

# **TO CATCH A WILDLIFE THIEF: STRATEGIES AND SUGGESTIONS FOR THE FIGHT AGAINST ILLEGAL WILDLIFE TRAFFICKING**

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## **I. INTRODUCTION**

Wildlife trafficking is very much in the headline news these days. Booming demand for wildlife products such as ivory and rhino horn—especially in Asia—coupled with uneven enforcement and porous border controls has fueled a big uptick in the illegal wildlife trade.<sup>1</sup> In recent years, trafficking rings have morphed from small-time gangs into sophisticated and well-organized criminal organizations, borrowing many of the tactics we've come to expect

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<sup>1</sup> PRESIDENTIAL TASK FORCE ON COMBATTING WILDLIFE TRAFFICKING, NATIONAL STRATEGY FOR COMBATTING WILDLIFE TRAFFICKING (2014) [hereinafter NATIONAL STRATEGY].

from the narcotics cartels.<sup>2</sup> The increase in wildlife trafficking has had a devastating impact, with a number of species, including elephants and rhinoceroses, facing the risk of significant decline or even extinction.<sup>3</sup> As President Obama's Task Force on Combatting Wildlife Trafficking has explained:

Wildlife trafficking threatens an increasing variety of terrestrial, freshwater, and marine species, including but not limited to: elephants, rhinos, tigers, sharks, tuna, sea turtles, land tortoises, great apes, exotic birds, pangolins, sturgeon, coral, iguanas, chameleons, and tarantulas. Wildlife trafficking is facilitated and exacerbated by illegal harvest and trade in plants and trees, which destroys needed habitat and opens access to previously remote populations of highly endangered wildlife, such as tigers. In addition, illegal trafficking of fisheries products, among others, threatens food supplies and food security. Many species decimated by illegal trade and other threats, such as habitat loss, are now in danger of extinction. Wildlife trafficking jeopardizes the survival of iconic species such as elephants and rhinos.<sup>4</sup>

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<sup>2</sup> See *id.*; see also Bryan Christy, *Tracking Ivory*, NAT'L GEOGRAPHIC (Aug. 12, 2015), <http://www.nationalgeographic.com/tracking-ivory/article.html>, archived at <https://perma.cc/RB9N-M3RT> (investigating links between ivory trafficking and funding for the Lord's Resistance Army); Statement for the Record on the Worldwide Threat Assessment of the US Intelligence Community, Before the S. Armed Services Comm., 114th Cong. 11-12, [https://www.armed-services.senate.gov/imo/media/doc/Clapper\\_02-09-16.pdf](https://www.armed-services.senate.gov/imo/media/doc/Clapper_02-09-16.pdf), archived at <https://perma.cc/Z2DQ-SBCS> (2016) (statement of James R. Clapper, Director of National Intelligence) ("Organized crime and rebel groups in Africa and elsewhere are likely to increase their involvement in wildlife trafficking to fund political activities, enhance political influence, and purchase weapons. Illicit trade in wildlife, timber, and marine resources endangers the environment, threatens good governance and border security in fragile regions, and destabilizes communities whose economic well-being depends on wildlife for biodiversity and ecotourism. Increased demand for ivory and rhino horn in East Asia has triggered unprecedented increases in poaching in Sub-Saharan Africa.").

<sup>3</sup> NATIONAL STRATEGY, *supra* note 1, at 4.

<sup>4</sup> NATIONAL STRATEGY, *supra* note 1, at 4.

Much of the battle against trafficking appropriately has focused on reducing demand by raising public awareness.<sup>5</sup> The United States and a number of other countries have organized highly publicized ivory “crushes,” destroying confiscated ivory in part to educate consumers about the poaching crisis and in part as an effort to dry up the market for ivory.<sup>6</sup> Non-governmental organizations (NGOs) have been busy raising public awareness through advertising, much of it focused on curbing demand in the Asian market.<sup>7</sup>

This article focuses on the enforcement side of the fight against the illegal wildlife trade. Drawing on a case I handled as a federal prosecutor in Manhattan—*United States v. Bengis*<sup>8</sup>—the article explores how a typical international wildlife trafficking scheme may work in practice. By understanding how wildlife trafficking actually works—how a ring *must* work in many instances—we will be in a better position to know where traffickers necessarily must leave evidence. With such an understanding, law enforcement agents and prosecutors will be in a better position to gather the evidence they need to prove the case. And legislators and policymakers will be able to craft laws and enforcement policies that will help ensure that the full force of criminal law is employed in the fight against wildlife trafficking.

Part I of this article provides a brief, high-level overview of the *Bengis* scheme, examining some of the methods the ring used in its decade-long fish trafficking scheme and focusing on where the

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<sup>5</sup> PRESIDENT’S TASK FORCE ON COMBATING WILDLIFE TRAFFICKING, NATIONAL STRATEGY FOR COMBATING WILDLIFE TRAFFICKING, 2015 ANNUAL PROGRESS ASSESSMENT (2015), at 20–23 (summarizing U.S. efforts to reduce demand).

<sup>6</sup> *The U.S. Ivory Crush at Times Square*, FISH & WILDLIFE SERVICE, <https://www.fws.gov/le/elephant-ivory-crush.html>, archived at <https://perma.cc/9Z8L-H8FK> (last visited Aug. 27, 2016).

