

Opinion

## **TOWARDS BRIDGING THE ACCOUNTABILITY GAP FOR INTERNATIONAL WILDLIFE TRAFFICKING: THE EFFORTS OF THE WILDLIFE JUSTICE COMMISSION**

*Elodie Théobald\**

Keywords: State Responsibility; Accountability; Wildlife Crime; Wildlife Trafficking; Non-governmental Organisations; Environmental Law; Law Enforcement; Non-compliance Procedures; Autonomous Institutional Arrangements.

### **Introduction**

There is an increasing need for more accountability in the international sphere. In the field of International Environmental Law, this is all the more the case in that the two traditional regimes of responsibility, for states and individuals, namely state responsibility and international criminal responsibility, are largely ill-equipped to address violations of this body of law.<sup>1</sup> Both states and civil society have thus come forward with other mechanisms to hold states and/or individuals accountable.

Accountability in this context is ‘the justification of an actor’s performance *vis-à-vis* others, the assessment or judgement of that performance against certain standards, and the possible imposition of consequences if that actor fails to live up to applicable standards’.<sup>2</sup> This definition is essentially an adaptation of the definition in general

---

\* *Elodie Théobald is Junior Strategic Partnerships Officer at the Wildlife Justice Commission (WJC). She holds a LL.M in Public International Law from Utrecht University where she studied, among others, International Environmental Law and the Law of the Sea. She also holds a L.L.B in French Law from the Catholic University of Lille. The author would like to thank Olivia Swaak-Goldman, Executive Director of the WJC, and Anne-Aurore Bertrand, Special Advisor on External Relations at the WJC, for their invaluable insight on this opinion piece.*

<sup>1</sup> Although the primary role of domestic courts has been stressed in the last part of this article, the options offered by the use of extraterritorial criminal jurisdiction in other fields such as corruption (e.g. US Foreign Corrupt Practices Act, 1977) have been considered to be outside of the scope of this article.

<sup>2</sup> J. Brunée, ‘International Legal Accountability Through the Lens of the Law of State Responsibility’, *Netherlands Yearbook of International Law* 2005 – 36, p. 4; herself referring to R.W Grant & R.O Keohane, ‘Accountability and Abuses of Power in World Politics’,

terms, which is very centred on the provision of a justification, to the specifics of International Law.<sup>3</sup> However, a clear legal definition of the term is still lacking and the translation of the term into other languages has posed unique challenges, including in international law's second language, French.<sup>4</sup> Although general definitions of 'accountability' refer to 'responsibility', in the context of international law, accountability is distinct from state responsibility, which obeys specific rules and 'involves a duty to provide reparation for an internationally wrongful act'.<sup>5</sup>

States have sought increased accountability through the development of monitoring review and non-compliance management mechanisms enshrined in a number of international conventions. Civil society has also contributed to this goal by setting up so-called Opinion Tribunals. It is noteworthy that these developments have occurred in both the International Environmental Law and Human Rights Law fields to different degrees. However, this paper will primarily focus on initiatives regarding International Environmental Law, and especially international wildlife trafficking.

In particular, this opinion piece will present the model developed by the Wildlife Justice Commission (WJC) as one avenue towards increased accountability at the international level for wildlife crimes. Established in 2015, the WJC is a new justice accountability mechanism. It operates by conducting intelligence-led investigations into major wildlife trafficking networks, specifically targeting their high-level kingpins, rather than low level smugglers or poachers. The WJC operates in a spirit of co-operation and dialogue with the national authorities of the countries where it conducts investigations. Whenever possible, the WJC shares intelligence, provides evidence and facilitates arrests. When immediate co-operation is not available, the WJC compiles its evidence into a case file: a very detailed and highly actionable document mapping out criminal networks and their illicit activities, which national authorities can put to immediate use. The WJC then engages with the national authorities in a National Dialogue,<sup>6</sup> and works with its Ambassadors and stakeholders to convince, and if necessary, exert background pressure on authorities to act on the evidence provided. If the National Dialogue is unsuccessful and insufficient action is taken, the organisation has the possibility to convene a public hearing where evidence from the Case File is presented for validation to an Independent Review Panel of experts from across the globe. At the end of the public hearing, the panel decides whether to affirm the fair and objective nature of the evidence presented, and subsequently issues recommendations for the national

---

*American Political Science Review* 2005 – 99, pp. 29-30. See also M.T. Kamminga, *Inter-State Accountability for Violations of Human Rights*, Philadelphia: University of Pennsylvania Press 1992, p. 5.

