

The protection of biodiversity in Italy: A case study of conviction for killing endangered species

Carla Campanaro, Lawyer, PhD student at Rome University and visiting researcher at Oxford University, Legal consultant to Lav and Waldrappteam LIFE+ Reason for Hope project.

Summary

1. The European Life+ Project; 2. Northern Bald Ibis (NBI) and its International and European legal protection; 3. The damage to the endangered species as an irreversible European environmental damage; 4. The Italian legal framework about the protection of biodiversity; 4. The Livorno case, a conviction for killing of endangered species: 4.1. The Northern Bald Ibis killed over the past few years in Italy; The history of Goja and Jedi, a conviction for illegal killing; 5. Conclusions.

1. The European Life+ Project.

The project of reintroduction of the Northern Bald Ibis (NBI) in Europe started on January 1st, 2014 and will end on December 31st, 2019. Austria, Italy and Germany participate in the project. The project aims to protect the NBI, a critically endangered bird species. The Austrian Förderverein Waldrappteam is the coordinating beneficiary of the project, and shall pursue the objectives of the project together with the other partners. The project is based upon a ten-year-long feasibility study in accordance with the International Union for Conservation of Nature (IUCN) guidelines, which proved possible sustainable livelihoods for colonies of Ibis in Europe. In particular, the task is to found breeding colonies of NBI in Salzburg and Baden-Württemberg (Bavaria). Those colonies will use a common migration route to the wintering area in Southern Tuscany (WWF Oasi Laguna di Orbetello). The

project aims to reach a population size of minimum 120 birds in order to exceed the so-called "Minimum Viable Population Size". The project focuses on activities for the scientific conservation of the bird through guided migration. The birds are monitored by using GPS trackers, especially during the migration flights. In Italy, over the years, the project has been and still is strongly threatened by poaching actions, which have caused extensive damage to the colony: 18 birds have gone missing and 15 have been hunted since 2011, as well as a substantial economic loss for the project (€234.352,12 only in 2016).

'...the project has been and still is strongly threatened by poaching actions, which have caused extensive damage to the colony...'

The Italian Authority has approved the reintroduction of the Northern Bald Ibis in Italy with prot.0027720-09/04/2013-PNMIII (proposal LIFE12BIO/AT/00143-Reintroduction of the Northern Bald Ibis) signed by the Director General of the Directorate General for the Protection of Nature and Sea of the Ministry of the Environment of Italy.

In this document addressed to the European Commission (International Affairs Directorate Life Nature), the Ministry of the Environment of Italy has clearly stated its support for the project and the reintroduction of NBI in Europe, founding wintering

areas for the species in Italy. Furthermore, in the above document, it committed to meet the orders that fall within its responsibility to designate new protection areas (SPA special protection areas), in full coordination with the Region of Tuscany, until the end of the project.

2. Northern Bald Ibis (NBI) and its international and European legal protection.

NBI is listed on the 2001 Red List as a critically endangered species (IUCN version 3.1).¹ The International Union for the Conservation of Nature (IUCN) is an international non-governmental organization with official United Nations Observer Status. It compiles the IUCN Red List of Threatened Species (also known as Red Data List), which gives information on the critically endangered species.²

'In the numerous cases of the NBI killed in Italy, the infringement of the protection legislation... caused irreparable damage to the wild fauna, endangering the species and causing environmental damage.'

Another NBI-protection international agreement is the Convention on International Trade of Endangered Species (CITES). CITES was made applicable throughout the European Union by adopting regulations such as Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, and Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein. NBI is included in Appendix I to CITES,³ which lists critically endangered species. Trade and killing of these species are prohibited. In fact, they are prescribed the highest degree of protection. Furthermore, NBI is included in

Appendix I to the Convention on the Conservation of Migratory Species of Wild Animals (also known as the CMS or Bonn Convention) ratified in Italy by Law No 42 of 25 January 1983 Ratifying and Implementing the Convention on the Conservation of Migratory Species of Wild Animals, with Annexes, adopted in Bonn on 23 June 1979.