<sup>7</sup> See, e.g., *Ivory Demand Reduction Campaign Launched in China*, AFRICAN WILDLIFE FOUNDATION (Dec. 6, 2013), <https://www.awf.org/news/ivory-demand-reduction-campaign-launched-china>, archived at <https://perma.cc/D8WD-22BP>. China recently announced that it would ban commerce in ivory by the end of 2017. See, e.g., Edward Wong & Jeffrey Gettleman, *China Bans Its Ivory Trade, Moving Against Elephant Poaching*, N.Y. TIMES (Dec. 30, 2016), [http://www.nytimes.com/2016/12/30/world/asia/china-ivory-ban-elephants.html?\\_r=0](http://www.nytimes.com/2016/12/30/world/asia/china-ivory-ban-elephants.html?_r=0), archived at <https://perma.cc/MB4N-KXLP>.

<sup>8</sup> *United States v. Bengis*, 03 Cr. 308 (LAK) (S.D.N.Y. 2003). The district court documents referenced herein are publicly available, and many of them may be found on PACER. Where possible, the docket number for particular filings is indicated with the citation.

co-conspirators had to leave behind the evidence that law enforcement later would use to catch them. Part II focuses on the investigation and prosecutions of the ring in South Africa and in the United States, highlighting how the evidence that the ring members necessarily left behind ultimately was used to disrupt their criminal organization and bring them to justice. Finally, Part III provides some lessons learned from the *Bengis* prosecution to highlight some of the challenges law enforcement faces in investigating and prosecuting wildlife trafficking. It also offers several reform proposals that legislators and policymakers (both in the United States and abroad) might consider in their efforts to bolster the legal landscape, with an eye toward giving prosecutors and agents better tools in the fight against traffickers.

## II. A TYPICAL INTERNATIONAL WILDLIFE TRAFFICKING SCHEME—UNITED STATES V. BENGIS

From at least 1987 through approximately August 2001, Arnold Bengis headed a ring of co-conspirators engaged in an elaborate scheme to illegally harvest massive quantities of South African rock lobster and Patagonian toothfish and then export the illegal seafood to the United States, where they sold it for a significant profit.<sup>9</sup> As part of the scheme, the Bengis organization routinely would harvest and purchase rock lobster far in excess of applicable quotas. A report prepared by Ocean and Land Resource Assessment Consultants (OLRAC) estimated, conservatively, that the ring illegally harvested approximately 856 metric tons of South

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<sup>9</sup> *United States v. Bengis*, 631 F.3d 33, 35 (2d Cir. 2011) (holding that South Africa suffered direct harm from Bengis’ scheme to illegally harvest lobsters, and therefore is a victim for restitution purposes); *see also* Indictment at 6-8, 23-28, *United States v. Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. 2003), ECF No. 201-1 [hereinafter Indictment] (laying out the Grand Jury charges to defendant Bengis’ and co-defendants’ conspiracy to violate the Lacey Act and commit smuggling); Brief for the United States of America at 4-6, *United States v. Bengis*, 07-4895-cr (2d Cir. May 9, 2008) [hereinafter Gov’t Appeal Bf.] (providing the statement of facts for the defendants’ offensive conduct); Government’s Memorandum of Law in Opposition to Defendants’ Joint Motion for a Departure from the Applicable Sentencing Guidelines Range at 7-9, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. May 26, 2004), ECF 195-28 [hereinafter Gov’t Sentencing Mem.] (elaborating on the defendants’ criminal scheme to illegally import into the United States large quantities of South African rock lobster, as well as Patagonian toothfish).

Coast rock lobster during the course of the scheme,<sup>10</sup> which significantly depleted the South Coast rock lobster resource.<sup>11</sup> One co-conspirator, who ended up cooperating with the investigation, reported that the ring also bought large quantities of illegally harvested West Coast rock lobster from local fishermen throughout the duration of the conspiracy—estimating that, in the final year of the scheme, approximately 93% of the West Coast rock lobster the ring handled had been illegally harvested.<sup>12</sup> By OLRAC’s conservative estimate, the ring caused damages of between \$46.7 million and \$61.9 million to South Africa’s rock lobster resource.<sup>13</sup>

#### A. *The Supply Side*

Any illicit trafficking operation—whether it involves wildlife, narcotics, blood diamonds, guns or even counterfeit goods—involves a supply side, a demand side, and a flow of money. The supply side of the Bengis scheme was centered in Cape Town, South Africa, where the ring operated a fish-processing plant (known as Hout Bay Fishing Industries (PTY) Ltd), and where it engaged in the fishing and fish-processing aspects of the operation. Hout Bay Fishing ran several ships that were used primarily to fish for South Coast rock lobster. It also bought West Coast rock lobster from a fleet of smaller local fishing vessels that operated around Cape Town. After the West Coast and South Coast rock lobster was

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<sup>10</sup> Gov’t Appeal Bf., *supra* note 9, at 9–10; OCEAN AND LAND RESOURCE ASSESSMENT CONSULTANTS, REVISION OF CALCULATIONS OF DAMAGES SUFFERED AS A RESULT OF OVERCATCHES IN THE SOUTH AFRICAN SOUTH COAST AND WEST COAST ROCK LOBSTER RESOURCES 38 (Table 6) (Dec. 22, 2004), ECF Nos. 195-13 & -14 [hereinafter OLRAC REPORT].

<sup>11</sup> J.C. Groeneveld, *Under-Reporting of Catches of South Coast Rock Lobster Palinurus Gilchristi, With Implications for the Assessment and Management of the Fishery*, 25 AFRICAN J. MARINE SCIENCE 407 (May 2003) (attached to Gov’t Sentencing Mem., ECF No. 195-28); Victim Statement of H.G.H. Kleinscmidt, Deputy Director General, Marine and Coastal Management, at 2 (attached to Gov’t Sentencing Mem., ECF No. 195-28); Gov’t Sentencing Mem., *supra* note 9, at 16.

