

**AN ANALYSIS OF ENFORCEMENT OF LAWS ON RHINO POACHING IN SOUTH AFRICA**

**SUBMITTED BY**

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## **ABSTRACT**

Rhinoceros (Rhinos) are poached at an alarming high rate in South Africa. The 1973 Convention on International Trade in Endangered Species of wild Fauna and Flora (CITES), prohibited the trade of rhino horns amongst its member states. Even though there are existing pieces of legislation in South Africa to curb the killing and illegal trade of rhino horns, compliance authorities rarely impose stringent sentences on culprits caught poaching rhinos. There should be stringent enforcement of laws on poachers and if caught, perpetrators should be brought to justice in order to deter aspiring or ambitious would-be perpetrators. Amendment of legislation currently used in South Africa on rhino poaching cases, if applied vigorously, would be more developmental in curbing the scourge.

The syndicate are highly skilled and well equipped for the execution of illicit poaching. It is in few instances that perpetrators are arrested and prosecuted. Even if arrested and prosecuted, lenient sentences are imposed upon conviction. The most noticeable lacuna in South African Criminal Justice System, is the lack of capacity and skills in investigations and successful prosecutions of rhino poachers. Worst still, despite frequent media reports on the alarming rate of rhino poaching cases, few arrests and convictions are reported.

This mini dissertation looks at rhino poaching as an organised crime, and focuses on literature review, legal framework and regulations, as well as comparative study on legislation which can be used to prosecute the perpetrators of this organised crime. The discourse recommends amendment of legislation presently used to prosecute rhino poaching offenders, and advocates that they should be stringently applied in order to curb the scourge.

## **DECLARATION BY SUPERVISOR**

I, Prof. KO Odeku, hereby declare that this mini-dissertation by Adv. M.S Mogoshi for the degree of Master of Laws (LLM) in Development and Management Law, be accepted for examination.

.....

Prof. KO Odeku

December 2016

## **DECLARATION BY STUDENT**

I, Malesela Samuel Mogoshi declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Masters of Laws (LLM) in Development and Management Law, has not been previously submitted by me for a degree at this university or any other university, that it is my own work in design and execution, and that all material contain herein has been duly acknowledged.

.....

Mogoshi M.S (Adv)

December 2016

## **DEDICATION**

To my wife, Khensane Mogoshi and my boys, Galaletsang and Aobakwe Mogoshi, thank you for being such a wonderful force of encouragement, during the course of my studies, my absence from home every week was not easy for you, I am grateful that your patience has finally yielded fruits.

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To my father and siblings, who look up to me for excellence. My mentee, Kgaugeo Maseko whose untimely death came when I was finalising this dissertation, you will never be forgotten, and finally, to my late mother, Lucy Mogoshi who believed in me through thick and thin.

## LIST OF ABBREVIATIONS

**AFU** – Asset Forfeiture Unit

**AJ** – Acting Judge

**ATM** – Automated Teller Machine

**CEA** – Custom and Excise Act

**CITES** – Convention on International Trade in Endangered Species of Wild  
Fauna and Flora

**CoP** – Council of Parties

**CPA** – Criminal Procedure Act

**DNA** – Deoxyribonucleic Acid

**DRC** – Democratic Republic of Congo

**KNP** – Kruger National Park

**NEMBA** – National Environmental Biodiversity Act

**NPA** – National Prosecuting Authority

**NWCRU** – National Wild Life Crime Reaction Unit

**POCA** – Prevention of Organized Crime Act

**RHINO** – Rhinoceros

**SANDF** – South African National Defense Force

**SAPS** – South African Police Services

**SCA** – Supreme Court of Appeal

**SCCU** – Specialized Commercial Crime Unit

**TOPS** -Threatened or Protected Species Regulations

**WCMA** – Wild Conservation Procedure Act

## **TABLE OF STATUTES**

Adjustment of Fines Act 101 of 1991

Constitution of South Africa, 1996

Criminal Procedure Act 51 of 1977

Criminal Law Amendment Act 105 of 1997

National Environmental Biodiversity Act 10 of 2004

Wildlife Conservation Parks Act 02 of 1992

## **TABLE OF REPORTED CASES**

S v Lemthongthai 2015 (1) SACR 353 (SCA)

S v Malgas 2001 (2) SACR 469 (SCA)

S v Sadler 2000 (1) SACR 331 (SCA)

# **CHAPTER ONE**

## **1.1. Introduction**

Rhinoceros (Rhinos) are being poached at an alarming rate in South Africa. The 1973 Convention on International Trade in Endangered Species of wild Fauna and Flora (CITES), prohibited the trade of rhino horns amongst its member states. Even though there are existing pieces of legislation in South Africa to curb the killing and illegal trade in rhino horns, compliance authorities rarely impose stringent sentences on culprits caught poaching rhinos. There should be stringent enforcement of laws on poachers and if caught, perpetrators should be brought to justice in order to deter aspiring or ambitious would-be perpetrators.

The sophistication of the illegal market makes Rhino poaching a huge international business often involving wealthy and educated people using high technology to carry out the crime. The rhino poaching syndicate are highly skilled and well equipped for the execution of illicit poaching. Even if arrested and prosecuted, lenient sentences are imposed upon conviction. The most noticeable lacuna in South African Criminal Justice System is the lack of capacity and skills in investigations and successful prosecutions of rhino poachers. Despite frequent media reports on alarming rate of rhino poaching cases, few arrests and convictions are reported. Therefore there is a need to explicitly understand the problem of rhino poaching, legal frame work and regulations on rhino poaching and finding ways to effectively curb rhino poaching and prevent the extinction of rhinos by using the law to curb the surge.

## **1.2. RESEARCH PROBLEM**

### **1.2.1. SOURCE OF THE RESEARCH PROBLEM**

Each province in South Africa applies its own regulations and laws regarding prosecution and sanctioning for rhino poaching. This results in a lack of uniformity in the application and interpretation of the laws regulating prosecution of rhino poaching. Hence, providing perpetrators with a leeway to escape criminal liability. Therefore, this mini-dissertation argues for the harmonisation of the regulations in order to strengthen implementation and enforcement of the laws and policies on

rhino poaching. This will assist the prosecuting authority to present a water tight case against the perpetrator and secure necessary conviction and sentencing.

### 1.3. BACKGROUND TO THE STUDY

Poaching of black rhinoceros (rhino) (*Diceros bicornis*) and white rhino (*Ceratotherium simum*) population, is a universal crisis<sup>1</sup>. Illicit trade in wildlife crime is one of the most profitable act in the world, estimated at up to \$10 billion annually.<sup>2</sup> In the 1970's, rhino poaching was stable with minimum of poaching incidents<sup>3</sup>. There were less than 100 white rhino left in South Africa in the 19<sup>th</sup> century.<sup>4</sup> Combined efforts of state's and private conservation authority resulted in the increase of rhino population to over 20 000.<sup>5</sup> There has been a myth, especially from Asia, Vietnam, that rhino horn can cure many illnesses such as vomiting, snake poisoning, fever and devil possession.<sup>6</sup>

The Chinese population has claimed that the rhino horn “possesses cancer- curing properties”. Despite lack of evidence to substantiate such allegations, demand in rhino horn, has nevertheless increased.<sup>7</sup> The acquisition of rhino horn, is seen as a sign of achievement, as it carries some status and fulfilment with it<sup>8</sup>. Since 2004, the nature conservation in South Africa was governed at the provincial level, by the “*National Environmental Management: Biodiversity Act, Act 10 of 2004 (NEMBA)*”.

On 01 July 2007, the “*Threatened or Protected Species Regulations (TOPS)*” were promulgated; the purpose thereof was “to provide a national standard for the protection and utilization of listed threatened or protected species in South Africa, including all White and Black Rhinos, regardless of whether they constitute owned or wild populations or are located on private, State or communal land”. It is however argued that; “the level of compliance is excessive, to the point of being unworkable”.

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<sup>1</sup> Media statement, 18 July 2013, Department of Environmental affairs.

<sup>2</sup> According to Forever Wild Rhino Protection Initiative Retrieved on 03/03/2015 from [www.samwari.com/propertyblogarticle.asp](http://www.samwari.com/propertyblogarticle.asp)

<sup>3</sup> Media statement, 18 July 2013, Department of Environmental affairs.

<sup>4</sup> In Camera, Rhino Poaching 2013

<sup>5</sup> Our Amazing Planet, 2011 Grim Tally: Rhino Poaching at All-Time High in S. Africa Retrieved 03/03/2015

<sup>6</sup> Ibid 12

<sup>7</sup> Ibid 14 - 15

<sup>8</sup> Ibid 16 -17

This is due to the strict applications of the regulations, which has caused considerable tension amongst local, provincial and national stakeholders. The national legislation, gives permission for provinces to have their own legislation used in protection of biodiversity, this creates several problems of harmonisation, and a loophole for arrested poachers to be acquitted, despite being linked to commission of offences.

Trophy hunting<sup>9</sup>, (legal poaching of rhino which is authorised through obtaining permit to hunt) is widely practised in South Africa. Despite that, White Rhino numbers in South Africa increased by an order of magnitude over the four decades, which is a positive step, rather than hindering population growth of the said species.

South African National Parks (SANParks) has drastically ramped up its efforts against poaching in Kruger in recent years under the direction of its leadership. Because of the vast number of rhino being killed, SANParks now plans to move up to 500 rhinos from Kruger, which could cost around \$1,500 or more per animal.<sup>10</sup>

SANParks, with collaboration of Department of Environmental Affairs, played a key role in the development and implementation of anti-poaching legislation, and has a strong background in environmental management, biodiversity, and conservation.<sup>11</sup> The legal sale of White Rhino generated over ZAR236 million (approximately USD35.5 million) between 2008 and 2011. This is through wildlife authorities and private auction company.<sup>12</sup>

The Wildlife industry in South Africa is highly developed, and as such, constitutes a dynamic and viable economic enterprise, which is competing favourably with the likes of agriculture and other forms of land use institutions.<sup>13</sup> South Africa became a Party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), in October 1975, as the 15<sup>th</sup> nation to join the Convention. Since

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<sup>9</sup> Ibid

<sup>10</sup> October 24, 2013, New CEO for SANParks, <http://africageographic.com/blog/new-ceo-for-sanparks/> (excerpt from the Department of Environmental Affairs, Republic of South Africa).

<sup>11</sup> Ibid 23 -25

<sup>12</sup> Ibid 23 -25

<sup>13</sup> Ibid 27

1977, all rhino species have been in Appendix I of CITES, which prohibits “commercial international trade in rhinos and their products and derivatives, including hunting trophies”.

White Rhino population of South Africa, was listed in Appendix II, since 1994, with an annotation that states: “*for the exclusive purpose of allowing international trade in live animals to appropriate and acceptable destinations and hunting trophies. All other specimens shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly*”. Rhino poaching in the last ten years has risen from just 7 rhinos being killed in the year 2000, to 335 in 2010<sup>14</sup>. Recent analysis displays that from 2009 to 2010 the number of rhino poached almost tripled.<sup>15</sup> In 2012, there were about 618 rhino poached, 1004 rhino poached in 2014. Despite the increase in rhino poaching, fewer arrests are made. There were approximately 257 arrests in 2010, 232 in 2011, 165 arrests in 2012, 343 arrests in 2013 and 386 in 2014<sup>16</sup>. In February 2015, about 49 rhino has already been poached.<sup>17</sup>

It was reported that between 2010 and 2012 about 573 people were arrested for rhino poaching related offences,<sup>18</sup> the country's success rate is about one arrest for every two rhinos killed<sup>19</sup>. Yet between 2011 and 2012 only 28 poachers were convicted<sup>20</sup>. And though some high-profile cases do emerge most people get off with little more than a fine for trespassing or illegal possession of a firearm, which only involves a minimal term of imprisonment or fine.<sup>21</sup> Between 2012 and 2014, the National Prosecuting Authority prosecuted 46 poachers versus seven dealers.<sup>22</sup>

Rhino poaching was declared a ‘priority ’crime in 2009, the Directorate for Priority Crime Investigation, colloquially known as the Hawks, who are tasked with the investigation of such offences) is reportedly understaffed and underfunded.<sup>23</sup> Furthermore, focusing mainly on low level poachers should theoretically be expanded with stronger efforts to track and dismantle the actual networks, which

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<sup>14</sup> Poaching Rhino Horn in South Africa and Mozambique KG Fenio, November 2014

<sup>15</sup> [www.panda.org](http://www.panda.org) WWF In Brief Retrieved 03/03/2015

<sup>16</sup> Ibid 233

<sup>17</sup> [www.iol.co.za/crime-courts](http://www.iol.co.za/crime-courts) Retrieved 03/03/2015

<sup>18</sup> Poaching Rhino Horn in South Africa and Mozambique KG Fenio, November 2014

<sup>19</sup> Ibid 37

<sup>20</sup> Ibid 39

<sup>21</sup> Ibid 42

<sup>22</sup> Poaching Rhino Horn in South Africa and Mozambique KG Fenio, Nov 2014

<sup>23</sup> Ibid 45

requires significant intelligence, analysis, and international cooperation.<sup>24</sup> The fight will be easily won, if the foot soldiers are prosecuted rigorously, since they act on behalf of kingpins, who usually are not arrested, let alone arrested.

The huge demand of rhino horn in Asian countries, the likes of China and Vietnam, creates what is termed, “inelastic relationship between the increasing demand and restricted supply”<sup>25</sup>, this influences the high black market prices for rhino horn, which is “making the product attractive to criminals and organised crime syndicates”<sup>26</sup>. The involvement by syndicated organised crime, can have greater degrading effects on society at large, and as such increase the scourge<sup>27</sup>. Furthermore, it has been argued that; “trade bans, such as that over the sale of rhino horn<sup>28</sup>, complicates the situation, driving up the black market prices for rhino horn even further and increasing pressure on wildlife populations.”<sup>29</sup>

The value of rhinos, moreover their horns, is increasing drastically. As such, protection costs have also sky rocketed. This development is making rhinos a liability to state conservation authorities, private and communal landowners alike, and a difficult task to monitor and regulate.<sup>30</sup> The private sector, which comprises of private game farms and owners, claims ownership of 24% of the South African rhino population, on the other hand, a further 2 million hectares of land, also play an integral role, in “conservation of the species and wildlife habitat”<sup>31</sup>.

The benefit streams from tourism, limited trophy hunting and live sales of rhinos, are no longer sufficient to offset increased security costs for rhinos. This setback has

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<sup>24</sup> Ibid 44

<sup>25</sup> Milliken, T. and Shaw, J. (2012) The South Africa – Vietnam Rhino Horn Trade Nexus: A deadly combination of institutional lapses, corrupt wildlife industry professionals and Asian crime syndicates. TRAFFIC, Johannesburg, South Africa.

<sup>26</sup> Blecher E, Thomas K, Muradzikwa S, Smith L, De Villiers P. Economics. 2nd ed. Cape Town: Oxford University Press; 2010.

<sup>27</sup> Hollway W, Jefferson T. The risk society in an age of anxiety: situating fear of crime. *Brit J Sociol.* 1997;48:255–266 <http://dx.doi.org/10.2307/591751>

<sup>28</sup> CITES. Consideration of proposals for the amendment of appendices I and II. 1995: Prop.10.28 [document on the Internet]. c1995 [cited 2012 Jan 25]. Available from: <http://www.cites.org/sites/default/files/eng/cop/10/prop/E-CoP10-P-28.pdf>

<sup>29</sup> Rivalan P, Delmas V, Angulo E, Bull LS, Hall RJ, Courchamp F, et al. Can bans stimulate wildlife trade? *Nature.* 2007;447:529–530. <http://dx.doi.org/10.1038/447529a>

<sup>30</sup> Child B. The sustainable use approach could save South Africa’s rhinos. *S Afr J Sci.* 2012;108

<sup>31</sup> Child B. The sustainable use approach could save South Africa’s rhinos. *S Afr J Sci.* 2012;108

contributed to some private rhino owners who are opting out of rhino conservation<sup>32</sup>. The circumstances surrounding such dilemma, is of such a nature that the industry has experienced lower carrying capacity for surplus rhino, further that there would be a reduction in the population growth, of utmost importance there would be reduced essential revenue for the conservation, and a major setback on the value of wild life industry<sup>33</sup>.

It has been observed that responses of escalating rhino poaching, ranges from “traditional increased law enforcement and protection” and “demand reduction approaches”<sup>34</sup>, to the traditionalists who are advocating a regulated legal trade in the rhino horn<sup>35</sup>. There is seemingly a notion of opposing strategies which have tended to polarise the rhino debate extremely<sup>36</sup>, considering the pros and cons of alternative strategies in a logical sense, then consensus building framework will remain unexplored. There are several approaches such as, “participatory risk–benefit analyses”, which may “facilitate consensus decisions”, this have been advocated as a way to evaluate various management strategies directed at curbing rhino poaching scourge.<sup>37</sup>

#### **1.4. STATEMENT OF THE RESEARCH PROBLEM**

The Constitution of South Africa, and legislation framework such as the NEMBA, CITES and TOPS, regulate protection of flora and fauna, including endangered species, such as the rhino. Despite the availability of these pieces of legislation, there are many challenges of the laws in order to make perpetrators of rhino poaching accountable.

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<sup>32</sup> Knight M. African Rhino Specialist Group report. 10th Meeting of the IUCN / SCC African Rhino Specialist Group. *Pachyderm*. 2012;52:7–19.

