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INTERNATIONAL COOPERATION IN THE INVESTIGATION AND PROSECUTION OF ENVIRONMENTAL CRIME

PROBLEMS AND CHALLENGES FOR THE LEGISLATIVE AND JUDICIAL AUTHORITIES

Prof. Dr. John A.E. VERVAELE[1]

Abstract

In this article we aim to verify the hypothesis that international cooperation in criminal matters will strongly rely on the national design of the regulation and enforcement of environmental law (incriminations, authorities, powers). Second, if this is the case, does it create particular problems that undermine the effectiveness of environmental protection through criminal law in this field?

For answering these questions we propose to analyse, first, the relationship between the international environmental regulation and the international enforcement obligations. Second, we have to verify whether and to which extent the international norms on judicial cooperation in criminal matters relate to environmental enforcement. Finally, we will conclude with some recommendations to remedy the particular problems.

Keywords: *international cooperation, environmental crime, criminal law, legislative and judicial authorities, legal practice.*

1. Introduction: the regulatory and enforcement policy chain

In scholarly work and legal practice a great deal can be found about the transnational nature of many environmental crimes and the global harm resulting from some serious violations. Trafficking in endangered species (flora and fauna) or substances therefrom put not only their survival at risk but also deprives humanity of extremely important natural resources for their own life quality and survival, not to speak of the damage to the biodiversity of planet earth. Trafficking in hazardous waste creates not only a high potential risk of pollution, but also puts endangers human beings who recycle them in illegal circumstances. Emissions of greenhouse gases by manipulated diesel engines have their impact on global warming, an increase in the sea level and new phenomena such as El Niño in the Americas. Is has become clear that the protection of the environment is not only

[1] Professor of economic and European criminal law, Utrecht Law School/the Netherlands; Professor of European criminal law, College of Europe, Bruges/Belgium; President of the AIDP.

about a specific nature-related interest, but also the systemic preservation of the commons of nature, essential for the life conditions of human beings and flora and fauna. The protection of the environment through criminal law does have to protect the essential interest related to the preservation of the commons. All serious and longstanding (potential) harm to these commons of nature committed by gross negligence, recklessness or intent do qualify for criminal law enforcement as they endanger sustainable development and people's very existence. They are also related to a broader concept of serious human rights violations and positive duties for States to protect life and living quality standards, including those of minorities who live in areas with a great potential for natural resources that can be exploited. In other words, there is a mix of criminal offences, human rights violations and societal harm at stake. Finally, some of the violations could be qualified as war crimes under the Rome Statute of the International Criminal Court[2] or as *ecocide*[3] when human and/or corporate behaviour cause extensive damage, the destruction or loss of ecosystems of a given territory to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.

Although much of this conduct might already be criminalized in national jurisdictions, it does not however mean that international public law dealing with environmental norms contains obligations about the duty to criminalize, its constitutive elements, sanctions and its jurisdictional reach. Neither do the specialized conventions on judicial cooperation in criminal matters focus on environmental offences or do the domestic norms on judicial cooperation in criminal matters refer explicitly to transnational environmental enforcement. From this statement we can derive that the policy cycle or chain of regulation and the enforcement of environmental norms contains several gaps or weak points. This policy circle/chain consists of the following 6 dimensions:

- International regulation of the environment, especially multilateral environmental agreements (MEAs) (international environmental dimension);
- National regulation of the environment (national environnmental dimension);
- International regulation of the criminal enforcement of environmental protection (international enforcement dimension);
- National criminal enforcement design in relation to environmental protection;

[2] Article 8(2)(b)(iv) of the ICC prohibits '[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the non- human environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'

[3] M.A. Drumbl, 'Waging War against The World: The Need to Move from War Crimes to Environmental Crimes', *Fordham International Law Journal* , 1998–9, vol. 22, p. 122.

- International regulation of judicial cooperation in criminal matters, especially of mutual legal assistance (international cooperation dimension);
- National regulation of judicial cooperation in criminal matters, especially in relation to substantive and procedural criminal law dealing with the environment (domestic criminal justice dimension).

At first glance we can already deduce some preliminary conclusions. When looking at the content of the regulation of environmental standards and norms at the international and domestic level, it is very clear that environmental protection covers a wide range and variety of very different fields and interests. Pollution, construction, mining, natural resources, trade, water management are just some examples. Second, it is also striking that international environmental law very rarely contains criminal law obligations. The Convention on the Protection of the Environment through Criminal Law of the Council of Europe in 1998[4] is one of the rare exceptions, but the Convention has not yet entered into force due to the lack of the necessary number of ratifications. From this we can already deduce the hypothesis that international cooperation in criminal matters will strongly rely on the national design of the regulation and enforcement of environmental law (incriminations, authorities, powers). Considering the variety of environmental protection the environmental offences include a wide variety of illegal conduct, extending from classic pollution (air, water, soil) to illegal construction in protected areas, illegal mining, illegal fishing, illegal logging and harvesting, poaching, trafficking in endangered species and illegal waste and serious violations of carbon trading and water management. Some forms of conduct are committed at the local level, while others are transnational in their nature. Some forms of conduct are committed by individual players or firms, others are committed by organized crime or terrorist organisations. In some forms of conduct there is also strong participation by governmental actors, including the police and the armed forces, certainly in countries where they have strong autonomy and great economic interest.

