CITES Appendix I. All CITES Appendix I species are included, as well as others where EC or international demand could threaten their survival.

¹¹ Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein (OJ L 61/1, 3.3.97), supplemented by Regulation 939/97/EC (OJ L 140, 30.5.97). Subsequent amendments have been made by Regulations 2307/97/EC (OJ L 171, 27.11.97); 2214/98/EC (OJ L 279, 16.10.98); and 1476/99/EC (OJ L 171, 7.7.99). In September 2001, Regulation 1808/2001/EC laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 (OJ L 250/1, 19.09.01) was adopted, repealing Regulation 939/97.

¹² Regulation 3626/82/EEC (OJ L 384/1, 31.12.82).

¹³ For a comprehensive account of the provisions of EC law see European Community Wildlife Trade Regulations Reference Guide, available at http://europa.eu.int/comm/environment/cites/wwf_en.pdf. Constraints of space preclude a detailed evaluation and thus only a flavour of the main provisions can be given.

¹⁴ Article 16(2). Unfortunately, as will be seen below when comparing the UK's laws to those of other EU states, the regulations do not harmonise sanctions – thus the *appropriateness* to which Article 16(2) refers in relation to punishments is effectively a subjective choice for a state's legislature.

¹⁵ Article 16 provides a detailed list that includes, inter alia, import to or export from the EC of non-permitted specimens, transit through the EC without appropriate permits, use of Annex A specimens except as in accordance with permit, certain sale/purchase offences, and offences relating to the falsification or fraudulent use of documents.

¹⁶ Reeve, R, *Policing international Trade in Endangered Species: the CITES Treaty and Compliance*, Royal Institute of International Affairs (Forthcoming), p66.

¹⁷ Article 13.

¹⁸ Contactable at www.ukcites.gov.uk, www.jncc.gov.uk and www.rbgekew.org.uk respectively.

- Annex B: necessity for import, export and re-export permits for the species listed, in a way similar to CITES Appendix II species. It goes further than CITES Appendix II, however, as import permits are required for Annex B specimens. It contains all remaining CITES Appendix II specimens, Appendix I species subject to reservations and others that may be threatened by trade or pose a threat to indigenous wildlife, even if not CITES-listed.
- Annex C: imports of species listed here, containing the CITES Appendix III species not listed in Annex B, are not subject to import permit requirements. However, a CITES (re)export document and the stricter measure of an import notification are required.
- Annex D: contains non-CITES species not listed in the above annexes but imported into the EC in large enough numbers to require monitoring in order that any potential conservation threat can be responded to. It also contains CITES Appendix III species subject to a reservation.

General import restrictions are imposed under the regulation in Article 4. They aim to ensure certainty in the operation of the system, so that all member states are dealing in the same manner. Further considerations include the possibility in limited circumstances of retrospective issuance of relevant permits¹⁹, and a list of exceptions to the import/export condition.

Important provisions relating to internal trade are included in Article 8, and cover the trade between member states and any trade within a member state. Prohibitions relating to trade aspects of Annex A specimens are set out, which in certain circumstances may be extended to apply to Annex B, and are subject to exemptions on both general and specific grounds²⁰. Further restrictions are placed on movements of live specimens, which take account of the facilities for housing and maintaining them at their place of destination.

Enforcement provisions are contained in Articles 14 and 15 and place primary responsibility for the monitoring and compliance requirements upon the competent authorities of the member states. An enforcement group, comprising representatives from the member states, has been established and fills an advisory role for enforcement issues. Additionally, species-specific restrictions, suspending the introduction of certain species into the EC, are issued from time to time²¹ in a similar way that country-specific bans were under previous regulation.

The principal EC regulation is generally perceived as an improvement on its predecessor and its effect has been to improve the enforcement climate in relation to illegal wildlife trade. The enlargement of the EU will offer a further opportunity to extend the reach of the provisions. But a strong lead from those countries with adequate punishment for wildlife trade offenders is needed to push the agenda, so that newly-acceded countries do not become the internal market's weak links. Discrepancies in some member states' laws are explored further in chapter 4.

UK LEGISLATIVE PROVISIONS

EC regulations²² are directly applicable in the UK, and all the provisions above are part of the UK's legal system. The specific legal obligations are enforced through a combination of two legislative provisions. The Customs and Excise Management Act 1979 (CEMA), enforced by

¹⁹ See, for example, the case of White, further below in the text at chapter 6.

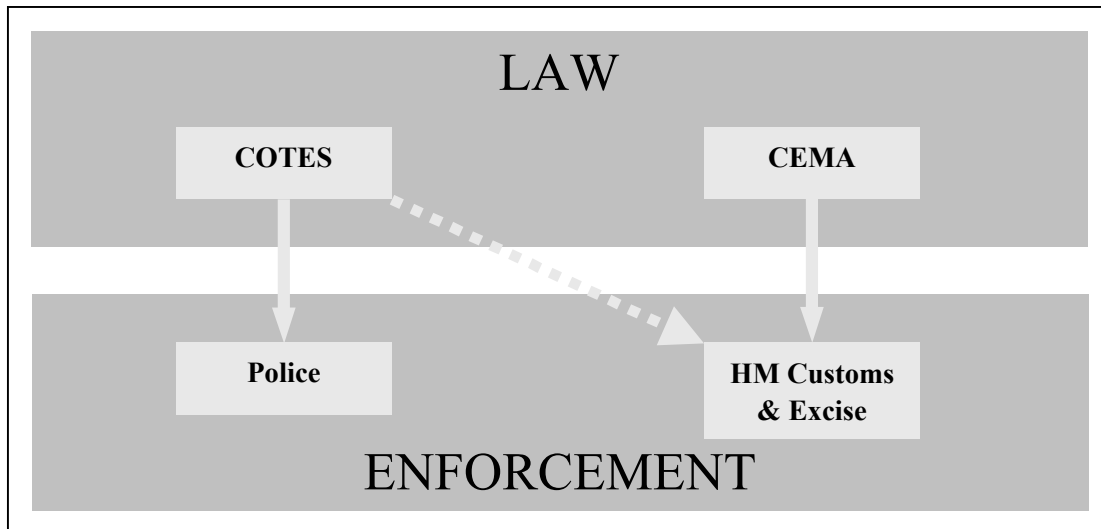
²⁰ See Article 8.

²¹ Recently for example Regulation (EC) 2087/2001 suspending the introduction into the Community of specimens of certain species of wild fauna and flora (OJ L 282/23, 24 Oct 2001) including various wild cats, primates and other mammals.

²² Article 249 EC Treaty.

HM C&E, regulates the import and export aspect of the trade at airports and other ports of entry. Within the UK, the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (COTES)²³ create offences and detail punishments that fulfil the requirements of the EC regulation. The detail relating to the offences and penalties available is set out in Annex 2.

Figure 1. Wildlife trade regulatory regimes in the UK



The simple diagram above (figure 1) indicates the two key regimes, enforced in the main by different agencies. Very broadly, most offences dealt with under COTES are investigated and enforced by the police with assistance and expertise provided by DEFRA-appointed wildlife inspectors, although HM C&E can also investigate and prosecute cases under COTES. One facet of this dual enforcement aspect is the prosecution by different bodies – the Crown Prosecution Service (CPS) for COTES offences and separate HM C&E prosecutors for CEMA offences.

²³ Statutory instrument No. 1997/1372.

3 The UK legal framework – taking the illegal wildlife trade seriously?

It is not in the interest of any nation state²⁴ to be seen as a market, repository or collaborator in the illegal international trade in endangered species, not least because the illegal trade may have links to other forms of (organised) crime. The UK is in a strong position to combat such trade: it has dedicated wildlife inspectors as part of its management authority and a relatively supportive government working within a framework of strong supranational law emanating from the EC.

However, the legal system in the UK is not as effective as it might be. It is characterised by:

- low criminal penalties;
- inconsistent and differing judicial or administrative sanctions, depending on the agency involved in the investigation or enforcement; and
- an uninformed approach to a damaging illicit trade with far-reaching impacts on the sustainability of species and habitats.

An example of all these problems is the case of the Renaissance Corporation²⁵. This company admitted trading in shawls made from shahtoosh wool, which is produced from the coats of the Tibetan antelope, a critically endangered species. Up to 1,000 antelope were killed to provide the wool for the 138 shawls which were confiscated. Despite the trader's serious impact on an endangered species, and the value of the confiscated shawls being £353,000, the company was fined just £1,500.

In relation to the issue of consistency, there is a fundamental disparity between the penalties available for those convicted at ports of entry for CEMA offences and those who trade species in the domestic arena only and are governed by COTES. This is evident in Table 1, which demonstrates how illegal wildlife trade cases have been prosecuted, the maximum penalties available and those actually imposed.

Clearly, CEMA's focus is broader than wildlife trade, encompassing as it does a range of smuggled goods, including drugs. This accounts for the higher penalties available. But because the maximum penalty available for an offence is often taken as a barometer of its seriousness, there should be more consistency in penalties available under CEMA and COTES. This would send a more consistent message regarding the seriousness of the illegal wildlife trade – whatever statute is invoked and whatever agency enforces it (see Figure 1 opposite).