<sup>33</sup> Ibid

<sup>34</sup> TRAFFIC. Creative experts' meeting on messaging to reduce consumer demand for tigers and other endangered wildlife species in Vietnam and China: Meeting report. Gland: TRAFFIC International; 2012.

<sup>35</sup> Biggs D, Courchamp F, Martin R, Possingham H. Legal trade of Africa's rhino horns. *Science*. 2012;339:1038–1039. <http://dx.doi.org/10.1126/science.1229998>

<sup>36</sup> Sohrabian S. Beyond biodiversity: Sustainable development implications of South Africa's “rhino wars” [homepage on the Internet]. c2012 [cited 2014 April 22]. Available from: <http://ictsd.org/i/news/bioresreview/142048/>

<sup>37</sup> Ferreira SM, Okita-Ouma B. A proposed framework for short-, medium- and long-term responses by range states to curb poaching for African rhino horns. *Pachyderm*. 2012;51:52–59.

The approach to prosecuting rhino poaching offences is a dilemma which is confusing and inconsistent, considering that every province within the Republic of South Africa has its own legislation to prosecute rhino poaching. This creates an enforcement problem, causing discords of interpretation and application of the law, which at times benefits the offenders. The other setback, pertains to the members of South African Police Services (SAPS), who are inexperienced in the investigation of rhino poaching cases. The lack of sufficient incentives, skills and training, lack of capacity of SAPS members, contributes to sky rocketing statistics of rhino poaching offences not being sanctioned.

## 1.5. DEFINITION OF KEY CONCEPTS

- (i) **Poaching:** “the illegal practice of trespassing on another’s property to hunt or steal game without the landowner’s permission.”<sup>38</sup>.
- (ii) **Subsistence Poachers:** “Subsistence poachers poach to get food, or to sell the poached animal for a small amount of money in order to buy food.
- (iii) **Commercial Poachers:** “Commercial poachers poach as a money-making venture. They are not driven by the need to survive—but by a desire of a massive financial gain. Also known as structured poaching, commercial poaching is responsible for the majority of poached rhinos”<sup>39</sup>.  
**Trophy Poachers:** “Trophy poachers poach to make enormous profit through trading in endangered species. They are driven by sheer greed”<sup>40</sup>.
- (iv) **Rhino poaching:** refers to “the illegal hunting of rhinoceros in Africa, primarily because of an increase in the demand for a traditional Chinese medicine that is made from the powder of rhinoceros horn”<sup>41</sup>. According to Save the Rhino, “an animal that boasted a population of more than 500,000 throughout the world early in the 1900s is in danger of extinction, despite aggressive efforts to fight the practice of poaching”. In 2011, the

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<sup>38</sup> <http://www.rhinoconservation.org/2011/03/29/busting-the-rhino-horn-medicine-myth-with-science/>

<sup>39</sup> <http://www.jcm.co.uk/endangered-species-campaign/rhinoceros/alternatives-to-rhino-horn/>

<sup>40</sup> Ibid 114

<sup>41</sup> Save the rhino.co.za

Western black rhino was declared to be extinct, primarily as a result of poaching.<sup>42</sup>

## **1.6. LITERATURE REVIEW**

### **1.6.1 South African perspective on Rhino Poaching**

The law is a prominent tool for change and development<sup>43</sup>. Our laws are flexible enough to accommodate specific aspects and issues which are problematic. Such issues are that of the rhino poaching pandemic that is devastating our country's environment. The African black rhino, *Diceros bicornis*, is internationally recognised as critically endangered and illegal poaching has caused the population to plummet greatly<sup>44</sup>. Although our legislation, being NEMBA and TOPS impose penalties, restrictions and methods to control hunting, the poaching of rhino has increased exponentially over the last five years<sup>45</sup>.

Perhaps the enforcement of the law currently in place is ineffective or perhaps more still need to be done in order to prevent poaching and illegal trade, rather than just penalising and prosecuting when, and if, they are caught. To address this it is worth making comparison with other African countries such as Kenya and Tanzania, in order to take lessons on what their laws about rhino poaching dictates, further to have an insight about how they are enforced.

On international perspective, since majority of rhino poached in Africa, ended up in markets in Asia, China, Vietnam and Taiwan, legislation(s) and response(s) in such countries would be reviewed, to clarify their stance on rhino poaching, and why its citizen(s) are fascinated by the rhino horn.

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<sup>42</sup> Ibid 44

<sup>43</sup> Giving It Horns : A legal vantage point of the rhino-poaching pandemic Michelle du Toit: 2013, p 20

<sup>44</sup> Giving It Horns : A legal vantage point of the rhino-poaching pandemic Michelle du Toit: 2013, p 21

<sup>45</sup> Media statement, 18 July 2013, Department of Environmental affairs.

## 1.6.2 Enforcement

When a crime is committed, the investigator would need a number of techniques that he / she can be used to link suspects and / or physical items, known as Exhibits to a crime, and or scene. In most instances, bullets recovered from carcasses of killed animals, can be linked to firearms seized from suspects, this would be made possible through the process of ballistics.<sup>46</sup> Evidence may be easily obtainable from the hands, fingernails, hair and clothing of suspects, which may contain essential evidence for linking them to the commission of the offence<sup>47</sup>. Evidence may further be uplifted from vehicles and premises may contain remnants of material from a scene of crime. Documents are very essential as they can reveal a suspect's handwriting, fingerprints or DNA Physical marks, that may be linked to tools, may be found in carved or cut items.<sup>48</sup>

It is evident that wildlife offenders are likely to expand their use of technology in furtherance of commission of their offences ,as such, an important area of forensic analysis work, is essential for the examination of such technology, including the analysis of mobile telephones, computers and storage devices that are linked to the suspects, and / or the scene of crime. Experience has shown that valuable evidence may be obtained relying on techniques such as financial transactions and history of internet surfing.<sup>49</sup>

Such examinations and analysis as mentioned above, would depend on the capability of the forensic scientist involved and the available laboratory facilities and equipment, which in most cases is a problematic to have such. In instances where the laboratory does not have equipment for DNA testing, then such testing cannot be performed, which might result in the guilty being acquitted on a technicality<sup>50</sup>. Furthermore, in instances where the laboratory is not staffed competent people in, the relevant examination will also not be conducted.

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<sup>46</sup> Forensic Investigations Manual: Sam 2012, at 69

<sup>47</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 02/07/2015

<sup>48</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 02/07/2015

<sup>49</sup> Ibid 44

<sup>50</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 02/07/2015

To sum up, in instances where forensic experts, or forensic equipment or facilities are temporarily or permanently unavailable, steps should be taken, and further that mechanisms to obtain or gain access to such expertise or equipment should be developed, for the benefit of crime prevention and enforcement. Several countries are assisted by Customs laboratories, which have also started to support frontline enforcement with their forensic examination, this may be applauded as a positive contribution to enforcement.<sup>51</sup>

### **1.6.3 NEMBA and TOPS**

The National Environmental Management: Biodiversity Act 10 of 2004, (NEMBA) inter alia,” restricts the activities that may be carried out in respect of Threatened or Protected Species (TOPS) animals”. In terms of the Act, white rhino are classified as “Protected” and black rhino as “Endangered.”<sup>52</sup> Permits are required for purposes of hunting Rhino in South Africa, as such specific procedures are required in terms of approving such permits, and owning rhino horn in the Republic. According to NEMBA, “International trade in live animals to appropriate and acceptable destination and hunting trophies is permitted”.<sup>53</sup>

The administration is such that, provincial conservation authorities in the Republic, are responsible for the consideration of permit applications as required by NEMBA and TOPS, especially in instances where the applicant is private individual or a company in need of such permit(s). All activities involving rhino and it’s horn, are regulated on a provincial level.<sup>54</sup> NEMBA and TOPS allow local authorities to impose further conditions as they see fit in respect of TOPS animals.

The private sector rhino owners has recently claimed that it is normatively easier, with permit to hunt a rhino and kill it, rather than to move the animal around South Africa.<sup>55</sup>

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<sup>51</sup> Forensic Investigations Manual: Sam 2012, at 69

<sup>52</sup> Department of Environmental Affairs (DEA) (2011). Biodiversity Management Plan for the Black Rhinoceros (*Diceros bicornis*) in South Africa, 2011-2020.

<sup>53</sup> Ibid 2017

<sup>54</sup> Ibid 2019

<sup>55</sup> Ibid 2020

It has been established that stakeholders, though critical about TOPS legislation, they however do not want the legislation to be removed, and are advocating for the amendments to be made to the Act and the regulations, in order to:

- a) “render compliance less onerous for legitimate rhino owners”
- b) “permit legal domestic trade” and / or
- c) “change and improve the permitting system to a central online and secure system in order to guard against corruption”.

#### **1.6.4 Conflicting legislation on Rhino Poaching**

Rhino Poaching is regulated by more than one legislation within each province, which creates several loopholes. In Limpopo, the legislation in place is the Limpopo Environmental Management Act (LEMA)<sup>56</sup>. There is a huge difference in terms of types of permits necessary to conduct restricted activities, furthermore, a gap about what is necessary for which activity in terms of provincial and national legislation, as well as TOPS, which are not at harmony.

If an activity falls under the provincial act (LEMA) and the national act (NEMBA) with referral to TOPS regulations – which permit should be issued? Should there be 2 permits issued? OR should there be 2 applications in terms of both provincial and national legislation but only 1 permit be issued? The confusion caused, need to be clarified for uniform application.

NEMBA, in terms of Section 92 thereof, refers to an “integrated permit”, such may be issued (in Limpopo the issuing authority only write on the NEMBA-permit the name of the Limpopo Act which they then regard as the integrated permit). Then, regulation 4 of TOPS indicates in 4(1) that a provincial permit in respect of restricted activities, is “regarded as a permit issued in terms of NEMBA”, but in 4(3) it states that an exemption issued in terms of the legislation referred to in sub regulation 1, will however, “not be regarded as a permit or exemption in terms of these regulations”.

Does it mean that even though you may have a ‘standing permit’ authorizing certain restricted activities on the listed species on your permits, for the specimens of listed

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<sup>56</sup> Act 07 of 2003

“threatened” or “protected species”, are you still required to obtain a separate permit? The concern is that defense use it to show TOPS / NEMBA and provincial act is so confusing, the ‘lay’ person or people applying for permits don’t know what to do – this might become important if there is the issue of “intention”.

#### **1.6.4.1 Difference between “species” and “specimen”**

Section 57(1), refers to “a person that may not carry out a restricted activity involving a specimen of a listed threatened or protected species”. Specimen includes any living or dead animal...or derivative.

In the ‘special conditions’ attached to the standing permit, it would indicate what the permit holder is allowed to do – however, in some cases, the ‘special conditions’ refers to species that may be catch, kept, conveyed, imported, exported, bought or sold – it does not specifically refers to living or dead animals – but also refers to the wild animal species. In LEMA<sup>57</sup> a “wild animal” can also include a tooth, tusk, horn etc. The defense is now claiming that the special conditions make provision for the horn and the person could there do restrictive activities in respect of any part of the animal ... - ‘wild animal’ is not defined in NEMBA.

In LEMA<sup>58</sup> a wild life translocator is defined as someone who catches or moves a wild or alien animal from one place to another as a profession – again, the defense argues that if a person is a wild life translocator, and such person has a permit to operate as a wildlife translocator, it can move wild animals – including any part or derivative of a specially protected wild animal.

“game capturer” is defined in TOPS as “a person that captures and conveys *specimens* of listed threatened or protected ... species for commercial purposes on behalf of another person and may include buying, temporary possession and selling of these specimens”. If you have a standing permit and is also registered as a game capturer, even though special conditions refer to the *species*, here the definition includes *specimens* .

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<sup>57</sup> Limpopo Environmental Management Act no 7 of 2003

<sup>58</sup> Ibid (n 57)

“registered wildlife trader” defined in TOPS includes taxidermists and game capturers. Does it again include to do a restricted activity in respect of *specimens*? “possession permit” defined in TOPS, “a permit for the keeping or conveying a specimen of a listed threatened or protected species for personal use in a person’s possession without carrying out any other restricted activity”.

Reg. 5(6) of TOPS states that “a registered wildlife trader may apply for personal effects permit, authorizing a person to buy, transport or convey and keep in his possession and, or export out of the Republic, dead or live specimens of listed threatened or protected species, including products derived from such species and acquired from the registered wildlife trade”.

If there is compliance of registration provisions in Chapter 3, would that not open the door for wildlife traders to obtain such personal effects permit and thereby giving clients the authority to export rhino horns out of the Republic. This needs clarification as ‘lay’ persons can use this to diminish their ‘intention’ when charged with certain offences. The State need to prove the intention to commit offences, therefore, it would be very difficult for the wildlife traders to understand such a situation.

The issue of enforcement and regulation on a piece meal basis, is contributing to the escalation of the scourge, since it becomes difficult to have uniform precedence on regulating Rhino Poaching. I will elaborate on the above submission based on a table mentioned below. The said table deals with different legislation, within the Republic, which is used to curb Rhino Poaching.

### 1.6.4.2 Differences in sentences in respect of NEMBA, LEMA and TOPS

Contravention or failure to comply with Regulations: Sect. 98(2) of NEMBA	Contravention or failure to comply with sect. 101 of NEMBA: Sect. 57(1) [restricted activities].., a notice by the Minister (Sect. 57(2))...	Contravention or failure to comply with provisions of LEMA [Sect 112], Penalties – Sect. 117(1) (in respect of specially protected animals like rhino’s:)	TOPS regulation 73 – undertaking of a restricted activity - Penalties reg. 74:
<ul style="list-style-type: none"> <li>a) “imprisonment for a maximum. of <b>5 years</b>”;</li> <li><b>b)</b> “a fine not exceeding <b>R5 million</b>”</li> <li>c) “or both”</li> </ul>	<ul style="list-style-type: none"> <li>a) “imprisonment for a maximum. of <b>10 years</b>”</li> <li><b>b)</b> “a fine not exceeding <b>R10 million</b>”</li> <li>c) “or both”</li> </ul>	<ul style="list-style-type: none"> <li>a) “imprisonment for a maximum of <b>15 years</b>”</li> <li>b) “a fine not exceeding <b>R250 000</b>”</li> <li>c) “or both “AND</li> <li>d) “a fine not exceeding 4 times the commercial value...”</li> </ul>	<ul style="list-style-type: none"> <li>a) “imprisonment for a maximum of <b>5 years</b>”</li> <li>b) “a fine not exceeding <b>R100 000</b> or 3 times the commercial value, whichever is the greater”</li> </ul>

Magistrates are reluctant to impose sentence of 15 years imprisonment in terms of the provincial act (LEMA) for example in the poaching of rhino’s, but the fine is only R250 000, in contradiction with the national act (NEMBA) where the fine of R10 million is way higher than the provincial legislation, but the prescribed imprisonment is less than the provincial legislation.

Although such legislations have concurrent authority, NEMBA stipulates in section 8 that in case of conflict, “it should be resolved in terms of sect. 146 of the Constitution” – read also section 148, 149 and 150. Blending such legislation, would bring harmony in interpreting offences and formulating charges. The application of such blended legislation, would reduce the scourge immensely.

### 1.6.5 Scholarly Review on Rhino Poaching

Legal research which is non-empirical, depends on secondary evidence, being data such as the articles by academics or researchers, articles of concerned organizations, court judgments as well as internet searches. Rhino poaching in South Africa, does not only receive attention through media channels. Several academics contributed immensely to the epidemic.

Ngwakwe and Mokgalong<sup>59</sup>, are of the view that joint efforts between South Africa and the International World on rhino poaching, would contribute positively in curbing the scourge. The submission was made based on the escalation of such horrendous crimes against wildlife, specifically the rhino. South Africa as a global country, will need assistance of other countries to ensure law enforcement and prosecutions of such offences.

It should be noted that rhino species, vulnerable as they are, needs to be protected for present and future generations. The best way to achieve such an objective is through stringent enforcement. In order to win the war against extinction, sustainability of such species must be maintained. Rhino species as major contributors to the environment due to their stature, are supposed to be conserved and their existence be sustained.

Tladi<sup>60</sup> is of the view that sustainable development, should benefit the present, and future generations. In supporting this view, Mafunganyika argued as follows<sup>61</sup>:

*“According to Stewart and Horsten, the concept of ‘sustainability’ (which is derived from sustainable development) refers to the ability of one or more entities either individually or collectively to exist and flourish (either unchanged or in evolved forms) for lengthy time periods. Therefore, sustainable development means an integration of social, economic, and ecological viability of a resource.”*

The extinction of the rhino species through poaching, would negatively impact on the tourism and interests of majority of the present and future generations. Rhinos are to be jealously protected, to avoid the dilemma suffered by dinosaur’s, which we can only refer to, but very difficult to comprehend.

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<sup>59</sup> Ngwakwe C and Makgoleng M, : Consumer Income growth and Rhino Poaching in South Africa, Environmental Economics, Volume 5, Issue 3, 2014.

<sup>60</sup> Tladi D ‘Intergenerational equity: A new name for International Environmental Justice’ (2003) *Fundamina: A Journal of Legal History*, Issue 9, 197, 197-202.