Considering this wide variety it is impossible to deal with my topic as if the problems and challenges were the same in every environmental field. In the case of the VW-Diesel emission scandal the problems of international cooperation are mostly related to concurring jurisdictions, multiple investigations and the risk of double prosecutions. In the case of trafficking offences the cases are mostly transnational in nature and trigger, by definition, judicial cooperation in criminal matters. However, it has to be underlined that even for environmental offences that have no transnational character at all, judicial authorities might need cooperation for gathering evidence, for the detention and extradition of suspects,

[4] *European Treaty Series,* No. 172.

for the execution of sanctions etc. This means that the whole variety of environmental crimes could trigger international cooperation. However, the problems and challenges are not always the same. For this reason I have chosen to tackle our topic from the dimension of natural resources crime and, more specifically, wildlife trafficking offences, for which we have a strong elaborated international regulatory framework laid down in the CITES Convention[5] which entered into force in 1975, and the International Tropical Timber Agreement (ITTA) of 1983 and 1994 which was replaced by the one from 2006 that entered into force in 2011[6]. CITES is the principal international instrument to control and regulate the international trade in protected species and to ensure that the international trade in specimens and wild animals and plants does not threaten their survival. Also species are listed and submitted to specific regulatory obligations (permits and permit requirement) depending on their status (threatened with extinction, in danger, to be monitored). It is mostly a trade regulatory convention and contains very few specific criminal law obligations, although it does impose upon member states a general enforcement obligation. This means that, due to the lack of comprehensive international legal norms dealing with wildlife and forest offences, the domestic criminal law is primarily responsible for the nature and scope of wildlife and forest offences. ITTA aims at promoting the expansion and diversification of the international trade in tropical timber from sustainably managed and legally harvested forests. It is aimed at environmental preservation in combination with encouraging market benefits.

Domestic law will have to deal with the following offences if it wants to counter, through criminal law, illegal, unregulated and unauthorized poaching and logging and the traffic in protected species and substances in order to preserve biodiversity and natural resources:

	Wildlife offences	**Forest Offences**	**Associated offences[7]**
Origin	origin poaching (illegal hunting) illegal possession illegal processing	illegal logging illegal possession illegal processing	corruption/organized crime tax offences document fraud money laundering
Transit	illegal export illegal possession	illegal export illegal	corruption/organized crime

[5] United Nations, *Treaty Series,* vol. 993, No. 14537.

[6] United Nations, *Treaty Series*, vol. 2797Doc. TD/TIMBER.3/12.

[7] This is a simplified version of Table 1, Wildlife, forest and associated offences at origin, transit and destination points in UNODC, Wildlife and Forest Crime Analytical Toolkit, p. 35, New York, 2012.

	illegal processing	possession illegal processing	tax offences customs fraud document fraud money laundering
Destination	illegal import illegal possession illegal supply and sale	illegal import illegal possession illegal supply and sale	corruption/organized crime tax offences customs fraud document fraud money laundering

The extent to which and the way in which States have incriminated this behaviour shows very significant variations. Some States prefer to deal with some of this conduct under civil law (product liability) or administrative law (violations of permit obligations). Even when incriminating, some States do this in the criminal code, others in special statutes. Also the incriminations in themselves do vary a great deal. Some States choose incriminations that sanction non-compliance with administrative obligations (permit and permit conditions); others also provide for autonomous incriminations, certainly when human health is put in danger.

In this article we aim to verify the hypothesis that international cooperation in criminal matters will strongly rely on the national design of the regulation and enforcement of environmental law (incriminations, authorities, powers). Second, if this is the case, does it create particular problems that undermine the effectiveness of environmental protection through criminal law in this field?

