

**Minor Dissertation**



**IMEL**

INSTITUTE OF MARINE  
& ENVIRONMENTAL LAW

## **POACHING IN CONTEXT**

A critical review of the role that corruption and criminal syndicates play in wildlife crime in South Africa, specifically in so far as it relates to the poaching of rhinoceros.

by

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***“Our lives begin to end the day we become silent about things that matter.”***

**Martin Luther King, Jr.**

## Declaration

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## **Acknowledgments**

After an extensive period, today is the day; writing this note of thanks is the final and finishing touch to my thesis. This has been a period of intensive learning, not only on an academic level but also on a personal one. Writing this thesis had a very big impact on me, therefore I would like to look back and reflect on the people that helped and supported me throughout this journey.

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Last but certainly not least, I would like to thank my parents. Thank you for always encouraging me to never give up, and to always chase my dreams no matter the costs. Thank you for your encouragement, love and support throughout this journey.

## **Abstract**

Wildlife crime is a longstanding problem. People have always considered living and non-living species as resources and tradable products used for pure economic gain, which then has a negative effect on biodiversity.<sup>1</sup> In addition, wildlife crime involves poachers; armed non-state actors from source nations; international crime groups; institutional corruption across global network chains and a range of players involved in demand countries, which range from organized criminal syndicates, non-state actors and legitimate authorities.<sup>2</sup>

States and the International community are responding to wildlife crime in the form of law enforcement and regulatory initiatives. The question therefore arises, why does wildlife crime persist and what is the driving force behind these crimes and the people involved.<sup>3</sup> For example, despite the broad legislative framework, the enforcement or rather lack thereof seems to be the reason that South African rhinos are still facing destruction. This paper aims to evaluate what the relationship is between wildlife crime with rhino poaching as a focus point, corruption and organised crime. It discusses the current enforcement framework, and investigates why the enforcement framework is not supporting the legislative framework. Lastly practical and structural solutions will be discussed and evaluated.

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<sup>1</sup> Julie Ayling 'What Sustains Wildlife Crime? Rhino Horn Trading and the Resilience of Criminal Networks' (2012) 16 *JIWLP* 1 at vi.

<sup>2</sup> Katherine Lawson & Alex Vines *Global Impacts of the Illegal Wildlife Trade The Costs of Crime, Insecurity and Institutional Erosion* (2014) ix.

<sup>3</sup> Julie Ayling op cit note 1 at iv.

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# **Chapter 1**

## **1.1 Background**

There is more than enough evidence that points to the effect which humankind has in the extinction of species. Humans have always regarded living and even non-living species as resources and tradable products, which more often than not has a negative impact on biodiversity.<sup>4</sup> Even though the trade of these species are met with an increasing battle from both the national and International community, through law enforcement and regulatory initiatives, the question which comes to mind is why it persists. One needs to consider what makes this crime sustainable and what support is provided for those involved.<sup>5</sup>

Wildlife crime encompasses a variety of diverse and overlapping offences, ranging from illegal hunting, exporting and importing, supplying to receiving, possessing and consuming parts of wild animals.<sup>6</sup> Furthermore it frequently involves other associated offences such as, corruption and organised crime.<sup>7</sup>

Organised crime and corruption is often treated as separate entities or offences but in fact they feed off one another.<sup>8</sup> Wildlife crime involves various aspects of organised crime such as individuals' co-operating in networks that are motivated by high profits and aided by corruption. Corruption is inherent in these crimes whether it is through a bribe; pay off; officials turning a blind eye or distortion of the judicial process following arrests.<sup>9</sup> Although the killing of wild animals can be opportunistic or driven by subsistence, the organised crime element is a common and persistent element.<sup>10</sup>

It would seem that even though corruption and organised crime is present throughout environmental crimes and wildlife crimes in general, it is more common

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<sup>4</sup> Julie Ayling op cit note 1 at 1.

<sup>5</sup> Ibid at 1.

<sup>6</sup> Maira Martini 'Wildlife Crime and Corruption' (2013) 367 Transparency International at 2.

<sup>7</sup> Ibid.

<sup>8</sup> Anthony Minnaar 'A Symbiotic Relationship? Organised Crime and Corruption in South Africa' (1999) 9<sup>th</sup> International Anti Corruption Conference at 1.

<sup>9</sup> EIA 'In cold blood Combating organised wildlife crime' available at [www.eia-international.org/wp-content/uploads/EIA-In-Cold-Blood-FINAL](http://www.eia-international.org/wp-content/uploads/EIA-In-Cold-Blood-FINAL) accessed on 25 January 2016 at 4.

<sup>10</sup> Ibid.

when it comes to threatened species. It is for this reason that this paper will focus on the poaching of rhinoceros because South African rhinos are suffering a poaching onslaught. Despite escalated anti-poaching activities and campaigns, the number of rhinos poached per year has continued to increase since 2008.<sup>11</sup>

According to Wyatt, people can also be indirect victims of the illegal trade of endangered species.<sup>12</sup> This can be attributed to the fact that the individuals living in the areas where they are dependent on the wildlife for their means of support, can be economically challenged by this illegal trade since; it is threatening the stability, livelihood and natural resources of these communities.<sup>13</sup> South Africa is a primary example of this as the citizens are dependent on wildlife tourism for their livelihoods. Furthermore a country as a whole can also be considered as an indirect victim because of the fact that illegal trade by its very nature circumvents taxes, and therefore contributes to a loss of income.<sup>14</sup>

South African citizens are not only victims because of the economic element, but also because of the fact that some of the citizens are in the front line when it comes to protecting the rhinos. Park rangers and dedicated teams patrol the parks in the war against poaching, and large numbers have lost their lives in the process.<sup>15</sup>

In a survey conducted by the endangered wildlife trust, a question was asked to prosecutors and police officials whether the current set of environmental legislation relating to biodiversity and conservation is adequate and effective in so far as it pertains to their work. Only 25% of the police officials answered yes, 50 % partly and the other 25% said no. The NPA answered 50% yes, and 50% partly.<sup>16</sup> With the current legislation the accused rhino poachers are easily released on bail and the light sentences which are imposed on the poachers after committing the offence,

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<sup>11</sup> Moses Montesh *Rhino Poaching: A new form of organised crime* (Research Paper, University of South Africa, 2012) 2.

<sup>12</sup> Tanya Wyatt *Wildlife Trafficking: A Deconstruction of the Crime, the Victims and the Offenders* (2013) at 64.

<sup>13</sup> Marina Ratchford, Beth Allgood & Paul Todd *Criminal Nature: The Global Security Implications of the Illegal Wildlife Trade* (2013) 10.

<sup>14</sup> Tanya Wyatt op cit note 12 at 65.

<sup>15</sup> SanParks 'Counter Poaching' available at <http://www.sanparksvolunteers.org/conservation-services/19-honorary-rangers/about-hrs/104?showall=1>, accessed on 7 October 2015.

<sup>16</sup> Yolán Friedman, Harriet Davies-Mostert & Marie Parramon-Gurney (eds) *Scoping Report: Investigating the Challenges Facing Compliance Monitoring and Enforcement of South Africa's Biodiversity Legislation and Recommendations for Improvement* (2012) 15.

make their criminal act well worth their while. The risk of being arrested is low and the risk of being imposed a harsh sentence of long term imprisonment is equally as low.<sup>17</sup>

The enforcement tactics that are currently being utilized have not kept up with the sophisticated criminal networks. Practices that will fight wildlife crime, and address it as serious organised crime needs to be applied rigorously, or wildlife crime will remain a high profit and low risk activity.<sup>18</sup>

## **1.2 Research Questions**

1. What is the relationship between corruption, organised crime and wildlife crime in so far as it relates to threatened and protected species, specifically rhinoceros?
2. What is the structure of this relationship?
3. How is South Africa currently responding to these crimes and offenders (enforcement framework)?
4. What are the shortcomings in this response (enforcement framework), and how can it be strengthened (Suggestions)?

## **1.3 Rationale for study**

The drastic increase in rhino poaching is largely due to the rise in demand for its horn. Rhino poaching and rhino poachers do not just commit these crimes coincidentally. These are well thought out operations and planned precisely by sophisticated organised criminal syndicates acting as a team to further their own interest. Corruption is a critical factor that enables wildlife crime, a facilitator for poaching as well as transactions between supply, transit and demand countries, and

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<sup>17</sup> Global March for elephants and rhinos 'Demand for Proposed Amendments to South African Legislation to Combat Rhino Poaching and Crimes Involving Threatened or Protected Species' available at [http://march4elephantsandrhinosaurs.org/wp-content/uploads/2016/07/gmfer\\_south\\_africa\\_only\\_demand\\_for\\_proposed\\_amendments\\_10.04.2014.doc](http://march4elephantsandrhinosaurs.org/wp-content/uploads/2016/07/gmfer_south_africa_only_demand_for_proposed_amendments_10.04.2014.doc), accessed on 10 March 2016.

<sup>18</sup> EIA op cit note 9 at 5.

most importantly an important source of resilience for organised criminal groups involved in such crimes.<sup>19</sup>

Transitional organised crime<sup>20</sup> operators are drawn to the high profits and low accountability of wildlife crime. As a result of deplorable rates of prosecution that are combined with corruption, ensures that organised criminal groups flourish within South Africa.<sup>21</sup> Even though corruption and organised crime are independent crimes, they are committed in the course of committing the ultimate end crime which is the poaching of a rhino.

The Minister of Environmental Affairs, Edwa Molewa, pointed out that environmental crime is not harmless, nor victimless. Whether it is specie smuggling; waste dumping or poaching, these environmental crimes are often linked with other forms of criminal activity.<sup>22</sup> There is a plethora of South African environmental legislation regulating crimes relating to threatened species including the National Environmental Management: Biodiversity Act.<sup>23</sup> Corruption on the other hand is regulated by the Prevention and Combating of Corrupt Activities Act<sup>24</sup> which is the key statute of corruption in South Africa. This statute provides for the general offences of corruption as well as specific offences. Organised crime is regulated by the Prevention of Organised Crime Act<sup>25</sup> which is aimed at combating organised crime, criminal gang activities and also racketeering activities.

Despite this seemingly strong and broad regulatory framework, South Africa is still facing a rhino poaching crisis. Therefore we must consider why the legislative framework is not supported by the enforcement framework and why this lack of

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<sup>19</sup> Maira Martini op cit note 6 at 1.

<sup>20</sup> This term is defined by the United States National Security Council as “Transnational organized crime refers to those self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/ or violence, or while protecting their illegal activities through a transnational organizational structure and the exploitation of transnational commerce or communication mechanisms”.

<sup>21</sup> Katherine Lawson & Alex Vines op cit note 2 at 9.

<sup>22</sup> Minister Edna Molewa’s speech at the 35<sup>th</sup> Annual Crime Stoppers International Conference.

<sup>23</sup> The National Environmental Management Act: Biodiversity Act No. 10 of 2004 (hereinafter referred to as NEMBA).

<sup>24</sup> The Prevention and Combating of Corrupt Activities Act 12 of 2004 (hereinafter referred to as PRECCA).

<sup>25</sup> The Prevention of Organised Crime Act 121 of 1998 (hereinafter referred to as POCA).

support exists in order to determine where the shortcomings are and how South Africa is being constrained by these shortcomings.

## **1.4 Methodology**

The research method used in this dissertation is a literature based approach of various sources of the law. This includes a study of books, journal articles, and applicable environmental legislation, case law and internet sources.

The main focus will be on the critical evaluation of the enforcement provisions in the legislation in order to establish whether or not the key issue is with the legislation or the enforcement thereof. Case law will form a pivotal part in the determination of the successful implementation of the legislative provisions.

During the evaluation of the enforcement provisions in the legislation, a distinction will be made between traditional and novel sanctions, to enable an easier evaluation thereof.

## **1.5 Structure of minor dissertation**

Apart from this chapter, this dissertation is divided into six chapters. In **Chapter two** the relationship between corruption, organised crime and wildlife crime in so far as it relates to threatened and protected species, specifically rhinoceros is critically reviewed in order to establish how this relationship is interlinked and feed of one another. By defining each component and discussing its operation, it enables one to identify the problem. This Chapter provides for a theoretical discussion of the problem.

**Chapter three** illustrates the practical and structural operations of the role players identified as the main problem in Chapter one. This discussion enables for the practical discussion of the problem. **Chapter four** deals with the current enforcement framework applied to rhino poaching. It critically discusses the strengths and weaknesses of the current enforcement framework, to enable the determination of the constraints and disadvantages within the current enforcement regime, which will serve as a pathway for the determination of suitable solutions.



**Chapter five** interlinks with Chapter 4, in that it provides for an in depth discussion regarding the current constraints experienced by the current enforcement regime. This Chapter will clearly show how South Africa is being constrained by the weaknesses pointed out in Chapter 4. **Chapter six** evaluates the legislative provisions for enforcement. This discussion is important since the legislative and enforcement framework must support one another and the enforcement framework is only as strong as the provisions contained in the legislative framework.

Finally **Chapter seven** discusses the practical suggestions for the strengthening of the enforcement framework. It looks at how this framework can be adapted to provide for better enforcement mechanisms, which will assist in the war against rhino poaching. This chapter also contains a final conclusion for the research.

## **Chapter 2- The relationship between organised crime, corruption and wildlife crime in so far as it relates to rhino poaching**

### **2.1 Introduction**

Before one can critically analyse where the problem lies, or how the problem can be addressed, one must identify what the problem is. This paper aims to assess rhino poaching. But rhino poaching cannot be looked at in isolation as it forms part of a much bigger issue which is wildlife crime.

Therefore this chapter's aim is to critically review the relationship between organised crime, corruption and wildlife crime in so far as it relates to rhino poaching. This critical analysis will consist of defining each component and discussing the nature and extent thereof. By having this critical review, it enables the theoretical illustration of the issue, and how the components interlink in order to later on assess the shortcomings and how these shortcomings can be reinforced to provide for a practical and sufficient solution.

### **2.2 Wildlife crime**

Valerie Hickey stated that:

*"Wildlife crime is leading to the proliferation of guns in exactly those areas that need less conflict, not more; it is providing money for corruption in exactly those countries in which corruption has already stalled all pro-poor decision making and doing business legitimately is already hard enough; and it is oiling the engine of crime and polluting efforts at good governance, democracy and transparency in exactly those communities that need more voice, not more silence . . . . The fight to end wildlife crime is a fight for humanity."*<sup>26</sup>

In essence wildlife crime refers to any environmental crime<sup>27</sup> that specifically involves the illegal trade, poaching, capture, smuggling, or collection of endangered species or protected wildlife. This includes animals and plants which are subject to

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<sup>26</sup> Valerie Hickey 'The fight to end wildlife crime is a fight for humanity' available at <http://blogs.worldbank.org/voices/Fightto-End-Wildlife-Crime-Is-Fight-for-Humanity>, accessed on 20 February 2016.

<sup>27</sup> Environmental crime as defined by USLegal means "a violation of environmental laws that are put into place to protect the environment".

harvest quotas and regulated permits. These crimes therefore refer to acts that are committed in contravention of national laws and policies.<sup>28</sup>

This usually starts with the illicit exploitation of the natural resource, such as in the case of poaching of a rhino. This may also include ensuing acts, such as the processing of fauna or flora into products, their transportation, offer for sale and the sale and possession thereof. Furthermore, it includes the concealment and laundering of financial benefits that was obtained through committing these crimes. Only a number of these crimes will occur solely in the country of origin, while others will occur in the destination country, where these fauna and flora or parts thereof are consumed and/or enjoyed.<sup>29</sup>

### **2.2.1 The nature and extent of wildlife crime**

The UN Secretary-General Ban Ki Moon stated the following on World Wildlife Day:

*“The environmental, economic and social consequences of wildlife crime are profound. Of particular concern are the implications of illicit trafficking for peace and security in a number of countries where organized crime, insurgency and terrorism are often closely linked.”*

Traditionally wildlife crime was being driven by demand in the various consumer countries and facilitated by poverty in source countries. These driving forces still remain but it appears that a parallel illegal wildlife trade is emerging that is increasingly dominated by organised criminal syndicates that are more sophisticated, better equipped and have extensive trade links across continents.<sup>30</sup> It is also facilitated by arms proliferation, which includes rangers that are among human casualties because they are on the front line in the fight against the poachers, who are well equipped and well funded.<sup>31</sup>

Wildlife crime has wide ranging impacts and effects that threaten the survival of these species in the wild, along with their ecosystems and habitats upon which

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<sup>28</sup> Maira Martini op cit note 6 at 2.

<sup>29</sup> CITES ‘ Wildlife Crime’ available at <https://www.cites.org/eng/prog/icwcw.php/Wildlife-Crime>, accessed on 1 October 2015.