<sup>3</sup> See Cambridge dictionary 'a situation in which someone is responsible for things that happen and can give a satisfactory reason for them', at:

<http://dictionary.cambridge.org/dictionary/english/accountability> accessed 24 July 2017); Oxford dictionary 'Accountable: Required or expected to justify actions or decisions; responsible' (<https://en.oxforddictionaries.com/definition/accountable> accessed 24 July 2017).

<sup>4</sup> Brunée 2005, *supra* note 2, p.4. See also International Law Association, 'Accountability of International Organisations' *Report of the Seventy-First Conference, Berlin 2004*, London: ILA 2004, p.168.

<sup>5</sup> M.T. Kamminga, *Inter-State Accountability for Violations of Human Rights*, Philadelphia: University of Pennsylvania Press 1992, p. 5.

<sup>6</sup> For more information, see <https://wildlifejustice.org/national-dialogue/>

authorities to take immediate action to combat the identified wildlife criminal networks.

This paper will analyse the particular challenges linked to the implementation of the traditional regimes of responsibility in the realm of International Environmental Law, with special focus on wildlife trafficking (I). It will then study the solution offered by the Non-Compliance Procedure established by the Convention on International Trade in Endangered Species (CITES),<sup>7</sup> the main international legal instrument addressing wildlife trafficking crimes (II). Lastly, it will explain how the mechanism set up by the WJC participates in bridging the accountability gap for wildlife trafficking (III).

## **I. Wildlife Trafficking and the Traditional Responsibility Regimes: Digging an Accountability Gap**

### **I.1. State Responsibility**

In a system dominated by states and the principle of state sovereignty, the regime of state responsibility has historically been the main regime to address breaches of international law. The regime of state responsibilities obeys a set of rules that has been codified by the International Law Commission in its Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>8</sup>

The regime of state responsibility presents several shortcomings when it comes to responsibility in instances of breaches of International Environmental Law, and particularly in relation to wildlife crime.

#### ***I.1.1. Wrongful acts and attribution***

Firstly, state responsibility can only be invoked when a state commits an internationally wrongful act.<sup>9</sup> Only in limited instances can the responsibility of a state be invoked for the acts committed by non-state actors, when these acts are attributable to the state at stake.<sup>10</sup> Yet, in cases of environmental damage caused in breach of International Environmental Law, the preponderant role of non-state actors (for example multinational corporations in cases of pollution, or individuals when it comes to wildlife crime) makes such attribution difficult, if not impossible, to establish.

#### ***I.1.2. The rules of invocation***

Secondly, the very strict rules of invocations are also particularly limiting when it comes to addressing environmental damage, as these rules restrict who can invoke the responsibility of a state, and how they can do so.

---

<sup>7</sup> 1973 Convention on International Trade in Endangered Species (CITES), 993 UNTS 243 (1976).

<sup>8</sup> International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/RE/56/83 (2001) [hereinafter ARSIWA].

<sup>9</sup> Arts. 1-2, ARSIWA.

<sup>10</sup> *Idem*, Arts. 8-11.

First, only states have a standing to invoke another state's responsibility. Non-state actors, such as non-governmental organisations (NGOs) and individuals, whose rights and interests are at stake when it comes to environmental damage, are not entitled to invoke state responsibility before international jurisdictions, unless the constitutive instrument of the respective states otherwise allows for this. This option is directly or indirectly available in a number of human rights instruments.<sup>11</sup> In terms of violations of International Environmental Law this possibility remains inexistent. Civil society has thus adopted a strategy seeking to link human rights and environmental claims to circumvent this shortcoming.<sup>12</sup> Although the account of environmental issues by human rights jurisdictions is to be saluted as a step forward, it does not aim at, nor result in, a protection of the environment *per se*. Instead, any environmental claim unrelated to human rights, is unable to go through because of the limited jurisdiction of human rights courts. Likewise, the situation is then only examined through the lens of human rights.