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2. International Environmental Policy and the (Criminal) Enforcement Dimension[8]

The UN Conference on Human Environment held in Stockholm in 1972 constitutes the awakening of the UN and its Member States to environmental problems. Even though the Stockholm Declaration addressed the problem of

[8] For a more detailed overview of UN environmental policy in relation to enforcement, see EFFACE, International Environmental Law and Environmental Crime: An Introduction. Work Package 2 on Instruments, Actors and Institutions, 2015.

domestic and transnational pollution, it did not qualify it as a possible environmental crime but merely as a concern that States had to face through cooperative action. On this basis the Brundtland Report[9], the Rio Declaration, Agenda 21, the Johannesburg Declaration on Sustainable Development, the Johannesburg Plan of Implementation and the Rio+20 Declaration have laid down the principles of international environmental law and have developed several multilateral environmental agreements (MEAs) such as, for instance, the MARPOL, BASEL and CITES Conventions. The International Convention for the Prevention of Pollution from Ships (1973) as modified by the Protocol of 1978 (MARPOL 73/78) [10] has as its objective to preserve the marine environment in an attempt to completely eliminate pollution by oil and other harmful substances and to minimize the accidental spillage of such substances. It does not contain criminal law obligations. The Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (1989, entered into force in 1992)[11] has as its key objectives to minimize the generation of hazardous waste and hazardous recyclable materials; to ensure they are disposed in an environmentally sound manner and as close to the source of generation as possible; and to minimize the international movement of hazardous waste and hazardous recyclable materials. The Convention is one of the few environmental treaties to define a prohibited activity as "criminal" even though the wording of Art. 4 does not impose a clear obligation to make illegal trafficking criminal, as it simply says that parties "consider" it to be criminal (para. 3) and requires each Party to take appropriate legal, administrative and other measures to implement and enforce the provisions of this Convention, including measures to prevent and punish conduct in contravention of the Convention (para. 4). CITES does contain penal provisions in Article 8(1), but they are very limited and do not contain specific obligations as to the constitutive elements of the incriminations, penalties or jurisdiction clauses:

"1. The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:

(a) to penalize trade in, or possession of, such specimens, or both; and

(b) to provide for the confiscation or return to the State of export of such specimens."

[9] The Brundlant Report: Our Common Future, 1987, http://www.un-documents.net/wced-ocf.htm.

[10] http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Prevention-of-Pollution-from-Ships-(MARPOL).aspx.

[11] United Nations, *Treaty Series*, vol. 1673, p. 57.

The other relevant international convention for our topic is the International Tropical Timber Agreement (ITTA, 2006) that aims to promote the conservation and sustainable management, use of and trade in tropical forest resources through the forum of the International Tropical Timber Organization (ITTO). As with other international environmental agreements, there are no criminal sanctions provided for in the ITTA instrument, and little is mentioned beyond a general objective: 'Strengthening the capacity of members to improve forest law enforcement and governance, and address illegal logging and related trade in tropical lumber.' The EU, a party to the ITTO, elaborated in regulation 995/2010[12] further obligations for operators who place timber and timber products on the market, including penalty obligations in Art. 19; however without imposing criminal penalties and less the type and level thereof:

"1. The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. 2. The penalties provided for must be effective, proportionate and dissuasive."

We can thus easily conclude that the international conventions on the protection of the environment do not include a set of penal provisions that really guide the national legislator as to the choice of incriminations and their content. States thus have enormous discretion when it comes to enacting offences in this field.

However, the UN has recently become increasingly aware of the importance of the criminal law dimension as part of a comprehensive enforcement strategy. In its Montevideo IV for the Development and Periodic Review of Environmental Law[13] in 2009, the UNEP elaborates an intra-disciplinary approach, extending from environmental self-regulation and compliance to human rights and security issues. Under the heading of the effectiveness of environmental law and implementation, compliance and enforcement the document points under (j) at "Evaluate and, as appropriate, promote the wider use of criminal and administrative law in the enforcement of domestic and national environmental law" as one of the policy priorities. The execution of Montevideo IV has been delegated to the new Division of Environmental Law and Conventions (DELC). It is within DELC that transnational criminal activities are defined as a central problem for the effective implementation, compliance with and enforcement of environmental law, including MEAs. Law enforcement cooperation to combat transnational crimes faces obstacles because this relatively new category of crime typically lacks common understandings and approaches between and among States.

[12] Regulation 995/2010 of 20 October 2010.

[13] http://www.unep.org/delc/Portals/119/MontevideoIV.pdf .

The real game changer has however been the UN Convention on Transnational Crime (UNTOC 2000). Although environmental crimes are not explicitly mentioned in the UNTOC preparatory work, it was noted that environmental crimes had evolved into organized crime.[14] That was fairly late, as for instance Interpol had already formed an Environmental Crimes Committee in 1991 to study emerging patterns of serious and organized crime in environmental law enforcement. The UNODC has been the main actor in the interlink between organized crime and environmental enforcement. In the 2012 UNODC Digest of Organized Crime Cases[15] specific attention is given to environmental crimes, as the Digest contains cases of illicit logging in the Amazon Rainforest. The Digest also pays attention to investigative techniques such as geo-intelligence and tracking and tracing to tackle transnational organized crimes such as the trafficking of forest and mineral resources. Some experts in the UNODC advocate adopting an approach that corresponds to the international norms applied to money laundering, and have stressed the urgency of studying and adopting international provisions for normative schemes for forest and mineral products similar to those in force for financial proceeds.

