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## Bringing Perpetrators of Wildlife Crime to Justice: Existing Obstacles and Opportunities

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### Abstract

Post-apartheid South Africa legislative framework recognises the need to bring those who perpetrate wildlife crime to justice. The perpetrators of this crime have also benefited drastically in the commercial trade of these illegal trades. International legal instruments have the potential to safeguard the survival of wild animals and plants by regulating international trade in their specimens. The sustainability of wildlife requires strict legal intervention to safeguard this valuable resource for the future. Essentially, the trade in wild animals and plants crosses borders between countries, and the effort to regulate requires international cooperation. South Africa has taken a bold stride to implement and enforce anti-wildlife interventions. Methodologically, relying on contemporary legal texts, case law and scholarly works, this article looks at the efficacy or the lack thereof of the legal interventions for combating wildlife crime.

**Keywords:** *Endangered Species, Prosecution, Illegal trade, Conservation, Justice, South Africa.*

## Introduction

The illegal trade of wildlife has gained both national and global recognition over the last few decades.<sup>177</sup> Various factors contribute to this issue, including our easily penetrable borders, insufficient border patrols, lack of appropriate technology at border checkpoints, irregular training for customs, immigration, police, prosecution, and judiciary personnel, corrupt customs and immigration officials, poverty, migration, and the absence of relevant laws criminalizing such activities. These factors greatly facilitate the operations of transnational organized criminal groups involved in this trade.<sup>178</sup> In South Africa, rates of rhino poaching have ballooned since 2007, causing alarm among both conservationists and concerned citizens.<sup>179</sup> While 13 rhinos were poached in South Africa in 2007, the deaths have risen rapidly, with 1 054 rhinos killed in 2016. South Africa's status as a prominent wildlife tourism hub makes it heavily reliant on tourism for revenue, so the decline of a Big Five species could have severe economic repercussions.<sup>180</sup> Moreover, poaching not only impacts biodiversity but also disrupts the entire ecosystem, with rhino poaching being a significant concern. In addition, the lack of effective collaboration between national agencies and regions results in significant time lags when addressing traffickers and handling confiscated wildlife items.<sup>181</sup> This issue is particularly noteworthy due to the nature of environmental crime, which violates multiple international agreements such as the CITES, the Global Initiative to End Wildlife Crime (established in June 2020), the “United Nations Convention Against Transnational Organized Crime (UNTOC), Resolution 31 of the Commission on Crime Prevention and Criminal Justice (CCPCJ),” and the IUCN. The

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<sup>177</sup> t Sas-Rolfes, M., Challender, D. W., Hinsley, A., Veríssimo, D., & Milner-Gulland, E. J. (2019). Illegal wildlife trade: Scale, processes, and governance. *Annual Review of Environment and Resources*, 44(1), 201-228.

<sup>178</sup> Heeks, R. (2017). *Information and communication technology for development (ICT4D)*. Routledge.

<sup>179</sup> Eloff, C., & Lemieux, A. M. (2014). Rhino poaching in Kruger National Park, South Africa: aligning analysis, technology and prevention. In *Situational prevention of poaching* (pp. 18-43). Routledge.

<sup>180</sup> Rubino, E. C., & Pienaar, E. F. (2017). Applying a conceptual framework to rhinoceros conservation on private lands in South Africa. *Endangered Species Research*, 34, 89-102.

<sup>181</sup> Duensing, S., Schleper, M. C., & Busse, C. (2023). Wildlife trafficking as a societal supply chain risk: Removing the parasite without damaging the host? *Journal of Supply Chain Management*, 59(2), 3-32.

main motive behind this form of crime is the financial gain and its familiar *modus operandi* of organised syndicates, uncontrolled access to the borders, illegal immigration, money laundering, corruption, and exploitation of poor communities. It is important to take into cognisance in the fight against wildlife crime that criminal organisations are moving their stunts from the usual norm to a more complex criminal activity as well as operational in less traditional platforms. It is of pivotal importance for the Judiciary and the prosecution to successfully respond to wildlife trafficking by broadly classifying them into different categories such that there are specialized and competent prosecution and judicial bodies focused on environmental crime.<sup>182</sup> Adequate intelligence training is essential to recognize patterns within organized criminal networks, leading to their effective dismantling.

### **Challenges and limitations of prosecution on extra-territorial jurisdiction**

The illegal trade of wildlife is influenced by its cross-border and transboundary characteristics, as well as the varied human and wildlife populations involved, along with a community-based management system, thus it should be regarded and referred to as a transnational crime.<sup>183</sup> Extra-territorial jurisdiction enables a country's court to exert authority over cross-border illegal wildlife trade in certain situations. Conversely, universal jurisdiction is a distinct type of extraterritorial jurisdiction that operates under the principle that certain crimes are of such gravity that all nations are obligated to prosecute perpetrators, regardless of their nationality or the location of the offense.

It is a general rule that South Africa does not have jurisdiction over offences committed beyond its borders. The courts and the Legislature make exceptions for every general rule.<sup>184</sup> Two main exceptions accompany the general rules, the first being established by South African courts for treason and theft offenses, while the second set of exceptions is legislated and covers national and international crimes under Universal

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<sup>182</sup> Nurse, A. (2023). Policing the Environment: The Prosecution of Wildlife and Environmental Crimes. In *Organized Crime in the 21st Century: Motivations, Opportunities, and Constraints* (pp. 171-190). Cham: Springer International Publishing.

<sup>183</sup> Agu, H. U., & Gore, M. L. (2020). Women in wildlife trafficking in Africa: A synthesis of literature. *Global Ecology and Conservation*, 23, e01166.