<sup>30</sup> Elisabeth Mclellan, Rob Perry-Jones & Richard Thomas et al ‘Illicit Wildlife Trafficking: An Environmental, Economic and Social Issue’ (2014) 14 UNEP at 2.

<sup>31</sup> EIA op cit note 9 at 4.

millions of people are dependant. As observed with other major crimes, wildlife criminals use corruption and intimidation tactics.<sup>32</sup> Furthermore, wildlife crime is of a transnational nature, which means that it includes transnational actors. Criminals who are involved in the illegal wildlife trade can also be involved in the trafficking of other illegal goods, which enables them to make use of the same trafficking routes and thereby making the trans-boundary movement of these products a lot faster and easier. The proceeds that wildlife crime generates may then further aid other organised criminal activities.<sup>33</sup>

Due to the transnational nature of wildlife crime, organised criminal syndicates are involved in the poaching, smuggling and trade of wildlife and wildlife products.<sup>34</sup> Organised criminal syndicates include individuals that co-operates in networks which are motivated by high profits and fuelled by corruption.<sup>35</sup>

A number of factors have been identified by expert analysis that are indicative of the serious and organised nature of the offences, especially in so far as it relates to Asian big cats, rhinos and elephant poaching. These include organised structure to poaching; use of gangs; supply of vehicles; weapons & ammunition and exploitation of local communities; Provision of high-quality lawyers and corruption of judicial process; violence towards law enforcement personnel; financial investment in 'start-up' and technology needed for processing and marketing; sophistication of smuggling techniques and routes; involvement of persons of high political or social status; sophisticated forgery and counterfeiting of documents; use of fake or 'front' companies; use of the internet to commission crime; previous convictions for other types of crime and huge profits.<sup>36</sup>

The extent of wildlife crime has reached epic proportions. Wildlife crime ranks amongst the top five largest transnational crimes in the world, and does not only threaten species but communities as well.<sup>37</sup> The global value of the illegal trade in wildlife products, including rhino products, is approximate a minimum of \$19 billion

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Maira Martini op cit note 6 at 2.

<sup>35</sup> EIA op cit note 9 at 4.

<sup>36</sup> Ibid.

<sup>37</sup> Tamsin Walker 'Where there is wildlife, there is crime' available at <http://www.dw.com/en/wheres-wildlife-theres-crime/a-18295057>, accessed on 8 October 2015.

per year. This makes it the fourth largest illegal transnational product worldwide; after drugs, counterfeited goods and humans.<sup>38</sup>

## **2.3 Corruption**

Corruption is a very sensitive issue, and can in essence be compared to cancer as it is truly an enemy that destroys from within.<sup>39</sup> Corruption is defined as “the unlawful use of public office for private gain”,<sup>40</sup> and “An act of wrongdoing which typically involves unethical behaviour and illegality and benefits usually accrue to either of the parties involved”.<sup>41</sup>

Corruption is a serious problem, which not only jeopardises sustainable development but also the rule of law and the credibility of governments. This provides for a breeding ground for organized and syndicated crime to develop and grow.<sup>42</sup>

### **2.3.1 The nature and extend of corruption in so far as it relates to wildlife crime**

Corruption is seen as the most critical factor when it comes to the enabling of wildlife crime and trafficking. It is also regarded as a facilitator to poaching and also contributes towards the success of transactions between supply, transit and demand countries. Corruption may facilitate many of the crimes along the wildlife trade route which include poaching. Corruption in this instance can be in the form of illegal payments for the issuing of hunting licenses; trafficking; bribery of customs officials; illegal payments to issue export certificates, to law enforcement which includes bribery of police officers and prosecutors to avoid investigations and illegal payments to manipulate court decisions.<sup>43</sup>

Wildlife crime thrives in countries where corruption is common, government enforcement is fragile and economic opportunities are very few. It is regarded as one of the most critical factors that enables illicit wildlife trafficking. Illegal networks are essentially linked to large scale corruption, specifically in order to facilitate fraudulent

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<sup>38</sup> Op cit note 30 at 2.

<sup>39</sup> Anthony Minnaar op cit note 8 at 4.

<sup>40</sup> Transparency International, 2003.

<sup>41</sup> Anthony Minnaar op cit note 8 at 4.

<sup>42</sup> ADV WH Heath SC ‘Defining corruption in terms of our legislation and its impact on service delivery – what are practical measures that could be undertaken’ (2010) at 2.

<sup>43</sup> Maira Martini op cit note 6 at 1.

trade, or forge import or export certificates. As a result, the same can be said for wildlife crime activities. Corruption acts as a facilitator to many of the crimes along the wildlife trade route which include poaching and trafficking, and also acts as a main obstacle that law enforcement has to overcome. In the form of bribes; preferential treatment and even in state capture, corruption can be observed in every step of the enforcement process.<sup>44</sup>

Corruption therefore has a variety of actors who are involved, which includes amongst others CITES<sup>45</sup> competent authorities; public officials; villagers; forest rangers; police officials; custom officials; traders and brokers; professional and international hunters; logistic companies such as shipping and airlines; veterinarians and game farmers to name a few.<sup>46</sup>

## **2.4 Organised crime**

Warren Christopher stated that:

*“Environmental degradation, overpopulation, refugees, narcotics, terrorism, world crime movements and organised crime are worldwide problems that don’t stop at a nation’s borders”*

### **2.4.1 Describing and defining organised crime**

In order to establish the type of organised crime and criminal syndicates that are involved in wildlife crime one must first define the term organised crime. Organised crime can be defined within two groups, namely those focussing on the criminal activities and those that focus on the criminal group aspect.<sup>47</sup>

#### 2.4.1.1 Definitions that has criminal activities as a focus point

Obokata is of the view that organised crime as an entire set of activities refers to the formation of a chain of events and a process of interaction, in which different

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<sup>44</sup> Maira Martini op cit note 6 at 3.

<sup>45</sup> CITES, which is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter referred to as CITES), which is an international agreement concluded between governments of different countries. The aim of CITES is to ensure that the international trade in species of wild animals and plants does not threaten their survival.

<sup>46</sup> Maira Martini op cit note 6 at 3.

<sup>47</sup> Seswantsho Godfrey Lebeya *Defining Organised Crime: A Comparative Analysis* (unpublished Phd thesis University of South Africa, 2012) 14.

individuals and groups participate in different ways and at different stages.<sup>48</sup> Conklin is of the opinion that organised crime is syndicate crime that violates the laws on a large scale by ongoing, tight structured groups that are devoted to the pursuit of profits through criminal means.<sup>49</sup> Beirne and Messerschmidt added to the view of Conklin by stating that the core syndicate crime is commonly known as organised crime.<sup>50</sup> If one critically analyse the views of Conklin and Beirne & Messerschmidt, it is suggestive that syndicate crime and organised crime is synonymous. This view supports the understanding that organised crime does not refer to the perpetrators but rather the crime itself.<sup>51</sup>

If we consider the various interpretations of organised crime by the various authors, it becomes clear that the organised criminal syndicates committing wildlife crime incorporates and supports the elements of their views. Wildlife crime is performed by individuals or groups who participate in different ways and in different stages.<sup>52</sup>

#### 2.4.1.2 Definitions that has the criminal group aspect as a focus point

Levi describes organised crime as a group of people that acts together on a long term basis in order to commit crimes for gain.<sup>53</sup>

If we are to consider Levi's description of organised crime, one can infer that wildlife criminal syndicates also incorporate elements of his view. Wildlife crime is committed for the high profits and low accountability, as mentioned before. In conclusion the organised criminal syndicates involved in wildlife crime incorporates both elements of criminal activities as well as criminal groups.

The FBI has defined organized crime as "any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of actual or threatened violence, corrupt public officials, graft, or extortion and generally have a significant impact on the people

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<sup>48</sup> Tom Obokata *Transnational Organised Crime in International Law* (2010) 19.

<sup>49</sup> John E Conklin *Criminology* 9 ed (2007) 315.

<sup>50</sup> James W. Messerschmidt and Piers Beirne *Criminology* 5 ed (2005) 160.

<sup>51</sup> Tom Obokata op cit note 48 at 26.

<sup>52</sup> These individuals and the stages they participate in will be discussed in Chapter 3.

<sup>53</sup> Levi Michael 'Liberalization and Transnational Financial Crime' in Berdal Mats and Serrano Monica (eds) *Transnational Organized Crime and International Security: Business as Usual?* (2002) 55.

in their locales, region, or country as a whole.”<sup>54</sup>

#### **2.4.2 The nature and extent of organised crime in so far as it relates to wildlife crime**

Experts have outlined that there are clear factors that connects groups and individuals in syndicates to operations in illicit wildlife crime, which include detailed planning; the use or threat of violence; international management of shipments; sophisticated forgery and alternation of permits and certificates; well equipped and armed actors with modern weapons; opportunity for massive profits and also the capacity to launder huge amounts of money.<sup>55</sup> The organised criminal groups that have smuggling capabilities, finds wildlife crime intriguing because it is usually low risk, high profits and weak penalties. Products like the smuggling of rhino horn has the ability of being worth more than gold and can also amount to over a thousand percent return on investment.<sup>56</sup>

The recent indictment<sup>57</sup> by the United States of the Groenewald brothers, illustrates the point of how syndicates operate to further their trade in wildlife often by using multiple countries to do so. The brothers, whose syndicate were made up of a number of professional hunters and veterinarians, defrauded and lied to circumvent South African and US laws. The syndicate deceived American hunters by informing them that the rhinos they will be hunting were regarded as troubled or nuisance animals and as a result of that, trophies cannot be exported. They did not obtain permits from either provincial or national authorities in South Africa for these hunting expeditions. After the rhino had been shot and trophy photos were taken, they would use agents and employees out of Africa to remove the horn and sell it on the black market.<sup>58</sup>

### **2.5 The rhino poaching crisis in South Africa**

There are two species of Rhinoceros that can be found in the African Continent, which are the White Rhinoceros (*Ceratotherium simu*) and the Black Rhinoceros (*Diceros bicornis*). Both these species are being threatened by poaching. The

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<sup>54</sup> Marina Ratchford, Beth Allgood, & Paul Todd op cit note 13 at 14.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> United States v Dawie Jacobus Groenewald & 3 others Case Number 214CR508-WKW.

<sup>58</sup> Khalil Goga ‘Poachers without borders’ (2014) ISS at 1-2.



distressing increase in rhino poaching of the rhinoceros is to a large extent due to the increase in the market demands. The main areas which have been targeted by poachers are those in which one will find the greater populations of Black and White Rhinos, for example the Kruger National Park in South Africa.<sup>59</sup>

South Africa has the largest population of the Southern White Rhino, which is present in the National parks as well as private game reserves and game farms. South Africa is also at the epicentre of the poaching crisis, as it has been experiencing an increase in the poaching of rhinos that amounts of 7000 percent since 2007.<sup>60</sup> The horn of the rhino weighs around 10kg, and is currently worth US\$60 000 a pound, according to a study from a group of international scientists. The lead author of the group stated that rhino horn is more valuable by its weight than gold, diamonds and cocaine.<sup>61</sup>

Rhino horn is highly prized in Asia, where it is believed that the horn possesses the power to cure cancer and other illnesses.<sup>62</sup> In China, according to traditional Chinese scripts such as in Li Shih-chen's 1597 medical text "Pen Ts' ao Kang Mu" it is claimed that rhino horn has been used for medicinal purposes in China for over 2000 years. The horn is used to treat amongst others fever, rheumatism and gout, and it is also claimed that the horn can cure food poisoning; snakebites; typhoid; headaches; hallucinations; carbuncles; vomiting and devil possession. The horn is shaved or ground into a powder and is then consumed by the patient.<sup>63</sup> In Vietnam the horn is used in a manner that is similar to a recreational drug such as "rhino wine" to improve male sexual performance.<sup>64</sup>

The abovementioned traditional medicine, for which rhino horn is used, has not been proven to be an effective cure. There have even been reports that ill individuals are

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<sup>59</sup> Madyo Couto ' A strategic approach to combating the illegal trade and poaching of Elephant and Rhinoceros.' WWF Mozambique at 5 available at [http://awsassets.wwfmz.panda.org/downloads/final\\_report\\_strategic\\_approach\\_to\\_combating\\_the\\_illegal\\_trafficking\\_of\\_fauna\\_and\\_elepha.pdf](http://awsassets.wwfmz.panda.org/downloads/final_report_strategic_approach_to_combating_the_illegal_trafficking_of_fauna_and_elepha.pdf), accessed on 20 June 2016.

<sup>60</sup> EIA op cit note 9 at 13.

<sup>61</sup> Jennifer Harper '\$60K a pound: Illegal rhino horn now declared more valuable than gold, diamonds and cocaine' available at <http://www.washingtontimes.com/news/2015/may/17/rhino-horn-considered-cure-all-and-aphrodesiac-now/>, accessed on 1 October 2015.

<sup>62</sup> Marina Ratchford, Beth Allgood, & Paul Todd op cit note 13 at 20.

<sup>63</sup> Save the Rhino 'Poaching for rhino horn' available at [https://www.savetherhino.org/rhino\\_info/threats\\_to\\_rhino/poaching\\_for\\_rhino\\_horn](https://www.savetherhino.org/rhino_info/threats_to_rhino/poaching_for_rhino_horn), accessed on 10 October 2015.

<sup>64</sup> Marina Ratchford, Beth Allgood, & Paul Todd op cit note 13 at 20.

being scammed by rhino horn traders outside of clinics persuading them to buy the product in the belief that it will cure cancer.<sup>65</sup> It is for this reason that the consumers of the rhino horn products can be regarded as victims because there has been no scientific research that proves rhino horn has the curative effect it is believed to possess. These victims are being targeted by traders who exploit their vulnerabilities, sickness and even lack of education.<sup>66</sup>

### **2.5.1 The nature and extent of rhino poaching**

The most obvious victims in rhino poaching incidents are the rhinos themselves and thus they are the direct victims. The way in which these rhinos are victimised can be in the form of injury, harm, suffering and death. According to Wyatt the illegal trade in endangered animals encompasses the kidnapping, smuggling, death or life in pain and/or confinement.<sup>67</sup>

The nature in which rhinos are typically killed is by using guns such as AK-47 assault rifles. But more recently a growing number of rhinos have been killed by a single shot from a high-calibre weapon such as .375 and .458 rifles typically used by wildlife industry professionals.<sup>68</sup> Another method used in rhino poaching is the use of cross-bows, though it is infrequent. The use of bow hunting has the advantage of being lethal, yet silent but it takes highly developed skill as well as equipment that are rarely available to a typical poacher. The reason being that the poachers need to be within 30 metres from the rhino in order to use these bows successfully. A more common method than cross-bow hunting is the darting of the rhinos with immobilization drugs, which can occur either from a helicopter or from the ground, where after the horn is removed. This method has the same advantage as with bows, which is silence. There is a lower risk of detection since there are no gunshots. These two methods of poaching can only be conducted by professionals that have access to restricted veterinary medicines and other equipment. The use of modern day equipment such as dart guns, immobilization drugs, heavy calibre rifles,

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<sup>65</sup> Megan Laura Griffiths *The illegal trade in endangered animals in KwaZulu Natal, with an emphasis on rhino poaching* (Unpublished L.LM Thesis at the University of South Africa, 2015) 59-60.

<sup>66</sup> *Ibid* at 60.

<sup>67</sup> Tanya Wyatt *op cit* note 12 at 70.

<sup>68</sup> Tom Milliken & Jo Shaw *The South Africa – Viet Nam Rhino Horn Trade Nexus: A deadly combination of institutional lapses, corrupt wildlife industry professionals and Asian crime syndicates* (2012) 11.

and also helicopters represent the new era of rhino poaching.<sup>69</sup> A small portion of the wildlife industry which includes game professional hunters, ranch owners, pilots, game capture operators, and wildlife veterinarians have all become active players in the rhino poaching epidemic, forming part of illicit criminal syndicates, aided and motivated by corruption.<sup>70</sup>

As mentioned earlier, a new era of poaching has emerged, which can be seen through the use of immobilization drugs and modern weapons. The use of these scheduled immobilization drugs should not mistakenly be regarded as an act of compassion. These animals are usually left tranquilized without the administration of a reversal agent, and would then slowly die from their wounds. There have been recorded instances, though rare, where the rhino has survived for some time after the attacks, and suffering serious facial injuries.<sup>71</sup>

The extent of rhino poaching can be traced back to more than a decade. For 16 years, between 1990 and 2005 rhino poaching cases in South Africa averaged 14 animals each year, but in 2000 the number rose to 83, and has escalated dramatically since then.<sup>72</sup> In 2014 there was a record high of 1215 rhinos poached in the country. The latest update for poaching statistics in 2015 was on the 27<sup>th</sup> of August 2015 during a media briefing by the Department of Environmental Affairs, and the total amounted to 749.<sup>73</sup> This is a worrying figure as the death rate of the rhinos is now possibly exceeding the birth rate.