The UNODC and DELC approach has however not led to a general criminal justice policy on the protection of the environment through criminal law at the UN level. This is the reason why the International Institute of Higher Studies in Criminal Sciences (ISISC)[16] and the Association International de Droit Pénal (AIDP)[17] elaborated a statement on "The protection of the environment through criminal law"[18] with the aim of enhancing the role of criminal law in the protection of the environment and the development of related international criminal law norms within the Twelfth United Nations Congress on Crime Prevention and Criminal Justice held in Salvador, Brazil (12-19 April 2010).[19] In this document it is clearly spelled out that the lack of criminal jurisdiction provisions in international environmental conventions is problematic. Equally lacking is a regulation of ne bis in idem protection in this conventions. The result is that we face examples of inactive states (and thus impunity) and the concurring use of jurisdictions in some cases. The document also contains an analysis from the point of view of international cooperation in criminal matters. Because of the lack of any

[14] Zimmermann, M., 'The Black Market for Wildlife: Combating Transnational Organized Crime in the Illegal Wildlife Trade', *Vanderbilt Journal of Transnational Law* 36 (1), 2003.

[15] https://www.unodc.org/unodc/en/organized-crime/digest-of-organized-crime-cases.html .

[16] http://www.isisc.org/.

[17] http://www.penal.org/en.

[18] A/CONF.213/NGO/10, http://www.isisc.org/dms/images/pdf/Activity%20Report%202010%20POST-CDA.pdf.

[19] Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and Their Development in a Changing World," doc. A/CONF.213/18, op. para. 14.

international harmonization of environmental offences the double criminality principle largely jeopardizes the chances of ample and effective legal cooperation to be provided within the scope of application of existing multilateral and bilateral treaties on extradition and mutual assistance or on the basis of domestic law. The document contains a recommendation to introduce in the Mutual Environmental Conventions 1/ obligations on incriminations; 2/ general provisions and obligations on mutual legal assistance and extradition and 3/ exploring the possibilities to include specific provisions on joint investigation teams, controlled delivery and international cooperation in tracing, seizing and confiscating instrumentalities and the proceeds of crime. Unfortunately the diplomatic level has dealt only marginally with the whole topic of environmental protection through criminal law.

We can thus conclude that the international environmental policy has been very active at the regulatory level, but without integrating the criminal enforcement dimension in its policy circle. The only recent exception is the interlink between organized crime and environmental crimes, but even there the policy interest is much more at a practical level (see point 3.) than at the level of regulatory enforcement. In other words, it is the organized crime dimension (and related corruption) that triggers the new interest in the enforcement of environmental protection through criminal law, and thus very much steered from UNODC. The broader perspective of the criminal law enforcement of environmental law is left to the discretion of the Member States[20], with the result that we have a very divergent picture at the domestic level, both when it comes to the substantive criminal law (the design and reach of incriminations)[21] as well as criminal law which is too procedural (authorities and powers)[22].

As stated the only exception is the Convention on the Protection of Environment through Criminal Law of the Council of Europe of 1998,[23] which was opened for signature in Strasbourg on 4 November 1998. The Convention never entered into force due to the lack of the necessary ratifications. Nevertheless, it should be underlined that while the "paucity of international environmental criminal legislation" cannot be neglected, the Convention demonstrates the relevance of the issue of the fight against environmental crime at the international

[20] For a general overview of the related problems see the excellent study by Angus Nurse, Policing Wildlife, Perspectives on the Enforcement of Wildlife Legislation, Palgrave Macmillan, Hampshire, 2015.

[21] For an overview of the fragmented and divergent picture for the EU countries see European Parliament, DG for Internal Policies. Study on Wildlife Crime, IP/A/ENVI/2015-10, March 2016.

[22] For an overview of the fragmented and divergent picture for the EU countries see Eurojust, Strategic Project on Environmental Crime. Report, The Hague, 2014.

[23] European Treaty Series, No 172.

(regional) level. The Convention provides for legislative obligations concerning substantive criminal law and procedural criminal law. In particular, with regard to substantive criminal law the Convention typifies intentional and negligent offences and is thus based on an *ultima ratio* approach[24]; the sanctions for these offences shall include imprisonment and pecuniary sanctions and may include reinstatement of the environment and confiscation measures. Corporate liability shall also be enabled, but the choice as to administrative or criminal liability is left to the states. As far as jurisdiction is concerned, the Convention foresees the territorial, flag, national and *aut dedere aut judicare* principles. Based on this each Party shall adopt such appropriate measures as may be necessary to establish jurisdiction over a criminal offence established in accordance with this Convention, in cases where an alleged offender is present in its territory and it does not extradite him to another Party after a request for extradition (Art. 5(2)). The Convention also stresses both national judicial cooperation and international judicial cooperation. Art. 10 deals with national cooperation and stipulates that each Party shall adopt such appropriate measures as may be necessary to ensure that the authorities responsible for environmental protection cooperate with the authorities responsible for investigating and prosecuting criminal offences and this in the area of information exchange and investigation. Art. 12 deals with international cooperation and stipulates that the Parties shall afford each other, in accordance with the provisions of relevant international instruments on international cooperation in criminal matters and with their domestic law, the widest measure of cooperation in investigations and judicial proceedings relating to criminal offences established in accordance with this Convention. This is as such not a real breakthrough as the problems related to international judicial cooperation (such as double criminality) are not resolved by a simple reference. The Convention also does not refer to specific transnational environmental cases such as, for instance, transborder pollution or trafficking offences.