<sup>184</sup> Joubert, JJ. (2011). *Criminal Procedure Handbook*. 12<sup>th</sup> Edition. South Africa: Juta.

jurisdiction principles.<sup>185</sup> Extraterritorial jurisdiction refers to a state's ability to enforce its laws outside its borders, such as maintaining control over its citizens abroad and prosecuting certain crimes committed internationally. This concept is heavily debated in human rights and business contexts due to its implications.<sup>186</sup> Currently, nations are not typically obligated by international human rights law to oversee the overseas operations of companies based in their territory or under their jurisdiction. They are also not usually forbidden from doing so, as long as there is a valid jurisdictional foundation. In this context, certain human rights treaty bodies suggest that home countries should take measures to prevent misconduct by corporations operating abroad within their jurisdiction. In the case of combating illegal wildlife trafficking, it is imperative that the legal framework is clear on the issues relating to the place where the suspect has been found, the court which has jurisdiction over the offence, the person who the authority to prosecute the offence committed is vested, the designation of specialised courts for the prosecution of this offence.

To effectively combat the escalating rhino poaching crisis in South Africa, it is crucial to adopt intelligent strategies that go beyond merely prosecuting individual poachers. Instead, efforts should be directed towards targeting the transnational criminals involved in the illicit trade of rhino horn once it has left the country. South Africa already has various laws in place to address rhino horn poaching. Still, the “Prevention of Organised Crime Act 121 of 1998” (POCA) falls short in terms of prosecuting offenders outside the country. Samples of seized horns are taken abroad and then returned to South Africa for analysis. This process enables the identification of the specific horn seized and its origin. Prosecutions should take place anywhere the perpetrators are intercepted with the exhibits in their possession, it also should be made easy for South Africa to have jurisdiction to charge the perpetrators with offences of illegal hunting, even if the act was committed outside the borders of South Africa. Only if they can be linked should any country be able to prosecute based on the uniform rule or law that is applicable internationally.

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<sup>185</sup> Mujuzi, J. D. (2015). The prosecution in South Africa of international offences committed abroad: the need to harmonise jurisdictional requirements and clarify some issues. *African Yearbook on International Humanitarian Law*, 2015(1), 96-117.

<sup>186</sup> Doroga, S. (2024). Extraterritorial Human Rights Obligations and the European Union. *Law Series Annals WU Timisoara*, 33.

The main advantage of using universal extraterritorial jurisdiction to prosecute serious crimes such as wildlife trafficking, is that it will promote accountability where it might otherwise be absent.<sup>187</sup> Universal jurisdiction will also be vital to seek justice in the territory of the other country which has not been equipped enough to deal with the cases involving wildlife crime, for example, due to instability or lack of resources, the absence of an independent judiciary that with uphold and enforce a rule of law. Conservation groups have begun backing new ways to deter poachers. Taken into cognisance is the newly created “Wildlife Justice Commission” (WJC), which gathers evidence to disrupt and help dismantle transnational, organized wildlife crime. The World Justice Commission (WJC) is located in The Hague, Netherlands, near the International Criminal Court and various UN tribunals that prosecute genocide, war crimes, and crimes against humanity. Since 2015, the Commission's intelligence division has been collecting data to produce tactical, operational, and strategic intelligence reports to aid ongoing investigations. Additionally, they share information with law enforcement agencies and non-governmental organizations to combat wildlife crime.<sup>188</sup> The WJC lacks the authority to enforce laws or issue legally binding judgments as it is not established through an international treaty. Following an inquiry, the commission initiates a phase of dialogue and diplomatic efforts to raise awareness, bring attention to the issue in political circles, and advocate for legal actions. If national authorities fail to act, the commission has the authority to conduct public hearings in front of an accountability panel. Legal enforcement gaps are facilitating the occurrence of wildlife crimes. The illicit trade could see a decrease if each country were to ban, through national legislation, the possession of wildlife that was unlawfully harvested or traded from any other location globally.

### **Strategies for combating organised crime**

Organised crime often and always encroaches beyond the national borders of each governing country or state, as offenders frequently commit crimes in territories of more than one State and try to evade law enforcement by moving between States. As mentioned in this study

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<sup>187</sup> Blattner, C. E. (2019). *Protecting animals within and across borders: Extraterritorial jurisdiction and the challenges of globalization*. Oxford University Press.

<sup>188</sup> Düerr, B. (2017). Conservationists take aim at poachers. *Africa Renewal*, 31(1), 24-25.

wildlife crime is a form of or is linked to organised crime, which extends beyond all terrestrial borders globally. It is crucial to visit various ways in which this pandemic has been attacked in a quest to eradicate this global criminal conduct. To ensure that transnational organised crime does not go unpunished it is necessary to reduce or eliminate jurisdictional gaps that enable fugitives to find safe havens in other jurisdictions. To find ways to combat and control extraterritorial organised crime the chiefs of 12 police of member countries, in August 1995, held a regional co-operation between law enforcement agencies which formed the “Southern African Region Police Chief’s Co-operation Organization” (SARPCCO), to find practical means to address and combat wildlife crime. Most importantly, when practically being proactive in the fight against wildlife crime, the main goal should be destructing organised syndicates as they are the main facilitators and actors of this crime. in doing so, law enforcement will be heading in the right direction of curbing this crime. in the Sub-Saharan regions, their efforts in dismantling major criminal networks proved to be a success discussed below:

### ***The Kromah cartel***

Moazu Kromah, a Liberian national, was arrested in Kampala and expelled from Uganda to the US in June 2019. Based out of Uganda, the Kromah cartel gained notoriety as the first major wildlife crime group to have its leaders extradited to the US specifically to face wildlife trafficking charges, although the indictment also included charges of conspiracy to possess and distribute 10 kilograms of heroin. The investigation that led to this indictment was coordinated by the US Fish and Wildlife Service (USFWS) Office of Law Enforcement, working in tandem with the Uganda Wildlife Authority (UWA) and the Natural Resource Conservation Network (NRCN), a Ugandan NGO that supports wildlife crime investigations and prosecutions as well as anti-corruption work. Despite Kromah and his sons having been arrested in February 2017, with 1 303 kilograms of ivory in their Kampala house, the case was not progressing through the Ugandan court system and concerns of corruption. The non-progression of the case was linked to corruption as an internal INTERPOL document referring to Kromah was found in the house where he was arrested. Kromah was at ‘the centre of a vast ring of organized criminals connected to at least four other major criminal syndicates supplying the biggest wildlife criminal