### **2.5.2 The relationship between corruption and rhino poaching**

Corruption can facilitate poaching in various ways. Bribes and extortion plays a role in the process of issuing hunting licenses. Individuals as well as companies may use corruption or personal relationships with individuals in order to obtain hunting permits which would otherwise not have been issued. Public officials or officials from

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<sup>69</sup> Moses Montesh op cit note 11 at 6.

<sup>70</sup> Ibid at 7.

<sup>71</sup> Moses Montesh op cit note 11 at 6.

<sup>72</sup> Tom Milliken & Jo Shaw op cit note 68 at 11.

<sup>73</sup> Save the Rhino ' 749 rhinos killed in South Africa this year' available at [http://www.savetherhino.org/latest\\_news/news/1350\\_749\\_rhinos\\_killed\\_in\\_south\\_africa\\_this\\_year](http://www.savetherhino.org/latest_news/news/1350_749_rhinos_killed_in_south_africa_this_year), accessed on 16 September 2015.

international organisations may also ask for illegal payments as a condition to issue such a permit.<sup>74</sup>

Public officials are bribed to issue false documents or committing document fraud. Wildlife officials are also granting preferential treatment and doing favours for those close to them such as friends and relatives in the issuing of hunting licenses etc. Furthermore there can be bribes or favouritism during processes of procurement, such as in South Africa where a gang allegedly, legally procured rhinos from game farms; wildlife parks and reserves for conservation purposes, but killed the animals to illegally sell the horns.<sup>75</sup>

Corruption does not only facilitate the poaching of rhinos, but it also facilitates the trafficking, sale and supply of the derived products obtained from the rhino that was poached. This is done by way of illegal payment for the issuance of export notification documents that is in contravention of domestic legislation or the provisions of CITES. In some cases, licensing officials may also be bribed to provide private individuals with blank export permits.<sup>76</sup>

Corruption may further also facilitate the process of accepting or authorising the exported shipment such as lack of compliance with an import restriction, lack of control of a contract. Bribery and other illegal advantages may also be offered at each border control to the officials in exchange for inappropriate inspection of the documents or control of the content of the shipment. Customs and other border control officials may be bribed to ignore smuggling and illegal payments may be offered to control officials to turn a blind eye to, amongst others, approve fraudulent documents, excessive export, or other irregularities such as exports without permits, or declarations of lower values and volumes. The existence of conflict of interests between the regulators and the wildlife trade companies, such as certain public officials have been found to maintain a personal or financial interest in wildlife trade enterprises that they are responsible for regulating.<sup>77</sup>

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<sup>74</sup> Maira Martini op cit note 6 at 3.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid at 3-4.

Corruption can further be used to influence the decisions of policy makers, regarding the trade in wildlife and the products thereof. Diplomatic immunity that is misused in contravention of wildlife regulations are also problematic in the sense that members of the diplomatic corps have allegedly used diplomatic sacks to transport wildlife parts from one region to another. Lastly, captive breeding operators have been used to conceal the export of wildlife or to launder the money received in such regard.<sup>78</sup>

Corruption also facilitates impunity in that local patrons assist hunting groups to evade national and international regulations; bribery of public officials to avoid the payment of tax, duties, tariffs and other fees; bribery of forest rangers and wardens to enable poaching, trading or trafficking of wildlife; illegal payments to avoid investigations or to obstruct justice; illegal payments to avoid prosecution or administrative sanctions for non-compliance with wildlife regulations; illegal payments or use of personal relationships to obtain favourable sentences in court. To illustrate, in Cameroon, some organizations claim to have observed corruption in 80% of court cases involving wildlife crimes. Lastly public officials and other institutions may help criminals launder the proceeds from wildlife crimes.<sup>79</sup>

It is clear from these factors that corruption is used as a means by a criminal syndicate to further their crimes. If we are to consider these factors, it becomes apparent that organised crime cannot exist without corruption in that corruption facilitates not only poaching and trafficking but also impunity. These 3 factors are considered the foundation of organised criminal groups, and therefore corruption seems to be the glue that sticks organised crime and rhino poaching to one another. It would thus appear that where corruption is present, organised crime flourishes.

Furthermore, corruption flourishes where there are little checks on the governing power and where the decision making is obscure.<sup>80</sup> We can therefore say that corruption can be linked with governments that are weak. Politically weak governments usually tend to rely on unstable alliances, corrupt rulers and powerful elites that also have a share in the corrupt state.<sup>81</sup>

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<sup>78</sup> Ibid at 4.

<sup>79</sup> Ibid.

<sup>80</sup> WWF *Fighting illicit wildlife trafficking: A consultation with governments (2012)* 14.

<sup>81</sup> Ibid.

South Africa was ranked 61/168 on the corruption perceptions index of 2015 scoring a mere 44 out of a 100. In 2012 South Africa scored 43, in 2013 a score of 42 and in 2014 a score of 44. This substantiates the fact that South Africa suffers from corruption, and more worryingly has not showed any improvement in the course of 4 years.<sup>82</sup>

### **2.5.3 The relationship between organised crime and rhino poaching**

Rhino poaching syndicates operates multi-nationally and is also known to be involved in other kinds of organised criminal activities which include drug and diamond smuggling, vehicle theft, armed robberies and ATM bombings.<sup>83</sup> Criminal syndicates specialize in the provision of illegal goods and also services. In order for the syndicates to reach their goal they participate in a hierarchical network, where each member is assigned to a specific task that needs to be carried out. With regards to rhino poaching, the primary focus of the syndicate is on obtaining rhino horn through legal hunting that is amplified by the attempt to buy privately owned and unregistered rhino horn stocks illegally.<sup>84</sup>

The South African White Rhino is listed on Appendix II of CITES, with an annotation that limits the trade to hunting trophies and live rhino to appropriate and acceptable destinations. This provision has created a loophole which has been exploited by resourceful criminal syndicates that obtains rhino horn through fake hunts.<sup>85</sup> The Groenewald brother's case is a good illustration of fake hunts. They defrauded American hunters into believing that the rhino hunting expeditions they will be going on were legal and that all the relevant and necessary documentation and permits have been approved and obtained. The hunters then under this misperception would then pay thousands of dollars to shoot the rhinos, and then the brothers would sell the rhino horn on the black market in Asia.

The best case to illustrate the trans-boundary workings of a criminal syndicate is the Xaysavang network. Vixay Keosavang is one of the biggest wildlife criminals that operate in the South East Asia region. The criminal syndicate he oversees is known

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<sup>82</sup> Transparency International 'Corruption by Country/ Territory' available at <https://www.transparency.org/country/#ZAF>, accessed on 06 August 2016.

<sup>83</sup> Moses Montesh op cit note 11 at 7.

<sup>84</sup> Ibid.

<sup>85</sup> EIA op cit note 9 at 13.

as the Xaysavang network. In 2011 two of Vixay's closest lieutenants; Chumlong Lemthongthai and Punpitak Chunchom were arrested.<sup>86</sup> On one of the lieutenants, Chumlong Lemthongthai's laptop there was photographs that illustrated the fake hunts and photos that documented various pay offs to game farmers were also discovered.<sup>87</sup>

Lemthongthai<sup>88</sup> fraudulently obtained twenty-six permits that enabled him to shoot and kill the rhinoceros on the belief that professional hunters would shoot the rhinos. However the persons whose names reflected on the permits did not in fact shoot them as he intended to trade with the rhino horn on the black market. The Regional Court sentenced the appellant to 40 years' imprisonment, but it was reduced on appeal to the High Court to 30 years' imprisonment, because the High Court believed that a sentence acting as a deterrent was called for. The Supreme Court of Appeal said that the sentence of 30 years' imprisonment was too severe and that the appellant already spent 16 months in custody awaiting his trial. The Supreme Court of Appeal reduced the sentence to 13 years' imprisonment and a fine of R1 million.

The other lieutenant Punpitak Chunchom, slipped out of South Africa and returned to his native Thailand. How he managed to do so is a mystery, as his passport was still in the possession of the South African Police Services. This again shows the power of corruption in facilitating these crimes.<sup>89</sup>

## **2.6 Conclusion**

It seems clear that poaching is driven by organised crime. Organised criminal syndicates are the key role players in the poaching crises. Organised syndicates cannot perform these acts on their own, and it is here where corruption comes in to play. Corruption is the key ingredient and the root cause of the current poaching

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<sup>86</sup> Julian Rademeyer 'Untouchable? Wildlife Crime Kingpin Vixay Keosavang' available at <https://eia-international.org/vixay-keosavang-an-untouchable-kingpin-of-wildlife-crime>, accessed on 7 October 2015.

<sup>87</sup> Ibid.

<sup>88</sup> S v Lemthongthai 2014 (1) SACR 495 (GJ). (hereinafter referred to as The Lemthongthai case).

<sup>89</sup> Ibid.

crises. Corruption is furthermore the binding force that binds organised crime and rhino poaching, and enables it to reach destructive potential.<sup>90</sup>

Ingrained corruption in a countries society, gives these syndicates the freedom of movement to exploit individuals within the community. If a country is already experiencing corruption, these syndicates misuse this and further corrupt an already corrupt system. In South Africa corruption is already endemic as mentioned previously and it is thus easier for these syndicates to further the corruption.<sup>91</sup>

Rhino poaching cannot be discussed in isolation as it forms part of a chain of components which ultimately leads to the poaching of a rhino. As discussed, South Africa has a plethora of legislation addressing every single aspect or component mentioned in this chapter, making provision for the regulation thereof. The question then arises as to what type of structure these syndicates are using and how it operates in practice that enables them to succeed in their operations, despite this seemingly strong and broad legislative framework.

In buying services of individuals in a country, the syndicates have to achieve high cooperation between public and private sectors in order for them to achieve their goals. There are a lot of evidence of the involvement of corrupt officials such as police officers in the rhino poaching crises which will be discussed in the next chapter.<sup>92</sup> Before one can start discussing solutions for this crisis, one must first establish the offenders committing these crimes.

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<sup>90</sup> Paula Kahumbu with Andrew Halliday 'The war on poaching cannot be won in the field unless we take on high-level corruption' available at <http://www.theguardian.com/environment/africa-wild/2014/may/05/war-on-poaching-cannot-be-won-unless-we-take-on-corruption>, accessed on 10 June 2016.

<sup>91</sup> Paula Kahumbu with Andrew Halliday op cit note 90.

<sup>92</sup> Ibid.



## **Chapter 3-The role players involved in rhino poaching and their structural operations**

### **3.1 Introduction**

The question which arose in the previous chapter, as to the structural operations of the syndicates will be evaluated in this chapter. I believe that it is important to discuss the different role players as well as their functions in order to provide a practical illustration of how rhino poaching, organised crime and corruption operate and exists as one entity. As previously discussed one cannot discuss these terms in isolation as they feed of one another, as the one will not exist without the other.

### **3.2 Offenders**

*"I cannot explain the emotions one feels when you hear the human like cries of pain from an adult male rhino that I once nurtured to make sure he would adapt well to the Aquila environment. Helpless and desperate feelings are motivating me to fight back. I will utilise my extensive experience in the security industry to ensure the deaths of our two rhinos are not in vain. 'Saving Private Rhino's' efforts will save the lives of many rhinos. I believe that every rhino in the world has a dart or bullet with its name on it! The odds lie with the poachers and not with the security teams, who are there to protect our rhino."*

Searl Derman, CEO of Aquila Private Game Reserve

#### **3.2.1 Organised crime offenders**

The organised crime groups that are involved in rhino poaching and the smuggling of the products derived therefrom have been found to operate in five identifiable, integrated and interlinked levels of the illegal value chain. This chain covers both the supply and demand aspects, as well as the functioning of the illegal trade.<sup>93</sup>

As mentioned above, the offenders that form part of criminal syndicates can be divided into 5 levels. These include Level 1- Poaching groups or individuals; Level 2-

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<sup>93</sup> SAPS Presentation to the portfolio committee on Police 2015 Rhino task team (2015) 1.

Local receivers/courier; Level 3- National buyers/couriers/facilitators; Level 4- National receiver/exporter and Level 5- International receiver/buyer.<sup>94</sup>

#### 3.2.1.1 Poaching groups or individual- Level 1

This level focuses on the actual poaching of the rhino. This is committed by individuals and groups that are directly or indirectly involved in the actual planning and/or killing of the rhino within the protected areas, private land, rhino reserves or government reserves.<sup>95</sup> The individuals found in this level are the so called foot soldiers. The profile of these poachers includes the recruitment from the local communities that lives in close proximity to the areas mentioned above. It also includes former military personnel, corrupt police officials and game rangers that have specialised skills in tracking and shooting.<sup>96</sup>

Usually it is only the individuals in this level that the law enforcement can track down and arrest, since they are physically present in the areas where the rhinos are poached, and are directly involved with the poaching.

#### 3.2.1.2 The local receivers/ couriers- Level 2

Within this level one find those individuals or groups that are better organised, including the operation in better structured, mobile association or groups that consists of trackers and shooters. These shooters and trackers can be found in the more sophisticated poaching groups, including those coming from inside the game ranch communities such as criminalized professional hunters, veterinarians and other game industry operators.<sup>97</sup>

This level further deal with the 1<sup>st</sup> receiver/ courier of the rhino horns after poaching took place from the individual poacher or group. Transportation and logistical management of the poachers are included within this level. The receiver/ courier will receive the rhino horns, and carry it over to the facilitator who is also known as level

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<sup>94</sup> Ibid at 1.

<sup>95</sup> Ibid at 3.

<sup>96</sup> Tom Milliken *Illegal Trade in Ivory and Rhino Horn: An Assessment to Improve Law Enforcement Under the Wildlife Traps Project* (2014) 17.

<sup>97</sup> Ibid at 17-18.

3. The action by this level takes place within the local community that is close to the criminal activity.<sup>98</sup>

#### 3.2.1.3 National buyers/couriers/facilitators- Level 3

In this level rhino horns are received by a Facilitator, Buyer, and Courier. In many instances these role players are from outside the local community. These Facilitators, Buyers and Couriers have contact with the established markets within South Africa and other neighbouring countries.<sup>99</sup>

The people within this level are middlemen buyers, exporters and the couriers which you will find at the end of the national or regional trade chains. These individuals can also be nationals of the African countries in which they operate, and work through local and regional networks that procure the horns through various channels which include pseudo-hunting, thefts, illegal private sector dehorning or unregistered stock sales. These methods of procurement can be either direct or through Level 2 individuals as mentioned above. The level 3 players usually sell their horns to those in Level 4, who also sometimes illegally move the rhino horns across the international boundaries within Africa only, but not to end-use buyers in foreign destinations.<sup>100</sup>

#### 3.2.1.4 National receiver/exporter- Level 4

It is the individuals in Level 4 whom are responsible for the illegal exportation of the rhino horns out of Africa to Asian destinations which is the consumer or end-use buyer country. These facilitators and buyers have well established markets within the East Asian structure that enable them to meet the demand for rhino horns. The players in this level are most often African-based, Asian operatives that have permanent or long-term resident status within key countries such as South Africa where the poaching takes place.<sup>101</sup>

These individuals are also typically linked to other networks, which includes corrupt players within the private sector and government. These players are usually well

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<sup>98</sup> SAPS op cit note 93 at 4.

<sup>99</sup> Ibid at 5.

<sup>100</sup> Tom Milliken op cit note 96 at 18.

<sup>101</sup> SAPS op cit note 93 at 6.

financed which enables them to regularly move within African and between Africa and Asia to set up deals for the selling of the rhino horn. A section of players within this level are the individuals who physically move the rhino horns out of Africa as the couriers and are either recruited locally or in consumer countries in the context of a particular deal. Although these individuals operate at this level, couriers can also function as foot soldiers who are readily replaceable if arrested by law enforcement.<sup>102</sup>

#### 3.2.1.5 International receiver/buyer- Level 5

Individuals in Level 5, which are the buyers and consumers can be found at the end of these trade chains and are residents of foreign countries or end-use countries, which is generally beyond the reach of South African law enforcement. Level 5 players control the delivery of the rhino horns into these end-use countries, and often also foster corrupt relationships with government regulators to prevent disruption of the trade at ports of entry.<sup>103</sup>

### **3.2.2 Corruption offenders**

Some of the illegal trade cannot be conducted if not for corruption of certain legitimate businesses and public officials. While it is a known fact that the corruption of the legitimate businesses and public officials are done by criminal networks, Morselli and Giguère argues that the interdependence is more widespread.<sup>104</sup>

Corruption offenders can vary from the police force and park rangers up to embassy members. These offenders will be discussed individually in the manner which they assist criminal syndicates in furthering their crimes and escape liability.