3. International Judicial Cooperation and Environmental Enforcement

International judicial cooperation or mutual legal assistance in criminal matters (MLA) is about cooperation between judicial authorities, the authorities that have competence to investigate, prosecute and adjudicate in criminal matters[25]. It does not include, in principle, mutual assistance between

[24] This is evident both from the selection of the types of conduct to be criminally punished and in the Preamble, where it is claimed that "whilst the prevention of the impairment of the environment must be achieved primarily through other measures, criminal law has an important part to play in protecting the environment".

[25] J.A.E.Vervaele, Mutual legal assistance in criminal matters to control (transnational) criminality, in N. Boister & R. Currie (eds.), *Routledge Handbook of Transnational Criminal Law, 2015,* London & New York: Routledge, p. 121-136.

administrative authorities, even if they are dealing with administrative punitive enforcement and can thus impose high financial penalties, withdraw permits and close down corporate activity or exclude them from subsidy schemes. Considering the fact that a great deal of enforcement in the wildlife chain is dependent upon administrative regulation and administrative enforcement, this poses a serious limitation. Some administrative enforcement agencies, such as customs authorities, have strong international tools of administrative cooperation (however with limited investigative powers), but they do not use them on a regular basis for the enforcement of environmental matters. On the other hand, the specialized environmental administrative agencies do not dispose of proper instruments of administrative enforcement cooperation, as these have not been developed at the international level for transnational environmental offences.

The competent judicial authorities for dealing with incoming or outgoing MLA requests are as a rule defined at the national level, in line with the design of the domestic administration of justice. The judicial assistance can be very wide, including tools such as the extradition of suspects or convicted persons, the gathering of evidence abroad (letters rogatory), the transfer of proceedings or prisoners, and the execution of sanctions, including the confiscation of assets. The tools of evidence gathering abroad vary from non-coercive measures, such as the exchange of judicial information or voluntary interrogation of experts and witnesses, to very intrusive measures, such as search and seizure, wire tapping, controlled delivery and undercover surveillance of criminal organizations. These intrusive measures are excluded from administrative mutual assistance.

In the Multilateral Environmental Agreements, there are no explicit references to obligations in the field of judicial cooperation in criminal matters and MLA or mutual administrative assistance. This is in stark contrast to the suppression conventions, such as the UNTOC on organized crime and the UNCAC on corruption, which do combine provisions on substantive criminalization, tools of judicial investigation and related obligations of judicial cooperation in criminal matters. For instance, in the Basel Convention Art. 9 (5) it is stipulated that each party shall introduce appropriate national legislation to prevent and punish illegal trafficking and parties shall cooperate with a view to achieving this objective. A specific Art. 10 on cooperation is included, but judicial cooperation in criminal matters is not even mentioned.

The problem of the interlink between international environmental regulation and judicial cooperation in criminal matters was already identified more than 20 years ago. In 1993 an ad-hoc Group of Experts delivered at the UN level[26] a Report

[26] Presented at an UN meeting, held at Vienna from 5 to 10 December 1993. No.: E/CN.15/1994/4/Add.2.annexe.

on more effective forms of international cooperation against transnational crime, including environmental crime. It is possibly a telling factor that neither the UN databases in Vienna, nor the Max Planck Institute for Foreign and International Criminal Law in Freiburg seem to have a copy of this Report.

Does the lacking interlink mean that the judicial criminal cooperation against transnational environmental crimes is non-existent? The UNTOC, adopted in 2000, consolidates the developments made in MLA in the last couple of decades. Thanks to the increasing efforts of the international community to control transnational crime, MLA has become a pivotal issue of global governance and part of transnational criminal justice. It does not replace existing or future bilateral or multilateral treaties, but complements them. It imposes broad MLA obligations in relation to the investigation and prosecution of transnational offences and the related freezing, seizure and confiscation of criminal proceeds. These are elaborated in the 30 paragraphs of Article 18. MLA must also be afforded where the requests relate to legal persons that are criminally liable in the requesting state only. Article 18(3) lists the investigative acts and purposes for which MLA may be requested under the duty to cooperate. The UNTOC also includes a spontaneous exchange of information in Article 18(4). So, theoretically, these obligations can also apply to transnational environmental offences, subject to the conditions that they qualify as serious offences committed by organized crime groups that do have a transnational dimension.