Second, states can only invoke state responsibility if they are injured by the internationally wrongful act in question,<sup>13</sup> or if the obligation breached was owed *erga omnes* or *erga omnes partes*.<sup>14</sup> Whereas bilateral situations – essentially questions of transboundary harm – enable a relatively easy implementation of the ‘injured state rule’,<sup>15</sup> multilateral situations – essentially questions of damage to the global environment – require the establishment of an obligation *erga omnes* or *erga omnes partes*.<sup>16</sup> The exact content of obligations *erga omnes* remains uncertain: only very few obligations are known to have an *erga omnes* character and none relate to the environment. However, Multilateral Environmental Agreements (MEAs) are widely based on collective regimes establishing *erga omnes partes* (or collective) obligations, that is, obligations owed to the entire community of states party to this MEA.<sup>17</sup> This should, in principle, enable states to invoke the responsibility of

---

<sup>11</sup> For example, 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (1955), Art. 34 (direct access); 1969 American Convention on Human Rights, 1144 UNTS 123 (1979), Art. 44 (indirect access through a commission); but also the different individual communications procedure before quasi-judicial bodies such as the Human Rights Committee.

<sup>12</sup> For instance, *Case of the Saramaka People v. Suriname*, Inter-American Court of Human Rights Series C No.172, Judgement, 28 November 2007. This strategy is also used before jurisdictions that are not specialised in Human Rights, for example *SERAP v. Federal Republic of Nigeria*, Court of Justice of the Economic Community of West African States, Judgement, 14 December 2012; *ANAW v. The Attorney General of the United Republic of Tanzania*, East African Court of Justice, Judgement, 20 June 2014.

<sup>13</sup> Art. 42, ARSIWA.

<sup>14</sup> Art. 48, ARSIWA.

<sup>15</sup> States have brought a number of bilateral environmental cases to the International Court of Justice (ICJ), for instance: *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement, ICJ Report 1997, p. 7; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgement, ICJ Reports 2010, p. 14.; Joint Cases *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgement, ICJ Reports 2015, p. 665.

<sup>16</sup> Obligations *erga omnes partes* are obligation owed to a whole community of state parties to a regime. They are distinct from obligations *erga omnes* which are owed to the international community as a whole.

<sup>17</sup> A. Cardesa-Salzmänn, ‘Constitutionalising Secondary Rules in Global Environmental Regimes:

Non-Compliance Procedure of Multilateral Environmental Agreements’, *Journal of Environmental Law* 2012 – 24(1), p. 110-111.

another state in breach of such *erga omnes partes* obligations. For instance, in the case of wildlife trafficking, the obligation to take appropriate measures to ensure the enforcement of CITES is a collective obligation that could allegedly be the legal basis to invoke state responsibility.<sup>18</sup> Yet, to the knowledge of the author, the breach of an MEA-based *erga omnes partes* obligation has never been used to invoke the responsibility of a state; *a fortiori* never has it been used in cases of wildlife crime.<sup>19</sup>

### ***I.1.3. The obligation of cessation, non-repetition and reparation***

The legal consequences of the regime of state responsibility further limits its relevance in the context of International Environmental Law. First, only injured states can claim for full reparation in the form of restitution, compensation or satisfaction.<sup>20</sup> This inherently excludes full reparation in instances where there is no injured state and where the obligation was ‘only’ owed *erga omnes (partes)*. This is confirmed by Article 48(2)(a) of ARSIWA, listing cessation and assurances or guarantees of non-repetition as the only claims available in these instances.<sup>21</sup> Second, even when reparation is available, restitution and compensation are very difficult to implement in the context of environmental damage.<sup>22</sup> Satisfaction is often the only option adapted to these situations, whereas it is a subsidiary means of reparation.<sup>23</sup>

These elements are what cause the current regime of state responsibility to be widely seen as ill-adapted to the enforcement of International Environmental Law.<sup>24</sup>

## **I.2. International Criminal Responsibility**

In opposition to the state-centred regime of state responsibility, International Criminal Law has developed considerably in the field of Human Rights Law. This represents a new paradigm for ensuring accountability, as the persons prosecuted can no longer hide behind the shield of states’ borders and political interests, as well as the immunities linked to their official capacity. The case law of both *ad hoc* international criminal tribunals and of the International Criminal Court (ICC), as well as the domestication of international criminal law and its implementation by national courts, sends a clear sign that impunity is not accepted anymore with

---

<sup>18</sup> Art. VIII, CITES.

