

# The South African regulatory framework relating to illegal trade in rhino horn

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Dissertation submitted in fulfilment of the requirements  
for the degree *Magister Legum* in Import and Export  
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Supervisor Prof Louis J Kotzé

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## **List of abbreviations**

AU	African Union
CAMLR	Conservation of Antarctic Marine Living Resources
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species
COP	Conference of the Parties
CPA	Criminal Procedure Act
DEA	Department of Environmental Affairs
EMCA	Environmental Management Co-operation Agreements
EMI	Environmental Management Inspectors
ESPU	Endangered Species Protection Unit
EU	European Union
GATT	General Agreement on Tariffs and Trade
ITA	International Trade Administration Act
KNP	Kruger National Park
MEA	Multilateral Environmental Agreements
MoU	Memorandum of Understanding
NEMA	National Environmental Management Act
NEMBA	National Environmental Management Biodiversity Act
NEMPAA	National Environmental Management Protected Areas Act
NGO's	Non Governmental Organisations
NPA	National Prosecuting Authority
RhoDIS	Rhino DNA Index System
RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Developing Community
SANBI	South African National Biodiversity Institute
SANDF	South African National Defence Force
TBT	The Technical Barriers to Trade Agreements
UN	United Nations
WTO	World Trade Organisation
WWF	World Wildlife Fund

## TABLE OF CONTENTS

List of abbreviations	i
Abstractiv	
<b>1 Introduction</b>	<b>1</b>
<b>2 Historical development and character of the illegal trade industry</b>	<b>7</b>
<b>2.1 Decrease of rhino populations</b>	<b>7</b>
<b>2.2 Commercial value of rhino horn</b>	<b>8</b>
<b>2.3 Extent and nature of illegal trade in rhino horn</b>	<b>11</b>
<b>3 International law regulating illegal trade</b>	<b>12</b>
<b>3.1 Convention on International Trade in Endangered Species</b>	<b>12</b>
3.1.1 Objectives of CITES	12
3.1.2 CITES and illegal trade	15
3.1.3 Challenges faced by CITES to combat illegal trade	19
<b>3.2 The Convention on Biological Diversity</b>	<b>20</b>
<b>3.3 The World Trade Organisation and General Agreement on Tariffs and Trade</b>	<b>23</b>
3.3.1 General Agreement on Tariffs and Trade	23
3.3.2 The World Trade Organisation	26
<b>4 Regional approach</b>	<b>27</b>
<b>4.1 African Union</b>	<b>27</b>
4.1.1 Applicability of African Regional Instruments in South Africa	27
<b>4.1 Southern African Developing Community</b>	<b>28</b>
4.1.1 General	28
4.1.2 SADC's contribution to curb illegal trade	28
<b>5 South African regulatory framework</b>	<b>31</b>
<b>5.1 Environmental Provisions</b>	<b>31</b>
5.1.1 National Environmental Management Act	31
5.1.1.1 Preamble of NEMA as Guideline	31
5.1.1.2 Environmental management in terms of NEMA	32

5.1.1.3	Environmental Management Cooperation Agreements	35
5.1.2	<i>National Environmental Management Biodiversity Act</i>	36
5.1.2.1	Objectives of NEMBA	36
5.1.2.2	Relevant provisions of NEMBA	37
5.1.3	<i>Other relevant Government Notices</i>	40
5.1.4	<i>National Environmental Management Protected Areas Act</i>	45
<b>5.2</b>	<b><i>Criminal Provisions</i></b>	<b>47</b>
5.2.1	<i>Criminal Procedure Act</i>	47
5.2.2	<i>Prevention of Organised Crimes Act</i>	49
<b>5.3</b>	<b><i>Trade Related Provisions</i></b>	<b>51</b>
5.3.1	<i>Trade Administration Act</i>	51
5.3.1.1	Import and Export Control	51
5.3.1.2	Search and Investigation	52
5.3.1.4	Penalties	53
	<b>Certificate of language editor</b>	<b>73</b>

## List of figures

<b>Figure 1</b>	Comparison between rhino numbers and the commercial value per kilogram of rhino horn	8
<b>Figure 2</b>	Decline in the numbers of the black rhino during the past century	9

## **Abstract**

The purpose of this study is to determine whether the current South African regulatory framework related to the illegal trade in wildlife, provides the means to regulate the illegal trade in rhino horn effectively. In an effort to combat and eradicate the illegal trade in wild species and parts therein, South Africa has enacted numerous laws and it has ratified various international conservation Conventions. However, with more than 800 rhinos having been killed in 2013 alone, it is doubtful whether these laws and conventions are adequate.

The first chapter is an introductory chapter summarising the latest statistics on rhinos fatalities as a result of poaching, an estimate on their numbers as well giving a brief overview of what laws and conventions will be discussed in this study. In the second chapter the historical development of the trade in rhino horn is dissected, who the culprits are and the reason why rhinos are poached for their horn. The third chapter analyses international conventions that have been adopted by South Africa, including conventions such as the Convention on International Trade in Enangered Species, the Convention on Biological Diversity and agreements such as the General Agreement on Tariffs and Trade. The fourth chapter will focus more on the regional contributions which the African Union and Southern African Developing Community have made in an effort to combat the illegal trade in endangered species and their products such as rhino. The fifth and final chapter discusses South African legislation which comprises of the National Environmental Management Act, National Environmental Management Biodiversity Act, National Environmental Management Protected Areas Act and the Criminal Procedure Act so as to determine what influence it has had in the effort to regulate the illegal trade in rhino horn.

The conclusion that can be drawn from this study is that the South African regulatory framework on paper is indeed adequate enough to regulate and even eradicate the illegal trade in rhino horn. The reason, however, for it's currently failure is attributable to a lack of enforcement of these measures as a result of a lack of provisions holding entities accountable.

**Keywords:** Rhino horn, illegal trade industry, South African legislative framework, regulating, preventing.

## **Opsomming**

Die doel van hierdie studie is om te bepaal of die huidige Suid-Afrikaanse wetgewende raamwerk met betrekking tot die onwettige handel in wild en dele daarin, effektief genoeg is om die onwettige handel in renoster horing te reguleer. In 'n poging om die onwettige handel hok te slaan het die Suid-Afrikaanse regering verskeie wetgewings gepromulgeer as ook om lid te word van internasionale konvensies. Ten spyte van die progressiewe stappe is daar egter steeds meer as 800 renosters in 2013 alleen gestroop vir hulle horings, en gevolglik word twyfel getrek oor die vraag of sodanige wetgewing en konvensies voldoende is.

Die eerste hoofstuk dien as 'n inleidende hoofstuk wat die nuutste statistieke met betrekking tot renoster sterftes aandui, asook wat die huidige renoster getalle is. Daar word ook kortliks vermeld watter wetgewende regulasies en konvensies die inhoud van die studie sal uitmaak. In hoofstuk twee word daar gekyk na die historiese agtergrond en ontwikkeling van die onwettige handel in renoster horing, wie die oortreders is asook waarvoor renoster horing gebruik word nadat die dier gestroop is. Hoofstuk 3 analiseer die internasionale konvensies wat die Suid-Afrika aangeneem is, wat insluit CITES, CBD en ooreenkomste soos GATT. Die vierde hoofstuk sal fokus op die regionale bydraes wat deur onder andere die AU en die SADC gemaak is in 'n poging om die onwettige handel in renoster horing te bekamp. Die vyfde en finale hoofstuk bespreek Suid-Afrikaanse wetgewing wat bestaan uit NEMA, NEMBA, NEMPA en die SPW ten einde te bepaal watter invloed dit het op die regulering van die onwettige handel in renoster horing, indien enige.

Die konklusie wat afgelei kan word, is dat die Suid-Afrikaanse wetgewende raamwerk wel voldoende is om die onwettige handel in renoster horing hok te slaan, maar dat die doelwit nie realiseer nie omrede daar 'n afwesigheid van bepaling is wat die nakoming van hierdie regulasies afdwing.

**Sleutelwoorde:** Renoster horing, onwettige handel industrieë, Suid-Afrikaanse wetgewende raamwerk, reguleer.



## 1 Introduction

Environmental protection is a fundamental right, guaranteed and protected under the *Constitution of the Republic of South Africa*, 1996.<sup>1</sup> Section 24(b)(ii) specifically provides the right that everyone has to an environment that is protected for the benefit of present and future generations. The responsibility rests upon the state to ensure the realisation thereof through reasonable legislative and other measures.<sup>2</sup>

Despite the fact that the abovementioned is entrenched in the Constitution, some wildlife resources, more than ever before, are faced with the threat of extinction. South Africa's wildlife resources are threatened by poaching and products are traded across the world. Trade, whatever the nature thereof, is a reality with several organisations that have been established over decades with the sole purpose of promoting trade on a global scale.<sup>3</sup> Trade can take place either on a legal basis or it can be done illegally. In the environmental context, and more specifically the trade in endangered species and their products such as rhino horn, it is done on an illegal basis in the majority of cases.<sup>4</sup>

The only manner in which rhino horn can be exported on a legal basis, is if the required permits and/ or necessary permission has been obtained. This requirement, moreover, poses several difficulties in that it can take months for these permits to be issued, as well as the fact that it can be quite expensive.<sup>5</sup> Furthermore, someone that wishes to export a rhino horn needs to prove that the horn itself is indeed being exported as a trophy which has been mounted adequately.<sup>6</sup> As such the exportation of rhino horn in this manner is not the norm but rather a severely circumscribed exception. All these barriers, amongst several

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1 Hereafter the Constitution.

2 S 24(b) of the Constitution.

3 These include organisations such as GATT established in the 1940's and WTO in 1995 respectively.

4 Wyler and Pervaze *International illegal trade 2*.

5 Modise 2012 [www.environment.gov.za](http://www.environment.gov.za).

6 Anon 2013 [www.defra.gov.uk](http://www.defra.gov.uk). Mounted rhino horns in their natural state are considered to be "worked items" prepared and acquired in such a condition, and can only be legally sold if it qualifies as the same 2.

reasons, have opened up a reality to an ever increasing illegal poaching epidemic, together with subsequent illegal trade activity. It is on the aspect of *illegal* trade upon which this study will mainly focus and more specifically the illegal trade in rhino horn.

The illegal poaching and trade in the species of endangered species has been a massive problem and challenge for environmental authorities in Africa for many decades. With specific reference to poaching, the South African Department of Environmental Affairs (hereafter the DEA) estimates that poachers have slaughtered more than a 2000 rhinos in the past three years.<sup>7</sup> In 2013 alone, poachers killed an alarming 1004 rhinos of which 606 horns were felled in the Kruger National Park<sup>8</sup> with another estimated 331 poached in 2014.<sup>9</sup> Included in these estimates are 19 critically endangered black rhinos. Only some 20,000 rhinos are left in the wild, but even these numbers are questioned by environmental experts who estimate the number at around 16,000.<sup>10</sup> According to recent reports made available by the DEA, 618 rhinos have already been killed in 2013 and this number increases on a daily basis.<sup>11</sup>

Rhinos have been slaughtered to near extinction to fuel the insatiable demand for rhino horn products in China - and more recently Vietnam - for medicinal use even though it is believed to have no medicinal properties.<sup>12</sup> Recent studies conducted by three researchers at the University of Hong Kong, however, indicated that rhino horn does indeed have the ability to lower symptoms of fever as well as to reduce head ace, albeit minor.<sup>13</sup> Statistics made available by the World Wildlife Foundation (WWF) reveal that between 2007 and 2011, rhino poaching in South Africa has increased by an alarming 3,000 percent.<sup>14</sup> From a financial point of view culprits seem to gain immensely (in comparison with gold,

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7 Issued by the Department of Environmental Affairs on 23 December 2013 update on rhino poaching statistics.

8 Emslie and Brooks 1999 *IUCN SSC African Rhino Status Summary and Conservaiton Action Plan* 21. The threat of poaching increases with the proximity to national borders, the Kruger Naitonal Park being situated adjacent to the Mozambican border.

9 [www.environment.gov.za/rhino](http://www.environment.gov.za/rhino) poaching statistics 2014.

10 Gunther 2011 [www.worldwildlife.org](http://www.worldwildlife.org).

11 Rhino population and poaching statistics issued by the DEA on 1 September 2013.

12 Farms 2012 [www.agriportal.co.za](http://www.agriportal.co.za).

13 Costa Neto 2004 *Sustainable Development* 161-174.

14 McLendon 2013 [www.mnn.com/record](http://www.mnn.com/record) number of rhinos poached in 2013.

which today sells at approximately \$ 49 665.80 / kg, a kilogram of rhino horn sells on the black market in Asia for almost \$ 60,000 /kg).<sup>15</sup> These statistics indicate that the value of these horns on the international market is worth more than gold and, therefore, constitutes one of the main driving forces or incentives for the illegal trade in rhino horn.<sup>16</sup>

To counter this ever growing threat of poaching and subsequent illegal trade, the government has put in place a series of statutes. It has also signed and ratified international treaties such as the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, (CITES) which was drawn up in 1973.<sup>17</sup> This is an international agreement between governments aimed at insuring that international trade in species of wild animals does not threaten their existence. Other examples include *the Convention on Biological Diversity* (CBD) which entered into force on 29 December 1993 and it mainly focuses on the conservation of biological diversity as well as the sustainable use of genetic resources. Finally, organisations such as the WTO need mentioning as it also provides several measures which contribute towards protecting endangered species.

Apart from the various instruments aimed at combating and preventing the illegal trade in wildlife, there are also several trade related instruments that exist and that are aimed, amongst other things, at regulating the trade in wild species. One such instrument is the *General Agreement on Tariffs and Trade* (hereafter GATT) that came into force on the 1<sup>st</sup> of January 1948, with South Africa becoming signatory on the 23<sup>rd</sup> of June that same year. Article XI is of specific relevance to this dissertation as it deals with quantitative restrictions on trade.<sup>18</sup> Sub article (iii) states that the elimination of quantitative restrictions, as imposed by paragraph 1 of article XI, will not extend to the restrictions that are imposed on the quantities of any animal product permitted to be produced and exported.<sup>19</sup> The relevance hereof for the South African context is that no such elimination of restrictions will

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15 Caulderwood 2014 [www.internationalbusinesstimes.com](http://www.internationalbusinesstimes.com) 10 April 2014.

16 Bryson 2012 [www.cnsnews.com](http://www.cnsnews.com) 11 April 2012.

17 Hereafter CITES.

18 Ford *WTO Allow New Trade Restrictions* 3.

19 GATT text of the Agreements 18.

have force regarding the trade in rhino horn due to the exception brought about by article XX of GATT.<sup>20</sup> The discussion on GATT will be elaborated on later in the dissertation.

When looking at the African regional contribution to the legal framework, the establishment of the Southern African Developing Community (hereafter SADC) was deemed to be of great value, complimenting the role of the African Union (hereafter AU) in its goal to further socio-economic cooperation and integration among 15 Southern African states.<sup>21</sup> The primary objective of SADC, as seen in article 4 of the Protocol on Wildlife Conservation and Law Enforcement, is to establish within the region and within the framework of the respective national laws of each State Party, common approaches to the conservation and sustainable use of wildlife resources. Adjacent hereto article 5 places further emphasis on the objective of achieving effective protection of the environment.<sup>22</sup> SADC seeks to enforce these objectives through its leading coordinating sectors and units that act as a legal and regional body providing a framework in which member states must enact legislation that enforces conservation.<sup>23</sup>

The first instrument assisting in achieving this goal can be found in the SADC Protocol on Wildlife Conservation and Law Enforcement.<sup>24</sup> The principles in terms of section 3(1) entail that each State Party declares that it will ensure the conservation and sustainable use of wildlife resources under its jurisdiction. Also of relevance is article 6(2) which states that State Parties shall endeavour to harmonize measures governing the trade in wildlife products and bringing the penalties for the illegal taking and trade of wildlife and wildlife products to comparable deterrent levels. Finally, State Parties are required to ensure the protection of wildlife so as to guarantee the maintenance of its populations, the

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20 Crawford 1995 *Geo Int'l Env'tl L Rev* 555.

21 [www.sadc/international.org](http://www.sadc/international.org); *Achievements of the Southern African Developing Community* 5.