This brings us directly to a serious problem of a second interlink, namely the one between environmental crimes and organized crime. First, even when committed by organized crime groups national enforcement authorities have difficulty in many cases in identifying the local players in the production and distribution chain of wildlife and forest business as belonging to organized crime. Moreover, many organized environmental crimes are non-conventional forms of organized crime. A large part of the conduct is covered by administrative authorizations and permits. This is certainly the case for (illegal) mining but also for trafficking in waste and flora and fauna. The product as such is not illegal and the organizations as such are not underground operators. The definition and scope of legality may thus depend to a large extent on governmental policies and administrative regulations that can or cannot be part of an international regulatory policy. Second, many environmental trafficking offences are not part of organized crime schemes and thus do not qualify for the UNTOC-related MLA potential. Third, in all scenarios the transnational enforcement of environmental crimes cannot be limited to the classic instruments of judicial cooperation and do need a set of cooperation instruments in the administrative sphere and in the proactive-anticipative criminal sphere, both of which are not regulated by UNTOC, as there are:

- Administrative monitoring of the production and distribution chain (from source to markets);

- Law enforcement and information sharing;
- Intelligence gathering at a proactive stage (including geo-intelligence);
- The involvement of private actors in the investigations;

UNTOC only offers the possibility of setting up joint investigation teams in which both administrative and judicial authorities could participate under the lead of a judicial competent authority. UNTOC has however no answer to the cooperation between the myriad of administrative and judicial agencies with different mandates, objectives, powers, investigative techniques and procedures for enforcing environmental rules and standards and to the problems of the conflict of jurisdictions and related potential ne bis in idem violations.

In the *Criminal justice assessment toolkit* of UNODC of 2006[27] a special part is dedicated to international cooperation under the heading of cross-cutting issues. Besides the classic instruments on judicial cooperation (extradition, mutual legal assistance, the transfer of proceedings, etc.) the text deals with a whole set of substantive fields of criminal law from the angle of the specific needs and challenges of international judicial cooperation. It will come as no surprise that classic fields of transnational law such as terrorism, organized crime, human trafficking, the smuggling of migrants, the smuggling of organs, corruption, and money laundering pass the review, as they are also at the core of the modern UN suppression conventions, such as the UNTOC and UNCAC. It is possibly something of a a surprise that transnational environmental crimes are not at all mentioned in the document, as they are a field of activity that is often of interest to organized crime[28].

However, even if we would add to the UNTOC as a new protocol dealing with transnational environmental crimes, it would be a serious mistake to reduce the solution to the organized crime paradigm only. Just as important is the interaction between administrative and judicial investigations at a transnational level.

Although there is thus a serious regulatory problem in the area of judicial cooperation in criminal environmental matters, it must be said that a great deal of activity has been deployed in the field of administrative and judicial practice in the field of wildlife crimes. In 2010 the International Consortium on Combating Wildlife Crime (ICCWC) was established and it aims at bringing coordinated support for governments, national wildlife and forest law enforcement agencies and sub-regional networks. ICCWC[29] is the collaborative effort of five

[27] https://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html.
[28] UNODC, *Transnational Organized Crime in the Fishing Industry*, Vienna: United Nations, 2011.
[29] https://cites.org/eng/prog/iccwc.php.

intergovernmental organizations working to bring coordinated support for the national wildlife law enforcement agencies and the sub-regional and regional networks that, on a daily basis, act in defence of natural resources. The ICCWC partners are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Secretariat, INTERPOL, the United Nations Office on Drugs and Crime, the World Bank and the World Customs Organization. They have elaborated one of the most remarkable soft law instruments to combat wildlife crime, the Wildlife and Forest Crime Analytic Toolkit.[30] It provides a conceptual map and the coordinates to deal with international and domestic laws and the problems related with practitioners. It was offered to assist government officials in wildlife and forestry administration, and customs and other relevant enforcement agencies to conduct a comprehensive analysis of possible means and related to the protection and monitoring of wildlife and forest products. It is an important reference to understand how organized environmental crime is comprehended in the wider concept of environmental crime. It is organized into five parts, dealing with 1/ wildlife offences and related offences (organized crime, corruption and money laundering) from an international and domestic perspective; 2/ law enforcement tools related to enforcement agencies, staffing, intelligence, investigations, border control and customs, international cooperation, technical assistance and aid, witness and victim protection, and the accountability and integrity of law enforcers; 3/ prosecutorial and judicial capacities to respond to wildlife and forest crime, including an analysis of the mandate, structure and processes of prosecution services and judicial organs, sentencing issues, international judicial cooperation and victim compensation; 4/ factors that drive wildlife and forest offences and the effectiveness of preventive interventions, including the motives of the actors involved, different uses of wildlife and forest products, and natural resource management systems and other preventive mechanisms; 5/ availability, collection, analysis and examination of data and other information relevant to wildlife and forest crime.

