

# A NEW INTERNATIONAL INSTRUMENT AGAINST WILDLIFE TRAFFICKING? AN APPRAISAL OF CURRENT PROPOSALS

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*This article explores the existing international legal framework relating to wildlife trafficking and critically examines proposals to develop a new international instrument to prevent and suppress this crime type. These include suggestions to develop a standalone treaty on the specific topic of wildlife trafficking or broader issues such as wildlife and forest crime or crimes that affect the environment as well as more concrete proposals to draft a new protocol against wildlife trafficking, supplementing the United Nations Convention against Transnational Organized Crime. This article highlights the gaps in the existing system and the challenges in developing a new instrument. It seeks to document the state of the current debates, their strengths and shortcomings, and pave the way for the next steps in enhancing global frameworks to prevent and suppress wildlife trafficking.*

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## I INTRODUCTION

Wildlife trafficking is a complex and multifaceted phenomenon with devastating consequences for endangered species, biodiversity, ecosystems, animal welfare, economic development and human security. The scale of wildlife trafficking and its relationship to transnational organised crime and corruption are well documented in a large and growing body of official reports and scholarly literature.<sup>1</sup> Slowly but noticeably, the problem is recognised by international governments and national governments worldwide<sup>2</sup> and action against wildlife trafficking has been elevated to the global agenda.<sup>3</sup>

The international framework to prevent and suppress wildlife trafficking consisting of various treaties and declarations remains patchy at best.<sup>4</sup> There is no single international legal instrument addressing, directly or indirectly, this issue.<sup>5</sup> Rather, existing multilateral treaties comprising of several conventions and other agreements that concern some of the environmental and criminal aspects of this phenomenon, focus on environmental protection and conservation, organised crime and corruption and international trade.

Over the past decade, calls to develop a new international instrument on wildlife trafficking have gained some momentum. This is part of growing traction in the international community to strengthen policies and develop practical mechanisms targeting wildlife trafficking as a form of wildlife and forest crime or crimes that affect the environment.<sup>6</sup> This development is exemplified in numerous resolutions, declarations and statements, chief among them United Nations *General Assembly Resolution 71/19* of 21 November 2016, which recognises the threat of environmental crime to global peace, security, biodiversity and the rule

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<sup>1</sup> See, eg, Michelle Anagnostou and Brent Doberstein, 'Illegal Wildlife Trade and Other Organised Crime: A Scoping Review' (2022) 51 *Ambio* 1615, 1615–17; Tim Wittig, 'IV. Poaching, Wildlife Trafficking and Organised Crime' (2016) 86(1) *Whitehall Papers* 77, 77–8; William D Moreto and Daan P Van Uhm, 'Nested Complex Crime: Assessing the Convergence of Wildlife Trafficking, Organized Crime and Loose Criminal Networks' (2021) 61(5) *British Journal of Criminology* 1334, 1334; United Nations Office on Drugs and Crime, *World Wildlife Crime Report: Trafficking in Protected Species* (Report, 2020) 31–2.

<sup>2</sup> See, eg, John C Cruden and David S Gualtieri, 'Toward a More Coordinated, Integrated Response to Wildlife Trafficking and Other Natural Resource Crime' (2016) 12(1) *University of Pennsylvania Asian Law Review* 23, 24–5; Wittig (n 1) 778.

<sup>3</sup> Angad Keith, 'Hunting for Efficacy: A Critical Evaluation of International Responses to Wildlife Trafficking in the African Great Lakes Region' (2018) 35(5) *Environmental and Planning Law Journal* 542, 542–3; Tanya Wyatt, 'A Comparative Analysis of Wildlife Trafficking in Australia, New Zealand and the United Kingdom' (2016) 2(1) *Journal of Trafficking, Organized Crime and Security* 62, 62.

<sup>4</sup> Amanda Cabrejo le Roux, *Tightening the Net: Toward a Global Legal Framework on Transnational Organized Environmental Crime* (Report, April 2015) 19.

<sup>5</sup> Lorraine Elliott, 'Cooperation on Transnational Environmental Crime: Institutional Complexity Matters' (2017) 26(2) *Review of European Community and International Environmental Law* 107, 110.

<sup>6</sup> See, eg, Christian Nellemann et al (eds), *The Environment Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources* (Report, 2014) 1, 23–4; Daan P van Uhm and Rick CC Nijman, 'The Convergence of Environmental Crime with Other Serious Crimes: Subtypes within the Environmental Crime Continuum' (2022) 19(4) *European Journal of Criminology* 542, 543; Hugh S Wilkins, 'Linking Environment with Peace and Security: Decisions on Sanctions on Illicit Wildlife Trafficking' (2014) 44(3) *Environmental Policy and Law* 277, 277; Olga Bieger and Christian Bueger, 'Poachers and Pirates: Improving Coordination of the Global Response to Wildlife Crime' 2017) 60 (June) *SA Crime Quarterly* 29, 31.

of law.<sup>7</sup> Furthermore, the UN General Assembly resolutions adopted in 2015,<sup>8</sup> 2016,<sup>9</sup> 2017,<sup>10</sup> 2019<sup>11</sup> and 2021<sup>12</sup> are urging member states to tackle wildlife trafficking by taking

decisive steps at the national level to prevent, combat and eradicate the illegal trade in wildlife, on the supply, transit and demand sides, including by strengthening their legislation and regulations necessary for the prevention, investigation, prosecution and appropriate punishment of such illegal trade, as well as by strengthening enforcement and criminal justice responses and to increase the exchange of information and knowledge among national authorities as well as among Member States and international crime authorities ...<sup>13</sup>

The growing attention devoted to wildlife trafficking has called the adequacy of existing international frameworks into question,<sup>14</sup> and has led to calls for a new instrument designed specifically for this crime type. Several experts, international organisations and non-governmental organisations ('NGOs') have developed and discussed several options, some within a broader environmental crime framework.<sup>15</sup> Fundamentally, these proposals maintain that new multilateral mechanisms are needed to tackle wildlife trafficking globally.<sup>16</sup> These proposals range from amendments to existing treaties, chiefly the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('CITES'),<sup>17</sup> to the development of a further protocol supplementing the *United Nations*

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<sup>7</sup> *Cooperation between the United Nations and the International Criminal Police Organization (INTERPOL)*, GA Res 71/19, UN Doc A/RES/71/19 (8 December 2016).

<sup>8</sup> *Tackling Illicit Trafficking in Wildlife*, GA Res 69/314, UN Doc A/RES/69/314 (19 August 2015) 3 [3].

<sup>9</sup> *Tackling Illicit Trafficking in Wildlife*, GA Res 70/301, UN Doc A/RES/70/301 (23 September 2016).

<sup>10</sup> *Tackling Illicit Trafficking in Wildlife*, GA Res 71/326, UN Doc A/RES/71/326 (28 September 2017) 4 [4].

<sup>11</sup> *Tackling Illicit Trafficking in Wildlife*, GA Res 73/343, UN Doc A/RES/73/343 (20 September 2019) 5 [4].

<sup>12</sup> *Tackling Illicit Trafficking in Wildlife*, GA Res 75/311, UN Doc A/RES/75/311 (26 July 2021) 6 [5].

<sup>13</sup> *Ibid.*

<sup>14</sup> Keith (n 3) 542; Hennie Strydom, 'Transnational Organised Crime and the Illegal Trade in Endangered Species of Wild Fauna and Flora' in Pierre Hauck and Sven Peterke (eds), *International Law and Transnational Organised Crime* (Oxford University Press, 2016) 264, 272–3; INTERPOL, *Global Wildlife Enforcement: Strengthening Law Enforcement Cooperation against Wildlife Crime* (Report, March 2018) 1–2; *The Future We Want*, GA Res 66/288, UN Doc A/RES/66/288 (11 September 2012) annex 39–40 [200]–[204]; United Nations Office on Drugs and Crime ('UNODC'), *World Wildlife Crime Report: Trafficking in Protected Species* (Report, May 2016) 23.

<sup>15</sup> See especially Alexandre Chitov, 'International Law and Criminalizing Illegal Trade in Endangered Species (from the Far Eastern Perspective)' (2019) 22(2) *Asia Pacific Journal of Environmental Law* 207, 207–8; Tanya Wyatt, *Is CITES Protecting Wildlife? Assessing Implementation and Compliance* (Routledge, 2021) 127–9; Cabrejo le Roux (n 4) 8–9; Fulvia Staiano, 'Wildlife Trafficking under the Lens of International Law: A Threat to the Peace or a Serious Transnational Crime?' (2020) 9(2) *Cambridge International Law Journal* 137, 139.

<sup>16</sup> See, eg, Cabrejo le Roux (n 4) 6–9. See generally Staiano (n 15) 137; Anneoos Wiersema, 'CITES and the Whole Chain Approach to Combating Illegal Wildlife Trade' (2017) 20(3–4) *Journal of International Wildlife Law and Policy* 207, 218.

<sup>17</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) ('CITES').

*Convention against Transnational Organized Crime*<sup>18</sup> and the creation of a new standalone convention on wildlife trafficking.<sup>19</sup>

This article critically explores the background of these discussions, reviews the existing international legal instruments and examines the various proposals and models for a new international instrument to prevent and suppress wildlife trafficking. The focus here is exclusively on global instruments; not further considered are mechanisms at regional, national and sub-national levels.

The term ‘wildlife trafficking’ (synonymous with the term ‘trafficking in fauna and flora’) is presently not defined in any international instrument but used widely to refer to the import, export, re-export, introduction from the sea, transport, sale, transfer, receipt, movement, acquisition and possession of wild species and specimens of fauna and flora in contravention of national and international laws.<sup>20</sup> It also covers associated offences, such as document fraud (including fraudulent marking and stamping), money laundering, tax evasion and corruption.<sup>21</sup> For the purposes of this article, ‘wildlife’ generally refers to wild animals collectively, as opposed to, for instance, domestic animals, pets, farm animals and animals in captivity. ‘Fauna and flora’ refer to any animal or plant; some sources also include marine species. Wildlife trafficking is a subset of the broader category of ‘wildlife and forest crime’ which some organisations use to describe any ‘illegal exploitation of the world’s wild fauna and flora’.<sup>22</sup> The term ‘crimes that affect the environment’ has recently emerged in UN circles to capture wildlife and forest crime along with other crimes such as the illegal contamination of air, land and water systems, the illegal dumping and trade of waste and the smuggling of ozone-depleting substances, to name but a few.<sup>23</sup>

Part II of this article provides an overview of the existing international legal framework and its main instruments, provisions and principles relevant to wildlife trafficking. Part III highlights the gaps in the current framework and the need for new tools to prevent and suppress wildlife trafficking at the international level. Part IV outlines and examines the existing proposals for a new international instrument. Part V evaluates these models and flags the way forward for the criminalisation of wildlife trafficking at the international level. Part VI provides concluding remarks and reflections on the political will and support for the implementation of a new international instrument.