<sup>12</sup> Declaration of Special Agent Jeffrey Ray ¶¶ 4g-i, *United States v. Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. Dec. 22, 2004), ECF No. 195-15 [hereinafter Ray Decl.]; Gov’t Appeal Bf., *supra* note 9, at 7–8; Government’s Recommendation Concerning Restitution at 12, *United States v. Bengis*, No. 1:03-cr-00308-LAK (S.D.N.Y. Dec. 22, 2004), ECF No. 195-12 [hereinafter Gov’t Restitution Recommendation].

<sup>13</sup> *United States v. Bengis*, 631 F.3d at 36–37; Gov’t Appeal Bf., *supra* note 9, at 24–25; Gov’t Restitution Recommendation at 6–8, 18–19; OLRAC REPORT, *supra* note 10, Summary Chart.

processed in Hout Bay Fishing's factory, much of it was loaded into shipping containers and exported to the United States and Asia.<sup>14</sup>

So how did the Bengis ring manage, for over a decade, to overharvest such a massive quantity of illegal fish, land it on docks in the middle of Cape Town harbor, process it in their Cape Town factory, move it through South African customs, and export it to the United States and Asia—all without being detected by South African authorities? In fact, they did what any trafficker would do if she was trying not to get caught. Worried that they might attract attention if they offloaded the illegal fish during the day, they offloaded it at night. Aware that authorities could pop up on the docks to see them unload the illegal catch, they bribed fisheries inspectors to look the other way. To keep up the façade that they were a legitimate operation, they reported to the South African fisheries authorities that they had, in fact, caught some fish. But they significantly underreported their catch, which allowed them to “stretch” the applicable catch quotas. And, to get the illegal fish out of the country without getting caught, they submitted false export documents to South African customs authorities, dramatically underreporting the quantity of rock lobster they were exporting.<sup>15</sup>

### B. *The Demand Side*

The demand side of the Bengis trafficking scheme was centered in New York City, where the co-conspirators had an office, and Portland, Maine, where they had a fish-processing factory. Importing multiple containers of illegal fish into the United States required the ring members to make a choice: what should they tell the United States border authorities was in the containers? On the one hand, they could have mislabeled the shipments, or told U.S. Customs the same lies that they told the South Africans, significantly underreporting the rock lobster in the containers. That was a risky option, though, because the U.S. border officials could always open a container, and then they would find that there was a great deal more lobster in the container than the ring had declared in the forms they submitted to U.S. Customs. The other option would

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<sup>14</sup> Indictment, *supra* note 9, at 14–15; Ray Decl., *supra* note 12 ¶¶ 4.e., 5.b., 5.f.; Gov't Restitution Recommendation at 12; Gov't Appeal Bf., *supra* note 9, at 5, 8.

<sup>15</sup> Indictment, *supra* note 9, at 6–7, 14–18; Gov't Sentencing Mem., *supra* note 9, at 10–11, 37; Gov't Appeal Bf., *supra* note 9, at 5–6.

be to tell the truth to U.S. Customs, accurately describing the contents of the containers. But that option also involved some risk, because then the declarations made to the United States during import would be different from the declarations made in South Africa during export. In the end, the co-conspirators elected to file truthful declarations with U.S. Customs, apparently banking on the idea that the U.S. and South African authorities would never compare notes, and that the inconsistencies between the declarations would go undetected.

### C. The Money Flow

Of course, all of this overharvesting costs money. As mentioned, as part of the scheme, the ring bought large quantities of illegal West Coast rock lobster from local fishermen; these fishermen needed to be paid. Hout Bay Fishing used its own boats to harvest South Coast rock lobster; but the massive overharvesting meant the traffickers had to pay more money for extra fuel, extra time at sea, and extra wages to the crew. Processing fish at Hout Bay Fishing's factory also cost money, and processing all that extra illegal fish meant extra processing expenses.

So how did the co-conspirators go about paying for their scheme? The money due to the local South African fishermen and crew was tied to the quantity of fish they caught. Paying them in South Africa could pose a problem, because they were making way too much money compared to the amount of fish that they reported to the fisheries inspectors. The co-conspirators could solve that problem, however, by paying the local fishermen and crew the extra amounts in bank accounts in places outside of South Africa, such as Switzerland or Spain.<sup>16</sup> But what about all of the extra profits made by selling illegal fish in the United States? Some of that money had to go back to South Africa; Hout Bay Fishing was posing as a legitimate operation, and South African authorities would expect that it would be making at least some profit. But it would be a rookie mistake to send all the money back to Cape Town, because the South African authorities might have figured out that Hout Bay Fishing was making too much money. There were plenty of ways to handle the problem of too much money: they could keep the extra

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<sup>16</sup> Gov't Appeal Bf., *supra* note 9, at 7; Gov't Sentencing Mem., *supra* note 9, at 3, 13.

money in U.S. banks or, better yet, send it to accounts in countries such as Switzerland that were known to have strict bank secrecy laws.<sup>17</sup>

The ring members had to keep track of what they had represented to the South African authorities, to ensure both that the numbers they declared kept within their allotted quotas, and that the revenue they reported comported with the declared catch. But they also had to keep track of the true amounts they had harvested, in part because the wages they owed to the fishermen and to their own crewmembers were based on the amount caught.<sup>18</sup> The ring members kept themselves organized by using two sets of books. One set—termed “Sheet A”—kept track of the legal fish: that is, the amounts of fish that were within Hout Bay Fishing’s allotted catch quotas and reported to the South African fisheries authorities. The amounts actually harvested were reflected in a separate sheet, “Sheet B,” which included the illegal fish that the ring had harvested or purchased.<sup>19</sup>

### III. INVESTIGATING AND PROSECUTING A WILDLIFE TRAFFICKING RING

#### A. *How Do We Catch the Bad Guys?*

So how do we go about investigating a wildlife trafficking scheme, such as the Bengis scheme described above? When conducting an investigation, it helps to put yourself in the shoes of the bad guys, and imagine how you would execute the scheme. The question to ask is simple: where does someone have to leave evidence when conducting a trafficking scheme, and how do we go about getting that evidence?