syndicates worldwide.’ Upon his arrest, the 2017 case was recalled. Immediately, he was arrested, there in his house, he offered me US\$15 000 to help make the case go away. He knew that there was evidence against him. The Kromah investigation unfolded using an undercover source who penetrated the network and documented the selling and shipping of 10 tonnes of ivory and 190 kilograms of rhino horn, as well as international payments, some of which went through US financial institutions. Four leaders of the cartel were indicted for the wildlife charges and only two of these for the heroin-related charges. In March 2022, Kromah pled guilty to three wildlife trafficking charges committed in Africa but transacted in US dollars, and on 18 August 2022, ‘he was finally sentenced to 63 months in jail including the 42 months already served.’ Judge Woods ruled further that: ‘The US Marshals are directed to execute the Final Order of Forfeiture as per the letter motion submitted by Assistant United States Attorneys (AUSA), Sagar K. Ravi on October 24, 2022, to Judge Gregory H. Woods.’” Consequently, all rights, titles, and interests in the Specific Property are now forfeited and transferred to the United States of America for lawful disposal. Under Title 21, United States Code, Section 853(n)(7), the United States of America is granted clear title to the Specific Property. The United States Marshals Service, or its assignee, is tasked with taking possession of the Specific Property and managing its disposal in compliance with Title 21, United States Code, Section 853(h), as per the order signed by Judge Gregory H. Woods on 10/26/22.<sup>189</sup> Subsequently to Kromah’s arrest, Amara Cherif, a Guinean national, was arrested in Senegal. Cherif was extradited to the United States and has agreed to a plea deal regarding charges of wildlife trafficking. As of now, U.S. District Judge Gregory H. Woods has sentenced him to 57 months for his involvement in conspiring to traffic in rhinoceros horns and elephant ivory, both of which are endangered species. This illegal activity included the poaching of over 35 rhinoceroses and more than 100 elephants.<sup>190</sup> Abdi Hussein Ahmed, a Kenyan national, was charged on the same indictment, and

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<sup>189</sup> Russel, M. [s.a.]. In *SDNY Rhino Case Kromah Got 63 Months Now Cherif Gets 57 with Kidnapped Son Cited Inner City Press*. From: <https://www.innercitypress.com/sdny22rhinohornunsealed121322.html>. (accessed on 17 April 2024).

<sup>190</sup> *Wildlife Traffickers Sentenced To 57 Months For Large-Scale Trafficking Of Rhinoceros Horns And Elephant Ivory*. 2022. United States Department of Justice Press Release. 14 December 2022. From: <https://www.justice.gov/usao-sdny/pr/wildlife-trafficker-uganda-sentenced-63-months-large-scale-trafficking-rhinoceros-horns>. (accessed on 17 April 2024).

sentenced to 48 months in prison for conspiring to traffic large quantities of rhinoceros horns and elephant ivory both protected wildlife species worth millions of dollars that involved the illegal poaching of more than approximately 35 rhinoceros and more than 100 elephants, as well as for conspiring to distribute and possess with intent to distribute one kilogram or more of heroin.<sup>191</sup> Also a fourth member of the cartel, Mansur Mohamed Surur “got 53 months, and his sentence was imposed on 17 October 2022, and on April 24, 2023, the fifth Kenyan national, Badru Abdul Aziz Saleh, pleaded guilty to Count 5 of the S1 Superseding Indictment. And was sentenced to 42 months of imprisonment.<sup>192</sup> Reportedly, these were the five main and lead members of the cartel and with them in custody, it means that the criminal network can no longer operate. Importantly, all sentences do not have an option of a fine and the main aim is to dismantle the criminal network.

### ***The Lin networks***

The Lin network was one of the largest wildlife trafficking groups to have operated in Southern Africa. Based in Malawi, they bought pangolin scales, ivory, and rhino horn from across the region and exported them directly to major wildlife traders in Asia. The origins of the ivory smuggling network can be traced to the 1980s, with the most recent network leader, a Chinese national named Lin Yun Hua, arriving in Malawi in 2014. Lin was also involved in buying gemstones, both licit and illicit from Malawi and Mozambique. (Illicit gemstones are often smuggled across the border into Malawi from artisanal mining sites in northern Mozambique). In 2017, 330 kilograms of ivory were discovered in Bangkok airport, shipped from Malawi, hidden in sacks of low-quality gemstones. While Lin could not be linked, local gemstone dealer Conteh who was close to Lin upon his arrest in connection with this shipment of gemstones confessed to the crime of wildlife crime and was sentenced to 14 years in prison. The court cases lasted two years and severely tested

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<sup>191</sup>Fifth Defendant Sentenced To 48 Months In Prison For Large-Scale Trafficking Of Rhinoceros Horns And Elephant Ivory And Heroin Conspiracy. 2023. United States Department of Justice Press Release. From: <https://www.justice.gov/usao-sdny/pr/fifth-defendant-sentenced-48-months-prison-large-scale-trafficking-rhinoceros-horns>. (accessed on 17 April 2024).

<sup>192</sup>Kenyan Fugitive Wanted for Wildlife, Drug Trafficking Arrested. 2022. Global Initiative Against Transnational Organised Crime. <https://riskbulletins.globalinitiative.net/esa-obs-025/01-long-road-to-prosecuting-moazu-kromah-wildlife-trafficking-network.html>. (accessed on 17 April 2024).

the integrity of Malawi's criminal justice system. Threats to the trial came from corrupt approaches and high-level interference, and implicit threats of violence to key witnesses.

