Contested illegality: Processing the trade prohibition of rhino horn

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Contested Illegality

Processing the Trade Prohibition of Rhino Horn

Annette Hübschle

Introduction

The international community declared a total ban on the trade of rhino horn in the late 1970s. Despite regulation and a variety of extraordinary conservation, protective, and security measures, the illegal killing of rhinoceroses (hereafter "rhinos") continues to plague rhino range states.[1] An average of three rhinos are poached and dehorned in the southern African bush each day. At the current rate of attrition, wild rhinos are likely to go extinct in our lifetime. The analytical focus of this chapter is on South Africa, which is the greatest African rhino range state, hosting nearly 80 percent of the continent's rhinos. This chapter shows that banning an economic exchange is not a straightforward political decision but a protracted process that may encounter unexpected hurdles along the way to effective implementation and enforcement. While political considerations informed the decision to ban all trade in rhino horn initially, diffusion of the prohibition was uneven and lacked social and cultural legitimacy among key actors affected by the ban and its impact. This chapter starts with a theoretical framing, introducing the notion of "contested illegality."[2] Important market actors thus justify their participation

[1] Range states are countries in which specific populations of wildlife occur "in the wild." South Africa, Namibia, Kenya, and Zimbabwe are the main African rhino range states.

[2] The research for this chapter derives from a doctoral research project, which followed flows of rhino horn from the source in southern Africa to illegal markets in Southeast Asia. The multi-sited ethnography included participant observations, interviews, and focus groups with more than 420 informants during fourteen months of fieldwork. The sample comprised, among others, convicted and active rhino poachers, smugglers and kingpins, private rhino breeders and hunting outfitters,

in illegal economic action involving rhino horn based on the perceived illegitimacy of the rhino horn prohibition. The chapter illustrates contested illegality with empirical examples. The conclusion hones in on the question of why the illegal market for rhino horn is difficult to disrupt in spite of the myriad measures employed to protect the animals.

Contested Illegality

The blurring of legality and illegality is of particular interest in the study of transnational flows, with national legal jurisdictions determining the boundaries and limits of legality and illegality in their sovereign territories. Once an economic exchange moves beyond the political boundaries of the state (the exchange may occur between actors located across several different states), issues of jurisdiction muddy the waters. Many scholars rely on the state as their analytical point of departure when studying regulatory frameworks and their impact. While the state[3] delineates what it considers to be legal or illegal, there may be a disconnect between the state and society regarding such legal definitions, their interpretation, and the legitimacy of such rules. Both agents of the state and members of society might flout some rules. As observed by Renate Mayntz in this volume, there is "very large room for interpretation of formal rules." The constructed and fixed dichotomies of legal/illegal or state-approved/forbidden ignore how illegal, informal, and grey economic practices are frequently intertwined with our daily lives (Van Schendel and Abraham 2005: 4–6). While a formal political authority may have criminalized (declared "illegal") something at some point in time, actors may not agree with the label or the process. It will be argued here that actors' implicit and explicit defiance or contestation of the state-sponsored label of illegality may serve as a legitimizing and enabling mechanism, which facilitates their participation in illegal markets.

Social, moral, and cultural norms may diverge from legal rules, thus delegitimizing them. Diverse cultural frames assign moral and normative meanings to the legitimacy or illegitimacy of economic exchanges, the goods or services to be exchanged, the act of producing or exchanging the goods or services, the actor constellations involved in different segments of the supply chain, or the impact of the market (see for examples: Satz 2010: 91–114). Social legitimation

African and Asian law enforcement officials, as well as affected local communities, and Asian consumers. Court files, CITES trade data, archival materials, newspaper reports, and social media posts were also analyzed to supplement findings and to verify and triangulate data from interviews, focus groups, and observations.

[3] It is acknowledged that the state is not a unitary actor. For the purposes of this argument, the state and its different arms of governance are presented as a homogenous entity.

of some goods and services is likely to confront additional challenges: while the production, exchange, or consumption/use of such goods or services may have been declared "illegal," the commodification of such goods or services may also be considered morally or culturally contested, questionable, or even repugnant. Important actors along the supply chain thus have to overcome moral scruples, cultural hurdles, or personal inhibitions associated with transacting in illegal markets (Beckert and Wehinger 2013: 7). However, actors may find it less daunting to enter, transact in, or establish markets that are illegal but socially accepted. Levels of social acceptance of the law on the books may vary based on new information, emerging cultural preferences and trends (see also the chapter by Dioun in this volume), or politico-legal developments. Wildlife contraband (especially rhino horn) falls into what has been called a "contested market" (Steiner and Trespeuch 2013) or a "contested commodity" (Radin 1996) elsewhere.[4] As will be shown later, there are competing claims as to whether rhino horn should be a tradable good or commodity, calling into question whether the label of illegality is appropriate or necessary, or constitutes a case of ethnocentric valuation (valuation that is based on a particular cultural outlook).