²⁴ See for example the views of the Standing Committee in relation to trade in the United Arab Emirates, SC45 Doc 11.2, June 2001.

²⁵ See case studies in Annex 1.

Table 1. Case study examples of penalties in the UK²⁶

Case	Year	Statute	Nature of Offence	Value	Max. Penalty	Actual Penalty
Raymond Humphrey and others – Thai birds of prey	2002	CEMA 1979	Smuggling endangered birds and other animals	£35,000	Unlimited fine/ 7 years jail	6 1/2 years jail; lesser penalties for accomplices
Harold Sissen – Lear’s macaws	2000	CEMA 1979	Illegally importing 3 Lear’s Macaws	£150,000	Unlimited fine/ 7 years jail	18 months jail
Robert Brastock – Hyacinth macaws	2000	COTES 1997	Illegally selling imported birds	£23,000	Unlimited fine/ 2 years jail	None – absolute discharge
Robert Sclare – “Get Stuffed”	2000	COTES 1997 and the Forgery Act	Forging CITES permits and illegally trading taxidermy specimens	Not known	Unlimited fine/ 2 years jail (COTES), 10 years jail (Forgery Act)	6 months jail (3 suspended)
The Renaissance Corporation – shahtoosh shawls	2000	COTES 1997	Stocking 138 shawls	£353,000	£5,000 fine/ 3 months jail (magistrates court)	£1,500 fine
Wilfred Bull and others – rhino horns	1998	COTES 1985	Attempting to sell more than 120 horns	£2.88 million	Unlimited fine/ 2 years jail	15 months jail; lesser penalties for accomplices

The protection of wildlife has traditionally not been high on the UK’s legislative agenda. While a collection of laws has evolved over time to protect indigenous wildlife, much of the current law is being inspired by the need to reflect higher EC standards. The specific UK domestic legal provisions relating to the illegal wildlife trade are particularly weak when set against other enforcement priorities such as the illegal importing of drugs or, more recently, the smuggling of cigarettes and alcohol on which no duty has been paid.

ARRESTING WILDLIFE OFFENDERS?

There is a key weakness in the way in which offenders may be brought to justice under COTES. This was highlighted by the conviction of Garry Job for an offence which was not arrestable²⁷ and for which, therefore, he could not be compelled to attend a police station for interview. In court it was observed that Job had declined to attend any interviews with the police or the RSPB, a situation later described as “unhelpful” by an RSPB investigation officer²⁸. This circumstance does not arise in the case of CEMA offences, which are arrestable. The following discussion explains the notion of arrestable offences and the potential application to COTES.

Within the criminal justice system, the seriousness of particular offences can be gauged by the manner in which they are dealt with by the enforcing authorities, and particularly by whether they are classified as arrestable or non-arrestable. This distinction is an important one. Subject

²⁶ See Annex 1 for more details of these case studies.

²⁷ Under Regulation 8 of COTES.

²⁸ RSPB: *Legal Eagle*. 26 October 2000, p3.

to certain conditions, it allows for the arrest of a suspected offender, without warrant, where the arresting officer reasonably believes that the suspect is committing, has committed or is about to commit an offence. The relevant section of the Police and Criminal Evidence Act 1984 (PACE)²⁹ means that the power of arrest without warrant is triggered by the present, past or future commission of a number of specified offences. The power brings with it additional powers of detention, search and seizure that would otherwise require a warrant.

The rationale behind the development and definition of arrestable offences was simplification – so that the many statutory powers of arrest that existed prior to PACE could be rationalised and be made simpler to process. The list of arrestable offences is given in the Act and additionally includes those for which a custodial sentence of five years could be imposed – which demonstrates a willingness on the part of legislators and policy-makers to deal with perceived criminal threats and the problems they pose as they arise. One recent example is the extension of the arrestable offence powers to certain offences committed under the Wildlife and Countryside Act 1981 (WCA), brought about by the new Countryside and Rights of Way Act 2000 (CRoW).

It would be sensible and desirable if these positive steps were emulated in relation to offences under COTES, in order to achieve greater consistency and certainty within the matrix of offences committed against wildlife. CRoW guidelines make the point that the majority of offences covered by the Act involve species of conservation concern. Logically, this should also apply to species on the CITES appendices and the EC Regulation Annexes, so that they, too, can become arrestable. But a change to PACE to incorporate such arrestable offences can only be accomplished by Act of Parliament.³⁰ However, raising the maximum penalty under COTES to five years imprisonment would achieve the same result. Any amendments could form part of a general criminal law amendment or consolidation bill.

In the meantime the paradox is that, in theory, a person could be arrested without warrant for attempting to sell, or in any other way trade in, a native species, but they would not be liable to immediate arrest if the offence were under COTES. It is interesting to note that research commissioned by DEFRA³¹ among the police, customs, other enforcement agencies and NGOs found that wildlife trade offences were regarded by the majority of respondents as the most serious wildlife crimes. Clearly, therefore, the current unequal situation between COTES and CEMA offences is neither logical nor tenable.

It should also be noted that COTES offences, although not arrestable, possess many of the characteristics associated with the most serious arrestable offences³². These include interference with the administration of justice, and substantial financial gain. Given the extremely high value of some wildlife specimens or their derivatives, and therefore the potential for huge profit for those involved in the illegal trade, these increased powers may be appropriate.

²⁹ S.24 PACE 1984

³⁰ Personal communication, Home Office, March 2002.

³¹ Roberts M, Cook D, Jones P and Lowther J (2001): *Wildlife Crime in the UK: towards a National Wildlife Crime Unit*. Report for the Department for Environment, Food and Rural Affairs.

³² See for example s.116 PACE, serious arrestable offences. This is in effect a compounding factor, triggered by the factors referred to above, that increases police powers to detain and deny immediate access to a solicitor or other person.

In addition, there is an increasing view (and much anecdotal evidence) that the illegal wildlife trade is a developing organised crime activity.³³ If this were proved, concerns would arise about serious interference with the administration of justice – for example the destruction of evidence or the laundering of trade proceeds. This is another reason why offences under COTES should be arrestable.

³³ Galster SR, LaBudde SF & Stark C (1994): *Crime Against Nature: organised crime and the illegal wildlife trade*. An investigative report by The Endangered Species Project; Le Duc J P (1996): Trafficking in animals and plants. *International Criminal Police Review*, 458-459, pp19-32.

4 The response in Europe and the US

Although the EC itself is not a party to CITES, it has issued a series of regulations that have sought to implement the convention in the member states³⁴. EC rules are more inclusive than CITES itself – for example, they incorporate a wider range of species – and provide for trade bans on suspect range states³⁵. Bans have been imposed on a variety of species or trade from range states over time³⁶ and removed when appropriate. But a recent report³⁷ concluded that such bans need to be properly implemented if they are to have any effect – and implementation is the province of the member states. Moreover, the EC does not have the ability to impose the actual sanction that an offender would receive. That remains within each member state's exclusive jurisdiction and thus accounts for the wide differences in penalties imposed across the various countries.

Table 2 highlights some of these inconsistencies and provides an easy reference for US legislation. It is important to understand these discrepancies when considering the single market aspect of the EC: in other words, the effectiveness of wildlife trade laws depends upon the port of entry to the EC of the illegal goods³⁸.

While the enforcement regimes, potential for conviction, and available penalties vary across the EC, there will be additional opportunities for the serious or dedicated trafficker to hedge some of the risk involved in plying this trade. Remedying this situation will require more concerted action by the EC CITES authorities³⁹. For example, the fact that there is no possibility of a custodial sentence being imposed in Portugal for a wildlife trade offence, and that the fine level is very low, would suggest a weak link in the EC's ability to police its borders effectively.

By contrast, the German penal code attaches a possible 10-year sentence where it is felt that lasting harm has been done to a species threatened with extinction⁴⁰ where the motive is profit. This provision does at least incorporate a clear and effective rationale to the law which seems to be absent in most other EC states.

³⁴ Regulation 3626/82, Regulation 3418/83, Reg. 338/97, 939/97 (as well as a variety of amending regulations to implement specific bans – see further above, footnote 18).

³⁵ E.g. Article 10(1)(b) of Regulation 3626/82, see further section 2 above in relation to species-specific bans.

³⁶ UNEP, WCMC, Effectiveness of past EC stricter measures on wildlife imports, EC Commission (3 Dec. 2001).

³⁷ *Ibid.*

³⁸ Note however, that CEMA (s170) is able to be applied as a continuing offence (as in the Sissen case) should an evasion of the prohibitions/restrictions of the EC Wildlife Trade Regulations take place extra-territorially, and should the specimen be imported to the UK without proper compliance with the legal provisions.

³⁹ For example the EC Committee on trade in wildlife, the enforcement group, and the scientific working group.

⁴⁰ Penal Code s330.