Of course, NBI is also protected by the European legislation, namely Directive 2009/147/EEC on the conservation of wild birds which provides the protection of wild birds in Europe. Therefore, in accordance with the abovementioned rules and the European project, it follows that, pursuant to Birds Directive, Member States – such as Italy – are prescribed to protect birds, including NBI.

The damage to the endangered species as an irreversible European environmental damage

The damage to the fauna, particularly to the endangered species, resulting from conduct, such as poaching, which infringes international and European law on protection of biodiversity and which causes death or injury to protected species may result in concrete and irreversible environmental damage. The legal content of the notion of damage to fauna has to be established in relation to the special protection that the European directives (Birds Directive and Habitat Directive) give to biodiversity, as well as in connection to Directive 2004/35/EC on environmental damage, according to which the damage occurs even if only one animal under special protection has been injured, killed or captured.

In the numerous cases of the NBI killed in Italy, the infringement of the protection legislation - i.e. injuring, capturing, killing NBI - caused irreparable damage to the wild fauna, endangering the species and causing environmental damage. The Directive on Environmental Damage states that preventing and remedying environmental damage “contributes to implementing the objectives and principles of the

¹ <http://www.iucnredlist.org/details/22697488/0>

² The Red List of 2012 was released on 19 July 2012 at The United Nations Conference on Sustainable Development 2012, also known as Earth Summit, Rio+20, or Rio 2012).

³ <https://cites.org/eng/app/appendices.php>



Community's environment policy as set out in the Treaty" and provides in Article 2 a notion of environmental damage as, inter alia, "damage to protected species and natural habitats."⁴ Article 3, subparagraph 1(b) provides that the Directive shall apply also to damage to protected species and natural habitats caused by any occupational activities other than those listed in Annex III, and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligent. In line with the aforementioned principle of prevention, which the Single European Act included in Article 174 of the Treaty establishing the European Community, the Directive regulates preventive actions (Article 5) as well as remedial actions (Article 6).

As to preventive actions, in accordance with Article 5, the Directive states that, where environmental damage

has not yet occurred but there is an imminent threat of such damage occurring, the operator shall, without delay, take the necessary preventive measures. The competent authority – the public body designated by the Member State to implement and monitor the Directive, which in this case is the Ministry of the Environment – may, at any time, itself take the necessary preventive measures. As to remedial actions (Article 6), the competent authority may take these measures itself, "as a means of last resort", where the offender cannot be identified.

3. The Italian legal framework on the protection of biodiversity

Law N. 157 of 11 February 1992 on "the protection of warm-blooded wild fauna and on hunting" protects wild fauna in Italy. According to this regulation, which transposes the Birds Directive as well as the Paris

⁴ Directive on Environmental Damage, Article 3, subparagraph 1, letter a «environmental damage»: a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching

or maintaining the favourable conservation status of such habitats or species. The significance of such effects is to be assessed with reference to the baseline condition, taking account of the criteria set out in Annex I.

Convention of 18 October 1950 and the Bern Convention of 19 September 1979, in Italy wild fauna belongs by right to the Italian State and its protection is in the interest of the national and international community. The aforementioned law⁵ obliges the State and the local authorities to take the necessary measures to ensure the effective protection of birds, including NBI. The infringement of Articles 1 and 2 of Law No 157 of 1992 applies the sanction referred to under Article 30(b) of Law No 157 1992, which provides for imprisonment of two to eight months or a fine between 900 and 2500 euro for the killing, destruction, capture, removal, detention of protected wild animal species listed in Article 2. When applied, such criminal penalty is ridiculously low. Moreover, the law provides certain circumstances for the option of immediate payment extinguishing prosecution as well as for an option to treat the offence as one, as referred to in Article 131-bis C.C.