<sup>19</sup> For the reluctance from states to recourse to state responsibility even on the basis of the breach of an *erga omnes partes* obligation, see J. Brunée, ‘International Legal Accountability Through the Lens of the Law of State Responsibility’, *Netherlands Yearbook of International Law* 2005- XXXVI, p. 21-25.

<sup>20</sup> Arts. 31 and 34-37, ARSIWA.

<sup>21</sup> Art. 48(2)(a), ARSIWA.

<sup>22</sup> Cardesa-Salzman 2012, *supra* note 17, p. 112; P-M. Dupuy & J.E. Viñuales, *International Environmental Law*, Cambridge: CUP 2015, p. 243.

<sup>23</sup> Art. 37, ARSIWA; International Law Commission, Report on the Work of Its Fifty-Third Session (23 April- 1 June and 2 July- 10 August 2001) UN Doc A/56/10 [hereinafter ARSIWA Commentary], p. 105.

<sup>24</sup> See for instance, P-M. Dupuy, ‘*A propos des mésaventures de la responsabilité internationale des États dans ses rapports avec la protection internationale de l’environnement*’ in M. Prieur (ed.), *Etudes en hommage à Alexandre Kiss*, Paris: Frisson-Roche 1998, pp. 269-282; Cardesa-Salzman 2012, *supra* note 17, p.111; P-M. Dupuy & J.E. Viñuales, *International Environmental Law*, Cambridge: CUP 2015, p. 243.

respect to war crimes, crimes against humanity and genocide. However, multinational corporations remain non-responsible under International Criminal Law.<sup>25</sup> Yet, as with state responsibility, this regime remains ill-suited to address the vast majority of International Environmental Law violations, and all the more, wildlife trafficking.

Environmental destruction is already criminalised under International Criminal Law in the context of war crimes.<sup>26</sup> Moreover, a recent policy paper of the Office of the Prosecutor of the International Criminal Court on 'Case Selection and Prioritisation' clearly restates that the destruction of the environment as a means or result of the commission of war crimes is among the criteria on which cases are selected based on their gravity.<sup>27</sup>

However, in situations of peace, the destruction of the environment is not recognised as a crime under International Criminal Law. This is why some advocate for the adoption of an international crime of ecocide applicable in peace time. The most often cited proposition is to amend the Rome Statute to add a crime of ecocide as the fifth crime prosecutable by the ICC.<sup>28</sup> Until the adoption of such crime at the international level, the prosecution of criminal destruction of the environment remains under the jurisdiction of sovereign states.

Looking at these shortcomings, one can reasonably say that the accountability of states for their inaction towards wildlife trafficking, or individuals engaging in such activities, is very limited. Alternative mechanisms exist to bridge this gap.

## **II. Wildlife Trafficking and CITES' Autonomous Institutional Arrangements: Bridging the Gap**

When the responsibility regimes do not constitute an effective means to ensure the enforcement of International Environmental Law, states have relied on a multitude of MEAs in order to adopt mechanisms designed to induce compliance and increase accountability towards other state parties and institutions established by these MEAs.<sup>29</sup> These mechanisms were designed as less confrontational and do not seek

---

<sup>25</sup> This impunity of multinationals is widely criticised, initiatives such as the International Monsanto Tribunal are raising awareness about this loophole.

<sup>26</sup> 1998 Rome Statute of the International Criminal Court 2187 UNTS 3 (2004), Art. 8(2)(b)(iv).

<sup>27</sup> Office of the Prosecutor, 'Policy Paper on Case Selection and Prioritisation', 15 September 2016, at [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) (accessed 24 June 2017).

<sup>28</sup> See Polly Higgins' and Valérie Cabanes' work; P. Higgins, D. Short & N. South, 'Protecting the Planet After Rio – The Need for a Crime of Ecocide', *Criminal Justice Matters* 2012- 90(1), p. 4-5; P. Merz, V. Cabanes & E. Gaillard, 'Ending Ecocide – The Next Necessary Step in International Law', Paper prepared for the 18th Congress of the International Association of Democratic Lawyers, 04 April 2014, at <https://www.endecocide.org/wp-content/uploads/2014/04/iadlcongress.pdf> (accessed 24 June 2017).

