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**Kobe and QMUL Symposium
on International Law**

**“Diversity of Transnational
Criminal Justice”**

**Environmental Crime in
International Law**

- Criminalization of environmental crime is included in **3 conventions:**
- **The Convention on International Trade of Endangered 1973 Species of Wild Fauna and Flora (CITES);**
- **1972/1973, The Convention on the Prevention of Pollution from Ships (MARPOL); and**
- **1989 The Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal (Basel Convention).**
- The EU is not a party to some of these Conventions (the MARPOL;) will be a party on the basis of the basis of an enabling amendment (the CITES); and a party (the Basel Convention).
- All of them are **global Multilateral Environmental Agreements (MEAs)**

- CITES penalizes trade in, or possession of, specimens, or both; and to provide for the confiscation or return to the State of export of specimens.
- MARPOL is regulates and criminalises pollution from vessels.
- The BASEL Convention introduced control over the transboundary movement of hazardous and other wastes., The Parties are obliged to adopt appropriate measures to minimize the generation of hazardous and other wastes and ensure adequate disposal facilities within the generating State. The Convention states that the Parties “consider” illegal traffic in hazardous wastes or other wastes as criminal and requires each Party to take appropriate legal, administrative and other measures to prevent and punish such conducts

- Frequently the **EU** goes beyond the international regulation such as in the case of the MARPOL where it had gone further than the requirement of the IMO after oil spillages such as in the cases of Erika and Prestige accidents.
- These Conventions are considered to be very effective, even **a success story**. However, there is a pending issue with **compliance**, notwithstanding that some of these Conventions (such the CITES and the Basel Convention) have instituted special bodies to monitor compliance. There are also States that avoid imposing criminal penalties. **However, it may be said the criminal penalties under the MARPOL are frequently imposed.**

- **CITES** aims at ensuring that international trade in specimens of wild animals and plants does not threaten the survival of the species in the wild and accords varying degrees of protection to more than thirty-four thousand species of animals and plants. CITES provides for the following penalties: to penalize trade in, or possession of, specimens, or both; and to provide for the confiscation or return to the State of export of specimens



- **MARPOL 73/78** is the main international Convention regulating pollution from vessels. The MARPOL Convention is one of the international legal responses that have been adopted after the occurrence of severe accidental releases of oil and other substances from ships.
- As to the punishment of “any violations of the requirements of the Convention”, **Article 4 provides a double system of national prohibitions and sanctions.** First, violations are to be prohibited and sanctions to be established under the law of the Administration of the ship concerned, wherever the violation occurs; and, secondly, violations are to be prohibited and sanctions established under the law of the Party within whose jurisdiction they occur.



- These MEAs rely on their State parties to enact domestic legislation to sanction targeted environmentally harmful actions through administrative and criminal laws and to develop the domestic institutional system to combat environmental crimes, such as environmental police forces specialized in the protection of the environment and the judiciary. The European Union and its Member States as parties of most of the MEAs have added value to this process of enforcement of environmental criminal law through the adoption of the EU legal instruments that constitute the pillars for the harmonization of domestic criminal laws in order to protect the environment, as in the case of the **Directive 2008/99/EC on the protection of the environment through criminal law and the Directive 2009/123/EC, amending Directive 2005/35/EC on ship source pollution and on the introduction of penalties for infringements.**

- **The BASEL Convention** seeks to provide enhanced control over the transboundary movement of hazardous and other wastes, so that it may act as an incentive for **environmentally sound management (ESM)** and reduce the frequency of such movements. The Parties are obliged to adopt appropriate measures to minimize the generation of hazardous and other wastes and ensure adequate disposal facilities within the generating State. Such measures are intended to ultimately reduce the transboundary movement of wastes. **The Convention states that the Parties “consider” illegal traffic in hazardous wastes or other wastes as criminal and requires each Party to take appropriate legal, administrative and other measures to prevent and punish such conducts.**



- Criminal provisions of these agreements constitute “an ‘indirect’ criminal law emanating from international mandates of criminal sanctions for the violation of certain environmental norms” , however, they are the source of obligations for the States Parties and have to be implemented in domestic legislation. The international origin of these rules explains their difficulties in taking root in the domestic legal systems, where on most occasions criminal laws are just ancillary to relatively new administrative laws protecting the environment

- The practice of these agreements shows how frequently systems for enforcing international law have failed to keep up with companies that operate transnationally, and how businesses – cruise lines, oil companies, etc. – have been able to take full advantage of legal uncertainties and jurisdictional loopholes. For these companies, activities damaging the environment such as operational discharges of oil or sewage or transporting waste to developing countries, are profitable and are done to save money and increase their competitive advantage over other companies complying with international and domestic rules. Organised crime is also a big problem for the enforcement of these agreements, since criminal networks can misuse their systems of permits and authorizations in order to legalise illegal products, and forge them to circumvent the measures adopted by international institutions and States parties to control poaching and smuggling.