#### 3.2.2.1 The South African national and provincial conservation officials.

Numerous concerns have been raised about the irregular conduct by national and provincial government officials, which can be traced all the way to senior levels, including management staff. In 2012 four SANParks officials who were based in the Pretoriaskop part of the Kruger National Park, were arrested for their involvement in

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<sup>102</sup> Tom Milliken op cit note 96 at 18.

<sup>103</sup> Ibid.

<sup>104</sup> Julie Ayling op cit note 1 at 9.

rhino poaching activities. This is not entirely unexpected according to Montesh, since historically guards have been known to get involved in poaching or even providing information to known poachers about the whereabouts of the rhinos, and information regarding operational plans for its protection.<sup>105</sup>

Due to the fact that there are well thought out operation and strategic plans regarding the protection and locations of rhinos, and since these plans are highly confidential it is believed that insider information stemming from those in key positions are critical to the successful undertaking of many rhino poaching activities. The involvement of governmental staff, in various positions doesn't only stop at the ranger level. The Reserve Manager for Atherstone Nature Reserve in Limpopo, committed suicide shortly after his alleged involvement in a rhino poaching incident at the reserve in March 2012. His actions led to the deaths of five rhinos.<sup>106</sup>

#### 3.2.2.2 Wildlife industry professionals

The investment in anti-poaching and wildlife protection measures remains an important feature of wildlife conservation within government-managed protected areas. In most instances, security measures were never an important budget consideration within the game ranching sector. Poaching of rhinos was so to say absent for decades and most game ranch landowners only required small precautionary measures for the protection and conservation of their rhinos. The increasing rise in rhino poaching on private game ranches as from 2007, resulted in a major change in poaching operations, together with a new breed of poachers within South Africa.<sup>107</sup>

Motivational factors such as poverty, debt and peer pressure are key drivers for the individuals that are from struggling local African communities to engage in rhino poaching. Greed is also a crucial driving factor as the idea of obtaining extra profits leads professional hunters and wildlife industry personnel to also join in the illegal killing of rhinos on poorly policed and managed properties. The experience of these professionals in the transportation, immobilization or hunting of the rhinos has properly equipped them with the necessary skills to poach rhinos effectively, without

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<sup>105</sup> Tom Milliken & Jo Shaw op cit note 68 at 79.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

any detection, making it very difficult to lead to any arrests. Some of the reported rhino poaching incidents indicated that rhinos have fallen from single, well-placed kill shots, which leads to the assumption that a highly-skilled or professional hunter has taken the shot, and killed the rhino.<sup>108</sup>

#### 3.2.2.3. Wildlife industry insiders

These role players include the game farmers and professional hunters which are involved in the planning of fake hunts, rhino horn thefts, permit violations such as illegal dehorning, as well as illegal rhino horn possession. It is becoming very clear that the greedy elements as mentioned above, regarding the idea of getting more money are those who become involved in rhino poaching and illegal horn trade is also drawn into the world of serious organized criminal activities. Rademeyer is of the opinion that the Groenwaldt gang's involvement in rhino poaching is a very worrying occurrence.<sup>109</sup>

#### 3.2.2.4 Embassy personnel.

The involvement of Embassy personnel within this crisis was first revealed when Viet Nam's Commercial Attaché, Khanh Toan Nguyen, was arrested on 1 April 2006 with possession of two rhino horns, as well as diamonds and large sums of cash. This once again illustrates the point that these syndicates are involved in other criminal gang activities which involves other substances. During Nguyen's interrogation, he allegedly admitted to officials that he used a diplomatic bag which he used to move the rhino horns to Viet Nam on previous occasions. The invocation of diplomatic immunity prevented prosecution against him which is a very worrying factor.<sup>110</sup>

#### 3.2.2.5 The illegal exporters of rhino horn

Rhino horns are commonly exported in whole as buyers at the end of the chain prefer to purchase whole rhino horn to ensure its authenticity. Less frequently it is cut into smaller pieces to reduce risk of detection by airport scanners, or border security. The smuggling of rhino horn out of South Africa is a highly organized criminal activity, as mentioned before as it is a trans-boundary crime. There have been

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<sup>108</sup> Ibid at 80.

<sup>109</sup> Ibid at 81.

<sup>110</sup> Ibid at 82.

various incidents to smuggle rhino horn, which have been reported at O.R. Tambo International Airport. Efforts have been made to ensure that the Customs officials, airport security, SAPS, Nature Conservation, and Intelligence work together, but the problem is far from over.<sup>111</sup>

#### 3.2.2.6 Kruger National Park Rangers and Police officials

Fenio states in his paper that a key driver for poaching that came up during his research was that many of the community members indicated that multiple levels are involved which included the police and park rangers. Both the rangers and community members claim crooked police officials are instrumental in allowing poachers to go free. Furthermore community members also acknowledge that corrupt rangers disclose the locations of the rhinos.<sup>112</sup>

Fenio's statement about multi-level involvement can be clearly seen in a recent case where a where Hawks operation led to the arrest of 12 suspects which included three police officers for alleged rhino poaching. The suspects were arrested in Gauteng and North West and appeared in the Roodepoort Magistrate's Court on Thursday on charges of money laundering and racketeering as contained in the POCA Act, possession of unlicensed firearms & ammunition and corruption.<sup>113</sup>

### **3.3 Conclusion**

In the second chapter the theoretical side of the problem, which included the relationship between the components' corruption, organised crime and rhino poaching were illustrated. This demonstrated how this theoretical relationship operates in practice, illustrating the practical side of the problem.

It seems clear that a serious problem exists when it comes to the protection of the rhino. Other than some isolated arrests which have been made, it would seem as if the poachers are always one step ahead. The question now arises whether we as a

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<sup>111</sup> Moses Montesh op cit note 11 at 9.

<sup>112</sup> Kenly Greer Fenio 'Poaching Rhino Horn in South Africa and Mozambique: Community and Expert Views

From the Trenches' (2014) Working Report at 27.

<sup>113</sup> HAWKS Media Statement "*Alleged Rhino Poaching Kingpin Behind Bars*" (2015).

country, and whether our government are doing enough to counter this crises which we are experiencing.



## **Chapter 4- The current enforcement framework**

### **4.1 Introduction**

As was mentioned above, it needs to be determined whether we as a country, and whether our government are doing enough to counter the rhino poaching crisis. In order to determine this, one must analyse the current enforcement regime as it relates to rhino poaching. I believe that the advantages and disadvantages thereof are an important part of such an analysis. This will allow the determination of the constraints and also point out the impediments that exist. Such an evaluation will serve as a pathway to address these constraints and shortcomings.

### **4.2 Enforcement**

Enforcement refers to governmental actions in order to achieve compliance within a regulated community and to prevent non-compliance.<sup>114</sup> Depending on the regulatory context, enforcement can take place through “compulsion and coercion, or by conciliation and compromise”.<sup>115</sup>

There are various enforcement mechanisms in place for the purposes of ensuring compliance with environmental laws. One of these mechanisms is control and command.

### **4.3 The enforcement framework for rhino poaching**

In South Africa, the method of ensuring enforcement of environmental law relating to rhino poaching, is through the use of certain control and command mechanisms such as criminal sanctions imposed on the non-compliance with environmental legislation and regulations.<sup>116</sup> There are two ways in which criminal sanctions can be imposed. It can either be through a primary sanction, which is a sanction that applies in a case where there is contravention of the provision which outlaws certain conduct directly; or by means of a subsidiary sanction where compliance with legislation is

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<sup>114</sup> INECE 'International Network for Environmental Compliance and Enforcement Principles of Environmental Enforcement 2005' available at <http://www.inece.org/principals/ch1.pdf>, accessed on 15 November 2016

<sup>115</sup> Keith Hawkins *Environment and Enforcement* (1984) 3.

<sup>116</sup> HA Strydom & ND King (eds) *Fuggie and Rabie's Environmental Management in South Africa* 2nd ed (2009) 243.

sought to be secured primarily by means of administrative measures and the criminal sanctions are only imposed where the administration measures fails.<sup>117</sup>

#### **4.4 The theoretical benefits of criminal measures**

In order to make a clear evaluation of the use of criminal measures, one must first consider why criminal sanctions are used. Environmental crime affects all sectors of society. These crimes can also be linked to the exploitation of disadvantaged communities, human right abuses, corruption and international criminal syndicates. Contrary to many misperceptions, wildlife crime is recognised as the fourth largest global illegal trade, after illegal drugs, human trafficking and trade armaments.<sup>118</sup>

Criminal measures are identified by the following features: it stigmatises certain forms of behaviour, it attracts the condemnation of the community, it involves punishment; and it is the only measure where the offender can be subjected to imprisonment.<sup>119</sup>

There are two main reasons for the justification of criminal measures imposing punishment, namely retribution and deterrence. Retribution rests on the principle of proportionality in terms of which the retribution imposed on the wrongdoer must bear some relationship with the harm caused to society, whereas the deterrence theory can be divided into individual deterrence and general deterrence, Individual deterrence means that the offender as an individual is deterred from the commission of further crimes, whilst general deterrence indicates that the whole community is deterred from committing crimes.<sup>120</sup> In addition to the above mentioned theories there are additional theories namely the reformatory and preventative theory.<sup>121</sup>

Fuggle and Rabie are of the view that criminal penalties should be reserved for the cases where there is intentional and unlawful activity, such as the killing of animals

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<sup>117</sup> Ibid at 244.

<sup>118</sup> UNEP News Centre 'UNEP and Interpol assess impacts of environmental crime on security and development' <http://www.unep.org/newscentre/Default.aspx?DocumentId=2755&ArticleId=9686>, accessed on 7 May 2015.

<sup>119</sup> A Paterson & Louis J Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 241.

<sup>120</sup> Law Blog South Africa <https://lawblogs.files.wordpress.com/2013/10/crw2601u-study-guide-notes.pdf>, accessed on 30 April 2015.

<sup>121</sup> CR Snyman *Criminal Law* 5th ed (2008) 10-21.

or the gathering of plants while failing to comply with directives, notices or instructions of officials.<sup>122</sup>

By enacting legislation that imposes criminal sanctions on environmental crimes, those responsible for committing the crimes are held accountable for their actions. Criminal measures are a country's way of ensuring compliance and enforcement with its laws and regulations. If there are laws, without any regulations to ensure compliance, the laws would be ineffective and futile.

Criminal measures also serve as a method of deterrence by imposing harsh sentences on those who violate environmental legislation in the hope that it would deter other offenders from doing the same. The Compliance and Enforcement report of 2013/2014 represents the efforts of the Environmental Management Inspectorate, and the network of compliance and enforcement officials at national, provincial and local spheres of government, in achieving these objectives. Compliance and enforcement activities, such as the finalisation of criminal investigation dockets, as well as the issuing of directives and compliance notices have increased appreciably in comparison to the previous reporting period.<sup>123</sup>

#### **4.5 The inherent and contingent weaknesses of criminal measures**

Even though environmental legislation provide for criminal sanctions, there has not been many successful prosecutions in South Africa generally. This can be due to the fact that the offenders and officials come to an agreement after negotiations that there are a number of shortcomings with the use of criminal sanctions.<sup>124</sup>

##### **4.5.1 Inherent weaknesses**

Inherent weaknesses would be present in any jurisdiction.<sup>125</sup> These weaknesses include the burden of time and cost; reactive nature of criminal law; problems of proof; procedural safeguards; preparation of cases for prosecution; officials' attendance in court; and moral aspects of criminal law.

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<sup>122</sup> Strydom & King *op cit* note 116 at 252.

<sup>123</sup> DEA *National Environmental Compliance and Enforcement Report* (2013) vi.

<sup>124</sup> Strydom & King *op cit* note 116 at 244.

<sup>125</sup> *Ibid.*

The first weakness of criminal measures is that criminal prosecutions are costly for the State. In addition there is also a delay between the commission of the offence and the conclusion of the trial. This delay might even be longer in respect of environmental crimes, because there might be a need for conducting expert scientific analysis and evidence. This delay might cause inconvenience for parties involved in the case such as witnesses.<sup>126</sup>

The second weakness we are faced with is that criminal law is designed to react to the crimes that have already been committed, in which case it might be too late to prevent damage to the environment as it has already occurred. The purpose of environmental law is to conserve the environment, but criminal law in this instance does not assist to achieve this objective of conservation. It aims to prevent the offender from committing future crimes. With that being said other methods exist that alleviate the damage before it becomes too severe, such as obtaining an interdict.<sup>127</sup>

The third weakness is one of proof. In a criminal case there is a more stringent burden on the state, and that is to prove the commission of the crime beyond a reasonable doubt. Generally there are three evidentiary problems facing the prosecution namely the identification of the offender, obtaining sufficient evidence to provide proof as to beyond a reasonable doubt and the difficulty to establish mens rea in cases which are not strict liability offences.<sup>128</sup>

The fourth weakness is found in the preparation of the cases by the prosecution. This might have the result of draining the resources of the agency and unwillingness to institute proceedings especially where the penalty will be light and insignificant.<sup>129</sup>

#### **4.5.2 Contingent weaknesses**

Contingent weaknesses are present in a particular country due to prevailing attitudes or resource constraints or similar characteristics of that society.<sup>130</sup> South Africa faces contingent weaknesses which include; inadequate policing; lack of public awareness;

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<sup>126</sup> Ibid at 244-245.

<sup>127</sup> Ibid at 245.

<sup>128</sup> Jeremy Rowan Robinson, Paul Q Watchmen & Christine R Barker *Crime and Regulation: A Study of the Enforcement of Regulatory Codes* (1990) 256.

<sup>129</sup> Ibid at 262.

<sup>130</sup> Strydom & King *op cit note 116 at 244.*

difficulties of investigation; lack of expertise of court officials and inadequate policies.<sup>131</sup>

Inadequate policing is a major problem in South Africa as a result of strained government resources. The administration of environmental legislation is assigned to provinces, which spend their budgets on matters they deem more important such as education and health services.<sup>132</sup>

The lack of the awareness of the public as to what constitutes environmental crimes and the forms and consequences thereof impairs the role and ability of criminal law to achieve its objectives. If the public was aware and had knowledge of environmental crime, they would be able to bring it to the attention of officials.<sup>133</sup>

Another difficulty for criminal law is with regards to investigation. Not only do officials require scientific and technical expertise, they also require knowledge in the rules of evidence and criminal procedure. For this to be possible, training is required, which again lead to the lack of resources.<sup>134</sup> This can also be linked to the problem relating to lack of expertise of officials. Most of our prosecutors and judicial officers are not experienced in environmental law as a result of the lack of prosecutions that take place. Where prosecution does take place, the judicial officers might become overwhelmed and intimidated by the lack of their knowledge of scientific evidence and then the standard of beyond reasonable doubt can get shifted to beyond any doubt.<sup>135</sup>

## 4.6 Conclusion

It would seem that the only major strengths of criminal sanctions are that it brands the offender with the stigma of being a criminal and it provides for harsh punishment, such as imprisonment.

This chapter clearly pointed out where the shortcomings and constraints are that the current enforcement approach in relation to rhino poaching is facing. Relying on

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<sup>131</sup> Michael Kidd *Environmental Law* 2nd ed (2011) at 272.

<sup>132</sup> Strydom & King *op cit* note 116 at 248.

<sup>133</sup> Kidd *op cit* note 131 at 273.

<sup>134</sup> Kidd *op cit* note 131 at 273.

<sup>135</sup> Strydom & King *op cit* note 116 at 248.

criminal sanctions for the enforcement of environmental laws can become challenging when taking the inherent and contingent weaknesses of the criminal measures into consideration. Criminal sanctions are the most widely prescribed sanction for contraventions of legal provisions. South Africa has a range of environmental legislation, rendering certain conduct unlawful and imposing penalties if the said unlawful conduct occurs. Despite having this array of environmental legislation, the use of the criminal sanctions available in the legislation seems to be low, and the impact felt by the lack thereof is severe such as in the case of rhino poaching.

## **Chapter 5- Constraints as a result of the weaknesses of the current enforcement framework**

### **5.1 Introduction**

The previous chapter discusses the current method of enforcement with regards to punishment of rhino poaching offenders. It also demonstrated what the weaknesses of the current method of enforcement are. This chapter will illustrate how South Africa is being constrained by these weaknesses. In order to establish and provide for a suitable and practical solution, we must first determine what problems should be solved.

### **5.2 To what extent have the state been constrained by the inherent weaknesses?**

#### **5.2.1 Prosecutions costly for the state**

The fact that criminal prosecutions are costly for the state would mean that crimes deemed of a more important nature such as murder, rape etc, would rather be prosecuted.<sup>136</sup>

As of the 8<sup>th</sup> of May 2016 a total number of 363 rhinos have been poached, and 206 suspects have been arrested.<sup>137</sup> Between March 2015 and April 2016, 49 cases were finalised which involved 103 accused. Of the number of accused, 80 were convicted therefore resulting in a 78 % conviction rate or so we are led to believe by the Minister of Environmental Affairs.<sup>138</sup>

The problem lies with the Minister's definition and interpretation of the word conviction rate. According to her it is defined as the conviction rate or even the successful prosecutions, as the percentage of cases that were finalised with a guilty verdict, where after it is then divided by the number of cases finalised with a verdict.