<sup>29</sup> P.A Nollkaemper & D.M Curtin, 'Conceptualizing Accountability in International and European Law', *Netherlands Yearbook of International Law* 2007 – 36, p. 5 & 12; Cardesa-Salzman 2012, *supra* note 17, p. 105, referring to J. Klabbbers, 'The Compliance Procedures' in D. Bodansky, J. Brunée & E. Hey, *The Oxford Handbook of International Law*, Oxford: OUP

to establish a responsibility.<sup>30</sup> Instead, these are mechanisms of accountability where states have to justify their conduct and possibly face some consequences.

In this area, wildlife trafficking is not left behind since CITES happens to have one of the most complete Non-Compliance Procedures (NCPs)<sup>31</sup> and reporting schemes.<sup>32</sup>

CITES' NCP is the archetype of an accountability procedure: it is characterised by a permanent dialogue and the provision of justifications, and can result in consequences that are distinct from those attached to state responsibility.

Pursuant to Article XIII CITES,<sup>33</sup> the Secretariat enters into a dialogue with the non-complying party when a non-compliance matter is brought to it. Any party to the CITES can do so, whenever it is concerned over matters related to trade in listed species.<sup>34</sup> NGOs are also entitled to bring a matter up to the Secretariat.<sup>35</sup> The non-complying state will then have one month to reply to the Secretariat providing the requested information.<sup>36</sup> If no response is provided after six months the state will have to provide a justification.<sup>37</sup> For major compliance matters, the Secretariat works with the party to try and solve the matter and offer advice or technical assistance.<sup>38</sup> If no solution is found, the Secretariat refers the matter to the Standing Committee.<sup>39</sup> When the compliance matter remains unresolved, the Standing Committee is entitled to take one or several measures, including: issuing a written caution requesting a response and offering assistance, sending a public notification of a compliance matter to all parties, and issuing a warning.<sup>40</sup> When the matter is unresolved and persistent, and the party shows no intention to achieve compliance, the Standing Committee can decide to recommend the suspension of commercial or all trade in specimens of one or more listed species.<sup>41</sup>

According to some, this NCP could increase accountability even more by enabling the Secretariat to trigger the procedure.<sup>42</sup> However, the possibility for NGOs to

---

2007, p. 996, and M. Fitzmaurice, 'International Environmental Law as a Special Field', *Netherlands Yearbook of International Law* 1994 – 25, pp. 182-183.

<sup>30</sup> Nollkaemper & Curtin 2007, *supra* note 29, p. 6.

<sup>31</sup> Art. XIII CITES; CITES, Conf.14.3, 'CITES Compliance Procedure'.

<sup>32</sup> Art. VIII (7), CITES; Notification to the Parties 2005/035, 6 July 2005; Notification to the Parties 2011/019, 17 February 2011.

<sup>33</sup> Art. XIII, CITES.

<sup>34</sup> CITES, Conf.14.3 'CITES Compliance procedures', para. 18.

<sup>35</sup> CITES Secretariat, Notification No. 2004/078 Submission of enforcement-related information by the public and non-governmental organisations to the CITES Secretariat, 9 December 2004.

<sup>36</sup> CITES, Conf.11.3 Rev. CoP16 'Compliance and enforcement', p. 4.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*; CITES, Conf.14.3 'CITES Compliance procedures', para. 21.

<sup>40</sup> CITES, Conf.14.3 'CITES Compliance procedures', para. 29.

<sup>41</sup> *Idem*, para. 30.

<sup>42</sup> Cardesa-Salzman 2012, *supra* note 17, pp. 121-122.

bring non-compliance matters in front of the Secretariat places CITES' regime ahead of several other MEAs' NCPs.<sup>43</sup>

NCPs are typically non-confrontational and seek to provide assistance instead of shaming a country for being non-compliant.<sup>44</sup> This is also the preferred approach of the WJC.

### **III. Wildlife Trafficking and the Wildlife Justice Commission: Building New Bridges**

#### **III.1 The Mechanism of the Wildlife Justice Commission**

The mechanism of the WJC has been explained in the introduction of this paper. It is essentially an effort of privatisation of enforcement. The role of the WJC is three-fold. First, it acts as a fact-finding commission by conducting intelligence-led investigations. Second, it aims at becoming a partner for states by establishing a direct collaboration and constructive dialogue with them. Third, as a last resort, it serves as a forum for the public and international exposure of a state's inaction to address wildlife trafficking. In November 2016, the WJC convened its first public hearing at the Peace Palace in The Hague, following an 18-month-long investigation in Vietnam. The panel validated the case file and issued recommendations to the Vietnamese authorities.<sup>45</sup> The WJC is now in the process of partnering with local stakeholders to monitor the progress made by the Vietnamese authorities.