<sup>61</sup> The importance of environmental laws in housing developments: Lessons from the Diepsloot housing project, Grace Mafunganyika, Lecturer, School of law, University of Limpopo (Turfloop Campus). This article is an excerpt from a research paper submitted in completion of her LLM (2009)

The present research addresses the sustainability of rhino, as seen against the background of illegal poaching. There is no harmony amongst scholars, on how to curb the scourge. Rhino poaching is the subject of media attention and publicity on a daily basis. There is a view that legalisation of rhino horn trade, would reduce the number of rhinos being poached, as the trade would be well regulated. Child<sup>62</sup> is one of the advocates of such a view. According to Child: *“A legal trade in rhino horn would provide substantial funding for private and state conservation in South Africa. Indirectly, an increase in the quantity and reliability of the supply of rhino horn would lower its global price. More importantly, legal trade should displace illegal trade, lessening the influence of organised crime, especially if markets were legalised in cooperation with consumer countries in Asia.”*

I disagree with the sentiments of Child<sup>63</sup>. Organised rhino poaching, can be a thing of the past, firstly, if there is proper planning to counter such offences. Secondly, if there are well trained, and well paid enforcement officers, who would not compromise their badges, and the lives of such precious animals, due to bribes and kick-backs promised to them by poachers. It should be noted that recently, majority of poachers arrested, implicated officers of bribery, such officers are supposed to protect such animals, however corruption is the order of the day. Thirdly, there are laws regulating rhino poaching, which includes contraventions and penalty clauses. If enforced correctly, such laws would bring the much needed stability in curbing the scourge.

It is very clear that the laxity of immigration and rhino poaching laws within the Republic, are of such a nature that a facelift is needed to tighten them. Ngwakwe and Mokgalong<sup>64</sup> argued that: *“The findings thus are important for improving rhino conservation policy management and research; in addition to local law enforcement, a more joint international rhino trading pact is desirable between South Africa and the rhino consuming Asian countries; a stronger agreement for border rhino trade monitoring, national stringent rhino trading regulations and enforcements should be sought by South Africa in the Asian consuming countries to abate rhino trading in*

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<sup>62</sup> Child, B.(2012): The sustainable use approach could save South Africa’s rhinos. S Africa Journal of Science

<sup>63</sup> Ibid (n 62)

<sup>64</sup> Ngwakwe C and Makgoleng M, : Consumer Income growth and Rhino Poaching in South Africa, Environmental Economics, Volume 5, Issue 3, 2014.

*these countries and to reduce rhino poaching in South Africa. A more effective immigration policy is also apposite regarding visitors from the consuming countries”.*

The sentiments echoed by Ngwakwe and Mokgalong<sup>65</sup> are more seasoned, and acceptable, and fully supported by Chair<sup>66</sup>, who argued as follows: *“There was general agreement that a multi-agency approach was needed and that Africa and Asia had to work together to safeguard rhinos”.* A more robust approach is needed to ensure enforcement compliance. Enforcement is the best solution, since laws are already in place. Martin<sup>67</sup> and Yonzon<sup>68</sup> agree that the best way to reduce poaching, is through stringent enforcement of laws and rigorous patrols by enforcement officers, conversely, failure to take necessary steps, would double the rate of poaching.

Adhikari<sup>69</sup> eloquently posits that a well revised and amendments in enforcement mechanisms, yielded results by eradication of poaching in Nepal. Such a success was experienced for many years, and there was huge stability within the wild life environment. Orenstein<sup>70</sup> supports the above view, and adds the following: *“CITES, effective as it has been in the past, cannot be the sole cure for lawlessness, corruption, crime and greed that have brought rhinos and elephants to their present state. At its best, though, it can catalyze the sort of cooperative actions we must have if real solutions are to be found and implemented.”* I am strongly opposed to any suggestions of legalisation of trade in rhino horn. Should such a step be taken, it would mean the criminals are the winners at the expense of the rhinos. Legalisation is tantamount to taking the fight against rhino poaching, back to square one.

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<sup>65</sup> Ngwakwe C and Makgoleng M, : Consumer Income growth and Rhino Poaching in South Africa, Environmental Economics, Volume 5, Issue 3, 2014.

<sup>66</sup> *Mike Knight, Chair* Park Planning & Development, South African National Parks, Nelson Mandela Metropolitan University, Pachyderm No. 50 July–December 2011,

<sup>67</sup> Martin, R. B. (1993): Rhino population dynamics, illegal hunting and law enforcement in the lower Zambezi Valley, Zimbabwe, 10-31.

<sup>68</sup> Yonzon,P. (2002): The wounds of neglect .Habitat Himalaya 9(1).

<sup>69</sup> Adhikari,T.R.(2002): The curse of success .Habitat Himalaya 9(3).

<sup>70</sup> Dr Ronald Orenstein: Ivory, Horn and Blood: Behind the Elephant and Rhinoceros Poaching Crisis, Firefly Books, 2013

Rademeyer<sup>71</sup> is of the view that by legalising trade of rhino horns, might be a futile exercise as price of rhino horns is not fixed, but depends on the fluctuations of the market. Legalisation would motivate criminals to enrich themselves illegally. Furthermore, legal trade would make the horns easily available in the market, thereby reducing prices in the black market extensively.

Leader-Williams & Milner Gulland<sup>72</sup> advocates for the stringent enforcement of laws, which includes severity of penalties in curbing the scourge. The authors are of the view that a fight against rhino poaching may be easily won through collaboration of different stake holders. According to them, fixed penalties on rhino poaching are deterrent. The authors argue forcefully that severe penalties deterred poachers in Nepal. It is clear that by properly blending fines in the form of penalties and imprisonment as a form of punishment, would contribute positively in fighting the scourge against rhino poaching in South Africa.

#### **1.6.6 Analysis of High Court judgment on trade of rhino horn ban**

CITES prohibited trade in rhino horn since 1977. In South Africa, the Minister of Water and Environmental Affairs, started a process of banning trade on rhino horn due to the escalating manner of brutal slaughter of the rhino species. Such a process was supposed to be in place for a period of six months. During such period, no sale of rhino horn, or trade thereof was supposed to take place. However, it is clear that since 2009, the scourge of rhino poaching has been gaining momentum.

In South Africa, professional rhino breeders<sup>73</sup> were against the moratorium which prevented them to trade on rhino horn. The moratorium did not do justice to the wildlife conservation in protecting the rhino. Several syndicates, which specializes in illegal poaching and selling of rhino horn escalated tremendously. Aggrieved with the uncontrollable scourge in rhino poaching, such rhino breeders<sup>74</sup> started litigation to unban trade on rhino horn.

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<sup>71</sup> Rademeyer, J. (2012): Killing for profit: exposing the illegal rhino horn trade. Cape Town, Zebra Press

<sup>72</sup> Leader-Williams, N. (1992): The world trade in rhino horn: a review. Traffic International, Cambridge, United Kingdom.

<sup>73</sup> Johan Kruger and John Hume

<sup>74</sup> Ibid (n 73)

The applicants in North Gauteng High Court case no 57221/2012, Mr Johan Kruger and John Hume, submitted that there was no proper consultation by the Minister when a decision of moratorium on rhino horn trade was put into operation. The contention was made on the strength of the provisions of Section 97(3) and (7) of NEMBA, which requires that the Minister must follow a consultative process as envisaged by Section 99 and 100 of the Act.

After much deliberation, the Full Bench of the High Court,<sup>75</sup> held that: "... the moratorium on domestic trade in rhino horn is hereby reviewed and set aside for substantial non-compliance with consultative and participatory process by the members of the public as contemplated by section 99 and 100 of NEMBA ..."

The impact of the decision is that, normatively, the professional breeders are now allowed to legally trade in rhino horn within South Africa. The dilemma, however, is the indication by the Minister that there would be an appeal lodged against judgment of the High Court. In practice, as soon as an appeal is lodged, the judgment of the High Court would be suspended until the appeal processes are completed.

South Africa is hosting Council of Parties in Johannesburg in 2016, it is apparent that international trade on rhino horn and enforcement would be at the center stage. The Department of Environmental Affairs, responded to the judgment by warning that the "the court judgment should not be construed to mean that the domestic trade in rhino horn may take place in an unregulated fashion. In the absence of the moratorium, it must be emphasized that all trade in rhino horn will be subjected to the issuing of the relevant permits in terms of NEMBA." It is worth noting that the South African High Court judgment does not relate to the international trade in rhino horn, which is for commercial purposes. Commercial international trade in rhino horn is still prohibited by CITES.

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<sup>75</sup> Case no 57221/2012 bench: Legodi J, Hlapi J and Dewrance AJ (Judgment delivered on 26 November 2015)

## **1.7. PURPOSE OF THE STUDY**

The purpose of this mini dissertation is to show case how law enforcement officers can apply the law to address the problems of rhino poaching and bring perpetrators to justice. Since legislation used for the prosecution of rhino poaching offences is on a piece meal basis, in as far as enforcement is concerned, relevant laws would be analysed and recommended to be used when investigating and prosecuting rhino poachers. This will increase the possibility of conviction rates that will lead to punitive sentences imposed in order to prevent the scourge. Suggested amendments to NEMBA<sup>76</sup> and the CPA<sup>77</sup> would be made as part of the recommendations. Such amendment will contribute to harmonisation of laws in order to strengthen enforcement mechanisms.

## **1.8. METHODOLOGY**

The research methodology used is qualitative wherein existing relevant literature on the topic was utilised. This method is acceptable in legal research activities. Therefore, legal sources such as journals, text books, case law and legislation. A comparative analysis with other jurisdiction on the subject of enforcement of laws on rhino poaching will also be used in order to reduce and curb the scourge.

## **1.9. SIGNIFICANCE OF THE RESEARCH**

This mini-dissertation showcases how laws could be used to bring about harmonisation of conflicting legislation in order to improve and strengthen the fight against rhino poaching thereby deter other would-be perpetrators. This intervention would bring reduction in the crime and facilitate criminal convictions and contribute to the prevention of the rhino from being extinct.

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<sup>76</sup> National Environmental Management: Biodiversity Act 10 of 2004

<sup>77</sup> Criminal Procedure Act 71 of 1977, specifically Section 60

## **1.10. SCOPE AND LIMITATION OF THE STUDY**

This mini-dissertation is organised as follows:

Chapter 1: Introduction

Chapter 2: Regulations and legal framework on rhino poaching

Chapter 3 Rhino poaching, a new form of organised crime

Chapter 4: Comparative analysis on rhino poaching

Chapter 5: Conclusion and Recommendations

## CHAPTER TWO: REGULATIONS AND LEGAL FRAMEWORK ON RHINO POACHING

### 2. Introduction

Legislation framework in every country, demonstrates the development of legal rules and practices on specific aspect of the law. It is important to consider such legal framework in order to resolve the matter at hand. There are different legislation frameworks to be discussed on the issue of Rhino poaching, as discussed below.

#### 2.1 Constitution of the Republic of South Africa

The Constitution, is “the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”<sup>78</sup>. Environmental provisions are included in the “Bill of Rights, in Chapter 2 of the Constitution” of South Africa<sup>79</sup>. In terms of Section 24 of the Act, “everyone has the right”:

*“(a) to an environment that is not harmful to their health or well-being; and  
(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:*

- *prevent pollution and ecological degradation;*
- *promote conservation; and*
- *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”*

The Constitution, provides for “the right to information”; “the right to freedom of expression”; “the right to participate in political activity”; “the right to administrative justice”; and “fundamental science, cultural, legal, economic and environmental right”<sup>80</sup>. In addition, the Constitution requires “that all legislatures facilitate public involvement in the legislative and other policy processes”. Citizens have “the right to engage in public initiatives and processes on an on-going basis”.

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<sup>78</sup> Section 2 of the Constitution of 1996

<sup>79</sup> No. 108 of 1996

<sup>80</sup> Chapter 2, Bill of Rights

## 2.2. South African response on Rhino Poaching

### 2.2.1. Legal and Regulatory Measures to be applied

NEMBA is legislation governing “the management and protection of South Africa’s biodiversity”, which is “designed to operate within the framework established by the National Environmental Management Act”<sup>81</sup> (NEMA).<sup>82</sup> NEMBA’s objectives, include “the management and conservation of the country’s biological diversity and its components, and it aims to give effect to international agreements ratified by South Africa”.<sup>83</sup>

NEMBA provides for “the promulgation of norms and standards necessary for the achievement of these objectives, including those related to the restriction of activities which impact on biodiversity and its components”.<sup>84</sup> The Norms and / Standards, on the other hand,” are essential for primary application to the management of rhinos. The marking of rhinoceros and rhinoceros horn, are products of such, and further for trophy hunting purposes”<sup>85</sup>

In July 2009, the marking of rhino horn and trophy hunting of white rhino was first promulgated.<sup>86</sup> Such Norms and Standards are aimed at addressing loopholes identified.<sup>87</sup> They act “to provide specific guidance by, for example, specifying that a hunting client may only hunt one white rhinoceros trophy per year”.<sup>88</sup> The loopholes on such “Norms and Standards”, are usually the strengths of the syndicates, who would capitalise on them to continue in illegal poaching of the Rhino, since they have access to the game lodge or parks where rhinos are encamped.

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<sup>81</sup> Act 107 of 1998.

<sup>82</sup> M Van der Linde & L Feris (eds) *Compendium of Environmental Legislation* (2010) Pretoria University Law Press, Pretoria, South Africa at 119.

<sup>83</sup> s 2(a),(b) of NEMBA.

<sup>84</sup> s 9(1)(a)(ii) of NEMBA.

<sup>85</sup> National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004): Norms and Standards for the marking of rhinoceros and rhinoceros horn, and for the hunting of rhinoceros for trophy hunting purposes GN 304 in GG 35248 of 10 April 2012.

<sup>86</sup> National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004): Marking of rhinoceros horn and hunting of rhinoceros for trophy hunting purposes GN 756 in GG 32426 of 20 July 2009.

<sup>87</sup> T Milliken & J Shaw

<sup>88</sup> Regulation 3(6) of the Norms and Standards for the marking of rhinoceros and rhinoceros horn, and for the hunting of rhinoceros for trophy hunting purposes

The “Norms and Standards” as mentioned above, are intended to be read in conjunction with the “TOPS Regulations”, which is governed by “Chapter 4 of NEMBA”, which deals with “the listing of species that are threatened or in need of national protection”.<sup>89</sup>

NEMBA further provides “that where a restricted activity involves a listed species, the person carrying out the activity must obtain a permit in terms of Chapter 7 of NEMBA which governs permitting”<sup>90</sup>. A “restricted activity”, is defined under NEMBA to include “the hunting, killing, chopping off of a specimen of a listed species, trading in a specimen of a listed species and exporting such a specimen from the Republic”.<sup>91</sup>

Furthermore, “The Minister of Environmental Affairs must monitor compliance with any international agreement regulating trade in specimens of endangered species which South Africa has ratified.”<sup>92</sup> Of particular relevance to this submission are sections 24 (b), which places emphasis on “the protection of the environment for the benefit of present and future generations” and 24 (b)(iii), which insists on “the sustainable use of resources”.

The “right to a healthy environment”, is fundamental to “the enjoyment of all human rights and is closely linked with the right to health, wellbeing and dignity”.<sup>93</sup> It is submitted that, “sound and healthy natural environment”, lends an enabling background for” the enjoyment of other human rights”.<sup>94</sup> It is therefore clear that the right to a healthy environment is a fundamental part of the right to life and to personal integrity.<sup>95</sup> While South Africa is blessed with a variety and abundance of animal and plant species and despite the fact that local communities and the tourism industry benefits from the trade in wildlife and biological resources, regulation of the trade in wildlife is critical for various reasons.<sup>96</sup> South Africa has to:

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<sup>89</sup> S 56 of NEMBA.

<sup>90</sup> Section 57

<sup>91</sup> S 1 of NEMBA.

<sup>92</sup> S 59(a)(ii) of NEMBA.

<sup>93</sup> Department of Environmental Affairs (DEA) (2011). *Biodiversity Management Plan for the Black Rhinoceros (Diceros bicornis) in South Africa, 2011-2020*.

<sup>94</sup> Ibid 2018

<sup>95</sup> Ibid 2019

<sup>96</sup> Ibid 2020

- Ensure the sustainable use of wildlife and biological resources for present and future generations;
- Ensure that trade in endangered and threatened species is carefully regulated;
- Ensure that wildlife used in the trade industry, “are properly cared for, so as to minimise the risk of injury, damage to health or cruel treatment”;
- Take the lead in the South African Development Community (“SADC”) region and the African continent in regulating, monitoring and reporting on the trade in wildlife; and<sup>97</sup>
- Ensure the practical implementation of CITES regulations, while ensuring that strict enforcement is not compromised. Given recent reports<sup>1</sup> of increased poaching and trade in species like rhino, proper and effective enforcement of the CITES regulations is essential.<sup>98</sup>

The “TOPS Regulations”, are promulgated in terms of section 97 of NEMBA. The purpose thereof being , “further regulation of the permit system established in terms of Chapter 7 of NEMBA, to the extent that the system applies to restricted activities involving listed species, as well as the regulation of hunting and the prohibition of certain restricted activities. Notably, the amendment to these regulations make special provision for matters pertaining to rhinos”<sup>99</sup>.

Regulation 24, “lists prohibited activities involving *Ceratotherium simum* (White rhinoceros) and *Diceros bicornis* (Black rhinoceros), which provide added control over the limited trade allowed with respect to rhinos in the form of sub-regulations governing hunting and dealing in live specimens”.<sup>100</sup> The regulations also” provide specifically for the marking of rhino horn”<sup>101</sup>:

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<sup>97</sup> Department of Environmental Affairs (DEA) (2011). Biodiversity Management Plan for the Black Rhinoceros (*Diceros bicornis*) in South Africa, 2011-2020.