In the *Bengis* scheme, the ring members had to leave evidence both in South Africa and in the United States. The most straightforward evidence involved the conflicting representations that the ring made to South African and U.S. authorities about the quantity and type of fish in particular shipping containers. Under international shipping protocols, each shipping container is assigned

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<sup>17</sup> Gov’t Appeal Bf., *supra* note 9, at 10; Gov’t Sentencing Mem., *supra* note 9, at 13–14.

<sup>18</sup> Gov’t Sentencing Mem., *supra* note 9, at 19.

<sup>19</sup> Ray Decl., *supra* note 12, ¶¶ 4.c., 4.j.; Gov’t Appeal Bf., *supra* note 9, at 6–7.

a unique serial number. Those numbers are included on both the export documents submitted when the container leaves South Africa and the import documents submitted when the container enters the United States. The co-conspirators presumably assumed that the United States and South Africa never would sit down to compare the two sets of documents. That was a mistake. By matching the export documents with the import documents, investigators from South Africa and the United States were able to demonstrate clearly that the ring members were lying either to South Africa or to the United States. Either way, the customs documents made it crystal clear that a crime was in the works.

To execute the scheme, the ring had to leave other evidence as well. In South Africa, for example, they had to keep records of the wages they paid the crew. Because the crew's pay was based on the actual quantity of lobster caught, the payroll records necessarily reflected the actual amounts of lobster harvested.<sup>20</sup> The ring also needed two separate sets of books in order to keep track of the financial aspects of the scheme, so it was not surprising that the investigation found the "Sheet A" and "Sheet B" documents during their search of Hout Bay Fishing's facility. And, of course, the ring had to rely on the financial system to make the money transfers and payments needed to support the scheme. Bank records in the United States are easily available to federal prosecutors with a grand jury subpoena, and a prosecutor with some effort and patience can get bank records from other countries through a Mutual Legal Assistance Treaty (MLAT) request.<sup>21</sup> Gathering all of these records, and piecing together the money trail, provided clear evidence of the money that the ring collected from selling the fish, and where they sent the money afterwards.<sup>22</sup>

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<sup>20</sup> Gov't Sentencing Bf., *supra* note 9, at 19.

<sup>21</sup> For a helpful overview of how the Mutual Legal Assistance Treaty process works, see Virginia M. Kendall & T. Markus Funk, *The Role of Mutual Legal Assistance Treaties in Obtaining Foreign Evidence*, 40 A.B.A. LITIG. J. 1, 3 (2014).

<sup>22</sup> For a good summary of the United States' efforts to follow the money trail see Daniel W. Levy, *Court Has Broad Authority Over Assets to Satisfy Restitution*, LAW 360 (Apr. 24, 2015), <http://www.law360.com/articles/646418/court-has-broad-authority-over-assets-to-satisfy-restitution>, archived at <https://perma.cc/F36F-SQDP>. See also Gov't Mem. Of Law in Support of Application for Writ Under 28 U.S.C. § 1651(a) at 3–6, *United States v. Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. Mar. 11, 2014), ECF No. 219 (providing investigation results regarding how the Government identified significant assets gathered, held and transferred by the ring among different bank accounts).

Of course, conducting such a large poaching and trafficking operation involves a large number of people, some of whom could serve as possible witnesses, giving the investigators a peek into the inner workings of the conspiracy. In the *Bengis* case, cooperating witnesses in South Africa helped shed light on the inner workings of the supply side of the scheme,<sup>23</sup> including how the ring was involved for over a decade in overharvesting lobster far in excess of applicable quotas, and how they tried to evade detection by misreporting their catches to fisheries authorities, offloading illegal fish at night, bribing fisheries officials, and “stretching” their allotted quotas by falsely reporting their catch and shipments to the fisheries authorities and to South African customs. Witnesses in the United States, in turn, would be able to tell the investigators how they went about importing and selling the illegal fish, and how the ring handled the financial side of the scheme.

Co-conspirator witnesses are especially useful in establishing mental state, often the most challenging aspect of building a criminal case against an individual trafficking defendant. Through witnesses, for example, the investigation was able to show that one ring member had participated in altering documents to conceal the actual quantity of South Coast rock lobster that Hout Bay Fishing had harvested.<sup>24</sup> Witnesses also reported that Arnold Bengis, upon learning of the investigation, had ordered employees to remove wage records from Hout Bay Fishing’s facility, apparently concerned that, because crew wages were based on actual catch, those records reflected the actual quantities of seafood harvested.<sup>25</sup> Witnesses helped establish that the ring arranged for previously-disadvantaged South African citizens who did not have valid U.S. working permits to work for low wages at the Maine factory, where they were required to process illegal fish.<sup>26</sup> And information from cooperating witnesses also helped establish mental state through conversations the ring members had during the course of the conspiracy. Perhaps the most dramatic conversation shedding light on mental state concerned a reported conversation during which Arnold Bengis’ lieutenants asked about the possibility of being caught in the illegal trafficking scheme. According to the

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<sup>23</sup> Ray Decl., *supra* note 12, ¶¶ 3–5.; Gov’t Appeal Bf., *supra* note 9, at 7.