The economic exchange of wildlife products was legal and legitimate until regulators declared otherwise in the 1970s. Ideally, the regulation of a formerly legal activity or product should involve a protracted process of public consultation with affected constituents, negotiation, drafting, and implementation. Illegalization per se presents a socio-political process rather than a static condition, likely to lead to regulations that tend to favor the preferences of powerful political elites (Heyman 2013: 304). It is important to note the significant role of the state, regulatory authorities, and law-enforcement agencies in determining legal rules and norms pertaining to the legality or illegality of an economic exchange. The influence of professional knowledge, scientific insights, and disciplinary regimes is likewise not to be discounted in the process of legalization or illegalization (Heyman 2013: 306). A further dimension relates to the sponsors of legal rules and norms, who may be economic elites or corporations seeking to protect their economic interests. Moreover, the history of "overrule that either suspended legalities or deployed them to authorize predation and criminalize opposition" has led to continued distrust of the state and its perceived anti-poor policies among the poor and marginalized strata of post-Colonial society in southern Africa (Comaroff and Comaroff 2006: 11).

[4] Steiner and Trespeuch (2013: 144) define "contested markets" as "markets in which contested commodities are bought and sold." The authors build on Radin's conception of contested commodities, which are goods whose consumption may be open to moral challenges.

What happens when the economic exchange of a good is declared illegal at a specific point in time, outlawing or banning the exchange that was legal and legitimate up until the prohibition takes effect? This state of affairs is qualitatively the opposite of the case of legalization of marijuana markets in the United States, described by Dioun in this volume. A further question is related to what happens in scenarios in which international actors (such as a multilateral treaty organization) impose a ban that lacks legitimacy at the local level? The poaching of endangered wildlife, for example, is illegal in so-called range countries, whereas trade hovers in a grey zone between legality and illegality, and consumption is socially legitimate in consumer countries even if it is illegal. Noteworthy is the partial ban of the trade in rhino horn; the sale of live rhinos and trophy hunting of white rhinos is allowed in a few jurisdictions, while a full trade ban applies elsewhere. Pre-Convention[5] processed rhino horn is traded legally in many jurisdictions and no commercial trade of post-Convention raw rhino horn is allowed in CITES (United Nations Convention on International Trade in Endangered Species of Wild Fauna and Flora) member states.

Methods of Horn Procurement and the Demand for Rhino Horn

The most common form of rhino horn procurement involves the illegal killing of rhinos (rhino poaching) in protected areas or on private land. Typically, a group of three poachers will launch an illegal hunting party with clearly defined roles during the hunt: those of the hunter, the tracker, and the food and water carrier (who carry the horns on the return trip if the hunt is successful). Once "harvested," the horns are first taken to domestic and then international transport hubs, from where they are transferred to consumer markets. The diversion of rhino horn from legal sources such as trophy hunting, private and public rhino horn stockpiles, or live animal is another source of rhino horn. The case study in this chapter illustrates the manipulation and diversion of seemingly legally procured rhino horn into illegal markets. Gangs of thieves also steal rhino horn from private collections, state-owned or private stockpiles, museums, and galleries across the globe (EUROPOL 2011; Milliken 2014). An unknown amount of previously "harvested," even antique rhino horn, horn artifacts, and hunting trophies are either in circulation or safely stowed away. Due to the high value of rhino horn—ranging between USD 45,000 and USD 120,000/kg at the time of

[5] CITES came into force in 1977. Any wildlife products that predated the enactment of CITES can be traded in most CITES member states provided that provenance can be shown.

writing—entrepreneurs have developed fake or "ersatz" horn, for which consumers are willing to part with substantial sums of money.

The demise of the rhino is linked to tenacious demand for rhino horn in consumer markets. The two horns on the African rhino's forehead are amongst the most expensive goods in the world. Asian consumers have been using powdered rhino horn in traditional Asian medicine for more than four millennia. Carved into hilts for traditional daggers known as "yambiyas," rhino horn was also in great demand in Yemen during the 1970s and 1980s (Varisco 1989). Small pockets of demand remain in the Middle Eastern country (see for more detail: Vigne and Martin 2008); however consumers cannot compete with the high prices offered in Southeast and East Asian markets (Vigne and Martin 2013: 324). Another centuries-old tradition relates to the legal sports hunting of rhinos, traditionally associated with affluent individuals from the Global North. The resultant hunting trophies are exported to the hunter's home country where they are kept in private collections, galleries, and museums. While these "traditional" uses endure to lesser degrees, rhino horn is increasingly employed as a status symbol, religious or cultural artifact, and gift among the upper strata of Asian societies (Truong et al. 2015; Ipsos Marketing 2013; Amman 2015a; PSI Vietnam 2015). It also serves as speculative asset and as a criminal currency (Hübschle 2016). The horn of the three-toed ungulate counts among the most expensive goods in the world, achieving illegal market prices of up to USD 120,000 per kilogram when carved into intricate artworks and religious objects. Rhino horn has long been priced as a valuable good, which has led to unregulated and excessive hunting in Asian and African rhino range states. The following sections show regulatory regimes aimed at protecting rhinos in the wild. An important element is the demonstration of the unexpected outcomes of regulation which can be explained by way of the social land cultural legitimacy of rhino horn trade among key actors.