Legislative Decree No 121 of 2011 - implementing the Environmental Crime Directive (2008/99/EC)⁶ and the Directive on ship-source pollution (2009/123/EC),⁷ as well as implementing the enabling Law No 96/2010 (Community law 2009)⁸ - introduced Article 727-bis of the Criminal Code, which provides fines for “the killing, destruction, capture, removal, detention of protected wild animal or plant species”. In the case of protected wild animals, it provides for imprisonment of one to six months or a fine up to EUR 4,000.00, “save where the act constitutes a more serious offence” or “in a case other than those provided for by law” and “except for cases where the conduct concerns a negligible quantity of such specimens and has a negligible impact on the conservation status of the species.”

Subparagraph 2 establishes that a criminal offence is committed by “Whoever, outside the allowed cases,

⁵ Law N. 157 of 1992, Article 1-bis provides that: ‘The State, Regions and autonomous Provinces, without any new or incremental charges for the public finance, shall take the requisite measures to maintain the population of the species referred to in Article 1 of Directive 2009/147/EC of 30 November 2009 of the European Parliament and of the Council at a level which corresponds in particular to ecological, scientific, touristic and cultural requirements, while taking account of economic and recreational requirements, and ensuring that all the measures being taken will not lead to a deterioration of the conservation

destroys, takes and holds specimens belonging to a protected wild flora species ...”, except for the safeguard clause referred to in the last part of Article. Article 733-bis, Subparagraph 2 specifies that “For the purposes of the enforcement of art. 727-bis of the Criminal Code, protected wild fauna or flora species are considered those set forth in attachment IV of the Directive 92/43/CE and attachment I of the Directive 2009/147/CE”.

This Article does not seem to respect the concern that the European legislator expresses in recital 12 of the Directive on the protection of the environment through criminal law, under which “As this Directive provides for minimum rules, Member States are free to adopt or maintain more stringent measures regarding the effective criminal law protection of the environment. Such measures must be compatible with the Treaty”.

‘The current penalties for killing and destruction (where fines and imprisonment are not joint) appear to be ridiculously low...’

For this reason, Article 727-bis C.C. as well as Law 157 of 1992, Article 30(b) (which provides penalties for the killing of a protected species) are considered as not reflecting the content of the Directive on the protection of the environment through criminal law, while the introduction of crime in case of killing or destruction of protected wild fauna would be necessary. Otherwise, even remaining within the penalty, at least it would be appropriate to extend the current penalties provided by Law No 157 of 1992 excluding the immediate payment extinguishing

status of the birds and their habitats, subject to the provision of Article 9, paragraph 1, letter a, and first and second intends of the same directive’.

⁶ Dir. 2008/99/EC of the European Parliament and of the Council, of 19 November 2009, protecting the environment by means of criminal law.

⁷ Legislative Decree. No 121/2011, published in the Official Journal No 177 of 1 August 2011, available on www.lexambiente.it.

⁸ Legislative Decree. No 121/2011, published in the Official Journal No 177 of 1 August 2011.

prosecution and including a joint penalty of fine and imprisonment up to three years, in line with the enabling law.

The current penalties for killing and destruction (where fines and imprisonment are not joint) appear to be ridiculously low, since they are subject to immediate payment extinguishing prosecution pursuant to Article 162 and Article 162bis C.C. (half of the highest penalty). It means that capturing a protected species would cost to the culprit only EUR 1,500.00 (where the immediate payment extinguishing prosecution is applied), extinguishing also the offence. In other words, the Italian law provides only an economic penalty for a widespread offence, while the European Community ask strong penalties for such offence.

In conclusion and in line with the current national criminal law framework protecting animals, it seems necessary to withdraw the penalties that punish the killing of protected species (Law 157 of 1992, Article 30, letters b, c, g), which are now obsolete.

In fact, today they bring unjustified and illogical limitation to the crime set out in Chapter IX-bis of the Criminal Code (Article 544-bis, which criminalises the killing of animals) and they need to be applied also to the killing and destruction of protected species, as it would be otherwise illogical, discriminatory and unjustified. The inappropriateness of the current regulatory protection measures against poaching appears to be confirmed by the European Commission, which has opened an EU pilot procedure (EU pilot 5283/13/ENVI) on the ineffective protection of wild birds. At this time, it is still not known whether the Italian State will align its regulation. In response to this EU pilot, the Italian Government approved a “National plan against birds poaching” on 30th March 2017, by State/Region Conference (CSR), which provides a future series of measures to tackle Italian poaching.