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<sup>18</sup> *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003).

<sup>19</sup> See, eg, Cabrejo le Roux (n 4) 6–8; Chitov (n 15) 207; Staiano (n 15) 149–150.

<sup>20</sup> See, eg, Elliott (n 5) 110; John E Scanlon, *Global Initiative to End Wildlife Crime: Form and Content of a Possible Protocol on the Illicit Trafficking of Wildlife* (Report, 16 October 2020) 5 <<https://endwildlifecrime.org/wp-content/uploads/2023/04/Possible-UNTOC-Protocol-Eng.pdf>>, archived at <<https://perma.cc/2KMQ-JQ8K>>.

<sup>21</sup> Elliott (n 5) 110.

<sup>22</sup> ‘Wildlife and Forest Crime: Overview’, *United Nations: Office on Drugs and Crime* (Web Page) archived at <<https://web.archive.org/web/20220404040349/https://www.unodc.org/unodc/en/wildlife-and-forest-crime/overview.html>>, archived at <<https://perma.cc/HF8Y-X8CL>>.

<sup>23</sup> Conference of the Parties to the United Nations Convention against Transnational Organized Crime Resolution, *Preventing and Combating Crimes that Affect the Environment Falling within the Scope of the United Nations Convention against Transnational Organised Crime*, 10<sup>th</sup> sess, UN Doc CTOC/COP/2020/L.9/Rev.1 (16 October 2020).

## II CURRENT INTERNATIONAL FRAMEWORK

The current international legal framework pertaining to wildlife trafficking is fragmented and limited in scope.<sup>24</sup> There is no single international agreement targeting this crime type, nor is there any instrument containing express provisions concerning the criminalisation of wildlife trafficking in national law.<sup>25</sup> The existing international instruments have been described as a ‘disorganised patchwork rather than a comprehensive system’.<sup>26</sup> Relevant obligations and principles can be found in several international instruments in the fields of environmental law, trade law and criminal law. They address wildlife trafficking-related issues in the context of biodiversity, protection of endangered species, organised crime and corruption and international trade.

### A *Convention on International Trade in Endangered Species of Wild Fauna and Flora*

*CITES* is the principal international legal instrument for regulating and restricting international trade in endangered species.<sup>27</sup> Its overarching objective is ‘to protect vulnerable and endangered species of wild fauna and flora from over-exploitation caused or exacerbated by international trade’.<sup>28</sup> *CITES* operates through a permit or ‘licensing’ system which is based upon whether a species or subspecies is listed in one of the three Appendices to the Convention.<sup>29</sup> Article II of *CITES* requires that states parties do not engage in trade of specimens of species included under Appendix I, II, or III except in accordance with the provisions of the Convention which contain the relevant permit requirements.<sup>30</sup>

It is only in recent years that scholars have focused on the role of *CITES* in combating wildlife trafficking and the requirement of penalisation and prohibition of trade in contravention of its provisions.<sup>31</sup> *CITES* contains no requirement to criminalise trafficking in endangered species of wild fauna and flora. While art VIII of the Convention requires states parties to take ‘appropriate measures’ to prohibit and penalise trade in contravention of its provisions, there is no obligation

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<sup>24</sup> Yunbo Jiao, Pichamon Yeophantong and Tien Ming Lee, ‘Strengthening International Legal Cooperation to Combat the Illegal Wildlife Trade Between Southeast Asia and China’ (2021) 9 *Frontiers in Ecology and Evolution* 1, 1–2; Ricardo Jorge Lopes, Juliana Machado Ferreira and Nadia Moraes-Barros, ‘Bolder Steps to Fight Global Wildlife Illegal Trade’ (2018) 33(1) *Conservation Biology* 7, 7–8; Wilkins (n 6) 277; Biegus and Bueger (n 6) 31.

<sup>25</sup> Chitov (n 15) 209; Elliott (n 5) 110.

<sup>26</sup> Cabrejo le Roux (n 4) 19.

<sup>27</sup> *CITES* (n 17).

<sup>28</sup> Madeleine Pitman, ‘The Convention on International Trade in Endangered Species of Wild Flora and Fauna: A Critical Analysis’ in Gian Ege, Andreas Schloenhardt and Christian Schwarzenegger (eds), *Wildlife Trafficking: The Illicit Trade in Wildlife, Animal Parts and Derivatives* (Carl Grossman, 2020) 149, 152.

<sup>29</sup> *Ibid.*

<sup>30</sup> Pitman (n 28) 164.

<sup>31</sup> Geoffrey Wandesforde-Smith, ‘Looking for Law in All the Wrong Places? Dying Elephants, Evolving Treaties, and Empty Threats’ (2016) 19(4) *Journal of International Wildlife Law and Policy* 365, 367; Rosalind Reeve, ‘Wildlife Trade, Sanctions and Compliance: Lessons from the *CITES* Regime’ (2006) 82(5) *International Affairs (Royal Institute of International Affairs)* 881, 895. See generally Peter Sand, ‘Whither *CITES*? The Evolution of a Treaty Regime in the Borderland of Trade and Environment’ (1997) 8(1) *European Journal of International Law* 29, 29–30.

to establish criminal offences or impose criminal penalties.<sup>32</sup> There are widespread inconsistencies in the implementation of *CITES* in domestic legal systems with penalties ranging from minor administrative sanctions and fines to life imprisonment.<sup>33</sup> Inadequate enforcement further frustrates efforts to protect trafficked species.<sup>34</sup>

The administrative organs of *CITES*, particularly its Secretariat and the Conference of the Parties, have focused significant attention on combatting wildlife trafficking and continue to direct increasing resources to the effort. This is reflected in resolutions by the Conference of the Parties,<sup>35</sup> as well as the current draft *CITES Strategic Vision: 2021–2030*, which recognises

that effective enforcement is key to combatting the threat illegal and unsustainable trade poses to wild flora and fauna. Parties recognize the important role of *CITES* in global efforts to combat poaching and trafficking of species ... to address both demand and supply of illegal wildlife products, and to tackle organized crime and poor governance, including corruption.<sup>36</sup>

There has been a considerable increase in cooperation between *CITES* and the administrative bodies of other treaties, UN agencies and NGOs to improve and coordinate responses to wildlife trafficking.<sup>37</sup>

Notwithstanding these efforts, the role and effectiveness of *CITES* in combatting wildlife trafficking remains limited. *CITES* is ‘by no means an international criminal law instrument, and was not developed or drafted for the international enforcement or prosecution of wildlife crime’.<sup>38</sup> The United Nations Office on Drugs and Crime (‘UNODC’) expressly noted that *CITES* ‘cannot credibly be extended into an agreement to suppress and control every aspect of illegal trade in wild fauna and flora’.<sup>39</sup> Most of the world’s fauna and flora is not covered by *CITES* and several widely trafficked species have become critically endangered or extinct despite their inclusion in the *CITES* Appendix system. As a trade instrument first and foremost, *CITES* will always have a limited ability to protect endangered species from criminal activity.

<sup>32</sup> Pitman (n 28) 170–1. See also Elliott (n 5) 112; Lydia Slobodian, ‘Addressing Transnational Wildlife Crime through a Protocol to the *UN Convention against Transnational Organized Crime: A Scoping Paper*’ (Research Paper, International Union for Conservation of Nature Environmental Law Centre and World Wildlife Foundation, 13 October 2014) 7.

<sup>33</sup> Cabrejo le Roux (n 4) 36–7. See also Staiano (n 15) 149; Ragnhild Aslaug Sollund, *The Crimes of Wildlife Trafficking: Issues of Justice, Legality and Morality* (Routledge, 2019) 203, 209.

<sup>34</sup> Kimberley Graham, ‘International Intent and Domestic Application of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): The Case of the Ocelot (Leopardus pardalis)*’ (2017) 20(3–4) *Journal of International Wildlife Law and Policy* 253, 288.

<sup>35</sup> Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, *CITES and Livelihoods*, Doc No Resolution Conf. 16.6 (Rev CoP18), 3 [7]; Conference of the Parties to the Convention on International Trade in Endangered Species of Fauna and Flora, *Compliance and Enforcement*, Doc No Resolution Conf. 11.3 (Rev CoP18), 5–6 [10], 8–9 [15], 10 [20].

<sup>36</sup> Conference of the Parties to the Convention on International Trade in Endangered Species, *CITES Strategic Vision: 2021–2030*, Doc No Resolution Conf. 18.3, 5.

<sup>37</sup> These efforts are noted by, inter alia, *Tackling Illicit Trafficking in Wildlife*, UN Doc A/RES/69/314 (n 8); *Tackling Illicit Trafficking in Wildlife*, UN Doc A/RES/71/326 (n 10).

<sup>38</sup> Pitman (n 28) 161. See also United Nations Office on Drugs and Crime, *Wildlife and Forest Crime Analytic Toolkit* (Report, 2012) 15.

<sup>39</sup> *Wildlife and Forest Crime Analytic Toolkit* (n 38) 15.