Table 2. Legislation and maximum penalties applicable to wildlife trade in selected countries

State	Main Statutes	Financial Penalty (max.)	Custodial Penalty (max.)	Notes ⁴¹
Germany	Wilful/negligent trafficking offences	€51,000 (approx. £31,000)	3 years	
	Possession of species	€51,000 (approx. £31,000)	3 years	
	Removing eggs or plants (protected species)	€51,000 (approx. £31,000)	5 years	
	Harms endangered species population	€51,000 (approx. £31,000)	10 years	
Ireland	Offences relating to listed species	€1,900 (summary) (approx. £1,200) €63,000 (indictment) (approx. £38,600)	12 months (summary) 2 years (indictment)	
Netherlands	Trade and trafficking offences, transport of species or derivatives, possession with intention to traffic or trade	€10,000 (infringement) (approx. £6,000) €50,000 (felony) (approx. £30,600)	1 year (infringement) 6 years (felony)	
Portugal	Non-licensed import, transport, non-conformity with CITES permit regime, import of species in breach of range state law	€2,500 (Annex I species) (approx. £1,500) €2,000 (Annex II species) (approx. £1,200) €1,500 (Annex III and other) (approx. £920)	None	Difference in fines if corporate offender (up to 12x for fault and 6x for negligence)
	Movement and taxidermy offences among miscellany of specific crimes	€1,500 (approx. £920)	None	
UK	CEMA 1979	£1,000 or 3x value of goods (summary) Unlimited (indictment)	6 months (summary) 7 years (indictment)	<i>Arrestable</i>
	COTES 1997	£5,000 (summary) Unlimited (indictment)	3 months (summary) 2 years (indictment)	<i>Not arrestable</i>
	WCA 1981 (as amended by CroW 2000)	£5,000 (summary) Unlimited (indictment)	6 months (summary) 2 years (indictment)	<i>Partially arrestable</i>
US	Lacey Act	US\$250,000 (felony) (approx. £163,000)	5 years (felony)	
	Endangered Species Act	US\$100,000 (misdemeanour) (approx. £65,000)	1 year (misdemeanour)	

The United States' focus is primarily on its domestic wildlife, but the important effect of some of its laws is to offer protection to a wider range of species in trade, with the provision of far higher fines (although the overall maximum prison sentence for any offence, other than money laundering, is lower than in the UK). A review of American cases indicates a greater willingness

⁴¹ All legislative provisions mentioned here also incorporate the power of forfeiture.

to impose higher sentences⁴², although such a comparison is imperfect in some respects, not least because rates of imprisonment differ. A report in the *Sunday Times*,⁴³ for example, stated that the US locks up 680 people per 100,000 of its population, compared with 125 per 100,000 in the UK.

In the US, two main wildlife-specific statutes govern the illegal trade in wildlife, as well as a more general provision, comparable to CEMA in the UK, relating to smuggling. The main provisions of US law are outlined below and serve as a useful comparison with the position in the UK. But it should be explained that the US, through the Fish and Wildlife Service, has a single unified body dealing with all administrative, scientific and enforcement aspects relating to wildlife protection. This federal overview undoubtedly helps enforcement and prosecution, with expertise concentrated among dedicated practitioners. The situation in the UK is different, with the illegal wildlife trade being combated by differing enforcement agencies.

The Endangered Species Act 1973⁴⁴ (ESA) is the primary law that implements CITES in the US. In parallel with EC regulations, the ESA gives protection to many CITES and native species by subjecting them to protection and prohibiting a range of trafficking offences. The ESA also prohibits the taking of listed species⁴⁵, and violating the provisions of CITES is also an offence under the Act. A defendant may be prosecuted without being aware that the wildlife is protected and without there being any intention to break the law. Offences are mainly treated as misdemeanours, attracting a maximum penalty of up to 12 months imprisonment and/or a fine of up to \$100,000. Along with these penalties, the ESA imposes strict liability⁴⁶ for the forfeiture of specimens and possible forfeiture of equipment and transport used to commit the offence.

Additionally, the Lacey Act⁴⁷ extends the criminal regime to all wildlife and derivatives offences in relation to domestic and international wildlife trafficking, and to false labelling. It is illegal to trade in any wildlife taken, possessed, transported or sold in violation of any wildlife law including foreign laws or wildlife-related regulations. Depending on the defendant's attitude to the offence element, and the extent to which the defendant was knowingly involved in importing or exporting⁴⁸, or was engaged in conduct relating to trade, the felony carries a maximum of five years imprisonment and/or a \$250,000 fine along with the forfeiture of equipment and specimens. A lower penalty can be imposed where the defendant had not exercised due care (equating to recklessness). False labelling of any traded species is a separate offence under the Act.

The Lacey Act has a particular and effective bite. The ability to link violation of a foreign law, which then triggers the Lacey Act provisions, makes it a potent weapon against illegal wildlife traders. In the case of *United States v Cook*⁴⁹ for example, a defendant from California was

⁴² A distinction is made in US law between felonies and misdemeanours. Felony crimes will always be treated as more serious offences and will attract higher penalties.

⁴³ The Tough Love Miracle, *The Sunday Times*, July 1 2001.

⁴⁴ 16 USC s1531 (United States Code)

⁴⁵ Which is defined to mean "harass, harm pursue, shoot, wound...capture or collect or attempt to engage in any such conduct" (16 USC s1532(19)).

⁴⁶ Effectively liability without proof of fault (intention, recklessness, negligence).

⁴⁷ 16 USC s3371.

⁴⁸ Mens rea is also considered in CEMA cases as well as police cases and in cases of strict liability

⁴⁹ No. 94-50607, 1996 WL 144224 (9th Cir. Mar 29, 1996); cited in Webb, J and Anderson, R, Prosecuting Wildlife Traffickers: Important Cases, Many Tools, Good Results. *US Attorney's Bulletin*, Dec 1999, 47(5), p6.

charged with selling tarantula spiders that had been collected in contravention of Mexican law. This breach of the Mexican law was able to serve as the Lacey Act trigger, resulting in a felony conviction.

Finally, the US's Smuggling Statute⁵⁰ aims to combat illegal importing into the US and is also concerned with the non-declaration of imported wildlife. Proof is required that a person knowingly imported merchandise contrary to another US law, even if it is only an administrative regulation. The Act triggers a felony charge and can potentially lead to tax evasion charges if a defendant fails to report or conceals income generated by illegal smuggling. The effect of a conviction can be severe. In the case of *United States v Silva*⁵¹ a defendant convicted of conspiring to smuggle exotic birds into the US and failing to report taxable income was sentenced to 82 months' imprisonment and fined US\$100,000⁵².

⁵⁰ 18 USC s545.

⁵¹ 122 F.3d 412 (7th Circuit 1997), cited in Webb and Anderson, *op cit* p9.

⁵² See case studies, Annex 1.

5 The law inaction in the UK

What of the UK's role in combating the illegal wildlife trade? A review of all available relevant research indicates that the key issues in law and its enforcement are⁵³:

- a lack of resources available to those responsible for enforcing the laws protecting wildlife which impacts on agencies' enforcement priorities;
- problems interpreting the UK's tripartite legislation;
- problems in identifying endangered species;
- extremely low levels of prosecution;
- difficulties in proving the very few cases that do come to court; and
- the relatively weak sanctions and penalties imposed by the law, which are insufficient to deter wildlife criminals in general and illegal wildlife traders in particular.

The case of the Renaissance Corporation⁵⁴ is evidence that the sentences imposed by the courts are often derisory and cannot be considered a deterrent to offending at all. Table 3 below indicates that since 1987, the average fine for illegal traders in the UK is just £1,014, despite the high market value of many of the species, goods and derivatives involved.

Table 3. Analysis of fines handed down in wildlife trade convictions in UK courts⁵⁵

Period	Number of fines	Total fines (£)*	Average fine (£)*
1987-1992	22	26,330	1,197
1993-1997	12	9,950	829
1998-2002	15	14,440	963
Total	49	50,720	1,014

*Amounts not adjusted for inflation.

So what *would* work to deter those who illegally trade in endangered species? Traditional deterrence and risk theories tell us that reducing and preventing crime involves reducing the opportunities for offending by making the commission of the crime more difficult, more risky, and less rewarding⁵⁶. If we take this argument further, tackling the illegal wildlife trade means focusing on two separate dimensions of deterrence:

- risks and rewards; and
- excuses and tolerance thresholds.

The *risks* of illegally trading would be increased if the basic principles of deterrence (that punishment would follow the crime certainly and swiftly) were applied equally to all offenders.

⁵³ See Joint Nature Conservation Committee 1999; Roberts et al (2001) *supra*.

⁵⁴ See case studies, Annex 1.

⁵⁵ Source: TRAFFIC International; HM Customs and Excise and Department for Environment, Food and Rural Affairs.

⁵⁶ Felson M & Clarke RV (eds.) (1997): *Business and Crime Prevention*. Monsey, New York: Criminal Justice Press.

Certainty would involve a radical change in resources devoted to enforcement, to engender confidence that the law would be applied, and would be applied to all. Swiftsw would entail positive changes in the simplification, speed and processing of these cases. These pose challenges to hard-pressed criminal justice and enforcement agencies.

The *rewards* of the illegal trade may be addressed through:

- market disruption strategies;⁵⁷ and
- awareness-raising to render the products less desirable.