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<sup>136</sup> DEA *op cit* note 123 at 3.

<sup>137</sup> DEA 'Rhino Poaching Statistic Updates available at [https://www.environment.gov.za/projectsprogrammes/rhinodialogues/poaching\\_statistics#2016](https://www.environment.gov.za/projectsprogrammes/rhinodialogues/poaching_statistics#2016), accessed on 24 September 2016.

<sup>138</sup> Melanie Verwoerd 'Rhino statistics: The Devil is in the details' available on <http://traveller24.news24.com/Explore/Green/rhino-statistics-the-devil-is-in-the-details-20160513>, accessed on 30 July 2016.

Therefore if we are to consider this, the percentage only takes into consideration the cases that actually went to trial where there was some kind of verdict given- not necessarily imprisonment. It does not take into consideration the number of offences committed such as the number of rhinos killed, the number of arrests made or most importantly the number of reported crimes.<sup>139</sup>

To practically illustrate this point I will use the 2015 statistics. In 2015 a total number of 1175 rhinos were poached, from which 317 arrests were made in total. From this 317 the Minister announced that 48 accused were convicted, therefore claiming an 88% conviction rate. In effect this means that only 48 of the total number has been prosecuted, this being is a mere 15%.<sup>140</sup>

On paper, rhino poaching is regarded as a priority crime, but as can be seen from the above statistics it is highly doubtful whether it is in actual fact being treated as such. As mentioned above, the state would rather prosecute crimes deemed to be of a more important nature.

The current low conviction rate act as further deterrent for the prosecution, as they would much rather pursue cases resulting in greater conviction success, making this costly procedure worthwhile. As a result of the state being faced with far greater priorities and inadequate policing due to strained government resources (another constraint discussed below), rhino poaching remains a priority crime on paper only. The players in the rhino poaching game as discussed fully in chapter 2 and 3 therefore are given much more freedom and opportunities to commit their crimes, as their apprehension and prosecution are not deemed a priority.

### **5.2.2 Reactive nature of criminal law**

Another inherent weakness is the fact that criminal law only applies once a crime has been committed and in the case of the environment such harm cannot always be rehabilitated. Environmental legislation is designed to conserve the environment and protect it from harm.

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<sup>139</sup> Ibid.

<sup>140</sup> Ibid.



Modern environmental criminology is of a reactive nature. This is due to the fact that we assume that we are separate from nature, and can transform it to our liking through control and command mechanisms. Furthermore modern environmental criminology does not question the behavioural influences that are jeopardizing the future, such as with rhino poaching and the ultimate extinction of rhinos. Environmental crimes that destroy natural resources must be reacted to as soon and quick as possible, in order to prevent maximum damage to be caused.<sup>141</sup>

Once an irreversible environmental crime has been committed as in the case of *S v MB Siyaya and P Khanyile*<sup>142</sup> where the two accused were charged with the illegal hunting of a black rhino, being in possession of two rhino horns, theft of rhino horns and also illegal possession of arms and ammunition, it becomes impossible to reverse the damaged caused.

In South Africa the black rhino is more threatened than the white rhino, as there are only about five thousand black rhinos left in South Africa.<sup>143</sup> If a Black Rhino is killed as in the above case, criminal law only applies after it has occurred to punish the offenders and to deter future offenders from doing the same, but the harm caused by the killing of the rhino remains and cannot be reversed, bringing the black rhino so much closer to extinction.

The fact that criminal law is of a reactive nature should be a big motivational factor to ensure that the role players are apprehended before committing the crime, which is not currently the case due to inadequate policing due to strained government resources. Rhino poaching should be treated as a priority crime to enable the apprehension before the damage is of a permanent and irreversible nature.

### **5.2.3 The burden of proof**

The burden of proof in criminal cases is far more stringent than in civil cases, because it has to be proven beyond a reasonable doubt. This makes it so much

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<sup>141</sup> Sally M. Edwards, Terry D. Edwards & Charles B. Fields (eds) *Environmental Crime and Criminality: Theoretical and Practical Issues* (1996) 196.

<sup>142</sup> *DEA op cit note 123 at 57.*

<sup>143</sup> Sean Martin 'World Rhino Day 2015: Rhinoceros in numbers' available at <http://www.ibtimes.co.uk/world-rhino-day-2015-rhinoceroses-numbers-1520744>, accessed on 3 August 2016.

harder for the prosecution to prove the guilt of an offender especially in cases where it is difficult establishing mens rea if it is not a strict liability offence.<sup>144</sup>

Beyond a reasonable doubt is the highest standard of proof that is used in a criminal court in South Africa. A person may only be convicted if their guilt was proven beyond a reasonable doubt. In a criminal trial the state has the onus to prove that the accused committed the crime by excluding any doubt which exist in the mind of the judicial officer that the accused indeed committed the crime. It cannot be sufficient to merely prove that the accused probably committed the crime, as this leaves room for doubt. Before the judicial officer can give a sentence or a conviction, they must be satisfied that there is no reasonable possibility that the accused may be innocent.<sup>145</sup>

The rationale behind this high standard of proof is that every person's freedom is considered fundamental and that a criminal penalty is a very serious harm to impose on someone, who might be innocent. The rationale is rather let a guilty person go free, than to punish an innocent.<sup>146</sup>

This can be seen in the case of *S v Honore Danilo and Gideon Mushegera*<sup>147</sup> where the accused was charged with being in possession of four rhino horns in the process of an undercover operation. Accused two was convicted of contravening section 57(1) of NEMBA<sup>148</sup> and was sentenced to eight years imprisonment. Accused one was acquitted on 12 April 2013 in terms of Section 174 of the Criminal Procedure Act.<sup>149</sup> This section states if, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.<sup>150</sup> This once again shows that if the evidence is not sufficient (as a result of inadequate policing due to strained

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<sup>144</sup> Imraan Kaka *Corporate self-regulation and environmental protection* (unpublished LLM thesis, North-West University, 2012) 26-27.

<sup>145</sup> GroundUp 'Guide to being tried for murder in South Africa' available at Staff [http://www.groundup.org.za/article/guide-being-tried-murder-south-africa\\_1787/](http://www.groundup.org.za/article/guide-being-tried-murder-south-africa_1787/), accessed on 30 July 2016.

<sup>146</sup> Ibid.

<sup>147</sup> DEA *op cit note 123 at 58*.

<sup>148</sup> Section 57(1) of the NEMBA states that a person may not carry out restricted activities involving a specimen of a listed threatened or protected species without a permit issued in terms of chapter 7 of the NEMBA.

<sup>149</sup> Act 51 of 1977.

<sup>150</sup> Section 174 of The Criminal Procedure.

government resources) to proof guilt beyond a reasonable doubt the offender can be found not guilty.

As the case above clearly demonstrated this stringent burden of proof sometimes secures certain key role players' freedom, and enabling them to go out and continue poaching rhinos as their reward outweighs their punishment by far.

#### **5.2.4 Preparation of cases by the prosecution**

The last inherent weakness that acts as a constraint is found in the preparation of the cases by the prosecution, especially where the penalty will be light and insignificant which then leads to unwillingness to prosecute.

The abovementioned can be clearly demonstrated by the case mentioned above *S v Lemthongthai*.<sup>151</sup> The initial sentence was for forty years imprisonment which was reduced to thirty years after taking mitigating circumstances into account. The end result of the case was that the offender was sentenced to only thirteen years imprisonment. Even though this was one of South Africa's greatest victories, the penalty is deemed to be very low for the damage caused and conduct displayed by the accused. Not only is he part of what is considered to be the biggest wildlife crime syndicate; he killed 26 rhinos and he also defrauded the state in obtaining permits. These are serious offenses in which irreparable harm was caused. Furthermore this was an opportunity to show large syndicates the penalties that they will face if caught, therefore using it as a stringent method of deterrence but it failed to do so when the sentence was reduced.

When so much effort is put into the preparation of a case in order to obtain a harsh sentence and the end result does not reward such effort, there might develop unwillingness when it comes to preparation of further cases. Why would the prosecutor be positive and confident with his case and the effort he has put into it, when sentences like the above mentioned are handed down and act as precedence over future cases. As mentioned above, the stringent burden of proof can also contribute to this weakness as prosecutors might realise during their preparation that

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<sup>151</sup> The Lemthongthai case.

there is not enough evidence to prove guilt beyond a reasonable doubt, therefore making them unwilling to prosecute, resulting in the freedom of key role players.

### **5.3 To what extent has the state been constrained by the contingent weaknesses?**

#### **5.3.1 Inadequate policing**

The constraints by the contingent weaknesses include inadequate policing which is a major problem in South Africa as a result of strained government resources. There are insufficient resources to meet the stringent requirements in South Africa's wildlife laws. In particular, wildlife crime enforcement agencies, suffer from a serious dearth of personnel and organised leadership, as well as resources, and equipment such as vehicles and drones.

This is clearly demonstrated by statistics relating to the number of poaching and the number of arrests made. In the year 2014 there was a total of 1215 poaching incidents recorded and from that 1215 incidents only 386 arrests were made. In 2015 there were about 1175 poaching incidents and only 317 arrests were made, and in 2016 as mentioned 363 rhinos were poached and 206 suspects arrested.<sup>152</sup> I believe that it is also important to note that these numbers of arrests which were made includes multiple arrests for one incident and does not necessarily refer to the number of incidents. This once again illustrates the strained government resources, because the administration of environmental legislation is to provinces that spend their budgets on matters they deem more important.

Not only can inadequate policing be considered in light of strained government resources, but also in light of the involvement of police officials in the rhino poaching cycle. In 2014 Minister Edna Molewa welcomed the arrest of two police officials and a SANPARKS field ranger after they were caught escorting a poacher armed with a rifle and ammunition in their police van.<sup>153</sup> Another case in 2014 was where another police officer was arrested for trying to poach rhinos on a private game farm in

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<sup>152</sup> OSCAP "Rhino Poaching Statistics– 1215 (31 Dec 2014) – South Africa" available at <http://www.oscap.co.za/rhino-poaching-statistics-south-africa>, accessed on 30 April 2015.

<sup>153</sup> Albi Modise 'Two police officers and former ranger arrested for rhino poaching in Kruger – DoEA' available at <http://www.politicsweb.co.za/politics/two-police-officers-and-former-ranger-arrested-for>, accessed on 30 July 2016.

Limpopo. The police officer was part of the Crime Prevention Unit at Hillbrow.<sup>154</sup> In 2015 an operation that was led by the HAWKS led to the arrest of 12 alleged rhino poaching, among which were three police officers.<sup>155</sup>

These are only a number of cases where either police officials or park rangers were involved in the crime which they were appointed to prevent.

This weakness is one of the most important weaknesses, as it can be regarded as a reason for the existence of all the other weakness mentioned herein:

- Prosecutions costly for the state: Prosecutions will always be a costly procedure, however, unsuccessful prosecutions merely result in wasteful expenditure and deterring the prosecution authorities from pursuing rhino poaching cases as priority crimes. Unsuccessful prosecutions stems from lack of evidence and a lack of evidence, in turn, stems from inadequate policing, as a result of strained government resources.
- Reactive nature of criminal law: Criminal law, as discussed earlier, is of a reactive nature and only comes into force subsequent to poaching incidents. Should policing be of a more proactive nature, this can be prevented by means of better operational planning, which cannot be achieved with strained governmental resources.
- The burden of proof: The burden of proof required in criminal matters is that of beyond a reasonable doubt. This, of course, being a very high threshold and not one easily achieved. With inadequate policing, this threshold becomes even harder to reach as a result of insufficient investigations and evidence.
- Preparation of cases by the prosecution: As with the problem that lies with the burden of proof and the fact that prosecutions are costly, mentioned above, if the prosecution authorities does not have confidence in the investigation, they will not be as willing to vigorously pursue and prosecute rhino poaching cases as they would have when adequate poling was present, as the chances of success will always remain slim when one is dealing with inadequate policing.

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<sup>154</sup> *Katie Spicer* 'South African Police Officer Held over Attempted Rhino Poaching' available at <http://www.ibtimes.co.uk/south-african-police-officer-held-over-attempted-rhino-poaching-1461778>, accessed on 30 July 2016.

<sup>155</sup> ENCA 'Hawks arrest 12 suspected rhino poachers' available at <https://www.enca.com/south-africa/hawks-arrest-12-suspected-rhino-poachers>, accessed on 7 September 2016.

### **5.3.2 Inexperienced judicial officers and prosecutors**

The last constraint as a result of a contingent weakness is that most of our prosecutors and judicial officers are not experienced in environmental law as can be seen from the lack of prosecutions which take place. Where prosecution does take place, the judicial officers might become overwhelmed and intimidated by the lack of their knowledge of scientific evidence and then the standard of beyond reasonable doubt can get shifted to beyond any doubt.

In 2003 in Hermanus the first environmental court of South Africa was established. The object and purpose of this court was to counter the misuse of the countries marine resources, and it had an 85% conviction success rate putting some of the key middlemen involved in marine poaching syndicates behind bars. After this court was closed down, environmental cases are being reverted to lower courts where there are no specialist prosecutors and where environmental convictions have a lower conviction rate.<sup>156</sup>

The weaknesses as mentioned cannot solely be blamed on inadequate policing. Inexperienced judicial officers and prosecutors can also be placed on the same scale as the aforesaid. In the event that these cases do reach the court, with a strong basis supported by strong evidence, the inexperience of the prosecutor or judicial officer can lead to the destruction of the case.

## **5.4 Conclusion**

It is quite clear that there are many constraints that South Africa is facing when it comes to the current enforcement framework which is in place, two of them standing out in particular. These are inadequate policing and inexperience of prosecutors and/or judicial officers. In order to determine whether or not these constraints are as a result of poor implementation of the legislation, or whether the legislative provisions for enforcement is the core of the problem, I think it is important to discuss the enforcement provisions contained in the legislation.

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<sup>156</sup> IOL News 'Future of South Africa's Green Court in the Balance' available at [www.iol.co.za/news/south-africa/future-of-sa-s-green-court-in-the-balance-1.274307#.VTS3NvmUf5M](http://www.iol.co.za/news/south-africa/future-of-sa-s-green-court-in-the-balance-1.274307#.VTS3NvmUf5M), accessed on 20 April 2015.

## **Chapter 6- Legislative framework (provisions for enforcement)**

### **6.1 Introduction**

The Constitution of the Republic of South Africa 108 of 1996, in Section 24 guarantees everyone the right to an environment that is not harmful to their health or well-being and a right to have the environment protected for future generations. This Section further places a burden on the state to act reasonably in order to protect the environment by preventing pollution, promoting conservation and sustainable development, while building the economy and society.

In South Africa there are a number of regulations in place, which protects the people as well as the environment by making it a crime to perform any activities which is harmful to the environment. With regards to rhino poaching, the most important regulation is the NEMBA. In relation to rhino poaching and the elements that go with it (corruption and organised crime) as previously discussed in Chapter 1 the NEMBA is supported by the Prevention and Combating of Corrupt Activities Act and also the Prevention of Organised Crime Act.

I think it is important to evaluate the legislative provisions for enforcement, since the legislative and enforcement framework must support one another and the enforcement framework is only as strong as the provisions contained in the legislative framework.

### **6.2 The National Environmental Management Act<sup>157</sup>**

If the preamble of NEMA is considered, one will find that it echoes Section 24 of the Constitution. It states that everyone has the right to an environment that is protected and it places an emphasis on the requirement that the state must implement measures to enable such protection.<sup>158</sup>

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<sup>157</sup> The National Environmental Management Act No. 107 of 1998 (hereinafter referred to as the NEMA).

<sup>158</sup> The preamble of the NEMA.

### 6.2.1 The Environmental Management Inspectorates as an instrument of enforcement

There are various means for achieving compliance and enforcement, one of these measures are through the Environmental Management Inspectorate.<sup>159</sup> EMI's cannot prosecute cases in court but their mandate however does include the seizing and investigating of evidence when searching the premises where the reported criminal activity has taken place. With regards to the illegal trade in rhino horn, these functions of EMI are of particular importance.<sup>160</sup>

The Environmental Management Inspectorate, which is a network of national, provincial and municipal government officials, is responsible for the enforcement of the NEMBA and its subsidiary legislation in conjunction with other legs of government. The EMI's enjoy broad enforcement powers which include amongst others the inspection, search and seizure, arrest powers, as well as administrative authority to issue compliance notices.<sup>161</sup>

EMIs enjoy broad administrative and enforcement powers, which include amongst others:<sup>162</sup>

- conduct routine warrantless inspections of vehicles, buildings, aircrafts, land, vessels, containers, bags to ensure compliance with the regulating laws or terms of a specific permit;
- conduct warrantless searches and seizure of aircraft, vehicles, vessels, or pack animals on the basis of any reasonable suspicion that they are being used in the commission of a crime or in violation of the controlling law or the terms of a permit, or contain evidence of an offense or a violation;
- issue a compliance notice upon discovering that a person has failed to comply with the terms of the controlling law or a permit issued under the law and make arrests

As previously mentioned the Environmental Management Inspectorate does enjoy any prosecutorial powers. The members of the South African Police Service also

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<sup>159</sup> Niel J de Wet *The South African regulatory framework relating to illegal trade in rhino horn* (unpublished LLM thesis, North-West University, 2014) at 33.