<sup>98</sup> Ibid

<sup>99</sup> s 59(a)(ii) of NEMBA.

<sup>100</sup> Prohibited activities include: the hunting of certain rhinos, the use of gin traps in hunting, and hunting rhinos in particular areas, or under certain conditions; the captive breeding of rhino without written undertaking that none of the animals will be bred, sold, supplied or exported for prohibited hunting activities; and the sale or purchase of live specimens without the requisite conditions being met.

<sup>101</sup> Ibid

“(1) Any person who is in possession of elephant ivory or rhinoceros horn must within three months of commencement of these regulations apply in writing to the issuing authority in the relevant province to have such elephant ivory or rhinoceros horn –

- (a) permitted;
- (b) marked in accordance with sub regulation (3); and
- (c) registered on the national database for elephant ivory and rhinoceros horn.”

...

Further, Paragraph 2(4) “states that an application for the possession of rhino horn must include information on the circumference, inner length and outer length of each individual detached horn, the weight of the horn and a photo of the horn. The issuing authority is then responsible for conducting an inspection of the horn and verifying the information supplied by the applicant.”<sup>102</sup>

The procedure is, “the official is then expected to mark the horn with indelible ink or punch die as per a particular formula”.<sup>103</sup> “The information is then to be kept in a provincial TRAFFIC database, and consolidated by the DEA in the national TRAFFIC database.”<sup>104</sup> *DNA sampling* DNA sampling is also governed by the Norms and Standards, which require that: when a live rhino is darted for any management purpose, samples must be taken on the animal’s horn and blood using specialised DNA kits; and whenever horn is micro-chipped, horn samples must be taken”.<sup>105</sup>

“The samples may only be collected by the persons listed under paragraph 4 (3) of the Norms and Standards, who include a registered veterinarian responsible for darting live rhino and adequately trained officials from the issuing authority. The aim of collecting samples is to send them to send them for analysis for DNA profiling.”<sup>106</sup>

“The role played by DNA profiling is to provide is to assist law enforcement officials in detecting, investigating and prosecuting offenders involved in rhinoceros poaching

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<sup>102</sup> Paragraph 2 (5) of the Norms and Standards.

<sup>103</sup> Paragraph 2 (6) of the Norms and Standards.

<sup>104</sup> Paragraph 2(7) of the Norms and Standards.

<sup>105</sup> Paragraph 4 (1),(2) of the Norms and Standards

<sup>106</sup> Paragraph 4 (4) of Norms and Standards

and trade in their horn.”<sup>107</sup> “To support and enhance this initiative, the DEA, and the University of Pretoria’s Veterinary Genetic Laboratory, in collaboration with the International Consortium on Combating Wildlife Crime (ICWC), held the first international DNA sampling workshop”<sup>108</sup>.

### **c) CITES Regulations**

In addition to the “TOPS Regulations” and the “Norms and Standards”, the DEA has also published “CITES Regulations”<sup>109</sup> under NEMBA. These regulations, “define the responsibilities of the Management Authority and Scientific Authority, the conditions of trade, specifications relating to the registration and marking of guide the domestic implementation of CITES”.<sup>110</sup>

### **d) Legal and practical measures to improve management of rhinos**

NEMBA makes provision for “the development of Biodiversity Management Plans (BMPs) with respect to, amongst others, a listed threatened or protected species”.<sup>111</sup>

The content of these plans is prescribed under “Section 45 of NEMBA”, which requires that, “the BMP be aimed at ensuring the long-term survival of the species to which it relates”. The DEA recently promulgated the Biodiversity Management Plan for the Black Rhinoceros,<sup>112</sup> which “although not aimed at managing poaching activities, seeks to ensure the survival of the black rhino”.<sup>113</sup>

Poaching is also being addressed further, by way of different processes such as the “National Rhino Management Strategy”. The National Strategy for the Safety and

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<sup>107</sup> The Department of Environmental Affairs \_Forensics to support the fight against Wildlife Crime’ (available [https://www.environment.gov.za/mediarelease/forensicssupport\\_wildlifecrime](https://www.environment.gov.za/mediarelease/forensicssupport_wildlifecrime), accessed on 05/07/2015

<sup>108</sup> The Department of Environmental Affairs \_Forensics to support the fight against Wildlife Crime’ (6 November 2013’ available at [https://www.environment.gov.za/mediarelease/forensicssupport\\_wildlifecrime](https://www.environment.gov.za/mediarelease/forensicssupport_wildlifecrime), accessed on 05/07/2015

<sup>109</sup> National Environmental Management Biodiversity Act, Act 10 of 2004: Convention on International Trade in Species (CITES) Regulations GNR 173 in GG 33002 of 5 March 2010.

<sup>110</sup> Ibid (n 109)

<sup>111</sup> s 43 of NEMBA.

<sup>112</sup> National Environmental Management Biodiversity Act, 2004 (Act No 10. 2004): Biodiversity Management Plan for the Black Rhinoceros (*Diceros Bicornis*) in South Africa 2011- 2020 GN 49 in GG 36096 of 03/07/2015.

<sup>113</sup> The Minister of Water and Environmental Affairs Gazettes the Biodiversity Management Plan for Black Rhino for Implementation 2013 available at [https://www.environment.gov.za/content/minister\\_gazettes\\_biodiversitymanagementplan\\_black\\_rhino](https://www.environment.gov.za/content/minister_gazettes_biodiversitymanagementplan_black_rhino), accessed on 03/7/2015.

Security of Rhinoceros Populations of South Africa (NSSSRPSA), “outlines the DEA’s rhino response strategy”.<sup>114</sup>

The purpose behind the strategy is “to provide guiding principles necessary for decision-making and planning related to curbing rhino poaching and to ensure the successful prosecution of those implicated in the illegal trade at a national, regional and international level”.<sup>115</sup> The NSSSRPSA is “informed by NEMBA, the National Environmental Management Protected Areas Act<sup>116</sup> (NEMPAA), national policy documents, relevant strategies and conservation plans and international agreements ratified by South Africa.”<sup>117</sup>

The RIMR was “commissioned for the purposes of augmenting the DEAs NSSSRPSA document”.<sup>118</sup> The RIMR is “an amalgamation of knowledge and perspectives around the sustainable conservation of rhinos from several experts, including ecologists, rhino specialists, civil society, hunters and economists”.<sup>119</sup>

The RIMR indicates that “there is support for the legalisation of a commercial trade in rhino horn as a primary component of South Africa’s response strategy, and that this has contributed towards Cabinet’s decision to submit a rhino trade proposal for consideration at the 17<sup>th</sup> CITES Conference of the Parties in 2016”.<sup>120</sup> My submission is that such a proposal, would not be suitable for South Africa, considering the nature of legislation in place. Rhino Poaching in South Africa would only be curbed by enforcement of stringent laws, policies and legislation.

## **2.2.2. Criminal Measures: Prosecutions and Penalties**

Rhino poaching features prominently in the National Environmental Compliance and Enforcement Report 2012/13(NECER),<sup>121</sup> due to its status as a priority crime

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<sup>114</sup> Department of Environmental Affairs

<sup>115</sup> Department of Environmental Affairs *National Strategy for the Safety and Security of Rhinoceros Populations in South Africa* (2010) available at <http://www.rhinosourcecenter.com/index.php?s=1&act=pdfviewer&id=1301008151&folder=13>  
Accessed on 03/07/2015

<sup>116</sup> Act 57 of 2003

<sup>117</sup> Ibid (n 116)

<sup>118</sup> Department of Environmental Affairs

<sup>119</sup> Ibid (n 117)

<sup>120</sup> Ibid (n 117)

<sup>121</sup> Department of Environmental Affairs *National Environmental Compliance and Enforcement*

Firstly, NECER stipulates “that illegal hunting continues to be the most prevalent environmental crime within the so-called —green|| sub-sector.”<sup>122</sup> The Report reflects that “SANPARKS reported 454 incidents of illegal hunting of rhino in a national park, its most prevalent crime. Similarly, the Mpumalanga Tourism and Parks Agency points to illegal hunting of rhino as its most prevalent crime, with 27 reported incidents”.<sup>123</sup> Chapter 9 of the NECER, which “relates to biodiversity enforcement and compliance, is largely focused around criminal enforcement related to rhinos.”<sup>124</sup>

It further acknowledges that proper investigation and prosecution of those arrested in connection with poaching, upon conviction, the imposition of an appropriate sentences,, are crucial in order for these measures to provide an effective deterrent to poaching, in sending a clear deterrent message. NECER reports “a total of 333 rhinos poached in 2010, 448 rhinos in 2011, and 668 rhinos in 2012”, across South Africa’s provinces and national parks.<sup>125</sup>

In contrast the Report provides that, despite media reports on the seriousness and prevalence of such offences, “a total of 165 arrests were made in connection with rhino poaching in 2011, with 232 arrests, and 267 arrests in 2012”. It is evident that while the poaching statistics have more than doubled over two years, the number of arrests has not increased proportionately,<sup>126</sup> no reasonable explanation is readily available for such failure. Kruger National Park experienced majority of losses to the rhino population. Despite that , NECER “reflects only 95 accused involved in 50 finalised cases related to rhino poaching prosecutions in the period April 2012 to April 2013”.<sup>127</sup>

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*Report 2012/13* (2013) Chief Directorate of Communications, Department of Environmental Affairs, Pretoria, South Africa.

<sup>122</sup> Department of Environmental Affairs *National Environmental Compliance and Enforcement Report 2012/13* (2013) Chief Directorate of Communications, Department of Environmental Affairs, Pretoria, South Africa.

<sup>123</sup> *Ibid* (n 122)

<sup>124</sup> *Ibid* (n 122)

<sup>125</sup> *Ibid* (n 122)

<sup>126</sup> *Ibid* (n 122)

<sup>127</sup> *Ibid* (n122)

In the case of Job Basi Tlou and 4 Others case no:A25/2015<sup>128</sup>, during July 2014 a white rhino resident in the Mapungubwe National Park (*“the Park”*) in the far northern part of the Limpopo Province, was fatally shot at a farm known as Den Staat, which lies adjacent to the Park. As a result of information received by the Investigating Officer, Mr Mario Scholtz (*“Scholtz”*), who is in the employ of the South African National Parks (*“SANPARKS”*) attached to the Environmental Crime Investigation Unit thereof, the five Appellants were arrested during August 2014. All the five Appellants were kept in police custody, and the application for their bail application was denied due to the seriousness of the offences. The trial is still pending at the Louis Trichardt Regional Court.

In the case of Morris Tumelo Sehlabela and 2 Others, case no A723/2014<sup>129</sup> the accused were charged with the following offences:

- Conspiracy to commit a statutory offence in performing a restricted activity in a National Park to wit: hunting and killing of rhinoceros;
- The possession of a .375 hunting rifle without a licence;
- The possession of 7 live rounds of .375 ammunition without a licence or a permit to possess such ammunition;
- The offence of resisting arrest;
- Failure to report the unlawful possession of a firearm and ammunition; and
- Using a motor vehicle, without the consent of the owner, and / or the person in lawful charge thereof.

The accused were also denied bail due to the seriousness of the offences. The matter is also pending at Nelspruit Regional Court. The offences of related to Rhino Poaching, are very difficult to detect, due to the organised fashion of its perpetration. Suspects arrested for committing such offences, must be rigorously dealt with in accordance with law, to instil deterrence even to the potential perpetrators.

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<sup>128</sup> Decided in Gauteng North High Court on the 13 February 2015

<sup>129</sup> Held at Gauteng North High Court on 13 October 2014

It is respectfully submitted that, the attitude of law enforcement officers, should be robust, in curbing the scourge. Bail application, is an inquiry held<sup>130</sup>, to determine whether the interests of justice permits the release of the accused on bail. There are several factors that are considered for one to be admitted to, or denied bail. It should however be stressed that each case should be adjudicated on its own merits for such purposes.

### **2.2.3 Anti-poaching activities and rhino-security**

South Africa has taken several practical steps towards curbing poaching within its borders. Notably; the South African government has increased state funding available for anti-poaching activities and activities related to rhino-security,<sup>131</sup> and by protecting its borders in curbing the scourge of rhino poaching. Furthermore, legislative loopholes, experienced due to abuse of trophy hunting, will be monitored intensively.

The establishment of the National Biodiversity Investigator's Forum in March of 2009, and the launch of the National Wildlife Crime Reaction Unit (NWRUCU) in early/late February 2010,<sup>132</sup> are some of the initiatives taken and considered beneficial as "it would encourage the exchange of information and cooperation between government bodies operating at provincial and national levels."<sup>133</sup>

Law enforcement officers, including, the South African Police Services (SAPS), the South African National Defence Force (SANDF), and South African National Parks (SANParks) have coordinated their responses in the area of Kruger National Park,<sup>134</sup> The South African Police Service (SAPS) has also appointed a team of the SAPS,

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<sup>130</sup> Section 60(11)a of the Criminal Procedure Act 51 of 1977 (as amended)

<sup>131</sup> S Ferreira & B Okita-Ouma \_A proposed framework for short-, medium- and long-term responses by range states to curb poaching for African rhino horns' 2012 *Pachyderm* No. 51 January—June 52 at 53.

<sup>132</sup> T Milliken & J Shaw 2012: Traffic Environmental magazine p 211

<sup>133</sup> Ibid 223

<sup>134</sup> S Ferreira & B Okita-Ouma \_A proposed framework for short-, medium- and long-term responses by range states to curb poaching for African rhino horns' 2012 *Pachyderm* No. 51 January—June 52 at 53.

Directorate of Priority Crime Investigation (SAPS DPCI) centred around rhino poaching activities at a national level.<sup>135</sup>

Further the National Prosecuting Authority (NPA), has designated specialist prosecutors for the purpose of dealing with organised environmental crime at a national and provincial level, including rhino poaching.<sup>136</sup>

## **2.3 INTERNATIONAL PERSPECTIVE.**

Wild life trade is regulated by a number of organisations, networks and agreements on an International Level in controlling trade of such wildlife. The application of such instruments, rigorously influences legislation on a domestic level addressing trade on rhino horn or, be it legal or illegal. CITES was adopted by Council of Parties (CoP) as an instrument that banned trade on rhino horn.

### **2.3.1. GENERAL BACKGROUND TO CITES**

CITES as the primary international instrument,” regulates international trade in certain listed species of wild animal”<sup>137</sup>, the main objective being “to ensure that said trade does not threaten their survival”<sup>138</sup>. The General Assembly of the World Conservation Union (IUCN), initiated such an agreement which is legally binding on those who have ratified it, including South Africa<sup>139</sup>. The agreement became enforceable in 1975.

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<sup>135</sup> Ibid 54

<sup>136</sup> PA Lindsey and A Taylor

<sup>137</sup> Department of Environmental Affairs ; PW Birnie and AE Boyle *International Law and the Environment* Second Edition 2002 Oxford University Press, Oxford, UK at 625; P Sands et al *Principles of International Environmental law* (2012) Cambridge University Press, UK at 472. There are several other bodies and regional instruments relevant to the efforts to conserve rhino, and monitor and control trade in rhino products. These include the following: African Rhino Specialist Group (AfRSG) of the World Conservation Union Species Specialist Commission (IUCN/SSC) which constitutes the international framework for the conservation of rhino; Trade Records Analysis on Fauna and Flora in Commerce (TRAFFIC) which is an organisation which has developed in to a wildlife trade monitoring network and is responsible for undertaking numerous studies on the rhino horn trade spanning Asia, the Middle East and America, thereby gathering data and a necessary understanding of the illegal trade (See R Emslie & M Brooke; at regional level here are several African conservation initiatives including the Rhino Management Group(RMG), the Southern African Rhino and Elephant Security Group (RESG), the South African Development Community (SADC) rhino programme and the Lusaka Agreement.

<sup>138</sup> Ibid

<sup>139</sup> T Milliken & J Shaw at 44; CITES ‘What is CITES?’, <http://www.cites.org/eng/disc/what.php>, accessed on 12 May 2015; U Beyerlin and T Marauhn *International Environmental Law* 2011 Hart Publishing Ltd, Oxford, UK at 184; S Lyster *International Wildlife Law* (1985) Grotius Publications, Cambridge, UK at 239.

CITES, to some extent, “specifies which species may be traded and to what degree, and its members are expected to adhere to the restrictions, prohibitions and regulatory requirements imposed on trade by the agreement, its appendices, as well as resolutions adopted at any Conference of the Parties (CoP)”. It is on this score that, CITES is seen as being “responsible for the present international trade ban with respect to rhinos and rhino products, and any proposal to legalise trade would require approval thereunder”<sup>140</sup>.

CITES, as the umbrella legal document, provides framework<sup>141</sup> which the member states may use to translate into domestic legislation, making sure that there is uniform implementation at a national level. “NEMBA and the “TOPS Regulations”<sup>142</sup>, bears evidence to such initiative in South Africa.

### **2.3.2 THE OPERATION OF CITES**

CITES is the major regulator on “international trade in the species listed in the Appendices, through a permitting system that governs import and export”.<sup>143</sup> It is therefore the requirement(s) of CITES to obtain “government-authorized permits for any trade involving species or the products of species that are endangered or threatened by any encroachment on such species”<sup>144</sup>.