<sup>24</sup> Indictment, *supra* note 9, at 26–27; Gov’t Sentencing Mem., *supra* note 9, at 19.

<sup>25</sup> Gov’t Sentencing Mem., *supra* note 9, at 19.

<sup>26</sup> Indictment, *supra* note 9, at 7, 20, 25; Gov’t Sentencing Mem., *supra* note 9, at 3.

witnesses, Bengis responded that he likely would never be prosecuted because he had “fuck you money.”<sup>27</sup>

### B. The Prosecutions

South Africa’s prosecution naturally focused on the damage the ring had inflicted in South Africa, targeting the poaching and bribery aspects of the scheme. South Africa prosecuted the operations manager for Hout Bay Fishing, a number of rock lobster fishermen involved in poaching, and fourteen corrupt fisheries inspectors.<sup>28</sup> South Africa also seized and forfeited Hout Bay’s factory, a number of vessels, and a large quantity of illegal lobster. Hout Bay Fishing entered a corporate plea of guilty, which required it to pay a hefty fine.<sup>29</sup>

The U.S. prosecution also concentrated on the local impact, but the focus was on the harm the ring had caused in the United States. Of course, the most tangible harm the ring caused was the poaching itself, which occurred over 7,000 miles away in Cape Town. But the defendants, by bringing the illegal goods to the United States, also harmed U.S. markets and consumers. By dumping illegal fish onto the U.S. market, they undercut legitimate competitors, hurt U.S. fishermen, passed off illegal lobster to unwitting U.S. consumers, and threatened the future viability of a previously healthy lobster supply.<sup>30</sup>

The U.S. prosecution was premised primarily on defendants’ violations of the Lacey Act,<sup>31</sup> one of the oldest and certainly one of the most powerful anti-trafficking tools around.<sup>32</sup> The anti-

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<sup>27</sup> Sentencing Hearing Transcript at 46, *United States v. Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. 2003); Gov’t Sentencing Bf., *supra* note 9, at 37.

<sup>28</sup> *United States v. Bengis*, 631 F.3d at 36; Gov’t Sentencing Mem., *supra* note 9, at 4.

<sup>29</sup> *United States v. Bengis*, 631 F.3d at 36; Gov’t Sentencing Mem., *supra* note 9, at 22.

<sup>30</sup> Gov’t Sentencing Mem., *supra* note 9, at 15–17 (outlining the harm to the U.S. market, competitors and consumers); see also S. Rep. No. 91-526, at 12 (1969) (noting that “[b]y prohibiting the sale in the United States of wildlife protected by a foreign government, the demand [in the U.S.] for poached wildlife from that country will be sharply reduced”).

<sup>31</sup> 16 U.S.C. § 3372 (2012).

<sup>32</sup> Robert S. Anderson, *The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 36–52 (1995) (providing an overview of the Lacey Act’s history and development); see also Elinor Colbourn & Thomas W. Swegle, *The Lacey Act Amendments of 2008: Curbing International Trafficking in Illegal Timber*, STO36 ALI-ABA 365, 373–77 (Apr. 26, 2012)) (explaining

trafficking provision of the Lacey Act, Section 3372(a)(2)(A), focuses on protecting the integrity of the U.S. market, making it a crime to “import, export, transport, sell, receive, acquire or purchase” wildlife, fish, plants and plant products that have been “taken, possessed, transported, or sold . . . in violation of any foreign law.”<sup>33</sup> The gist of the Lacey Act is a two-step approach. The first step—the “predicate law” inquiry—concerns the wildlife itself: were the goods at issue “taken, possessed, transported, or sold” in violation of some local (including foreign) law or regulation intended to regulate fish, wildlife or plants?<sup>34</sup> The second step focuses on the trade of those tainted goods *in the United States*, making it illegal to “import, export, transport, sell, receive, acquire or purchase” illegal wildlife in the United States.<sup>35</sup> The great power of the anti-trafficking provision of the Lacey Act is that the Act itself is largely agnostic about whether certain species may or may not be harvested. Instead, the Act envisions that local states or foreign countries will set the rules governing the conservation of the wildlife, fish and plants in their own jurisdictions. But, once wildlife, fish or plants have been “taken, possessed, transported, or sold” illegally under local law, the Lacey Act says you cannot bring those goods into the United States and trade them on U.S. markets.

So how was the Bengis prosecution able to establish the “predicate law” violation—that the fish being brought into the United States had been “taken, possessed, transported, or sold . . . in violation of any foreign law”? Proving that one particular lobster brought into the United States had been illegally harvested in South African waters no doubt would have been difficult, if not impossible. But, remember, the co-conspirators didn’t just overharvest; they also tried to hide their poaching by offloading the illegal fish at night when fisheries officials weren’t around, bribing fisheries inspectors to look the other way, misreporting their catches to the

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the importance and potency of the Lacey Act in the fight against widespread illegal wildlife trafficking).

<sup>33</sup> 16 U.S.C. § 3372 (2016).

<sup>34</sup> The underlying predicate law violation may be, but need not be, a criminal law violation. *United States v. Lee*, 937 F. 2d 1388 (9th Cir. 1991). Rather, a violation of a civil regulation may serve as a predicate for a Lacey Act prosecution, provided the law is designed in part to protect wildlife, fish or plants.