## B *Multilateral Environmental Agreements*

Beyond *CITES*, several multilateral environmental agreements concerning biological diversity, environmental protection and conservation contain provisions relevant to wildlife trafficking.<sup>40</sup> The three most important instruments are the *Convention on Biological Diversity*,<sup>41</sup> which addresses all aspects of biodiversity including the conservation of biological diversity and sustainable use of biological resources, the *Convention Concerning the Protection of the World Cultural and Natural Heritage* ('*World Heritage Convention*'),<sup>42</sup> 'which protects cultural and natural heritage of outstanding universal value'<sup>43</sup> and the *Convention on the Conservation of Migratory Species of Wild Animals* ('*CMS*').<sup>44</sup> The *Ramsar Convention on Wetlands of International Importance Especially as the Wildfowl Habitat*<sup>45</sup> is another international instrument governing threats to biological diversity, but it is only concerned with the protection of wetlands with a focus on waterfowl habitat and its provisions are not relevant to combating wildlife trafficking across state borders.<sup>46</sup>

### 1 *Convention on the Conservation of Migratory Species of Wild Animals*

The *CMS* was adopted in 1979 in response to widespread concerns about threats to migratory species. It recognises that 'states must be the protectors of migratory species that live within or pass through their national jurisdictions', and 'aims to conserve terrestrial, marine and avian migratory species throughout their ranges'.<sup>47</sup> The species range includes 'all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route'.<sup>48</sup> These areas are referred to as the 'range states' for the migratory species in question.<sup>49</sup>

The *CMS* operates similarly to *CITES* through the listing of threatened species in one of two appendices. Migratory species threatened with extinction throughout all or a substantial part of their migratory range are listed in Appendix I.<sup>50</sup> Migratory species that need or would significantly benefit from international

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<sup>40</sup> Joseph Lelliott, 'International Law Relating to Wildlife Trafficking: An Overview' in Gian Ege, Andreas Schloenhardt and Christian Schwarzenegger (eds), *Wildlife Trafficking: The Illicit Trade in Wildlife, Animal Parts and Derivatives* (Carl Grossman, 2020) 125, 126; Arie Trouwborst et al, 'International Wildlife Law: Understanding and Enhancing Its Role in Conservation' (2017) 67(9) *BioScience* 784, 785.

<sup>41</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

<sup>42</sup> *Convention Concerning the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) ('*World Heritage Convention*').

<sup>43</sup> Lelliott (n 40) 128.

<sup>44</sup> *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) ('*CMS*').

<sup>45</sup> *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975).

<sup>46</sup> David M Ong, 'International Environmental Law Governing Threats to Biological Diversity' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar, 2010) 519, 521.

<sup>47</sup> *Ibid* 532.

<sup>48</sup> *CMS* (n 44) art I(1)(f).

<sup>49</sup> *Ibid* art I(1)(h).

<sup>50</sup> *Ibid* art III(1).

cooperation are listed in app II.<sup>51</sup> For this reason, the Convention encourages range states to conclude agreements.<sup>52</sup> These subsidiary agreements stand separate to *CMS* and ‘are open to all range states of the species’.<sup>53</sup> To date, seven supplementary agreements have been concluded under the Convention, as well as several less formal memoranda of understanding adapted to the requirements of particular regions.<sup>54</sup> While the *CMS* does not contain any specific provisions concerning wildlife trafficking, its operational bodies have been at the centre of cooperative efforts with the administrative branches of other international institutions.<sup>55</sup>

## 2 World Heritage Convention

The *World Heritage Convention* was adopted within the General Conference of the United Nations Educational, Scientific and Cultural Organization (‘UNESCO’) in 1972.<sup>56</sup> The purpose of the Convention is to establish ‘an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis and in accordance with modern scientific methods’.<sup>57</sup> Parties to the Convention may identify cultural and natural properties for protection which are submitted to the World Heritage Committee for consideration and potential inclusion in the *List of World Heritage in Danger*.<sup>58</sup> For a site to be included on this *World Heritage List* it must be of ‘outstanding universal value’.<sup>59</sup> Outstanding universal value is determined according to criteria included in the *Operational Guidelines for the Implementation of the World Heritage Convention*.<sup>60</sup> One relevant consideration (criterion (x)) is whether the site contains important significant natural habitats for threatened species.<sup>61</sup> The fact that a significant number of sites contain endangered plant and animal species, many of which are affected by wildlife trafficking and listed in the *CITES* Appendices, has prompted cooperation between the governing bodies of *CITES*

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<sup>51</sup> Ibid art IV(1).

<sup>52</sup> Ibid art IV(4).

<sup>53</sup> Ong (n 46) 533.

<sup>54</sup> See Convention on the Conservation of Migratory Species of Wild Animals, ‘Agreements’ (Web Page, 2020) <<https://www.cms.int/en/cms-instruments/agreements>>, archived at <<https://perma.cc/4EJ8-P3K8>>; Convention on the Conservation of Migratory Species of Wild Animals, ‘Memoranda of Understanding’ Agreements’ (Web Page, 2020) <<https://www.cms.int/en/cms-instruments/mou>>, archived at <<https://perma.cc/5QLU-2QZB>>.

<sup>55</sup> Lelliott (n 40) 132.

<sup>56</sup> *World Heritage Convention* (n 42) Preamble para 10.

<sup>57</sup> Ibid Preamble para 8.

<sup>58</sup> Ibid art 11(4).

<sup>59</sup> Ibid art 1.

<sup>60</sup> Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage, United Nations Educational, Scientific and Cultural Organization, *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO Doc WHC.21/01 (31 July 2021) (‘*Operational Guidelines*’).

<sup>61</sup> Ibid art 77(x).

and the *World Heritage Convention*.<sup>62</sup> While the *World Heritage Convention* is relevant to combating wildlife trafficking through the protection of certain natural sites and the species, it does not prescribe measures for the protection of threatened species, nor does it contain provisions criminalising acts on protected sites.<sup>63</sup>

### 3 *Convention on Biological Diversity*

The *Convention on Biological Diversity*, opened for signature in 1992, seeks to conserve biological diversity through sustainable use of its components and fair, equitable sharing of the benefits from use of genetic resources.<sup>64</sup> The Convention provides for an ‘overall framework for nature conservation and minimum standards of wildlife protection’<sup>65</sup> and ‘encourages the sustainable use of nature and equitable sharing of the benefits from use of genetic resources’.<sup>66</sup> The Convention covers a broad range of subject matters, including deforestation, access to biotechnology and managing fragile ecosystems.<sup>67</sup> It focuses on the conservation of species *in-situ*<sup>68</sup> and *ex-situ*,<sup>69</sup> with an emphasis on the need to protect species within their natural habitats and thus maintain ecosystem integrity.<sup>70</sup> The generalised wording and ‘qualified nature’ of its provisions ‘defies any imputation of legal obligation, despite the legally binding status of the *Convention* itself’.<sup>71</sup> While the *Convention on Biological Diversity* encourages states parties to implement ‘measures to prevent and combat the trafficking of wildlife’, it does not impose any concrete obligations and ultimately has ‘little practical effect’.<sup>72</sup>

### C *Transnational Criminal Law Instruments*

The *United Nations Convention against Transnational Organized Crime* (‘*UNTOC*’)<sup>73</sup> and the *United Nations Convention against Corruption* (‘*UNCAC*’)<sup>74</sup> do not expressly address wildlife trafficking but include provisions which incidentally apply to certain types of wildlife crime.<sup>75</sup>

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<sup>62</sup> Theresia Angerer, “‘Conservation Through Habitat Protection’”: Die UNESCO Welterbekonvention im Kampf gegen den illegalen internationalen Handel von gefährdeten Tier- und Pflanzenarten’ in Gian Ege, Andreas Schloenhardt and Christian Schwarzenegger (eds), *Wildlife Trafficking: The Illicit Trade in Wildlife, Animal Parts and Derivatives* (Carl Grossmann, 2020) 235–6.

<sup>63</sup> Lelliott (n 40) 129. See also Angerer (n 62) 216–7.

<sup>64</sup> *Convention on Biological Diversity* (n 41) art 1.

<sup>65</sup> Ong (n 46) 536.

<sup>66</sup> Lelliott (n 40) 130.

<sup>67</sup> *Convention on Biological Diversity* (n 41) art 2.

<sup>68</sup> *Ibid* art 8.

<sup>69</sup> *Ibid* art 9.

<sup>70</sup> *Ibid* 8(d).

<sup>71</sup> Ong (n 46) 536–7.

<sup>72</sup> Lelliott (n 40) 130.

<sup>73</sup> *United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003) (‘*UNTOC*’).

<sup>74</sup> *United Nations Convention against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005) (‘*UNCAC*’).

<sup>75</sup> Cabrejo le Roux (n 4) 30.

1 *UN Convention against Transnational Organized Crime*

The purpose of *UNTOC* ‘is to promote cooperation to prevent and combat transnational organized crime more effectively’.<sup>76</sup> Given the scale and patterns of wildlife trafficking, this crime will frequently fall within the definition of an ‘organised criminal group’ under art 2(a) of the *UNTOC*.<sup>77</sup> Furthermore, it has been noted that ‘[m]uch of modern day wildlife crime is also transnational in nature and satisfies Article 3(2) of the Convention’.<sup>78</sup> *UNTOC* is supplemented by three protocols on specific crime-types, including trafficking in persons,<sup>79</sup> smuggling of migrants<sup>80</sup> and the illegal manufacture of and trafficking in firearms, their parts and components and ammunition.<sup>81</sup>

While *UNTOC* explicitly applies to certain offences, including those articulated in the three Protocols and four offences included in *UNTOC* itself (participation in an organised criminal group,<sup>82</sup> money laundering,<sup>83</sup> corruption<sup>84</sup> and obstruction of justice),<sup>85</sup> it also applies more broadly to the prevention, investigation and prosecution of any ‘serious crime’.<sup>86</sup> ‘Serious crime’ is defined in art 2(b) as ‘conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty’.<sup>87</sup> Seriousness thus refers to the statutory penalty for an offence under national law. Conceivably, this can cover wildlife trafficking offences with a statutory penalty of imprisonment of four years or more.<sup>88</sup> Several authors have, however, noted that in most national jurisdictions wildlife trafficking and other forms of environmental crime ‘are [not typically] met by a “deprivation of liberty” (generally, a jail sentence), of at least four years’.<sup>89</sup> In a review of 131 states

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<sup>76</sup> *UNTOC* (n 73) art 1.

<sup>77</sup> *Ibid* art 2(a).

<sup>78</sup> Strydom (n 14) 278.

<sup>79</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2237 UNTS 319 (entered into force 25 December 2003) (*Trafficking in Persons Protocol*).

<sup>80</sup> *Protocol against the Smuggling of Migrants by Land, Sea, and Air Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2241 UNTS 507 (entered into force 28 January 2004) (*Smuggling of Migrants Protocol*).

<sup>81</sup> *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition Supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 2 July 2001, 2326 UNTS 208 (entered into force 3 July 2005) (*Firearms Protocol*).

<sup>82</sup> *UNTOC* (n 73) art 5.

<sup>83</sup> *Ibid* art 6.

<sup>84</sup> *Ibid* art 8.

<sup>85</sup> *Ibid* art 23.

<sup>86</sup> *Ibid* art 3(1).

<sup>87</sup> *Ibid* art 2(b).

<sup>88</sup> Slobodian (n 32) 7; Conference of the Parties to the United Nations Convention against Transnational Organised Crime Resolution (n 23) 3 [4].