- **The CITES** requires that a permit or certificate is obtained for each consignment of specimens and that an export permit is considered valid only for six months from the date it was granted. CITES regulates trade not only between Parties but also between Parties and non-Parties. The criteria for trading with non-Parties have been adopted by the ninth COP and provide a very strict regulation under which the Parties cannot accept permits or certificate issued by a non-Party unless they respect the requirements of the Convention . The import-permitting requirement applies in fact even to non-Parties that must comply with the conventional provisions on export, providing less incentive for non-participation to the Convention.

- CITES allows parties to present a reservation with regard to any species included in the three Appendices. Reservations must be specific as to the species that they cover and must be taken at the time a Party deposits its instrument of ratification, acceptance, approval or accession to the Convention. However, there is also the possibility of reservations to amendments to the appendices at the time they are amended. Reasons for taking reservations need to be given although they are normally made by Parties objecting to increased protection for which they have an established trade.
- CITES requires that Parties be treated as non-Parties in relation to trade in species on which they have taken reservations

- Art. VIII of CITES provides that:
- “The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include .measures:
 - 1. to penalize trade in, or possession of, such specimens, or both; and
 - 2. to provide for the confiscation or return to the State of export of such specimens”

- It has been reported that “Hong Kong made some 350 prosecutions under its Animal and Plants (Protection of Endangered Species) Ordinance between June 1978 and November 1981, but a fine of approximately US\$ 1.000 was the highest penalty levied because it was the maximum allowed under the Ordinance at that time. Thus, although a trader who had illegally imported 319 cheetah skins into Hong Kong in 1979 was fined the maximum amount, the fine bore no relation to the value of the shipment. However, in 1997 the relevant Hong Kong Ordinance was amended to allow for the imposition of a HK\$5 million fine (approximately US\$640.000) and a term of imprisonment of up to two years. Of course, these represent maximum penalties in Hong Kong. A recent prosecution is more indicative of actual fines imposed in practice and arguably underlines that the imposition of inadequate fines remains an issue. Over three hundred live Indian star tortoises (listed on Appendix II) were found in an unclaimed bag on a flight from Malaysia, leading to the imposition on the offender of a HK\$29.000 fine (approximately US\$3.400) for illegal importation and a HK\$1.000 fine (approximately US\$130) for animal cruelty, together with a two-month suspended prison sentence. There is a growing number of cases in which offenders have been imprisoned. An individual thought to be responsible for widespread criminal activity in wildlife in India was sentenced to five years’ imprisonment in April 2004. This sentence was the harshest then imposed in India under the Wild Life (Protection) Act in 1972. In August 2004, following their conviction for poaching of and trading in the Sumatran tiger, five individuals were imprisoned for six years and also fined 70 million rupiah (approximately US\$7.750). It is thought that in the preceding ten-year period a minimum of sixty tigers were sold by the network to which these five people were connected. Moreover, a smuggler or trader in rare birds was given the then-longest sentence given by a UK court for a wildlife offence of six and a half years after being arrested at Heathrow Airport in July 2000. He was involved in the smuggling of twenty-three Appendix II-listed birds which had been placed in tubes fifteen centimeters in diameter for their flight to Bangkok. Around a quarter of the birds died in the flight. The offender was also found to have been keeping a large number of endangered birds at premises in Norfolk. In China, penalties can be even more severe; in March 2009 a smuggler of saker falcons was sentenced to death, and three accomplices to life imprisonment. There is certainly evidence that some parties will impose both heavy fines and prison terms on offenders; a Canadian in 2008 was sentenced in the US to five years’ imprisonment and fined US\$100.000 for illegally smuggling ivory from Cameroon”.
- A study has noted that low awareness amongst the judiciary is also an exacerbating factor: even EU Member States with legislation allowing for high penalties may find that illegal traders escape heavy fines or imprisonment because prosecutors do not understand the impact that illegal trade can have on species, ecosystems and livelihoods. Since 2000 penalties in the UK have been increased and training workshops to raise awareness amongst the judiciary carried out .
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- Recently, a toolkit dedicated to wildlife and forest offences has been adopted by the International Consortium on Combating Wildlife Crime in order to help the States to comply with these provisions . The CITES Secretariat is a member of the International Consortium on Combating Wildlife Crime , that is the collaborative effort by five inter-governmental organizations (Interpol, United Nations Office on Drugs and Crime (UNODC), the World Bank and the World Customs Organization) working to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks that, on a daily basis, act in defence of natural resources (see further below: international cooperation