##### ***III.1.1. Past similar efforts in the area of human rights***

Similar efforts exist and have existed with regard to human rights violations, particularly addressing what was seen as a deficit of implementation of International Criminal Law through so-called Opinion Tribunals. One can cite for instance, the Russell Tribunal on war Crimes in the Vietnam War (1966-1967), the Russell Tribunal to Palestine (2010-2013), the Permanent People's Tribunal (1979-today). Recently the International Monsanto Tribunal in The Hague (October 2016) addressed the shortcoming of multinational corporations' impunity under the current international legal system, and even included prospective questions concerning the crime of ecocide.<sup>46</sup>

Despite their appellation 'Tribunal', and the symbolic venue of the WJC's public hearing at the Peace Palace, these initiatives are not 'kangaroo courts'<sup>47</sup>, but instead are meant to publicly expose and fill-in the gaps left by the international legal system or lack of political will.

---

<sup>43</sup> See *idem*, pp. 122-123, calling for more access to NGOs in NCPs.

<sup>44</sup> *Idem*, p. 113.

<sup>45</sup> The recommendations of the Panel (then referred to as 'Accountability Panel') are available at

<https://wildlifejustice.org/wp-content/uploads/2016/11/AP-rec.pdf> (accessed 29 June 2017).

<sup>46</sup> For more details, see <http://en.monsantotribunal.org/Startpagina-en-mt>.

<sup>47</sup> A biased court without legal ground and disregarding the principles of a fair trial.

Although similarities can be found between these Opinion Tribunals and the WJC – namely the fact-finding and public exposure aspects – it is essential to note that the WJC does not present itself as an Opinion Tribunal.

### ***III.1.2. The WJC: an innovative approach***

The WJC is the first initiative of its kind dedicated to wildlife trafficking. The WJC presents additional innovative characteristics both as an effort to privatise enforcement, and as an NGO operating in the field of wildlife.

As a civil society effort to enforce the law, the WJC is unique in the way it positions itself as a partner and interlocutory for national authorities. The focus of the WJC is to obtain law enforcement actions and the activation of justice against the criminals it investigates. The preferred way to obtain this outcome is through direct co-operation at the operative level by sharing intelligence and providing support to national authorities. As such, the WJC is able to facilitate immediate arrests, prosecutions and convictions. During the 10 past months, immediate collaboration with the Malaysian and Indian authorities resulted in the arrest of 35 individuals and 17 convictions. When immediate collaboration is not available to the WJC, it compiles its evidence into a case file reviewed by an independent expert,<sup>48</sup> translated in the official language of the state concerned, and then transmitted to the national authorities. After the transmission of the case file, a phase of National Dialogue is initiated to obtain law enforcement action based on the evidence contained in the case file. During the National Dialogue, the WJC uses the leverage of local and international stakeholders to achieve change. Contrary to other Opinion Tribunals, the public showcasing of its findings is not the ultimate objective of the WJC, which operates behind the scene throughout most of its process, and recurses to the public hearing as last resort.

Moreover, as an NGO operating in the field of wildlife, the focus of the WJC on the activation of justice and the rule of law rather than on advocacy and conservation projects is also unique. The WJC is meant to complement these initiatives that are key to raising awareness about the loss of biodiversity, and create sustainable environments for wildlife species. Its *modus operandi* is distinct from other NGOs. The WJC operates with law enforcement methods for its intelligence-led investigations. Moreover, its case file is different in nature from other reports, as it is a document compiling compelling evidence with actionable recommendations, presented in a format that is consistent with the practises of law enforcement agencies.

## **III.2. A Bridging Mechanism of Accountability**

### ***III.2.1. Accountability for wildlife trafficking***

The WJC holds states accountable for their inaction regarding wildlife trafficking by presenting them with objective and compelling evidence of the crimes committed as well as an analysis of the gaps present in their legal system. The evidence is gathered by law enforcement and legal experts, and when necessary, is reviewed by renowned independent experts.

---

<sup>48</sup> This initial reviewer is drawn from the WJC's Independent Review Panel.