The main purpose of permitting, is “to provide a regulatory system for the control and monitoring of trade in wildlife across the borders of member states”.<sup>145</sup> This would then imply that successful application of CITES, basically relies on the efficacy of the permit(s) system, the competent domestic legislation as well as law enforcement.<sup>146</sup>

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<sup>140</sup> Trade ban is currently subject to white rhino which are partially listed under Appendix II, allowing for restricted trade in live rhino and hunting trophies.

<sup>141</sup> Department of Environmental Affairs

<sup>142</sup> Ibid Glazweski J Environmental Law In South Africa Second Edition (2005) Lexis Nexus Durban, SA at 50

<sup>143</sup> CITES, at article II (4).

<sup>144</sup> Glazweski J Environmental Law In South Africa Second Edition (2005) Lexis Nexus Durban, SA at 50

<sup>145</sup> CITES at article II (4).

<sup>146</sup> Ibid (n 144)

<sup>146</sup> Ibid (n 144)

The observation of the CITES preamble, depicts that “the purpose of this instrument is to strike a balance between species preservation and the competing economic and recreational demands placed upon wildlife”.<sup>147</sup>

CITES therefore, gives effect to both the conservationist and preservationist ideologies, as elaborated fully in Article II (4).<sup>148</sup> The balancing act as reflected throughout the Convention, “provides for the protection of species, and thus the restriction of trade, proportional to the risk posed to the sustainability of such species”.<sup>149</sup> It is vital to list species in a hierarchy of appendices, so as to classify such according to their vulnerability to likely experience extinction.<sup>150</sup> Proper administration dictates that species should be divided amongst the first three appendices.

Firstly, Appendix I lists species that are threatened with extinction which are or may be affected by trade. CITES requires that “trade in these species be severely restricted”.<sup>151</sup> Secondly, Article III of CITES, “prohibits commercial trade in Appendix I species and their products, and prescribes a strict permitting regime where both the importing and exporting country require permits for specific transactions”. This Appendix is the one advocating the “preservationist approach” by propounding the idea that the eradication of trade will eliminate such as one of the threats to the survival of species.<sup>152</sup>

Thirdly, Appendix II lists threatened species, whose strict regulation of trade is considered necessary in order to guard against utilisation that may threaten their sustainability. The objective of the Appendix is to advance the conservationist theory by allowing a sustainable level of commercial trade on species having the potential of facing the threat of extinction.<sup>153</sup>

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<sup>147</sup> CITES article II (4)

<sup>148</sup> Ibid (n 147)

<sup>149</sup> Ibid (n 147)

<sup>150</sup> Ibid (n 147)

<sup>151</sup> Ibid (n 147)

<sup>152</sup> J E Carey; A J Heimert : How the elephant lost his tusks’ 1995-6 104 *Yale L.J.* 1473 at 1476.

<sup>153</sup> Ibid 1477

It is required by CITES that export permits accompany trade in species listed in Appendix II, further that the export permits be monitored.<sup>154</sup>

### 2.3.3 CITES DECISIONS ON PROTECTION OF THE RHINO

South Africa ratified CITES on 13 October 1975, she was the 15<sup>th</sup> party to sign such a convention. During 1977, there was rhino poaching crisis, as such, all rhinos were placed on CITES Appendix I, which prohibited commercial trade rhinos internationally. It was only in 1994, at CITES CoP9 where South Africa succeeded in obtaining the partial down-listing of white rhino to Appendix II, even though trade remained restricted, such was authorised with respect to trading on live animals, and exporting hunting trophies legally.<sup>155</sup>

Similarly, CoP9 experienced the introduction of Resolution 9.14 on *Conservation of rhinoceros in South Africa*<sup>156</sup>, this encouraged parties to the Convention to, amongst others: “develop a recovery plan for their rhino population; to implement adequate legislation and internal trade restrictions; reduce illegal trade and increase law enforcement cooperation to curtail trafficking in rhino horn”.<sup>157</sup>

The resolution also incorporated a previous resolution which authorised legal sport hunting with respect to species on Appendix I, as non-commercial trade, in instances where such a trade would be beneficial to the said species.<sup>158</sup> TRAFFIC brought the emergence of the rhino horn trade in South Africa, including those that were legally acquired and subsequently laundered into the illegal trade to the attention of CITES CoP14.<sup>159</sup> Subsequent to that, CoP15 in 2010, the TRAFFIC/IUCN Reported on *“the national and continental conservation status of African and Asian rhinoceros species, trade in specimens of rhinoceros, stocks management, incidents of illegal killing of rhinoceroses, enforcement issues, and conservation management*

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<sup>154</sup> J E Carey; A J Heimert : How the elephant lost his tusks’ 1995-6 104 Yale L.J. 1473 at 1476

<sup>155</sup> T Milliken & J Shaw The South Africa - Vietnam Trade Nexus: A deadly combination of institutional lapses, corrupt wildlife industry professionals and Asian crime syndicates (2012) TRAFFIC, Johannesburg, South Africa at 58-60.

<sup>156</sup> Ibid (n 155)

<sup>157</sup> Ibid (n 155)

<sup>158</sup> Ibid (n 155)

<sup>159</sup> Ibid (n 155)

*strategies, with an evaluation of their effectiveness*”,<sup>160</sup> this was as a result of Resolution 9.14. The said report, which highlighted the escalation of rhino poaching and the trade in rhino horn, wherein South Africa and Zimbabwe were identified as the primary source countries, whereas Vietnam identified as the key consumer country, since majority of rhino horns poached in this countries, ended up at Vietnam.<sup>161</sup>

The main objective of CITES on CoP16, which was held in 2013, in Bangkok, where there was a follow-up report submitted by TRAFFIC / IUCN on “the status, conservation and trade of African and Asian rhinoceroses”<sup>162</sup>, such a report indicated trends since the CoP15 Report, and was aimed at fulfilling the mandate of Resolution 9.14. Vietnam was called by CITES CoP16, firstly, develop legislation relating to the domestic imports of hunting trophies, secondly, a database for the tracking of these trophies, and thirdly, to make progress in developing and implementing the South Africa- Vietnam 2012 - 2017 Joint Action Plan, and to improve the investigations and prosecutions of Vietnamese nationals who are suspected of any involvement in the illegal rhino horn trade within the South Africa.<sup>163</sup>

Legislation, regulations and any form of enforcement is important in such countries, as the scourge of rhino poaching is escalating uncontrollably. Proper and regulated measures are to be adopted, and enforced in order to avoid extinction of such animals.

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<sup>160</sup> J E Carey; A J Heimert : How the elephant lost his tusks’ 1995-6 104 *Yale L.J.* 1473 at 1476

<sup>161</sup> *Ibid* 1473

<sup>162</sup> *Ibid* 1475

<sup>163</sup> *Ibid* 1475

## **2.4 LAW ENFORCEMENT AGENCIES IN SOUTH AFRICA ON RHINO POACHING**

### **Introduction**

The South African law enforcement agencies, were formed based on the influence brought by the enactment of the Constitution<sup>164</sup> of the Republic of South Africa. The scourge of rhino poaching, as well as the inability to control such scourge, encouraged several groups and individuals to form such agencies. Despite the involvement of the South African Police Services (SAPS) and South African National Defence Force (SANDF), such scourge of rhino poaching has escalated tremendously.

### **2.4.1 National Wildlife Crime Reaction (NWCRU)**

NWCRU, a brain child of the Department of Environmental Affairs, was established in 2010. NWCRU, as a law enforcement structure, consists of member representatives from SAPS, SANParks, national and provincial nature conservation officials, NPA, the Asset Forfeiture Unit and INTERPOL, to function properly.

This initiative, was one of the first in at least a decade, wherein a national law-enforcement co-ordination body, constituting different officials, was put in place to operate effectively across provincial boundaries<sup>165</sup>. The development was aimed at stabilising the sky rocketing scourge of rhino poaching, and the threat it brought within the Republic.

It is eloquently applauded, that since the establishment of NRWCU, there are evidence of stability on rhino poaching, increased number of arrests and it has proven that joint effort in essential in fighting and winning war against rhino poaching, and related offences .<sup>166</sup>

### **2.4.2 THE NATIONAL PROSECUTING AUTHORITY (NPA)**

The NPA is the independent prosecuting authority in South Africa, which is responsible for all prosecutions related matters. There are five Business Units within

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<sup>164</sup> Constitution Act 108 of 1996

<sup>165</sup> Ngwakwe C and Mokgalong M, : Consumer Income growth and Rhino Poaching in South Africa, Environmental Economics, Volume 5, Issue 3, 2014.

<sup>166</sup> Ibid 4 - 7

the NPA, that are responsible for such prosecutions, being National Prosecuting Services (NPS), Asset Forfeiture Unit (AFU), Tax Unit, Specialised Commercial Crime Unit (SCCU) and Organised Crime Unit<sup>167</sup>.

Rhino crimes are prosecuted, by the Organised Crime Unit, which formulates the charges from the National Biodiversity Act, as well as the National and Provincial Nature Conservation Ordinances, which makes provision of prosecutions that relates to illegal dealing, trading and possession of rhino horn. In instances where the accused cannot be linked to a specific rhino poaching incident, they have been charged with trespassing and possession of firearms, as in many other cases that were prosecuted<sup>168</sup>.

The NPA, as the institution tasked with prosecution of all offences in the Republic, has invoked a wide range of legislation to enact charges upon those involved in rhino poaching offences, such as Prevention of Organised Crime Act (POCA) which codified offences such as racketeering, money laundering. Racketeering offences, are usually committed by a group of people, acting together, In furtherance of a common purpose, for monetary gain.

Recently, there has been a specific focus on investigating cases involving which syndicates, and a view to charging them with racketeering and money laundering offences, which carries hefty penalty clauses upon conviction<sup>169</sup>.

## 2.5 Conclusion

To sum up, although there are plans in place to increase the rhino population, there is no legislation specifically aimed at preventing poaching and given that a great number of rhino have been poached this year alone, the threat of these penalties may be to no avail<sup>170</sup>. The *Threatened or Protected Species Regulations (ToPS)*, under *NEMBA*, requires a permit to be issued for a person wishing to hunt, kill, remove parts, import or export and sell black rhino or any parts of it.

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<sup>167</sup> National Prosecuting Authority Act 32 of 1998

<sup>168</sup> Ngwakwe C and Mokgalong M, : Consumer Income growth and Rhino Poaching in South Africa, *Environmental Economics*, Volume 5, Issue 3, 2014.

<sup>169</sup> Ibid 7

<sup>170</sup> Media statement, 18 July 2013, Department of Environmental affairs.

Another applicable aspect of the law is the CITES,<sup>171</sup> under which all commercial trading of rhino products are banned. Despite these legislative efforts, policies and regulations, the poaching numbers continue to increase. Other countries have managed somewhat to combat the poaching pandemic by the implementation of laws, regulations and security measures to limit poaching and trafficking.

My observation is that, It is evident that the scourge of Rhino Poaching in South Africa is at its peak. This is based on the evident analysis and findings that, the commission of rhino poaching offences, are perpetrated by a group of individuals, acting in furtherance of a common purpose with each other. Such syndicates, makes rhino poaching offences, to be more complex and well organised. The punishment meted against such syndicates, upon conviction, must be severe, in order to send a clear message on the objective of deterrence.

Disturbingly, it is reported that majority of offenders arrested for the crimes relating to rhino poaching, are park rangers and police officers. The fight against rhino poaching would not be won if more drastic steps are not taken to address the incentives for poaching by the rangers and police officers.

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<sup>171</sup> *National Environmental Management: Biodiversity Act 10 of 2004.*

## CHAPTER THREE: RHINO POACHING, A NEW FORM OF ORGANISED CRIME

### 3.1 Introduction

Organised Crime involves the co-operation of several persons or groups. The main activity of the organisation is usually professional crime, depending on the structure of the organisation being loose or formal in nature. The main objective of the said organisation, would be to acquire benefits through commission of offence(s)<sup>172</sup>.

Organised Crime can be seen as cancer within society. Members of society treat each other according to the rules they call laws. Organised Crime flouts rules aimed at preventing antisocial conduct. Communities ought to be careful, not to be involved in the futile pursuit of some crime free future.<sup>173</sup> Corruption and violence are usually used to achieve the objectives of Organised Crime.<sup>174</sup> It is observed that wildlife crime, are committed by group of syndicates, who organised themselves in a fashion that, at times it becomes difficult for law enforcement officers to detect them. However, there are success stories, where enforcement has been very effective, in instances where such offenders are arrested and prosecuted<sup>175</sup>.

The only successful way to win the fight against wildlife crimes, including rhino poaching, is through collaboration of law enforcement agencies on national and international level, to have specialities in dealing with the scourge. A helping hand would be required by political commitment in advancing such a success, which would reduce the level of extinction of such precious animals<sup>176</sup>.

Failure to have effective enforcement in discouraging the international syndicates involved in wildlife crime is a great and persistent dilemma. Such a dilemma is encouraged by lack of investment in wildlife and commitment from the highest levels of government, has faces such crimes, to have a proactive and a thought out plan for

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<sup>172</sup> Misha Glenny *McMafia: Crime Without Frontiers* 2008, Bodleyhead at 64

<sup>173</sup> Edwards and Gill "After transitional Organised Crime? The Politics of Public Safety" 278

<sup>174</sup> Joyce *Criminology* 2011: Complete Introduction 128 – 129.

<sup>175</sup> Sehlabela case (note 124 above)

<sup>176</sup> Environmental Investigation Agency: 2014 p 221

effective response<sup>177</sup>. Organised crime has proven to be the main challenge that is facing governments and intergovernmental organisations in grappling it.

The history thereof, the consequences and its different forms, are well documented. In South Africa, prevention of Organised Crime is legislated, and governed by “*The Prevention of Organised Crime Act*<sup>178</sup> 121 of 1998 (POCA) (as amended)”.

## 3.2 PREVENTION OF ORGANISED CRIME ACT<sup>179</sup> (POCA)

### 3.2.1 OVERVIEW

On 21 January 1999, POCA<sup>180</sup> became operational. The preamble thereof, recognises, *inter alia*, that: “the South African common law and statutory law fail to deal effectively with organised crime, money laundering and criminal gang activities, and also fail to keep pace with international measures aimed at dealing effectively with organised crime, money laundering and criminal gang activities”.<sup>181</sup>

The purposes of POCA, amongst others, is to make sure that: “no person should benefit from the fruits of unlawful activities.”<sup>182</sup> The Supreme Court of Appeal has held that: “one should not lose sight of the fact that the purpose of the Act [POCA] is to divest criminals of the proceeds of their criminal activity and to prevent them from deriving benefit from such proceeds”.<sup>183</sup>

To sum an extent, POCA has limited the rights of those who are subjected to it. The State, vest with exercise of power to impose such limitations, has not inherently experience any problems in that regard.<sup>184</sup> In practise, it is always observed that , the

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<sup>177</sup> Ibid 223

<sup>179</sup> Act 121 of 2008

<sup>180</sup> Ibid (n 178)

<sup>181</sup> Ibid (n 178)

<sup>182</sup> Ibid (n 178)

<sup>183</sup> Senior Project Officer, Criminal Justice Initiative, Open Society Foundation for South Africa.

<sup>184</sup> For the definitions of organised crime see A. Wright, *Organised Crime* (2006), Willan Publishing: Cullompton, 2–26; V. Mitsilegas, ‘From National to Global, From Empirical to Legal: The Ambivalent Concept of Transnational Organised Crime’ in M. E. Bear (ed) *Critical Reflections on Transnational Organised Crime, Money Laundering and Corruption* (2005), University of Toronto Press: Toronto, 55–87. POCA does not define organised crime.

common law, like any other law, has always been seen to allow severe restrictions on the rights of all convicted offenders.<sup>185</sup>

### **3.2.2 LINK BETWEEN RHINO POACHING AND ORGANISED CRIME**

The South African rhino horn trade organisation, has evolved in a rapid way, to a phenomenon which is seen as efficient and highly sophisticated. It is apparent about the involvement of the syndicates from Asian countries, who are behind the illegal export of rhino horn from Africa to such Asian countries.

It is further evident that the illegal trading networks, are having direct links with other highly lucrative natural resource product trades within the Republic, which includes abalone, ivory, lion bones, crocodile organs and live game<sup>186</sup>. Rhino poaching syndicates are operating nationally in an organised fashion and are well known to participate in other organised, high-risk criminal activities which includes drug and diamond smuggling, vehicle theft, armed robberies and ATM bombings<sup>187</sup>. It cannot be excluded that key individuals within the Republic, have compromised relationships with organized crime kingpins in Southeast Asia.

Recently, the involvement of members of Viet Nam's diplomatic community in rhino poaching has been exposed, this is a unique and very worrying aspect<sup>188</sup>. This clearly indicates that it is not all those who belong to criminal classes, that can be linked to rhino poaching incidents. It can be safely submitted that those who are involved in rhino poaching incidents, usually disguises their true nature, in order to avoid detection. It is on this basis that, to some an extent, rhino poaching, has the characteristics, of white collar crime. Offenders are usually from respectable backgrounds, and detection becomes a huge dilemma.

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<sup>185</sup> *ABSA Bank Ltd v Fraser and another* 2006(2) SACR 158 (SCA) , A. Kruger, *Organised Crime and Proceeds of Crime Law in South Africa* (2008), LexisNexis, Durban.