In March 2012, Interpol and UNEP convened the first International Chiefs of Environmental Compliance and Enforcement Summit, where delegates expressed concern about the existence and operation of transnational criminal networks engaged in environmental crime. These criminal operations were initially identified as specialized smuggling activities dealing with timber and CITES-protected species, but were extended to include black markets in ozone-depleting substances (ODS) and other prohibited chemicals, illicit transboundary movements of toxic or hazardous wastes, and even illegal, unregulated, and unreported fishing. Typically, all such crimes are in violation of both multi-lateral environmental agreements and the domestic legislation that implements them.

[30] https://www.unodc.org/documents/Wildlife/Toolkit_e.pdf .

Interpol and UNEP label them clearly as 'transnational environmental crimes.' In 2012 Interpol also created the Environmental Compliance and Enforcement Committee (ECEC)[31] that brings together senior officials and decision makers from all 190 Interpol member countries to provide strategic advice on relevant issues. Within the ECEC the Interpol Wildlife Crime Working Group was established that initiates and leads a number of projects to combat the poaching, trafficking, or possession of legally protected flora and fauna. Thanks to all of these efforts Interpol could publish in 2015 an impressive Global Directory of Environmental Enforcement Networks.

Also at the EU level we see increasing activity at the practical cooperation level. In November 2013 EUROPOL presented its specific Threat Assessment 2013 on Environmental Crime in the EU[32] as an addition to the conclusions of the 2013-2017 EU Policy Cycle for Organized and Serious International Crime and to the EU Organized and Serious Organized Crime Threat Assessment (SOTCA 2013). It this report, Europol identifies environmental crime as one of the emerging threats requiring intensified monitoring and mentions that the most prominent environmental crimes featuring the involvement of organized crime in the EU are the trafficking in illicit waste and the trafficking in endangered species. In 2014 Eurojust published its Strategic Project on Environmental Crime Report[33]. In 2013-2016 the EU also funded EFFACE (European Union Action to Fight Environmental Crime)[34], in which 11 European research institutions, think thanks and practitioners were involved.

We also see the shaping of networks for enforcement coordination and coordination. The most important international network is the International Network for Environmental Compliance and Enforcement (INECE)[35], with a broad range of members from governmental enforcement agencies to NGOs and business. On the level of the EU, the networks are more restrictive in their membership, each focusing on a different group of actors concerned with environmental crime, for example the European Network for the Implementation and Enforcement of Environmental Law (IMPEL)[36] focusing on officials from environmental ministries and agencies, the European Network for Environmental

[31] http://www.interpol.int/Crime-areas/Environmental-crime/Environmental-Compliance-and-Enforcement-Committee.

[32] https://www.europol.europa.eu/content/threat-assessment-2013-environmental-crime-eu.

[33] http://www.eurojust.europa.eu/doclibrary/eurojust- framework/casework/strategic%20project%20on%20environmental%20crime%20(october%202014)/environmental-crime- report_2014-11-21-en.pdf.

[34] http://efface.eu/.

[35] http://inece.org/.

[36] http://www.impel.eu/.

Crime (EnviCrimeNet)[37] on members of investigation services, the European Network of Prosecutors for the Environment (ENPE)[38] on prosecutors and the European Union Forum of Judges for the Environment (EUFJE)[39] for judges.

So, overall it seems that the enforcement and policy actors have taken the problem from the bottom and tried to set up groups and networks for information sharing, enforcement cooperation and even outreach with civil society.

4. Conclusions: streamlining the regulatory and enforcement chain

In this article we have aimed to verify the hypothesis that international cooperation in criminal matters strongly relies on the national design of the regulation and enforcement of environmental law (incriminations, authorities, powers). Our analysis has definitely shown that international the environmental law and international law on judicial cooperation in criminal matters have little regulatory impact on the national legislative and practical reality. If public international law enters the frame then it is only through its focus on organized crime, which is not specifically designated for this a-typical form of organized crime. This does not therefore mean as such that the regulatory standards of public international law and the ones of judicial cooperation in criminal matters do not matter, but it depends to a large extent on the proactive attitude of national legislators and enforcers to use them.

Second, the relation between environmental crimes, serious human rights violations and societal harm is not really perceived as a mandatory duty to protect these interests and a duty for the state to investigate, prosecute and adjudicate them. The result is that the law enforcement of serious environmental crimes is not perceived as having high priority[40]. Even when investigated, few cases make it to the courts and the sentencing is rather modest. When state or para-state actors are involved the situation is even worse. This can be due to illegal or manipulated permit procedures or to direct or indirect involvement in the offences through commission or omission. Needless to say, all these particular problems undermine the effectiveness of environmental protection through criminal law in this field. We can clearly speak of a wide range of impunity and of the weak impact of criminal justice on harm reduction.