<sup>89</sup> Peter Stoett and Delon Alain Omrow, ‘Responses to Transnational Ecoviolence and Crime’ in Peter Stoett and Delon Alain Omrow (eds), *Spheres of Transnational Ecoviolence: Environmental Crime, Human Security and Justice* (Palgrave Macmillan, 2021) 195, 213. See also Slobodian (n 32) 7–10, Rob White, ‘United Nations Initiatives in Preventing Environmental Crime’ in Helmut Kury and Sławomir Redo (eds), *Crime Prevention and Justice in 2030: The UN and the Universal Declaration of Human Rights* (Springer, 2021) 253, 260.

conducted by UNODC in 2015, only 26 per cent punished violations of *CITES* with a penalty of four years or more, with 31 per cent of the states reviewed punished violations through use of fines only.<sup>90</sup> Against this background, in 2022 the UN General Assembly reiterated its ‘call upon Member States to make crimes that affect the environment’ which include wildlife trafficking,

in appropriate cases, serious crimes, as defined in article 2, subparagraph (b), of the *Organized Crime Convention*, in accordance with their national legislation, in order to ensure that, where the offence is transnational in nature and involves an organized criminal group, effective international cooperation can be afforded under the *Convention*.<sup>91</sup>

## 2 *UN Convention against Corruption*

*UNCAC* builds on the design and content of *UNTOC* and incorporates a substantial number of similar provisions. *UNCAC* criminalises corruption and contains a number of separate criminalisation provisions ‘both mandatory and non-mandatory, all of which may be relevant to combatting wildlife crime’.<sup>92</sup> It also contains similar provisions to those in *UNTOC* with respect to ‘cooperation, mutual legal assistance, extradition, technical assistance, and information exchange’.<sup>93</sup>

Although the link between wildlife trafficking and corruption is not explicitly articulated in the Convention, various international materials refer to the role of *UNCAC* in strengthening responses to ‘prohibit, prevent and counter any form of corruption that facilitates illicit trafficking in wildlife and wildlife products’.<sup>94</sup> Thus, *UNCAC* ‘is complementary to broader efforts to combat wildlife crime’, but does not provide a framework for the criminalisation of wildlife trafficking.<sup>95</sup>

### III GAPS IN THE INTERNATIONAL LEGAL FRAMEWORK

There is widespread agreement among scholars and experts in the field of transnational criminal law that the current international legal framework is inadequate in combating wildlife trafficking as a form of environmental crime.<sup>96</sup> In the absence of any international instrument requiring the criminalisation of wildlife trafficking, states must resort to relevant provisions in existing multilateral trade and environmental agreements.<sup>97</sup> Despite some progress made through enhanced cooperation between international organisations, NGOs and other regional and bilateral compliance and enforcement efforts, the gaps in the

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<sup>90</sup> UNODC (n 14) 24. See also Lorraine Elliott, ‘Fighting Transnational Environmental Crime’ (2012) 66(1) *Journal of International Affairs* 87, 95. See also an example in Slobodian (n 32) 15.

<sup>91</sup> *Preventing and Combating Crimes that Affect the Environment*, GA Res 78/185, UN Doc A/RES/76/185 (11 January 2022, adopted 16 December 2021) 6 [6].

<sup>92</sup> Lelliott (n 40) 142.

<sup>93</sup> Slobodian (n 32) 10.

<sup>94</sup> *Tackling Illicit Trafficking in Wildlife*, UN Doc A/RES/69/314 (n 8) 4 [10]. See also *Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in Particular its Technical Cooperation Capacity*, GA Res 68/193, UN Doc A/RES/68/193 (14 February 2014, adopted 18 December 2013) 5.

<sup>95</sup> Lelliott (n 40) 141.

<sup>96</sup> See, eg, Elliott and Schaedla (n 20) 3, 8–11; Nellemann et al (n 6) 4; Slobodian (n 32) 7.

<sup>97</sup> See, eg, Wiersema (n 16) 218.

existing international legal framework impede the implementation of effective criminal justice measures against wildlife trafficking. For this reason, there is ‘[a]n urgent need to reflect on current global legal frameworks’ and consider new solutions ‘to tackle this escalating problem’.<sup>98</sup>

#### A Limitations of Existing Instruments

Critically, existing international legal instruments do not provide clear parameters for the criminalisation of wildlife trafficking.<sup>99</sup> The absence of an internationally accepted definition of ‘wildlife trafficking’ or ‘wildlife crime’ results in inconsistencies at both the international and domestic levels.<sup>100</sup> There is no requirement in any existing international agreement for states parties to enact offences to prevent and punish trafficking in fauna and flora.<sup>101</sup> As a result, criminalisation in national laws is very uneven and, in many places, lacking. This in turn enables criminal elements to ‘exploit the lack of international consensus and the divergence of approaches’ taken by different states.<sup>102</sup> The fragmented international framework, note Christian Nellemann et al, ‘effectively enables criminals to go “forum shopping” and use for example one country to conduct poaching, another to prepare merchandise, and export via a third transit country’.<sup>103</sup>

In the absence of any specific global agreement, *CITES* remains the ‘primary legal mechanism to facilitate action against the threat of wildlife trafficking’.<sup>104</sup> But even when looked at in conjunction with other international countermeasures, the *CITES* regime is widely regarded as insufficient to prevent and suppress wildlife trafficking.<sup>105</sup>

The particular limitation associated with the *CITES* regime for combating wildlife trafficking is the scope of its art VIII. It requires states parties to penalise trade in contravention of the provisions of *CITES* but does not specifically prescribe such violations as criminal or illegal.<sup>106</sup> In the absence of any requirement for criminalisation in cases of *CITES* breaches, notes Ragnhild Sollund, wildlife trafficking will ‘remain low-priority and ... receive lenient punishment’ in many jurisdictions.<sup>107</sup> Lydia Slobodian adds that:

*CITES* is not inherently a criminal law enforcement agreement, and the agreement itself does not provide mechanisms to support specific enforcement operations,

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<sup>98</sup> Cabrejo le Roux (n 4) 6.

<sup>99</sup> Chitov (n 15) 207–9; Elliott and Schaedla (n 20) 3, 9–10; M Jambozorg et al, ‘Challenges Ahead of Codification of Environmental Crime Indices As an International Crime’ (2015) 12 *International Journal of Environmental Science and Technology* 3719, 3725; Gregory L Rose, ‘Time for a Protocol on Transnational Environmental Crime?’ (2021) 51(1–2) *Environmental Policy and Law* 75, 77; Slobodian (n 32) 7.

<sup>100</sup> Rose (n 99) 77.

<sup>101</sup> Ibid.

<sup>102</sup> Christian Nellemann et al, *The Environment Crime Crisis: Threats to Sustainable Development from Illegal Exploitation and Trade in Wildlife and Forest Resources* (United Nations Environment Program and GRID-Arendal, 2016) 25.

<sup>103</sup> Ibid.

<sup>104</sup> Pitman (n 28) 154. See also Strydom (n 14) 270; UNODC (n 38) 15.

<sup>105</sup> Elliott and Schaedla (n 20) 9–10; Jambozorg et al (n 99) 3723, 3725; Cabrejo le Roux (n 4) 6–9.

<sup>106</sup> Elliott and Schaedla (n 20) 9. See also Rose (n 99) 77–8.

<sup>107</sup> Sollund (n 33) 208, 212–15. See also Chitov (n 15) 209–10.

such as intelligence sharing between enforcement agencies or extradition requirements ... Most importantly, *CITES* requirements only apply to species listed in its appendices, not to wildlife in general.<sup>108</sup>

While transnational criminal law conventions such as *UNTOC* and *UNCAC* provide the tools for law enforcement and international cooperation, they are not readily suited to criminalise and combat wildlife trafficking. The Global Initiative against Transnational Organized Crime ('GITOC'), a Geneva-based think-tank, notes that

*UNTOC* is only applicable if national laws reach the *UNTOC* application threshold (which is the establishment by national laws of a criminal penalty of at least four years of imprisonment) otherwise it is not applicable. Unfortunately many countries do not yet criminalize the activities that constitute forms of transnational organized environmental crime, they often prohibit them as illegal or unlawful but it is not the same as legally defining them as criminal. In addition, where the criminal approach does exist, the *UNTOC* application threshold is not always reached.<sup>109</sup>

Several commentators have noted that the strengthened synergies between the *CITES* regime and *UNTOC* along with the cooperation between the *CITES* Secretariat and UNODC (acting as the secretariat of the *UNTOC*), while a positive development, is not a sufficient response to the gaps in the current international legal framework.<sup>110</sup> Peter Stoett and Delon Omrow acknowledge the successes of the Convention in regulating and eradicating illegal international trade in protected specimens, but maintain that 'it simply does not have enough of a mandate for its success to either spread horizontally across sectors or dig into the actual roots of the illegal wildlife trade'.<sup>111</sup>

*CITES* is a trade convention and is constrained to targeting the impacts of the international wildlife trade on the survival of species listed in its Appendices.<sup>112</sup> The *CITES* regime does not capture the causes, circumstances and consequences of wildlife trafficking, the impacts on ecosystems or the animal welfare and public health implications.<sup>113</sup> Furthermore, as *CITES* is only focused on international trade, it is unable to respond to the range of domestic activities involved in the trafficking process.<sup>114</sup> The lack of adequate enforcement and monitoring mechanisms has been identified as a further shortcoming. In the absence of an 'international wildlife law enforcement agency', it is the responsibility of states parties to implement and enforce the Convention. In a recent analysis of *CITES* implementation and compliance, Tanya Wyatt concludes that

the scale of improvement needed and the scope of the biodiversity crisis that is still ongoing despite *CITES*' 45 years of trying to regulate the trade in (some)

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<sup>108</sup> Slobodian (n 32) 8.

<sup>109</sup> Cabrejo le Roux (n 4) 7.

<sup>110</sup> Staiano (n 15) 149.

<sup>111</sup> Stoett and Omrow (n 89) 215.

<sup>112</sup> Ibid; Reeve (n 31) 881–3.

<sup>113</sup> Wyatt (n 15) 126; 'Outline of Possible Amendments to Wildlife Trade Laws', *End Wildlife Crime Amendments* (Web Page) <<https://endwildlifecrime.org/cites-amendments/>>, archived at <<https://perma.cc/DC5Z-VJQ4>>.