22 As stated in article 5(1)(g) of the SADC Protocol on Wildlife Conservation and Law Enforcement.

23 SADC Sub-regional Report on the UN Conference on Environment and Development 62.

24 Article 5(7)(b); Institutional Arrangements of the Wildlife Sector Committee.

prevention of the over-exploitation of endangered species and the restriction of trade in wildlife and its products.<sup>25</sup>

With South Africa being a member to the AU, the revised version<sup>26</sup> of the *African Convention on Conservation of Nature and Natural Resources*, enacted 11 July 2003, also applies within the limits of its national jurisdiction in terms of section I(1).<sup>27</sup> This imposes the obligation upon a state to enact legislation that enhances environmental protection in such a way that developmental and environmental needs are met in a sustainable and equitable manner as stated in articles II(1) and III(3) respectively. Article X(2) specifically emphasizes the importance of adopting legislation to protect threatened species with article XI(2) stating that members should co-operate through bilateral and sub-regional agreements with the view of ultimately eliminating the illegal trade in wild fauna and flora or their species or products.

One of the consequences of South Africa being a party to the abovementioned treaties is that it has to change and enact domestic legislation that specifically regulates trade so as to adhere to the general provisions of sections 39 and 231 of the Constitution.<sup>28</sup> In the South African context, there are some legislative measures that have been introduced to combat the illegal trade of wild species, the most distinctive being the *National Environmental Management Act 107 of 1998* (hereafter NEMA) together with the *National Environmental Management: Biodiversity Act 10 of 2004* (NEMBA) and the *National Environmental Management: Protected Areas Act 57 of 2003* (NEMPAA). Other statutes are the *National Environmental Management: Protected Areas Act* (NEMPAA) 57 of 2003, the *Criminal Procedure Act* (CPA) 51 of 1977, the *National Defence Act 42 of 2002* as well as the *Prevention of Organised Crime Act 121 of 1998*. Trade

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25 Stated in articles 7(3)(a), (c) and (d) respectively.

26 *African Convention on Conservation of Nature and Natural Resources* 2003.

27 With specific reference to article VII(2)(b): b. Contracting States shall adopt adequate legislation on hunting, under which: unauthorized methods are prohibited.

28 S 39(1)(b) requires that courts, tribunals or forums should consider international law when interpreting the Bill of Rights. Section 231 is twofold, sub-par (4) stating that any international agreement becomes law in the Republic when it is enacted into law by national legislation unless it is inconsistent with the Constitution. Sub-par (5) states that the Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

legislation such as the *International Trade Administration Act*<sup>29</sup> (ITA) has also been adopted to make provision for control, through a permit system, of all goods imported and exported specified by regulation.<sup>30</sup>

In light of the foregoing, this dissertation addresses the following question: due to the dramatic increase in rhinos killed in recent years, does South African law, within the context of the international and regional legal orders, provide the means to regulate the illegal trade in rhino horn,<sup>31</sup> and if so to what extent?

In order to answer this question a study will be undertaken mainly based on a literature review of relevant textbooks, legislation, law journals, case law and internet sources relating to the illegal trade in rhino horn. The study will include a focus on the international, African and South African laws regulating trade because they provide the regional context and framework within which South African law is meant to be understood and in terms of which South African law functions.

In the subsequent chapter a brief history of the illegal trade in rhino horn will be given so as to assist in providing context. Thereafter, a study of international instruments and treaties aimed at regulating and preventing trade will be done. The following chapter will deal with the AU as well as SADC law, which will specifically focus on trade measures and provisions for conservation. Penultimately, South African law aimed at combating illegal trade and prosecuting trade offenders will be analysed. Following these sections, a conclusion will be formulated together with recommendations based on the content of the study.

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29 Act 71 of 2002.

30 Hansen 2012 [www.wwf.org](http://www.wwf.org) 3.

31 Thus horns that are traded without the necessary permits and which was obtained through illegal poaching activities with the goal of selling it to Asian black markets.

## **2 Historical development and character of the illegal trade industry**

This section, among other issues, presents a review of the nature and extent of the illegal trade in endangered species, with specific reference to rhino horn. In order to do so, it is necessary to delve into the historical development and character of this industry as a means to describe the nature and extent of the illegal trade in rhino horn.

### ***2.1 Decrease of rhino populations***

South Africa has between 70% and 80% of the world's rhino population and as such has become the centre of poaching and subsequent illegal trade in rhino horn.<sup>32</sup> Information that was made available by the Endangered Species Protection Unit (ESPU) of South Africa, indicates that crimes related to rhino horn comprise of at least 40% of the trade in endangered species.<sup>33</sup> Accordingly the vast majority of the worldwide illegal trade in rhino horn occurs in South Africa with the effect that it is at the forefront of the struggle to combating trade therein.<sup>34</sup>

No other species in the world has been depleted so rapidly as a result of poaching as is the case with rhinos, mainly due to the commercial value of their horns.<sup>35</sup> Research revealed that in 1960 there were an estimated 100 000 black rhinos in the world, which dramatically decreased to 65 000 by 1970, with as few as 2200 alive in 1996. This indicates the most precipitous decline in numbers of any large mammal ever recorded.<sup>36</sup>

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32 Gates 2013 [www.huffingtonpost.com](http://www.huffingtonpost.com).

33 IUCN Report (09/11/00) *Trade Measures In Multilateral Environmental Agreements* 49.

34 Du Bois 1997 *African Security Review* 28-41.

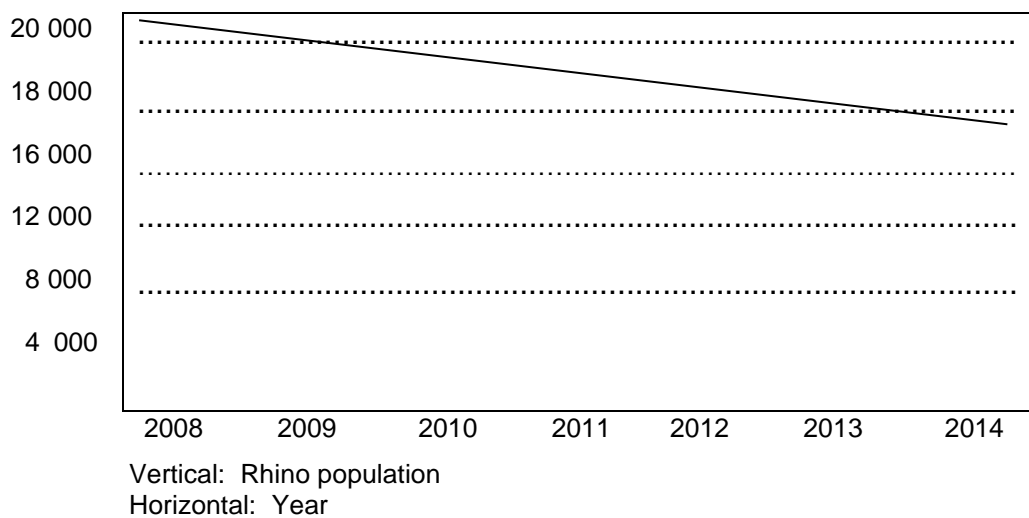
35 Dunn, Hearne and McArthur *A Simple Individual Based Model* 2202.

36 Swanepoel 1998 *International Journal of Risk Security and Crime Prevention* 207-222.

## 2.2 Commercial value of rhino horn

The historical development of the illegal trade industry is inextricably linked to the commercial value of rhino horn. Substantiating the latter statement the following graph indicates how the number of animals has decreased, as the value per kilogram horn increased from the period 2008 to 2014.<sup>37</sup>

**Figure 1: Comparison between white rhino numbers and the commercial value per kilogram of rhino horn<sup>38</sup>**



YEAR	2008	2010	2012	2014
Population	21 000 <sup>39</sup>	20 160 <sup>40</sup>	19 346	18 342
Rand Unit <sup>41</sup> per	17	34	11 143	18 440

During the 20<sup>th</sup> century it was black rhinos that suffered the most at the hands of poachers due to the fact that their populations far exceeded that of the white rhino during the same period. Throughout most of the 20<sup>th</sup> century, black rhinos were the most numerous of the world's rhino species numbering at more than a

37 [www.stoprhinopoaching.com/statistics](http://www.stoprhinopoaching.com/statistics) issued by the Department of Environmental Affairs on 9 April 2014

38 Swanepoel 1998 *International Journal of Risk Security and Crime Prevention* 207-222.

39 [www.wwf.org.za](http://www.wwf.org.za); *Rhino Poaching in South Africa Reaches all-time High* 1.

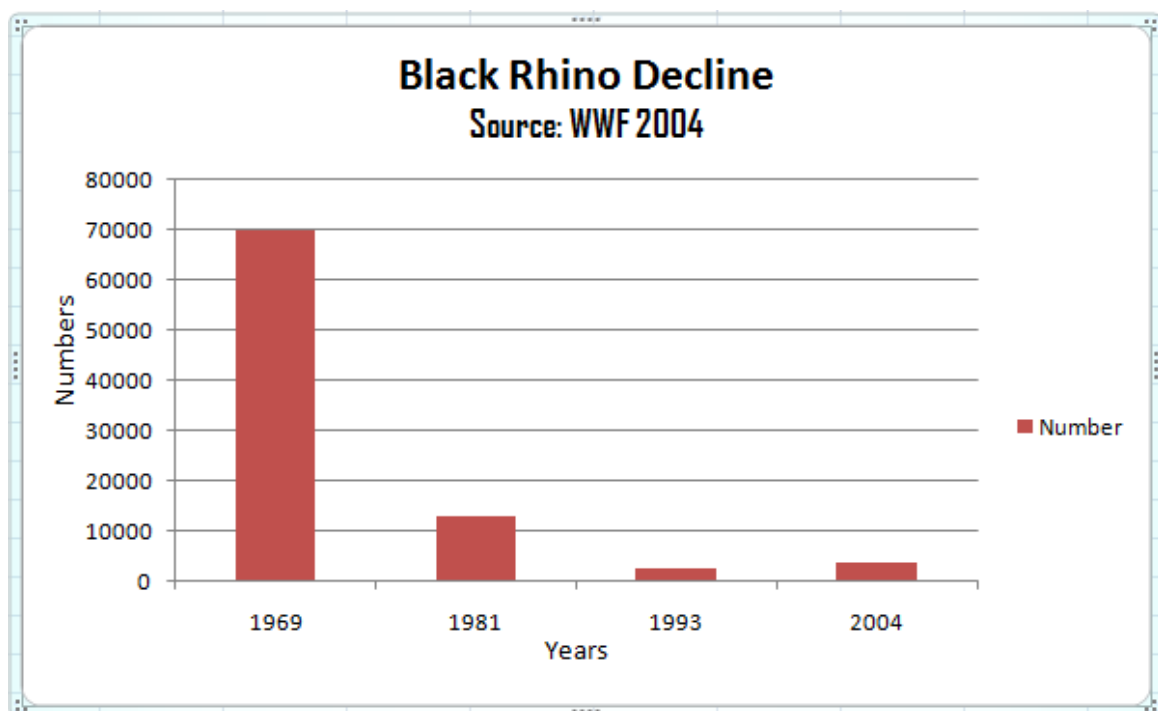
40 Mead 2013 [www.motherboardvice.com](http://www.motherboardvice.com) *The Rhino Horn Crises and the Darknet*

41 A unit equals a kilogram.



hundred thousand.<sup>42</sup> Their numbers decreased at such an alarming rate that at the end of 1995, they nearly faced extinction. The biggest decline (Figure 2) occurred during the 1960's and 1970's.<sup>43</sup> This is not a coincidence, seeing that it is during this period, as is indicated in the abovementioned graph, that rhino horns became valuable commodities. Between 1960 and 2013 the value of rhino horn increased from just R17 per unit to a staggering R19 000, clearly substantiating the belief that the greatest incentive behind the poaching of rhinos is the financial gain it holds for perpetrators.

**Figure 2: Decline in the numbers of the black rhino since 1960<sup>44</sup>**



The WWF estimated that 96% of all black rhinos were killed during the period 1960 to 1980.<sup>45</sup> At the end of 1996, South Africa accommodated around 890 of the world's 2200 black rhinos, (thus around 40%), whilst 6300 of the 6800 white rhinos were found in South Africa, or 92%.<sup>46</sup> The dramatic decrease in the

42 Blakely 2013 [www.theaustralian.au/](http://www.theaustralian.au/).

43 Their population decreased from 70 000 to just more that 10 000.

44 [www.wwf.org/effective black rhino poptlion size 2004](http://www.wwf.org/effective_black_rhino_population_size_2004).

45 Anon 2012 [www.wwf.org.uk/africanrhinos](http://www.wwf.org.uk/africanrhinos).

46 Swanepoel 1998 *International Journal of Risk Security and Crime Prevention* 207-222.

population of rhinos in the rest of Africa, together with the rise in the value of their horns, subsequently left the rhinos in South Africa in a very vulnerable position.

The biggest market for rhino horn and other affiliated rhino products was (and are still found) in countries in the Far East such as China, Korea, Taiwan, Thailand and more recently Vietnam.<sup>47</sup> At the start of 1996 it was, however, the white rhino that came under threat with the number of white rhinos being slaughtered far exceeding that of black rhinos. This is mainly attributable to the fact that its horn is substantially bigger than that of the black rhino which in turn means a substantially higher profit being made by perpetrators.<sup>48</sup> The main uses of rhino horn are the following:<sup>49</sup>

- The making of daggers, which are given to Yemeni boys as a gift after they have been initiated into manhood. Annually up to as many as 50 000 boys are initiated, clearly indicating that the demand for these horns far exceeds the supply with the result of promoting the illegal trade.<sup>50</sup>
- Medicinal uses. The ancient Greeks dating as far back as the 5<sup>th</sup> century BC used the horn of rhinos as a cup to detect poisons, as well as believing it to be an ingredient for medicinal recipes. Today it is believed that the horn acts as a remedy for fevers, arthritis and even having the capability of curing cancer although its remedial properties and value have been disputed.<sup>51</sup>
- As sexual stimulant, also known as an aphrodisiac. The cause of this reasoning lies in the ability of the male rhino to have intercourse for long periods of time and adjacent hereto its ability to ejaculate on various occasions during this period; a traditional Viagra.<sup>52</sup>

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47 Rooker-Smith 2012 [www.go/news/legalise-rhino.com](http://www.go/news/legalise-rhino.com).

48 448 white rhinos were killed in 2012, whilst only 19 black rhinos were killed in the same year. *Update on Rhino Poaching Statistics* - the Department of Environmental Affairs.

49 Swanepoel 1998 *International Journal of Risk Security and Crime Prevention* 207-222.

50 Balfour and Balfour *Rhino* 63-70.

51 Montesh "Rhino poaching" 2.

52 Handwerk 2006 [www.news.nationalgeographic.com](http://www.news.nationalgeographic.com).

### **2.3 Extent and nature of illegal trade in rhino horn**

Generally speaking a rhino horn weighs anything between 0.5 kg to 7 kg, with the average at around 2,88 to 4.0 kg per horn.<sup>53</sup> Most of the horns are, however, not very heavy, which makes it possible for poachers to conceal, transport and trade them more easily by concealing the horns in suitcases, rucksacks and even sleeping bags.<sup>54</sup> At the end of 1996 it was determined that 90% of all offenders are men ranging between 20 to 65 years of age with the average age being 35. 76.5% were citizens of South Africa, with around 23% residing in countries such as Namibia, Botswana, Zimbabwe, Mozambique and China.<sup>55</sup> The general occupation of these culprits include, general labourers, miners, taxi drivers and business men, the latter most of the time being the brains and the financiers behind the poaching activity.

It has been determined that the majority of illegal trade takes place in and around thoroughfares, airports and cities; especially those where established crime syndicates operate.<sup>56</sup> One of these cities, as can be expected, is Johannesburg where OR Tambo International Airport (the busiest airport in Africa) is situated.<sup>57</sup> An article released by the conservation group, Saving Rhinos, contained a document that was published by the South African Parliamentary Monitoring Group which revealed that 38 rhino horns were exported from OR Tambo to China during the period 2008-2011.<sup>58</sup> This document also stated that during that same period estimated 60 rhino horns were illegally transported from the Limpopo and North West Province to OR Tambo, respectively. Another 40 horns were confiscated at OR Tambo which were transported from Mpumalanga, thus confirming the argument that Johannesburg is indeed a major destination from where syndicates operate their illegal trade activity.<sup>59</sup>

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53 Sas Rolfes *Ten rhino conservation myths and misconceptions* 6.

54 2011 [www.sanwild.org](http://www.sanwild.org).

55 Swanepoel 1998 *International Journal of Risk Security and Crime Prevention* 207-222.

56 [www.thebibleandanimals.org/](http://www.thebibleandanimals.org/) Maputo's harbour and airport serves as a gateway for international crime syndicates to smuggle rhino horn to China and Vietnam.