Any positive changes in combating illegal wildlife trading would have to assume a position of “no excuses”. This is not uncommon in relation to recent hardening of political attitudes to youth offending and to mobile phone theft, for example. The issue of tolerance thresholds is a linked, but more complex, one. One way in which illegal wildlife trading is “justified” in court feeds on the notion of ignorance. For example, judges and magistrates do not assume that defendants are ignorant of the fact that cannabis or heroin smuggling is illegal, yet they are often persuaded that wildlife smugglers don’t realise that their actions are illegal and harmful.

Another way of addressing tolerance thresholds may be through a “due diligence” scheme among legal traders. This would provide additional “soft” regulation by harnessing the expertise and good practice of a group that could identify and isolate examples of illegal trading. There are numerous examples of due diligence schemes covering many fields, and a number of organisations seek to facilitate compliance⁵⁸. For example, in the UK arts and antiques trade, the Due Diligence Code⁵⁹ aims to promote ethical behaviour at all levels of the trade. Its provisions cover dealers, auctioneers, museums and other industry professionals, and even extend to buyers and collectors:

“Due diligence is a simple procedure that reduces unnecessary risk and obviates the potentially damaging consequences of the unwitting purchase or sale of stolen art.”⁶⁰

The scheme is linked to specialist arts and antiques police liaison officers, and in part relies on an international standard for the description of art⁶¹. There are clearly many parallels between the arts and antiques trade and the wildlife trade, and it may be that the infrastructure for due diligence is essentially in place in the UK.

Applying the principles of maximising risk and reducing rewards, lowering tolerance and denying excuses in relation to the illegal wildlife trade is not easy. In practice this would mean the law and its sanctions must reflect more accurately the seriousness and the potential seriousness of such offences. Low levels of sanctions (see Table 2), difficulties in interpretation, the burden of proof and lack of resources provided to enforcers all compound the problem of ensuring an effective response to the threat of the illegal wildlife trade.

⁵⁷ See Roberts, et al: *supra*. p28.

⁵⁸ See, for instance: *Invaluable* in relation to arts and antiques – www.invaluable.com; *Valpak* in relation to packaging regulations – www.valpak.co.uk.

⁵⁹ Launched by the Council for the Prevention of Art Theft (CoPAT) with Home Office backing in 1999. www.invaluable.com/protect/products_dd.asp.

⁶⁰ *Ibid*.

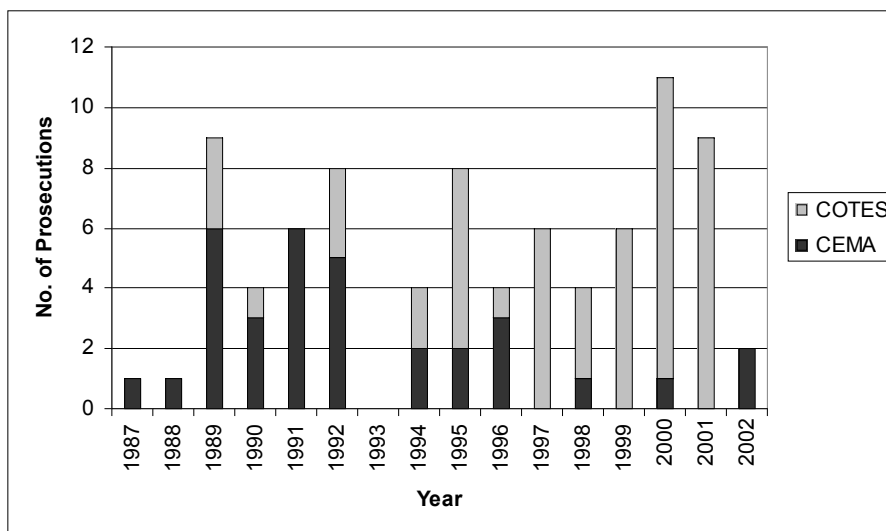
⁶¹ Object-ID. See: www.object-id.com.

At the same time, it is important to recognise that very few cases of illegal wildlife trade are prosecuted at all. Figure 2 demonstrates that numbers of prosecutions for illegal wildlife trading in CITES-listed species (under CEMA and COTES) are very low, with a total of just 83 prosecutions since 1987. Although such small numbers mean that there are no discernible prosecution trends, there is an apparent decline in CEMA-related cases and a parallel increase in prosecutions under COTES (which carries lesser penalties).

To put the number of prosecutions into a broader context, it is worth noting that in the last four years alone, HM C&E have seized 2,211 CITES-listed items (see Table 4).

Although not directly comparable (not least because cases may take several years to come to court), the discrepancy between numbers of seizures and numbers of cases taken forward to prosecution under CEMA is huge. Moreover, analysis of seizure data indicates that even the biggest seizures are not inevitably prosecuted, as the largest 10 seizures accounted for only two prosecutions (possibly due to issues of evidence and/or burden of proof)⁶². However, the majority of these seizures would be of tourist souvenirs where lack of knowledge was involved, and therefore no prosecution would have followed. Other commercial seizures would not have gone to prosecution because knowledge of the offence could not be proved.

Figure 2. Wildlife trade prosecutions relating to CITES-listed species, 1987-2002⁶³



⁶² See Annex 2 in relation to this issue. A difficulty facing customs officers is the need to convince prosecutors that enough evidence of intent to evade relevant restriction or prohibitions is present in the offender.

⁶³ Source: TRAFFIC International; HM Customs and Excise and Department for Environment, Food and Rural Affairs. Data is incomplete for 1987 and 2002, and may omit COTES prosecutions undertaken by local police forces and not notified to national agencies. The data here includes a case in 1989 in which an incident of illegal wildlife trade was prosecuted as VAT evasion.

Table 4. HM C&E seizures⁶⁴ of illegally imported or exported CITES-listed wildlife at UK ports of entry, 1996-2000⁶⁵.

Year	Total
1996	442
1997	495
1998	497
1999	336
2000	441
Total	2,211

This low level of prosecution is very significant in terms of setting thresholds of tolerance which may encourage offending. As in other areas of criminality, it may lead to a vicious circle where crimes that are rarely prosecuted are seen as being less serious. This is clearly a fallacy: for instance, many “white collar” cases of tax evasion, health and safety violations, fraud and computer crime are not prosecuted, even though they are serious in terms of financial loss and impact on the victims involved.

Similarly, the penalties available for illegal wildlife traders may not fit the seriousness of the impact of the crime. In the case of *Regina v Sissen*, the accused was found guilty of smuggling into the UK, from eastern Europe, three Lear’s macaws (a critically endangered species with only an estimated 150 birds remaining in the wild) and his crimes posed a threat to the survival of the species. Sissen’s 2½-year prison sentence was reduced to 18 months on appeal and asset confiscation proceedings are stalled pending a further appeal. It is significant that the judge in the case stated: “The law is clear as to where the interests of conservation lie. These are serious offences. An immediate custodial sentence is usually appropriate to mark their gravity and the need for deterrence.”⁶⁶

Even so, some fellow aviculturalists supported Sissen⁶⁷ and his sentence reduction on appeal was allowed because of his age (61) and previous good character.

Recent research into wildlife crime in the UK, conducted for DEFRA⁶⁸, sought the views of more than 100 representatives from a range of enforcement, statutory and campaigning groups. They were asked about the penalties available under the relevant legislation, and how they were applied in sentencing. Most respondents felt that the available penalties did not adequately reflect the seriousness of wildlife crime and 72 per cent felt that the sentences applied by the courts failed to use these penalties to the full. Many also stressed a mismatch between the penalties available and those actually imposed on offenders. Typical comments included:

⁶⁴ A seizure is an instance of seizing a consignment of goods (whether passenger luggage, postal packets or commercial shipments).

⁶⁵ Source: HM C&E.

⁶⁶ At paragraph 51 of the judgment in *R v Sissen* [2000] All ER (D) 2193, 8 December 2000, Court of Appeal.

⁶⁷ See, for instance: Gould N (2001): Editorial. *International Zoo News*, 48/6 (311). September.

<www.zoonews.ws/IZN/311/IZN-311.html>

⁶⁸ Roberts, et al: *supra*.

“[Sentencers] rarely use existing powers to the full. They are frequently far too lenient – fails to act as a deterrent.”

“A key failing of enforcement is that you can’t get it to happen. The legislation is weak or unintelligible. Public interest is often interpreted as ‘humans have more rights than animals’ and it’s hard to get the Crown Prosecution Service to follow up.”

“The chances of being caught are remote – they don’t stop.”

“[Wildlife crime has] become more attractive... more money-involved, very little risk of apprehension.”

Another issue to emerge from this DEFRA research reflected the notion of a vicious circle discussed above: one respondent commented that “unless the penalties are realistic, the police will not put in the resources”. This indicates that enforcement of the law is also shaped by issues of politics and resources.

Although there is currently little reliable research on patterns, networks and markets for the illegal wildlife trade, there is a perception that it is becoming increasingly organised and lucrative⁶⁹. It is clear that for those most engaged with combating it, the enforcement and penalties imposed are not seen to fit the seriousness of the crime.