Hunting and Anti-Poaching Measures in Colonial Times

After Jan van Riebeeck and the Dutch East India Company arrived at the Cape of Good Hope in 1652, the lives and fortunes of local African people and wild animals changed forever. In the process of colonization, Africans lost property and hunting rights, and systemic exploitation was instituted first by colonial rulers, and subsequently reinforced during the apartheid regime. The scales tipped towards overexploitation of the still abundant wildlife shortly after the European colonizers arrived. The first colonial administrator Jan van Riebeeck decreed the first poaching law a mere five years after landing at the Cape. He declared wild animals as *res nullius*. According to this legal principle, whoever

captured or killed a wild animal, owned it (Couzens 2003: 4). Despite the restricted access to firearms, hunting dogs, as well as the withdrawal of hunting and landownership rights, African people received the blame for the annihilation of wildlife during colonial times. With historical hindsight, a confluence of destructive forces—such as agricultural transformation, modernization, and industrialization—seem to have played their role, while the hunting by the colonial landowners was equally devastating for wildlife numbers (Carruthers 1993: 13). A significant aim of the early hunting laws was the creation of an African workforce that was reliant on income from wages for their livelihoods. Many Africans had maintained their economic independence from European settlers by hunting and trading wildlife and carried on with their pastoralist and agricultural lifestyles. Through the hunting ban and other colonial measures, the colonial masters created a workforce consisting of individuals who were no longer self-sufficient and depended on income from working in mines and other industrial endeavors (Carruthers 1993: 13).

While the early wildlife-protection measures served the colonial objectives, later measures were driven by the desire to preserve wildlife for sports hunting. At the turn of the nineteenth century, game reserves were designed to provide "free from all human interference, a sanctuary in which certain species of wildlife could prosper" (Carruthers 1993: 13). The early game reserves of Transvaal, for example, were to be located on land considered barren, disease-ridden, and worthless to mining interests. Eventually these "state game farming enterprises" were to be opened to sportsmen, who would pay the state for hunting privileges (Carruthers 1993: 14). While the land devoted to game reserves was uninteresting to other industries, national and provincial parks were established on sought-after real estate. These parks entail "the utilization of an area through active management for the benefit of the ecosystem and visitors." Thus, game reserves and national parks had different aims and legal foundations. While game reserves could be established and abolished by proclamation, national parks were legally secure and economically viable (Carruthers 1993: 13). Indigenous and local African property and hunting rights, and ancestral burial grounds (which are significant cultural sites) were not considered when reserves and parks were proclaimed during the twentieth century.[6]

Rhino Conservation during the Apartheid Regime

The National Party came to power in South Africa in 1948, which paved the way for a whole range of race laws and policies that affected all aspects of social

[6] More than half of the area of the Kruger National Park is subject to land claims by local claimants in post-Apartheid South Africa.

and political life, including nature conservation. The systematic exploitation of African people that started under colonial rule was further entrenched under the formalized system of apartheid, which benefitted the interests of the white population only. African people experienced "double exclusion" from national parks. They were denied visitor's access to the parks and systematically excluded from the governance of parks (Cock and Fig 2000: 132).[7] Parks such as the Kruger National Park (South Africa's signature national park) came to represent a mechanism of apartheid rule. The apartheid regime actively promoted the view that Afrikaners had set up national parks and the black population came to perceive parks as "manifestations of apartheid."

South Africa constitutes a special case within the southern African region because private individuals can legally own wildlife including rhinos and derive financial benefit from it.[8] Although wild animals continue to be considered *res nullius* in South African common law (see earlier section), regulators made several legal changes to encourage wildlife conservation on private land. Through these successive changes in the law, game ranchers were granted ownership over wildlife and the right to derive income from consumptive utilization, such as the hunting of wild animals for profit (Lindsey et al. 2007: 463). The Transvaal Directorate of Nature Conservation[9] initially introduced the "certificate of adequate enclosure" in 1968, which was subsequently rolled out to the other provinces. This certificate exempted landowners from regulations applicable to hunting seasons and bag limits, and wild animals thus could be hunted all year round. Landowners were invited to apply for the certificate if they could demonstrate adequate game-proof fencing (Reilly 2014).[10] In essence, game ranchers were granted ownership over wildlife and the right to derive income from consumptive utilization, such as the killing of wild animals for profit (Lindsey et al. 2007: 463). The commercial trophy-hunting industry took off in the 1960s as hunters started to pay to stalk wild animals (Scriven and Eloff 2003: 246). Trophy hunting has become a major income generator on game ranches, including rhino reserves. However, the limits of the common law position (*res nullius*) remained unsatisfactory to the private sector. The South African Law Commission protected the proprietary rights of land owners through the recommendation of the Game Theft Act

[7] Until the 1980s black visitors to the Kruger Park could only stay overnight at the rudimentarily equipped Balule tented camp. Economic deprivation through apartheid restricted access further as few Africans had access to cars and disposable income to afford vacations (Cock and Fig 2000: 132).

[8] Namibia also allows private ownership of wildlife, including white rhinos. However, black rhinos (given a global population of fewer than 5,250 black rhinos, the species is considered critically endangered) form part of a state-controlled custodian program. Communities and private individuals thus may lease rhinos from the state.

[9] Transvaal was one of the four provinces in apartheid South Africa.