57 Anon 2012 [www.africanbusinessreview.co.za](http://www.africanbusinessreview.co.za).

58 Larson 2012 [www.rhinoconservation.org](http://www.rhinoconservation.org).

59 Milliken, Emslie and Talukdar 2009 *Traffic* 5.

Despite the fact that the trade in rhino horn has been banned for nearly 4 decades, illegal trade in rhino horn is regarded as being one of the most lucrative international trade industries. As such it poses a great challenge to efforts of conserving these threatened animals and more properly regulating trade in the horns. Organisations involved in combating illegal trade should take cognisance of the fact that the public's ignorance regarding the nature and the extent of this crime is a factor which offenders rely heavily upon and as such the task of preventing illegal trade is increasingly extending to legislators and law enforcers.<sup>60</sup>

### **3 International law regulating illegal trade**

This section will focus on international conventions South Africa has adopted in its effort to combat the illegal trade in rhino horn. It will focus on the provisions and relevant conventions regarding the aspect of trade in endangered species such as rhinos.

#### ***3.1 Convention on International Trade in Endangered Species***

##### *3.1.1 Objectives of CITES*

CITES was established as a response to growing concerns that over-exploitation of the international trade in wild species and their products was the reason for the rapid decline of many animal species worldwide. This is also one of the main reasons or incentives for the establishment of this Convention as is clearly stated in its preamble.<sup>61</sup> The fact that South Africa ratified CITES,<sup>62</sup> therefore, means that it becomes directly relevant to the South African context as it is the trade in rhino horn that poses a significant threat to their very existence.

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60 Swanepoel 1998 *International Journal of Risk Security and Crime Prevention* 207-222.

61 The representatives of roughly 80 countries signed this convention in Washington DC on the 3rd of March 1973, with its subsequent enforcement on the 1st of July that same year. The number of member states has since then increased to a 173 in 2008 of which South Africa is one.

62 South Africa ratified this convention July 1975.

In short, CITES aims at achieving the following goals: to monitor and stop commercial trade in endangered species; to maintain species under international commercial exploitation; and to assist countries towards sustainable use of species through international trade.<sup>63</sup> The proper functioning of the Convention and whether or not it will succeed in achieving these goals, depend to a great extent on the commitment of the parties to comply with and implement the Convention and its Principles. One of the key characteristics by which this treaty functions is formal international meetings, which is attended by all member states, known as the Conference of the Parties (hereafter CoP). The latter acts as the governing body of CITES and meets every 2 to 3 years.<sup>64</sup> Apart from the adopting of resolutions and the amending of principles, the main purpose or agenda of these meetings is to discuss the status of endangered species as well as the listing or delisting of such species.<sup>65</sup>

While a number of human activities contribute to the extinction of endangered species, a further fundamental discussion point at the Conference is related to problems that arise from international trade. For this reason the pragmatic point of control of the treaty is the actions related to importation and exportation.<sup>66</sup> Such control is implemented through the establishment of appendices, with subsection 4 of the treaty stating that “parties shall not allow trade in specimens of species (for example rhino horn) included in Appendices I, II or III.

Currently approximately 33 000 species of fauna and flora are protected under the three CITES appendices. The first appendix lists all the species that are critically endangered (including rhinos) and which are or may be affected by trade.<sup>67</sup> Trade in specimens of these species is subject to particular strict regulations in order not to further endanger their survival and must only be authorised in exceptional circumstances.<sup>68</sup> It should, however, be emphasised that

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63 Fuchs *CITES - Conservation Efforts* 1.

64 This body mainly reflects on matters concerning progress made in the conservation of species listed in its appendices; to discuss and adopt proposals to amend the list of species in appendices i and ii and finally to consider recommendations and propositions of parties.

65 Favre 1989 *A Guide to CITES* xviii.

66 Favre 1989 *A Guide to CITES* 2.

67 Milliken and Shaw *SA-Viet Nam Rhino Horn Trade Nexus* 9.

68 Favre 1989 *A Guide to CITES* 29.

in the context of this study, the trade in rhino horn is strictly prohibited, with the trade in trophies, which forms only a small aspect of the trade, being the exception as mentioned above. The second appendix lists animals that will be endangered if the trade in these animals continue unregulated. The third appendix includes animals that are regulated domestically by a specific party, and which seeks the co-operation of other parties to control the international trade in those specific species.<sup>69</sup>

The international trade in CITES species is regulated by parties through a system of permits and certificates. These permits and certificates are a pre-requisite for any importation or exportation of any animal or parts thereof to or from a country if such an animal is listed in the CITES appendices.<sup>70</sup> Moreover, each party is required to enact national legislation that assists in reaching the goals set out by CITES. Secondly, two national authorities must be appointed of which the first is a Management Authority.<sup>71</sup> The latter will be responsible for the issuing of the above-mentioned permits and certificates and it will do so on advice of the second authority which is the Scientific Authority. These authorities further provide assistance in enforcing the goals of CITES by working closely with national bodies such as the police, customs and other relevant agencies. In South Africa, the DEA is both the managing as well as the scientific authority.<sup>72</sup>

It was at CoP 11 and 13 respectively that the issue regarding the poaching of rhinos was at the centre of discussion. At the 11<sup>th</sup> meeting, held at Nairobi in October 2000, the conservation of, and trade in rhinos was the issue of concern, whilst at the 13<sup>th</sup> meeting<sup>73</sup> the subject regarding rhino trophy hunting was mainly focused upon.<sup>74</sup> It was decided that South Africa would be allowed an annual quota of five black rhinos each for trophy hunting and adjacent hereto be allowed to open up the hunting of white rhinos although on a strictly controlled basis.<sup>75</sup> Recommendations included that: the Scientific Authority of the State of import, in

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69 Vasquez 2012 [www.cites.org/eng/news](http://www.cites.org/eng/news) 5.

70 Vasquez 2012 [www.cites.org/eng/news](http://www.cites.org/eng/news) 6.

71 Article IX(a) and (b) of CITES.

72 [www.environment.gov.za](http://www.environment.gov.za).

73 Held in Bangkok in April 2004.

74 Anon 2009 [www.iisd.ca/wildlife-cites](http://www.iisd.ca/wildlife-cites).

75 Resolution Conference 13.5 in CoP 14 Documents 37.2.

reviewing applications for permits to import black rhinos hunting trophies, can only approve permits if it is satisfied that the trophies considered are from a range State to which an export quota has been granted in accordance with the provisions of the present Resolution 9.14. Furthermore, that the authority has to be satisfied that the trophies are not to be sold in the country of export and that no more than one trophy will be imported in one calendar year.<sup>76</sup>

Regarding the aspect of illegal trade, CoP 13 called for the reinstatement of resolution 3.11 and 6.10. Resolution 3.1 was adopted at CoP's 3<sup>rd</sup> meeting back in 1981, which called for a halt in *all* trade in rhinos and their products by placing a moratorium on sale of government and parastatal stocks.<sup>77</sup> Moreover Resolution 6.10 adopted in Ottawa 1987, holds that all stocks of rhino horn accumulated globally be destroyed seeing as it indirectly contributes to supplying in the demand for rhino horn.<sup>78</sup>

### 3.1.2 CITES and illegal trade

Due to the rapid decline in their populations, the first step CITES took was to list all rhino species in appendix 1 of CITES<sup>79</sup> after which it was followed by the international banning of the trade in 1977. This was a major step forward for South African conservation as the numbers of rhino populations were still very fragile. South Africa had by then been at the forefront of rhino conservation for many years and as such any kind of support CITES brought to the table was indeed of great significance be it financially or legislative. Thus the approach was aggressively stepped up to a 'ban and enforce' policy, with the only exception being an appendix 2 down listing in 1994 for the South African white rhino population that allowed for trophy hunting.<sup>80</sup> Regarding the question of whether or not this ban has been successful to date, one has to consider the basic laws of

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76 Resolution Conference 13.5 *The Establishment of quotas for Rhino hunting trophies 2.*

77 Traffic Network Report 1997 *Rhino Progress 2.*

78 Milliken, Emslie and Talukdar 2009 *Traffic* 86. For example, 8 rhino horns were stolen from the Irish National Museum this year, with another 3 museums in Germany having been infected by the illegal rhino horn trade. Horns were stolen from Bamberg, Oerrel and Hamberg respectively and as such justifying the conclusion that accumulated horns only act as a temptation for syndicates to fuel the market.

79 Sas-Rolfes *CITES and the Trade in Rhino Horn 1.*

80 Sas-Rolfes *CITES and the Trade in Rhino Horn 2.*

economics; namely supply and demand. As was stated in the previous chapter, the banning of a trade does not necessarily end it; on the contrary, it simply raises the risk and subsequently the cost of trading. If the demand for a product persists and the price thereof is right, illegal supply will continue even after the trade has been banned.<sup>81</sup> The problem with price-elastic demand is that when you restrict supply, the illegal trade actually becomes more profitable, not less, which in turn attracts criminals whom operating on a professional basis.<sup>82</sup> This statement is clearly substantiated by practise as the number of rhinos poached has increased dramatically since the banning was instituted.<sup>83</sup>

The aspect of trophy hunting also became a thorn in the side of conservationists as this market has encouraged the increased private sector investment in living rhinos. This led to many poachers posing as hunters which enabled them to hunt rhinos on these privately owned reserves and subsequently opened up the possibility of legally exporting these horns out of the country.<sup>84</sup> This was indeed the case in South Africa in July 2011 when a Thai syndicate, Chemlong Lemtongthai, used prostitutes to pose as sanctioned hunters. After about 40 rhinos were poached, this organised syndicate used hunting permits to export rhino horns illegally to the Far East. In fact, as much as a quarter of the 222 rhinos that were killed in 2010 in South Africa were "hunts" authorised by provincial conservation authorities.<sup>85</sup>

In reaction hereto, the CITES-complaint authority attempted to clamp down on this market but without the desired result. CITES sought to dictate the market in such a way that trade had to be monitored and controlled, but to levels that were possibly unachievable. The only result it brought about was that it restricted the supply of horns to the market, thereby driving the price on the black market up even further. This subsequently led to an increase in illegal rhino poaching and trade which in turn became even more difficult to control seeing as an increasing

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81 Sas-Rolfes *CITES and the Trade in Rhino Horn* 3.

82 Sas-Rolfes *CITES and the Trade in Rhino Horn* 3.

83 As is clearly indicated in Figure 1 on page 8 of this dissertation.

84 Sas-Rolfes *CITES and the Trade in Rhino Horn* 5.

85 McLeod 2011 [www.wwf.scorecardreport.com](http://www.wwf.scorecardreport.com). The secretariat however believes that South Africa since then has put in place comprehensive measures to control trophy hunting adequately and to avoid pseudo-hunting.



number of specialised syndicates became involved.<sup>86</sup> It would seem as if the only result the increased measures implemented by CITES might have had, was to make it even more difficult to regulate and monitor the illegal trade as it has forced syndicates to operate more meticulously.

At the recently held CITES CoP 16,<sup>87</sup> major discussions were held regarding the poaching of rhinos and the illegal trade in their horns. South Africa, being the country hardest hit by poaching, failed to submit a legal rhino horn trade proposal for CoP16. One of the reasons for that being that WWF South Africa believes that the demand for rhino horn could be "terminated without resorting to trade", since the market was still relatively new.<sup>88</sup> During this meeting it was estimated that in South Africa alone criminals attempted to move over a minimum of 4200 horns by illegal trade over the last 45 months.<sup>89</sup>

Assuming that 85% of these exports comprised of the horns of white rhinos,<sup>90</sup> it would account for around 12.6 tonnes of horn having been sourced from South Africa to the Asian black market. It was agreed at the end of the conference that although national rhino numbers continue to increase, South Africa still remains the country with the greatest number of losses due to poaching as well as being the greatest source of horns for the illegal market and as such will remain a high priority for CITES attention under Resolution Conf. 9.14.<sup>91</sup> Accordingly the Standing Committee will give special attention to improving coordinated information management at the national level on rhino numbers and horn stocks. Moreover, state members are urged to increase law enforcement cooperation among them in order to curtail illegal trade in rhino horn.<sup>92</sup>

One of the most effective means of achieving this goal is by signing bilateral agreements such as the Memorandum of Understanding (MOU) that was signed between South Africa and Vietnam in 2010 in terms of which law enforcement

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86 Sas-Rolfes *CITES and the Trade in Rhino Horn* 5.

87 Held the 29th of November to the 10th of December 2012 Cancun, Mexico.

88 Larson 2010/2012 [www.rhinoconservation.org](http://www.rhinoconservation.org) 1.

89 Milliken, Emslie and Talukdar 2009 *Traffic* 4.

90 Milliken, Emslie and Talukdar 2009 *Traffic* 5.

91 Milliken, Emslie and Talukdar 2009 *Traffic* 17.

92 CITES Resolution Conference 9.14(e).

measures were discussed that could aid Vietnamese authorities in preventing and regulating the illegal trade in rhino horn.<sup>93</sup> During March that same year the Minister of Environmental Affairs, Edna Molewa met with Mozambique's Minister of Tourism, Fernando Sumbana, to discuss the implementation of a decree that will assist in combating the illegal trade in rhino horn. This decree will create a flexible state-owned agency, similar to South Africa's Sanparks in terms of which the protection of rhinos against illegal trade will be facilitated.<sup>94</sup> However, if taking into account that at least 139 Mozambican nationals have been arrested since 2011 in connection with the illegal possession of rhino horn, it would seem as if more needs to be done if the desired outcome is to be achieved as the slaughtering of rhinos continue unabated.<sup>95</sup>

Geneva was the most recent scene for the 62<sup>nd</sup> meeting of the CITES Standing Committee during which crucial measures were adopted to halt the escalation of elephant ivory and rhino horn smuggling.<sup>96</sup> It was unanimously decided by the Committee that urgent measures had to be taken to tackle the current poaching and smuggling crisis threatening the very existence of rhinos and elephants. Member countries and territories that are most affected by the illegal trade in rhino horn were requested to adopt a series of immediate measures to control their own domestic markets and to combat smuggling.<sup>97</sup> It seems as if this approach taken by the standing committee is one whereby each individual state needs to take responsibility for a mutually shared problem, thereby distributing the workload of CITES whilst simultaneously hoping to improve the chances of successfully combating the threat of poaching.

Ironically South Africa's submission to CITES for the March 2013 meeting that was held in Bangkok<sup>98</sup> contained nothing on rhino poaching. This was mainly due to the fact that the rhino issue manager's report on how to combat the escalation in rhino poaching, had not been finalized. This seems almost unimaginable as

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93 Milliken, Emslie and Talukdar 2009 *Traffic* 18.

94 [www.gov.za/sagovinfo](http://www.gov.za/sagovinfo); Statement by Minister Edna Molewa on the ongoing scourge of illegal rhino horn trade 2011.

95 Davies 2012 [www.guardian.co.uk](http://www.guardian.co.uk).

96 Official documents entitled: *The Future We Want - United Nations Environment Programme*.

97 Vasquez 2012 [www.cites.org/eng/news](http://www.cites.org/eng/news) 1.

98 This meeting will specifically focus on the species trade and conservation of rhinos.

South Africa; arguably the country most technologically advanced in Africa and accommodating the vast majority of the world's rhino populations, is supposed to be the pillar of CITES in its efforts to combat rhino poaching.<sup>99</sup>

### 3.1.3 Challenges faced by CITES to combat illegal trade

The first challenge faced by CITES is the failure of various governments to enforce CITES resolutions and trade policies adequately, aimed at reducing and combating the illegal trade, on ground level.<sup>100</sup> Rhinos are listed in the CITES appendices and as such Member States are obliged to implement legislation preventing illegal trade as well as penalising offenders that are found guilty of illegally trading in the species of wild animals. The WWF has recently established that Vietnam has the worst record for preventing the illegal trade in the products of wild species, more specifically that of rhino horn, and as such urged Vietnam to seek to review its penalty provisions regarding perpetrators desperately.<sup>101</sup>

A second and major challenge presents itself in the form of specialized trafficking in rhino horn. Today, more than ever, the trade in rhino horn is one of the most structured criminal activities currently faced by CITES, with clear indications that organised criminal groups are involved in the poaching of these animals.<sup>102</sup> The South African enforcement authorities recently gathered intelligence that indicated the involvement of organised crime groups that consist of about five different levels from the poacher to the end consumer.<sup>103</sup> The biggest problem regarding this challenge lies in the fact that the individuals that are often arrested in connection with poaching are simply replaced. The syndicates behind the

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99 The Department, as to the question on why no report had been submitted, stated that the upcoming 3 years are vital for Mr Msimang (CEO of South African National Parks) to prepare for the following COP in 2016 seeing that by then South Africa's rhino populations could be in decline, with more animals being poached than being born.