While the illegal wildlife trade undoubtedly yields rich rewards for the criminals who engage in it, the threat it poses cannot be assessed only in financial terms; environmental impacts – the threat to biodiversity and the sustainability of endangered species – must also be taken into account. The most damaging long-term consequences of the trade are non-financial, because it is impossible to put a monetary value on a lost species. Steering policy-makers to tackle this issue will entail a strategic push. This proactive approach would fit with the rationale of the precautionary principle, which states that a lack of evidence or scientific consensus should not prevent action being taken to protect the environment⁷⁰.

⁶⁹ Roberts, et al: *supra*.

⁷⁰ Hardstaff P (2000): *The Precautionary Principle, Trade and the WTO*. Discussion paper for the European Commission consultation on trade and sustainable development. Sandy, Bedfordshire: Royal Society for the Protection of Birds.

6 Prosecution policy and sentencing guidelines

The lack of sentencing guidelines, or of a published enforcement strategy, are matters of further concern in relation to the UK's response to the illegal wildlife trade. By contrast, a definitive guide to enforcement has been published by the Environment Agency in relation to the prosecution of environmental pollution offences. This serves to demonstrate to potential offenders that they will be subject to enforcement proceedings. At present, there is no coherent statement of intent in relation to the prosecution of those involved in the illegal wildlife trade – there is a need for one, and a need for it to be robustly pursued.

The strategic vision of the CITES Secretariat⁷¹ is of the judiciary needing to appreciate “the social and economic significance of conservation threats posed by illegal trade in wild fauna and flora”. This suggests a need for awareness-raising measures and guidance on appropriate sentencing. DEFRA's biennial report on the UK's implementation of CITES⁷² refers to efforts being made in this direction through the Partnership for Action Against Wildlife Crime (PAW), and several training and information initiatives are reported, although none refers specifically to the judiciary.

For some time, the UK Environmental Law Association has called for sentencing guidelines to be given to the courts in relation to penalties in cases of environmental crime. The association's point is to establish a structured approach to sentencing that takes account of the aggravating factors, if any, that are a component of the offence. These might include, for example, the use of violence, levels of organisation, previous convictions, and the value and impact of the offence. These sentencing principles, and their effective dissemination, could usefully apply to the illegal wildlife trade.

So far, there has been little authoritative guidance in relation to the illegal wildlife trade. DEFRA reflects that magistrates are required to take account of general principles in exercising their discretion as to the penalty that should be imposed⁷³. While DEFRA considers that enforcement action could be enhanced and that awareness-raising is important, it is of the general view that “the maximum penalties for CITES [sic] offences are adequate, in the context of the penalties available for other offences committed in the UK”⁷⁴. This might be a sustainable argument if the penalties available were appropriately utilised, but they are clearly not. It is worth noting that no custodial sentence under COTES has been imposed by a magistrates court.

In terms of precedents to guide sentencing practice, most cases do not get far enough into the criminal justice system for there to be any precedent value, and thus any comments that might be made by a judge carry little weight. The nearest to anything that represents definitive guidance on the issue came from obiter statements made by Mr Justice Ouseley in the *Sissen*⁷⁵ appeal.

Considering the appropriateness of the initial 2½ year sentence imposed upon the defendant, Mr Justice Ouseley observed: “There is nothing wrong in principle with a sentence of 30 months for

⁷¹ CITES Secretariat (2000): *Strategic Vision Through 2005*. Geneva: CITES/UNEP.

⁷² CITES 2000 *UK Implementation Report*, DEFRA (Sept 2001).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *R v Sissen* [2000] All ER (D) 2193, 8 December 2000, Court of Appeal. See case studies in Annex 1.

an offence such as this. This was, as the sentencing judge put it, a devious and elaborate scheme to smuggle birds into the country, including critically endangered species.”⁷⁶

A more recent case involving the importing of caviar⁷⁷ made a passing reference to the conservation aspect, although the case did not involve a criminal prosecution. The claimant was seeking to have a retrospective import permit granted where caviar of a particular species not originally ordered was substituted (by the exporter) for that of another species, without proper CITES documentation. The claimant had tried to argue that the confiscation, for destruction, of the caviar in the circumstances was disproportionate and breached his human rights. This was held not to be so, on either point, and Mr Justice Forbes, dismissing the claimant’s case, referred to a “fundamental public interest in the preservation of endangered species”. While this concern is undoubtedly welcome, it does not really provide any predictable outcome for wildlife trade offences. It may send a message to those involved in the legal trade that the rules will be stringently applied, but what is required is clear guidance that is unequivocal in its condemnation of wildlife crime.

In relation to drugs offences⁷⁸, burglary and the like, the courts are obliged to consider and apply sentencing guidelines issued by the Court of Appeal: thus there is limited certainty concerning any penalty handed down.⁷⁹ Such guidelines raise the profile of the offences in question in the minds of the judiciary and aim to counter the criticism that there is inconsistency of approach or a basic misunderstanding on the part of judges or (more commonly) magistrates, of the seriousness of the offences before the court.

SENTENCING GUIDELINES AND THE CASE OF ENVIRONMENTAL CRIME

Under the Crime and Disorder Act 1998⁸⁰ the Home Secretary may ask the Sentencing Advisory Panel to propose sentencing guidelines to the Court of Appeal. This was done in July 1999 in respect of environmental offences. The basis of this direction was the feeling of a “growing public awareness of the threat to the environment from pollution and the inappropriate disposal of waste”⁸¹. The Panel’s advice acknowledged the fact that judges and magistrates often had little experience of these types of offences, reflecting the generally low prosecution rate. The advice seeks to:

- clarify the sentencing principles;
- help achieve consistency in the courts in assessing seriousness (taking account of aggravating and mitigating factors); and
- provide advice on the choice and level of appropriate sentence.

⁷⁶ *Ibid.*

⁷⁷ *R (on the application of White) v Secretary of State for the Environment, Food Rural Affairs and another* - High Court 30 November 2002 (unreported), see ELM 14 [2001] 1 p14.

⁷⁸ See, for example, Sentencing Advisory Panel press notice SAP 5/00 (14 June 2000) in relation to opium offences.

⁷⁹ “*The guidelines of the court of appeal are a part of case law and the lower courts must follow them when passing sentence.*” Sentencing advisory panel, accessed via www.sentencing-advisory-panel.gov.uk.

⁸⁰ Specifically s81(3).

⁸¹ *Environmental Offences: The Panel’s Advice to the Court of Appeal*, Foreword by Prof. M. Wasik, Chair, Sentencing Advisory Panel.

Uppermost in the mind of the Panel appeared to be the concept that certain defined and limited environmental offences “affect the general quality of life”.⁸² Additionally, harm to fauna and flora, or the risk of harm to human or animal health, were identified as factors caused by the commission of these offences. There was a perception that the penalties imposed by the courts had been too low: respondents to a consultation on the issue tied this in with the Panel’s view that there was limited experience in dealing with these offences. Particular mention was made of the preparation of cases by the prosecution and defence to ensure that all relevant factors in relation to the gravity of the offence and the defendant’s circumstances were brought before the court, reflecting a view expressed by previous survey respondents that better training in wildlife prosecutions was necessary.

Those relevant factors include aggravating factors, which increase the seriousness of the offences. These are considered under two headings:

- those affecting the culpability of the defendant; and
- those relating to the potential extent of any damage.

Below is a (non-exhaustive) sample of certain general aggravating factors which may influence sentencing, and which could also be applied to illegal wildlife traders:

Culpability

- deliberate or reckless, rather than merely careless, breach of the law;
- financial motive;
- a knowledge of the specific risks involved; and
- attitude towards the environmental authorities was dismissive or obstructive.

Extent of damage

- human health, animal health or flora were adversely affected, especially where a protected species was affected, or where a site designated for nature conservation was affected;
- animal rehabilitation operations were required; and
- other lawful activities were significantly interfered with or prevented.

Additionally, previous convictions for similar offences would be seen as factors that would increase the sentence. Although little is known about the extent of wildlife offenders’ criminal histories, there is a perception that many of the most serious are repeat offenders.⁸³ Although there may be no direct comparison between environmental and wildlife trade offences, the available sentencing guidelines provided for the former give a degree of certainty, in rationale as well as effect, that is quite obviously missing in relation to wildlife trade offences. Certainly the view of those involved with environmental law is that sentences more adequately reflect the perceived seriousness of the crimes in a way that they did not before. Similar arguments could usefully be applied in the context of combating the illegal wildlife trade.

⁸² Specifically, air or water pollution, illegal abstraction of water, illegal deposit recovery or disposal of waste, and failing to meet packing regulation imposed obligations.

⁸³ Roberts, et al, *supra*.

7 Conclusions

Several themes have emerged from this report, many of which militate against the effective protection of wildlife from illegal trade. International law, through the operation of CITES, provides a framework which, although not perfect, sets out clear priorities and a rationale for protecting the world's threatened species. But it is essential that individual countries reflect the principles of CITES in their own laws and practice. Education and training has a key role, so the development of effective guidelines and awareness-raising programmes for those charged with administering the law should be a priority.