[10] A multi-strand nine-foot fence designed to keep wild animals inside the game ranch constituted the minimum standard of adequate enclosure (Reilly 2014).

105 of 1991 (Glazewski 2000: 428). Upon enactment, the law further protected the landowner's rights of ownership of game in cases where game escapes or is lured away from the landowner's "sufficiently enclosed" land (Glazewski 2000: 428). Beyond fencing in wild animals and claiming ownership rights both over land and wild animals this move led to the further alienation and deprivation of rural African communities, restricting their access to land and resources. Once these property and ownership rights had been asserted, subsistence hunting on game farms was inevitably branded as poaching, and accessing private land for the purposes of seeking grazing, water, or medicinal plants was deemed to fall under the criminal offence of "trespass." The apartheid regime employed this category of crime to prevent black South Africans from moving around freely in demarcated "whites-only" areas, which included parks, private land, and towns. Dangerous wild animals were to be contained within game fences, which effectively determined "no-go areas" for local communities. If a farmer were to find an unknown black person "trespassing" on the land, the latter ran the risk of being shot on sight. The waiver of the *res nullius* principle entrenched by the new regulation also strengthened the relationship between the apartheid state and the white farming community, one of its main political powerbases.

The white rhino has an important role in the drive to privatize wildlife in South Africa. The number of white rhinos in the Hluhluwe-Umfolozi Game Reserve[11] in KwaZulu-Natal was reduced through unrestrained hunting to about fifty to seventy animals in the early twentieth century and locally went extinct elsewhere in South Africa. Through successful breeding and conservation programs within the protected area, however, white rhino numbers started to increase by the 1960s. When rhino numbers began to exceed carrying capacity, conservators feared that an outbreak of disease could halt the recovery of white rhino numbers. It was at this point that the Natal Parks Board[12] commenced "Operation Rhino," which over the course of the 1960s and early 1970s saw more than 1,200 white rhinos relocated from the Hluhluwe-Umfolozi Game Reserve to the Kruger Park, white-owned private game reserves, as well as zoos and safari parks abroad (Player 2013). The Natal Parks Board had envisaged that the provision of white rhinos at low cost to private landowners would render them effective custodians of rhinos. The first white rhinos were sold to private landowners at highly subsidized prices in 1963. To parks authorities in South Africa, the sale of live rhinos to private operators constituted (and continues to do so) a much-needed cash injection.

[11] South Africa's oldest proclaimed nature reserve is now known as the Hluhluwe-iMfolozi Park.
[12] The former province of Natal has been known as KwaZulu-Natal since the end of apartheid, and its parks authority is known as Ezemvelo KZN Wildlife, the former Natal Parks Board.

In post-apartheid South Africa, conservation authorities continue to sell rhinos and other wildlife to private individuals and entities as a fund-raising and conservation strategy. By 2016, private rhino reserves occupied an area of about 2 million hectares, incorporating about 380 separate properties, similar in size to the Kruger National Park. A total of 33 percent (or about 6,200 animals) of the national population of white rhinos and 450 black rhinos were protected on private land in South Africa at the end of 2014 (personal communication with Pelham Jones, Private Rhino Owners Association, 2016). While the privatization of rhinos has been portrayed as an unqualified conservation success story ('t Sas-Rolfes 2012; Bothma et al. 2012), the darker side is often disregarded. By virtue of the apartheid race laws, African people were legally excluded from owning commercial farming land and wild animals until the end of the apartheid regime in 1994. It needs to be stressed that private rhino breeders and farmers form part of the economic landed elite (the white farming community was one of the power bases of the apartheid state), which also points to deeper structural issues that undermine rhino conservation and facilitate illegal economic activities in the post-apartheid dispensation. The need to generate profits to run and secure rhino farms and reserves provides one point of entry for illegal economic action, partly through the exploitation of legislative and regulatory loopholes (explored later in this chapter).

CITES: Is the International Political Regulatory Regime a Neo-Colonial Tool?

CITES provides the regulatory framework for international trade in endangered plant and animal species. It was originally signed in Washington in 1973 and entered into force in 1975. Earlier regulatory attempts to deal with the unsustainable exploitation of wildlife were unsuccessful because the international community struggled to reach consensus and broad ratification of various instruments (Sand 1997). The system of negative lists (CITES calls them "Appendices") provided the first bone of contention during the drafting process of CITES. The International Union for the Conservation of Nature had suggested that wildlife trade should be controlled or banned on the basis of global lists of threatened species to be drawn up and updated on the advice of an international committee of experts. A coalition of countries from the Global South was in favor of range states determining their lists of tradable species. The United States supported the bid, thereby paving the way for the Washington Conference, which led to CITES (Sand 1997: 20). The core approach of CITES is to subject all wildlife imports to mandatory licensing with permits issued by the exporting countries on the basis of an agreed

negative listing (Sand 1997: 20). Twenty-one states signed the Convention initially, which placed 1,100 species in the Appendices. Although it was a pariah state in the international community at the time, apartheid South Africa was one of the original signatories of the treaty.