100 Vasquez 2012 [www.cites.org/eng/nwes](http://www.cites.org/eng/nwes) 4.

101 Lipes 2012 [www.rfa.org/vietnamwildlife](http://www.rfa.org/vietnamwildlife) 3.

102 *Mail and Guardian* 12 January 2012, there is increasing evidence overall that in the rhino horn and ivory trade, there is greater involvement of criminal syndicates, and greater organisation, said David Newton, the Southern Africa regional director for wildlife trade monitoring network Traffic.

103 CoP16 Document 54.2 (Rev 1) 5.

illegal trade industry are, therefore, never apprehended with the result that the trade market continues to exist.<sup>104</sup>

Finally, the aspect of *demand* poses the biggest challenge for CITES in its attempts to combat the illegal trade in rhino horn. The demand for rhino horn in East Asian countries has surged reaching the highest levels in 20 years, with even the Vietnam government acknowledging the severity of the crisis. Recently, officials of Vietnam's CITES management authority even met with government representatives from South Africa and America to examine current and future legislation aimed at preventing the illegal trade in rhino horn.<sup>105</sup> Recently CITES delegates, in what they refer to as a breakthrough, approved a slew of updated rules which require countries such as Vietnam and China to step up enforcement preventing illegal trade, or risk sanctions.<sup>106</sup> Thus offenders that do not adhere to this plea to combat illegal trade could be forbidden from trading any wildlife with other CITES members.

### **3.2 *The Convention on Biological Diversity***

The CBD is arguably the primary international instrument for the conservation of biodiversity.<sup>107</sup> This convention represents a watershed in the evolution of international commitments to environmental conservation and sustainable development.<sup>108</sup> Even though the Convention itself does not impose any obligation upon its parties related to international trade, the CoP to the CBD still established goals and sub-targets prior to 2010 for focal areas, in order to help assess progress towards the World Summit 2010 target.<sup>109</sup> One of these goals was target 4.3 which states the prohibition of international trade in species that are endangered.<sup>110</sup> Implementing this target, however, necessitates international co-operation and proper management in order to ensure the renewability of biological resources and to protect certain species of wild fauna and flora against

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104 CoP16 Document 54.2 (Rev 1) 6.

105 Harvey 2012 [www.rhinopoaching.sa/vietnam.com](http://www.rhinopoaching.sa/vietnam.com) 2.

106 McLendon 2013 [www.cites.com](http://www.cites.com) 3.

107 Lubbe *Cross-border biodiversity conservation* 27.

108 Glavovic *The Protection of Biological Diversity: An Introduction* 16.

109 Glavovic *The Protection of Biological Diversity: An Introduction* 17.

110 International Academy for Nature Conservation, final workshop report, Germany 2.

exploitation through international trade.<sup>111</sup> Accordingly, close co-operation between CBD and organisations such as CITES is of vital importance to implement this target.<sup>112</sup>

Even though the CBD text does not contain provisions on trade *per se*, it has established programmes, which to a certain extent address the aspect of trade, by taking a different approach, namely conservation and sustainable use of natural resources.<sup>113</sup> The inference that can be drawn from CoP's 6<sup>th</sup> Conference, which was held in the Netherlands in 2002, is that through conservation, the CBD sought to achieve sustainable use of wild, and specifically, threatened fauna and flora. Sustainable use means the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.<sup>114</sup>

Article 6 of the Convention states that each contracting party shall develop national strategies, plans or programmes for the conservation and sustainable use of biodiversity or adapt, for this purpose, such existing strategies. One of the reasons why rhino populations have not only increased, but flourished in South Africa, is because of its adherence to this requirement of implementing conservation and sustainable use plans or strategies.<sup>115</sup> One of the most successful of these plans was the publishing of the Regional Rhino Conservation Plan and the Conservation for Black Rhino Plan.<sup>116</sup> The aim and the objective of these plans was to provide a reassessment of the status of the African rhino populations and to highlight the priorities for rhino conservation in South Africa.<sup>117</sup> In particular emphasis was placed on adequate field conservation, translocation and the establishment of protected areas, which was critical to the success<sup>118</sup> of

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111 This specifically falls within the ambit of the CITES framework.

112 Glavovic *The Protection of Biological Diversity: An Introduction* 18. The need for international co-operation is even emphasised in the preamble of the convention itself.

113 Dexel 2003 [www.traffic.org](http://www.traffic.org) 6. The topic of conservation and sustainable use being at the centre of discussion at the CoP's 6th Conference.

114 Article 2 of the Convention on Biological Diversity.

115 Emslie & Brooks 1999 *Conservation Action Plan; African Rhino* v.

116 Cumming *et al* 1990, established in 1989.

117 Emslie & Brooks 1999 *Conservation Action Plan; African Rhino* 7.

118 Emslie & Brooks 1999 *Conservation Action Plan; African Rhino* 52. The success of this Programme is indicated by the fact that at the 9<sup>th</sup> CoP meeting in 1994, a proposal was

increasing rhino numbers.<sup>119</sup> These plans provided for the extensive protection of rhino populations in Kwazulu Natal's Hluhluwe-Imfolozi National park, as well as translocating rhinos from there to the rest of South Africa as their number increased.<sup>120</sup>

Apart from the above mentioned plan further examples of programmes include the African Rhino Programme which coordinates the world wildlife's investment in rhino conservation adopted in 1997, as well as the black rhino expansion project. The aim of this project is to translocate founder populations of black rhino from the saturated provincial parks to private parks with adequate security for the protection of rhinos,<sup>121</sup> thereby simultaneously also adhering to the provisions of Article 8(a) and (b) of the Convention.<sup>122</sup> It can therefore be said that the fact that South Africa accommodates around 90% of the world's total rhino population, is an indication that it has indeed adopted the required plans and programmes.

Finally South Africa, as a result of its being a Contracting Party to the CBD, has to enforce the *in-situ* and *ex-situ* conservation measures as stated in articles 8 and 9 respectively. This means that on paper, even more extensive steps are taken to protect species such as rhinos,<sup>123</sup> which in turn ought to have a direct impact on poaching for the purposes of supplying the illegal trade market, or at least this is the supposed intention. As has been mentioned briefly above, *in situ* conservation focuses extensively on the establishment of and preservation of protected areas which South Africa has adhered to to the greatest extent when considering the vast amount of National Parks. *Ex-situ* conservation on the other hand focuses on external components which supplement the *in-situ* regulations. This includes financial contributions towards the the establishment of facilities for

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made to downlist the white rhino from Appendix I to Appendix II.

119 This simultaneously also adhered to the requirements of article 7(a) of the Convention in that aspects were identified that are important for the conservation of rhinos (falling within the category f annex 1).

120 Emslie & Brooks 1999 *Conservation Action Plan; African Rhino* 8.

121 Markham 2013 [www.wwf.org.za/blackrhino](http://www.wwf.org.za/blackrhino)

122 These articles state that contracting parties shall establish and develop, where necessary, a system of protected areas where special measures need to be taken to protect and conserve populations of species.

123 Article 8(f) - promote the recovery and protection of threatened species through the development and implementation of management strategies and other measures.

the recovery and rehabilitation of endangered species in terms of article 9(a) & (b).<sup>124</sup>

However, due to a lack of legislative provisions, not only in the context of the CBD, but also CITES, which is directly aimed at more aggressively confronting the aspect of illegal trade in wild species, syndicates still retain the upper hand. On paper many of the provisions of CDB and CITES might sketch a promising result, but if one considers the current blooming illegal trade market, it becomes apparent that the main challenge remains the fact that there is a lack of provisions aimed specifically at reducing or prohibiting trade. Moreover that there is a lack of punitive provisions which force countries to adhere to the existing provisions aimed at effectively conserving threatened species.

### ***3.3 The World Trade Organisation and General Agreement on Tariffs and Trade***

#### *3.3.1 General Agreement on Tariffs and Trade*

South Africa became a party to GATT in 1948 and is one of its founding members.<sup>125</sup> GATT is a multilateral agreement with the purpose of regulating international trade and, according to its preamble, the substantial reduction on tariffs and other trade barriers on a reciprocal and mutually advantageous basis. This objective is embodied in the GATT text in specifically paragraph 1 of article 1 which advocates the elimination of quantitative restrictions imposed on products imported or exported between member state parties.<sup>126</sup> This article thus indicates a deliberate effort to regulate and promote free trade and as such limiting the use of trade restrictions that could promote conservation goals.<sup>127</sup> This then begs the question that if GATT's objective is the promotion and regulation of *free trade*, does it bare any relevance to the trade in a natural thing such as rhino horn, or

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124 In 2013 alone the South African government allocated R 255 million rand towards fighting rhino poaching.

125 Edwards *South Africa and the GATT* 1.

126 With respect to customs duties and charges relating to any product, any privilege, advantage or immunity granted by a contracting party shall be accorded immediately to the like product originating from another contracting state.

127 Crawford 1995 *Geo Int'l Env'tl L Rev* 555.

alternatively does it not defeat the whole purpose of conservation and efforts to eradicate illegal trade operations?

In the midst of reaching this objective of developing global free trade, there were several GATT members that were concerned about the environment and keen on its protection.<sup>128</sup> These members argued that it was possible to incorporate a set of trade rules that will set down the essential conditions for competitive international commerce, but without impairing the ability of nations to protect their own environments effectively.<sup>129</sup> The subsequent result was the incorporation of article XI which states that countries will not be strained from applying trade restrictions when entering into international trade activities or agreements. Article XI can, therefore, be seen as the exception to the elimination of quantitative restrictions and is, therefore, of relevance to the trade in animal products.<sup>130</sup>

As has been mentioned in the introductory paragraph, article XI of GATT deals with the aspect of quantitative restrictions, with sub article 2(c)(iii) being the exception to article 1.<sup>131</sup> This article generally prohibits quantitative restrictions on the importation or the exportation of any product.<sup>132</sup> It states that the elimination of quantitative restrictions will *not* extend to the restrictions that are imposed on the quantities of certain animal products permitted to be produced and exported.<sup>133</sup> One reason for this prohibition is that quantitative restrictions are considered to have a greater protective effect than tariff measures and are more likely to distort free trade. The main reason for its effectiveness is that it is exceptionally difficult to export in excess of the quota irrespective the nature of the product or its demand. The latter plays a pivotal role when it comes to the illegal trade in rhino horn as the demand for rhino horn is at its highest level in

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128 Kelemen 2001 *Comparative Political Studies* 622. In recent years environmental and consumer advocates have expressed concern that the bodies associated with the global trade institutions such as the GATT may strike down important domestic environmental protection legislation.

129 Mikesell 2007 *Contemporary Economic Policy* 7.

130 Kelemen 2001 *Comparative Political Studies* 627. Measures that have a discriminatory impact on trade can be justified on the ground of the protection of human kind, *animal* and plant life.

131 Jackson *Section V, the exception in article XI: 2(c)* 371.

132 [www.wto.org/analytical](http://www.wto.org/analytical) index of the gatt, quantitative restrictions 4.

133 GATT text 18.



decades.<sup>134</sup> The only instance where the elimination of quantitative restrictions in the context of rhino products can be justified, is the argument that the profits that are made from sales are desperately needed and moreover can in turn be used to fund conservation efforts as well as to combat illegal trade.<sup>135</sup>

The implementation of this article is, however, not without certain conditions, one of them being that such measures do not differentiate or discriminate between the domestic and international trade market.<sup>136</sup> Moreover, the GATT Panel Report<sup>137</sup> also states that any restricted imports or exports alleged to be harmful to the domestic environment must be proved with "scientific evidence" which indicates that such harm indeed exists.<sup>138</sup> The report does, however, make provision that member states can apply restrictions on imports and domestic sales of endangered species without having regard to the source of the product.<sup>139</sup> This simultaneously deals with the threat of conflict there might exist between the interest of the environment and the provisions of GATT.

Regarding the abovementioned requirements relating to article XI, it is clear in the first instance that the elimination of trade restrictions regarding rhino horn poses no threat for a differentiation to be made between domestic and international imported products. Furthermore, the fact that more than 1004 rhinos were slaughtered in 2013 and more than 3200 horns exported to Asia from South Africa the past 5 years, is a compelling indication that the trade definitely had disastrous consequences for the South African domestic environment, posing an even bigger threat for their future existence. Put differently, Eastern countries' obsession with rhino horn and the resulting importation thereof, poses a significant threat for domestic rhino populations in South Africa and has caused severe damage with more than 2560 rhinos having been killed the past 5 years.<sup>140</sup>

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134 [www.meti.gov](http://www.meti.gov) Chapter 3 *Quantitative restrictions 2*.

135 [www.meti.gov](http://www.meti.gov) Chapter 3 *Quantitative restrictions 4*.

136 GATT Secretariat Report 1992.

137 Reports Relating to the Review of the Agreement, Quantitative Restrictions 170,191 at par 73.

138 GATT Secretariat Report 1992 16.

139 Mikesell 2007 *Contemporary Economic Policy 7*.

140 Issued by the DEA 14 March 2014.

### 3.3.2 *The World Trade Organisation*

The creation of the WTO led to the establishment of a much stronger enforcement mechanism as member nations to GATT often ignored its rulings as it lacked such power.<sup>141</sup> Today sustainable development and the protection and preservation of the environment are fundamental goals of the WTO.<sup>142</sup> As such members are obliged, in terms of the WTO's Principles of Trade, to adopt certain trade related measures aimed at protecting the environment and its wildlife. These measures must, amongst other things, attempt to restrict trade, especially that of endangered animals, as well as to protect animal life.

The WTO's most notable measure agreement is CITES which places great emphasis on the requirement of export permits for the trade in all endangered species without which trade is forbidden. In the case of a country being in persistent non-compliance, as is the case with Vietnam regarding the trade in rhino horn, member states are encouraged to apply article XIV(1) of the Convention.<sup>143</sup> Specifically regarding the aspect of the illegal trade in rhino horn it, however, again begs the question but does this approach of cooperation between the WTO and CITES through these adopted programmes, indeed contribute to combating illegal trade? The provisions of both CITES and WTO promotes the sufficient monitoring of illegal trade, but this can only give an indication of how serious a nature the market really is, who the main culprits are, or how many rhinos are being poached. It does not really get to the core of preventing or stopping the illegal trade.

There are other WTO agreements that assist in the protection of the environment which are also relevant to the CBD namely: the Technical Trade to Barriers Agreement<sup>144</sup> and the Sanitary and Phytosanitary<sup>145</sup> Agreement.<sup>146</sup> These agreements recognize explicitly members' rights to protect animal or plant health

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141 Judith 2007 [www.wto.org](http://www.wto.org) 4.

142 Oxley 2001 *International Trade Strategies Pty Ltd* 1.

143 Brack *MEA's and the WTO* 10 - This article completely prohibits any form of trade in wild species against the offending country.

144 Hereafter the TBT Agreement.

145 Also known as SPS Measures.

146 Anon 2011 *WTO rules and environmental policies: introduction*.

and the environment at the level they choose, but simultaneously also ensure that environmental requirements that products must fulfil do not create unnecessary obstacles for international trade.<sup>147</sup> Accordingly it deals with the abovementioned conflict of urging increased free trade on the one hand but not to the detriment of the environment and *vice versa*.

## **4 Regional approach**

This section will focus on the provisions of the AU and SADC and if South Africa, as a member state of both organisations, has adhered to these provisions aimed at regulating and monitoring the trade in wild species and whether it has contributed to the efforts to combat the illegal trade of rhino horn across South African borders.

### **4.1 African Union**

#### *4.1.1 Applicability of African Regional Instruments in South Africa*

It is important to note that when interpreting African Regional Instrument's caution should be had not to interpret it as being applicable in a normative way. In other words, that it does not necessarily mean that if these instruments are applied in a certain manner in other African countries, that it will similarly be applicable in South Africa. In the South African context being member state of a convention or having ratified international law, does not automatically make such laws or conventions apart of the South African regulatory framework. Express consent by means of signing and ratification of an international instrument is necessary to make it binding, and as such any bilateral or multinational agreement needs to be incorporated into domestic law in one form or another in order to have force and effect within the jurisdiction of South Africa.<sup>148</sup> The reason herefore is that South Africa follows a dualist approach due to the differences between international and

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147 Calvin and Krissoff 1998 *Journal of Agricultural and Resource Economics* 351-366.

148 Kotze & du Plessis 2006 *The Inception and Role of IEL in Domestic Biodiversity Conservation Efforts: The South African Experience 2.*

municipal law and as such domestic courts can only apply international law once in has been transformed into local law by means of legislation.<sup>149</sup>

#### **4.1 *Southern African Developing Community***<sup>150</sup>

##### *4.1.1 General*

SADC is an inter-governmental organisation whose main objectives are to liberalise intra-regional trade, to ensure efficient production, enhance economic development, and to establish a free trade area within the SADC region.<sup>151</sup> These objectives seem to be very similar to that of GATT namely; to develop and enhance economic trade. As such the question, therefore, again becomes relevant; does the SADC legal framework contribute to fighting the illegal trade in rhino horn in South Africa?