Where the enforcement of law to combat the illegal wildlife trade is concerned, the challenges in the UK context are considerable. Effective action would involve:

- an appropriate, workable and effective legal framework;
- the judicial and political will to enforce the laws within that framework;
- appropriate use of all available legal sanctions;
- adequate resourcing of those agencies responsible for enforcement;
- environmental vigilance, in terms of monitoring and updating CITES and EU listings in line with the precautionary principle⁸⁴; and
- heightened public awareness of the consequences of the illegal wildlife trade, which would underpin informed support for the full enforcement of the law; and
- environmental vigilance at all times.

There are varying and inconsistent approaches to the law and the imposition of penalties for illegal wildlife trade. This clearly raises questions concerning any deterrent value. The fear of a severe penalty is not sufficient on its own to deter; the potential offender must realise that there is a certainty of detection and arrest, and that the authorities will prosecute. At present, this is unlikely in the UK. The risk that wildlife offenders take is minimal, and the rewards extremely high, when balanced against the chance of getting caught and the likely penalty that would be imposed.

The penalty is not just an external matter or an occupational hazard – it signifies society's disapproval. Levels of tolerance can and do shift, as we have seen in attitudes to domestic violence and drink driving. Change may be equally possible in relation to wildlife trade. At present, many feel that the penalties imposed in most cases do not adequately signal the seriousness and impact of offences that threaten the survival of species.

Recognition of the scale and impact of illegal trade as far as the UK is concerned is not explicit in the courts' treatment of the majority of offenders: with a handful of high profile exceptions, the higher available penalties are not utilised. But change is possible: similar criticisms when levelled at environmental prosecutions served to push forward the enforcement agenda and yielded modest returns. There is now a perception that environmental crimes are more than just regulatory offences and deserve to be treated in a manner that reflects social harm in environmental damage. The same thinking should be applied to the protection of wildlife from illegal trade, so that levels of penalty reflect its potentially irrevocable effects in terms of the loss of species and threat to biodiversity.

⁸⁴ As attempted in relation to the basking shark at COP11.

8 Recommendations

As a result of the issues raised in this report, we recommend that the following actions be taken by the appropriate agencies:

- 1 Seek to reduce the disparity between the maximum penalties available under CEMA (seven years imprisonment) and COTES (two years imprisonment) by raising the maximum penalty for COTES offences to five years. This will send a more consistent message to all concerned about the seriousness of the illegal wildlife trade.
- 2 Make arrestable offences consistent across UK wildlife legislation so that the powers of arrest under the Wildlife and Countryside Act 1981 (WCA) for domestic wildlife offences are mirrored in COTES trade offences. This could effectively be accomplished by implementing recommendation 1.
- 3 Give judges and magistrates additional information and training about the wider environmental, social, economic and cultural impacts of wildlife trade offences.
- 4 Encourage judges and magistrates to use the full range of appropriate penalties available to them in order to provide a just, consistent and deterrent response to serious wildlife trade offences.
- 5 In order to provide even greater consistency and effectiveness, key frontline enforcement agencies should work towards developing shared prosecution principles and criteria concerning offences committed under COTES and CEMA.
- 6 Consider developing and/or adapting the sentencing guidelines for environmental offences in the context of combating the illegal wildlife trade⁸⁵.
- 7 Promote deterrence of illegal wildlife trade through:
 - increasing the risks of detection through increased resources directed to enforcement;
 - encouraging speedier processing of cases;
 - seeking to reduce rewards of the illicit trade through disrupting markets for illegally traded goods – particularly by raising awareness of the threat the illegal wildlife trade poses to endangered species; and
 - lowering the threshold of tolerance of the illegal trade, through education and campaigning (see also 8 below).
- 8 Consider introducing a due diligence scheme and code of conduct for the legal wildlife trade, drawing legal traders into more effective partnerships with regulators, and enhancing their role in intelligence-gathering to challenge illegal traders.

⁸⁵ While these two types of offences clearly differ, there are significant areas of shared concern – particularly in relation to environmental and wildlife trade crimes impact on ‘quality of life’, in addition to low penalties imposed by the courts and overall lack of experience and knowledge on such cases

Annex 1: Case studies

	Case	Year	Statute	Nature of Offence	Value	Max. Penalty	Actual Penalty
UK	Raymond Humphrey and others – Thai birds of prey	2002	CEMA 1979	Smuggling endangered birds and other animals	£35,000	Unlimited fine/ 7 years jail	6½ years jail; lesser penalties for accomplices
	Harold Sissen – Lear’s macaws	2000	CEMA 1979	Illegally importing three Lear’s Macaws	£150,000	Unlimited fine/ 7 years jail	18 months jail
	Robert Brastock – Hyacinth macaws	2000	COTES 1997	Illegally selling imported birds	£23,000	Unlimited fine/ 2 years jail	None – absolute discharge
	Robert Sclare – “Get Stuffed”	2000	COTES 1997 and the Forgery Act	Forging CITES permits and illegally trading taxidermy specimens	Not known	Unlimited fine/ 2 years jail (COTES), 10 years jail (Forgery Act)	6 months jail (3 suspended)
	The Renaissance Corporation – Shahtoosh shawls	2000	COTES 1997	Stocking 138 shawls	£353,000	£5,000 fine/3 months jail (magistrates court)	£1,500 fine
	Wilfred Bull and others – rhino horns	1998	COTES 1985	Attempting to sell over 120 horns	£2.88m	Unlimited fine/ 2 years jail	15 months jail; lesser penalties for accomplices
US	US Caviar & Caviar – Trafficking caviar	2001	Endangered Species Act; Lacey Act (<i>Multiple felony counts</i>)	Five-year caviar smuggling operation	\$7.5m (approx. £4.9m)	<i>Per count:</i> \$500,000 for the company; \$250,000 fine/ 5 years jail for individuals	\$10.4m (approx. £6.8m) fine for the company, and prison sentences for individuals
	Navarang Exports – Shahtoosh shawls	2000	Endangered Species Act	Smuggling 308 shawls.	\$246,400 (approx. £160,000)	\$500,000 for the company; \$25,000/ 6 months jail for individuals	Company fined \$5,000 (approx. £3,250); one individual fined \$10,000 (approx. £6,500)
	Stephen Cook – Tarantulas	1994	Lacey Act	Smuggling 600 tarantulas from Mexico	\$20,000	\$250,000 fine/ 5 years jail	105 months and fine of \$7,500 (approx. £4,800)
	Tony Silva – South American parrots	1994	Endangered Species Act; Lacey Act	Smuggling endangered parrots and macaws	\$1.3m (approx. £845,000)	\$250,000 fine/ 5 years jail	82 months jail and fine of \$100,000 (approx. £65,000) plus 200 hours community service; lesser penalties for co-conspirators
EU	Spain – Shahtoosh shawls	1999	Not known	Stocking nine shahtoosh shawls	Not known	Not known	2,025,000 pesetas (approx. £7,000)
	Netherlands – Chinese medicines	1998	Not known	Stocking medicines containing derivatives of CITES-listed species	Not known – eight sea container loads	Not known	Total fines of HFL40,000 (approx. £13,000)

UK CASE STUDIES

Raymond Humphrey and others – Thai birds of prey⁸⁶

An investigation beginning in 1997 eventually led to the prosecution of three people for trafficking in endangered birds of prey from Thailand to the UK. After a 13-week trial, the most severe penalties yet imposed for wildlife offences in the UK were handed down at Isleworth Crown Court in January 2002.

Raymond Humphrey, a bird-keeper from Norfolk, together with Wayne Standley and Peera Jungthirapanich (a Thai student studying in the UK) collaborated to capture and smuggle rare birds of prey from Thailand. Birds were packed in plastic tubes inside suitcases, and many did not survive their journeys. When arrested at Heathrow, the accused had 23 birds in a single consignment. Subsequent searches at Humphrey's home revealed a further 54 birds of prey, seven Slow Loris, five tortoises and a Golden Cheeked Gibbon, as well as other dead birds and a dead Slow Loris in his freezer.

Humphrey was found guilty on all 22 counts brought against him, and was sentenced to 6½ years jail. Peera Jungthirapanich pleaded guilty, and was sentenced to 22 months, half of which was suspended. Wayne Standley was acquitted. Humphrey had 45 previous convictions for a range of offences including burglary and assault, and had previously stolen a golden eagle from a bird-keeper in the UK. During the trial Humphrey assaulted a witness and threatened a police officer.

Harold Sissen – Lear's macaws⁸⁷

Sissen was a well-known figure in the bird collecting field, admired by some as a contributor to conservation through captive breeding, but disliked by others for a cavalier attitude to collecting and keeping birds. In 1998, customs officers raided his premises, seizing three Lear's macaws and six blue-headed macaws that had been smuggled into the UK in the previous 18 months. The Lear's macaw is a CITES Appendix I (EC Annex A) listed species, and is judged to be critically endangered with an estimated 150 birds remaining in the wild at the time of the offence. A breeding pair of Lear's macaws was estimated to be worth over £50,000 on the black market. More than 140 other parrots were seized during the raid.

The trial took place at Newcastle Crown Court in April 2000, with Sissen being prosecuted under CEMA. He was sentenced to 2½ years imprisonment and ordered to pay costs of £5,000. It was clear from the evidence that Sissen had travelled to eastern Europe with the intention of obtaining the birds and smuggling them into the UK in the full knowledge that this was illegal. An appeal, based on technical arguments regarding the validity and applicability of EC wildlife trade regulation, was rejected, although the sentence was reduced to 18 months because of his age (he was 61).