<sup>186</sup> *S v Job Basi Tlou and 4 Others* Case A 25/2015 (Unreported decision of NGHC)

<sup>187</sup> *S v Morris Tumelo Sehlabela and 2 Others* Case no 723/2013 (Unreported decision of NGHC)

<sup>188</sup> *Ibid* (n 186)

### 3.2.3 THE ROLE AND INVOLVEMENT OF SYNDICATES

Syndicates or criminal gangs, are organised in a fashion that they are, to some extent, be regarded as specialist in commission of specific offences. The specialist skills, are usually attained, when one practises in their line of speciality to achieve goals set by the syndicate. In most instances, a particular member would be given a specific task, which would have the fashion of reporting in a hierarchical manner<sup>189</sup>.

Organized crime as practised by syndicates, is run by leaders who gives instructions to foot soldiers for the participation and involvement in criminal activity. In rhino poaching, the primary focus of syndicates on criminal activity, in cases of rhino poaching, is the acquisition of rhino horns, this will be made possible through legal trophy hunting. This would further be augmented by a concerted efforts to purchase rhino horn from unregistered private owners, in most instances, such stocks would be illegal. Sports hunting industry is an opportunistic market in the Republic. The vigilance of South African law enforcement officers, identified five Vietnamese syndicates which were operated in a professional way around 2007, in order to acquire rhino horns<sup>190</sup>. It is not in dispute that Asian-run rhino horn trade operations in South Africa has increased steadily, it is evident that majority of rhino horns acquired in the Republic, end up in markets at Vietnam<sup>191</sup>.

Vietnam, is the capital of rhino horn industry in Asia and other Asians, tend to associate themselves in the trade in rhino poaching and the, Vietnamese operations. It can be safely submitted, that several Thai businessmen, showed passion of the illegal export of rhino horns, which is from “pseudo-hunts” in South Africa. Such hunting(s) are to Asian company(s), mostly based in Lao PDR, which has a very extensive wildlife trade dealings in Vietnam market<sup>192</sup>.

It has been observed that Chinese operations in South Africa are not lagging behind in the acquisition of rhino horn(s), such are usually sold to Vietnamese operatives, and in other instances, exported to China<sup>193</sup>. Further evidence is that the Thai and

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<sup>189</sup> S v Morris Tumelo Sehlabela and 2 Others Case no 723/2013 (Unreported decision of NGHC)

<sup>190</sup> WWF, 2012:45

<sup>191</sup> Ibid

<sup>192</sup> Sehlabela case (n 188)

<sup>193</sup> Ibid (n 188)

Cambodian nationals, also plays roles in involvement and participation of the illegal movement of rhino horn to Asian markets, which at times, is disguised as “sport hunting’s”<sup>194</sup>

In rhino horn trade, there is a causal nexus that extends from the poacher at a local level, which would end up, generally in an Asian country, to an end-user, which in most instances would be Vietnam. There are other role players, such as middleman buyers, exporters and couriers, who take roles along the ever unending trade chain. In most instances, dealing with rhino horns is supported by several sources, which includes “sport hunted trophies”, “stock thefts and poached animals”<sup>195</sup>.

### **3.2.4 ROLE PLAYERS IN RHINO POACHING**

There has been some serious concerns raised repeatedly, which is about irregular conduct by some officials on a national to a provincial level, and all the way up to ranks in senior levels, which includes staff management. The undisputed report is that four SANParks officials, who were based in Pretoriaskop, in the Kruger National Park (KNP), were involved and later arrested in participating in the rhino poaching incidents<sup>196</sup>.

It is a well-known fact that inside information plays a pivotal role in enhancing and giving syndicates information<sup>197</sup>. Such information provided to syndicates, is critical to events leading to rhino poaching. The number of arrests reported, were as a result of the investigation(s) which were conducted by joint members of SANParks and South African Police Service (SAPS), and further by the SAPS K9 Unit for Endangered Species. The Reserve Manager for Atherstone Nature Reserve in Limpopo, Mr Walter Nkuna, committed suicide after it was alleged that he was involved by assisting three Mozambican nationals in a rhino poaching incident at the reserve, resulting in the death of five rhinos in March 2012.<sup>198</sup>.

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<sup>194</sup> Ibid (n 188)

<sup>195</sup> TRAFFIC, 2012:23

<sup>196</sup> Milliken & Shaw, 2012: Environmental magazine: Traffic, p 45

<sup>197</sup> Ibid 46

<sup>198</sup> Rademeyer, Killing Fields 2012, p156

### **3.2.5 INVOLVEMENT OF WILD LIFE PROFESSIONALS**

It is important to invest in anti-poaching and wildlife protection. Security of wild life, including the rhino should be highly considered, and budget allocated for such. Indeed, the poaching of rhinos unknown for decades. There was no need for adequate fencing and a few ranch hands, “most game ranch landowners only required modest precautions in protecting their rhinos”<sup>199</sup>. By the dawn of 2007, it became clearer that there was new breed of poachers in South Africa<sup>200</sup>.

### **3.3 ANALYSIS OF THE LEMTHONGTHAI DECISION<sup>201</sup>**

The facts of the case are briefly as follows, the appellant, Mr Chumlong Lemthongthai, a Thai national, successfully applied in terms of Chapter 7 of the National Environmental Management: Biodiversity Act 10 of 2004 (the NEMBA) to the Department of Environmental Affairs for 26 permits to shoot and kill rhino, representing to them that professional hunters would hunt and kill the rhino for trophy purposes.

In fact, the persons whose names appeared on the permits did not participate in the hunt that was supervised by department officials. Ultimately, at the instance of the appellant, 26 rhino were shot and killed and most of their horns exported. Simply put, the object was not to hunt rhino for trophy purposes but rather to engage unlawfully in trade in rhino horn. To that end the appellant unlawfully and intentionally made improper use of customs documents to enable the rhino horn to be exported. The name of the consignee and country of destination was changed, contrary to the CITES, in the permits issued in relation to the rhino hunt.

The appellant was charged in the Regional Court with 26 counts of contravening “S 80(1)(i) of the Customs and Excise Act 91 of 1964 (the CEA)”, in that he traded illegally in rhino horn. He also faced counts 27 to 52 which related to contraventions of s 57(1) read with, amongst others, ss 101(1) and 102 of the NEMBA. The

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<sup>199</sup> Traffic; Environmental Magazine, 2012, p 29

<sup>200</sup> Traffic; Environmental magazine, 2011, p45

<sup>201</sup> S v Lemthongthai 2015 (1) SACR 353 (SCA)

alternative counts are irrelevant.

Section 80(1)(j) of the CEA reads as follows:

“(1) Any person who –

(j) makes improper use of a licence, permit or other document issued in respect of goods to which this Act relates;

shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or treble the value of the goods in respect of which such offence was committed, whichever is the greater, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.”

Section 57(1) of the NEMBA reads as follows:

“A person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7.”

Section 101 of NEMBA provides for penalties and deals with further offences.

Section 101(1)(a) reads as follows:

“(1) A person is guilty of an offence if that person contravenes or fails to comply with a provision of –

(a) section 57(1), 57(1A), 65(1), 67(2), 71(1), 81(1) or 81A(1); . . . .”

Section 102(1) and (2) provides:

“(1) A person convicted of an offence in terms of section 101 is liable to a fine not exceeding R10 million, or an imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment.

(2) 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.”

Section 88 under Chapter 7 of NEMBA makes provision for permits to engage in a restricted activity. Section 90 makes it obligatory for the permit to specify the purpose for which it is issued. Section 92 provides for ‘integrated permits’. Section 92(1)(a) and (b) reads as follows:

“(1) If the carrying out of an activity mentioned in section 87 is also regulated in terms of other law, the authority empowered under that other law to authorize that activity and the issuing authority empowered under this Act to issue permits in respect of that activity may –

- (a) exercise their respective powers jointly; and
- (b) issue a single integrated permit instead of a separate permit and authorisation.”

‘Restricted activity’ is defined in s 1(a), inter alia, as follows:

“(i) hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen;

...

(iv) importing into the Republic, including introducing from the sea, any specimen of a listed threatened or protected species;

...

(ix) selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species; . . . .”

The accused, being faced with over whelming evidence, pleaded guilty to all the offences, and was convicted on his plea of guilty.

The Magistrate took into account the seriousness of the offence and was particularly concerned about the appellant’s manipulation of the permit system. He held it against the appellant that he used the identification particulars of other persons in order to procure the permits. The Magistrate considered, in favour of the appellant, the fact that he had been in custody for a period of approximately 16 months. He was concerned about preservation of South Africa’s biodiversity. The Magistrate considered the appellant to be ‘almost the same as a poacher’ because the ultimate aim was to obtain the rhino horn.

For purposes of sentencing, the Magistrate took counts 1 to 26 together and sentenced the appellant to ten years’ imprisonment. Counts 27 to 36 were taken as one for the purposes of sentencing and the appellant was sentenced to 12 years’ imprisonment. He took counts 37 to 46 as one for purposes of sentencing and the appellant was sentenced to 12 years’ imprisonment. Counts 47 to 52 were also

taken as one for sentencing purposes and the appellant was sentenced to six years' imprisonment. In summary he was sentenced as follows:

- “(i) Counts 1 to 26: ten years' imprisonment;
- (ii) Counts 27 to 36: 12 years' imprisonment;
- (iii) Counts 37 to 46: 12 years' imprisonment; and
- (iv) Counts 47 to 52: six years' imprisonment.”

The effective sentence was 40 years' imprisonment. The Magistrate provided no reason for grouping counts 27 to 52 in this way and none appears from the record. It seems that his concern was simply to arrive at an overall sentence that he regarded as appropriate without trespassing beyond the statutory limits on his sentencing powers.

The appellant appealed the sentences to the high court (Tsoka J, Levenberg AJ concurring), which took into account that the maximum period of imprisonment in terms of s 80(1)(i) of the CEA was five years. The high court reasoned that, since the Magistrate took the number of counts in relation to this section of the CEA as one, he ought rightly to have restricted it to five years' imprisonment rather than the ten years' imprisonment imposed.

Similarly, so the trial court reasoned, the same applied in respect of the sentences imposed in terms of count 27 to 36 and counts 37 to 46. Having determined that the trial court misdirected itself as aforesaid the high court considered itself at liberty to impose sentence afresh. In engaging in that exercise the high court took into account the appellant's personal circumstances, namely, that he was 44 years old, married, had two children at university and was a first offender. It considered in his favour that he had been in custody for 16 months awaiting the finalisation of his trial.

The High Court took into account aggravating factors. First, that the permits to shoot rhinos were issued on the basis of a fraud perpetrated on the authorities and that the offences were pre-meditated, inspired by greed. The high court made an assumption that the appellant was part of a Thai syndicate which specialises in dealing in rhino

horn. The high court held it against the appellant that he had not disclosed the identity of the syndicate to the authorities.

Tsoka J correctly took into consideration that the rhino population since 2010 has been in decline due to illegal rhino poaching. He referred to the decision in *Chu v The State* [2012] ZAGP JHC 204 (13 March 2012) in which the South Gauteng High Court, sitting as a court of appeal, was emphatic in its concern about our diversity heritage and the protection of endangered species such as the rhino. At para 20 Tsoka J said the following:

‘The sentiments expressed by Willis J above resonate not only with the people of the world but with the population of South Africa. If we do not take measures such as imposing appropriate sentences for people such as the appellant, these magnificent creatures would be decimated from earth. Our Flora and Fauna would be poorer for it. South Africa would no longer be the safe home of one of the “Big Five”, as it is known all over the world.’

The high court took the view that the present case called out for a sentence that would act as a deterrent. Paras 33 and 34 of the judgment of the high court, which contain its conclusion, are set out hereafter:

‘Having regard to the personal circumstances of the appellant, the nature and circumstances of the offences that the appellant was convicted of and the interests of justice, the just and appropriate sentence would be 5 years imprisonment in respect of counts 1 to 26; 10 years imprisonment in terms of counts 27 to 36; 10 years imprisonment in respect of counts 37 to 46 and 10 years imprisonment in respect of counts 47 to 52, totalling 35 years imprisonment. It is ordered that the 5 years imprisonment in respect of counts 1 to 26 run concurrently with the 30 years imprisonment in respect of counts 27 to 52.

In the result the appeal against sentence imposed on the appellant succeeds. It is ordered that the sentence imposed on the appellant is set aside and replaced with a direct imprisonment of 30 years.’

Like the magistrate, the high court divided counts 27 to 52 into arbitrary groups in the quest to arrive at a sentence that was both permissible and, in its view, appropriate, but in the absence of any rational reason for this grouping it was an inappropriate approach.

The SCA deliberated on the matter, inviting the State and the defence to make their

submissions, pertaining to an appropriate sentence, to be considered by the SCA. Navsa JA, penned down the following:

The order of the court below is set aside and substituted as follows:

“The appeal against sentence is upheld to the extent reflected hereafter:

- (a) The sentences imposed by the court below are set aside and substituted as follows:
  - (i) In respect of count 1 to 26 the accused is fined R1 million or five years’ imprisonment.
  - (ii) In respect of counts 27 to 52 a sentence of imprisonment of six months on each count is imposed.
  - (iii) Thus, the effective sentence is payment of a fine of R1 million plus a period of imprisonment of thirteen years, antedated to 9 July 2011 and failing payment of the fine to an effective period of imprisonment of 18 years.”

### **3.4 Conclusion**

The trade in rhino horn usually involves internal middleman dealers, majority being South African citizens. In a syndicate, different participants have different roles, which they play to the point that the rhino horn is ultimately sold to Asian syndicates, where the criminal nexus in rhino poaching ends<sup>202</sup>. It is further evident that law enforcement on rhino poaching should be kept stringent. The outcome would be to deter would be perpetrators, on this new form of organised crime. Such offences has the characteristics of being white collar crime.

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<sup>202</sup> WWF ; Environmental magazine, 2011, p 29

The landslide decision on rhino poaching<sup>203</sup>, sets a robust precedence that must be followed confidently when rhino poachers are investigated and prosecuted. More stringent enforcement of laws on rhino poaching, would send a clear message, that rhino poaching, as a form of organised crime, must be severely penalised. Rhino poaching offences may be categorised as white collar crime, considering the involvement of syndicates and the benefits derived from such offences<sup>204</sup>. Our courts have been vocal on sentencing white collar criminals<sup>205</sup>, and such attitude should be adopted when sentencing rhino poachers. The seriousness of this type(s) of offences was emphasized in S v Sadler<sup>206</sup>, where the SCA had the following to say:<sup>207</sup>

*“...So called ‘white collar’ crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of ‘white collar crime’ as non-violent crime and its perpetrators (where they are first offenders) as not truly being ‘criminals’ or ‘prison material’ by the reason of their often ostensibly respectable histories and backgrounds. Empty generalizations of that kind are of no help in assessing appropriate sentences for ‘white collar’ crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from ‘respectable’ backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entails gross breaches of trust. These are heresies. Nothing will be gained by lending credence to them. Quite contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not visited with rigorous punishment will be fostered and more will be tempted to indulge in it.*

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<sup>203</sup> Lemthongthai 2015 (1) SACR 353 (SCA)

<sup>204</sup> CR Snyman, Criminal Law 2006, Juta and Co, Cape Town at 235

<sup>205</sup> S v Sadler 2000 (1) SACR 331 (SCA)

<sup>206</sup> Ibid (n 204) para 11

<sup>207</sup> Sadler(n 204) para 11 – 13

*It is unnecessary to repeat yet what this court has had to say in the past about crimes like corruption, forgery and uttering and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society to require elaboration.”*

The undisputed truth is, rhino poaching, as a form of organized crime. Must be severely penalized. Such offences requires some level of planning, by organized and professional gangs. The syndicates are driven by greed to commit such offences, and as such, all the above would be considered as aggravating for sentencing purposes.

## CHAPTER FOUR: COMPARATIVE ANALYSIS ON RHINO POACHING

### 4.1. Introduction

To compare means to put objects or ideas side by side to see whether they pair<sup>208</sup>. Similarities and differences are marked and brought together, this requires method. First, one has to describe what is compared, then identify similarities and differences, and finally, to explain the differences and similarities. To perform this tasks, one needs a point of reference. The golden rule is therefore, to compare the comparable, like should be compared with like<sup>209</sup>.

It is an acceptable view that, “comparing the law can be empowering and liberating, provided that we do not take our terms and perspective on law for granted, but are open to a radical re-evaluation of the domestic consciousness<sup>210</sup>. Without the employment of comparative method, no body of knowledge regarding the facts of the physical world or the facts of social life can take rank as a science”<sup>211</sup>.

### 4.2 REGIONAL ENFORCEMENT

#### 4.2.1 Kenya

Kenya has established an institution responsible for law enforcement concerning wildlife - the Kenya Wildlife Service (KWS)<sup>212</sup>. The KWS has full prosecution powers and has within it a security division to investigate wildlife crimes specifically<sup>213</sup>. Like the DRC, Kenya has strict hunting regulations that are enforced by the KWS. These regulations and institutions are controlled by the *Wildlife Conservation and Management Act (WCMA)*<sup>214</sup>. The security division has spheres covering protection, development, investigation and intelligence.