In the light of the reconstruction carried out, to this day, waiting for possible improvement by the Plan mentioned, the Italian general rules regarding the framework for sanctions on the killing of protected or endangered species appears to be completely unfit for purposes. New penalties with real deterrent effect should urgently be laid down, including through

ancillary measures for the withdrawal of a firearms licence or of a hunting licence as well as by making the trade associations more responsible.

4. The Livorno case, a conviction for killing of endangered species.

4.1 About the NBI killed in Italy.

Illegal hunting in Italy causes about 70% of the mortality to the reintroduced NBI population. Since all NBI carry GPS-transmitter, the species becomes an indicator species for the threat of illegal hunting in Italy. We assume that for other endangered migratory bird species along the Italian flyway the rate of losses by illegal hunting is the same or even higher, in absence of certain data at the moment.

Data collected from the team of the Project strongly indicate that poaching is undertaken mainly by people who also hunt legally, during the hunting season.

In October 2014, a four-year-old male NBI named Hella, who belonged to a population of about 40 reintroduced NBI, was found dead in the province of Livorno, Tuscany. An X-ray of the bird showed pellets in the body, a clear indication of illegal hunting as the cause of death. The province of Livorno and Tuscany became a major hot spot for illegal hunting on this highly-endangered bird species. Also in 2012, a further migratory NBI named Domino was shot near Cecina, just 30 km north of Hella’s locality. This bird survived due to emergency surgery but could never again be released due to the heavy violations of one wing.

Two years earlier, in 2012, two NBI, named Goja and Jedi, were shot dead during autumn migration. This incident happened just 6 km north of the place where Hella was shot. The culprit was convicted in September 2016, but some days after, in the autumn of 2016, five more NBI were shot in Italy. The financial damage to the European reintroduction project LIFE+ Northern Bald Ibis is estimated at 234.000 Euro. This demonstrates that conviction alone cannot counteract poaching in Italy; the law needs more instruments.

Notwithstanding all of these illegal killings, the legal measures against the perpetrators are still hesitant, as in the case of Tara, one of the birds shot near Vicenza

with a damage of 70.400 Euro, where in a first step the Public Prosecutor asked immediately for the dismissal of the investigation. There is a serious risk of dismissal of the case before detailed investigations have been started, and often the authorities never begin detailed investigations because Tribunals have few resources to dedicate to tackling poaching.

4.2 The history of Goja and Jedi, a conviction for illegal killing

As mentioned above, in October 2012, two Northern Bald Ibises, called Goja and Jedi, were shot dead during autumn migration in Tuscany. The culprit was a hunter from Tuscany who was definitively convicted by the Third Criminal Section of Supreme Court on the 1th June 2017, 5 years after the killing.

The two birds were an important part of the project. Goja was raised by human foster parents in the context of the Waldrapteam project and was trained to follow a microlight aircraft to perform a human-led autumn migration in 2009. It was the first bird ever to come back by itself to the breeding area of Burghausen (July 2011), and in autumn 2011 it returned to the Tuscany by itself. That made the bird an extraordinary individual in the project, which raised a lot of international attention.

Jane Goodall, one of the most famous conservationists in the world as well as an UN messenger of peace, became a honorary godfather for Goja (the name Goja comes from Godall and Jane). In April 2012, the bird returned again by itself to the breeding area, and in October 2012 it departed from the breeding area with two juvenile birds. Each bird carried a GPS tracker; this allowed a member of Waldrapteam to follow them by car. On 13th October 2012 between 08:30 am and 09:00 am Goja and Jedi were shot. The member of the staff who was following them arrived onsite at about 09:30 am and this was the key of the trial, as we will see later. Goja died in the arms of the member of staff soon after, due to a heavy injury to the neck.