<sup>114</sup> Chitov (n 15) 207–10.

endangered species still leads to the question whether *CITES* is ensuring that trade is sustainable? Is *CITES* doing what it set out to do?<sup>115</sup>

### B *Calls for New International Frameworks*

There have been extensive efforts to encourage and support states parties to *CITES* and *UNTOC* to implement appropriate domestic criminal laws against wildlife trafficking.<sup>116</sup> Despite various international resolutions calling for the criminalisation of wildlife trafficking as a serious crime within the scope of *UNTOC*, these ‘bottom-up’<sup>117</sup> efforts have proven inefficient and ineffective.<sup>118</sup> Stoett and Omrow further observe that ‘in most national jurisdictions environmental crime is barely an issue, let alone one that evinces serious detention or sentences’.<sup>119</sup>

Against this background, several scholars maintain that the key to suppressing and eradicating wildlife trafficking ‘is to change the risk equation’ through a global criminalisation approach.<sup>120</sup> The *GITOC* concludes that there is a critical need ‘for a global criminal law approach since legal frameworks applying the environmental law and trade law perspectives are insufficient to combat transnational organized crime’.<sup>121</sup> Alexandre Chitov specifically suggests that the solution to the problems associated with existing international mechanisms for combating and suppressing wildlife trafficking is ‘the establishment of a comprehensive international criminal offence of illegal trade in endangered species’.<sup>122</sup>

### C *Proposed Amendments to the CITES Regime*

As a first small step to address the existing weaknesses, several authors have proposed amendments to *CITES*. Chitov, for instance, maintains that the need for enhanced cooperation between states parties is

difficult to achieve without law harmonization. This is exactly where a reform of the *Convention* is highly desirable. There must be an authoritative recognition of the states’ obligation to criminalize globally not only the trade itself but also the illegal possession of the relevant species and the abuse of administrative powers in permitting the trade.<sup>123</sup>

He proposes a number of essential changes to *CITES* to facilitate the criminalisation of wildlife trafficking as well as the ‘harmonization of law and cooperation between the law enforcement agencies’ of states parties.<sup>124</sup> Chitov

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<sup>115</sup> Wyatt (n 15) 125.

<sup>116</sup> See especially United Nations Office on Drugs and Crime, *Guide on Drafting Legislation to Combat Wildlife Crime* (United Nations, 2018).

<sup>117</sup> Cabrejo le Roux (n 4) 8.

<sup>118</sup> Wyatt (n 15) 125.

<sup>119</sup> Stoett and Omrow (n 89) 213.

<sup>120</sup> Marcus A Asner, ‘To Catch a Wildlife Thief: Strategies and Suggestions for the Fight Against Illegal Wildlife Trafficking’ (2016) 12(1) *University of Pennsylvania Asian Law Review* 1, 14. See also Chitov, (n 15) 210; Nellemann et al (n 6) 23.

<sup>121</sup> Cabrejo le Roux (n 4) 44.

<sup>122</sup> Chitov (n 15) 226. See also Jambozorg et al (n 99) 3725; Slobodian (n 32) 7.

<sup>123</sup> Chitov (n 15) 226.

<sup>124</sup> *Ibid* 223.

maintains that ‘[t]here are several provisions that are still lacking in the text of the agreement’ which are necessary if *CITES* is to remain relevant in the fight against wildlife trafficking.<sup>125</sup> Firstly, Chitov asserts that a new provision, or an additional subsection to the existing art VIII, must be inserted requiring states parties to criminalise wildlife trafficking.<sup>126</sup> In addition,

[t]he second required provision is an obligation of the states to designate a specific governmental body responsible for the investigation of the relevant criminal offences within its borders and for giving assistance to other countries in investigating and prosecuting the crime of illegal trade, exactly in the same way, the *Convention* obliges to designate scientific and management authorities...

The third provision would be that mere possession of a specimen of endangered species (and their derivatives) which have been caught or collected illegally within the country or abroad should be considered a criminal offence, if the possessor knew or should have known of its illegal origin. Finally, an intentional or negligent practice of issuing permits to hunt, collect, possess, or make trade in endangered species which endangers its survival should also be internationally criminalized.<sup>127</sup>

Given the complexity and political difficulties of the amendment process for any international agreement, it is highly unlikely that these amendments will be considered — let alone implemented — in the near future. Chitov acknowledges that the ‘goals of further criminalization [...] and the international harmonization of criminal law’ concerning wildlife trafficking can be achieved without the time consuming and complicated process of significant amendments to text of *CITES*.<sup>128</sup>

#### IV EXISTING PROPOSALS FOR A NEW INTERNATIONAL INSTRUMENT AGAINST WILDLIFE TRAFFICKING

Support for the development of a new international instrument to prevent and punish wildlife trafficking is still in its infancy, but calls for such a step are gaining in momentum and substance.<sup>129</sup> Elizabeth McLellan et al, for instance, assert that wildlife trafficking ‘is perhaps the last form of global organized crime to be addressed seriously’<sup>130</sup> and requires the introduction of a new legally binding instrument to enable the investigation and prosecution of transnational criminal actors across state borders.<sup>131</sup> Several NGOs, officials and experts have stressed the urgent need for a new international instrument in the global fight against wildlife and forest crime. Presently, there are two alternative proposals which warrant further analysis: the implementation of an additional *UNTOC* ‘protocol against wildlife trafficking’ and the introduction of a new, standalone convention.<sup>132</sup>

<sup>125</sup> Ibid.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid 225.

<sup>129</sup> Ibid 226; Jambozorg et al (n 99) 3724; Slobodian (n 32) 7.

<sup>130</sup> Elizabeth McLellan et al, *Illicit Wildlife Trafficking: An Environmental, Economic and Social Issue* (2014) 14 *Perspectives* 2.

<sup>131</sup> Chitov (n 15) 207.

<sup>132</sup> See, eg, Cabrejo le Roux (n 4) 6–9; Chitov (n 15) 225; Staiano (n 15) 150.

## A A New Convention

Several, especially early proposals to reform the existing international legal framework for combating wildlife trafficking advocate the idea of developing a new standalone treaty. Both the GITOC and the Global Initiative to End Wildlife Crime ('GIEWC'), have promoted the ideas of creating a new international convention on wildlife crime.

In 2014, GITOC proposed the adoption of a new global framework 'dedicated to transnational organized environmental crime'.<sup>133</sup> It argued that a 'universal legal framework is needed that would firmly situate environmental crime as a serious, organized and criminal activity, and provide an effective legal architecture for international cooperation and national responses'.<sup>134</sup> Such a framework would allow definitional challenges to be addressed in a unified manner and provide for common law enforcement strategies:<sup>135</sup>

One way to envision the discussion of a global instrument would be to foster agreement on a broad definition of the scope of transnational organized environmental crime and include a list of specific offences in a separate annex, developed and/or maintained by a designated institution. Establishing such a list of criminal offences through a separately negotiated annex could facilitate the detailed definition of offences while making it easier to negotiate the core wildlife crime definition in the body of the protocol. This technical solution might however be politically challenging since states would be reluctant to entrust the definition of criminal offences to a separate organ.<sup>136</sup>

Similarly, GIEWC originally advocated for the creation of a new international instrument to address wildlife trafficking as a form of wildlife crime.<sup>137</sup> Both proposals initially contained few specific details, only noting that a new legal instrument should include measures to suppress as well as prevent wildlife crime.<sup>138</sup>

A small number of scholars have considered the development of a separate convention containing provisions requiring the criminalisation of wildlife trafficking.<sup>139</sup> In this context, Amanda Cabrejo le Roux highlights the relevance of the *Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal* ('*Basel Convention*')<sup>140</sup> as a possible model.<sup>141</sup> This Convention is also the only multilateral environmental agreement which obliges parties to criminalise violations of its provisions.<sup>142</sup>

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<sup>133</sup> Cabrejo le Roux (n 4) 7.

<sup>134</sup> GITOC, *The Global Response to Transnational Organized Environmental Crime: Key Messages and Core Recommendations* (Report, June 2014) iii.

<sup>135</sup> See also Jambozorg et al (n 99) 3725.

<sup>136</sup> Cabrejo le Roux (n 4) 36.

<sup>137</sup> See GIEWC (n 113); see also Wyatt (n 15) 127.

<sup>138</sup> GIEWC (n 113).

<sup>139</sup> Rose (n 100) 76–7; Stoett and Omrow (n 89) 213–5.

<sup>140</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, opened for signature 22 March 1989, 1673 UNTS 126 (entered into force 5 May 1992) ('*Basel Convention*').

<sup>141</sup> Cabrejo le Roux (n 4) 29.

<sup>142</sup> *Basel Convention* (n 140) art 4(4).

## B *A New UNTOC Protocol*

While the voices in support of a separate convention on wildlife trafficking or wildlife crime have been rather scant, there appears to be slightly more momentum and more substance to suggestions to make wildlife trafficking the subject matter of a further protocol supplementing *UNTOC*.<sup>143</sup> Indeed, following stakeholder and expert input, the GIEWC's early calls for the adoption of a separate convention transitioned to the framing of a new *UNTOC* protocol against wildlife trafficking.

### 1 *UNTOC and its Protocols*

The relationship between *UNTOC* and its protocols is the set out in art 37 of the Convention and in art 1 of each of the existing Protocols.<sup>144</sup> While these four instruments were drafted as a group at the same time, *UNTOC* has a special standing: *UNTOC* has been set up to be a 'parent' convention addressing general matters concerning organised crime, while offences, enforcement measures and other issues concerning specific crime types are left to separate, supplementing instruments, referred to as protocols.<sup>145</sup> It is mandatory that states become a party to the Convention before they can become a party to a protocol.<sup>146</sup>

*UNTOC* contains general provisions concerning all forms of organised crime, and, according to art 37(4), the Protocols must be interpreted in light of that.<sup>147</sup> The Protocols, on the other hand, only contain offences and other provisions relating to the specific subject matter of the relevant Protocol.<sup>148</sup> This system is set up to enable the development of further protocols on additional crime types, though in the 20 years since the adoption of the Convention, there have been no concrete initiatives of this sort.<sup>149</sup>

Wildlife trafficking is one of a very small number of crime types that has been discussed in this context. While the Convention already contains a number of provisions that can apply to wildlife trafficking in certain cases, a separate protocol would allow for the establishment of an internationally agreed definition of wildlife trafficking, harmonisation of national criminal offences, and use of *UNTOC* provisions on international cooperation, prevention, training and technical assistance.<sup>150</sup>

### 2 *Initial Proposals*

In 2014, the United Nations Environment Programme ('UNEP') published an analysis of the 'environmental, economic and social impacts of wildlife crime'.<sup>151</sup> This report, authored by experts representing the World Wildlife Fund ('WWF')

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<sup>143</sup> Slobodian (n 32) 3; Gregory Rose and Martin Tsamenyi, *Universalizing Jurisdiction over Marine Living Resources* (Report, October 2013) 15; Stoett and Omrow (n 89) 213.