### ***Akasha Case***

Aktash Akasha and his sibling, Ibrahim Akasha, led an intricate global drug trafficking syndicate from Kenya, overseeing the distribution of large quantities of narcotics worldwide.<sup>193</sup> Throughout two decades, they engaged in the production and dissemination of drugs, resorting to violence against any individuals who threatened their illicit activities. In response to legal challenges, the brothers attempted to corruptly influence various officials, such as judges, prosecutors, and law enforcement officers, in order to evade extradition to the United States. In 2014, the Akasha brothers, along with two accomplices, were apprehended in Mombasa, Kenya, by the Kenyan Anti-Narcotics Unit after providing substantial amounts of heroin and methamphetamine to undercover DEA informants. Despite their arrests and pending extradition proceedings, the Akasha siblings persisted in their criminal endeavours, utilizing their profits to bribe corrupt individuals within the system. In 2017, the bribery scheme of the Akasha brothers came to an end when they were expelled from Kenya and subsequently brought to the United States by DEA agents for prosecution. On 24 October 2018, both Baktash and Ibrahim Akasha pleaded guilty in a US Federal Court to various charges, including conspiracy to import and importation of heroin and methamphetamine, conspiring to use and carry machine guns and destructive devices in relation to their drug-trafficking activities, and obstruction of justice. Baktash was sentenced to 25 years in prison in August 2019, while his brother Ibrahim received a 23-year sentence in January 2020

### ***International organisations strategy for combating wildlife crime in africa***

With sharp poaching kingpins directing operations from behind the scenes, the syndicates profit from the slaughter of numerous animals

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<sup>193</sup> The Akasha brothers' international drug trafficking network. UNODC. From: <https://www.unodc.org/unodc/en/unto20/truecrimestories/akasha-brothers.html>. (accessed on 17 April 2024).

through transborder crimes, orchestrated by cunning poaching kingpins who operate covertly, requiring meticulous planning, intelligence, and substantial financial resources. While perpetrators are exploring new methods of poaching animals or their derivatives, such as crushing rhino horns into powder or processing them into beads with the intention of getting the products past customs authorities. Delays in deploying appropriate response teams to combat traffickers and manage smuggled wildlife products occur due to limited collaboration among national agencies and across regions. This hampers the effective handling of perpetrators once they are apprehended. The International Anticorruption and Good Governance Act was enacted by the US congress on 5 October 2000. The legislation aims to ensure that United States assistance programs play a role in promoting good governance by aiding other countries in their fight against corruption across society, while also enhancing transparency and accountability at all levels of government and within the private sector.<sup>194</sup> In fiscal years 2001-2002, United States agencies allocated approximately \$33 million annually to support anticorruption efforts in 22 sub-Saharan African nations. Kenya and Botswana are among the African countries that have implemented legal frameworks and policies to address criminal activity. However, the lack of awareness about wildlife crime hinders the effective enforcement of wildlife acts. Additionally, insufficient bilateral cooperation and unclear sentencing procedures create loopholes for poachers and wildlife traffickers to exploit. As a result, of the decimation in the animal population, there was a need to identify species that are most vulnerable and list them which will work in the deterrence of wildlife trafficking. In 1963, the Red List was created by the International Union for the Conservation of Nature (IUCN) as a listing method to identify and protect species in need of conservation. The Red List is periodically updated to include new targets for protection. Red List assessments are constantly being compiled and given for publication on the IUCN Red List of Threatened Species, and the database is constantly updated to accommodate new species that are brought in and where existing species undergo scientific revisions. To ensure a regular flow of assessments on the website, we endeavour to update The IUCN Red List at least twice

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<sup>194</sup> Foreign assistance: U.S. anticorruption programs in Sub-Saharan Africa will require time and commitment. 2004. United States Government Accountability Office. From: <https://www.gao.gov/assets/gao-04-506.pdf>. (accessed on 17 April 2024).

each year.<sup>195</sup> Assessments are conducted by extensive networks of scientists, conservationists, and other stakeholders who collaborate to share their expertise. Red Lists have emerged as a fundamental and standardized approach in global conservation, serving as a tool to quantify the decline in biodiversity and guide policy and conservation strategies. The red list indicates that over 42,100 species are at risk of extinction, accounting for 28% of all species that have been evaluated.<sup>196</sup> Since the inception of the IUCN Red List in 1963, an international agreement known as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) was signed by 184 State parties in 1973. This agreement aims to safeguard the survival of animals and plants in the wild by regulating international trade to prevent any threats to their existence.<sup>197</sup> The Conference of the Parties, which consists of the Parties to CITES, convenes every two to three years to assess the progress of the Convention. Typically lasting around two weeks, these gatherings are commonly known as ‘CoPs’ and are hosted by one of the Parties.

Ratifying parties are obligated to adopt domestic legislation in order to ensure compliance with CITES at the national level, as the Convention holds legally binding power. The scope of the Convention is specifically focused on international trade and the species impacted by such trade, as stated in Articles I(c) and (e). Lastly, in ensuring enforcement and compliance with CITES regulations the International Criminal Police Organisation Wildlife Enforcement team, (INTERPOL) comes into play and its role regarding wildlife crime as an extraterritorial crime aid in the disruption and dismantlement of transnational organized crime networks that are involved in the illegal trafficking of wildlife. INTERPOL was set up in 1923, in Vienna, Austria by 20 countries that saw an urgent need to facilitate cooperation between police across borders and gave the organisation administrative capabilities to help countries work together to fight international crime.<sup>198</sup> The organisation has done many projects on wildlife crime, such as Project Predator,

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<sup>195</sup>Planned Red List Updates. IUCN. Version 2023-1. From

<https://www.iucnredlist.org/assessment/updates>. (accessed on 1 October 2023).

<sup>196</sup> IUCN Red List of Threatened Species. 2023-2. <https://www.iucnredlist.org/> (accessed on 1 October 2023).

<sup>197</sup> Importance of CITES for Marine Species. NOAA Fisheries. From:

<https://www.fisheries.noaa.gov/national/international-affairs/convention-international-trade-endangered-species-wild-fauna-and>. (accessed 1 October 2023).

<sup>198</sup> How our history started. INTERPOL. From <https://www.interpol.int/en/Who-we-are/INTERPOL-100/1923-how-our-history-started>. (accessed 1 October 2023).

Project Wisdom, Operation Thunderstorm (2018), Operation Thunderbird (2017), Operation Worthy II (2015) and Operation Paws II (2015). Even with these reported interventions, there is little knowledge of INTERPOL and its successes in the scourge of wildlife crime.