Jedi was raised by its biological parents under the breeding programme in Bavaria. In October 2012, Jedi and another juvenile bird departed from the breeding area; they followed the experienced migrant Goja to

the south, and they crossed the Apennine. The second juvenile bird lost contact with the group. Jedi continued to follow Goja and they were shot at the same time by the same rifle, in the same location. Jedi had such heavy injuries, with a broken leg and a broken wing. When it was brought to the LIPU veterinary center of CRUMA in Livorno, it was still alive, but it died three days later due to the heavy injury.

'The programme staff found the two birds shot on the ground, close to each other and very close to the hunting lodge... Since birds of this species usually fly very close to each other, we were able to find out that they were killed by the same shot.'

The veterinary centre performed X-rays on both birds, revealing the presence of many pellets in both bodies. At the time, no complete autopsy was made on the bodies during the investigation, but the Livorno Tribunal and the Third Criminal Section of Supreme Court considered the X-ray acquired by the police to be evidence that the two birds died from the shots.

Thanks to the GPS trackers, which all birds that are part of the project wear on their backs, these two animals were detected only a few minutes after they were shot, while they were still alive. Of course, as soon as the member of the project noticed the unusual stop during the flight at 9.00 a.m., she ran to the spot localized by the GPS and discovered that the birds. This was vitally important, as it allowed her to testify in detail regarding the scene of the crime to the police, the public prosecutor, and the judges, when the trial begun.

Approaching the scene of the crime the member of staff saw two hunters hunting from a hunting lodge in a fenced area. One of them (the culprit) was collecting some birds already shot. The two hunters refused to open the gate to help her to find the birds. Only when she met another hunter nearby the scene of the crime (but outside of the gate), who spoke to the other

hunters inside the area, did they decide to open the gate.

The programme staff found the two birds shot on the ground, close to each other and very close to the hunting lodge, as shown by the photos taken by the Provincial Police. Since birds of this species usually fly very close to each other, we were able to find out that they were killed by the same shot. Thanks to the immediate and operative support from the Provincial Police of Livorno, called by the member of the programme staff, the offender was subsequently identified; he was a member of an Italian hunting association. In the meantime, Italian national and local media were giving great emphasis to the news of the killing.

Provincial Police of Livorno decided to hear the testimonies from all of the hunters who were around the place where the birds were shot, including the two hunters on the hunting lodge. As for the source of the shot, the Provincial Police run a great investigation, using the precious GPS data collected by the member of the project. Through the analysis of the GPS, the trajectory and the point of fall of the animals as well as the location of their finding, it turned out that before their death, the birds transited to a height of 60 meters from the soil and right above the fixed hunting system n. 7078, in the vicinity of which (50 meters away) they were found.

Documentary inquiries revealed that the hunting system belonged to one of the hunters (who was convicted of shooting the birds) and that he had an authorization to hunt right in that area. Moreover, he and his friend were there on the day of the killing. The certainty that the origin of the shot was in the shed comes from the overlapping of the geographic coordinates and the photograph of a part of the GPS tracks, from which it emerged that the subjects had been had fallen vertically right nearby the hunting system fixed shipment. On the basis of this evidence, the hunter was sent to trial.

During the investigation, police excluded the possibility that someone else could had been near the hunting lodge, because of the Italian rules about hunting distance. This established that that the only hunters

present on the area at the moment of the killing were the two hunters on the hunting lodge. Moreover, during the shooting, one of them was on the ground. Then the Public Prosecutor ordered a search of the flat of the hunter identified and investigated, where the police found many rifles and bullets of the same kind as the one which killed the birds. During the investigation, the police underlined the impossibility for anyone to see the birds in flight because they were flying very high and the vegetation was blocking the view from below. They could have been seen only by climbing on the hunting cabin.

'Unfortunately, the Italian legislation considers crimes against wild fauna and endangered species a "contravention" and, therefore, it is a general practice by the Tribunals to apply the "oblazione".'