<sup>144</sup> *UNTOC* (n 73) art 37; *Trafficking in Persons Protocol* (n 79) art 1; *Smuggling of Migrants Protocol* (n 80) art 1; *Firearms Protocol* (n 81) art 1.

<sup>145</sup> *UNTOC* (n 73) art 37(1).

<sup>146</sup> *Ibid* art 37(2), (3).

<sup>147</sup> *Ibid* art 37(4).

<sup>148</sup> UNODC, *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime* (UNODC, 2<sup>nd</sup> ed 2017) [51].

<sup>149</sup> *UNTOC* (n 73) art 37(1).

<sup>150</sup> Slobodian (n 32) 20–1.

<sup>151</sup> McLellan et al (n 130).

and TRAFFIC, identified a number of ‘critical next steps’ to address the gaps in the existing international legal framework.<sup>152</sup> In this context, the report expressly proposes the development of

a protocol concerning “Illicit trade in wildlife, including fisheries and forest crime” under the *UN Convention on Transnational Organized Crime (UNTOC)* in order to provide clarity to Parties concerning definitions of illegal wildlife trade, jurisdiction and steps required at the national level.<sup>153</sup>

The additional *UNTOC* protocol would effectively respond to the gaps in the scope of *CITES* as a multilateral mechanism,<sup>154</sup> but the report does not provide further insights into the rationale and content of such a protocol and how its provisions would relate to those under *UNTOC*. The suggestion, as cited, merely makes reference to definitions, jurisdiction and other steps to be taken at the national level.

In addition to these calls by the WWF and TRAFFIC, further statements in support of the development of a new *UNTOC* protocol have been made by think-tanks including the Hague Institute for Global Justice<sup>155</sup> and GITOC. GITOC considers a ‘sector-specific approach’, ie the implementation of an *UNTOC* protocol specific to trafficking in protected species of fauna and flora, to be too narrow and instead promotes the development of a new *UNTOC* protocol dedicated to environmental crime.<sup>156</sup> This is said to offer a top down ‘global criminal law approach’ to harmonise definitions and facilitate international enforcement mechanisms.<sup>157</sup> In the piece published by The Hague Institute for Global Justice, Stoett further discusses these recommendations by GITOC and concurs that a fourth protocol against environmental crime, encompassing ‘wildlife crime’ or ‘wildlife trafficking’, ‘would be a good place to start the broader pursuit of TECs [transnational environmental crimes] and demand more resource pooling and information sharing amongst member states’.<sup>158</sup>

The broad approach of GITOC may be contrasted with separate recommendations for the development of a supplementary protocol specific to wildlife trafficking made by academic experts. Slobodian and Wyatt, for instance, highlight the advantages of a further *UNTOC* protocol in facilitating harmonised and coordinated domestic criminal responses against wildlife trafficking as a distinct form of environmental crime.<sup>159</sup> They argue that a narrow focus would not only allow for greater technical precision and assist in the harmonisation of offences and penalties at the domestic level, but would also be more likely to garner political support over a broad agreement with greater ramifications for state sovereignty over natural resource exploitation.<sup>160</sup>

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<sup>152</sup> Ibid 8.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Peter J Stoett, ‘Background Paper: The Evolution of and Future Prospects for Transnational Environmental Crime Prevention’ (Background Paper, Hague Institute for Global Justice and Stimson Center, 2015) 9–10.

<sup>156</sup> Cabrejo le Roux (n 4) 8.

<sup>157</sup> Ibid.

<sup>158</sup> Stoett (n 155) 9–10.

<sup>159</sup> Slobodian (n 32) 3–5; Wyatt (n 15) 127–31.

<sup>160</sup> Ibid.

### 3 *Global Initiative to End Wildlife Crime*

Perhaps the most robust proposals for the creation of a further *UNTOC* protocol have been made by former *CITES* Secretary-General John E Scanlon. He is a founding member and current chair of GIEWC which specifically aims to fill the ‘serious gaps in international law’ by advocating for and offering technical support to create a new global agreement on ‘wildlife crime’.<sup>161</sup> Since its establishment in June 2020, GIEWC has sought to build political momentum and set up technical assistance to develop a designated *UNTOC* protocol on the topic of wildlife trafficking. On 16 October 2020, GIEWC released a draft text of a ‘Protocol against the Illicit Trafficking in Specimens of Wild Fauna and Flora’, noting that the proposed Protocol:

would criminalize the intentional illicit trafficking of specimens of wild fauna and flora. States Parties to the Protocol would be agreeing to adopt legislation establishing as a criminal offence the illicit trafficking of any whole or part of a wild animal or plant, whether alive or dead, in violation of an applicable international agreement or any domestic or foreign law, together with a wide range of other matters...

The Protocol would also automatically trigger, and enhance the use of, all of the *UNTOC*’s provisions on international cooperation, mutual legal assistance, joint investigations, special investigative techniques such as controlled deliveries, and law enforcement cooperation provisions in tackling the illicit trafficking of wildlife.<sup>162</sup>

The draft text was developed on the basis of the three existing *UNTOC* protocols, the UNODC *Guide on Drafting Legislation to Combat Wildlife Crime* published in 2018<sup>163</sup> and with reference to various domestic legislative instruments.<sup>164</sup> The draft text includes provisions to both prevent and combat wildlife trafficking. Notably, art 5 of the draft concerns the criminalisation of wildlife trafficking in contravention of existing international and domestic laws relating to the ‘protection, conservation, management, trade or use of wild fauna and flora’.<sup>165</sup> The text of the draft offence is based on provisions under the *Lacey Act*, the principal statute in the United States to prevent and combat wildlife trafficking.<sup>166</sup> It allows for what Nick Fromherz and Erika Lyman describe as

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<sup>161</sup> ‘Addressing Serious gaps in International Law’, *End Wildlife Crime* (Web Page, 2022) <<https://endwildlifecrime.org>>, archived at <<https://perma.cc/69DV-58MT>>; John E Scanlon, ‘New Global Agreement to Address Serious Gaps in Environmental Law’, *International Union for Conservation of Nature* (Web Page, 30 October 2020) <<https://www.iucn.org/news/world-commission-environmental-law/202010/new-global-agreement-address-serious-gaps-environmental-law>>, archived at <<https://perma.cc/2AZF-MQ3F>>. See also Adrian Linacre, ‘Wildlife Crime in Australia’ (2021) 5(3) *Emerging Topics in Life Sciences* 487, 488.

<sup>162</sup> GIEWC (n 20) 1–2.

<sup>163</sup> United Nations Office on Drugs and Crime (n 116).

<sup>164</sup> GIEWC (n 20) 3.

<sup>165</sup> *Ibid* art 5.

<sup>166</sup> *Lacey Act of 1900*, 16 USC § 3372(a)(1).

‘structural legal collaboration’ across source, transit and destination countries.<sup>167</sup> Since its initial release, the draft protocol has gained considerable attention and has been presented at a side event to the tenth session of the Conference of the Parties to the *UNTOC* and at the 14<sup>th</sup> UN Conference on Crime Prevention and Criminal Justice held in Kyoto in 2021.<sup>168</sup>

It is difficult to gauge the attitude of officials towards this proposal, though some States have come out in support of this initiative. For example, in May 2021 Gabon and Costa Rica presented a joint statement at the Opening Plenary of the 13<sup>th</sup> meeting of the UN Commission on Crime Prevention and Criminal Justice in which the presidents of the two nations argue that existing international conventions and *UNTOC* tools are ineffective and call for wildlife trafficking to be elevated to priority status:

Both Costa Rica and Gabon are calling for preventing and combating wildlife crime to be embedded into the international criminal law framework by developing a new global agreement, namely a new agreement on wildlife crime, taking the form of a Fourth Protocol under the *UN Convention Against Transnational Organised Crime (UNTOC)* against the illicit trafficking in wild fauna and flora.<sup>169</sup>

These calls have reignited state support for a further *UNTOC* protocol on wildlife trafficking and appear to be gaining further momentum. In May 2022, the 31st UN Commission on Crime Prevention and Criminal Justice adopted a landmark resolution on ‘Strengthening the international legal framework for international cooperation to prevent and combat illicit trafficking in wildlife’.<sup>170</sup> Significantly, the resolution formally invites states to provide their views on ‘possible responses, including the potential of an additional protocol to the *United Nations Convention against Transnational Organized Crime (UNTOC)*, to address any gaps that may exist in the current international legal framework to prevent and

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<sup>167</sup> Nick Fromherz and Erica Lyman, ‘Learning from Lacey: Structural Legal Collaboration Under the Proposed UNTOC Wildlife Crime Protocol’, *Lewis and Clark Law School Center for Animal Law Studies* (Blog Post, 7 May 2021) <<https://law.lclark.edu/live/news/46028-learning-from-lacey-structural-legal>>, archived at <<https://perma.cc/HR33-STD2>>.

<sup>168</sup> GIEWC, ‘Filling the Gaps in International Wildlife Law: The Global Initiative to End Wildlife Crime to Host an Ancillary Event at the 14th UN Crime Congress’, (Web Page, March 2021) <<https://endwildlifecrime.org/wp-content/uploads/2021/03/EWC-Webpage.pdf>>, archived at <<https://perma.cc/5SPK-ANL8>>.

<sup>169</sup> International Conservation Caucus Foundation Group, ‘Costa Rica and Gabon Call for a New Global Agreement to Prevent and Combat Wildlife Crime’ (Joint Statement, 17 May 2021) <[https://www.internationalconservation.org/publications/others/gabon\\_and\\_costa\\_rica\\_joint\\_statement\\_on-wildlife\\_crime\\_press\\_release\\_and\\_statements.pdf](https://www.internationalconservation.org/publications/others/gabon_and_costa_rica_joint_statement_on-wildlife_crime_press_release_and_statements.pdf)>, archived at <<https://perma.cc/QZ8N-G9JJ>>. See also Lauren Fagan, ‘Gabon, Costa Rica Call for a New UN Protocol on Wildlife Trade’, *Sustainability Times* (Web Page, 17 May 2021) <<https://www.sustainability-times.com/environmental-protection/gabon-costa-rica-call-for-new-un-protocol-on-wildlife-trade/>>, archived at <<https://perma.cc/7BTG-G4M6>>.