The WJC has no power to force states to take its findings into account, however the format with which it collects its evidence (*i.e.* its case file) makes it difficult for states not to use the actionable information contained herein. By also involving stakeholders at the local level, such as foreign ambassadors, local NGOs and donors, the WJC is able to increase accountability. In order to identify these stakeholders, existing tools, and possible leverages at the national level, the WJC conducts an analysis of the different wildlife-related capacity building activities, investments, political commitments, existing discussion platforms and civil society networks in the state in question. On the basis of this analysis, it gains a better understanding of the situation and knowledge of potential partners.

In light of this information, the WJC is in an adequate position to build a constructive and informed dialogue with the national authorities, giving the state an opportunity to address wildlife trafficking in its jurisdiction and in cases of inaction, of being held accountable. Conversely, the WJC has no mandate to require reparation which is specific to responsibility. The WJC does not ask for compensation or satisfaction on behalf of any state, even less so does it ask for restitution. It will not even ask for non-repetition or cessation. Instead the WJC counts on building trustworthy relationships and providing support before and/or after the public hearing, to ensure inaction will cease and loopholes will be fixed.

For the WJC, accountability does stop not after the public hearing. After the public hearing has taken place, and the Independent Review Panel has addressed recommendations to the state in question, the WJC seeks to set up a monitoring mechanism to follow-up on these recommendations. To do so, it relies on several triggers available in the international sphere. These triggers include transmitting relevant information it collected to the bodies in charge of compliance embedded in international conventions – such as the CITES Managing Authority. – They prompt the intervention of influential partners – such as trade partners and donors and promote compliance inducements. The latter is achieved through proposing trainings and technical assistance, establishing partnerships with local actors to sustainably monitor the progress made, and by making the issue well known to the public

### ***III.2.2. Bridging the accountability gap***

The process of the WJC addresses several shortcomings of the responsibility regime. To start with a pragmatic view, this private, non-profit initiative bears significantly lower costs than traditional judicial proceedings – let alone the establishment of an International Environmental Court.<sup>49</sup> This is true not only concerning the community of states, but also and particularly concerning the state involved in a WJC investigation. This point was rightfully raised by Motoo Noguchi, chair of the Board of Directors of the Trust Fund for Victims of the ICC and member of the WJC Advisory Council, during his keynote speech at the November 2016 WJC's public hearing.

---

<sup>49</sup> For debates concerning the establishment of an International Environmental Court see E. Hey, *Reflections on an International Environmental Court*, The Hague: Kluwer Law International 2000; T. Stephens, *International Courts and Environmental Protection*, New York: CUP 2009, pp. 56-61; O.W. Pedersen, 'An International Environmental Court and International Legalism', *Journal of Environmental Law* 2012 – 24(3), pp. 547-558.

Furthermore, the non-sanctioning, non-confrontational, non-binding and flexible nature of the WJC process allows for good faith co-operation, and adaption to each particular case. Although its activities are subject to its internal policies and the Independent Review Panel Rules of Procedure,<sup>50</sup> the organisation has the ability to adapt each case with regard to the specificities of the country and its relationship with the actors involved. Nevertheless, as laid out in its Rules of Procedure, the public hearing and the procedure leading to it always obey the principles of fairness, integrity, objectivity and transparency.<sup>51</sup>

Naturally, the WJC's process escapes the strict rules of state responsibility when it comes to standing. As a non-state actor, the WJC typically does not enjoy standing to invoke state responsibility before international jurisdictions where standing is subjected to 'Articles 42 and 48' ARSIWA. Moreover, the cases investigated by the WJC would typically often regard breaches of *erga omnes partes* obligations like a breach of 'Article VIII' CITES, which states might be reluctant to bring forward.

Additionally, when it comes to the primary rules that are breached, the WJC does not limit itself to the international legal system, but also looks at the domestic legal systems, which are not available to the regime of state responsibility. This is highly relevant when it comes to wildlife trafficking, since an important number of the relevant conventions provide for the obligation to criminalise certain behaviour within the domestic legal systems. This is the case for CITES<sup>52</sup>, the United Nations Convention Against Corruption (UNCAC),<sup>53</sup> and the United Nations Convention against Transnational Organised Crime (UNTOC).<sup>54</sup> As a result, the enforcement shifts from the international legal system to the domestic legal systems. This means that domestic courts will have a determining relevance, rather than international ones.<sup>55</sup> In fact, some have dismissed the relevance of state responsibilities for breach of such obligations.<sup>56</sup> This is in line with the idea that the best fora to address obligations essentially regulating the behaviour of individuals or private actors are domestic courts.<sup>57</sup> As such, by focusing on the activation of the local judicial system for the individuals identified throughout its investigation, the approach of the WJC is appropriate to ensure the effectiveness of the international efforts to combat wildlife trafficking. Domestic courts appear to be the most logical fora to address

---

<sup>50</sup> WJC, Rules of Procedure, April 2017, at <https://wildlifejustice.org/wp-content/uploads/2017/05/Rules-of-Procedure.pdf> (accessed 25 June 2017).