##### *4.1.2 SADC's contribution to curb illegal trade*

SADC's Protocol on Wildlife Conservation<sup>152</sup> is of specific relevance when answering this question. Article 2 begins to emphasize that the sustainable use of wildlife forms part of the main scope of this protocol, the relevance as well as importance hereof being that the illegal trade market has the exact opposite effect. Accordingly the more effective sustainable utilization of wild animals could be realized, mainly through conservation, the bigger the effect will be on hampering illegal trade market activity. Article 3(1) goes on to state that each State Party shall ensure the conservation and sustainable use of wildlife resources under its own jurisdiction.

In 1994 South Africa initiated legal hunting as one way of achieving this goal, precisely because of the potential it has to create incentives for wildlife conservation and sustainable use, which in turn could assist in preventing illegal

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149 Dugard 2005 *International Law: A South African Perspective* 29-63.

150 Khamfula and Huizinga 2004 *Journal of Development Economics* 699-714 - SADC is an inter-governmental organisation, its headquarters situated in Gaborone, Botswana, whose main objective is the enhancing of socio-economic cooperation and integration among its 15 Southern African member states.

151 Article 2 of the SADC Trade text 4.

152 SADC Protocol on Wildlife Conservation and Law enforcement 1999.

trade.<sup>153</sup> This step has had a positive effect on the legal rhino hunting market as the number of white rhinos increased from 1800 to 16 000 in 2003.<sup>154</sup> It is, however, important to mention that it was during the 1980's and 1990's that the demand for rhino horn, and therefore illegal trade, was at its lowest point.<sup>155</sup> Accordingly this allowed for conservation efforts, such as the limitation of legal hunting, to have a positive effect on rhino populations. The relevance of this is that articles 2 and 3(1), regarding sustainable use, are usually read within the context of a legally operating environment, one which can be controlled. Despite the fact that the illegal trade market cannot be controlled optimally, sustainable use can still include certain measures that attempt to eradicate illegal trade.<sup>156</sup> Even though it is a very wide concept, it is still one which can provide regulations for countries in which such measures can be adopted.

Article 3(2)(a) states the requirement that State Parties are obliged to take up policy and legal measures as appropriate to ensure such conservation. In 2006 South Africa became part of SADC's Rhino Conservation Programme,<sup>157</sup> which for purposes of this study is relevant as it focuses entirely on the monitoring of rhino populations as well as creating awareness for rhino conservation issues such as the illegal trade in rhino horn. Similarly, article 6(2)(c) requires that State Parties shall adopt measures governing trade in wildlife and its products as well as penalties for the illegal trade therein. The South Africa government has adopted these measures (discussed in greater detail in the following chapter) in the form of NEMA and NEMBA, both of which are aimed at protecting wildlife.

Article 4(f) goes on to state that Member States should promote conservation of shared wildlife through the establishment of transfrontier conservation areas. South Africa has also adhered to this requirement by removing the fence

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153 Damm 2005 *African Indaba* 1-23.

154 Emslie 2005 [www.savetherhino.org](http://www.savetherhino.org) 2.

155 Milledge 2008 *Pachyderm* 8. The volume of horn entering illegal trade has increased dramatically since 2000.

156 Shaw 2012 [www.savetherhino.org](http://www.savetherhino.org) 2. Such as the donation of all rhino horn stockpiles in South Africa to Asia in an attempt to reduce the demand.

157 SADC's Regional Programme for Rhino Conservation: *Guidelines for Implementing Strategies*.

bordering Mozambique to form the Greater Limpopo Transfrontier Park.<sup>158</sup> However adjacent to the above-mentioned requirement is article 3(2)(c) which states that Member States have the obligation of managing any transfrontier effects. This requirement is reciprocal in that Mozambique, as a Member State to SADC, bears the obligation to assist South Africa in managing any effects. The effects referred to, according to Jones<sup>159</sup> is the increase of illegal trade in rhino horn since the inception of the transfrontier area, which is mainly caused by the epistemological difference that exists between conservation and rural livelihoods.<sup>160</sup> South Africa has actively been negotiating with Mozambique since 2010 to make the trade in rhino horn a criminal offence, as it is currently only a misdemeanour, as well as to act more harshly against perpetrators so as to deter Mozambicans from poaching rhinos in the Kruger National Park and subsequently illegally trading in their horn.<sup>161</sup>

Finally, article 21(F) of the SADC Regional Programme for Rhino Conservation designates natural resources and environment as an area of co-operation for Member States. It further notes that the viability of wildlife resources in the region requires collective and co-operative action by all Member States.<sup>162</sup> It, therefore, seems as if SADC also places much emphasis on the aspect of intergovernmental co-operation and as such will be a basis upon which SADC attempts to combat issues such as the illegal trade in rhino horn.<sup>163</sup> The latter is substantiated in the SADC Regional Indicative Strategic Development Plan<sup>164</sup> which in chapter 3 notes that the same commitments (as referred to in article 21) are expressed in current policies which focus on the conservation of regional

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158 More examples include that of the Ais/Richtersveld Transfrontier Park (Namibia and SA, the Kgalagadi Transfrontier Park (Botswana and SA as well as the Limpopo/Shashe Transfrontier Park (Botswana, SA and Zimbabwe).

159 Jones *Transboundary Conservation* 1.

160 Epistemology is the science of knowledge and in this context refers to the difference or even absence of such a knowledge that prevails in rural areas as to the negative effects and unsustainable nature of the illegal trade in rhino horn, as opposed to this knowledge being one of the main driving forces for conservationists in the battle against illegal trade.

161 Harvey 2012 [www.rhinopoaching.sa/vietnam.com](http://www.rhinopoaching.sa/vietnam.com).

162 Du Toit, Brooks and Emslie "Summary of guidelines"6.

163 This comment is further substantiated by article 3 which commits state parties to *co-operate* with member states to manage shared wildlife resources as well as conservation activities within their jurisdiction or control.

164 Hereafter RISDP.

ecosystems and endangered species especially those distributed across national boundaries, as is the case with rhinos.<sup>165</sup>

## **5 South African regulatory framework**

NEMA and NEMBA are aimed at environmental protection, regulation and conservation in South African. Accordingly this section is dedicated to analysing these legislative measures in order to determine what their contributions have been, if any, towards fighting and preventing the illegal trade in the parts of endangered animals such as rhino. Also the *Criminal Procedure Act* 51 of 1977 will be looked at as it has already been determined what a vital role prosecution of and sentence imposition to culprits plays in deterring illegal trade activity. Finally, legislation such as the *Prevention of Organised Crimes Act* 121 of 1998 as well as the *International Trade Administration Act* 71 of 2002 will also be discussed which was adopted by South Africa in 1998 and 2002 respectively. The latter act specifically focuses on assisting the continued effort to control all goods that are imported to and exported out of the country.<sup>166</sup>

### **5.1 Environmental Provisions**

#### **5.1.1 National Environmental Management Act**

##### **5.1.1.1 Preamble of NEMA as Guideline**

The preamble of NEMA echoes article 24 of the Constitution in that it states the right that everyone has to an environment that is protected. It places emphasis on the requirement that all spheres of government must co-operate and support one another in order to achieve adequate protection.<sup>167</sup> When examining the content of NEMA it becomes apparent that its main goal is to regulate functions of national departments that may affect the environment, and as such forms the principal environmental framework act in South Africa.<sup>168</sup> This includes regulating

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165 Du Toit, Brooks and Emslie "Summary of guidelines"6.

166 As stated in its preamble 2.

167 NEMA 2.

168 Kotzé and Du Plessis 2006 *Queensland U Tech L & Just J* 30.

in such a manner that these functions optimally benefit especially those that have been disadvantaged in the past and that utilization of environmental resources takes place in such a manner that it does not disturb ecosystems or cause the loss of biological diversity.<sup>169</sup> Sections 3 to 6 further refer to the types of forums that are brought about, their composition, what their functionalities are as well as the requirement of inter-governmental co-operation in order to achieve NEMA's goals.<sup>170</sup> NEMA can, therefore, be seen as the instrument that regulates and controls activities of both state organs and non-state organs in such a manner that the environment is properly protected.

#### 5.1.1.2 Environmental management in terms of NEMA

The inclusion of an environmental right in the Constitution (section 24) has resulted in the substantial strengthening of environmental law.<sup>171</sup> The Constitution has provided a clear and unambiguous mandate to the state to provide, by way of laws and regulations, measures that will ensure adequate environmental protection. Section 2(2) of NEMA begins by stating that environmental management must place people and their needs at the forefront of its concern.<sup>172</sup> This need most likely refers to the right to an environment that is protected for the benefit of current and future generations.<sup>173</sup> Simultaneously this includes that the state, in terms of section 2(4)(b)(viii) of NEMA, has to anticipate and prevent negative impacts on the environment and environmental rights, or at least minimize the effects.<sup>174</sup> The impact the illegal trade in rhino horn has can definitely be seen as a factor which infringes on all the abovementioned rights and as such there is a direct obligation on the state to act progressively to comply and enforce these rights. More specifically it infringes with article 24(b)(ii) of the Constitution in that the illegal trade market poses a great threat to realizing the goal of preserving the environment for the benefit of future generations.

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169 Article 2(2) and 2(4)(a)(i) of NEMA.

170 This fact is apparent as one reads through the entire Act specifically chapters 2, 3, 5 and 9.

171 Paterson and Kotzé *Environmental Compliance and Enforcement* 150.

172 Kidd *Environmental Law* 36.

173 S 24(b)(ii) of the Constitution which also corresponds with the right contained in s 2(4)(o) of NEMA which states that the environment must be protected as the people's common heritage.

174 Kidd *Environmental Law* 37.



Various means exist in terms of which the compliance and enforcement of these obligations are achieved, one of which is through the Environmental Management Inspectorate.<sup>175</sup> The DEA, provincial environmental departments and municipal organs of state employ environmental enforcement officials from various national and provincial departments created by NEMA.<sup>176</sup> NEMA, for example, determines that EMIs are empowered to issue compliance notices (usually a Grade 1 inspector). Their functions are varied in terms of seniority and their powers and functions include inspecting, monitoring and enforcing compliance.<sup>177</sup> Even though EMIs are not empowered to prosecute cases in court their mandate may also include seizing/investigating evidence when searching premises where criminal activity has taken place as well as to enforce aircraft surveillance.<sup>178</sup>

These functions are of great relevance when it comes to the illegal trade in rhino horn. Regarding the collection of evidence, a new system has been put in place namely the RhoDIS.<sup>179</sup> RhoDIS serves as a database of DNA profiles of African white and black rhinos and in collaboration with the Veterinary Generics Laboratory Onderstepoort and the University of Pretoria, it launched its Rhino Alive Campaign at the Galagar Convention Centre in April 2011.<sup>180</sup> This campaign promotes the logging of all rhino and rhino horn DNA samples onto the RhoDIS. This in turn will then assist in positively identifying each animal and its horn, thereby providing a tool that enhances the *traceability of illegal trade in rhino horn*.<sup>181</sup> Inspectors employed in terms of the EMI can accordingly assist this cause by handing over any evidence gathered from poaching scenes, such as blood samples or even fragments of rhino horn that may be scattered around the carcass. Such evidence can then be handed over to authorities such as the SAPS so that it can be optimally used in terms of RhoDIS.

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175 Hereafter MEA's.

176 [www.environment.gov.za/environmental-management-inspectorate](http://www.environment.gov.za/environmental-management-inspectorate).

177 Paterson and Kotzé *Environmental Compliance and Enforcement* 162.

178 Appendix 5(B) section IX of the Biodiversity Management Plan for the Black Rhinoceros in South Africa 2011-2020. EMI's work closely together with prosecuting authorities such as the SAPS when investigating environmental crimes which in turn contributes to the successful prosecution of offenders.

179 Rhino DNA Index System.

180 Els 2011 [www.sahunters.co.za](http://www.sahunters.co.za) 2.

181 Els 2011 [www.sahunters.co.za](http://www.sahunters.co.za) 11 3.

NEMA makes reference to international instruments, with section 25(3)(g) stating that where the Republic is party to an international instrument it has to comply with the provisions of that instrument. This includes the creation of offences and the prescription of penalties. As signatory to CITES, South Africa has adhered to its provisions by declaring the trade in rhino horn a criminal offence with imprisonment as penalty if found guilty.<sup>182</sup> Section 26(1)(a) goes further to mention that the Minister must report to Parliament on an annual basis regarding preparations undertaken in respect of international meetings. Minister Molewa recently made the announcement that South Africa is going to propose, at the CITES convention in 2016, the legalisation and regulation of the rhino horn trade whilst simultaneously creating a national fund for increased intelligence, security and awareness.<sup>183</sup> This is not only indicative of South Africa's leading role it plays within the ambit of CITES and the trade in rhino horn, but also that it has pursued some of the prescribed international provisions in an attempt to curb the trade in rhino horn.

Section 34(1)(2) and (3) of NEMA deal with criminal proceedings and with sub section (1) stating that whenever a person is convicted of an offence under any provisions listed in Schedule 3<sup>184</sup> and it appears that such a person has caused damage or loss to any organ of state the court may at the written request of the Minister, in the presence of the convicted person, inquire into the amount of loss or damage including the cost incurred to preventing damage to the environment.<sup>185</sup> That court may then give a judgement in favour of an organ of state against the convicted person of such an amount.<sup>186</sup> In terms of sub section (3) the amount will be determined in accordance with the monetary value or advantage gained by such person as a consequence of that offence. This section, therefore, brings another form of penalisation than imprisonment, one which can be just as effective. In practise this would mean that if a syndicate

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182 Chemlong Lemtongthai was sentenced to 40 years imprisonment in November 2012.

183 Alter 2013 [www.thesouterntimes.co.za](http://www.thesouterntimes.co.za).

184 Including the provisions of the Animal Protection Act 71 of 1962.

185 This section is also directly relevant to the provisions of NEMBA, particularly section 59(a)(i), which states that the Minister must monitor compliance with section 57(2)(a), a person may not carry out a restricted activity (such as the trade in rhino horn) involving a specimen of a listed threatened species. Furthermore may prohibit any activity which is of a nature that may negatively impact the environment and survival of threatened species.

186 S 34(2) of NEMA.

were to be apprehended and found guilty of illegally trading in rhino horn, that person can be fined to pay an amount equal to the value of the horn which can be as much as \$65 000 p/kg.

Section 33 adds on to section 7 of the CPA in that any person may *in the interest of protecting the environment* (which will include the animals inhabiting such an environment) institute and conduct a prosecution,<sup>187</sup> and even take into custody any person guilty of an offence.<sup>188</sup> This significantly increases the opportunities to prosecute poachers/traders where the state fails to do so.

#### 5.1.1.3 Environmental Management Cooperation Agreements

Another tool exists for co-operative governance namely EMCAs.<sup>189</sup> Internationally, the use of EMCA's as a policy tool to improve environmental performance, has been encouraged since the 1960's.<sup>190</sup> For the past ten years a process of law reform has been underway in South Africa and through it NEMA has made provision for the signing of EMCAs between the South African government and industry.<sup>191</sup> In this context more specifically, the signing of agreements with game farmers or private entities that is able to contribute to fighting the illegal trade in rhino horn is possible. One such an agreement related to the donation of aeroplanes (referred to earlier) by Paramount Group which is now also used to track syndicates in the Kruger Park. Chief executive of SANParks, David Mabunda stated that the people making the money are syndicates and as such all available recourses are needed in order to prosecute them.<sup>192</sup>

As a second measure government has also acquired the services of retired Major General Johan Jooste (60) as a part of its effort to fight the illegal trade surge.

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187 In terms of s 42(2) of the CPA.

188 Bekker, Geldenhuys and Joubert *Strafprosesreg* 12. Irrespective of the nature or context of the offence, any person is authorised to privately take into custody someone guilty of criminal activity.

189 Environmental Management Cooperation Agreements.

190 Fischer *EMCA's: a contribution to prevent environmental decline* 2008.

191 S 35 of NEMA states that any tier of government may enter into EMCA's with any person or community for the purpose of promoting compliance with the principles of the Act.