An asset confiscation hearing in September 2001 made an order in the sum of £150,000, reflecting the amount Sissen is estimated to have made from his illegal trafficking activities. An appeal has been lodged against this order, and at the time of going to press, further proceedings are pending in respect of the forfeited birds.

⁸⁶ Pitt, R (2002): Some recent cases. Paper given at DEFRA Wildlife Inspectors Annual Seminar, Bristol, January.

⁸⁷ Information from Partnership for Action Against Wildlife Crime website:

www.defra.gov.uk/paw/prosecutions/default.htm (accessed 30 March 2002); Pitt, R (2002): *supra*.

Robert Brastock – Hyacinth macaws and golden conures⁸⁸

In 1998, Brastock imported under licence six hyacinth macaws and two golden conures, ostensibly for a UK-based captive breeding programme. There are thought to be only around 3,000 of the CITES Appendix I (EC Annex A) listed hyacinth macaw surviving in the wild, but as Brastock had an established bird breeding business, the licences were issued. In 1999 it was discovered that one bird had been sold to a bird-keeper not mentioned in the original licence application. An investigation by Avon and Somerset Police revealed that six of the eight birds had been sold without licence, netting around £23,000 for Brastock. He was charged under COTES, but claimed to have found the licensing requirements confusing, despite his previous experience in bird breeding. However, after hearing a witness speak in support of the defence, the judge accepted this explanation, giving Brastock an absolute discharge – the only penalty being forfeiture of the birds in question and the payment of £330 costs.

Robert Sclare – “Get Stuffed”⁸⁹

In December 2000, Robert Sclare was sentenced to six months imprisonment at Snaresbrook Crown Court. The owner of the Get Stuffed taxidermy shop in London, Sclare was charged under the Forgery Act for forging permits, and under COTES for buying and selling endangered animals.

Following tip-offs received through the WWF *Eyes and Ears* hotline, Sclare’s shop was raided in 1998 and 65 taxidermy specimens were seized. Items discovered included a gorilla skull, a female tiger with a litter of cubs, and vultures, sparrowhawks and snowy owls. In court, it was argued that some specimens were antique and that there was no evidence to show that any specimens were taken from the wild. These claims were dismissed, and the judge stressed that the offence was essentially one of permit fraud. He said: “These are very serious offences – so serious in fact that nothing but a custodial sentence will suffice”. The sentence imposed was just three months imprisonment.

The Renaissance Corporation – Shahtoosh shawls⁹⁰

Shahtoosh, a fine textured wool, is produced from the fleece of the Tibetan antelope, a critically endangered species listed on CITES Appendix I (EC Annex A). The illegal harvest is not sustainable as the animals must be killed to obtain the fleece.

In 1997, the Metropolitan Police seized 138 shahtoosh shawls from the Renaissance Corporation in London, with a value of £353,000. It is estimated that up to 1,000 antelope would be required to provide the wool for these shawls, some of which measured over six metres in length and were valued at over £12,000. Recent enforcement efforts in China have seen many poachers arrested and hundreds of dead antelope confiscated.

The Renaissance Corporation pleaded guilty and was fined just £1,500. The shawls were forfeited.

⁸⁸ See RSPB *Legal Eagle* 27, January 2001, p5.

⁸⁹ Details from Partnership for Action Against Wildlife Crime website: www.defra.gov.uk/paw/prosecutions/default.htm (accessed 30 March 2002); *TRAFFIC Bulletin* 18(3), December 2000; BBC News, 2 December 2000: http://news.bbc.co.uk/1/hi/english/uk/newsid_1050000/1050813.stm

⁹⁰ Details from <http://ens.lycos.com/ens/apr2000/2000L-04-13-03.html>>

Wilfred Bull and others – Rhino horn⁹¹

In 1998, Bull and three others pleaded guilty to conspiring to sell rhino horn. A collection of more than 120 horns – estimated to be worth £2.88m and equivalent to about one per cent of the remaining wild population of rhinos – was acquired in 1985 prior to the UK prohibiting trade in rhino horn. Later in 1985, Bull was imprisoned for life for murdering his wife, but in 1996, while still in prison, he instigated the sale of the horns through his girlfriend Carol Scotchford-Hughes, who in turn recruited two further accomplices, David Eley and Elaine Arscott. To sell the horns was now illegal, and an investigation by the RSPCA and the south-east Regional Crime Squad resulted in Bull's three accomplices being detained and charged under COTES.

Bull was sentenced to 15 months imprisonment to run concurrently with his life sentence. Scotchford-Hughes was given 120 hours community service, while Eley was jailed for nine months. The horns were forfeited on the assumption they were acquired illegally. A later appeal accepted there was no proof the horns had not been acquired legally, so the forfeiture was revoked and the horns returned⁹².

US CASE STUDIES

US Caviar & Caviar – Trafficking caviar⁹³

In 2001, US Caviar & Caviar – one of the US's largest caviar importers – was fined US\$10.4 million (approx. £6.8 million) for a five-year smuggling operation that resulted in the illegal importation of caviar with a market value of approximately US\$7.5 million (£4.9 million).

The sturgeon roe was smuggled out of the Caspian Sea area and routed through the United Arab Emirates (UAE), where a US-owned caviar export firm provided a legitimate front for the operation. Counterfeit labels printed by US Caviar & Caviar were applied to the caviar tins in the UAE, hiding their original labels. They were then exported to the US as legitimate Russian produce. In 1998 alone at least nine tons (US) of caviar were imported by this route, compared with a total of 143 tons in 1999.

The fine represents the largest financial penalty yet imposed in a US court for wildlife trafficking offences. In addition, the company's former owner received a 41-month jail term, a sales manager was sent to prison for 21 months, and the president of the UAE export firm was imprisoned for 15 months.

Navarang Exports – Shahtoosh shawls⁹⁴

In July 2000, the first criminal prosecution for shahtoosh offences in the US saw Navarang Exports of Mumbai, India, together with former senior officers of Cocoon North America, plead guilty to smuggling shawls. The crimes, committed in 1994 and 1995, involved smuggling 308 shawls from India to the US, with Cocoon acting as the US agent and in some cases re-exporting items to France.

⁹¹ *TRAFFIC Bulletin* 17(2) and 17(3), 1999. Plus BBC News 11 March 1998

http://news6.thdo.bbc.co.uk/hi/english/uk/newsid_64000/64714.stm

⁹² This decision was made under the COTES 1985 regulations – the 1997 amendments would not allow this defence.

⁹³ Details from US Fish & Wildlife Service Press Release 21 February 2001.

⁹⁴ Details from: Environmental News Service E-Wire Press Release: [http://ens.lycos.com/e-](http://ens.lycos.com/e-wire/July00/07July0001.html)

[wire/July00/07July0001.html](http://ens.lycos.com/e-wire/July00/07July0001.html); US Department of Justice News Release 7 July 2000; Earth Island Institute News Release 8 March 2001 www.earthisland.org/news/new_news.cfm?newsID=42.

The US Fish and Wildlife Service estimated that at least 1,000 Tibetan antelope were needed to produce the shawls. Their retail value was estimated at US\$246,400 (£160,000), and sales included a charity event in New York City where approximately US\$100,000 (£65,000) worth of shawls were auctioned.

The sentences included five years probation and a US\$5,000 fine (£3,250) for Navarang Exports, and each of the Cocoon executives received one year probation and were required to pay US\$32,000 (£21,000) apiece in customs duties. One executive was further fined US\$10,000 (£6,500). The US authorities felt these penalties were disappointing, amounting to little more than incidental business expenses for the companies involved.

Stephen Cook – Tarantulas⁹⁵

Stephen Cook, a reptile and spider dealer of Long Beach, California, was convicted in 1994 on five counts of smuggling and selling approximately 600 Mexican red-kneed tarantulas in violation of the Lacey Act. These tarantulas are protected as an endangered species under Mexican law, international law (CITES Appendix II), and the US Endangered Species Act. Cook travelled to Colima, Mexico – the only place where this species naturally occurs – and bought the spiders for US\$3 each (£2). He resold them in the US for between US\$30 and US\$45 each (£20-£30). Prosecution under the Lacey Act allowed the US court to admit the relevant Mexican law as the underlying violation, so enabling a felony conviction.

In court, expert witnesses testified as to the conservation impact of the crime and that the venom of this species was being researched for possible medicinal benefits.

In November 1994, Cook was sentenced to 105 months (8 years and 9 months) imprisonment, plus a fine of US\$7,500 (£4,800). This represents the most severe prison sentence imposed to date for wildlife offences in the US.

Tony Silva – South American parrots⁹⁶

Tony Silva had established an international reputation as a scientist and parrot breeder, authoring numerous books and articles on aviculture and avian conservation. In 1994, after a four-year investigation, Silva, together with his mother and two others, was charged with conspiring to illegally import more than US\$1.3m-worth (£845,000) of protected parrots and macaws into the US from South America. The conspirators included a Paraguayan national. The imports included at least 186 specimens of the CITES Appendix I (EC Annex A) listed hyacinth macaw – valued at between US\$5,000 and US\$12,000 each (£3,200-£7,800) – and the highly endangered crimson-bellied conure and vinaceous Amazon.