Species are considered for inclusion in or deletion from the Appendices at the Conference of Parties (CoP), held every three years. Appendix I provides a list of species threatened with extinction and thus commercial trade in wild-caught specimens of these species is illegal (CITES 2002).[13] Species listed under Appendix II are not necessarily threatened with extinction but may become threatened unless trade is subject to strict regulation to prevent extinction in the wild. International trade may be authorized by the presentation and granting of an export permit or re-export certificate (CITES 1973). Appendix III relates to species, which were listed after one state party asked other state parties for assistance in controlling trade in a specific species. These species are not necessarily threatened with extinction globally. Trade is only authorized by way of an appropriate export permit and a certificate of origin (CITES 1973). CITES allows for some room to manoeuver when it comes to the listing of species where the conservation status of a species differs across its range. So-called "split listing" refers to cases in which "different populations or sub-species are in different Appendices and [in which] a population (or sub-species) may be listed and another may not" (Willock 2004: 15). Rhinos are an example of "split listing," as white rhinos in South Africa and Swaziland were moved to Appendix II after the initial absolute trade ban.

In the early years of the Convention, CITES parties placed all rhino species in Appendix I, effectively banning international trade except under exceptional circumstances (Milliken and Shaw 2012: 44). The split listing that allowed the listing of South African populations of white rhino to be moved to Appendix II happened in 1994. With this move, CITES parties recognized the huge strides made by South Africa in terms of rhino population and range growth. An annotation confined permissible trade in live rhinos to "acceptable and appropriate destinations and hunting trophies only" (CITES 1994). While CITES regulates international trade, individual states have to transpose the CITES stipulations into national law, and regulate domestic trade of endangered species. It is thus legal for live animals and hunting trophies to be exported from South Africa to elsewhere in the world. Once live rhinos or hunting trophies leave African shores, national regulatory agencies relinquish their responsibilities to authorities in receiving countries. While passing through international airspace, waters, or transit countries, there are

[13] The trade of captive-bred animals or cultivated plants of Appendix I species are considered Appendix II specimens with the concomitant requirements (CITES 2002). In other words, so-called Appendix I species can be traded if they do not derive from wild populations.

numerous opportunities for criminal networks to manoeuver, launder, and deceive national regulatory authorities that have limited oversight beyond their national jurisdictions. The annotation of permissible trades coupled with the relatively short lifespan of the CITES prohibition have allowed for legal flows to co-exist with grey and illegal flows.

CITES offers interesting insights as to why it might be difficult to garner support for trade bans when they are imposed "from the outside world" (interview with South African environmental official, 2013) or in a different historical context. The political, social, economic, and environmental dimensions of the modern world have changed since the treaty entered into force more than forty years ago. It is, for example, noteworthy that South Africa's apartheid regime gave CITES the stamp of approval in 1975, making it one of the Convention's earliest signatories. Moreover, significant consumer countries such as Cambodia, Laos, Myanmar, Taiwan, Vietnam, and Yemen joined CITES only twenty years after its inception, allowing a massive window for uncontrolled international trade in wildlife in the intervening period.

Interviews with selected African political elites revealed sentiments that reflected negatively on the politics of CITES, the futility of trade bans, and the perceived influence of Western conservation non-governmental organizations and the animal rights movement. Meanwhile, African environmental justice movements have had no or little representation at CoPs. Falling short of calling CITES a neo-colonial institution, southern African government officials portrayed CITES as an instrument that was developed and sponsored by countries of the Global North. It is seen to reflect Western conservation philosophies and animal rights ethics while paying "little concern to the plight of African rural people and their developmental concerns" (Institute for Security Studies 2009–10). Officials also pointed to the uncontrolled "slaughter of wild animals" during the colonial period, questioning why the descendants of the colonial hunters should have any say in African conservation matters. While the "Northern" lobby at CITES is perceived to be criticizing African states, Northern countries have failed to "put their money where there mouth is" in terms of paying compensation for loss of income and implementation of new CITES determinations.[14] African and Asian delegates are frequently portrayed as corruptible when it comes to crucial votes at CITES CoPs (see for example: Amman 2015b); former African delegates reported, however, that Northern conservation organizations were attempting to influence votes to swing crucial listing decisions in their favor (interviews, 2013 and 2015). The perception that Northern countries and conservation

[14] Trade bans can lead to loss of income for public institutions, protected areas, and local communities. In addition, regulators have to transpose "downlisting" or "uplisting" decisions into local laws, which costs money, time, and resources.

organizations hold sway at CITES is supported by voting patterns at CoPs.[15] Wildlife professionals shared these sentiments. A South African law-enforcement official said:

> It is crazy that these old colonial institutions are still in place. CITES decides how much and what we can sell. We stock about 90 percent of the world's rhinos. So who are they to prescribe to us? I mean we are in a controlled area, where we manage stock. We know what we are doing and we are trying to protect them for our children.
>
> (Interview with law enforcer 3, 2013)

The significance of perceptions such as the one expressed here is that they affect the diffusion and acceptance of CITES at the local level. As will be shown in the next section, South African regulations such as the Threatened or Protected Species regulations (TOPS) and the moratorium on the domestic trade in rhino horn lack support and legitimacy among key constituencies in South Africa. In essence, the perceived unfairness of CITES as an international instrument that impacts conservation and trade also affects the legitimacy of domestic laws, ordinances, and regulations in South Africa and other range, transfer, and consumer countries.