192 Serino 2012b [www.mg.co.za/sanparks](http://www.mg.co.za/sanparks).

This appointment came after the Kruger National Park lost more than 60 rhinos in January 2013 alone.<sup>193</sup> The scope of his duties will include to assist in and to oversee all anti-poaching operations conducted within the Kruger Park as part of its "multipronged strategy agreement" to combat poaching and illegal trade activities.<sup>194</sup> The importance of his appointment<sup>195</sup> lies in the fact that Jooste served in the South African Army during the Apartheid Era where he fought on the Angola border for many years.<sup>196</sup> The Department hopes that the invaluable experience he gained during this time will benefit the effort of staunching the flow of rhino horn out of Kruger to Mozambique. It is, however, still to be seen whether these tactics deployed will benefit the struggle as it currently seems to be of no avail with a staggering 280 rhinos having been poached by April 2013. A further problem related to these EMCAs is the fact that these agreements are not binding, which means that an industry party to an EMCA could pull out or renege on the agreement at any time without any threat of being sanctioned.<sup>197</sup> In other words government has no guarantee to the commitment of the private sector.

### 5.1.2 *National Environmental Management Biodiversity Act*

#### 5.1.2.1 Objectives of NEMBA

In terms of the long title of the act, the objectives, relevant to this study, is to provide for the protection of species that are threatened or in need of protection to ensure their survival in the wild.<sup>198</sup> Furthermore, and more importantly to give effect to the Republic's obligation under international agreements which regulate international trade in endangered species.<sup>199</sup> In order to adhere to these requirements the South African National Biodiversity Institute (SANBI) was established by NEMBA in terms of section 10 with one of its primary objectives being to assist in the conservation of all listed threatened or protected species.<sup>200</sup>

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193 Serino 2012a [www.mg.co.za/sanparks](http://www.mg.co.za/sanparks).

194 Blaine 2013 [www.bdlive.co.za](http://www.bdlive.co.za).

195 Made in terms of s 35(1) of NEMA which states that the Minister may enter into EMCA's with any person for the purpose of protecting the environment, sub-sec 3(a).

196 Wild 2013 [www.businessweek.com](http://www.businessweek.com).

197 McDonald *Environmental justice* 3.

198 Section 51(b) of the Act.

199 Kidd *Environmental Law* 102, section 51(c) of the Act.

200 Section 11(1)(a) of the Act.

The most recent action taken by this organisation is its involvement in the Black Rhino Range Expansion Project – WWF SA.<sup>201</sup> The primary vision of this programme is to promote the long term conservation of black rhinos in Kwazulu Natal and to contribute towards the target of 1000 black rhino for the province. This is to be achieved by providing support for the protection of existing rhino populations against poaching and the subsequent illegal trade in rhino horn and is conducted in partnership with the SANBI.<sup>202</sup> In terms of section 35(1) (a), all functions and actions performed by the SANBI are monitored by the Minister so as to insure in turn that its efforts endeavour to realise the objectives of the NEMBA.<sup>203</sup> SANBI also serves as a vital instrument in giving effect to international agreements which include art 7 of CBD, which relates to the identification and monitoring of components of biodiversity for conservation purposes, as well as article IX(1)(a) of CITES which expect parties to designate one or more management authorities competent to grant permits and monitor permits. Both these provisions play a relevant role in the effort to combat or irradiate the illegal trade in rhino horn.<sup>204</sup>

#### 5.1.2.2 Relevant provisions of NEMBA

The essence of section 56(1)(a) to (d) proposes that the Minister must issue a list of national protected species which are either critically endangered or endangered, facing an extremely high risk of extinction in the wild so as to protect them. This is sought to be done by means of restricting or prohibiting any activities relating to threatened or endangered species.<sup>205</sup> A violation of any prohibition issued by the Minister under this authority is an offence under the NEMBA.<sup>206</sup> Such a list has indeed been compiled known as the South African Government's Threatened or Protected Species List (hereafter referred to as

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201 Markham 2013 [www.wwf.org.za](http://www.wwf.org.za).

202 Flamand 2013 [www.mazdawildlifefund.co.za](http://www.mazdawildlifefund.co.za)

203 Kotze & du Plessis 2006 *The Inception and Role of IEL in Domestic Biodiversity Conservation Efforts: The South African Experience* 4.

204 Kotze & du Plessis 2006 *The Inception and Role of IEL in Domestic Biodiversity Conservation Efforts: The South African Experience* 5.

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

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

ToPS).<sup>207</sup> This species list was drafted under Chapter 4 of the NEMBA in accordance with the provisions of section 56. It is, however, important to note that these regulations were repealed and replaced by the new regulations published in early 2013.<sup>208</sup>

The NEMBA regulations prohibit certain activities involving species so listed by the Minister which for the purposes of this study includes both black and white rhino. It prohibits hunting; a “put and take animal”, in a controlled environment, with the use of any tranquilizer, narcotic or other immobilizing agent, in a reserved area, with the use of a gin trap or where the hunter does not first obtain a written affidavit from the owner of the land where the animal is located, indicating that it is not a “put and take animal”.<sup>209</sup> In addition to section 56(1), section 57 addresses the aspect of restricted activity in more dept. It states that a person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit.<sup>210</sup> Such activity include activities which consist of the hunting, catching, capturing or killing of 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 hurt, catch, capture or kill any such specimen.<sup>211</sup>

The provisions of section 57(2)(a) state that the Minister may prohibit the carrying out of any activity which is of a nature that may negatively impact the survival of such species. All the mentioned activities bare a direct relevance to the poaching of rhinos and the subsequent trade in rhino horn.<sup>212</sup> Not only has such activity been restricted, but it has been banned and declared a criminal offence in South Africa. As such legislative authorities have adhered to this requirement to its

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207 Friedmann 2009 *Threatened Species List as Tools of Environmental Governance in South Africa* 55.

208 Government Gazette Notice Number 36375 R388 published 16 April 2013.

209 Friedmann 2009 *Threatened Species List as Tools of Environmental Governance in South Africa* 51.

210 Section 57(1) of the Act.

211 This form the obvious restricted activity relevant to rhino poaching.

212 It is self-explanatory that rhino poaching and the illegal trade in rhino horn has a negative impact on the future survival of the species as rhino populations have been diminished in their thousands the past 5 years.

fullest extent. There has also been adherence to the requirement regarding permits in the context of the legal hunting of rhinos. As was mentioned in the introduction the only way in which rhino horn can legally be taken out of South African borders is if the required hunting permit has been obtained and if it is found to have been adequately mounted as a trophy.<sup>213</sup>

In addition to this there are further aspects that will be taken into consideration before a permit will be issued authorising rhino hunting. This includes; any applicable hunting proclamations issued in terms of provincial legislation, any methods of hunting prohibited in terms of such regulations and whether such activity will result in the irreparable damage.<sup>214</sup> In addition to the latter the granting of such a permit will be refused with specific reference to rhino hunting if the manager of a game farm has not signed off the permit, or an official of the relevant provincial conservation authority of environmental management inspectorate who supervised the hunt.<sup>215</sup>

Furthermore, the NEMBA also prohibits and regulates any activity related to the purchase, acquisition, sale, supply, and export or otherwise trading in any such listed animal or part thereof from the Republic.<sup>216</sup> Here too a permit has to be obtained authorising the export of rhino horn, subject to the condition that the holder thereof may not import, export or re-export such specimen or part thereof if it is not authorised in terms of the CITES regulations, 2010.<sup>217</sup>

Finally, when considering the provisions of section 102(2) it would seem as if it also has a role to play in deterring illegal trade in rhino horn as it poses a big risk to syndicates. It states that if a person is convicted to an offence involving trade in a species or a part thereof which is listed as a *threatened species*, a fine equal to 3 times the commercial value thereof will become payable. In the context of rhino horn this amounts to a fine of not more than R5 000 000 or imprisonment

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213 Section 4(1) of the Government Gazette R 388 stipulates that a person may only carry out a restricted activity involving a specimen of a listed threatened species, if he or she is the holder of a permit as stated in terms of Chapter 7 of the NEMBA.

214 Section 20 of Government Gazette Notice R 388 39.

215 Section 20 of Government Gazette Notice R 388 42.

216 Section 24 of the Act.

217 Section 20 of Government Gazette Notice R 388 80.

for a period not exceeding 5 years<sup>218</sup>, which could serve as a more effective deterrent to illegal trade.

### *5.1.3 Other relevant Government Notices*

#### *5.1.3.1 Government Gazette Notice R173 in GG 33002<sup>219</sup>*

The first relevant government gazette notice is no 33002 published 5 March 2010 known as the so-called CITES regulations made under NEMBA. In terms of section 2, these regulations are applicable to all plants and animal's species listed on Schedule I, II and III thereof, with the appendices to these regulations being automatically amended when amendments to Appendices I, II and III of CITES enter into force. In terms of section 3(3) the Minister again has the responsibility to issue permits or certificates relating to the export of any animal listed in the appendices, with the Provincial Management Authority to monitor the export permits granted for specimens of species listed in the Appendices as well as to limit the issuing of such permits.<sup>220</sup>

When considering the provisions of Section 5(1) and 6(1) respectively it reads as follow; that as far as possible authorities need to ensure that specimens of CITES listed species pass through the required formalities and furthermore that the export of any specimens of species listed in the appendices requires prior grant and permission from relevant authorities. Regarding penalty provisions contained in section 16 it provides for the same punishment as was previously mentioned in Government Gazette Notice R388.

#### *5.1.3.2 Government Gazette Notice 49 in GG 36096<sup>221</sup>*

The Biodiversity Management Plan for Black Rhinoceros is in terms of NEMBA and was developed in accordance with the National Norms and Standards for the

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218 Section 104 of the Government Gazette R 388 94. In the case off a subsequent conviction a fine of up tp R 10 million or 10 years imprisonment.

219 Published 5 March 2010.

220 Section 4(1)(d).

221 Published 25 January 2013 by the Minister of Environmental Affiars, Ms Molewa.



Development of Biodiversity Management Plans for Species published in 2009.<sup>222</sup> The main objective of this plan is to promote the development and long term maintenance of viable populations of African rhino in the wild, but more specifically to contribute significantly to the management and conservation of black rhinos. The short term 10 year conservation goal is to achieve an average South African meta-population growth rate for black rhinos of at least 5% per annum. The current average annual net meta-population growth rate is 4.9%, a population growth rate of 5% is needed annually to result in a net population after mortality. Poaching, however, has placed serious pressure on the ability of rhinos to sustain favorable net growth rates.<sup>223</sup>

There are 6 key components which will be used in an effort to realise these goals. They include mechanisms such as biological management, monitoring of management, security and protection, coordination, sustainable use and economic and social sustainability to name but a few. Of specific relevance to this study, however, Minister Molewa placed emphasis on the aspect of protection as a key activity to minimising rhino losses from illegal activities. Effective law enforcement, improved neighbour relations (an aspect which is reiterated in this study numerous), effective criminal investigations, prosecuting and strict rhino hunting guidelines so as to ensure proper control over the removal of animals are deemed to be points of priority.<sup>224</sup>

The first action or strategy to achieving the desired levels of protection involves field law enforcement which will outline the requirement for rhino protection.<sup>225</sup> Field law enforcement will be characterised by; securing an adequate law enforcement staff component, developing adequate ground surveillance, effecting translocations of rhino populations, establishing a specialized anti-poaching unit, as well as to establish support networks with other law enforcement agencies. A second strategy is to investigate and prosecute illegal rhino activities. This entails

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222 [www.environment.gov.za/gazettes](http://www.environment.gov.za/gazettes) *Biodiversity management Plan for Black Rhinoceros* 2013. The BMP-S allows for the monitoring and review of actions taken to preserve species in the wild amidst a changing environment and also require that, in terms of NEMBA, all management plans compiled by conservation authorities are approved by the minister.

223 Emslie R 2012 *The debate around Rhino Hunting* 21.

224 [www.environment.gov.za/gazettes](http://www.environment.gov.za/gazettes) *Biodiversity management Plan for Black Rhinoceros* 2013

225 Section 5.3.2.1 of Government Gazette Notice 36096 37.

to developing a scene of crime and incident tracking standard operating procedure, that a poaching scene should be secured minimising disturbance to the area as well as to use experienced wildlife crime investigators and prosecutors in rhino related cases to improve the chances of successful convictions.<sup>226</sup> The final strategy is the development of human resources which include the development of skills required to protect rhinos, making use of available training resources as well as to attempt to sufficient funding to meet requirements.<sup>227</sup>

In practise, NATJOINTS, a South African National coordinating security bond, is at the forefront in attempting to achieve these strategies. It has initiated Operation Rhino which will aim at reducing the incidents of successful rhino poaching by putting in place priority committees as well as investigation teams in the all provinces. All the information gathered by these groups will be reported to the Central Priority Crime Knowledge Management Centre. They are furthermore involved in the training of tracker dogs and handlers who will be deployed in areas deemed to be most venerable. Visible air patrols with increased reaction capability has also been deployed in areas such as the Kruger Park together with drone rangers (unmanned remote planes).<sup>228</sup> Furthermore SARS Tax and Customs Enforcement Investigations division has implemented a number of projects to prevent rhino products from being illegally exported from South Africa and is required in terms of the South African international agreement to work closely with the International Consortium for Controlled Deliveries in Wildlife Crime (ICCWC).<sup>229</sup>

In South African a combined effort from The Hawks, Interpol, National Wildlife Crime Reaction Unit, DEA, NPA, NATJOINTS and SARS was also conducted.<sup>230</sup> Inspections were conducted at taxidermists, freight agencies, airports, borders, game farms and road blocks were held at key areas which led to the gathering of critical information, with a number of arrests having been made with subsequent

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226 Section 5.3.2.4 of Government Gazette Notice 36096 38.

227 Section 5.4.2 of Government Gazette Notice 36096 39.

228 Mapanye & Chipu 2012 *Environmental Affairs Rhino Issue Management Report* 26.

229 Mapanye & Chipu 2012 *Environmental Affairs Rhino Issue Management Report* 29.

230 Mapanye & Chipu 2012 *Environmental Affairs Rhino Issue Management Report* 29.

convictions.<sup>231</sup> Furthermore security checks are done on all operational personnel who work with the black rhino identified in the Biodiversity Plan with security partnerships having been initiated *inter alia* with veterinary professionals, private rhino owners, farmers, civil aviation partnerships and NGO's.

Emslie and Brooks, in their study African Rhino Status and Conservation Action Plan,<sup>232</sup> make the critical point by stating that the treat of poaching and subsequent illegal trade in rhino horn increases with the proximity to national borders. The Kruger National Park, which accommodates the vast majority of South Africa's rhinos, is situated adjacent to Mozambique. As such initiatives such as the Black Rhino Expansion Project become of vital importance in terms of which a 130 black rhinos have been translocated from high risk areas such as KwaZulu Natal and the Kruger National Park to other destinations further inland. This in turn has greatly contributed to not only the protection of the black rhino populations but has also contributed to steadily increasing their numbers.<sup>233</sup>

Negotiations are also underway with the National Defence Force of neighbouring countries such as Mozambique, who play a critical role in curbing the illegal trade market, to develop shared rhino safety and security and conservation strategies. On 17 April 2014 Minister Molewa and her Mozambican counterpart signed such a MOU with specific attention being given to the scourge of rhino poaching in the Great Limpopo Transfrontier Park. The success of this programme, as emphasised by minister Molewa, will, however, to a large extent be dependant on the assistance of neighbouring countries.

#### 5.1.3.3 Government Gazette Notice 304 in GG 35248<sup>234</sup>

The norms and standards for rhino trophy hunting and the marking of rhino horn as it existed in 2009 was replaced on 10 April 2012 by Government Gazette 35248 made under NEMBA. The new norms and standards were developed with

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231 Mapanye & Chipu 2012 *Environmental Affairs Rhino Issue Management Report* SAPS 2013 Records.

232 Emslie & Brooks 1999 *IUCN SSC African Rhino Status Summary and Conservation Action Plan*

233 Anon 2013 [www.wwf.org.za/translocations](http://www.wwf.org.za/translocations).

234 Published 10 April 2012.

one of its main goals being to regulating the hunting market of rhino as well as to ensure that the subsequent exporting of rhino horn is done as is required by South African Law.<sup>235</sup> With regards to the marking of rhino horn it provides that each and every dehorning procedure has to be accompanied by the insertion of a microchip into the horn and in addition thereto, the horn, if more than 5 cm in length, has to be marked with indelible ink.<sup>236</sup>

When it comes to the hunting of rhinos the new norms and standards state that legislation of the applicant's country or place of residence has to accompany such a prospective hunter. Moreover such a hunter must provide proof that he or she is indeed a member of a hunting association which is also recognised by the government of that country.<sup>237</sup> Furthermore an EMI must be one of the officials present during such a hunt as well as during the processing and preparing of the rhino horn for trophy purposes to be exported.<sup>238</sup>

As was mentioned each horn has to be marked and micro-chipped, which not only has relevance domestically but also internationally. Each and every horn that is micro-chipped must be captured by means of a clear photograph which then has to be consolidated on the national TRAFFIC database.<sup>239</sup> This process of micro-chipping the horn will be done with extreme care hardly noticeable to the bare eye. Should a syndicate attempt to illegally export a rhino horn from South African customs these horns will be picked up instantaneously and should they manage to do so, there will be another custom port awaiting.<sup>240</sup> The relevance of marking rhino horn with indelible ink lies in the fact that if a horn was to be seized which is not so marked, the holder thereof will not be able to rely on the notion that it was hunted legally. Moreover it will prevent syndicates from falsely marking these horns as each horn marked will have been photographed and consolidated on the national database.