### ***Prosecution challenges for offences committed in South Africa***

One of the challenges faced is the duration it takes to conclude legal cases. The court system is burdened, and the accused often employs tactics to cause delays. The court holds the authority to decide whether to grant bail or not. Furthermore, it is concerning that many individuals who are granted bail go on to commit further crimes, and South Africa must put an end to the circulation of these criminals. Another critical issue is the insufficient number of specialized prosecutors and investigators. Although competent investigators and prosecutors are dealing with certain organized crimes in the country, there is a need for more professionals in this field. The criminal justice system and anti-wildlife organizations are collaborating to explore ways to train individuals to specialize in prosecuting wildlife crime. The South African criminal justice system has made significant progress in combating wildlife crime, as demonstrated by the ongoing case involving game farmer Dawie Groenewald, Sariette Gronewald, Karel Toet, Manie du Plessis, Marisa Toets, Koos Pronk, Tielman Erasmus, Gys du Preez, Nardus Rossouw, Dewald Gouws, and Paul Matomela. This case, which is currently sub judicare, highlights the challenges faced in prosecution. The accused individuals have appeared in the Pretoria High Court and are facing a total of 1872 charges related to illegal hunting.<sup>199</sup> The case concerning the trafficking of wildlife, involving Gronewald and his four (4) co-accused, has been under judicial consideration for over 14 years. One of the reasons for the prolonged delay was the group's anticipation of a Constitutional Court ruling from Kruger.<sup>200</sup> The cessation of South Africa's ban on the internal commerce of rhino horn has been verified.<sup>201</sup> As a consequence, approximately 60 charges against the accused were

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<sup>199</sup>Mashaba, E. (2016). 11 In Pretoria Court for Rhino Poaching. From: <https://www.suidkaapforum.com/News/Artide/National/11-in-pretoria-court-for-rhino-poaching-20170711>. (accessed on 24 September 2023).

<sup>200</sup>See (footnote 109).

<sup>201</sup>Venter, Z. (2022). Rhino horn trade case delayed again 12 years after arrest of suspects. From: <https://www.iol.co.za/pretoria-news/news/rhino-horn-trade-case-delayed-again-12-years-after-arrest-of-suspects-5a6a3864-9d74-4e6d-bd2b-4768488b153b> (accessed on 24 September 2023).

dropped by the state, and a revised charge sheet was subsequently presented to the group. The group is now optimistic that their renewed challenge against the charges will lead to the dismissal of more or all of the charges. However, they are still currently facing around 1,600 charges, which include offenses such as racketeering, money laundering, illegal hunting of rhinos, and dealing in rhino horn. Several African countries, including Kenya and Botswana, have implemented legal frameworks to combat criminal activities, as failure to prosecute wildlife crimes would result in a significant decline in the population of endangered species and megafauna. Extended periods of thorough investigation are typically necessary in cases, yet this endeavour is hindered by limited resources and institutional deficiencies. Insufficient international legal cooperation further exacerbates the issue, as it allows poachers and wildlife traffickers to exploit loopholes due to unclear sentencing procedures. To effectively combat wildlife crime and ensure accountability for perpetrators, it is imperative to bolster investigative teams, enhance intelligence capabilities, provide adequate prosecution facilities and personnel, and revise both international and local legal frameworks. These measures are crucial not only in South Africa but also on a global scale.

### ***South African cases on successful Prosecution of wildlife crime***

South Africa is witnessing the fruition of its long-standing efforts to combat wildlife crime through direct imprisonment. It is crucial to engage in discussions with the prosecuting authority and magistrates to emphasize the significance of wildlife and environmental issues. Presently, there is a commendably high conviction rate for wildlife crime cases, thanks to the National Prosecuting Authority of South Africa's dedicated and experienced prosecutors. A notable example is the case of *Kubai and Another vs The State* [2023] ZALMPTHC, 1 2023 (2) SACR 196 (LT) (27 January 2023), where the accused Mr Kubai's appeal resulted in the overturning of a 12-year sentence imposed by a lower court. Instead, the sentence was increased to 15 years of imprisonment.<sup>202</sup> Cases that have been adjudicated in court remain unreported. Typically, individuals convicted of killing a rhino in Limpopo and Mpumalanga, South Africa, receive sentences ranging from 10 to 15 years of direct imprisonment. However, if there are multiple charges, such as illegal possession of

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<sup>202</sup> *Kubai and Another vs The State* [2023] ZALMPTHC, 1 2023 (2) SACR 196 (LT) (27 January 2023).

firearms and ammunition, the sentence could increase to 15 to 25 years, with each count potentially being ordered to run consecutively under section 280 of the Criminal Procedure Act.<sup>203</sup> Where there prosecutor proves that the act falls under organised crime; 8 more years can be added to that sentence.<sup>204</sup> Animal DNA evidence is crucially utilized, particularly through ERhodis (Rhino DNA Index system). South Africa has individualised rhinos as each has a microchip and DNA kept in a database for easy identification. DNA is collected and a microchip is implanted whenever a rhino is dehorned, whether it is from a poaching incident or a stockpile. Similarly, whenever a veterinarian performs routine procedures on a rhino, DNA is also collected for the purpose of identification and detection.<sup>205</sup> These offences are now in courts deemed as schedule 5 offences for bail purposes due to the high value of wildlife products involved. In Northwest, specifically in Mahikeng, authorities have apprehended four individuals in connection to the theft of 51 rhino horns from a stockpile facility in June 2023. The suspects are Elias Manganda (40), Lindani Vernon Mthombeni (32), Lonjezo Kanjipiti (26), and Lefa Daniel Mankgaba.<sup>206</sup> Following this, the South African Police Service (SAPS) and the Directorate for Priority Crime Investigation (Hawks) provided updates on the ongoing investigation into the theft of the rhino horns. The horns, valued at approximately R9 million, were stolen by a syndicate. Unfortunately, the authorities have not yet been able to recover the stolen rhino horns. The court has rescheduled the case for additional investigation, setting the new date as 14th August 2023. Two out of the four suspects have presented a formal bail application to the court, considering the severity of the offense categorized as a Schedule 5 offense. Consequently, the applicants were granted bail amounts of R2,000 and R5,000 respectively. However, the remaining accused individuals are still being held in custody. A recent matter in December 2023, is that one of the suspected kingpins, Mr Joseph Nyalunga, who was arrested for rhino poaching was granted R10 000 bail by the Naphuno Magistrate's Court outside Tzaneen in

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<sup>203</sup>South Africa. The Firearms Controls Act, 60, 2000.