Unfortunately, the first hearing began only in April 2015, 3 years after the killings, and there were many delays due to procedural reasons and to the condition of the Livorno Tribunal. During the first hearing, the hunter's lawyer tried to finalize the case by an extrajudicial comparison, asking for the application of the "oblazione", which a procedure is provided by Italian Criminal Code, where the crime is settled paying a fine. This procedure may be applied in case of "contraventions", i.e. criminal provision considered as "less serious".

Unfortunately, the Italian legislation considers crimes against wild fauna and endangered species a "contravention" and, therefore, it is a general practice by the Tribunals to apply the "oblazione". In the first hearing, LAV (a NGO for animal rights) - which was a civil party at the trial - opposed this and, due to the relevance of the case, the Tribunal rejected the "oblazione". The hunter appealed this point at the Supreme Court, claiming that the Livorno Tribunal did not justify in detail its decision to deny him the "oblazione", but the appeal was rejected. During the hearings (many were postponed for procedural

reasons), public officials, the hunter, and the members of the team were heard. Police underlined that it is a duty for a hunter to distinguish hunting animals from non-hunting animals. It would have been very easy to distinguish the birds they were hunting (wood pigeons) from NBI, as ibises are completely "unmistakable".

Since the offence was considered only a "contravention", a procedural cause of non-punishability called "prescription" might have been applied after 5 years from the killing. In order to avoid such situation, LAV and Waldrappteam asked the Tribunal to schedule the hearings as soon as possible. Finally, in September 2016, the hunter was found guilty of the crime of killing and sentenced to a fine of 2,000 euro and his hunting license was withdrawn.

With the Judgement No 2027 of 13 September 2016, the Livorno Tribunal convicted the hunter to a 2000-euro penalty for the infringement of Articles 1 and 2 of Law No 157 of 1992 and the related sanction referred to under Article 30(b) of Law No 157 1992, which provides the imprisonment of two to eight months or a fine between 900 and 2500 euro for the killing.

The Tribunal had no doubt about the criminal liability of the hunter in accordance with the evidence collected. Thanks to GPS data and the flight coordinates data, it was possible to identify the exact spot where, at 9.00 a.m., the fatal shots were fired. It matched the hunting system n.4078, where the hunter was. This was also confirmed by the ballistic test and by the police, who stated that the deadly shot could not come from the ground since there were too many trees obstructing the view. According to the judgment, it was impossible for the hunter not to recognize the Ibis from the other birds, as they are unmistakable. The Tribunal also dismissed the request to apply a procedure called "option of minor nature of the offence" as referred to in Article 131-bis C.C. This procedural institute is provided by art 131 of the Criminal Code and it is a substantial reason for non-punishability, where the judge may evaluate the "importance" of the crime.

With this important judgement, the Tribunal denied the use of this institute because the culprit killed an endangered specimen protected by international rules and by a European project.

The convict appealed to the Supreme Court, which, on June 1 2017, confirmed the condemnation and thus created a unique and essential precedent in the fight against illegal bird hunting. This condemnation, at the Supreme Court level, is one of the greatest achievements of the LIFE+ reintroduction project, because it makes the Northern Bald Ibis a flagship species against illegal bird hunting.

5. Conclusions

A vital need for the sustainable reintroduction of a migratory NBI colony and for the survival of the other endangered migratory bird species along the Italian flyway is the elimination of losses due to illegal bird hunting and poaching in Italy. This judgment proves that, thanks to the LIFE + Reason for Hope project and its related important activities, it has been possible to identify the poacher, through the permanent GPS monitoring of all individuals, by escorting the birds whilst flying through Italy during the hunting season and thanks to a great job of Police, Public Prosecutor and the NGO that were civil part during the trial.

But this is not enough, and further joint efforts are required, particularly from Italian institutions, and a change of the legislation is needed, for example to prevent the possibility for a perpetrator to avoid a criminal case by paying a minor fine, by strengthening the controls and training for police and public prosecutors for poaching investigations. This includes, among the other things, the establishment and training of a task force along the migration route in Italy, as well as the development of technical equipment which, in the case of accidents, immediately transmits the position of the bird who may be at threat.