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235 [www.sabinetlaw.co.za/](http://www.sabinetlaw.co.za/) *rhino horn marketing and trophy hunting* 2012.

236 Section 2(6) of the Government Gazette.

237 Section 3(3)(a) of the Government Gazette.

238 [www.sabinetlaw.co.za/](http://www.sabinetlaw.co.za/) *rhino horn marketing and trophy hunting* 2012.

239 Section 2(7) of the Government Gazette.

240 Amfield 2014 *Rhinos lend an ear in the fight against illegal wildlife trade* 2.

As far as the hunting itself is concerned, the new norms and standards also serves its relevance and contribution. Firstly foreign legislation pertaining to the hunting of rhino is of vital importance as a prospective hunter can be forbidden to hunt if it is found that the hunting of rhinos is not permitted in that country. Secondly if such a prospective hunter cannot provide the required proof that he or she is a member of a government recognised association, they hunt will equally be denied. The fact that a hunt needs to take place in the presence of an EMI is also of great importance as this prevents a person acting under the guise of a hunter from removing a rhino horn after a hunt with the intention of illegally exporting it out of the country.

A further aspect that needs mentioning is that in terms of section 3(14)(b) the horn of a rhino that has been hunted needs to be weighed and the taxidermist then has to report such information to the department. This will prevent a hunter from removing even just the slightest part from such a horn. Finally, in terms of section 3(16), the horn of a rhino which has been hunted as a trophy, may not be exported in hand or personal luggage, again preventing such a hunting client from illegally smuggling the horns.

Having regard to the above mentioned, it would appear that these norms and standards will not necessarily contribute towards preventing rhinos from being poached. Important in the context of this study, its relevance and usefulness rather lies in the fact that it will play a major role in preventing rhinos from being illegally hunted with the horns thereof being exported from South Africa under the guise that it was hunted legally.

#### *5.1.4 National Environmental Management Protected Areas Act*

One of the main objectives of this act, as stated in section 2(a), is to provide, within the framework of national legislation for the declaration and management of protected areas.<sup>241</sup> The constitutional right contained in section 24 is echoed in section 2(e) of NEMPAA which further emphasises the importance of sustainable utilization and the protection of the environment, for the benefit of people. In

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241 Feris 2006 *PELJ* 18.

realising this goal the Minister, in terms of section 38(a), in writing, assign the management of these nature reserves to a suitable organ of state or organisation. Sparks<sup>242</sup> is an example hereof as it was established in terms of the NAMPAA specifically to serve this function.<sup>243</sup> Apart from its responsibility to promote tourism in South Africa actively as well as being a part of ongoing research programmes regarding the environment, it also bears a great responsibility towards protecting the environment.<sup>244</sup> In the context of the illegal trade in rhino horn SANParks obtained a 1000 DNA kits, which CEO David Mabunda said will go a long way in changing the trend of offenders.<sup>245</sup> SANParks further announced that it was going to add tracking and tracing measures as well as dogs able to trace human scent.<sup>246</sup>

Arguably the most important section in this act is section 17(e) which states that the purpose of declaring such areas as protected is in order to protect threatened and rare species.<sup>247</sup> It does so, amongst other, by means of environmental management agreements as referred to in section 41(1) of the act. The realisation of section 17(e) is further supplemented by the provisions of section 45(1) and 46(1) of the act. In a nutshell the main purpose of these provisions is to limit the access of the general public to these nature reserves or protected areas precisely for the purpose of protecting, amongst other, endangered species. Sections 45(1) and 46(1) of the act state that no person may enter a protected area or nature reserve without the written permission of the management authority, in other words SANParks, of that a nature reserve.

Moreover no person may fly over such a nature reserve at an altitude of less than 2500 feet, or land without the permission of the management authority.<sup>248</sup> On paper these provisions are sound and of vital importance in the effort to combat

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242 South African National Parks formed in 1926.

243 Strydom *et al Environmental Management* 117.

244 SANParks Official Website; [www.SANParks.org](http://www.SANParks.org).

245 Offenders found in possession of rhino horn will no longer only be charged only with possession with the intent of illegally trading but also with the charge of poaching which increases the amount of charges to be laid.

246 Miya 2013 [www.sabc.co.za](http://www.sabc.co.za).

247 Strydom *et al Environmental Management* 113. One of the main purposes of establishing these protected areas (although not obligatory) is for the conservation of the habitat in which these threatened and or endangered species live, specifically in terms of s 52 of NEMBA.

248 In terms of s 47(2) of NEMPAA.

illegal trade. Finally sections 89(1) and (2) hold that any person guilty of an offence of contravening sections 45(1), 46(1) or 47(2) shall be liable to a fine or even imprisonment for a period not exceeding 5 years or both.

## **5.2 Criminal Provisions**

### *5.2.1 Criminal Procedure Act*

#### 5.2.1.1 Persons authorised to apprehend a perpetrator

It is important to note that the CPA is not aimed at addressing any specific type of crime, but merely contains the legal prescriptions related to aspects such as crime investigations, trial procedures and review applications etc.<sup>249</sup> The Minister of Justice and Constitutional Development is, however, authorised, in terms of section 334 of the CPA, to declare certain persons as peace officers, consequently giving them the authority to make arrests regarding specific crimes.<sup>250</sup> Examples of such include the Hawks, SANPark officials as well as the Environmental Crime Investigations Unit.

There are also other legislative measures that authorise groups or even individuals to prosecute those guilty of environmental crimes such as illegal trade, however, still subject to the provisions of the CPA. In short these provisions hold that a person that institutes a private prosecution, however, needs to do so through a person entitled to practise as an advocate or attorney and has given written notice to the appropriate public prosecutor that he or she or they intend to do so. This condition limits the extent of this provisions' functionality. The CPA's influence in preventing or eradicating the illegal trade in rhino horn in this regard is therefore limited. It does, however, broaden the scope of persons or groups authorized to apprehend or arrest individuals guilty of illegal trade activity to beyond just officers of law. This in turn means that there is an increased chance

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249 Bekker, Geldenhuys and Joubert *Strafprosesreg* 6. It as such has no specific bearing on environmental related issues such as the illegal trade in rhino horn.

250 Tafline 2013 [www.Sanparks.org/peopleandeducation](http://www.Sanparks.org/peopleandeducation). Nature conservation officers have been given the authority to arrest any potential poachers as well as individuals illegally trading in rhino horn.

of more frequently and successfully apprehending offenders and thereby reducing illegal trade.

#### 5.2.1.2 Apprehension through warrants and the seizure

Section 20 of the CPA states that State authorities may, in accordance with the provisions of this section, seize anything; which is concerned in or is on reasonable grounds believed to be concerned in the commission of an offence, that may afford evidence of such a commission of an offence and which is intended to be used for the commission of an offence. Firstly, the poaching of rhino qualifies as the commission of an offence, secondly rhino horn is obtained through such an omission. These horns are then to be used for the commission of a further offence as it is sold illegally on the black market. This illustration therefore indicates that it is well within such authorities' discretion to seize rhino horn that is in the possession of individuals illegally and that the Act adequately makes provision for such seizures to be carried out.

However, before such a seizure can be carried out it is compulsory, as it is in all other instances, with section 22 being the exception that a warrant should first be obtained from a magistrate or judicial officer.<sup>251</sup> In addition to the seizure of such rhino horn the police official will also be entitled to search any person or premises identified in the warrant, as provided for in section 21(2) of the Act. The latter provisions are relevant in that not only does it prevent rhino horn from being exported illegally but also contributes to swifter prosecutions as well as convictions by placing the offenders at the scene of the crime. As mentioned section 22 is the exception to this rule and states that a police official may without search any person or premises if he on reasonable grounds believe that the delay in obtaining such CPA is of utmost important in the context of this study as most culprits are apprehended when either travelling to the border or at the point to export the horn via plane or ship.<sup>252</sup> This provides authorities the opportunity to act on instinct, tip off if suspicion is detected, which in most instances lead to the

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251 Section 21(1)(a) and (b) of the Act.

252 Anon 2014 *China-Africa Reporting Project*.



recovery hundreds of kilograms of rhino horn and subsequent arrests being made.<sup>253</sup>

### 5.1.2.3 The entering of premises

Section 24 of the CPA regulates the apprehension of persons or articles by entering a premises on which it is suspected unlawful activities are undergoing.<sup>254</sup> In addition to this it contains a further aspect which needs to be emphasised and that is that any person who is lawfully in charge of any premises and who suspects that such stolen stock or produce is being held at that premises, may at any time if a police official is not present enter such premises for searching purposes. This is important due to the fact that police officials cannot always be readily available in order to search and apprehend. With the assistance of the public in further increases the success rate regarding prosecutions being made, rhino horn being apprehended and convictions being gotten.

### 5.2.2 *Prevention of Organised Crimes Act*

The *Prevention of Organised Crimes Act* 21 of 1998 is probably the most important legislative measure in this respect due to the fact that the entire illegal trade industry relating to rhino horn is driven by syndicates.<sup>255</sup> The preamble of this act notes that it is specifically aimed at introducing measures to combat organised crime and gang activities as well as to criminalise certain of these activities.<sup>256</sup> In terms of section (1) (iv) a criminal gang includes any formal or informal *ongoing, organisation, association or group* of 3 or more persons whose activities amount to a criminal offence. Moreover, it also has an identifiable name and whose members collectively engage in a pattern of criminal activity. The

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253 Anon 2014 *China-Africa Reporting* Project. More than 13kg's of rhino horn was confiscated at the OR Thambo airport in March 2013 along with another Thai national arrested at the same airport in 2012 for smuggling more than 300kg's of rhino horn to Asia.

254 Any such premises may be entered for the purpose of searching such premises and any person thereon or therein, and if any such stock, produce or article is found as is defined in law relating to theft of stock or produce, shall take possession thereof and forthwith deliver it to a police official.

255 Milliken and Shaw *SA-Viet Nam Rhino Horn Trade Nexus* 76.

256 The criminalisation of rhino horn trade was of great significance due to the fact that prosecuting authorities were able to hand down much harsher sentences to offenders. This is also one of the biggest reasons why the trade in rhino horn flourishes in Mozambique, as its government is still to criminalise such activity, only being a misdemeanour.

trade in rhino horn certainly falls within this description which was substantiated by Minister Edna Molewa's public address held May 2012.<sup>257</sup>

Section 3 of this act relates to offences regarding proceeds of unlawful activities, with more specifically sub section 6 being relevant to illegal trade activity. This sub section notes that any person who has possession of property and who knows or ought reasonably to have known that it is or forms part of what will be the proceeds of unlawful activities, shall be guilty of an offence. Again it needs to be emphasised that the poacher plays a pivotal role in the illegal trade industry as trade cannot take place without firstly the horn having been poached. It is common knowledge to all poachers that the horn, after it has been handed over to syndicates, subsequently gets traded *illegally* on the black market. Any person convicted of such an offence as contemplated in section 6 shall be liable to a fine of up to R 100 million or imprisonment not exceeding 30 years. It was, however, encouraging to see that the latest penalty given to a syndicate upon conviction was even harsher as authorities deemed it fit to hand down a 40 year sentence to Chemlong in 2012.<sup>258</sup>

Moreover sentence imposition may include that syndicates convicted must pay to the State any amount it considers appropriate which will usually be the value of such proceeds related to the crime, in this case being the illegally traded horn.<sup>259</sup> The value of rhino horn as was mentioned in Chapter 1, can range between \$60 000 to \$70 000 per kg, with a horn weighing as much as 4kgs.<sup>260</sup> This means that a single horn can be worth almost \$ 280 000 or R 2, 8 million. Accordingly

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257 [www.SAnews.gov.za/](http://www.SAnews.gov.za/) *Fight against rhino poaching requires joint initiatives* 5 May 2012. Syndicates use poachers, referred to as subsistence poachers, usually from poor communities driven by hunger and poverty, giving the horns to the syndicates after the job has been done. This industry without a doubt indicating a pattern and is ongoing as more than 1600 rhinos have been poached for the purpose of trading its horn to Eastern countries.

258 S 3(8) of the Act 10. The same is provided for in s 4(9)(2)(a) which states that any person who wilfully aids any criminal activity (illegal trade in rhino horn) for the benefit of and with the assistance of a criminal gang (syndicates) shall be guilty of an offence liable to imprisonment up to ten years.

259 Ss 5(18)(2)(a) of the Act 14 with sub-sec 19(1) taking it even further by stating that such amounts may be payable even before the commencement of the act constituting the criminal offence. In other words, if a syndicate is caught with rhino horn in its possession, the amount referred to above can be retrieved despite the fact that the horn has been convicted before being exported.

260 Roach 2013 [www.nbcnews.com](http://www.nbcnews.com) 2012.

this ups the stakes for syndicates even more if caught and found guilty. The National Director may further, by way of an *ex parte* application apply to a competent High Court for an order prohibiting such groups, which include syndicates, from dealing in any manner with any property, parts or products.<sup>261</sup>

### **5.3 Trade Related Provisions**

#### **5.3.1 Trade Administration Act**

##### **5.3.1.1 Import and Export Control**

One of the main objectives of this act, as indicated by the title thereof, is to provide for the continued control of goods being imported and exported into and out of the Republic.<sup>262</sup> It does so through a permit system.<sup>263</sup> The Minister of Trade and Industry derives authority from article 6(1) which states that he or she may, by notice in the Gazette, declare that no goods of a specified class or kind may be exported from the Republic, except under the authority of and in accordance with the conditions stated in a permit issued by the Commission.<sup>264</sup>

This is indeed the case with rhinos in South Africa as a permit is needed in order to legally hunt and export rhino horn. For instance the horn itself may not be exported if it is not mounted as part of a proper hunting trophy. Moreover, as South Africa is member state to CITES, it takes it a step further to state that before an export permit will be issued such a member state (from where the horn is to be exported) must inform CITES authorities of the country of destination and verify that they are in agreement with the importation of that species.<sup>265</sup> As such the identities of both the importer and exporter need to be verified and recorded as well. This can be done amongst other by keeping a copy of their identification documents which also simplifies prosecution in the case of a violation.<sup>266</sup>

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261 S 26(1) of the Act, with s 26(3)(a) holding that such a restraint will have immediate effect.

262 [www.itac.oeg.za/importregulations](http://www.itac.oeg.za/importregulations) 2005.

263 In terms of s 6 of the Act as well as investigation and enforcement in terms of part E of the Act.

264 In terms of article 6(1)(d) of the Act.

265 EU Guidance Document 2012: *Export, re-export and Union trade of rhino horn* 4.

266 EU Guidance Document 2012: *Export, re-export and Union trade of rhino horn* 5.

These measures have been put in place in an effort to control the hunting as well as the legal exportation of rhino horn out of the country. Syndicates do not intend to obtain permits in order to hunt and export horns legally. It is the aspect of *illegal* trade in rhino horn together with drastic measures needed in order to deter it that is absent from this text. In other words it does not really address or solve the essence of the problem, namely to eradicate the illegal trade in rhino horn. It only brings to the table means as to how hunting and trade can be regulated and monitored more strictly in general.

#### 5.3.1.2 Search and Investigation

A provision that may be of greater importance to combating illegal trade in rhino horn is section 36 of the act. This section contains provisions which give certain authorities the power to conduct investigative searches and inspections, being the same as those provided for in sections 21, 23 and 24 of the CPA. Sub-section (1) states that the Chief Commissioner may appoint any person in the service of the Commission, or any other suitable person, as an investigating officer. Such an investigating office has the authority, under the direction of the Commissioner, to question any person under oath or affirmation. The Chief Commissioner or appointed officer may also, at any time during such an investigation, summon any other person which they think can furnish information on the subject under investigation or who is in possession or control of any object.<sup>267</sup> In the context of this study the perfect example is someone that is in possession of rhino horn. These types of investigations may be of paramount importance when it comes to preventing rhino horn from illegally being exported out of the Republic.