<sup>170</sup> United Nations Commission on Crime Prevention and Criminal Justice, *Strengthening the International Legal framework for International Cooperation to Prevent and Combat Illicit Trafficking in Wildlife*, CCPCJ Res 31/1, UN Doc E/CN.15/2022/14 (May 2022).

combat illicit trafficking in wildlife'.<sup>171</sup> This resolution, which was initially submitted by Angola, Kenya and Peru, and co-sponsored by Colombia, Ecuador, Egypt, Gabon, Ghana, Honduras, Malawi, Morocco, Mozambique, Paraguay, the Philippines and the US, has opened a formal avenue for states to further discuss the scope and merits of a new international instrument in the coming year.<sup>172</sup>

## V WEIGHING UP THE OPTIONS

The proposals for a new international instrument against wildlife trafficking, either as a standalone treaty or as a protocol to *UNTOC*, seek to address the gaps in the current international legal framework from a 'global criminal law perspective'.<sup>173</sup> Both involve a 'top-down approach' in the sense that a new global legal framework is created in order to shape and harmonise national laws.<sup>174</sup> Both centre on criminalisation, cooperation and enforcement, with less of a focus on addressing animal welfare and the causes and consequences of wildlife trafficking.

The existing proposals raise a further threshold question concerning the scope of a new instrument. While several proposals favour a broad focus on crimes that affect the environment, which would encompass wildlife crime including wildlife trafficking alongside several other crime types,<sup>175</sup> others prefer a narrow, specific focus on wildlife trafficking. The broader scope recognises that wildlife trafficking is just one of several offences detrimental to nature, though it may be difficult to garner official support for an instrument covering such a wide range of issues, including crimes that are politically particularly sensitive. It is also very ambitious to capture the diversity, complexity and technicalities of crimes in the wildlife, forestry and fisheries sector in a single instrument and negotiate a treaty with such wide scope.<sup>176</sup> Slobodian further fears that the implementation of a new instrument covering all 'environmental crimes' would attract stronger political opposition, particularly due to the reliance on sustainable harvest, trade and resource use in the forest and fisheries sectors.<sup>177</sup> Against this background, there are strategic advantages of focussing on the narrower topic of wildlife trafficking, at least initially. If adopted successfully, this may be complemented in the future by additional instruments covering other crimes that affect the environment.

### A *Support for a New Protocol*

Among the existing proposals for a new instrument to prevent and combat wildlife trafficking, there appears predominant support for the development of an

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<sup>171</sup> 'Progress Towards a New International Agreement to Combat Trafficking in Wildlife', *IUCN* (Web Page, 16 August 2022) <<https://www.iucn.org/story/202208/progress-towards-new-international-agreement-combat-trafficking-wildlife>>, archived at <<https://perma.cc/Y5QP-TF3L>>. See also 'Historic First Resolution on Wildlife Trafficking Adopted by the United Nations Commission on Crime Prevention and Criminal Justice', *Jane Goodall Institute Australia* (Web Page, 1 June 2022) <<https://www.janegoodall.org.au/2022/06/historic-first-resolution-on-wildlife-trafficking-adopted-by-the-united-nations-commission-on-crime-prevention-and-criminal-justice/>>, archived at <<https://perma.cc/J4S9-3RCG>>.

<sup>172</sup> 'Progress Towards a New International Agreement to Combat Trafficking in Wildlife' (n 171).

<sup>173</sup> Cabrejo le Roux (n 4) 8.

<sup>174</sup> *Ibid.* See also Chitov (n 15) 207.

<sup>175</sup> Jambozorg et al (n 99) 3732.

<sup>176</sup> Cabrejo le Roux (n 4) 15.

<sup>177</sup> Slobodian (n 32) 3–4.

additional *UNTOC* protocol rather than a standalone treaty.<sup>178</sup> GIEWC,<sup>179</sup> Slobodian<sup>180</sup> and Wyatt<sup>181</sup> acknowledge the possibility for an ‘original global instrument dedicated to transnational organized environmental crime’<sup>182</sup> but ultimately conclude that the implementation an *UNTOC* protocol on wildlife trafficking would most effectively support and enhance existing processes and regimes. Speaking at the Conference of the Parties to *UNTOC*, Wyatt underscored the advantages of a new protocol, noting that:

*CITES* is the only international mechanism that currently attempts to address wildlife trafficking. Yet, *CITES* does not require that violations of the Convention be defined as crimes. So, collecting, harvesting, killing, transporting, importing, exporting, possessing, and so forth, in breach of parties’ national legislation transposing *CITES* is not necessarily a crime. So, in the first instance, having a fourth protocol specifically about wildlife trafficking sends a clear message about its severity. This could have deterrence effects; global recognition as one of the most serious forms of organized crime could be symbolically powerful...<sup>183</sup>

An additional protocol has the practical advantage that the existing criminalisation, cooperation, prevention and enforcement provisions under *UNTOC* would apply, mutatis mutandis, to the protocol in which the specific and technical issues relating to preventing and suppressing wildlife trafficking would be regulated. Furthermore, an additional protocol would be best suited to address the criminal justice dimension of this phenomenon and recognise wildlife trafficking as a form of transnational organised crime.<sup>184</sup> Stoett and Omrow, referencing research conducted by the UN Interregional Crime and Justice Research Institute (‘UNICRI’), agree that a new *UNTOC* protocol would be ‘a good place to start the broader pursuit of environmental crimes and demand more resource pooling and information sharing among member states’.<sup>185</sup> Gregory Rose adds that an additional protocol, ‘complemented by voluntary guidelines and model legislation, could promote international harmonisation of laws against environmental crimes’ leading to coordinated and effective international enforcement efforts.<sup>186</sup>

Additional advantages associated with the development of a further protocol relate to the wider criminalisation of wildlife trafficking and harmonisation of national laws and penalties at the domestic level.<sup>187</sup> Rose, for instance, notes that harmonised national criminal laws against wildlife trafficking are ‘a condition precedent to systematic international cooperation to enforce them’.<sup>188</sup> As discussed earlier, while a number of states already provide criminal sanctions for

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<sup>178</sup> Wyatt (n 15) 128–30; Cabrejo le Roux (n 4) 40.

<sup>179</sup> Scanlon (n 161).

<sup>180</sup> Slobodian (n 32) 52.

<sup>181</sup> Wyatt (n 15) 128.

<sup>182</sup> Cabrejo le Roux (n 4) 40.

<sup>183</sup> Wyatt (n 15) 129.

<sup>184</sup> McLellan et al (n 130) 1–3.

<sup>185</sup> Stoett and Omrow (n 89) 214.

<sup>186</sup> Rose (n 99) 75.

<sup>187</sup> Antonio Cordesa-Salzmann, ‘Multilateral Environmental Agreements and Illegality’ in Lorraine Elliott and William Schaedla (eds), *Handbook of Transnational Environmental Crime* (Edward Elgar, 2016) 299, 299–300.

<sup>188</sup> Rose (n 99) 76.

wildlife trafficking (though not all meet the ‘serious crime’ threshold of art 2(b) of the Convention),<sup>189</sup> there are major inconsistencies between existing national laws criminalising the issue.

A new protocol would bring clarity, nomenclature and standards to an area of law that is presently marked by differences, discrepancies and a lack of understanding. One of the benefits — and duties — of a new protocol would be to establish an international definition of ‘wildlife trafficking’, ‘wildlife crime’ or similar terms, along with the obligation to criminalise this phenomenon under national law. In the context of the *UNTOC*, such an offence would be regarded as an offence under the Convention (and would free the offence from the requirement to be a serious crime punishable by imprisonment for four years or more under domestic law).<sup>190</sup> Pursuant to art 11 of *UNTOC*, states parties would nevertheless be required to provide appropriate penalties for the offence.<sup>191</sup> Slobodian notes:

In the absence of a special protocol on wildlife crime, countries could be encouraged to adopt national legislation criminalizing certain wildlife related activities and stipulating a maximum penalty of four years or more to bring them within the scope of these provisions of *UNTOC*. A protocol may be a more efficient and effective way to promote and standardize criminalization. Moreover, a protocol could broaden the scope of *UNTOC* to defined activities which do not carry a criminal penalty of four years or more. Finally, a protocol could include additional provisions to address issues specific to wildlife crime.<sup>192</sup>

The additional protocol ‘would allow for the offering of crucial tools for the repression of transnational wildlife crime to national legislators and courts’ even if domestic offences do not qualify as ‘serious crimes’ under art 2.<sup>193</sup> It would enable the full use of the enforcement and cooperation tools offered by *UNTOC* to prevent and suppress wildlife trafficking at international and national levels. This includes, inter alia, the ability to exchange information, confiscate assets, provide mutual legal assistance, extradite fugitives, transfer criminal proceedings and extend jurisdiction extraterritorially. These measures are crucial — but still rarely used — to combat cross-border wildlife and forest crime. Fulvia Staiano, for instance, highlights that a lack of extradition agreements with transit and destination countries is a major obstacle in the prosecution of individuals occupying the higher ranks of organised criminal groups involved in wildlife trafficking.<sup>194</sup>

## B Concerns

Despite much enthusiasm for the development of a new international instrument, several authors have expressed concern with respect to the “global criminalisation” approach to tackling wildlife trafficking.<sup>195</sup> Some stress that any

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<sup>189</sup> *UNTOC* (n 73) art 2(b).

<sup>190</sup> Cabrejo le Roux (n 4) 34.

<sup>191</sup> *UNTOC* (n 73) art 11.

<sup>192</sup> Slobodian (n 32) 17. See also Cabrejo le Roux (n 4) 8–9.

<sup>193</sup> *UNTOC* (n 73) art 2.

<sup>194</sup> Staiano (n 15) 151.

<sup>195</sup> See, eg, Sollund (n 33) 211–15; Wyatt (n 15) 121; Lauren Wilson and Rachel Boratto, ‘Conservation, Wildlife Crime, and Tough-on Crime Policies: Lessons from the Criminological Literature’ (2020) 251 *Biological Conservation* 1.

new framework would still require a formal accession process and rely upon states parties for domestic implementation of the instrument.<sup>196</sup> Others note that the political will required to negotiate and adopt a new instrument is fundamentally lacking.<sup>197</sup> Many states merely pay lip service to fighting wildlife trafficking; others, directly or indirectly, benefit from the illicit trade in fauna and flora which is frequently linked to corruption, sometimes at the highest level. The expertise and resources required to develop and implement a new instrument are lacking in some states, as are the capacity to enforce it and the know-how to carry out investigative procedures and scientific work associated, for instance, with forensics and DNA analysis.