<sup>35</sup> See generally Robert S. Anderson & Mary Dee Carraway, *Current Issues Arising in Lacey Act Prosecutions*, 63:3 U.S. ATT’YS BULL. 3, 3–7 (2015) (summarizing the Lacey Act’s anti-trafficking provisions).

authorities, and lying on the export documents they submitted to the South African customs officials. Of course, as mentioned, each of these ploys required the ring to leave behind at least some evidence, and that evidence proved crucial to the investigation. But these deceptions also were central to the Lacey Act prosecution, because a number of their evasive tricks themselves violated South African law. So, while the ring members' efforts to conceal the scheme was a step away from the poaching itself, those efforts also independently were violations of South African law, and formed predicate law violations for the purposes of a Lacey Act prosecution.<sup>36</sup>

That's one of the beautiful things about the Lacey Act: to execute their trafficking scheme without getting caught, the ring had to violate a whole slew of South Africa's reporting laws and export regulations, a number of which were general laws governing trade. While those laws and regulations all served a role in protecting wildlife, fish and plants, they were not exclusively or specifically targeted at prohibiting poaching. By violating those laws and regulations, the co-conspirators provided the prosecution with a number of the predicate law violations needed to support a prosecution under the Lacey Act.

Five defendants were arrested in the U.S. case, and charged with violations of the Lacey Act, smuggling and conspiracy. All five pleaded guilty and ultimately were sentenced to terms of 46 months in jail for Arnold Bengis, 30 months in jail for Jeffrey Noll, 1 year in jail for David Bengis, and probation for the two defendants who decided to cooperate with the U.S. prosecution.<sup>37</sup> The defendants also were required to forfeit to the United States a total of \$7.4 million, which included \$5.9 million forfeited by Arnold Bengis and \$1.5 million forfeited by David Bengis representing proceeds of the sale of the Maine facility.<sup>38</sup> Finally, after many years of litigation, the defendants were ordered to pay approximately \$22.4 million in restitution to South Africa, to compensate the country for the harm they had caused.<sup>39</sup>

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<sup>36</sup> See Indictment, *supra* note 9, at 22–23, 29–39.

<sup>37</sup> Docket Sheet, *United States v. Bengis*, S1 03 Cr. 308 (LAK) (S.D.N.Y. 2003).

<sup>38</sup> Gov't Appeal Bf., *supra* note 9, at 3–4.

<sup>39</sup> *United States v. Bengis*, No. S1 03 Crim. 308 (LAK), (S.D.N.Y. 2013).

#### IV. SOME TAKEAWAYS AND THOUGHTS FOR REFORM

So what are some of the strategies that we might use to detect and hopefully disrupt an international wildlife trafficking scheme? Some of the answers are obvious. We start by putting ourselves in the shoes of the traffickers. To begin with, they are well aware that poaching is illegal. They also know that regulators are tasked with trying to prevent trade of illegal goods by inspecting goods at commercial gateways, such as ports or border crossings, and by requiring traders to declare the goods they are exporting and importing. So, to engage in a trafficking scheme, the criminals need to poach in places where their activities are hard to detect or in situations where either no one will enforce the laws or the penalties are so light that the occasional slap on the wrist will not significantly impact their business. They also need to figure out ways to circumvent the various regulations governments have put in place to police the international trade routes. And they will need to move money around, both to fund their ongoing scheme and to conceal their illegal profits.

The trafficker's tactic is to look for, and exploit, gaps in the regulatory apparatus. Worried about the game warden? Have your people poach where and when she is not around or, if necessary, bribe her to look the other way. Concerned about the harbormaster or the borders? Learn about how the authorities actually work, and figure out ways to circumvent their controls, perhaps by mislabeling and disguising the cargo, and by misreporting the true contents in any declaration you submit to the authorities. Unless the customs officials from the exporting country routinely exchange information about particular shipments with their counterparts in the importing country, you might decide it makes sense to tell each country something different about the goods you've packed in a particular container. Finally, you need to understand how the banking system works, and look for ways to move money around without anyone figuring out that you got the money illegally and are funding a wildlife trafficking ring.

How do we stop them? The traffickers don't hate animals; they're in the illegal wildlife trade because they want to make money, and they have calculated that the rewards outweigh the risks. The key to stopping wildlife traffickers is to change the risk equation. The various efforts by countries and NGOs to dampen

demand<sup>40</sup> hopefully will go a long way toward lowering the reward side of the equation. And law enforcement, by becoming better at catching the traffickers, making sure they get stiffer penalties, and taking away any ill-gotten gains, will help increase the risk, thus pushing the bad guys out of the wildlife trafficking business.

Much of the required framework already is in place, but enforcement sometimes suffers because of anemic execution. The first step on the enforcement side is to detect the crime and catch the bad guys. The fight against poaching itself presents a tough problem to crack, at least right now, in part because much of the poaching occurs in poorer developing countries, where enforcement is lax and corruption is pervasive. To help stop poaching in the range (or source) countries or on the high seas, it no doubt would help to have more and better equipped wildlife and fisheries enforcement officials, and it also would help if poachers faced serious penalties if they got caught. Local corruption will undercut all of these efforts, however, both because the traffickers can pay off the game wardens or fisheries officials, and because they can pay off prosecutors or judges if they do end up getting caught.

Much of the solution to such pervasive corruption in developing countries boils down to ongoing efforts by the Organisation for Economic Co-operation and Development (OECD) and others to build a “rule of law” culture throughout the world. The Fraud Section of the U.S. Department of Justice could play a more constructive role in this area by concentrating some of their robust efforts to enforce the Foreign Corrupt Practices Act<sup>41</sup> on international environmental crimes.<sup>42</sup> The press and NGOs also can play a role by directing their bright lights and publicity machines more closely on individual arrests and prosecutions in poaching and low-level trafficking cases, both to make it more difficult for defendants to buy their way out of an arrest by bribing a local

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<sup>40</sup> See AFRICAN WILDLIFE FOUNDATION, *supra* note 7 and accompanying text.