- As to ‘sentencing and sanctions’ the toolkit highlights that:
- “wildlife and forest offences are seen by many, including investigators, researchers and, most importantly, perpetrators, as a high-profit, low-risk activity. This is because penalties for wildlife and forest offences are often lenient in relation to the crime committed. Accordingly, countries should take the measures necessary to ensure that the relevant offences [...] are punishable by effective, proportionate and dissuasive criminal penalties. Furthermore, convictions need to be followed by sentences that adequately:
 - - Punish the offender to an extent or in a way that is justified in all circumstances;
 - - Provide conditions that will help the offender to be rehabilitated;
 - - Deter the offender and other persons from committing the same or a similar offence;
 - - Make clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; and
 - - Protect the community from the offender, where necessary.
- In addition, the court, in imposing a penalty for a wildlife or forest offence, may also take into account:
 - - The extent of harm caused or is likely to be caused to the environment (including the natural habitat, species and biodiversity) by the commission of the offence;
 - - The practical measures that could have been taken to prevent, control, abate or mitigate the harm;
 - - The extent to which the person committing the offence had control over the causes that gave rise to the offence and the extent to which he or she could have reasonably foreseen the harm; and
 - - Whether, in committing the offence, the person was complying with orders from an employer or supervisor” .
- As to the principles of sentencing:
- “In determining sentences, the court should be guided by the gravity of the offence, which is determined by the harm caused, and the culpability of the offender. The harm may be reflected in the damage that is caused by the offence to the environment or individual species, plants or animals, in the injuries, loss or other harm caused to individuals, and any detriment, loss or damage caused to local communities or the public at large. The culpability of the offender is generally reflected in his or her mental state at the time the offence was committed. Generally, higher penalties are reserved for those acting intentionally, knowingly or recklessly, while lower penalties (or no punishment) are appropriate for offenders acting negligently or with no fault of their own. The severity of the sentence will be further determined by evidence of mitigating or aggravating circumstances presented to the sentencing judge(s). For example, the commission of an offence for financial gain or on behalf of a criminal organization is a common circumstance that may aggravate a sentence. Recurrent offenders also often face higher penalties. Repeated breaches of the law can also be followed by the “blacklisting” of companies. Another important factor is that the courts tend to be lenient if, in their subjective judgment, they believe that wildlife and forest offences are less serious offences than other types of crime. Some organizations and individuals have recommended the requirement of minimum penalties as a possible way to counter this belief. These suggestions have, however, only very limited support as they may infringe upon the independence of the judiciary and limit the courts’ ability to take into account all relevant circumstances when determining a sentence” .
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- As to ‘sanctions’ the toolkit specifies that:
- “Most convictions for wildlife and forest offences presently result in the confiscation of illegally acquired property and assets, and the payment of fines and damages. Other types of sanctions include warnings, incarceration, territory bans, the deprivation of civic rights, bans on continuing the trade or the occupation in the course of which the offence was committed, licence or permit revocations, restrictions on being in possession of wildlife or forestry that is related to the offence or of specific tools and instrumentalities related to the offence, the publication of the offence, remediation and restoration. In practice, a combination of these sanctions may often be appropriate. Territory bans can be useful, for instance, in denying an offender access to an area or population of species which in turn may prevent illegal harvesting or poaching, and thus also break the illegal trade chain to transit and destination points. Bans on continuing the trade or the occupation in the course of which the offence was committed may equally be an effective means of preventing future violations. The same can be said for the suspension of logging and hunting licences, trade permits and so forth. In determining the appropriate sentence, it is pertinent that courts consider the whole range of sanctions provided for under current laws. Imprisonment should be reserved for the most serious offences. The imposition of sentences involving corporal or capital punishment should be discouraged. Administrative penalties (sanctions) are generally carried out by enforcement agencies, with the possibility of judicial review by aggrieved parties. Civil and criminal penalties usually require judicial involvement and depend upon the law and practice of the particular State. Certain penalties, such as fines, can apply to administrative, civil or criminal contexts” .
- As to ‘restitution, compensation and restoration’:
- “Offenders should, where possible and appropriate, make restitution to victims. The restitution should include the return of property or payment for the harm or loss caused, the reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of right,