<sup>204</sup>South Africa. Prevention of Organised Crime Act, 121,1998.

<sup>205</sup>Summers, E. (2022). Let's talk Rhino Poaching Prevention. EcoTraining. 2 Decembe. From: <https://www.ecotraining.co.za/blog/rhino-poaching-prevention/>. (accessed on 8 March 2024).

<sup>206</sup>Modise, P. Climate Change Bill public hearings report; Stolen rhino horns at North West Parks Board. 2023. Parliamentary Monitoring Group. From: <https://pmg.org.za/committee-meeting/37322/>. (accessed on 8 march 2024).

Limpopo.<sup>207</sup> The accused is a former member of the SAPS, Joseph Nyalungu (also known as Big – Joe), who is facing numerous charges, including rhino poaching and racketeering among others. During the period between April and July 2022, the Skhukuza regional court, which serves as the primary court for rhino-related cases, concluded a total of 23 cases involving 29 individuals who were accused. The sentences handed down varied, ranging from fines for admitting guilt to lengthy imprisonment terms. Additionally, a notable proportion of the accused pleaded guilty.<sup>208</sup> This is massive in terms of the impact a court like this is having. In as much as the South African criminal justice system is making remarkable efforts towards the goal of holding perpetrators accountable for wildlife crime, there has been success as we are heading in the right direction in the fight on combating wildlife trafficking. So far there has been a success in prosecution with positive feedback and recently the numbers showed 150 cases still in process, amongst these cases, the following are outstanding and successful cases of the National Prosecuting Authority.

Other outstanding, but unreported cases are the following: In the case of *State v Santos Baloyi*, a 31-year-old Mozambican National, the individual stood trial at the Skukuza Regional Court for various offenses including illegal hunting, possession of an unlicensed firearm, possession of ammunition, possession of dangerous weapons, unlawful possession of rhino horns, and contravention of immigration laws. In September 2022, the accused together with his accomplices were spotted by the ranger officers on patrol after they were attracted by a gunshot that emanated near the area they were patrolling. The poachers upon being spotted fled the scene to evade arrest, which led to a chase and subsequently a shootout ensuing between the rangers and the poachers leading to Baloyi being injured on his leg, one of his accomplices died and his body was discovered the next day and one fled the scene. The accused Baloyi was brought to court and in February 2023, he subsequently pleaded guilty to the above-mentioned charges. The honourable Regional Magistrate ultimately sentenced the accused to an

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<sup>207</sup> Viljoen, B. (2023). Alleged rhino poacher, Big Joe, gets granted bail. Lowvelder News. 16 December. Pretoria. From: <https://www.citizen.co.za/lowvelder/news-headlines/local-news/2023/12/16/alleged-rhino-poacher-big-joe-gets-granted-bail/>. (accessed 8 March 2024).

<sup>208</sup> Bega, S. (2022). Direct jail sentences a win in fight against South Africa's illegal wildlife trade. Mailand Guardian News. 30 August 2022. Pretoria. From: <https://mg.co.za/environment/2022-08-30-direct-jail-sentences-a-win-in-fight-against-south-africas-illegal-wildlife-trade/> (accessed 24 September 2023).

effective 21-year direct term of imprisonment. The sentence was dissected as follows: - two years in prison for trespassing (entering a National park at night without permission), The individual was sentenced to five years in prison for possessing an illegal firearm, two years for having ammunition without a license, 10 years for unlawfully possessing rhino horns, one year for possessing dangerous weapons, and an additional year for violating the Immigration Act when it was revealed that he was from Mozambique and had been residing in South Africa illegally.<sup>209</sup>

In November 2022, the Skhukuza Regional court in the matter of *S v Zitha*, once again convicted and sentenced Mr Sylvester Zitha, a 40-year-old poacher to an effective 17-year imprisonment for poaching-related offences, including the killing of a rhino.<sup>210</sup> In October 2019, at the Kruger National Park. On the day of the incident, rangers were alert after hearing gunshots and embarked on a search and patrol. They then followed up tracks (spoor) and thereafter gave chase in the Tshokwane section of the Kruger National Park, and they spotted two poachers and apprehended them. Upon the apprehension and search the two poachers were found with high calibre hunting rifles fitted with a silencer, ammunition, two rhino horns, and an axe. The poachers were then handed over to the SAPS for further processing and investigation. The two suspects applied and were granted bail. The second suspect Mr Richard Phiri absconded while on bail and was still at large when Mr Zitha was sentenced. On 15 November 2022, the accused was found guilty on six (6) charges which are related to rhino poaching. The Regional Court Magistrate imposed the following sentence on him. Two years for trespassing (entering a National Park without permission), five years for possession of an unlicensed firearm, ten years for killing a rhino, one year for possession of a dangerous weapon (axe) in a national park, and four years for conspiracy to commit a crime. Therefore, the court ordered that the accused serve an effective 17-year direct imprisonment.

In May 2022, the regional court in Empangeni, Kwa Zulu-Natal in the Matter of *S v Michael Masuku*, also set an example where it sentenced

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<sup>209</sup>Endangered species poacher handed down 18 years direct imprisonment. From: <https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=44580> (accessed on 24 September 2023).

<sup>210</sup>Nombembe, P. (2023). Mozambican rhino poacher sentenced to 21 years' imprisonment. From: <https://www.sowetanlive.co.za/news/south-africa/2023-02-04-mozambican-rhino-poacher-sentenced-to-21-years-imprisonment/> (accessed on 24 September 2023).