<sup>51</sup> 'Underlying principles', WJC, Rules of Procedure, p.3; see also Rule 5.1.1.b which provides for the invitation of the National Authority.

<sup>52</sup> Art. VIII (1), CITES.

<sup>53</sup> 2003 United Nations Convention Against Corruption 2349 UNTS 41 (2007), Chapter III. This convention is relevant for wildlife trafficking since these activities are greatly facilitated by corrupt practices.

<sup>54</sup> 2000 United Nations Convention Against Transnational Organised Crime 2225 UNTS 209 (2007), Arts. 5-10.

<sup>55</sup> See Cardesa-Salzman 2012, *supra* note 17, p.127, who made this observation concerning transboundary movement of hazardous products regimes.

<sup>56</sup> See A. Nollkaemper, 'Compliance Control in International Environmental Law: Traversing the Limits of the National Legal Order', *Yearbook of International Environmental Law* 2002–13, p. 170.

<sup>57</sup> See M.E O'Connell, 'Enforcement and the Success of International Environmental Law', *Indiana Journal of Global Legal Studies* 1995–3(1), pp. 47-64. Regarding climate change claims, Dennis Van Berkel, legal counsel at Urgenda recently expressed the same idea of using domestic courts during the Amsterdam Law Forum 2017 Annual Seminar on 'The Environment and International Law'.

these issues, but if it were to be used, state responsibility could potentially provide for solutions. Indeed, if states fail to enforce the laws they have enacted to implement international conventions, it is arguable that this behaviour is contrary to the ‘object and purpose’ of the convention.<sup>58</sup>

Furthermore, the WJC also often observes loopholes in the particular legal system it investigates. When this occurs, the WJC will comment upon these loopholes in its case file with recommendations, will leverage stakeholders to induce change, and if need be, will highlight these breaches of international obligations during the public hearing.<sup>59</sup>

The WJC does not aim to directly hold accountable the individuals referred to in the case file during the public hearing. In fact, the identity of the individuals suspected of committing the offences is not disclosed, except to the relevant authorities receiving the case file. Evidence made public is always anonymised. In addition, maintaining the confidentiality of the names prevents WJC from inadvertently jeopardising ongoing and future investigations. Instead, the WJC encourages the state to assess the individual responsibility of these persons at the national level. The WJC thus creates the best conditions for the state to prevent the impunity of those engaging in wildlife trafficking.

## **Conclusion**

The WJC’s objective is to contribute to filling in the accountability gap for states and individuals when it comes to wildlife trafficking. Indeed, both the regime of state responsibility and international criminal responsibility largely fail to hold states and individuals accountable on the subject. The approach of the WJC is innovative in the way it operates, yet it is part of a greater movement to bridge accountability gaps in the international legal system in general through autonomous institutional arrangements, but also civil society initiatives. Furthermore, it is noteworthy that these different approaches are not exclusionary and have the potential to complement each other.

Despite its young existence (it was established in 2015), in the past ten months, the WJC has been able to disrupt seven major trafficking networks, facilitate the arrest of 35 individuals resulting in 17 convictions, and routinely collaborates with law enforcements in three countries. More arrests, convictions and collaborations are likely in the future. Its public hearing in November 2016 was the first of its kind, and was saluted internationally for its professionalism and objectivity. The WJC is now engaged in monitoring the implementation of the recommendations issued by the Independent Review Panel at the end of the public hearing, and the results look promising. These early achievements demonstrate that a new approach is possible to obtain tangible results to halt international wildlife trafficking.

---

<sup>58</sup> See 1969 Vienna Convention on the Law of Treaties 1155 UNTS 331 (1980), Article 31(1).

<sup>59</sup> Enacting appropriate legislation is an international obligation under the above cited instruments.