<sup>160</sup> Appendix 5(B) section IX of the Biodiversity Management Plan for the Black Rhinoceros in South Africa 2011-2020.

<sup>161</sup> Library of Congress 'Wildlife Trafficking and Poaching: South Africa' available at [https://www.loc.gov/law/help/wildlife-poaching/southafrica.php#\\_ftn8](https://www.loc.gov/law/help/wildlife-poaching/southafrica.php#_ftn8), accessed on 30 July 2016.

<sup>162</sup> Ibid.



enjoy all the enforcement powers conferred on the EMIs as mentioned above, with two notable exceptions. These are the power to conduct routine searches and the power to issue compliance notices.<sup>163</sup>

Furthermore Section 33 of the Act also contributes to the provisions of section 7 of the CPA, in that any person may in the interest of protecting the environment, which in our case will include the animals inhabiting the environment such as rhinos, to institute and conduct a prosecution, and even take into custody any person guilty of an offence with regards to such an animal. This increases the opportunities to prosecute poachers and traders where the state fails to do so.

### **6.2.2 Traditional Sanctions**

For less serious offences, admissions of guilt fines play an important role as contained in Section 34G of the NEMA, which states in subsection 1 that the Minister may by regulation specify offences in terms of this Act or a specific environmental management Act in respect of which alleged offenders may pay a prescribed admission of guilt fine instead of being tried by a court for the offence. This Section in subsection 2 further contains that an environmental management inspector who has reason to believe that a person has committed an offence specified in terms of subsection (1) may issue to the alleged offender a written notice referred to in section 56 of the Criminal Procedure Act 51 of 1977. Subsection 3 prescribes that the amount of the fine stipulated in the notice referred to in subsection (2) may not exceed the amount prescribed for the offence; and which a court would presumably have imposed in the circumstances.<sup>164</sup>

### **6.2.3 Novel Sanctions**

The court may impose additional penalties which can be found under Section 34 of the National Environmental Management Act.<sup>165</sup> This section only applies to offences listed under schedule 3. Schedule 3 offences include those contained in Section 57 of NEMBA relating to the restricted activities with respect to protected and threatened species, and therefore these additional penalties will apply.

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<sup>163</sup> Ibid.

<sup>164</sup> Section 34G of the NEMA.

<sup>165</sup> Section 34 of NEMA.

Section 34 of the NEMA contains additional penalties such as whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.<sup>166</sup>

Section 34 also states that whenever a person is convicted of an offence under any provision listed in Schedule 3 that the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order (a) the award of damages or compensation or a fine equal to the amount so assessed; or (b) that such remedial measures as the court may determine must be undertaken by the convicted person. Provision is also made for whenever any person is convicted of an offence under any provision listed in Schedule 3 that the court convicting such person may, upon application by the public prosecutor or another organ of state, order such person to pay the reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence.<sup>167</sup>

#### **6.2.4 Analysis of NEMA enforcement provisions**

Even though NEMA is mainly a tool that regulates the functions that are executed by National Departments which might have a negative result on the environment, it does play an important role in the fight against the killing and the illegal trade of endangered species and their parts. NEMA forms the basis for the environmental right and its protection, and also contains measures that enforce the implementation of the provisions and in addition also providing for the necessary punitive structures in cases where there is non-compliance.<sup>168</sup>

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<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

<sup>168</sup> Neil J de Wet op cit note 159 at 58.

The foundation of this Act is laid by Section 24 of the Constitution, because it places the needs of individuals at the forefront. By placing the people's needs at the forefront, it reiterates the right of every individual to have the environment, which for the purposes of this study is the rhinos, protected for the benefit of future generations. Linking with this is the state's obligation to minimize any effects that might have a negative impact on the individual's right. As already illustrated, rhino poaching has a definite negative impact on the environment, therefore also effecting the individuals' rights as contained in Section 24 and necessitates the state to act proactively.<sup>169</sup>

The state contributes by the structures of EMI's, who play a vital role in the enforcement of illegal trade as they have the authority to seize rhino horn, investigate crime scenes as well as to search any premises deemed or suspected to be deemed to be involved in the illegal trade.<sup>170</sup>

The provisions for the appointment of EMI's are crucial, as they are responsible for a large number of arrests of rhino poachers. During the period of 2011-2012 the EMI's made a total number of 1339 arrests, for the period of 2012-2013 a total number of 1818 arrests were affected by the EMI's and during the period of 2013-2014 the EMI's was once again responsible for a large number of arrests, consisting of 1371.<sup>171</sup>

If we are to consider the penalty provisions contained in NEMA, it does not only provide for the prosecution of offenders but also provide for monetary punishment by way of Section 24 (1),(2) and (3). Offenders can be held liable to forfeit to the state the amount equal to that which the offender has benefitted from committing the act. This provision does not only act as a deterrent, but also in turn enables the state to use this monetary punishment in the conservation of rhinos and also towards improving enforcement measures. The most valuable provisions is Section 33, which enables any person to either prosecute or take into custody a person whom they suspected is apart of, or on the verge of committing or having already committed a

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<sup>169</sup> Ibid.

<sup>170</sup> Ibid at 58-59.

<sup>171</sup> Nadia Shah 'Department of Environmental Affairs Releases the 2013/14 National Environmental Compliance and Enforcement Report' available at <http://www.urbanearth.co.za/articles/departement-environmental-affairs-releases-201314-national-environmental-compliance-and>, accessed on 6 August 2016.

crime relating to the rhino poaching. This improves the chances of arrests being made and also offenders being prosecuted as the public are not restricted to the jurisdiction as is the case with police and other law officials.<sup>172</sup>

To illustrate the possible implementation of the above, in the ongoing trial of S v Hugo Ras and others, the syndicate which consists of 10 members illegally obtained 84 rhino horns in different ways. 24 Rhinos were killed and the majority of these rhinos were darted and killed with M99 rifles or other firearms. 14 rhino horns were stolen whereas 29 were obtained by other means. A conservative estimate of the value of 84 horns is R22 million and the value of the 22 rhinos which were killed is R5.5 million.<sup>173</sup>

The ten accused were charged with various common law offences which included theft, fraud, malicious injury to property, attempting to defeat the ends of justice as well as statutory offences including racketeering, money laundering, conspiracy, incitement to commit a crime, intimidation, killing and dehorning of rhino as well as illegal possession, transporting and selling of rhino horns and illegal possession of firearms and possession of scheduled substances. The Prosecutor told the court the syndicate had allegedly made R5.5m from killing 22 rhinos and R16m through rhino horn sales.<sup>174</sup>

If we are to consider this case, the value of the 22 rhinos amounted to R5.5 million. The provisions of NEMA under Section 34 as discussed above can be utilised.

## **6.3 National Environmental Management Act: Biodiversity Act**

### **6.3.1 The Objectives set forth by NEMBA**

If we consider the long title of the act, the objectives which relates to rhino poaching and the illegal trade of its rhino products, is to provide for the protection of the species that are threatened or in need of protection to ensure its survival in the wild.<sup>175</sup> Furthermore it is to give effect to the South Africa's obligation under

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<sup>172</sup> Neil J de Wet op cit note 159 at 59.

<sup>173</sup> NPA 'Annual Report 2014/2015' at 68-69 available at <https://www.npa.gov.za/sites/default/files/annual-reports/Annual%20Report%202014%20-%202015.pdf>, accessed on 1 November 2016.

<sup>174</sup> Ibid.

<sup>175</sup> Section 51(b) of the NEMBA.

international agreements to which we are party to, which regulate international trade in endangered species.<sup>176</sup>

### **6.3.2 Relevant provisions of NEMBA relating to enforcement of rhino poaching.**

The objective of Section 56(1)(a) to (d) is to oblige the Minister to issue a list of national protected species which are either critically endangered, endangered or facing an extremely high risk of extinction in the wild, so that it can be protected. This is done by restricting or prohibiting certain activities relating to these threatened or endangered species contained on the list.<sup>177</sup>

Section 57(1) of the NEMBA<sup>178</sup> states that a person may not carry out any restricted activities that involve a specimen that is listed as a threatened or protected species without having a permit issued in terms of Chapter 7 of the Act. Subsection (1A)<sup>179</sup> also restrict the import, export, re-export or introduction from the sea, a specimen or species listed in terms of the Convention on International Trade in Endangered Species of Wild Fauna and Flora without a permit issued in terms of Chapter 7. Subsection (2)<sup>180</sup> provides for the prohibition of the carrying out of any activity which is of a nature that may negatively impact on the survival of a listed threatened or protected species; and which is specified in the notice, prohibit the carrying out of such activity without a permit issued in terms of Chapter 7. Subsections (1) and (1A) do not apply in respect of a specimen of a listed threatened or protected species or a specie to which an international agreement regulating international trade applies conveyed from outside the Republic in transit through the Republic to a destination outside the Republic, provided that such transit through the Republic takes place with the required original documentation from the country of origin accompanying the shipment.

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<sup>176</sup> Kidd M op cit note 131 at 102.

<sup>177</sup> Such species are indeed listed in terms of sub section 56(1) of NEMBA, which is also indicated in s 1(4)(b).

<sup>178</sup> Section 57(1) of NEMBA.

<sup>179</sup> Section 57(1A) of NEMBA.

<sup>180</sup> Section 57(2) of NEMBA.

A violation of any prohibition of the restricted activities that is issued by the Minister under the abovementioned provisions is an offence under the NEMBA, which will be discussed below.<sup>181</sup>

Through the above provisions, it is clear that the legislature made provision for the protection of threatened and endangered species by making provision for certain activities that are restricted with regards to these listed species. The hunting, or rather poaching of a rhino is therefore restricted by means of these provisions, and carrying out the act of poaching evokes the penalties provided for in the NEMBA.

### **6.3.3 The offences**

There are various environmental legislation which have provisions making certain conduct unlawful. The legislation imposes criminal penalties in instances where unlawful conduct occurs. In terms of the NEMBA regulations, certain activities regarding these listed species are prohibited as already discussed. For purposes of this paper, I will only be focusing on the black and white rhino species.

Section 101 of the NEMBA<sup>182</sup> sets out the offences in respect of threatened and protected species. This section states that a person is guilty of an offence if that person fails to comply with the provisions of section 57 (1) and 57 (1A) or a notice published in terms of section 57 (2).

It is further held that a person will be guilty for an offence if that person fraudulently alters a permit, fabricates or forges any document for the purpose of passing it as a permit, passes, uses, alters or has in his or her possession any altered or false document purporting to be a permit, knowingly makes any false statement or report for the purpose of obtaining a permit; or permits or allows any other person to do, or to omit to do, anything which is an offence in terms of subsection (1) or (2).<sup>183</sup>

### **6.3.4 Traditional sanctions**

Section 102(1) of the NEMBA provides that if a person commits an offence in terms of Section 101 as mentioned above, that person is liable to a fine not exceeding R10

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<sup>181</sup> Section 101 of NEMBA states that a person is guilty of an offence if that person contravenes or fails to comply with a provision of section 56 of the Act.

<sup>182</sup> Section 101 of NEMBA.

<sup>183</sup> Section 101 of NEMBA.

million, or an imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment. It is further held in Section 102 (2) that if a person is convicted of an offence involving a specimen of a listed threatened or protected species, or an alien species or commencing the commercialisation phase of bio prospecting without a permit issued in terms of Chapter 7, a fine may be determined, either in terms of subsection (1) or equal to three times the commercial value of the specimen or activity in respect of which the offence was committed, whichever is the greater. Finally Section 102 (3) states that notwithstanding anything to the contrary in any other law, a magistrate's court shall have jurisdiction to impose any penalty prescribed by this Act.<sup>184</sup>

### **6.3.5 Analysis of NEMBA enforcement provisions**

When considering the Preamble of NEMBA, it reiterates the importance of regulating the legal trade as it forms part of the Republic's International obligations to do so. Despite this fact and when considering the provisions of NEMBA, it would seem that it does indeed lend a hand towards the contribution to prevent illegal trade in rhino. The fact that Section 56 (1) (a) requires endangered species to be listed by the Minister, is of utmost importance as any activity relating to the trade of any such listed species constitutes a criminal offence.<sup>185</sup>

Section 20 of Regulation 388 provides support to NEMBA in combating the illegal trade, in the form of permits as well as regulating the exportation of animal parts. Even though the former is incorporated in the form of legal hunting, it prohibits syndicates to successfully execute any illegal trade activities, disguised as legal hunting. Furthermore, the regulation for the exportation provides for strict custom control measures at all entry and exit points within South Africa in order to affect more arrests.<sup>186</sup>

As mentioned above, Section 102 (2) provides for penalties in the form of imprisonment or fines for any contravention of Section 56 (1) (a) and 57 (2) (a).

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<sup>184</sup> Section 102 of NEMBA.

<sup>185</sup> Neil J De Wet op cit note 159 at 59.

<sup>186</sup> Ibid.

When considering the provisions of Section 102 (2) it can be deduced that it has a big role to play when it comes to deterring syndicates to trade illegally.<sup>187</sup>

As an illustration of how these provisions can adequately be used, I will use 3 previous court decisions. In the first case of *S v Mandla Chauke*<sup>188</sup> the accused was charged with murder; illegal hunting of three rhinos, alternatively possession of two horns; possession of firearm; possession of ammunition and trespassing. When judgment was given the accused was found guilty of murder-*dolus eventualis* as well as common purpose, for which he received a 15 year sentence. He was found guilty of illegal hunting, 3 counts for 3 rhinos for which he received 10 years per count. For theft of rhino horns the accused received 8 years imprisonment, possession of firearm he received 15 years, possession of ammunition 7 years and trespassing 2 years imprisonment, which resulted in a total 77 years imprisonment. The court ordered that the sentence on theft to run concurrently with the sentence for 3x illegal hunting, and the sentence on possession of firearm and ammunition to run concurrently with sentence for murder. The final sentence was 47 years imprisonment.<sup>189</sup>

The second case, involved a syndicate of six members who were found guilty in the Makhado Magistrate's Court in July 2014 for the poaching of a rhino. Five were convicted to 15 years imprisonment and another to 10 years.

The last case was in the Mokopane Magistrate's Court in Limpopo, where four men were convicted and sentenced for the poaching of two rhinos in 2013. The convicted poachers were handed down sentences including effective prison terms of between 14 and 20 years. They were found guilty of charges which included the illegal hunting of rhino, the illegal possession of a prohibited firearm, and the use and possession of the proceeds of crime.<sup>190</sup>

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<sup>187</sup> Ibid at 60.

<sup>188</sup> *S v Mandla Chauke Skukuza* CAS 27/4/2011, unreported Magistrates Court case.

<sup>189</sup> SABC News 'Rhino poacher sentenced to 77 years' available at <http://www.sabc.co.za/news/a/5810a00044d2b46f92cab7637588af07/Rhino-Poacher-sentenced-to-77-years--20140722>, accessed on 25 September 2016.

<sup>190</sup> News 24 'First four months of 2016 sees 363 rhino poached' available at <http://www.news24.com/SouthAfrica/News/first-four-months-of-2016-sees-363-rhino-poached-20160508>, accessed on 15 September 2016.



On the other hand, the best case to illustrate how the above provisions are not adequately enforced is the *Lemtongthai* case. Chumlong Lemtongthai was alleged to have been trading in and exporting rhino horns from South Africa to Asia. He was using prostitutes to pretend to be hunters to enable him to smuggle the rhino horns out of the South Africa. He was furthermore believed to be one of the kingpins of an international rhino horn smuggling syndicate. The accused was charged with contravention of section 80(1)(i) of the Customs and Excise Act, Act 91 of 1964, making improper use of a licence, permit or other document issued in respect of goods in terms of the Act and section 57(1) of NEM:BA carrying out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued. The accused was found guilty and sentenced to 40 years direct imprisonment.<sup>191</sup>

He appealed against the sentence to the High Court of 40 years imprisonment. The High court took into account that the he was forty-four years of age, was married and had two children and was a first offender, which had been in custody for sixteen months whilst awaiting trial. The High court took the view that a deterrent sentence was called for but the maximum period of imprisonment in terms of section 80(1)(i) of the CEA was five years. Since the magistrate took the number of counts in respect of this section of the CEA as one, it had to have restricted the sentenced to five years' imprisonment rather than the ten years' imprisonment that it imposed. This resulted in a total sentence of thirty years' imprisonment.<sup>192</sup>

On appeal to the Supreme Court of Appeal it was held that the sentences imposed by the court a quo had to be set aside, and be substituted in respect of counts 1-26 with a fine of R1 million or five years imprisonment. With respect to counts 27-52, a sentence of six months for each count, being a thirteen year imprisonment sentence and a fine of R1million.<sup>193</sup>

As is clearly demonstrated by the abovementioned cases, it is clear that the provisions are not always used to its full extent. It seems rather apparent that the sentences, as imposed in the first three cases, impose a much higher deterrent than

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<sup>191</sup> The Lemthonthai case.