Mr Michael Kleinbaas Masuku, a 45-year-old, to an effective, 28 years direct term of imprisonment. The accused's conviction follows an incident that took place at the Hluhluwe Umfolozi Game Reserve at KwaZulu Natal. On the specified date, the defendant, along with an accomplice, illicitly plotted to kill rhinoceroses for monetary profit. Subsequently, they unlawfully entered the reserve and proceeded to shoot two rhinoceroses, one white and one black. Following this, they extracted the horns from the first rhinoceros and one from the other before escaping the location. Mr. Masuku was apprehended shortly after the investigation was initiated and was taken to court. After the prosecution led overwhelming evidence against the accused including cellphone mapping evidence and viva voce evidence, he individual was convicted and given a 28-year direct prison sentence for participating in a conspiracy to poach rhinoceros, as well as for two instances of poaching and killing a protected species, and one instance of hunting without the necessary permit.<sup>211</sup>

All three cases illustrated above are a good example and precedence to direct and indicate a direction that should be followed when it comes to sanctioning wildlife crime in South Africa. However, the sentences still do not serve any deterrence as they are always altered in terms of the Correctional Service Act.<sup>212</sup> It is unfortunate because this Act allows for the alteration by reducing sentences imposed by the courts, and this is by the law. Therefore, life imprisonment as a provision of the law with respect of wildlife crime will be the only deterrent sentence, as one will only be eligible for parole after 25 years have elapsed. The Correctional Services Act 1998 gives effect to the Constitution by changing the law governing the correctional system. Its main object and purpose are stipulated as follows: "to establish a correctional system, it is necessary to consider the functions and control of the Department of Correctional Services, the proper custody of all prisoners with respect to human dignity, the rights and responsibilities of both sentenced and non-sentenced prisoners, the implementation of community corrections, the process of release from prison and placement under correctional supervision including day parole and parole, the existence of a National Council for Correctional Services, a Judicial Inspectorate, Independent Prison Visitors, internal service evaluation, Department officials, joint

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<sup>211</sup>Mabuza, E. (2022). Hluhluwe Umfolozi rhino poacher handed 28-year prison sentence. From: <https://www.sowetanlive.co.za/news/south-africa/2022-05-30-hluhluwe-imfolozi-rhino-poacher-handed-28-year-prison-sentence/> (accessed 24 September 2023).

<sup>212</sup>South Africa. Correctional Services Act, 111, 1998.

venture prisons, penalties for offenses, the revision and amendment of specific laws, and other related matters.” This Act allows for remittance of a sentence of a sentenced prisoner in terms of section 80 (1), which reads as follows: A Correctional Supervision and Parole Board has the authority, based on the advice of the Commissioner, to award a prisoner, except those serving life sentences or sentences under section 286A of the Criminal Procedure Act, who have displayed exceptional conduct, a special reduction in sentence of up to two years, either with no conditions or with conditions set by the Board.

Further, to this provision, Section 73(6)(a) of the legislation outlines the conditions under which a prisoner serving a determinate sentence may be considered for parole. Specifically, it mandates that a prisoner must have served either the stipulated non-parole period or half of the sentence before being eligible for parole. However, it also stipulates that parole must be considered once a prisoner has served 25 years of a sentence or cumulative sentences. On the other hand, section 76(6)(v) further elaborates on the criteria for parole eligibility, stating that a prisoner must have served at least four-fifths of the term of imprisonment imposed or 25 years, whichever is shorter. Additionally, the court has the discretion to order that a prisoner be considered for parole after serving two-thirds of the term of imprisonment. The aforementioned regulations solely apply to durations of imprisonment lasting 24 months or more. As Mujuzi aptly stated, the purpose of allowing offenders to be released on parole before completing their full sentence is to serve as an incentive, among other things, to encourage prisoners to exhibit exemplary behaviour during their time of incarceration.<sup>213</sup> It is crucial to note that regardless of whether an offender's parole is regulated by section 73(6)(a) or section 73(6)(v), the maximum duration an offender must serve before becoming eligible for parole is 25 years.

### ***Civil accountability to wildlife crime***

The main objective of the Prevention of Organised Crime Act (POCA) is to criminalise certain activities and prevent any individual from fruitfully benefiting from illegal activities. The ninth and tenth paragraphs of the preamble set out the main objectives of the Act: Individuals mustn't profit

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<sup>213</sup> Mujuzi, J.D. (2011). Unpacking the law and practice relating to parole in South Africa. *Potchefstroom Electronic Law Journal*, 14(5).

from the proceeds of organized crime and money laundering. Therefore, laws must be enacted to ensure the preservation and confiscation of assets linked to the commission or suspected commission of a crime. Furthermore, "it is imperative to allocate these confiscated assets and earnings towards the eradication of organized criminal activities and the prevention of money laundering." The POCA grants the prosecution with the authority to safeguard assets that are suspected to be linked to a criminal act at any point during the investigation and prosecution of said act. Chapter 6 of this Act establishes a system where the emphasis is placed on the proceeds of the crime rather than the person responsible for committing the offense. The procedures outlined in Chapter 6 can be influenced by the Asset Forfeiture Unit of the National Prosecuting Authority, which can make an *ex parte* application to the High Court. This application is a separate process from the criminal investigation, but it always stems from such an investigation. In cases involving racketeering, where the focus is on the network or enterprise rather than an individual perpetrator of individual offenses, this regime is applicable. Furthermore, in cases where the preservation order was not obtained at the commencement of criminal investigations, this legislation grants the prosecution additional authority to seize any assets that can be proven, through evidence, to have been acquired from illegal activities or the proceeds of such activities. This action can be taken upon conviction when the prosecutor in a criminal trial requests the court to conduct an inquiry into the accused's assets and order their forfeiture to the state. In instances of wildlife crime, both the preservation order and confiscation process are applicable, as the nature of the crime itself is organized and driven by financial motives. The term "preservation of property order" in this Act refers to an order mentioned in section 38: (iii), and its procedure is considered a civil process, while the confiscation process outlined in section 18 is intertwined with the criminal process. For the purposes of this Act, the term "proceeds of unlawful activities" is defined as any property, or part thereof, as well as any service, advantage, benefit, or reward that has been obtained, received, or retained, directly or indirectly, in connection with or as a result of any illegal activity conducted by any individual, whether within the country or elsewhere. However, it is important to note that in Chapter 5, the term "proceeds of unlawful activities" carries a different meaning:

- (a) any illegal activity conducted by an individual; or
- (b) any action or failure to act outside the country that would be considered illegal if it had taken place within the country and encompasses any assets derived from such property.