What does this mean for the use of judicial cooperation in criminal matters related to transnational environmental offences, especially in our case of wildlife and forest offences?

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[37] http://envicrimenet.com/.

[38] https://www.environmentalprosecutors.eu/.

[39] http://www.eufje.org/index.php/en/.

[40] European Parliament, DG internal policy, Study on Wildlife Crime, 2016, http://www.europar l.europa.eu/RegData/etudes/STUD/2016/570008/IPOL_STU(2016) 570008_EN.pdf.

First of all, at the domestic level we need a regulatory and enforcement policy that takes into account all the relevant factors of law compliance. This ranges from knowledge about root causes of deviance and the political economy of the field to streamlining administrative procedures (permits, administrative monitoring), interagency information sharing, interlinks between administrative and judicial investigations, strengthening investigative capacities and public-private partnerships.

Second, international cooperation should be a full part of this strategy, which means that cooperation cannot be plugged in at only the stage of judicial crime investigations. When dealing with environmental crimes that are strongly related to global market economy chains it is important to have cooperation at all stages (from production sources to consumption markets or to put it in agricultural terms, from stable to table). This means that administrative and judicial cooperation need to be intertwined and that some tools have to be used from the very beginning. It is recommended for states to develop a proactive criminal policy strategy in order to increase intelligence-led policing related to potential serious violations of ecosystems. For instance, the use of geo-intelligence should be used as an administrative monitoring tool and in case of suspicion also as an investigatory tool. Information positions have to be built up at the administrative stage in order to detect, in good time, potential serious criminal deviant behaviour. Data from the EU-TWIX database provides, for instance, a good overview of the trade routes for goods but their usefulness for research and enforcement could be further enhanced by reorganizing some parts of the data collection. A good example of this integrated enforcement approach can be found in the Protocol to Eliminate Illicit Trade in Tobacco Products, negotiated in the WHO Framework Convention on Tobacco Control (FCTC) and opened for ratification in 2013[41]. In order to prevent the illegal trade, the Protocol aims to secure the supply chain of tobacco products it imposes a whole set of administrative obligations, including licensing, due diligence obligations, tracking and tracing systems record-keeping, etc. To address the illicit trade, the Protocol establishes unlawful conduct, including offences and addresses liability and seizure payments, as well as the disposal of confiscated products. Interesting are the requirement to boost international cooperation. They make a clear distinction between general information sharing and enforcement information sharing. Specific cooperation duties are also included for law enforcement cooperation, mutual administrative assistance and mutual legal assistance, in order to cope with all phases of the necessary cooperation and thus guarantee a full comprehensive enforcement cooperation scheme.

[41] As of January 2016, 179 countries plus the European Union have become Parties to the FCTC. Of these 180 Parties, 54 signed the Protocol between 10 January 2013 and 9 January 2014, during which period the Protocol was open for signature. As of January 2016, 13 Parties to the Convention are Parties to the Protocol. The Protocol requires 40 Parties to enter into force.

Third, this new approach to international assistance practice needs, of course, also a professional culture of international cooperation, meaning the inclination to expand both the analysis and the investigative approach of a case to cover its transnational dimensions and to devote operational resources to coordination with foreign authorities. The attitude to compound the investigation to the domestic dimension, based on legal jurisdiction constraints or the practical non-use of jurisdiction ('your crime is not my crime') is of course denying the links between countries of origin, destination countries and major illegal trade routes and thus leading to an enforcement deficit, partial impunity and little harm reduction. The way to overcome this is by: 1/ integrating international assistance at all levels into the environmental policy; 2/ setting up specialized units for environmental administrative and judicial enforcement besides or within the mainstream law enforcement agencies and judicial authorities and 3/elaborating public-private partnerships with civil society (specialized NGOs, reliable business actors), both in the area of self-compliance as well as in the area of enforcement.

At the international level a great deal can and has still to be done. Concerning the regulatory framework, international organizations could better interlink environmental enforcement with tools of judicial cooperation. This could be done through specific suppression treaties or through an annex to UNTOC. At the level of the specialized bodies dealing with multilateral environmental agreements attention could be paid to elaborating specific international assistance tools that extend from information sharing and monitoring to administrative and judicial investigations in order to close the gaps in the enforcement chain. It is also worth thinking about formal enforcement networks at a regional and/or global level in order to tackle serious transnational violations.

These are all steps aimed at approving the legislative and judicial practice of environmental protection of the commons and thus of the life quality and life preservation of us all. For serious violations that also constitute violations of human rights they will contribute to realizing the positive duty of the state to investigate, prosecute and adjudicate them under a shared scheme of responsibility instead of the unilateral sovereign approach.