Diffusion to the Local Level

While the apartheid regime was one of its original signatories, it failed to honor its international obligations under CITES other than passing piecemeal regulations to ensure favorable CITES decisions (such as the "downlisting" of white rhinos from Appendix I to Appendix II). On the election of the first democratic government in 1994, a new constitution cleared the way for the transformation of laws, policies, and the apartheid bureaucracy in South Africa. Environmental rights, sustainable development, and the use of natural resources became enshrined in the new constitution (Republic of South Africa 1996: 6). The protection of the environment—and by extension, the rhino—is thus considered and guaranteed by the highest law of the land. In the period immediately following the end of apartheid, several significant events impacted the state of nature conservation, known as "environmental affairs" under the new dispensation. On the eve of the first democratic elections, the former four provinces and homelands were sub-divided into nine provinces. The new environmental affairs bureaucracy was transformed and many former public servants from the old regime opted out by accepting retrenchment

[15] European Union member states have a common position at CITES meetings and vote as a block. In July 2015, the European Union became a member of the Convention.

packages, early retirement, or job opportunities in the private sector. Beyond the institutional and staffing changes in the Department of Environmental Affairs (its name and scope of work went through several changes in the new South Africa), the criminal justice, security, law enforcement, and defense sectors were equally transformed. Transposing CITES regulations into domestic laws and regulations happened at a slow pace due to the many demands for broad-based transformation across society in post-apartheid South Africa.

Dealing with the CITES requirements had been put on the backburner in lieu of the need to draft new comprehensive legislation, culminating with the enactment of the National Environmental Management Biodiversity Act (NEMBA) in 2004 and the promulgation of TOPS in 2008. The TOPS regulations list prohibits activities involving listed species, and they regulate hunting and compulsory registration requirements. The TOPS regulations were aimed not only at bringing South African norms and standards in tune with the requirements set out by CITES but also at closing loopholes that had previously been exploited. The regulations were initially promulgated in 2008; however, due to so-called "pseudo-hunting" (which involved rhino "hunters" from Vietnam and other countries of origin atypical for trophy hunters) and the identification of additional loopholes, the regulations were amended and updated in 2013. In 2009, the former Minister of Environmental Affairs and Tourism, Marthinus van Schalkwyk, declared a national moratorium on the sale of individual rhino horns (Department of Environmental Affairs and Tourism 2009)—the domestic trade of rhino horn had never been banned and presented a loophole that criminals were readily abusing. For example, rogue wildlife professionals procured rhino horn under the guise of domestic trade and sold it illegally to Asian organized-crime networks (see next section). In 2012, a Limpopo rhino breeder started to litigate against the South African government to have the moratorium lifted. John Hume, the world's biggest private rhino owner, joined Johan Krüger in 2015. The pair argued that the government was infringing on their constitutional rights, as the right to sustainable utilization is entrenched in the constitution of South Africa (Legodi 2015). High Court Judge Legodi set aside the moratorium due to insufficient public consultation in September 2015 (Legodi 2015). The Minister lodged a notice of leave to appeal soon after the court's decision, which she lost (with costs) in May 2016. By appealing to the Constitutional Court, the Department of Environmental Affairs reinstated, possibly only temporarily, the 2009 ban (Goitom 2016).

Because the TOPS regulations apply to South Africa's national jurisdiction only, CITES processes are used to deal with "import" countries and trade that transcends its national borders. The marriage between the TOPS regulations and CITES processes has been difficult, as the channels of communication were patchy at first. For example, provincial government officials deal with

national and international hunting and trophy applications and permits within their province, whereas national government officials communicate with the CITES Secretariat and its various enforcement bodies regarding international trade and export. Given the "pseudo-hunting" phenomenon, all rhino-hunting applications have to be forwarded to the national department for a recommendation. This new procedure derives from illegitimate hunters' practice of "province hopping" in order to shoot more than one rhino per year without detection by provincial permit officials, who have oversight only over what happens on their own doorstep (the permissible hunting quota is one rhino per hunter within a calendar year). Previously, provincial permit officers had no recourse for determining whether a hunter had shot rhinos in any of the other eight provinces. Once the national department has made a recommendation, the provincial permit officer may then issue or refuse a hunting permit. Although the national department has a centralized database, it is not connected to other crime or biodiversity management databases as yet.

The implementation and enforcement of the law and regulations have been riddled with problems, ranging from capacity constraints within the nature conservation bureaucracy through to practical issues linked to the geography of South Africa and locations of rhino reserves, which are spread across the country. The congruence of the nine sets of provincial ordinances is also limited. The permit system thus differs across the nine provinces, with public officials displaying varying degrees of efficiency, responsiveness, and accountability. Although the Department of Environmental Affairs had consulted various stakeholders and local communities before drafting the regulations, the final version and list of protected species were not communicated ahead of publication and implementation (Institute for Security Studies 2009–10; interview with conservator 2, 2013). Moreover, the enforcers of the regulations—provincial government officials—had neither been sufficiently informed of the new regulations nor provided with adequate training prior to promulgation (interview with provincial government official, 2013).