Section 38 (1) of the Act allows for the initiation of a civil action in a subsequent manner: The National Director has the authority to file an *ex*

*parte* application with a High Court seeking an order to prevent any individual, under the conditions and exceptions outlined in the order, from engaging in any transactions involving any property.

This action will mean therefore that in any investigation, where it appears to the prosecution authority that the assets of the party who is investigated are proceeds of crime or object of crime. In the Supreme Court of Appeal case of the *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd* 260/03 [2004] ZASCA 36 (13 May 2004), The Supreme Court of Appeal at [7] analysed “the interpretation of the phrase and affirmed that the forfeiture of the instrumentalities used in a crime is not dependent on a conviction. It can be enforced even in the absence of prosecution. Chapter 6 forfeiture is allowed when it is proven on a balance of probabilities that property was utilized to commit an offense, regardless of whether criminal proceedings are ongoing. Unlike Chapter 5 forfeiture, Chapter 6 is centered on the property used in the commission of an offense rather than the wrongdoers themselves.”

Therefore, the culpability or misconduct of the property owners or possessors is not the main focus of the proceedings. Section 18 (1) of the Act may be applied in the following manner upon conviction and sentence of the accused: “When a defendant is found guilty of a crime, the court that convicted the defendant has the authority to investigate any potential gains that the defendant may have obtained, upon request from the public prosecutor”

- (a) the said offense,
- (b) any other offense for which the defendant has been found guilty during the same trial, and
- (c) any criminal activity that the court determines to be sufficiently connected to those offenses. If the court determines that the defendant has derived any benefit from such activities, it may, apart from imposing any punishment for the offense, issue an order requiring the defendant to pay an amount deemed appropriate to the State. Furthermore, the court may issue any additional orders it deems necessary to ensure the effectiveness and fairness of said order.”

In the case of *National Director of Public Prosecutions v Ramlutchman* (AR161/14) [2015] ZAKZPHC 23; 2016 (1) SACR 362 (KZP) (20 April 2015), the court held that there exists a strong link between the criminal conviction and the confiscation order, with the court having the discretion under section 18 to decide the amount a defendant must pay.

This decision is typically made after the defendant has been convicted of a criminal offense and sentenced. The judge who presided over the criminal trial and sentenced the defendant is usually the one entrusted with this discretion. Having been exposed to all evidence and arguments during the trial, this judicial officer is well-informed about the case. Therefore, the discretion in handling the confiscation order is akin to determining the appropriate sentence in criminal proceedings.

Considering the provisions of the Act, it is clear that the Act focuses on the property, the instrument, or the gains derived from illegal activities. For preservation orders in terms of section 38, to stand one need not prove a link between the crime and the instrument and further one need not prove knowledge of wrongdoing. On the other hand, the confiscation orders in terms of section 18 can be done after the criminal process has been concluded and the accused is convicted. Then the convicting Magistrates need to hold an enquiry into the assets of the convict. The POCA was solely enacted to provide relief to the state for assets derived from illegal activities.

### ***Conclusion***

Soon, the legislature must make room for all domestic legislation regulating wildlife trafficking to give cognisance to universal and/ or extra-territorial jurisdiction such as the Trafficking in Persons and it is widely acknowledged that organized criminal gangs are responsible for committing wildlife crimes across national borders. The reason for this is that wildlife is a global universal concern and needs serious intervention. Upholding compliance with conservation legislation relies heavily on enforcement, yet the presence of corrupt law enforcement officers often obstructs the criminal justice system in apprehending offenders who flee across national borders following the commission of a crime. The boundaries of jurisdiction should not hinder the prosecution of wildlife trafficking crimes. It is crucial to establish global agreements that allow for the trial of wildlife criminals anywhere in the world, regardless of where the offense was committed. This would eliminate the need for extradition and instead consolidate all charges against an individual. Given the cross-border nature of illegal wildlife trade, international and regional cooperation is essential in combating and preventing wildlife crimes. It is widely recognized that wildlife crime is a global issue with ties to international criminal organizations, resulting in a complex and extensive supply chain that cannot be dismantled by a single country or agency. Regional and international cooperation in wildlife law

enforcement is crucial. A global centralized system is necessary to ensure that perpetrators are apprehended, and their offenses are consolidated for trial. The current system allows criminals to evade justice by moving freely across borders, taking advantage of the global nature of wildlife trafficking. Furthermore, a universal legal instrument is needed to enable extraterritorial jurisdiction for prosecuting wildlife crime offenders worldwide. The offenses committed are comparable to those against humanity that led to the establishment of the Geneva Convention. A worldwide agreement is necessary to ensure consistent protection, enforcement, and prosecution with equal penalties across all nations. While South Africa is making progress in the fight against wildlife trafficking, there is still much work to be done. Unfortunately, successful prosecutions in South Africa are rarely publicized unless they reach the High Courts for appeals and reviews. This lack of visibility and precedent hinders future efforts to hold wildlife crime perpetrators accountable. Increased reporting on these cases is essential to provide a foundation for future legal actions against wildlife crime in South Africa. International interventions are crucial during a global pandemic to ensure that perpetrators of wildlife crime are held responsible. Efforts to address the issue encompass intensifying diplomatic efforts to exert pressure on countries where consumers reside, in order to control the illicit trade of wildlife. Expanding the awareness campaigns that specifically target consumers in receiving countries is imperative. Furthermore, a thorough review of the prosecution process within each country should be done to ensure a unified global approach. This will be accompanied by enhanced collaboration among law enforcement agencies and heightened monitoring of international passenger and freight carriers. Crucially, the identification and interception of organized criminal networks will be prioritized, with the ultimate goal of dismantling and eradicating the value and supply chain associated with these activities