- **MARPOL**
- The definition of 'discharge' is broad and covers intentional and unintentional releases from ship, including "any escape, disposal, spilling, leaking, pumping emitting or emptying"; however, it does not include dumping within the meaning of the 1972 London Convention, releases directly arising from exploration and exploitation of seabed mineral resources, or releases for certain scientific research.
- MARPOL 73/78 applies to ships that are entitled to fly the flag of a Party or which operate under the authority of a State and are used only on governmental non-commercial service. **The MARPOL Convention does not apply to any warship, naval auxiliary or other ship owned or operated by a State and used on government non-commercial service. However, the Convention imposed an obligation on these ships to act in a manner consistent with the Convention, as long as it is practicable.**

- With respect to ships of non-parties to the MARPOL Convention, the Parties are to apply such requirements as may be necessary to ensure that no more favourable treatment is given to such ships (Art. 5). Article 5 is the source of some **doctrinal controversy** in so far as they purport to apply to ships flying the flag of non-parties. As an exercise of jurisdiction of the coastal State over foreign ships, these provisions cannot, according to one of the authors, restrict the rights enjoyed by non-Parties under the general international law principle of *pacta tertiis nec nocent nec prosunt*.

- **MARPOL consists of an umbrella convention and 6 Annexes:**
 - Annex I: Prevention of Pollution by Oil;**
 - Annex II: Regulations for the Control of Pollution by Noxious Liquid Substances in Bulk;**
 - Annex III: Regulations for the Prevention of Pollution by Harmful Substances in Packaged Form;**
 - Annex IV: Sewage;**
 - Annex V: Garbage;**
 - Annex VI: The Regulations for the Prevention of Air Pollution from Ships**
- **Under MARPOL States can also establish MARPOL Special Areas and Particularly Sensitive Areas.**

- The enforcement of MARPOL can be done in three different ways:
 - • through ship inspections to ensure that vessels fulfil minimum technical standards;
 - • by monitoring ship compliance with discharge standards;
 - • and by punishing ships violating the standards .
- The main responsibility of inspections of ships is bestowed on the flag State. The MARPOL requires States to conduct inspections or surveys prior to putting the ship into service and when issuing the five year International Oil Pollution Prevention Certificate (IOPP). At minimum a survey must be conducted once every five years. The ship which fails such a survey cannot sail unless it has fulfilled MARPOL standards.
- One particular features of MARPOL is the wide scope of the port State jurisdiction. The PSC officers can board the vessel and inspect the ship's IOPP certificate and other MARPOL certificates. In case of the lack thereof or there are “clear grounds” to believe that the condition of the ship, its equipment or crew does not substantially meet international Convention, the PSC has jurisdiction of conducting the full detailed survey. If the ship, on the other hand has IOPP, the PSC has to treat it as its own and issue a “clean” inspection report to the master of the ship

- As to the punishment of “any violations of the requirements of the Convention”, Article 4 provides a double system of national prohibitions and sanctions. First, violations are to be prohibited and sanctions to be established under the law of the Administration of the ship concerned, wherever the violation occurs (**Art. 4(1)**); and, secondly, violations are to be prohibited and sanctions established under the law of the Party within whose jurisdiction they occur (Art. 4(2)).
- In the event of such a violation within a jurisdiction of any Party of the Convention, according to Article 4(2), this Party can either start proceedings in accordance with its own law or furnish such information and evidence as it may have in possession that violation has occurred to the Administration of the ship concerned (Art. 4 (2a-b)). Article 4(1) further provides that if the Administration of the ship involved in a violation is informed of it is satisfied that sufficient evidence is available to enable proceedings to be brought that Administration shall cause such proceedings as soon as possible in accordance with its law. The Administration has also an obligation of notifying the State Party which reported the violation of the action it had taken . **It may also be noted that ‘any violation’ in Article 4(2) means that it applies to operational and discharge standards, as well as to design and equipment standards of the Convention. Art. 4(4) further states that the penalties applied shall be adequate in severity to discourage violations of the Convention and shall be equally severe irrespective of where the violations occur.**

- The Basel Convention seeks to provide enhanced control over the transboundary movement of hazardous and other wastes, so that it may act as an incentive for environmentally sound management (ESM) and reduce the frequency of such movements . The parties are obliged to adopt appropriate measures to minimize the generation of hazardous and other wastes and ensure adequate disposal facilities within the generating State. Such measures are intended to ultimately reduce the transboundary movement of wastes