Each division has a role to combat poaching, survey and monitor, investigate and prosecute. Powers awarded to these officers as well as other law enforcement

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<sup>208</sup> Critical Comparisons: (26) 1985 Harvard International Law Journal; p 441

<sup>209</sup> Ibid p 441

<sup>210</sup> Ibid p 441

<sup>211</sup> HE Yntema: Zweigert and Puttfarken Rechtsvergleichung 1978; 175

<sup>212</sup> Wildlife (Conservation and Management) Act of 1976.

<sup>213</sup> H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 30.

<sup>214</sup> Wildlife Conservation Act of 1976.

officers include those of inspection, detention, arrest and search and seizure<sup>215</sup>. The act also imposes strict penalties on those who contravene the law, and where concerning rhino, an offender can be imprisoned for up to 10 years and/or a fine up to \$460 when a trophy such as a rhino horn is involved<sup>216</sup>.

#### 4.2.2 Tanzania

The wildlife of Tanzania, like South Africa, is central to its tourism industry<sup>217</sup>. As this sector contributes up to 17% of Tanzania's gross domestic product, it is crucial that the wildlife be protected<sup>218</sup>. This protection is governed by the *Wild Conservation Act*<sup>219</sup>, the *National Parks Act*<sup>220</sup> and the *Forest Resources Management and Conservation Act*<sup>221</sup>. These Acts impose regulations and penalties with regard to poaching offences.

Like South Africa, Tanzania has a large number of National Parks<sup>222</sup>. This makes for an easy comparison between responses to poaching. By looking at the way in which other African countries are combating the war against poaching, it is evident that South Africa is not leading the troops. In South Africa a total of 142 alleged poachers have been arrested since the beginning of the year 2015, yet the number of incidents continues to grow<sup>223</sup>.

Perhaps South Africa needs to take the lead and combine the effective mechanisms that our African neighbours have in place in order for us to compete in this battle. A page can be taken from all the countries by making the penalties higher as the Department of Environmental Affairs is seeking to do.

The DEA is seeking the amendment of the penalty clause to read:

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<sup>215</sup> H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 34.

<sup>216</sup> Wildlife (Conservation and Management) Act of 1976 sch 56.

<sup>217</sup> H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 50.

<sup>218</sup> Ibid 51

<sup>219</sup> Wildlife Conservation Act 5 of 2009

<sup>220</sup> VII Laws of Tanzania: Principal Legislation, Cap.282.

<sup>221</sup> Forest Resources Management and Conservation Act 10 of 1996

<sup>222</sup> H Goitom (2013) 'Wildlife trafficking and poaching' *Law Library of Congress* 52.

<sup>223</sup> Media statement, 18 July 2013, Department of Environmental affairs.

- “A fine, not exceeding R10 million;
- Imprisonment, not exceeding 10 years, or
- Both such fine and imprisonment”<sup>224</sup>

Again, this is merely imposing stricter penalties, not putting into effect enforcement or prevention methods. South Africa could look at the establishment of a special unit for wildlife protection such as in Kenya. Perhaps stricter hunting regulations are needed, as in the DRC<sup>225</sup>.

South Africa, like Tanzania, relies on our wildlife, it is part of country’s heritage and therefore it seems logical to implement anything possible that could preserve this. Rhino in South Africa is dwindling and action needs to be taken to prevent poaching. The world is looking to South Africa to take the lead and in a country where the law has been able to resolve many problems surely it can also be used to implement change in protecting the rhino<sup>226</sup>.

The comparative law establishes that South Africa will be supported in its ventures against poaching<sup>227</sup>. There is already a basis of effective methods of prevention or regulation in place throughout Africa and this should be used in combination with our resources and international interest to prevent the irreversible consequences of rhino poaching<sup>228</sup>. NEMBA’s plans to increase the rhino population and implement stricter penalties will be to no avail if poaching statistics continue to rise. The problem is calling out to the law and whilst it is in our hands something should be done before the poachers becomes heroes in the extinction of the rhino<sup>229</sup>.

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<sup>224</sup> National Environmental Management: Biodiversity Act 10 of 2004

<sup>225</sup> H Goitom (2013) ‘Wildlife trafficking and poaching’ *Law Library of Congress* 52.

<sup>226</sup> Ibid 52

<sup>227</sup> Ibid 53

<sup>228</sup> Ibid 53

<sup>229</sup> Ibid 54

A combination of international co-operation, political will, tough penalties and aggressive enforcement are all needed desperately to save these species. Without them these animals face a very uncertain future<sup>230</sup>.

### **4.3 INTERNATIONAL ENFORCEMENT**

#### **4.3.1 Vietnam**

Recently, Asian nationals have been in the lime light for all the wrong reasons. The Viet Names are leading the pack in the illegal hunting of White Rhinos in South Africa. Such has been a dilemma since April 2012, until the intervention of the Minister for Water and Environmental Affairs, who announced suspension of the issuing of hunting licences to all Vietnamese nationals within the Republic<sup>231</sup>.

Since 2004, it is evident that such Vietnamese nationals played a major role in the escalation of rhino horn prices. The involvement of these Asian nationals, which is mostly used for acquiring horn for commercial trade purposes, has been termed “pseudo hunting”<sup>232</sup>. In South Africa, rhino hunting is perpetrated by the triad,” the foreign hunting client, the landowner with White Rhinos on the property and the professional hunter(s)”. it has been observed that, “landowners and professional hunters generally collaborate to market White Rhino hunts internationally through hunting magazines, websites on the internet or through visitation to the annual sport hunting conventions like those offered each year in the United States by Safari Club International”<sup>233</sup>.

The Asian hunters, particularly the Vietnamese, were introduced into illegal hunting, by the involvement of dodgy professional hunters, as well as unscrupulous property owners within South African<sup>234</sup>.

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<sup>230</sup> In Camera ;Environmental magazine 2013, p 22

<sup>231</sup> Statement by the Department of Environmental Affairs on the on going rhino poaching and update on interventions aimed at addressing the problem. Media statement, Department of Environmental Affairs, 29 March 2012, Johannesburg, South Africa.

<sup>232</sup> Ibid (n 230)

<sup>233</sup> Ibid (n 230)

<sup>234</sup> Ibid (n 230)

### 4.3.2 Legislation regulating Rhino Poaching in Vietnam

Wildlife trade, including products, and anything that is made from either native or exotic rhino species, are properly regulated by Vietnamese law. Legislation provides “for either the issuance of fines or the imposition of prison sentences depending on whether or not the violation in question resulted in *serious consequences*”<sup>235</sup>. On Viet Names national level, the illegal and exploitation of the indigenous Javan Rhino is regulated under “the *Government Decree 32/2006/ND-CP on the Management of Terrestrial Endangered, Precious and Rare Species of Wild Plants and Animals*”<sup>236</sup>.

Vietnam became the signatory to CITES since 1994 as, the 121st Party to the Convention. CITES has been developed domestically and implemented in Viet Nam through “*Decree 82/2006/ND-CP on Management of Export, Import, Re-export, Introduction from the Sea, Transit, Breeding, Rearing and Artificial Propagation of Endangered Species of Precious and Rare Wild Fauna and Flora*”<sup>237</sup>. The said Decree, “covers the international trade in endangered or threatened fauna and flora of both domestically protected species and those covered by CITES”<sup>238</sup>.

The Decree further makes provision for “the CITES Appendices in accordance with Articles III, IV and V of the Convention”<sup>239</sup>, which further adopted “the international permit system”, as one the requirement for such trade<sup>240</sup>. Having said that, all CITES Appendix I species, which includes, all non-indigenous rhino species, are properly regulated under this Decree, which requires CITES exports and , or imports permits, in exceptional circumstances.

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<sup>235</sup> Ives, M. (2012). Vietnam craves rhino horn; costs more than cocaine. Associated Press. <http://news.yahoo.com/vietnam-craves-rhino-horn-costs-more-cocaine-062134928.html>.

<sup>236</sup> Management of Terrestrial Endangered, Precious and Rare Species of Wild Plants and Animals of 30 March 2006

<sup>237</sup> Decree 82/2006/ND-CP on Management of Export, Import, Re-export, Introduction from the Sea, Transit, Breeding, Rearing and Artificial Propagation of Endangered Species of Precious and Rare Wild Fauna and Flora of 10 August 2006

<sup>238</sup> Article 1.a. of CITES

<sup>239</sup> Article 2.5 of CITES

<sup>240</sup> Article 3 of CITES

The legal instrument alluded to above, dealing in international trade in White Rhino trophies from South Africa, is used for valid export CITES permits for Appendix II species from all the exporting countries. Viet Nam has been identified as the leading importer of rhino horns, which are obtained through legal sport hunting in South Africa. Procedurally, to import a rhino horn specimen for purposes of a hunting trophy, certain documents have to be presented to the CITES Management Authority in Viet Nam:

- "a CITES export permit from the country of origin;
- the hunting permit issued by the government authority in the country of origin;
- a copy of the passport of the Vietnamese hunter to verify that the person stayed in the country where the rhino was hunted; and
- a residence certificate issued by the local police<sup>241</sup>. Viet Nam's CITES Management Authority will then, based on the copy of the export permit, confirm legality and the particular details with the CITES Management Authority in the country of export, more specifically South Africa. If importation is allowed, stipulation is made that the horn is not eligible for sale, but it is taxed at the rate of 3% of its value, which is calculated at USD25 000 per kg<sup>242</sup>.

The Penal Clause for the violation of these laws, are covered under the Viet Names Penal Code under certain circumstances such as: "Where the violation is considered to be a serious one or criminal offence, or *Decree 99/2009/ND-CP on Sanctioning of Administrative Violations in the Domain of Forest Management, Forest Protection and Forest Product Management*<sup>243</sup>, and further, if the violation is regarded as an administrative infraction".

The "*Decree 99/2009/ ND-CP*" only applies to "violations considered to be less serious in nature, with financial penalties for the exploitation of species protected

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<sup>241</sup> Tung, Q. D. (2011). *Rhino and Rhino Horn Management in Viet Nam*. PowerPoint presentation given at CAWT Rhino Trafficking Workshop, Johannesburg, South Africa, 26-27 September 2011.

<sup>242</sup> Ibid

<sup>243</sup> Sanctioning of Administrative Violations in the Domain of Forest Management, Forest Protection and Forest Product Management of 2 November 2009

under this decree based on the value of the goods, with a maximum penalty of VND500 million (approximately USD29 000)<sup>244</sup>.

Where an offence serious, more than an administrative violation, the criminal law concerned will be effected and applied, wherein penalties are to be issued under the Penal Code, of 2009<sup>245</sup>. Penalties prescribed under the Penal Code, includes “fines, non-custodial reform (i.e. non-detention re-education) for up to three years, or a prison sentence of six months to three years”<sup>246</sup>. Seriousness of the offences under the Penal Code, is considered and determined by the value of goods seized and whether a violation:

- “is conducted in an organized manner,
- results through abuse of position held,
- results through abuse of the power under position held,
- entails hunting in a prohibited area or prohibited seasons, and / or
- has caused severe or exceptionally severe consequences. Such violations result in a maximum penalty of VND500 million (USD29 000) and up to seven years imprisonment”<sup>247</sup>.

#### **4.4 China**

In response to an international trade ban to protect wild rhinos in 1993, the Chinese government took the initiative of banning the use of rhino horn used in traditional Chinese medicine. The ban was further to the effect of removing rhino horn from the Chinese pharmacopoeia, which is regulated and administered by the Ministry of Health, of the People’s Republic of China. Despite the ban, rhino horn remains one of the ingredients which are in demand for use within Traditional Chinese Medicine as well as China and Southeast Asia nations<sup>248</sup>.

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<sup>244</sup> Sanctioning of Administrative Violations in the Domain of Forest Management, Forest Protection and Forest Product Management of 2 November 2009

<sup>245</sup> Article 190.1

<sup>246</sup> Ibid (n 244)

<sup>247</sup> Article 190.2 and 3

<sup>248</sup> The Journal of Chinese Medicine. [www.jcm.co.uk](http://www.jcm.co.uk) accessed 20/03/2015.

It has been observed that high dosage of rhino horn mixture, might slightly reduce fever, it is however, not worth pursuing as a medicine, more so since acetaminophen works more effectively<sup>249</sup>. Be that as it may, The high demand for its use for traditional medicine and as a speculative asset, appears to have grown in recent years, especially in Asian countries.

The uncontested observation about the use of rhino horn is that it “relieve fever, improve sexual competency, detoxify the body, and in recent years in Vietnam, serves as a magical cure for cancer and hangovers, with no conclusive medical scientific evidence”<sup>250</sup> On the other hand, rhino horn is also used to demonstrate affluence, bragging rights, and social status both as a party drug and as a gift to important political officials, in some instances used for ornaments and utensil<sup>251</sup>

#### **4.4.1 Legislation regulating rhino poaching in China**

CITES<sup>252</sup>, which played a pivotal role since after its enactment, introduced ban on the commercial trade in rhino products. Despite the ban, some countries were however, allowed to trade live rhinos and trophy hunting(s). The remainder of all other rhino species were categorised to be on Appendix I of CITES listings by 1977. On the other hand, Appendix I species were prohibited from being used and traded internationally for commercial purposes.

The South African Southern White rhino saw a great improvement in 1994<sup>253</sup>, as such, there were then down-listed to Appendix II. All the Species placed on Appendix II are identified as “not currently threatened by extinction, but may become threatened if trade is not strictly regulated”<sup>254</sup>.

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<sup>249</sup> Beech, H. “Killing Fields: Africa’s Rhinos Under Threat.” TIME Magazine / 2011. Nowell, Kristin. “Species trade and conservation, Miliken T and Shaw J, The South Africa –Vietnam Rhino Horn Trade Nexus Traffic, 2012.

<sup>250</sup> Ibid (n 248)

<sup>251</sup> Ibid (n 248)

<sup>252</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973

<sup>253</sup> IUCN Red List. IUCN, 2014.

<sup>254</sup> Ibid (n 252)

In China, rhino poaching is not regarded as an essential aspect, conversely, it may become crucial due to the growing need for environmental protection and international conservation<sup>255</sup>. The effect of the international trade ban and the 1981 signatory to the CITES agreement, resulted in China banning “the trade and use of rhino horn in Traditional Chinese Medicine in 1993”<sup>256</sup>.

The use of rhino horn substitutes, for to treating patients, brought relieve to the scourge. Collaboration between government and non-government organisations, reduced the high demand of rhino horns. Despite such an initiative, the sky rocketing demand, remained a dilemma in East Asia<sup>257</sup>. The Chinese are specifically targeted by civil society organisations in assisting the protection of African wildlife. South Africa is targeted due to its ownership and production, the country has since become a key target for rhino poachers<sup>258</sup>.

According to “A proposal from the China Institute of Science and Technology Research, Beijing, entitled *Proposal for Protection of the Rhinoceros and the Sustainable Use of Rhinoceros Horn*”, which is funded by the “State Soft Sciences Project”, and the “Development for Traditional Chinese Medicine Research” indicates that “China is already farming rhinos in order to use rhino horn in traditional Chinese medicine”.

The rhino “farm” which is referred to as “the Sanya City Center for artificial propagation of the rhinoceros”, is located in China's Hainan Province according to reports<sup>259</sup>. The said reports, are of the view that “horn harvesting” experiments are already being conducted in such a farm. This is due to the fact that between the year 2006 and 2009, China managed to import 121 rhinos from South Africa. As at the time, China was the only country to have purchased more than a handful of

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<sup>255</sup>The Centre for Chinese Studies (CCS) at Stellenbosch University is the leading African research Institution for innovative 2012, p 233

<sup>256</sup> Ibid p 233

<sup>257</sup> Ibid 234

<sup>258</sup> Ibid 234

<sup>259</sup> Killing Fields: Africa's Rhinos under Threat (TIME, 13 June 2011)

<http://www.rhinoconservation.org/2010/07/20/revealed-location-of-chinas-rhino-farm-and-horn-harvesting-experiment>

animals for zoological and, or breeding purposes<sup>260</sup>. The Chinese research paper which came to light in 2008, entitled "Proposal for Protection of the Rhinoceros and the Sustainable Use of Rhinoceros", also alluded to the rhino project in Sanya on China's southern Hainan Island, which makes the initiative more compelling.

Sanya rhino farm was promoted by the Chinese to be a tourism destination by Hainan media, the firm's true ambitions as displayed on website being clear: "To provide our pharmaceutical raw materials, the company has built an endangered animals breeding station in Sanya, Hainan province". According to a statements from a provincial Entry-Exit Inspection and Quarantine Bureau in Yunnan province, "Sanya facility is not the only rhino-horn farm in China"<sup>261</sup>.

China's patent office, took an initiative and published a patent application in June 2010 coined a "self-suction living rhinoceros horn-scraping tool." The current CITES regulations, are to the effect that China is bound, and trading in rhino horn for medicinal purposes, whether from live or dead animals , remains illegal in China<sup>262</sup>.

#### **4.5 CONCLUSION**

Prosecution of organised crime, including rhino poaching, requires some level of commitment and skills showing efficiency in the reduction of the scourge through criminal justice system. The dilemma about the criminal justice system is lack of available resources, including manpower, as such, multiple blockages ,which are not easily fixed in the short term, remains the order of the day.

Rhino poaching incidents, may be a thing of the past, if the authority can acknowledge and reward hard workers within the system. The indication of poor enforcement, is due to lack of morale by officials that are over looked, or whose wages are minimal. The dilemma is further fuelled by recent promotions of inexperienced official, and lack of support from management.