Silva was convicted and sentenced to 82 months (nearly seven years) in jail, and 200 hours community service to be performed during a three-year supervised release programme to follow the prison term. He was also fined US\$100,000. Silva's mother was sentenced to 27 months imprisonment, plus a one-year supervised release and 200 hours community service. The judge said: "The real victims of these crimes were the birds themselves, and our children and future generations who may never have the opportunity to see any of these rare birds".

⁹⁵ Details from CITES Update no. 28, US Fish and Wildlife Service; USFWS Personal Communication, 28 March 2002.

⁹⁶ Details from Favre, D, 1998: The Risk of Extinction: a risk analysis of the Endangered Species Act as compared to CITES. *New York University Environmental Law Journal, Symposium on the Endangered Species Act*. www.nyu.edu/pages/elj/issueArchive/vol6/2/6nyuelj341.html; US Fish & Wildlife Service News Releases 13 December 1994 and 20 November 1996.

EUROPEAN UNION CASE STUDIES

Spain – Shahtoosh shawls⁹⁷

In December 1999, following investigations by TRAFFIC Europe, the Spanish authorities seized nine shahtoosh shawls from a fashion boutique in Marbella. The owner of the shop was prosecuted, and fined 2,025,000 pesetas (£7,000).

Netherlands – Traditional east Asian medicines⁹⁸

In 1998, the Chinese Medical Centre of Utrecht was found guilty of selling animal and plant parts and packages claiming to contain ingredients from CITES-listed species. Investigations by TRAFFIC led to a raid in 1996 where eight sea container loads of traditional east Asian medicines were seized, including packaged medicines produced in China stating that they included derivatives of tiger bone, rhino horn, bear gall bladder, musk deer, saiga antelope and pangolin. Forensic tests substantiated many of these statements. In addition, a wide range of plant and animal parts were seized such as hawksbill turtle shell and dried orchid roots.

The court sentenced the company's owner to three months in prison and a fine of HFL10,000 (£3,200), and the company itself was fined HFL80,000 (£26,000) of which HFL50,000 (£16,250) was suspended.

⁹⁷ Details from *TRAFFIC Bulletin* 18(3), 2000, p125.

⁹⁸ Details from *TRAFFIC Bulletin* 17(2), 1998, p87.

Annex 2: The UK legal framework

(A) COTES OFFENCES AND PENALTIES

The COTES regulations provide for the enforcement of the EC Regulations that apply to the trade in endangered species. These in turn not only implement CITES in EC member states, but also offer stronger provisions. COTES provides for a range of criminal offences relating to the requirements of the EC Regulations.

COTES offences relate to:

- the making of false statements or the furnishing of false information in order to obtain a permit or certificate (Regulation 3);
- knowingly misusing permits or certificates;
- the contravention of any condition or requirement of a permit or certificate (Regulation 6);
- the movement or housing of an Annex A specimen covered by a certificate without prior authorisation (Regulation 7); and
- the purchase, sale or advertising of specimens in Annex A, or specimens listed in Annex B, that have been imported or acquired unlawfully (Regulation 8).

With the exception of knowingly misusing permits or certificates, offences under COTES do not require proof of any criminal intent on the part of the offender. In theory, this makes COTES offences simpler to prosecute, but could be at least part of the reason why sentences are so low.

Additionally, provision is made for the seizure⁹⁹ by a police officer of items relating to the offence and the forfeiture¹⁰⁰ of the specimen and items used to commit the offence. A further requirement¹⁰¹ enables HM C&E to detain a specimen by virtue of powers under CEMA until an importer or exporter of (or person possessing or having control of) a specimen can prove that the specimen's import or export was not or is not unlawful by virtue of the EC implementing regulation. If this proof cannot be provided, the specimen will be liable to forfeiture under CEMA¹⁰².

The penalties under COTES are the same for all offences, in that they provide for the possibility of either a summary (magistrates court) or indictable (Crown Court) trial. Respectively, the penalties are a term of imprisonment for up to three months and/or a £5,000 fine; and a maximum term of two years imprisonment and/or the imposition of an unlimited fine.

(B) CEMA 1979 OFFENCES AND PENALTIES

The Customs and Excise Management Act 1979 (CEMA) sets out offences relating to the import and export of goods. Where imports or exports are subject to restriction, the Act provides for offences that may be committed if such restrictions are not complied with. Additionally, the

⁹⁹ Regulation 10.

¹⁰⁰ Regulation 12. (by order of the court if the defendant is found guilty)

¹⁰¹ Regulation.5. (see also note 4 below)

¹⁰² s.139 CEMA by either a police officer or customs officer. A person has three months within which to challenge such a seizure, and if this is done must prove, on a balance of probabilities, that the item was not subject to be forfeited under CEMA provisions.

goods involved can be liable to forfeiture¹⁰³. In the case of wildlife, CEMA provides two avenues for punishing offenders. Penalties may be imposed for importing goods that are subject to restriction or prohibition, provided that the *person had the intent to evade the restriction or prohibition*¹⁰⁴. Otherwise, and more commonly, sections 170 (1) and (2) CEMA can be utilised¹⁰⁵.

Both sections are also concerned with goods that are regulated and thus subject to restriction or prohibition. In the case of wildlife, this could include a particular specimen or derivative that is regulated by virtue of the EC Regulations.

Section 170 (1) – The offence is made out if:

- a person knowingly acquires possession or knowingly has any dealing with any goods which have been imported contrary to a prohibition or restriction under any enactment;
- the person is proved to have done so with the intent to evade the prohibition or restriction.

Section 170 (2) – The offence is made out if:

- a person is, in relation to any goods, in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any prohibition or restriction in force under any enactment.

In relation to exporting, the offences are set out in Section 68 and provide for the forfeiture of goods that have been attempted to be exported, should the offence be complete:

Section 68 (1) – The offence is made out if:

- a person exports goods or brings them to the UK to export, and that export would be contrary to a restriction in an enactment in force and applies to the exporter, intending exporter and even agents.

Section 68 (2) – The offence is made out if:

- a person is knowingly involved in the export or attempted export of goods contrary to a restriction, with intent to evade that restriction.

In both situations the criminal burden of proof beyond reasonable doubt must be satisfied. This relates to the fact that the offender was *knowingly* involved with *intent* to evade. There is the accompanying need to prove the offender's intent: if this cannot be done, no prosecution could succeed. Mere proof of the commission of the act – for example the import or the export – would not suffice as the offender's state of mind (intent) must be proved. This is why the seizure figures for goods, which can be seized regardless of intent, and the actual prosecution figures may be seen to differ.

All CEMA offences can be summary or indictable offences. In the case of a summary conviction, a defendant may be subject to a maximum of six month imprisonment and/or a fine of £1,000 or three times the value of the goods, whichever is the greater. The penalties are greater on indictment, attracting a term of imprisonment for up to seven years and/or an unlimited fine.

¹⁰³ s49 CEMA 1979.

¹⁰⁴ s50.

¹⁰⁵ s170(6) further provides for forfeiture if a person is found guilty under these provisions.

STOP ILLEGAL WILDLIFE TRADE

WWF'S WILDLIFE TRADE CAMPAIGN IN PARTNERSHIP WITH TRAFFIC

Throughout the world, hundreds of millions of plants and animals are traded each year – something which impacts directly on the survival of many species in their natural environments. Of great concern is the fact that the UK has become a worldwide centre for this multi-billion pound trade, a quarter of which is estimated to be illegal. While trade in some wildlife is well regulated, some endangered species are targeted by the illegal trade.

One of the main problems in the UK is that you could be arrested for poaching pheasants – but not for buying or selling tigers. WWF-UK's Wildlife Trade Campaign, in partnership with TRAFFIC, will seek to change current legislation by calling for effective deterrents against offenders and providing guidance for the judiciary that will help stop the illegal wildlife trade and make sure the punishment fits the crime. We are:

- calling for the maximum sentence for illegal wildlife trade in the UK to be increased from two to five years imprisonment, which will make wildlife crime an arrestable offence; and
- lobbying the Home Office to ask for sentencing guidelines to be issued to magistrates and judges on the appropriate penalties for wildlife crime, to ensure that the penalties act as a deterrent.

The Wildlife Trade Campaign's mission is to restore the balance between humans and nature, and ensure that people's use of wildlife is managed carefully, so that it threatens neither the wildlife nor the natural resources upon which communities depend.

TRAFFIC

TRAFFIC, the wildlife trade monitoring network, works to ensure that trade in wild plants and animals is not a threat to the conservation of nature. It works in cooperation with the Secretariat of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

TRAFFIC is a joint programme of WWF and IUCN The World Conservation Union.



The mission of WWF – the global environment network – is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature, by:

- conserving the world's biological diversity
- ensuring that the use of renewable resources is sustainable
- promoting the reduction of pollution and wasteful consumption

Taking action for a living planet

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