- The Basel Convention provides for a broad definition of the term hazardous waste. As it has been reported, “[w]astes’ are defined as “substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law.” A waste is hazardous if it is listed under Annex I, unless it does not possess any of the characteristics enumerated in Annex III, namely flammability, explosivity, toxicity and eco-toxicity. **Wastes that are not covered by this clause can still be considered as hazardous wastes if they are so considered under the national law of the Party of export, import or transit . Radioactive wastes and wastes arising from the normal operation of a ship, which are governed by MARPOL are excluded from its ambit. Annexes I and II list the wastes regulated under the Basel Convention (subject to the criteria mentioned in Annex III); Annexes VIII and IX clarify the specific wastes that can be covered by the Convention. Wastes that belong to any category contained in Annex II that are subject to transboundary movements shall be “other wastes” : such as household wastes and their residuals.** As far as the major actors in the trade are concerned, the Basel convention envisages five natural or legal persons that can be involved in the transport of hazardous wastes. The first is the “generator”, the entity whose activity has produced the wastes or, in cases where the entity is not known, the person who has possession or control over the wastes . The second is the “exporter” who arranges for the export of hazardous wastes and is under the jurisdiction of the exporting State . The “carrier” is the performing carrier , while the “importer” is any person under the jurisdiction of the importing State who imports the hazardous wastes . The final player, the “disposer”, receives the hazardous cargo for disposal . These entities operate in a broad framework where the main drivers are the States of export , import and transit

- The Basel Convention requires the State Parties to “The Basel Convention requires the State Parties to “consider criminal” illegal traffic that includes any transboundary movement of hazardous wastes or other wastes undertaken without compliance with the provisions of the Convention ..It is interesting that the wording of Article 4(3) does not actually impose a clear obligation to make illegal traffic criminal. It simply says that parties “**consider**” it to be criminal
- **Illegal traffic** occurs if the transboundary movement of hazardous wastes is taking place under the following conditions:
 - **without notification pursuant to the provisions of the Convention to all States concerned; without the consent of a State concerned; through consent obtained by falsification, misrepresentation or fraud; when movement does not conform in a material way with the documents; or when movement results in deliberate disposal of hazardous wastes in contravention of the Convention and of general principles of international law.**
- Common methods of illegal traffic include making false declarations, the concealment, mixture or double layering of the materials in a shipment and the mislabelling of individual containers. Such methods seek to misrepresent the actual contents of a said shipment and, because of this the meticulous and thorough scrutiny of national enforcement officers is required to detect cases of illegal traffic . The Secretariat is not mandated to take a unilateral decision to intervene when a case of alleged illegal traffic is brought to its attention. Under Article 16 (1)(i) of the Convention, the Secretariat’s functions include assisting Parties, upon request, in the identification of cases of illegal traffic and to circulate immediately to the Parties concerned any information it has received regarding illegal traffic.

- The Basel Convention is one of the few environmental treaties to define a prohibited activity as “criminal” even though the wording of Article 4(3) does not impose a clear obligation to make illegal traffic criminal, as it simply says that parties “consider” it to be criminal (see also above).
- According to the Secretariat, the fact that illegal traffic is deemed a crime that Parties undertake to prevent and punish says a lot about the international community’s commitment to the environmentally sound management of hazardous and other wastes. Illegal traffic of hazardous waste is unfortunately still very common in all corners of the world .
- **Art. 4 of the Convention states that the Parties “consider” illegal traffic in hazardous wastes or other wastes as criminal and requires each Party to take appropriate legal, administrative and other measures to prevent and punish such conducts:**
- **(3) The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal.**
- **(4) Each Party shall take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention.**
- **Furthermore, the Convention requires that Parties cooperate when dealing with illegal traffic (Art. 9(5)).**
- It has to be noted though that each State has its own, necessarily different, means of investigation, compliance and enforcement and of effecting legislation to define penalties according to its own established framework. The application of national offences and penalties to the various actors involved in a transboundary movement has to be set out in the national legal framework. Similarly, how far the powers of a prosecutor and the jurisdiction of a court can extend to such actors who are physically or legally established in a foreign country is a matter for national legislation to clarify. However, Part VII of the Model National Legislation provides some guidance and contains model provisions on illegal traffic .
- One of the major problems faced by the actors involved in the fight against illegal traffic is to prove the existence of a “waste” that is “hazardous”. Under the Basel Convention, a substance or an object is waste if it is disposed of, intended to be disposed of or if it is required to be disposed of by the provisions of national law. This definition clearly relies on subjective elements that are difficult to assess.

Conclusions

- 1. there is a great difference in criminalisation ecological crime in these 3 MEAs;
- The main feature is that national laws are implementing their provisions, therefore there is a great degree of **subjectivity, which is also present in various definitions, makes criminalization patchy;**
- Criminalization of ecological crimes is a part and parcel of a **holistic approach to enforcement of MEAs** which involves e.g. **Compliance Procedures;**
- **The international cooperation is improving but need closer links.**
- **However, it must be stated that MARPOL and CITES are indeed a success story of environmental law.**