<sup>192</sup> The Lemthonthai case.

<sup>193</sup> The Lemthonthai case [par 23].

the judgement in the Lemtongthai case. What is alarming, though, is the fact that the latter case is a Supreme Court of Appeal judgement, and in effect, serves as authority for similar future cases which will result in the same conviction

## **6.4 The Prevention of Organised Crimes Act**

The preamble of POCA indicates that it is specifically aimed at introducing certain measures that will fight organised crime and gang related activities. In addition it also criminalise certain of these activities. In terms of section (1) (iv) a criminal gang includes any formal or informal ongoing, organisation, association or group of 3 or more persons whose activities amount to a criminal offence. In addition, it also has an identifiable name and whose members collectively engage in a pattern of criminal activity.<sup>194</sup> The poaching and trade in rhino horn clearly falls within this ambit, which was substantiated by Minister Edna Molewa's public address held May 2012.<sup>195</sup>

The POCA enables law enforcement agencies as well as the National Prosecuting Authority to combat organised crime and money laundering. The main feature of the POCA is for the recovery of the proceeds that stems from unlawful activity. Chapter 5 of the Act provides for the freezing and confiscation of the value of the benefit derived from crime in cases where the accused is convicted of an offence. Chapter 6 focuses on property that has been used either to commit an offence or which constitutes proceeds of crime. It provides for freezing and forfeiture of proceeds and instrumentalities of crime through a process that is not dependent on a prosecution. In addition, section 71 of the POCA empowers the National Director to request information from government departments and statutory bodies in respect of investigations relevant to this Act without having to issue subpoenas.<sup>196</sup>

### **6.4.1 Offences and Penalties**

Section 3 of POCA provides for offences in relation to the proceeds obtained from unlawful activities. Sub section 6 more specifically is relevant to illegal trade activity. This section states that a person who is in possession of property, and who knows or ought reasonably to have known that this property is or forms part of what will be the

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<sup>194</sup> Neil J De Wet op cit note 159 at 49.

<sup>195</sup> Ibid at 49-50.

<sup>196</sup> NPA op cit note 190 at 17.

proceeds of unlawful activities, shall be guilty of an offence. Poacher plays a very big role within the trade industry as the industry will not exist without the horn being poached and secured in order to be sold on the market. Every poacher knows that the horn will be illegally traded on the black market, once it has been handed over to members of the syndicate. Any person convicted of an offence as contemplated in section 6 shall be liable to a fine of up to R 100 million or imprisonment not exceeding 30 years.<sup>197</sup>

Further sentences may include that members of the syndicates which are convicted must pay to the State any amount which it considers appropriate, which is usually the value of the proceeds obtained from committing the crime, which in the case of rhino poaching is the horn itself. The National Director may also, by way of an *ex parte* application apply to a High Court for an order prohibiting such groups from dealing in any manner with any property, parts or products.<sup>198</sup>

The relevance of POCA has been established through the provisions of the Act, as it relates to criminal gangs, which in the case of rhino poaching is of utmost importance, as it is done through criminal gangs. The most important provision of this Act in so far as it relates to rhino poaching is Section 18(2)(a), which imposes penalty measures of up to a R 100 000 000 or imprisonment of up to 40 years.<sup>199</sup>

#### **6.4.2 Analysing POCA enforcement provisions**

The applicability and importance of the POCA has been demonstrated in the above discussion as it is focused on the activities of criminal syndicates. Section 18(2)(a) is a very important Section as it provides for very strict penalty measures as mentioned above.<sup>200</sup>

If we are to assess the majority of the cases involving the conviction of rhino poachers, it would seem that a significant number are not charged in terms of POCA. As mentioned above a criminal gang as defined by POCA includes 3 or more persons. Most of the poaching incidents involve more than 3 poachers working as a

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<sup>197</sup> Neil J de Wet op cit note 159 at 50.

<sup>198</sup> Ibid at 50-51.

<sup>199</sup> Ibid at 63.

<sup>200</sup> Ibid.

gang towards an end goal, therefore the provisions of POCA immediately becomes applicable.

The only provisions which one can see that is being utilized is the seizing of the property that has been used in the crime. One of the more effective provisions in my opinion is that which relates to the convicted syndicate must pay to the State any amount it considers appropriate, which is usually the value of the proceeds related to the crime, which in the case of rhino poaching is the horn. Rhino horn is very valuable, and a rhino horn can be sold up to \$100 000.

If we are to consider the case of Hugo Ras and the proceeds made from the rhino horn sales, the provisions of POCA allows that if and when the syndicate is convicted it should pay the State an amount so ordered, usually the amount of the proceeds made from the horn. This money can be used to implement better conservation measures, which include enforcement mechanisms.

The only shortfall of POCCA is the fact that it does not really provide for the prevention of these organised crimes which include the illegal trade. It emphasizes what the terms organised, crimes and groups means, to which activities its provisions apply and what the penalties are if contravened, however there are very few provisions that provide for the prevention of the illegal trade.<sup>201</sup>

## **6.5 Prevention and Combating of Corrupt Activities Act**

### **6.5.1 Objective**

The Prevention and Combating of Corrupt Activities Act has the effect of corruption being an offence. This Act applies to all individuals working within the government, such as police officials, Ministers, and also individuals outside of government. The act differentiates between different types of corruption, which is very similar to one another. Corruption can be described as someone giving or offering to give someone something in order to use their power illegally and unfairly in order to obtain an advantage. The person who makes the offer to the other person will always be guilty

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<sup>201</sup> Ibid.

of corruption. The other person to whom the offer is made will only become guilty once the offer is accepted.<sup>202</sup>

The object of this Act is to strengthen the measures for combating and preventing corruption and corrupt activities; to provide for offences relating to these activities and to provide for investigative measures for these practices.<sup>203</sup> The crime of corruption usually entails the giving of money, but other types of payment also qualify such as donations and gifts.<sup>204</sup>

### 6.5.2 The Offences

The general crime of corruption, which also applies in rhino poaching incidents, applies to everyone in the private and public sector. The provisions in Section 3 apply in the following two situations.<sup>205</sup>

When an employee in the private or the public sector offers to use their position to help someone else get what they desire in return for money or any other favour. In this case the employee is guilty of the crime of corruption. Only when the person to whom the offer is made, accepts will he also become guilty of corruption.<sup>206</sup>

Someone offers an employee in the private or public sector money or a favour in order to assist them to get what they want. In this case the person that makes the offer is guilty of corruption, and if the employee accepts the offer he/she will also become guilty of corruption.<sup>207</sup>

Section 4 of the Act applies to public officials such as police officers, which are extremely important in the rhino poaching crises. Corrupt police officials as mentioned already are one of the biggest constraints when it comes to poaching rhinos or pointing out the location of the rhinos. If any one person in the private sector offers a public official, such as a police officer money or a favour in

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<sup>202</sup> National Anti Corruption Forum 'Guide to the prevention and combating of corrupt activities Act no 12 of 2004' available at <http://www.nacf.org.za/guide-prevention-combating-corrupt-activities>, accessed on 30 July 2016.

<sup>203</sup> Commonwealth Secretariat *Commonwealth Law Bulletin* vol 30 (2004) 27-28.

<sup>204</sup> National Anti Corruption Forum op cit note 202.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid.

<sup>207</sup> Ibid.

exchange for a benefit; which benefit can include information or material that they have, they will be guilty of corruption.<sup>208</sup>

If the official agrees to accept the offer, both parties will be guilty of corruption. If a public official on the other hand offers to do or does something for anyone in the private sector in return for favours or money the public official will be guilty of corruption, if the other party accepts, both parties will be guilty.<sup>209</sup>

### **6.5.3 Traditional Sanctions**

The Act imposes penalties for people who are convicted of corrupt activities, which activities have been discussed above. Hefty prison sentences can be imposed by a court, as well as fines. If a person is convicted in the High Court for the crime of corruption, that person can receive up to life imprisonment.<sup>210</sup>

If someone is convicted in the regional magistrates' court, that person can receive a sentence of up to 18 years in imprisonment. If someone is convicted in the district magistrates' court, that person can receive up to five years in imprisonment.<sup>211</sup>

### **6.5.4 Analysing PRECCA enforcement measures**

The analysis of PRECCA will be illustrated by means of various cases involving officials who have been involved in the rhino poaching syndicates.

The most extreme allegation would be that against Magistrate Deuteronomium Ncgobo. He presided over various rhino poaching cases in the Mtubatuba courthouse, during which the accused pleaded guilty and would only receive small fines with no jail time.<sup>212</sup>

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<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Corruption Watch 'CORRUPTION AND THE LAW IN SOUTH AFRICA – PART TWO' available at <http://www.corruptionwatch.org.za/corruption-and-the-law-in-south-africa-part-two/> accessed on 30 July 2016.

<sup>211</sup> Ibid.

<sup>212</sup> Jamie Joseph 'Justice System in the crosshairs as alleged rhino poaching kingpin goes to court' available at [http://www.huffingtonpost.com/jamie-joseph/justice-system-in-the-cro\\_b\\_9402246.html](http://www.huffingtonpost.com/jamie-joseph/justice-system-in-the-cro_b_9402246.html), accessed on 18 November 2016.

During the aforesaid period all the accused were represented by the same attorney, Mr Ngwenya. In 2014 three men<sup>213</sup> were accused of conspiring to hunt rhino. One of the accused pleaded guilty and was represented by Ngwenya. During his bail application Magistrate Ngcobo allowed him to be released on bail, and later only issued a small fine. The other accused, pleaded not guilty to the charges. They were represented by a different attorney before a different magistrate, and their bail was denied and they are still in jail awaiting trial.<sup>214</sup>

Four men were arrested<sup>215</sup> inside a private game reserve in Zululand where after they were charged with conspiring to hunt rhino. The case was split between two courthouses. Two of the accused were represented by Ngwenya, again before Magistrate Ngcobo. Both accused pleaded guilty and were given the option to pay fines over an extended period.<sup>216</sup>

The other two accused appeared in a different court, before a different magistrate and pleaded not guilty. They were sentenced to eight years imprisonment without the option of a fine.<sup>217</sup>

In another case 3 accused<sup>218</sup> were arrested for hunting rhino. As Ngwenya as their attorney they once again appeared before Magistrate Ngcobo who only gave them a small fine.<sup>219</sup>

In a more recent case, Warrant Officer Christopher Gumbi was arrested in KwaZulu-Natal, after he allegedly pointed a firearm at two undercover agents who posed as rhino poachers. After he pointed his firearm at them, he fled with the 'sting' rhino horns in an unmarked police vehicle which had fake registration plates. According to the media statement given by the KwaZulu-Natal South African Police Service, he was charged with armed robbery, possession of horn as well as defeating the ends of justice.<sup>220</sup>

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<sup>213</sup> S v Ngubane and 2 others CAS 25 / 06 / 2014], unreported Magistrate Court case.

<sup>214</sup> Jamie Joseph op cit note 210.

<sup>215</sup> S v Hlope and 3 others CAS 78 / 07 / 2014, unreported Magistrate Court case.

<sup>216</sup> Jamie Joseph op cit note 212.

<sup>217</sup> Ibid.

<sup>218</sup> S v Hlatswayo and two others CAS 9 / 11 / 2014, unreported Magistrate Court case.

<sup>219</sup> Jamie Joseph op cit note 212.

<sup>220</sup> Ibid.

Represented by Ngwenya, Gumbi was granted bail of R500 by Magistrate Ngcobo, who later acquitted him of all charges, claiming that the police fabricated the story. A police spokesman at that time commented by stating 'poaching syndicates appear to have infiltrated the country's judicial system,' saying the case 'speaks of endemic corruption'.<sup>221</sup>

Believed to be the head of KwaZulu-Natal's largest poaching syndicate, Dumisani Gwala was arrested in December 2014. Ngwenya represented Gwala after he was arrested during a sting operation. Magistrate Ngcobo granted him R10 000 bail and released six of his implicated luxury vehicles seized under the Prevention of Organised Crime Act. As of January 2016 he is still awaiting trial. This was not the first time that the alleged poaching kingpin has been arrested. Charges have been brought against Gwala several times, but all of these cases have suffered from incidents that either suggest a statistically level of poor case management by prosecutors and court staff or systematic corruption within the courts that allows Gwala and his associates to routinely go free.<sup>222</sup>

As seem apparent from the above illustrations, it would appear that even the authority of higher ranked officials such as Magistrates and Judges might become compromised. It would further suggest that they are in effect a part of the syndicates that they are suppose to bring to justice, and this may defeat the honourable purpose which PRECCA might have been enacted for.

## **6.6 The Criminal Procedure Act**

The CPA is not specifically aimed at addressing specific crimes, but contains legal provisions that relates to certain aspects such as investigations of crimes and the procedures to be followed during time. Section 334 of the Act authorises the Minister of Justice and Constitutional Development to declare certain persons peace officers which authorises them to make arrests with respect to specific crime. The HAWKS,

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<sup>221</sup> Ibid.

<sup>222</sup> Jamie Joseph 'Jamies Blood Rhino Blacklist- Magistrate Number 2' available at <http://www.sapeople.com/2016/06/23/blood-rhino-blacklist-magistrate-no-2-south-africa/>, accessed on 13 November 2016.



SANPark officials as well as the Environmental Crime Investigations Unit are examples of these when it comes to rhino poaching.<sup>223</sup>

Furthermore the CPA also makes provision for those authorises groups of persons or individuals to prosecute persons that are guilty of committing environmental crimes by means of a private prosecution. The Act provides that any person that institutes a private prosecution have to do so through a person that is entitled to practise as an advocate or attorney. Furthermore they have to give written notice to the appropriate public prosecutor that they intend to do so. This provision limits the extent of the provisions functionality, which in effect also limits the CPA contribution in preventing the illegal trade in rhino horn. This Act does however broaden the scope of the persons or groups that are authorized to apprehend or arrest individuals guilty of illegal trade activity to beyond just officers of law.<sup>224</sup>

#### **6.6.1 Seizure of property**

Section 20 authorises the State to seize anything which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, which may afford evidence of such a commission or suspected commission of an offence and which is believed or on reasonable grounds believed to be intended to be used for the commission of an offence.<sup>225</sup> When we consider rhino poaching, poaching constitutes an offence. This Section authorises the relevant authorities to seize anything that formed part of the poaching which includes the rhino horn.<sup>226</sup>

Before any such a seizure can be carried out it is compulsory that a warrant should be obtained from a magistrate or judicial officer, with section 22 of the CPA being the exception to this rule. In addition to seizing the rhino horns, the police officials will also be entitled to search any of the persons or premises which have been described in the warrant, as provided for in section 21(2) of the Act.

Section 22 and 21(2) does not only prevent rhino horn from being exported illegally for purposes of distribution, but it also contributes to faster prosecutions and

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<sup>223</sup> Neil J de Wet op cit note 159 at 47.

<sup>224</sup> Ibid.

<sup>225</sup> Section 20 of the CPA.

<sup>226</sup> Neil J de Wet op cit note 159 at 48.

convictions due to the fact that it places the offenders at the scene of the crime from which the rhino horn is confiscated. As already mentioned above, Section 22 is the exception to the rule that a police official first has to obtain a warrant before any seizure can be carried out, as it provides that a police official may without a warrant search any person or premises if he on reasonable grounds believe that the delay in obtaining such warrant would defeat the object of the search. Most accused are apprehended while they are either travelling to the border or at the point to export the horn via plane or ship. This Section enables the relevant authorities the opportunity to act on instinct or a tip off, which in most instances lead to the recovery of hundreds of kilograms of rhino horn and subsequent arrests being made.<sup>227</sup>

### **6.6.2 The entering of the premises of accused persons**

Section 24 of the CPA makes provisions for the apprehension of any persons or any objects by entering the premises on which it is suspected that unlawful activities are being conducted. It further provides for a further aspect which is that any person who is lawfully in charge of a premises who reasonable suspects that stolen stock or produce is being held at the said premises, may at any time without the presence of police, enter such premises for searching purposes. This provision is very relevant when it comes to rhino poaching due to the fact that police officials cannot always be readily available in order to search and apprehend. This provides for the assistance of the public which will further increase the success rate with relation to prosecutions being made, rhino horn being apprehended and convictions being obtained.<sup>228</sup>

### **6.6.3 Analysis of the CPA enforcement provisions**

As already mentioned above, the CPA does not address any specific crimes. Irrespective of that, it does never the less contain provisions that contributes towards the prevention of the illegal trade in rhino horn. Section 20 of the CPA authorises the relevant authorities to seize any items which has been or is about to be used in the commission of an offence. The importance of this provision is not due to the fact that such items can be detained, but rather because it can be used as evidence to secure arrests and obtain harsher convictions. Section 21(2) authorises the officials to take

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<sup>227</sup> Ibid at 48-49.