<sup>41</sup> The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1–78dd-3.

<sup>42</sup> See Marcus Asner, Samuel Witten & Jacklyn DeMar, *The Foreign Corrupt Practices Act and Overseas Environmental Crimes: How Did We Get Here and What Happens Next?* BLOOMBERG BNA DAILY ENV’T REP. (July 12, 2012), <http://www.bna.com/overseas-environmental-crimes> (discussing the connections between corruption and foreign environmental crimes and advocating for stricter international regulation of natural resources).

prosecutor or court official, and to publicize successful enforcement efforts.

How do we go about detecting trafficking once the illegal goods have entered international trade channels? A first big step would be to make sure people declare clearly and precisely what goods they are shipping. Allowing traffickers to fall back on general terms—such as “frozen fish” or “fresh meat” or “wood”—provides them with a good opportunity to avoid detection. Opening and inspecting more containers, and making sure that customs and other border inspectors learn enough about the wildlife trade so they know what to look for, is another way to help catch and deter trafficking. Adopting a uniform computerized system to enable customs officials in an exporting country to exchange export documentation seamlessly with customs officials in the importing country would help ensure that traffickers would not be able to conceal the scheme by telling different things to different countries about what they packed into a particular container.

Once a trafficking scheme is detected, how do we go about using criminal law to punish the traffickers, deter others, and compensate the victim countries? In the United States, we are helped by having robust criminal enforcement statutes, such as the Lacey Act. Other countries should follow suit, both by adopting Lacey Act-style laws and by shoring up their existing laws to make wildlife trafficking a serious criminal offense.<sup>43</sup> Ensuring that judges and prosecutors treat wildlife trafficking as a serious crime, on par with other financial crimes such as fraud or theft, has the immediate and obvious benefit of helping ensure that the traffickers are punished for their crimes. But there are collateral benefits as well. The prospect of a lengthy prison sentence and hefty fines also can deter others from entering the wildlife trafficking business in the first place. An added bonus is that the fear of a heavy penalty can prove crucial to the investigation itself as well—particularly if a country’s legal system has a well-developed witness cooperation framework<sup>44</sup>—because it gives a defendant a strong incentive to

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<sup>43</sup> See UNODC/WWF FISHERIES CRIME EXPERT GROUP MEETING, WWF MEETING REP. 11 (2016) (recommending that “states should adopt US Lacey-Act type legislation”).

<sup>44</sup> The United States federal system has a robust system for encouraging defendants in federal criminal cases to cooperate with investigations and prosecutions. Section 5K1.1 of the United States Sentencing Guidelines allows for judges to depart from the otherwise applicable Sentencing Guidelines range “[u]pon motion of the government stating that the

cooperate with the investigation and prosecution. This cooperation often is a key factor both in identifying all players in a trafficking ring and in establishing that individual members had the requisite mental state to make them guilty of a crime.

While the U.S. criminal statutes are comparatively strong, the United States also could take steps to enhance its laws. One change that would help would be for Congress to pass a bill proposed by the President's Advisory Council on Wildlife Trafficking to modify federal criminal law so that wildlife trafficking violations, especially felony violations of the Lacey Act, would serve as predicate violations under (i) the Travel Act,<sup>45</sup> (ii) the federal money laundering statutes,<sup>46</sup> and (iii) the Racketeer Influenced and Corrupt Organizations Act of 1970 (RICO).<sup>47</sup> As the Council explained in a public letter to Senators Lindsey Graham and Dianne Feinstein:

The [proposed] modifications would provide federal law enforcement with additional tools in the fight against wildlife trafficking, both by expanding the reach of federal law enforcement jurisdiction in this area, and by increasing possible penalties. The legislation also would send an important message, because it would signal that the United States considers wildlife trafficking a serious crime, in the same general band as a wide range of other federal crimes, ranging from wire fraud to Interstate

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defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”

<sup>45</sup> Travel Act, 18 U.S.C. § 1952 (2016).

<sup>46</sup> Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956–57 (2016).

<sup>47</sup> Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §§ 1961–1968 (2016); Advisory Council on Wildlife Trafficking Recommendations to Presidential Task Force on Combatting Wildlife Trafficking 3 (June 9, 2014), <https://www.fws.gov/international/advisory-council-wildlife-trafficking/pdf/advisory-council-recommendations-06-09-14.pdf>, *archived at* <https://perma.cc/C6JR-NEVF> [hereinafter Advisory Council Recommendations]. The Department of Justice recently proposed amending the money laundering statute, 18 U.S.C. § 1956, to include as a predicate act (“specified unlawful activity”) “any act or activity constituting an offense in violation of the laws of the United States punishable by imprisonment for a term exceeding one year.” DEPARTMENT OF JUSTICE, ANTI-CORRUPTION LEGISLATIVE PROPOSALS, 114th Cong., at 2 (2016), <https://www.justice.gov/opa/file/849986/download>, *archived at* <https://perma.cc/TLG2-RXR3>. The DOJ proposal as a practical matter is far more sweeping than the Advisory Council’s more modest proposed change to the money laundering statute.