Support for a new instrument, regardless of the shape it may take, is still its infancy.<sup>198</sup> Despite strong calls for a further protocol, Stoett and Omrow note that 'it has proven too contentious an issue for international diplomacy to channel into something concrete'.<sup>199</sup> Wyatt adds that even if a new convention or a fourth *UNTOC* protocol was implemented, it would not solve countless problems at the national and subnational levels, including 'corruption, politics and undue influence, North versus South, people versus conservation and the ethics of wildlife consumption'.<sup>200</sup> For this reason, some experts recommend that the available resources and diplomatic efforts should rather be used to strengthen domestic systems and enforcement mechanisms.<sup>201</sup>

Lastly, it also needs to be noted that any new international instrument limited to criminal justice measures is unlikely to reduce let alone end wildlife trafficking and that it is not the most effective tool to address the many facets and complexities of the illicit trade in fauna and flora. Other frameworks are needed to address the causes that lead individuals, communities and criminal networks to engage in or facilitate wildlife trafficking. Similarly, new initiatives are called for that prevent and remedy the devastating consequences of wildlife trafficking on fauna and flora, especially endangered species, on biodiversity and the environment at large, on communities and individuals reliant on wildlife resources and on governance and security.

## VI CONCLUDING REMARKS

This article has shown that dissatisfaction with the existing patchwork of international frameworks addressing some of the aspects of wildlife trafficking is growing while concerns over the inadequacy of national laws are long-standing. It has also been shown that calls for a new global instrument to prevent and suppress

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<sup>196</sup> Trouwborst et al (n 40) 789; Bram Janssens and Arie Trouwborst, 'Rhinoceros Conservation and International Law: The Role of Wildlife Treaties in Averting Megaherbivore Extinction' (2018) 21(2–3) *Journal of International Wildlife Law and Policy* 146, 161–2; John M Sellar, 'Do We Need a Global Agreement on Wildlife Crime?', *Global Initiative against Transnational Organized Crime* (Web Page, 28 February 2019) <<https://globalinitiative.net/analysis/do-we-need-a-global-agreement-on-wildlife-crime/>>, archived at <<https://perma.cc/2V2J-UERT>>.

<sup>197</sup> Stoett and Omrow (n 89) 213–15; Wyatt (n 15) 126–8.

<sup>198</sup> UNODC, *Enhancing the Detection, Investigation and Disruption of Illicit Financial Flows from Wildlife Crime* (Report, 2017) 5.

<sup>199</sup> Stoett and Omrow (n 89) 214.

<sup>200</sup> Wyatt (n 15) 121.

<sup>201</sup> Wandesforde-Smith (n 31) 369.

wildlife trafficking (or crimes that affect the environment more broadly) are getting louder and have advanced from being lofty ideas to more concrete proposals about the type of instrument and content best suited to address these offences.

The failures and gaps of the existing international legal frameworks for combating wildlife trafficking have been the main catalyst for discussions about how best to address this crime type and whether a new instrument is needed.<sup>202</sup> There is general consensus that the existing treaties, chief among them *CITES*, are ill equipped to tackle this problem and that they cannot be altered easily and in a way to make them fit for criminalising wildlife trafficking and promoting strict enforcement and international cooperation. Among the many organisations and experts that have written or spoken on this point there is widespread agreement that a new approach to combat wildlife trafficking is needed. At the regional level, in early 2023, the Council of Europe began its work on drafting a new convention ‘to Protect the Environment through Criminal Law’.<sup>203</sup>

The increasing traction among international organisations, NGOs and experts to start negotiating a new international instrument against wildlife trafficking — whether as a discrete crime type or as part of a wider agreement on wildlife and forest crime and other crimes that affect the environment — is well documented in various policy papers, conference presentations and scholarly articles that are growing in numbers each year. There is widespread recognition, including by official sources, that a global criminal law approach through a new international instrument would enhance the criminalisation of wildlife trafficking, facilitate the harmonisation of national laws, strengthen international cooperation, expand the reach of national jurisdictions and improve efforts to bring perpetrators to justice.

Such an instrument would also serve an important symbolic function as it would highlight the value placed on fauna and flora and recognise the devastating impact wildlife and forest crime can have on species, habitats, biodiversity, human lives, the economy and security. Given the failures and weaknesses of the existing system, authors such as Wyatt express the view that the international community is left with no alternative to developing a new international legal instrument.<sup>204</sup> Concerns over the nexus between wildlife trafficking and the origins of the COVID-19 pandemic provide a further ‘impetus needed to move States to take the proposition seriously and toward realization’.<sup>205</sup>

In the current debate and among the many voices and proposals, suggestions to develop an additional protocol supplementing *UNTOC* crystallise as the most widely supported and perhaps easiest model for a new instrument against wildlife trafficking. It would make a neat fit for the framework established by *UNTOC* and its existing protocols and could build on more than 20 years of experience with their implementation, interpretation and practical use. A new protocol would also highlight the transnational and organised crime dimensions of wildlife trafficking

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<sup>202</sup> Chitov (n 15) 207.

<sup>203</sup> ‘Newsroom: Council of Europe to Draft a New Global Convention to Protect the Environment through Criminal Law’, *Council of Europe* (Web Page, 24 November 2022) <<https://www.coe.int/en/web/cdpc/-/council-of-europe-to-draft-a-new-global-convention-to-protect-the-environment-through-criminal-law>>, archived at <<https://perma.cc/N58N-D4ET>>.

<sup>204</sup> Wyatt (n 15) 142.

<sup>205</sup> Stoett and Omrow (n 89) 217.

and reinforce the relationship between wildlife trafficking and other serious crimes.<sup>206</sup> As a criminal justice instrument, it would help in the enforcement of wildlife trafficking offences and in international cooperation in criminal matters.<sup>207</sup> What is less clear is how a new protocol could address the many conservation, animal welfare, environmental, security, sustainable development and human rights issues associated with wildlife and forest crime.

There is also concern that a fourth *UNTOC* protocol would not capture wildlife trafficking that is perpetrated by ‘different networks of traffickers that do not meet the internationally accepted definition of organized crime’.<sup>208</sup> A number of recent studies underscore that many instances of wildlife trafficking are simple, informal and disorganised and not the work of sophisticated organized criminal groups.<sup>209</sup> The role of ‘disorganized, eclectic, and temporary networks’ is often overlooked,<sup>210</sup> and the diversity of criminal networks and perpetrators, including organised crime groups, corporate crime groups, disorganised criminal networks, and unattached individuals, is oversimplified, note Rosaleen Duffy and Wyatt.<sup>211</sup>

The further development and, eventually, the adoption of any new global instrument against wildlife trafficking will require major support from all states, regardless of the roles they play as points of origin, transit and destination. It will also require great political will of international and national leaders, policy makers and legislators in order to ‘answer a global challenge with a global response’.<sup>212</sup> Negotiations to draft a new international instrument will require extensive and ongoing consultation and diplomatic efforts between developing and industrialised nations and across the Western and Southern hemispheres.<sup>213</sup>

There is no suggestion here that a new instrument, regardless of the form it may take, will bring a quick end to wildlife trafficking, will quickly save protected species from extinction, or lift communities depending on scarce wildlife and forest resources out of poverty. It would be naïve to think that new international law on wildlife trafficking will stop criminal elements from engaging in a profitable crime type or solve one of the world’s environmental crises. It is acknowledged that the development, implementation and enforcement of such an instrument comes with many challenges, faces fierce opposition from government, industry and some communities and involves financial, human and other resources that some states are unwilling or unable to provide.

These factors are, however, no reason to capitulate. The scale and spread of wildlife and forest crime, which is documented widely and acknowledged by governments worldwide, is an urgent call for action. So long as wildlife trafficking remains a low risk, high yield crime, local perpetrators and transnational organised

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<sup>206</sup> Anagnostou and Doberstein (n 1) 1615.

<sup>207</sup> See also Chitov (n 15) 207–10.

<sup>208</sup> Rosaleen Duffy, *Security and Conservation: The Politics of the Illegal Wildlife Trade* (Yale University Press, 2022) 49.

<sup>209</sup> *Ibid* 48–9; Moreto and Van Uhm (n 1) 1334–53.

<sup>210</sup> Duffy (n 208) 49;

<sup>211</sup> Tanya Wyatt, Daan van Uhm and Angus Nurse, ‘Differentiating Criminal Networks in the Illegal Wildlife Trade: Organized, Corporate and Disorganized Crime’ (2020) 23 *Trends in Organized Crime* 350, 360.

<sup>212</sup> Kofi Annan, ‘Address at the Opening of the Signing Conference for the *United Nations Convention against Transnational Organized Crime*’ (Speech, Palermo, 12 December 2000). See also Rob White (n 89) 253–4.

<sup>213</sup> See also Stoett and Omrow (n 89) 215.

criminal groups will seek to profit and put fauna, flora, biodiversity, sustainable development and human lives at risk. There is a pressing need for global action to stop wildlife trafficking and international law is one essential tool in this quest. It can help bring perpetrators to justice and deprive them of the vast profits they generate. Since wildlife trafficking is intimately connected with corruption and money laundering, efforts to investigate and prosecute these crimes can have a lasting impact on others. A 2021 resolution by the UN General Assembly on ‘*Tackling Illicit Trafficking in Wildlife*’ specifically emphasises the link between wildlife crime and financial crimes and calls upon member states to increase and enhance their efforts to investigate these crimes.<sup>214</sup> A new instrument against wildlife trafficking would be an important addition to these efforts.

This article adds one voice to the existing calls for a new international instrument against wildlife trafficking. It summarises the developments to this day and analyses the available arguments in favour and against such an instrument. It seeks to provide a basis for policy makers, international organisations, NGOs and further research to start exploring the elements of a new instrument and subsequently take up more in-depth discussions about the content and draft text. Model legislative provisions developed for various types of organised crime can provide a useful starting point for these efforts along with the extensive background and interpretative material for *UNTOC* and its protocols. The path towards a new treaty may be less rough than it seems and it is hoped that this article encourages others to take it.

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<sup>214</sup> *Tackling Illicit Trafficking in Wildlife*, GA Res 75/311, UN Doc A/RES/75/311 (26 July 2021, adopted 23 July 2021).