<sup>228</sup> Ibid at 49.

the offenders into custody. The benefits of this provision can be seen in twofold. Firstly it prevents the perpetrator from being able to execute any illegal activity such as poaching or trading rhino horns. Secondly it presents the state with the opportunity to let the offender become a state witness, which may then further assist authorities in making further arrests or even apprehending the kingpin that is in charge of the syndicates.<sup>229</sup>

Generally, seizures in terms of the CPA can only be affected by means of a warrant. This requirement more often than not hinders the point of the operation as prior knowledge thereof risks the success. However, Section 22 authorises seizures without the requirement of obtaining a warrant. This exception to the general rule contributes to successful prosecutions as offenders are caught off guard while in the act. Successful prosecutions lead to speedy convictions. The most valuable CPA's provision in relation to rhino poaching is Section 24. This Section authorises any person who is the owner or in charge of a premises to enter such a premises for the purposes of searching and investigating where there is a belief that any criminal activity is underway.<sup>230</sup>

## **6.7 Conclusion**

The importance of the enforcement provisions was made clear during this chapter. It is clear that the provisions for enforcement within the legislative framework are quite broad. It would seem that sufficient provisions have been made for enforcement within the legislative framework.

The problem however seems to be with the implementation of the provisions. It would seem that the legislation is not used to its full extent nor neither in conjunction with one another. If the legislation is to be used to its full extent it can provide for harsher sentences. This again goes to show the problem is not within the legislation, but rather the enforcement thereof through the current enforcement mechanisms utilized.

As discussed the most utilised piece of legislation is NEMBA, as it regulates the main issue, which is the restricted activities as it relates to threatened and protected

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<sup>229</sup> Ibid at 63.

<sup>230</sup> Ibid.

species. It is for this reason that NEMBA is the primary piece of legislation as rhinos fall within the ambit and scope of this Act. If NEMBA is used in conjunction with all the other legislation discussed in this Chapter, harsher sentences can be advocated for during trial as well as the proceeds gained by the convicted accused can be used to implement better conservation measures which includes improving and investing in better enforcement.

A major issue that was illustrated during the analysis of this Chapter was the fact that PRECCA seems to be irrelevant. The case of Magistrate Ncgobo and attorney Ngwenya illustrated this quite clearly, as perpetrators are being charged under a specific Act which is being contravened by the very persons that should ensure the latter to be effected. Magistrates have to apply the law to such an extent as to ensure that justice is served. This is clearly not the case and serves to show the reach and power that criminal syndicates have.

This is a very important illustration that became clear during this Chapter, as it proves that corruption stems from organised crime, and organised crime flourishes due to weak law enforcement, reiterating the point that the problem does not lie in the legislative framework, but rather the enforcement thereof.

## **Chapter 7-Recommended solutions**

### **7.1 Introduction**

This paper clearly established that the legislative framework is not supported by the enforcement framework, due to various constraints suffered as a result of certain weaknesses of the enforcement framework. This was clearly illustrated during the discussion in Chapter 5 and 6. These constraints are not absolute and support can be given to the enforcement framework through certain strengthening implementations which will ensure the necessary support of the legislative framework.

It is important to establish what more needs to be done, or done differently to properly provide for this strengthening of the enforcement framework by looking at various suggestions that will assist in filling the gaps in the current enforcement framework.

If we are to consider the weaknesses of the current enforcement framework as discussed in Chapter 5, two of them stand out. These are inadequate policing as well as inexperienced judicial officers and prosecutors. The reasons why these two stand out are because the former is of utmost importance when it comes to the protection of the rhinos as well as affecting arrests of alleged rhino poachers. The latter is of utmost importance due to the fact that once the aforesaid affects arrests, the prosecutors and judicial officers have a major responsibility in ensuring that the legislation is used to its fullest extent and applying the relevant law to affect an appropriate punishment and conviction.

Furthermore, when it comes to the enforcement framework, adequate policing together with prosecution and successful convictions are in my opinion the most important elements to focus and improve in the enforcement framework. This chapter will focus on recommendation to strengthen these two weaknesses.

## 7.2 Inadequate policing recommendations

### 7.2.1 Strengthen security through specialized law enforcement agencies

The Endangered Species Protection Unit (ESPU) was a specialist police unit, established in 1989 after numerous requests made to the South African Police to broaden the services to the community by protecting endangered fauna and flora. One of the functions of the units were to identify the main routes being used for smuggling the endangered species, or its products such as ivory and rhino horn out of the country, as well as ensuring the fall of the syndicates behind these actions. The main function of the unit was not only to apprehend individuals but also the networks responsible for these crimes.<sup>231</sup>

The unit consisted of a total number of 27 police officers, many of whom have infiltrated large smuggling operations.<sup>232</sup> The objectives were not only to stop the illegal trade in South Africa but also to encourage international law enforcement agencies to be active in this war.

During the 1990s, The Endangered Species Protection Unit was disbanded, and has been replaced by an Endangered Species Desk in the Directorate for Priority Crime Investigation known as the HAWKS. The HAWKS addresses organised crime in general.

Currently the capacity experienced by the HAWKS is consisting of four national investigators which are dedicated to wildlife and national heritage crimes, and also provincial representatives that deal with the investigation of endangered species crimes as well as other organised crimes such as drugs, racketeering, kidnappings etc. This seems to be insufficient. Even though rhino poaching is considered a national priority crime in South Africa, the situation on the ground at the South African Police Service level does not support this attitude.<sup>233</sup>

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<sup>231</sup> Lt Col P Lategan 'The role of the endangered species protection unit (ESPU) of the South African Police in combating rhinoceros poaching and the smuggling of rhino horn' (1994) at 5.

<sup>232</sup> Melanie Gosling 'Endangered Species Unit to be Disbanded' available at <http://www.iol.co.za/news/south-africa/endangered-species-unit-to-be-disbanded-97964>, accessed on 30 July 2016.

<sup>233</sup> EWT 'Recommendations and strategy to combat rhino poaching' (2014) at 3.

If we look at the National level, there is not sufficient capacity to enable the undertaking of the large increase in wildlife crime investigations, as the HAWKS is tasked with the investigation of crimes that does not only relate to wildlife crime.<sup>234</sup> It would seem that there is a need for a more specialized unit to deal with wildlife crime investigations independently.

Inadequate policing as previously discussed is a major constraint for South Africa. By having a small specialized unit for the protection and investigation of endangered species will assist with this constraint. Corruption which occurs only within the rhino poaching sphere can also be more closely monitored within a smaller unit such as this.

### **7.2.2 Improve capacity constraints by filling vacant posts, developing skills and increasing operational budgets for provincial conservation departments**

The various conservation agencies are immensely under-resourced and also lack the capacity needed to be effective in the fight against rhino poaching. The conservation agencies play an immensely important role as they are the right hand of the authorities because they are not only responsible for the conservation of rhinos but also assist the police with information and arrests. They are experienced with rhinos and their information regarding rhinos are pivotal, as it assist police regarding the procedure followed by poachers when killing and removing the horn from the rhino.<sup>235</sup>

As of May 2014, the Wildlife Protection Services Section of the Mpumalanga Parks and Tourism Agency experienced a 68% vacancy rate and the Conservation Services a 72% vacancy rate. Some progress and efforts has been made in filling these vacant posts, but the provincial authorities' needs to prioritise the allocation of funds to fill these capacity gaps.<sup>236</sup>

As mentioned previously the lack of sufficient resources which include suffering from a serious dearth of personnel and organised leadership, as well as resources and

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<sup>234</sup> Ibid.

<sup>235</sup> Ibid.

<sup>236</sup> Ibid at 4.

equipment such as vehicles and drones, are other serious constraints which contributes to inadequate policing.

If we should consider this realistically, these capacity constraints can only be addressed by the provincial authorities. NGOs do their best to assist the provinces in addressing the shortfalls in resources by making financial contributions. A number of various organisations have provided support to provinces in the form of training, tracker & sniffer dogs and equipment.<sup>237</sup>

By adhering to this recommendation, police can get more support structures to assist them in the form of park rangers and conservationalists. Furthermore, by having more resources available such as equipped vehicles and sniffer dogs, it will assist authorities to respond to incidents much quicker, and might save rhinos by catching the poacher before they poach the rhino.

### **7.2.3 Training local law enforcement in basic crime investigation, forensic principles and continued case management**

At the local level, the law enforcement officials more often than not lack the knowledge required of investigating wildlife crimes, crime scene management and the forensics thereof. Often these officials are the first point of contact when a poaching incident occurs, but then lack the knowledge and skills on how to proceed. This can lead to contamination of the scene where the crime occurred, as well as not reading the accused their rights when arrested. Problems like these can lead to trials in which the accused might get a light sentence, or not be sentenced at all due to mistakes made by the inexperienced enforcement officials.<sup>238</sup>

Furthermore local law enforcement officials are those involved in manning the roadblocks and doing searches and seizures, but do not always know what to look for. By transferring additional law enforcement powers into the private sector can provide more local enforcers. In this way, constrained law enforcement capacity can be assisted by enlisting people with knowledge of conservation into police reservist positions, either for training or assistance during these roadblocks or crime scene conservation. This is adequately provided for in the South African Police Service Act.

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<sup>237</sup> Ibid.

<sup>238</sup> Ibid.



Because environmental law is an area that is regularly changing, ongoing training is required to provide the necessary knowledge, skill and confidence to enforcement officials and also officials responsible for the issuing of permits. Training in other agencies and institutions are also required such as in the Police Service, Customs and Border Police on biodiversity and conservation enforcement as well as magistrates and prosecutors.<sup>239</sup>

#### **7.2.4 Greater intelligence sharing between high-level officials**

There is a lack of information sharing about the poaching events that occurs between law enforcement agencies that deals with the rhino poaching crimes, such as SAPS, SARS and the provincial conservation officials of the various parks. Poaching events are usually linked, even when it occurred or is conducted in different provinces. The lack of cooperation hinders the chances of apprehending the offenders.<sup>240</sup>

As illustrated in the previous chapters rhino poaching is a trans boundary crime as it is committed by sophisticated syndicates. It is for this reason that better communication and information sharing needs to be adhered to if we are to catch more than just the foot soldier poaching the rhino. Foot soldiers as already mentioned are easy replaceable. If we are to win the battle against rhino poaching, we need to cut the head of the snake, who are the kingpins.

### **7.3 Judicial officers and prosecutors**

#### **7.3.1 Appoint more prosecutors dedicated to dealing with rhino crimes.**

There has been a number of training initiatives which has taken place over the past few years in a bid to address the shortcomings relating to prosecutors' lack of knowledge regarding environmental laws. In the 2010/11 financial year for instance, 67 magistrates and 177 prosecutors received training aimed at developing their capacity to understand the nature, scope, impacts and legislation related to environmental crimes.<sup>241</sup>

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<sup>239</sup> Yolán Friedman, Harriet Davies-Mostert & Marie Parramon-Gurney (eds) op cit note 16 at 26.

<sup>240</sup> EWT op cit note 233 at 4-5.

<sup>241</sup> DEA op cit note 123 at 63.

If more prosecutors are trained in environmental law with a specific focus on wildlife crime, they will be able to use and understand the full extent of the legislation in conjunction with one another to ensure the maximum sentence is obtained.

### **7.3.2 Increase the prosecution rate and lengthen sentences.**

The low penalties that are provided for in some of the legislative provisions remain a present constraint. Although the provinces are in the process of amending their provincial acts and ordinances, which will address this issue, it is submitted that further amendments should be considered to further increase the penalties for biodiversity and conservation related offences in both nation and provincial legislation.<sup>242</sup> This will also help solve the issue that prosecutor's face of their unwillingness to institute proceedings against an offender because of the fact that the penalty might be low and insignificant. They would rather spend their time and resources pursuing cases with more significant penalties and outcomes.

Fine lists provide a list of the maximum monetary value of admissions of guilt fines, per court district. This amount is set in the Criminal Procedure Act and is binding on all peace officers. In some magistrate districts these fine lists are outdated, and the fines that are issued are insufficiently low and defeats the purpose of deterrence of would be or repeat offenders. Therefore these lists must be regularly updated where needed.<sup>243</sup>

### **7.3.3 Make poaching a Section 5 offence so that bail can be denied.**

In a survey conducted by the endangered wildlife trust, a question was asked to prosecutors and police officials whether the current set of environmental legislation, relating to biodiversity and conservation is adequate and effective in so far as it pertains to their work. Only 25% of the police officials answered yes, 50 % partly and the other 25% said no. The NPA answered 50% yes, and 50% partly.<sup>244</sup> There were a number of requests and recommendations made, one of which was made by the NPA to help prosecutors by amending the Criminal Procedure Act to include rhino poaching as a schedule 5 or schedule 6 offence. This would also help for purposes

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<sup>242</sup> Yolán Friedman, Harriet Davies-Mostert & Marie Parramon-Gurney (eds) op cit note 16 at 25.

<sup>243</sup> Ibid at 28.

<sup>244</sup> Yolán Friedman, Harriet Davies-Mostert & Marie Parramon-Gurney (eds) op cit note 16 at 15.

of bail.<sup>245</sup> The current legislation allows for rhino poachers to be released on bail very easily, and the light sentences which are imposed make their criminal efforts well worth their while. The risk of being caught is low and the risk of being imposed a sentence of long term imprisonment is equally low.<sup>246</sup>

#### **7.3.4 Use the full extent of South Africa's legislation**

South Africa has a reputation for having globally progressive environmental legislation, as discussed in chapter 6. However, a case could be made for better use of the supporting legislation, which is the POCA and PRECCA that can add increased weight to the charge sheet of a poacher. By using all the relevant legislation in conjunction with one another it will increase the chances of harsher sentences for poachers.<sup>247</sup>

When harsher sentences are handed down, it would serve as a much bigger deterrent and rhino poacher might reconsider committing the crime should the risk become greater than the reward. At this stage rhino poachers feel as if they have nothing to lose, as a small fine or a little time in prison is well worth the money for poaching a rhino.

### **7.4 Conclusion**

This paper critically evaluated the current enforcement framework utilized in South Africa. This evaluation included an in dept look at what are the different factors contributing to the rhino poaching crisis, and what makes it so sustainable. This in depth discussion enabled the conclusion that the problem that is rhino poaching does not lie in weak legislation or lack of suitable provisions with respect to rhino poaching, but rather the implementation thereof by exposing the shortcomings of the enforcement framework and provided for suitable and practical solutions.

As was apparent from all the discussions in the various chapters, it became clear that corruption is present due to the fact that criminal syndicates uses it as a means to further their crime and in effect rhino poaching will not be possible if it was not for corruption. Organised crime therefore seems to be the major cause of rhino

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<sup>245</sup> Yolán Friedman, Harriet Davies-Mostert & Marie Parramon-Gurney (eds) op cit note 16 at 24.

<sup>246</sup> Global March for Elephants and Rhinos op cit note 17.

<sup>247</sup> EWT op cit note 233 at 5.

poaching, and organised crime is present due to the fact that law enforcement is weak and has not kept up to date with its sophistication. Therefore if we are to improve enforcement, the presence of organised crime will decrease which will in effect automatically decrease the presence of corruption.

In order to give effect to the above, various practical strategies are required that will reduce the rewards and increase the risks to poachers and members of the syndicates. These practical strategies include the establishment of a specialized unit dealing in rhino poaching only; improve capacity constraints by filling vacant posts; developing skills and increasing operational budgets for provincial conservation departments; training local law enforcement in basic crime investigation; forensic principles and continued case management; greater intelligence sharing between high-level officials; appoint more prosecutors dedicated to dealing with rhino crimes; increase the prosecution rate and lengthen sentences; make poaching a Section 5 offence in order for bail to be denied; and the use of the full extent of South Africa's legislation.

The implementation of all these strategies will require strong commitment from the government, provincial supporting structures, NGO's and also the public. If these minds do not meet, and support one another; the fight against rhino poaching will be lost, and we will surely lose a majestic animal forever.

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