Transportation of Stolen Property to narcotics trafficking, and set an example that will influence other countries to do the same. The United States has supported efforts through United Nations agencies (such as the United Nations Organizations on Drugs and Organized Crime) and other fora to have wildlife trafficking recognized as serious crime, and we believe that legislation here in the U.S. should reflect this.<sup>48</sup>

Finally, one powerful way to change the trafficker's risk/reward equation is to reduce the trafficker's expected reward by taking away his illegal profits. A trafficker expecting to make a few million dollars in a trafficking scheme, and facing a small chance of spending a few years in jail, may decide that wildlife trafficking is worth the risk, especially if he can expect to end up with the money after he gets out of jail. Taking away the illegal profits changes the equation.

Forfeiting the proceeds of wildlife trafficking to the government can be a powerful tool in ensuring that traffickers are denied the fruits of their crime. But making the traffickers pay restitution to their victims can be even more powerful in appropriate cases. Following the Second Circuit's restitution decision in *Bengis*,<sup>49</sup> prosecutors often are able to rely on the federal restitution statutes, Sections 3663 and 3663A of Title 18 of the United States Code, to obtain restitution for victims of wildlife crime.<sup>50</sup> The *Bengis* decision is limited, however, because it bases restitution on violations of general criminal statutes, such as smuggling or conspiracy, and not on violations of statutes that are specifically directed at wildlife trafficking, such as the Lacey Act. This means that, in some cases, serious wildlife criminals may be able to avoid

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<sup>48</sup> Letter from Advisory Council on Wildlife Trafficking to Senators Graham and Feinstein 2 (June 9, 2014), <https://www.fws.gov/international/advisory-council-wildlife-trafficking/pdf/federal-advisory-council-letter-06-09-14.pdf>, archived at <https://perma.cc/K7U6-SWNW> [hereinafter Advisory Council Letter].

<sup>49</sup> 631 F.3d 33 (2d Cir. 2011).

<sup>50</sup> See *United States v. Bruce*, 437 F. App'x 357 (6th Cir. 2011) (ordering restitution to the States of Tennessee and Alabama); *United States v. Oceanpro Indus., Ltd.*, 674 F.3d 323, 332 (4th Cir. 2012) (ordering restitution to Maryland and Virginia); see generally Melanie Pierson & Meghan N. Dilges, *Restitution in Wildlife Cases*, 63 U.S. ATT'YS BULL., no. 3, 82, 86–87 (2015) (summarizing recent restitution cases in wildlife cases).

having to pay restitution to their victims. It also signals that the United States considers wildlife trafficking to be a less serious crime. A simple remedy would be to modify the federal restitution statutes to include wildlife crime statutes, particularly the Lacey Act.<sup>51</sup>

To be sure, there may be situations in which awarding restitution to a victim country would not be appropriate. In some cases, for example, there is no clear victim or local corruption makes it unclear where the restitution payments would end up. But making sure appropriate victims get compensation in wildlife cases—whether the victims are individual landowners, states or countries—serves an important role in the fight against wildlife trafficking. Ensuring that innocent victims receive compensation reflects the reality that wildlife has a real, economic value to local communities. Affording victims their right to restitution also will give them a power incentive to work with U.S. law enforcement in the fight against trafficking.

## V. CONCLUSION

Illegal wildlife trafficking has evolved into a big business in recent years, and the organized criminal rings that trade in wildlife, seafood and timber have grown ever more professional and sophisticated. Their methods of moving their illegal product through the borders and other gateways of commerce increasingly resemble the approaches we usually associate with narcotics trafficking or other sorts of smuggling. This Article argues that the key to catching the traffickers in large part boils down to understanding better how they go about moving their illegal goods, what sorts of things they have to do to evade detection, and how they move around money both to support the scheme and to launder their illegal profits. Once we better understand how the traffickers must operate, we'll be in a much better position to know where they leave evidence behind for us to find.

Learning how traffickers operate and where they will leave evidence certainly will help in the effort to catch them and break up

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<sup>51</sup> See Advisory Council Recommendations, *supra* note 47, at 3 (recommending three strategic priorities set forth in the National Strategy); Advisory Council Letter, *supra* note 48, at 2–3 (supporting proposed legislation against wildlife trafficking).

their organizations. But that knowledge also will help legislators enact laws that will better arm law enforcement in the fight against wildlife trafficking. Understanding, for example, that a trafficking ring likely will need to violate multiple local trade laws and regulations before it ships poached goods to sell in another country provides a strong argument for Lacey Act-style legislation. If all countries adopted a version of the Lacey Act, for example, demand countries would be in a better position to combat the illegal wildlife trade in their own markets, which in turn will help dry up the market and ultimately help bolster the efforts of the source countries to stop local poaching.

While the Lacey Act gives United States law enforcement a leg up in the fight against wildlife trafficking, the United States also could improve its legal framework. As we saw in *Bengis*, trafficking rings can be complex, organized enterprises that establish elaborate money laundering operations to further their schemes. U.S. law enforcement often relies on powerful statutes such as RICO or the anti-money laundering laws to break up sophisticated criminal organizations. If we are serious about fighting wildlife trafficking, Congress should amend the law to make wildlife trafficking a predicate crime under the RICO, money laundering and Travel Act statutes. Bolstering the federal restitution statutes to include wildlife trafficking also would help in the fight against trafficking, in part because it would give law enforcement another tool to ensure that traffickers don't get to keep the proceeds of their illegal scheme. Perhaps more fundamentally, however, bolstering the restitution statutes will help ensure that victim communities receive appropriate compensation for the harm that the traffickers inflicted. Awarding compensation to local communities will contribute to the ongoing fight against trafficking because it will incentivize them both to value and better protect their own wildlife, and to cooperate with U.S. law enforcement in international wildlife trafficking investigations.