The TOPS regulations and the now defunct moratorium lack legitimacy among key players in the wildlife industry, who feel that they were not sufficiently consulted ahead of the promulgation while being affected by the new status quo. Resistance to regulation is also linked to a sense of deprivation of agency. Increased state intervention by way of rule making, strict or partial implementation and enforcement of the rules has accentuated tensions between the wildlife industry and the state in the post-apartheid period. The apartheid state facilitated the establishment of private game reserves and farms by providing farmers and wildlife entrepreneurs with support (for example, subsidies and property rights). Wildlife owners had free reign over their movable and immoveable assets, with little regulatory interference or disruption to economic exchanges. In addition to other existential threats to

the preferential status quo, the post-apartheid state is associated with introducing new rules, which are believed to aim at dispossessing and emasculating white landowners. Sentiments of a loss of privilege (the right to determine what happens to their property), deprivation, and entitlement were expressed: "the government is out to get us."

Utilizing the Legal/Illegal Interface

The focus of this section is the "production" of rhino horn on private land, which constituted the principal source of supply of South African rhino horn between the late 1960s and late 2000s. Actors capitalize on loopholes within the regulatory framework. Involved are members of the wildlife industry[16] with intimate knowledge of the product (rhino horn) and of the institutional and legislative framework governing the international trade of rhino horn. These actors belong to influential and transnational social networks with links to political and economic elites in supply, transit, and consumer countries. Different modes of horn "production" on private land share the commonality that perpetrators display detailed and extensive knowledge of the rules and how to bypass, flout, or break them, or how to exploit legal loopholes. While wildlife professionals and rhino owners tend to regard the law (NEMBA), the regulations (TOPS regulations), and the moratorium on domestic trade as responsible for the surge in poaching, the regulatory framework did not emerge from a vacuum. In fact, the first rules governing the management and specifically the hunting of wildlife were passed during colonial times. The breaking or flouting of hunting rules was seen as a minor transgression (unless it involved indigenous hunters or Afrikaners) and, in some cases, it was a rite of passage. A double morality legitimizes modern rule breaking, partially linked to a sense of entitlement and privilege, and a "silent rebellion" against the new rule makers and "their rules." A wildlife expert explains (interview, 2013):

> The way it used to work, the law was always there but nobody ever pushed it. Within 48 hours of the guy getting the horn, you had to go to nature conservation and get a chip in. And then you could apply for a permit and sell it. As you had a permit to sell and trade, they never kept track of anything. You could sell without anyone noticing or caring. And because it wasn't really checked on, if you had a permit for one horn, you could use it for weeks or months. So what a lot of people

[16] The term "member of the wildlife industry" refers to any person involved in the transporting, translocation, well-being, management, farming, breeding, hunting, or securing of wildlife on private or public land.

> miss is not only the entitlement that the farmer feels and that he is truly entitled to. He just bought this, most of them come from the park.

The quotation above refers to the most common form of permit fraud prior to the implementation of stricter regulations and enforcement (interviews with law-enforcement officials and conservators, 2013). Wildlife professionals would use the same permit to shoot and dehorn multiple rhinos. Or, as was the case in some provinces—most notably in the northern Limpopo Province—wildlife professionals could use a "standing permit" for white rhino hunts on certain properties. In other words, hunting outfitters applied for a blanket permit once and thereafter they hunted without further permits and state supervision on these properties until August 2008 (Milliken and Shaw 2012: 38; interviews with wildlife professionals, 2013). The existence of legal trade channels allows for early-stage conversion of an essentially illegally harvested wildlife product to a legal export product. The ban itself is ambiguous as it only concerns international trade of rhino horn, leaving space for illegal market actors to maneuver at the national level.

A few South African court cases showcase the involvement of rhino breeders, professional hunters, veterinarians, nature conservation officials, and others in the illicit "production" and trafficking of rhino horn.[17] These actors from the formal or "legal" sector not only orchestrated poaching in private and public conservation areas and theft from rhino horn stockpiles; they were also involved in complex schemes that bypass existing conservation regulations, exploit regulatory loopholes, and use legal trade channels to export illegally obtained rhino horn. Alleged rhino poaching trafficker Dawie Groenewald and his accomplices—known as the Groenewald gang or the "Musina group"[18]—illustrate a cunning instrumentalization of the legal/illegal interface. The rhino poaching syndicate currently faces 1,736 counts of racketeering, money laundering, fraud, intimidation, and illegal hunting and dealing in rhino horns in South Africa, while a US indictment alleges that the Groenewald siblings sold illegal hunts to US trophy hunters (Grand Jury for the Middle District of Alabama 2014). According to the South African criminal indictment (compare with National Prosecuting Authority 2011), Groenewald and his accomplices were involved in intricate scams, ranging from false permit applications through to illegal dehorning of rhinos and the laundering of unregistered rhino horns. Rhinos and rhino horns were acquired through a variety of grey and illegal channels. Among Groenewald's co-accused are

[17] These "big" cases revolve around Dawie Groenewald (case study is discussed in this chapter), Hugo Ras, and Chumlong Lemthongthai.