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<sup>260</sup> Killing Fields: Africa's Rhinos under Threat (TIME, 13 June 2011)  
<http://www.rhinoconservation.org/2010/07/20/revealed-location-of-chinas-rhino-farm-and-horn-harvesting-experiment>

<sup>261</sup> Ibid (n 259)

<sup>262</sup> Ibid (n 259)

## **CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS**

### **5.1 CONCLUSIONS**

#### **5.1.1 OVERVIEW**

It must be recognized that rhino poaching has always been around in Africa, and that the two species of rhino, Black and White, will always be under threat. During the last number of years rhino have always been poached, but the annual numbers poached were manageable. The recent increase in Rhino Poaching cases, is a serious threat to the extinction of such precious species. The Constitution requires that the environment must be sustained, for the benefit of future generations.<sup>263</sup>

Organized crime syndicates are known to operate in South Africa, the scale of involvement became surprisingly high in recent years. Organised Crime Syndicates flourish in regions of instability, and South Africa is no exception. Public opinion and criticism has increased over the marked increase in Rhino Poaching, enforcement units bore the brunt of much of this criticism not only by the South African public, but internationally as well.

#### **5.1.2 REVIEW ON THE IMPACT OF RHINO POACHING**

Rhino Poaching, as a new form of organised crime, has the ability of eroding any form of revenues of the government, and further undermines the ability to implement any development(s) programmes and the strengthening of the rule of law<sup>264</sup>. Such offences, which are linked to organized crime, are well known for destabilizing governments and threatening regional security.

It has been observed that wildlife offences, including rhino poaching, are the most profitable forms of organized crime, as compared to illegal drugs and trafficking in firearms and ammunition, it remains difficult, and almost impossible, in estimating

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<sup>263</sup> S 24 of the Constitution, 1996.

<sup>264</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 15/06/2015

the true scale of the problem on the subject<sup>265</sup>. “Fauna and flora are very heterogeneous”<sup>266</sup>.

According to Anti -Poaching Intelligence Group<sup>267</sup>, “the use of selected volunteers as informants, a dedicated full time operating intelligence gathering unit, networking strengths, extensive contact base of law enforcement, conservation, intelligence operatives makes the fight against Rhino Poaching very cost effective”. “They are not statically based and are able, to move at a moment’s notice to problem areas, or areas that are being hit by rhino poachers. They have extensive background in wildlife conservation, tracking and anti - tracking, and follow up operations with aircraft or helicopters, and anti-poaching operations. They conduct wildlife investigations on all types of poaching, wildlife smuggling”<sup>268</sup>.

In principle, law enforcement, is to some an extent, increasingly led by intelligence for purpose of success<sup>269</sup>. The involvement of, *amongst others*, being “the collation, analysis and dissemination of information, and provides a systematic approach to critical thinking, which, in turn, can assist in the prevention and suppression of criminal activities”. The investigations that are managed properly and are having intelligence, can to some an extent, prove to be resourceful, and cost effective, rather than being speculative and, or having reactive methods<sup>270</sup>.

Wildlife offences, has proven to that “intelligence relating to perpetrators, smuggling routes, logging and poaching patterns, markets, consumers” and other contributing factors, are often missing or to some extent, non-existent. There are several countries, where the issue of intelligence, including its gathering, collation, analysis and dissemination, is a foreign, and not well understood<sup>271</sup>.

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<sup>265</sup> CITES of 2014

<sup>266</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za)

<sup>267</sup> Traffic Environmental Magazine 2014 at 18

<sup>268</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 15/06/2015

<sup>269</sup> Ibid (n 266 p 19)

<sup>270</sup> Ibid (n 266 p 21)

<sup>271</sup> Ibid (n 266 p 22)

In cases of intelligence relating to wildlife crime, such may be used effectively, in a way that other types of crimes are not compromised and, or included. Such view, however, restricts the ability to coordinate responses to individual cases or to establish strategies, policies or general operational guidance on the scourge of rhino poaching<sup>272</sup>

## **5.2 RECOMMENDATIONS**

### **5.2.1 AMENDMENT OF LEGISLATION<sup>273</sup>**

The South African Law Commission is requested to intervene in making submissions to Parliament about the rhino poaching crisis by amending relevant legislation that governing the bail applications, as well as the prescribed sentence(s) for contravention of Section 57(1) of the “National Environmental Management: Biodiversity Act 10 of 2004” which deals with, “Restricted activity with a threatened or protected species”.

The trade in rhino horn, as well as the scourge of rhino poaching, has climaxed to a point that positive action from the South African Government, mainly on the highest political level is essential and would be justified to be taken care of, before the extinction of the entire species. The laxity of the current legislation, is to the effect that rhino poachers, are granted bail easily and if convicted, the lenient sentences meted against them. The dilemma facing the enforcement is that, there is minimal risk of being arrested, whereas the imposition of a stringent sentence(s) equally low, if not non-existent. Precedence dictates that, escalation of violent crimes, challenged the legislature to respond positively, hence, the enactment of the Criminal Law Amendment Act<sup>274</sup>.

The prevalence and increase in violent crimes, the likes, “armed robberies, hijacking, rape and murder”, the legislature intervened and enacted the Act, colloquially known as “The Minimum Sentences Act”, whose objective was penalise such crimes with prescribed minimum sentences, with long term imprisonment.

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<sup>272</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 15/06/2015

<sup>273</sup> NEMBA, 2004; [www.globalmarchforrhinoandelephants.org](http://www.globalmarchforrhinoandelephants.org) accessed 15/06/2015

<sup>274</sup> Criminal Law Amendment Act 105 of 1997, which came into effect on 31 December 2007

The effect of the legislation was to some an extent, removing the unfettered discretion that the presiding officer ha, in imposing sentences.

Section 51(3)(a) of the Act further requires that, “if any court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence, it shall enter those circumstances on the record of proceedings and may thereupon impose such lesser sentence”<sup>275</sup>. My submission is that, similar intervention by the legislature, is requested for “restricted activities involving threatened or protected species”. It is evident that should the law be strengthened in this regard, the task of the courts and prosecution would automatically be made easy and necessary in dealing with such offences<sup>276</sup>.

### **5.2.2. PROPOSED AMENDMENTS<sup>277</sup>**

My submission is that, the two proposals mentioned below, would have an impact on curbing rhino poaching and they are the following:

“1. Amendment to Part III of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 to prescribe a minimum sentence of 10 (TEN) years imprisonment applicable to the crime of contravening Section 57(1) of the National Environmental: Biodiversity Act 10 of 2004 when the crime involves rhinoceros or elephant, or other threatened or protected species where the value in question involves amounts of R100 000 or more; and

2. Amendment to Schedule 5 of the Criminal Procedure Act 51 of 1977 to include the offence of contravening Section 57(1) of the National Environmental: Biodiversity Act 10 of 2004 where rhinoceros or elephant are involved, or the value of the threatened or protected species in question involves amounts of R100 000 or more, as a Schedule 5 offence”.

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<sup>275</sup> Criminal Law Amendment Act 105 of 1997

<sup>276</sup> Criminal Law Amendment Act, 1997; [www.globalmarchforrhinoandelephant.org](http://www.globalmarchforrhinoandelephant.org)

<sup>277</sup> Ibid (n 275)

### **5.2.3. AMENDMENT TO THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997<sup>278</sup>**

My recommendation in this regard is that the legislature enacts the prescribed minimum sentence of 10 years imprisonment for *“carrying out a restricted activity with a threatened or protected species where it is proved that a rhinoceros or elephant is involved; or where the value of the threatened or protected species in question involves amounts of R100 000 or more”*.

The South African law, does not have substantive legislation, that specifically prohibits “rhino poaching”, in its own right. However, *“to hunt a rhino illegally, or any threatened or protected species”, is prohibited in terms of “Section 57(1) of the National Environmental Management: Biodiversity Act 10 of 2004”*. The offence is referred to as: *“Restricted activity involving a listed threatened or protected species”*. Therefore any reference to “rhino poaching” should, from the above wording, be interpreted to mean “a contravention of this section as well as to include offences with other high value threatened or protected species”.

The offence is coined as follows:

*“Section 57(1): “A person may not carry out a restricted activity involving a listed specimen of a threatened or protected species without a permit issued in terms of Chapter 7”*.

*Penalty Clause: “Fine not exceeding R10 million, or imprisonment for a period not exceeding ten years, or to both such fine and imprisonment”*.

It has been observed, and therefore submitted that, the fact that Rhino poaching is committed by armed and dangerous criminals, in furtherance of a common purpose, be equated to Robbery with aggravating circumstances which falls under Part II of Schedule 2, of the Criminal Law Amendment Act, wherein the minimum sentencing provision prescribes 15 years imprisonment for a first offender, upon conviction.

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<sup>278</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 15/06/2015

There are several factors that need to be taken into account, which includes the value of one rhino. Presently such value, is over R100 000, which means that poaching a rhino, thereby killing and removing the horn(s), leads to effective and permanent removal of ownership of such horn(s), as in the case of theft.

The “Minimum Sentences Act 105 of 1997”, prescribes a minimum sentence of 15 years imprisonment in cases of theft –

- ” involving amounts of more than R500 000;
- or involving amounts of more than R100 000, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; then the crime falls under Part II of Schedule 2 of the Act<sup>279</sup>.

The argument and submission above, clearly dictates that the value of the commodity, being rhino horn(s), which are the subject of rhino poaching cases, therefore qualify to be listed under “Part II of Schedule 2 of the Minimum Sentence Act 105 of 1997”. However the minimum sentence prescribed by Act 105 of 1997, for offences listed on Part II of Schedule 2 is 15 years imprisonment which exceeds the maximum sentence of 10 years imprisonment prescribed by the “National Environmental Management: Biodiversity Act 10 of 2004” for a “restricted activity with a threatened or protected species with 5 years- imprisonment<sup>280</sup>.

It would not in the interest of justice that different Statutes enacted by one and the same legislature contradict each other in terms of the penalties prescribed. Therefore it would then rather make sense to enlist rhino poaching on Part III of Schedule 2 of Act 105 of 1997 since the prescribed sentence is in line with that of the Biodiversity Act which amounts to 10 years imprisonment<sup>281</sup>.

Section 51(2)(b) of Act 105 of 1997 read with Part III of Schedule 2 the prescribed penalties for the above offences are:

“In the case of—

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<sup>279</sup> NEMBA

<sup>280</sup> Ibid ( n 278)

<sup>281</sup> Ibid (n 278)

- (i) a first offender, to imprisonment for a period not less than 10 years;
- (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years”<sup>282</sup>;

Sight should not be lost, of the fact that crimes involving other “threatened or protected species”, that has a much lower value than rhino, are nevertheless, also prosecuted by means of Section 57(1), it will not be appropriate, to make the minimum sentence applicable to all other species. My qualified recommendation is that, the amendment should be applied to crimes involving “rhinoceros and elephant and any threatened or protected species where it is proved that a value of R100 000 or more is involved”<sup>283</sup>.

My recommended suggestion, pertaining to the amendment, is that the amendment should fall under Part III of Schedule 2 of the Criminal Law Amendment Act 105 of 1997, further to have the addition of the following offence to the list, and to read as follows:<sup>284</sup>

“Any offence referred to in section 57(1) of the National Environmental Management: Biodiversity Act 10 of 2004, if it is proved that-

- (a) the listed threatened or protected species involved is a rhinoceros or elephant; or
- (b) the value of the listed threatened or protected species or product or derivative in question involves amounts of more than R100 000; or
- (c) the value of the listed threatened or protected species or product or derivative in question involves amounts of more than R10 000; if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
- (d) if it is alleged that the offence was committed by any law enforcement officer-
  - (i) involving amounts of more than R10 000,00; or

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<sup>282</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 15/06/2015

<sup>283</sup> NEMBA, 2004

<sup>284</sup> Criminal Law Amendment Act 105 of 1997; [www.globalmarchforrhinoandelephant.org](http://www.globalmarchforrhinoandelephant.org)

(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose<sup>285</sup>.

#### **5.2.4. AMENDMENT TO SCHEDULE 5 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977<sup>286</sup>**

It is of vital importance to make use of the more stringent measures, when suspects of rhino poaching apply to be released on bail. The following passage is important for amendment:

Section 60(1) (a) of the Criminal Procedure Act 51 of 1977 states:

*“An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.” Any accused person, is therefore by law, entitled to be released on bail in respect of any offence unless the offence is listed on “Schedule 5 or 6 of the Criminal Procedure Act 51 of 1977<sup>287</sup>.*

Section 60(11)(b) of the Criminal Procedure Act 51 of 1977 provides the following:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

- (b) Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release<sup>288</sup>.

Procedurally and legally, “every person is innocent until proven guilty”. Bail application should not be used as a form of punishment against an accused person.

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<sup>285</sup> Criminal Law Amendment Act 105 of 1997

<sup>286</sup> Ibid (n 284)

<sup>287</sup> Ibid (n 284)

<sup>288</sup> S 60(11) of the CPA 51 of 1977

Such should be seen as security of the accused person to stand trial until finalisation of his case<sup>289</sup>.

Generally, there are factors that impacts on the prevalence of rhino poaching cases, which includes is the leniency of courts during bail proceedings. Depending on the complexity of the case, experience has shown that accused person who are released on bail, has the disadvantage of their cases dragging long, before being finalised on trial, than those whose release was denied.

Experience has shown that an accused person in custody, has eagerness for the trial to proceed and reach its finality without delay. Conversely, for an accused person who is released on bail, there no urgency to finalise, as they have nothing to lose. In several instances, the accused has used the tactic of dragging the case for a long time, which usually results in witnesses losing interest in the matter<sup>290</sup>.

The suggested recommendations and amendment of the legislation governing bail, would assist in giving the court the authority to deal with the offence in the same manner as it does with the more serious offences listed on Schedule 5 of the CPA. Should Section 57(1) of the 'National Environmental Management: Biodiversity Act 10 of 2004' be listed on Schedule 5, the onus shifts to the accused to prove that "his release is permitted in the interests of justice"<sup>291</sup>.

The suggested proposed amendment to Schedule 5 of the Criminal Procedure Act 51 of 1977 to read as follows:

"Any offence referred to in section 57(1) of the National Environmental Management: Biodiversity Act 10 of 2004, if it is proved that:

- (a) the listed threatened or protected species involved is a rhinoceros or elephant; or
- (b) the value of the listed threatened or protected species or product or derivative in question involves amounts of more than R100 000; or
- (c) the value of the listed threatened or protected species or product derivative in question involves amounts of more than R10 000; if it is alleged that the offence was

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<sup>289</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 15/06/2015

<sup>290</sup> NPA Policies and Guidelines, 2002 Edition

<sup>291</sup> S60(11) of CPA 51 of 1977

committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or  
(d) if it is alleged that the offence was committed by any law enforcement officer-  
(i) involving amounts of more than R10 000,00; or  
(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose”<sup>292</sup>.

### **5.2.5. CONCLUSION**

It is an undisputed fact, that rhino poaching is a crime committed by organised criminal syndicates, who act in furtherance of a common purpose, in most instances, driven by greed. To date, despite awareness on social media within the Republic and Internationally, enforcement on rhino poaching incidents, has not been the best to report about in South Africa<sup>293</sup>.

In most instances, when rhino poachers are arrested, it is apparent that they are easily released on bail. Much more disappointing, upon conviction, the sentences imposed are similarly lenient and highly unsatisfactory. My submission is that the proposed changes to legislation, will bring a robust change and send a clear message to poachers, that if they are arrested and prosecuted successfully, they will be dealt with harshly, depending on the circumstances of a specific case<sup>294</sup>.

The only way forward in curbing the scourge against rhino poaching, is through stringent enforcement of laws. The recommended prescribed minimum sentence of 10 years imprisonment for a “restricted activity involving a rhinoceros, elephant or any threatened or protected species”, with a value of R100 000 or more, and furthermore, to categorise the offence under Schedule 5 for the purposes of bail applications, would be more stringent for enforcement purposes.

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<sup>292</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 15/06/2015

<sup>293</sup> [www.globalmarchforrhinoandelephants.org](http://www.globalmarchforrhinoandelephants.org) accessed 16/062015

<sup>294</sup> Ibid (n 292)

My further recommendation, with the owner(s) of rhino(s) in mind, is that “a person found guilty of the illegal killing of a rhinoceros or elephant should be penalised to refund the owner of such killed rhinoceros or elephant at market related prices”<sup>295</sup>.

The following passage is being quoted frequently, when courts are tasked to impose sentences on offenders, which has been adopted from Malgas decision<sup>296</sup>. “Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded”<sup>297</sup>.

Ghandi<sup>298</sup> stated that: “the greatness of a nation and its moral progress, can be judged by the way its animals are treated”. A message must be sent, we shall protect our precious animals through stringent enforcement of laws, in curbing the scourge. Animals, like human beings, also have rights and interests to be protected.

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<sup>295</sup> Stop Rhino Poaching Now, Magazine 2015 at 2

<sup>296</sup> S v Malgas 2001 (2) SACR 469 (SCA) at para 25

<sup>297</sup> [www.antipoachingintelligence.co.za](http://www.antipoachingintelligence.co.za) accessed 15/06/2015

<sup>298</sup> Mahatma Ghandi: Animal Rights: A History and Quotes [www.ghandiqoutes.com](http://www.ghandiqoutes.com) accessed 26/07/2015

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