[18] Musina is a border town in the Limpopo Province. Dawie Groenewald's farm called Prachtig is located near Musina and most of the South African wildlife professionals with direct links to his criminal network live in the town or nearby.

wildlife veterinarians, professional hunters, a pilot, farm laborers, and two wives (his own and the wife of wildlife veterinarian Karel Toet), who assisted with the permit applications and other administrative tasks. The Groenewald gang entered into business ventures with rhino farmers and wildlife professionals, many of whom were unaware that they were breaking the law at the time.

Groenewald hunted numerous rhinos illegally on his farm Prachtig in the northern Limpopo Province (the indictment alleges that he illegally hunted fifty-nine of his own rhinos) and procured live rhinos and rhino horns from other rhino farmers. It is alleged that he dehorned rhinos and sold at least 384 rhino horns over a four-year period (Jooste 2012). In terms of NEMBA, separate permit applications have to be tendered to dehorn a rhino, to transport rhino horns, as well as to possess rhino horn. According to Colonel Jooste's affidavit (Jooste 2012: 14),[19] the Groenewald gang flouted these rules on numerous occasions. The carcasses of rhinos that were illegally hunted, killed, and dehorned on Prachtig were either sold to a local butcher,[20] buried, or burnt (Jooste 2012: 11). Socially embedded in the southern African wildlife industry with strong business connections to the consumer market (Vietnam), as well as extensive knowledge of legal market processes and loopholes, Groenewald was in an excellent position to procure high volumes of rhino horn through grey and illegal channels. Many horn-procurement methods crossed the fine line between legality and illegality. Although it was illegal to hunt and dehorn rhinos without the required paperwork, the gang portrayed their criminal and grey activities as legitimate business enterprises. Moreover, the privatization of rhinos and the entitlement to do "as you please with your own property" allowed many criminal and grey activities to go undetected for several years. The outcome of the Minister's constitutional appeal to reinstitute the domestic moratorium may affect the outcome of the court case. If the Constitutional Court were to dismiss the moratorium, then Groenewald could argue for charges involving domestic trade exchanges of rhino horn to be dropped from the charge sheet.

Pseudo-hunting, illegal hunting of rhinos on private land, rhino horn laundering, and grey traffic were the primary modes of rhino horn supply until rhino poaching took off in national and provincial parks, as well as in private game reserves in South Africa in the late 2000s. Essentially, grey traffic paved the way and laid the transport routes for the high volumes of rhino horn leaving southern African shores for Asian markets. Groenewald and his ilk had access to wide-ranging social and professional networks that facilitated illegal and grey transnational trade with Asian partners. The displacement of

[19] Colonel Johan Jooste heads the Endangered Species Unit at the Directorate for Priority Crime Investigations, South Africa's organized crime fighting unit.

[20] Thirty-nine carcasses were sold to a local butcher between 2008 and 2010.

grey traffic is partially explained by tougher conservation regulations, as well as the private sector "out pricing" itself. Essentially, it became cheaper and more efficient to pay local hunters to poach rhinos in protected areas than to orchestrate pseudo-hunts or pay market-related prices for rhino horn derived from private sources.

Conclusion

The illegalization of the trade in rhino horn commenced in the late 1970s when the multilateral environmental treaty CITES entered into force. Prior to that, economic exchanges involving rhino horn were either legal or undetermined. The diffusion of the trade ban to the domestic level in range, transit, and consumer countries has succeeded to varying degrees.

The chapter highlights how important actors at the source do not accept the law on the books for a variety of reasons, including the perceived unfairness of the ban, divergent social or cultural norms that clash with the ban, and for politico-historical reasons. This sentiment is replicated further along the rhino supply chain. Dioun's chapter on marijuana markets in the United States shows that the process of legalization is protracted, encountering many institutional hurdles. In the case of rhino horn, the process of illegalization is an ongoing negotiation with divergent views among producers and regulators concerning whether trade in rhino horn should be illegal in light of its economic contribution to the private and public sectors in South Africa, as well as the social and cultural legitimacy of its use among key market participants (for more details about the cultural and social legitimacy of rhino horn consumption, see Hübschle 2016).

The chapter also shows that apartheid state actors facilitated the economic valuation of rhino horn on the supply side by facilitating the privatization of white rhinos. While current narratives focus on rhino poaching within conservation areas such as the embattled Kruger National Park (which hosts 40 percent of the world's remaining rhinos), rogue elements within the wildlife industry "set up the rhino horn pipeline to Asia" (interview with organized crime investigator, 2013). Bolstered by sentiments of contested illegality, wildlife professionals have no qualms about exploiting or bypassing regulatory loopholes (as shown in the Groenewald case). The interface between legality and illegality thus relates to agents of the state facilitating illegal flows, the existence of legal and illegal means of horn supply, and legitimate and illegitimate uses of rhino horn. The appropriation of legal trade channels (for example, hunting trophies) and exploitation of legal loopholes (domestic trade) suggests not only an interface between legal and illegal markets for rhino horn but that illegal economic activities are firmly embedded in legal

markets. These findings suggest the need for a nuanced conceptualization of illegal, grey, and legal markets. Similar to findings in the antiquities sector (see Simon Mackenzie's contribution), illegal rhino horn markets are firmly embedded in legal trade chains, with industry actors featuring prominently in production, procurement, distribution, and trade.

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