This is where section 41(1) (a) comes into play as it regulates import and export control inspections. This section authorises an investigative officer, usually an EMI, to enter upon or inspect any place, premises, vehicle or belongings in terms

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267 S 39(2) of the Act 38.

of any goods to which section 6(1) (d) applies, whether they are stored, handled, transported or dealt with.<sup>268</sup>

This authority to search and inspect, however, goes beyond the realm of import and export control. Section 45(2)(c) authorises any such an officer as mentioned in section 43 above to search any person, vehicle or premises or examine any article on premises that may have a bearing to an investigation. Moreover officers have the authority to remove from premises for examination and safekeeping, anything that has a bearing on the investigation. During March this year officials arrested a Chinese member of a syndicate at a residence in Lake Brume. The NPA together with the Hawks conducted a road block at key exiting points from Kruger which led to the arrest of a notorious syndicate Kevin Cooper. As many as 15 rhino horns as well as 6 elephant tusks were found in his truck which was routing for Mozambique.<sup>269</sup>

#### 5.3.1.3 Detection of rhino horn

Up until recently the detection of rhino horn through custom control, apart from the search and investigation methods, seemed to be a challenge as thousands of rhino horns were exported illegally from South African shores in recent years.<sup>270</sup> This led to the introduction of initiatives such as the Rhino Rescue Project in terms of which scientist have developed a red dye that is injected into the rhino's horn. Not only is this fluid poisonous but it also shows on x-ray airport customs security scanners and more importantly, cannot be washed off with water, soap or alcohol. This will serve as a major break trough for authorities in detecting the smuggling of rhino horn.

#### 5.3.1.4 Penalties

Any person convicted of an offence relating to the import or export of any item or goods in terms of section 6 can be liable to a fine of up to R500 000 or

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268 According to sanews.co.za, between the period of March 2010 and February 2012 officials arrested more than 7 Vietnamese and Chinese nationals at OR Thambo International Airport's customs control, guilty of having rhino horn in their possession.

269 Johnson 2012 [www.krugerpark.co.za/](http://www.krugerpark.co.za/) 55 million worth of assets seized from traders 1.

270 Cota-Larson 2013 *Rhino horn: Debunking the Pro0TradePropaganda* 3.

imprisonment of up to 10 years. The same will apply to any person who is found guilty of obstructing justice (such as to attempt to influence any investigation or withhold information).<sup>271</sup> This sturdy fine or risk of imprisonment could assist in curbing illegal trade as it will definitely make syndicates think twice before participating in illegal trade activity, even if only a few.

## **6. Conclusions and recommendations**

The purpose of this chapter is to draw conclusions from the research done on the South African legal framework within the context of the illegal trade in parts of endangered specimen. This formed the core part of the study as it attempts to answer the legal question as to whether the current legal framework is adequate enough to prevent or prohibit, more specifically, the illegal trade in rhino horn. As such this chapter will discuss the limitations or shortcomings that exist in current legislation, with recommendations to follow for the purpose of aiding future research.

### ***6.1 International measures as part of the South African legal framework***

The first section of the legal framework to be discussed is the International framework which consists of CITES, CBD, GATT and WTO. The Convention on the International Trade in Endangered Species' contribution towards achieving sustainable use of environmental resources is unquestionable. In realising interaction between member states on a regular basis with one of its' sole objectives being the protection of endangered species, it has had many successes over the past few decades. Such success is to a large extent as a result of measures having been put in place such as the appendices, legislation protecting endangered species and structures such as permit systems. The main shortcoming of CITES, however, is the fact that almost all of the above mentioned is aimed at protecting such specimen or regulating the legal trade in parts thereof.

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271 S 55 of the Act 38.

The listing of endangered animals in these appendices contributed in raising awareness with the main objective, as read in chapter 3, being to stop or regulate trade in a specific species.<sup>272</sup> But in the context of rhino horn where such a trade is banned as a whole, the listing of rhinos as such does not contribute to preventing or eradicating the illegal trade in rhino horn at all. The permit system was established with the same purpose but with a different approach namely to ensure that trade takes place within a restrictive or regulated framework.<sup>273</sup> The same comment can be made regarding limitations that have been imposed in connection with trophy hunting. Ultimately the current measures in place do not address the aspect of how to prevent or eradicate illegal trade *per se*, rather the current emphasis exists on protecting endangered species which does not lend assistance to eradicating illegal trade.

The most drastic step CITES has taken in an attempt to hamper the illegal trade in rhino horn was to ban such trade at its third COP meeting.<sup>274</sup> However, restricting supplies of rhino horn, has only succeeded in generating huge rewards for an illegal high-tech poaching industry, which is slaughtering rhinos at an alarming rate.<sup>275</sup> As such the banning thereof has actually worsened the trade in rhino horn rather as opposed to preventing it. Accordingly it has become vital that CITES members need to consider the adoption of legislation that is more specifically aimed at preventing illegal trade. Adjacent hereto the enactment of provisions which provide for more strict measures in case of non-compliance,<sup>276</sup> which apart from animal trade sanctions, must include economic sanctions as this will serve as a far better leverage in motivating member states in complying with CITES regulations.<sup>277</sup>

Finally, CITES will have to find a solution in the form of newly adopted legislation that addresses the aspect of specialized syndicate trafficking in rhino horn. As discussed under sub section 3.1.3 South African authorities are often faced with

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272 Favre 1989 *A Guide to CITES* 29.

273 Vasquez 2012 [www.cites.org/eng/news](http://www.cites.org/eng/news) 6.

274 Regulation 3.1 during 1981.

275 Bigg & Courchamp 2013 *Economist's View: Legal Trade in Rhino Horn* 2.

276 Lipes 2012 [www.rfa.org/vietnamwildlife](http://www.rfa.org/vietnamwildlife) 3.

277 This aspect is of specific importance where CITES attempts to achieve co-operation between member states with the objective of distributing responsibilities and workload.

the challenge of being unable to apprehend syndicates heading illegal trade activities as they operate beyond South African borders. Mozambique as of yet has failed to declare the trade in rhino horn a criminal offence and as such South African authorities cannot rely on their Mozambican counterparts to apprehend these syndicates. Accordingly measures will have to be considered and adopted that are aimed at bridging the current jurisdictional limitation.

As the discussion on the Convention of Biological Diversity indicated, there is an abundance of programmes which are primarily aimed at sustainable development and conservation within the context of biodiversity diversity. However, the focus of these programmes are broad to begin with as the term biodiversity is used to describe a variety of life which includes both plant and animal life. They are therefore not centralised or focused on a specific aspect such as the illegal trade in endangered species.<sup>278</sup> Even though it can be said that notions such as conservation and sustainable development does directly contribute to protecting endangered species, they don't bring a solution to the question as to how illegal trade is to be prevented or eradicated. Moreover, and even more importantly, there is a total absence of legislation or regulations, directed at realising this goal. Accordingly, if the CBD seeks to lend any noteworthy contribution, legislators will have to put in place measures, whether it be legislation, regulations or otherwise, that are directed more specifically at preventing the illegal trade in parts of endangered specimen such as rhino.

The General Agreement on Tariffs and Trade, as seen in Chapter 3.3, is aimed at achieving free unhindered international trade with the exception being the provisions to article XI which impose quantitative restrictions. Quantitative restrictions are of utmost relevance if the trade in question is legal and such restrictions are imposed for the purpose of avoiding the over exploitation through trade. In the context of rhino horn the trade therein has been banned as a whole, accordingly regulations related to imposing quantitative restrictions are totally irrelevant as restrictions cannot be imposed on something that is prohibited. As

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278 To a lesser extent, in co-operation with CITES, these programmes do focus on endangered animals as seen from the 6<sup>th</sup> COP meeting where the most noteworthy was the adoption of sub targets 4.3, which prohibit the trade in endangered species, and programmes aimed at achieving sustainable development of threatened wild fauna and flora, page 19.



such it cannot be said that this agreement provides for any sort of framework within which the prevention of illegal trade can be adequately achieved.

The shortcoming that presents itself on further inspection of agreements enacted under the World Trade Organisation is again that none of them have any specific bearing on the protection of wild species and the subsequent trade in parts thereof. It refers to the protection of the environment in the broad sense which happens to include animals as well.<sup>279</sup> The TBT specifically focuses on ensuring that all specifications given with regard to protecting the environment during trade operations are adhered to, whilst the SPS deals with food safety as well as animal and plant health.<sup>280</sup> Regrettably none of this has any relevance or influence on regulating the illegal trade in wild species or their products such as rhino horn.

## **6.2 The SADC's Contribution**

The discussion on SADC begins with article 3(1) to the SADC's Protocol on Wildlife Conservation which entails the sustainable use of wildlife resources through legal hunting. It is argued that the proceeds made through such legal hunting operations can be utilised to preventing illegal trade if directed at this purpose.<sup>281</sup> Secondly article 6(2)(c) was mentioned as stating that member states need to adopt measures in the form of legislation or otherwise that governs trade in wildlife and its products as well as penalties for the illegal trade therein. South Africa did adhere to this requirement as was discussed in debt in chapter 5.

In addition hereto article 3(2)(c) under chapter 4.1.2 requires that Member States have the obligation of managing any transfrontier effects and adjacent hereto this is to be done by means of co-operation between Member States.<sup>282</sup> This again brings us back to the predicament of Mozambique having failed to take any steps to adhering to this requirement to which they have an obligation after the establishment of the Limpopo Transfrontier Park. If such a non-compliance is to

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279 Anon 2011 *WTO rules and environmental policies: other relevant WTO policies*.

280 Calvin and Krissoff 1998 *Journal of Agricultural and Resource Economics* 351-366.

281 Damm 2005 *African Indaba* 1-23.

282 Article 21(F) of SADC's Protocol on Wildlife Conservation.

persist it would render such a provision, which actually contributes to the cause of effectively preventing illegal trade, to be of no effect.

As opposed to the measures that have already been dealt with above, SADC's provisions are actually relevant and sufficient or adequate enough as it is on paper to successfully deter illegal trade activity. The challenge that exists here is simply whether Member States will be able to effectively adhere to its provisions in practice. In other words, South African authorities need to ensure that all funds generated through legal hunting activities are directed at contributing towards the cause of eradicating illegal trade. Furthermore Member States, and more specifically Mozambique, needs to step up to the plate and support South Africa in its efforts to apprehend criminal syndicate groups by declaring such an activity a criminal offence. Finally South African legislators need to review existing laws on a regular basis in order to determine whether such laws are still on par so as to adhere to the requirement as set out by article 6(2)(c).

### ***6.3 The South African contribution***

In spite of the fact that NEMA serves mainly as the instrument which ensures the regulation of functions executed by national departments which might affect the environment, NEMA plays a pivotal role in the battle against the illegal trade in endangered species and parts therein. It forms the basis not only for environmental protection, but also contains measures which enforce the implementation of its provisions as well as providing for the necessary punitive structures in the case of non-compliance.

The foundation is laid by Section 24 of the Constitution placing the needs of people at the forefront which encompasses the right each and every individual has to have the environment (rhinos) protected for the benefit of future generations. Adjacent hereto the state has the obligation to minimize any effects that may have a negative impact on this right. As was mentioned in the study itself, poaching and the subsequent illegal trade definitely has a negative impact on the environment and therefore also the right as contained in Section 24 therefore necessitating the state to act proactively. This is done through structures such as EMI's whom play a vital role as they have the authority to

seize rhino horn, investigate crime scenes as well as to search any premises deemed to be involved in the illegal trade of rhino horn. The value of these functions and its potential to contribution to the fight against the illegal trade in rhino horn is self-explanatory.

When turning to the penalty provisions it becomes evident that not only does it have the ability to prosecute offenders but also that it provides for monetary punishment in the form of Section 24(1)(2) and (3). As was explained in the discussion to NEMA, offenders can be held liable to forfeit to the state the amount equal to that which the offender has benefitted from committing the act. The added benefit hereof is that the state can in turn use these funds to aid its operations aimed at eradicating illegal trade. Arguably the most valuable provision is Section 33 of NEMA, as it authorises any person to conduct a prosecution or take into custody any person whom is suspected of being part, on the verge of committing or having already committed a crime relating to the illegal trade. Accordingly this drastically enhances the chances of arrests being made and offenders being prosecuted as the general public is not confined to the availability of numbers nor to a jurisdiction as is the case with police and other law officials.

Despite the fact that the preamble to NEMBA reiterates the importance of regulating legal trade as the Republic's international obligation to do so, NEMBA does lend a healthy contribution to preventing illegal trade. The listing of endangered species in terms of Section 56(1)(a) is of utmost relevance as any activity<sup>283</sup> of trade relating to an animal so listed constitutes a criminal offence, with the provisions of section 57(2)(a) echoing the same prohibitions. Furthermore Section 20 of Regulation 388 also provides assistance in preventing illegal trade in the form of permits and the regulation of the exportation of animal parts.<sup>284</sup> The former, even though implemented in the context of legal hunting, closes any opportunity for syndicates to execute illegal trade activities under the guise of legal hunting. Whilst regulation of exportation puts in place strict custom

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283 Which activity is also prohibited in terms of Government Gazette Notice Number R 388 and includes a variety of activities of which the most relevant to rhinos is that of hacking or chopping off of any part of such an animal.

284 Also required in terms of section 20 of the Act itself.

control measures at all ports within the Republic which subsequently increases the chances of affecting arrests. Section 102(2) provides for the imposition of penalties in the form of imprisonment and fines for any contravention of the provisions of Sections 56(1)(a) and 57(2)(a) therefore serving as a deterring measure. Accordingly its contribution in preventing illegal trade cannot be emphasised enough.

The adoption, under NEMBA, of Government Gazette Notice Numbers 33002, 36096 and 35248 respectively can be seen as a valuable addition to the existing structures as it introduced the practical implementation of provisions which previously lacked.

In terms of Gazette Notice Number 33002 schedules have also been drawn up similar to those of CITES. Section 3(1) necessitates the Minister to issue permits regarding any trade activity in such endangered species. Moreover any exportation of any part of such a listed species, in addition to the permits, has to be accompanied by an authoritative permission such as that of the SAPS.<sup>285</sup> It also contains penalty provisions similar to those of Regulation 388 in the case of non-compliance, which includes imprisonment or a fine. Government Notice 33002 is, however, predominantly if not solely applicable to regulating the trade in species or specimens thereof which is not illegal but merely threatened. As such it questions its ability to prevent the trade in rhino horn which is strictly forbidden.

Government Gazette Notice Number 36096 has the clear objective of increasing the numbers of black rhino populations. Even though this might seem to be irrelevant to the aspect of preventing illegal trade it is the way in which such increase is to be achieved, that its applicability in this context becomes evident. This goal is to be realised by increasing protection and conservation efforts through a system which comprises of field law enforcement and effective prosecution.<sup>286</sup> Up to this point none of the previously discussed legislation has provided for such a hands on, practical enforceable measure which is of utmost importance. In terms of this provision anti-poaching units are put in the field of

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285 In terms of Section 5(1) and 6(1).

286 Section 5.3.2.1 of Government Gazette Notice 36096.

battle, confronting the issue of poaching at its source which in turn prevents illegal trade in rhino horn. Furthermore translocations are effected which also play a major role in preventing illegal trade as rhinos are removed from high risk areas such as the Kruger National Park to areas where they are less vulnerable to poaching thereby reducing illegal trade.

Regarding the aspect of heightened prosecutions in terms of Section 5.3.2.1, the introduction of tracker dogs is seen as an excellent initiative as these dogs can track poachers which will aid authorities in making arrests before the horn can be taken cross border. Moreover effective border control by the SAPS, Hawks, DEA and NPA will undoubtedly result in increasing the rate of prosecutions made.<sup>287</sup> Accordingly Government Notice 36096 has laid a platform which has the potential of effectively addressing the aspect of preventing illegal trade. Its success, however, will only become clear in time as it has only recently been adopted.

The provisions of Government Gazette Notice Number 35248 has also indicated it's relevance by restricting trade through a system which entails the insertion of microchips which increases the chances of successfully tracking poachers and confiscating horns that have been poached. It also introduced a system whereby EMI's fiscally accompany hunters so as to ensure the legality thereof, accordingly assisting in narrowing the gap for syndicates to operate illegal trade activities under the guise of legal hunting. Finally prohibitions as contained in section 3(16)<sup>288</sup> will bring about a more effective monitoring of horns that are mounted as trophies. Again as it has only been enacted into law recently its success in eradicating illegal trade will only be assessable in time.

As seen from the discussion under NEMPAA the main objective is to establish and manage protected areas for the sake of species that are endangered. Supplementing this objective is the provisions of Section 45(1) and 46(1) respectively aimed at secluding these reserves from the general public so as to minimize the risk of exposing these species. The concept as such is on paper

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287 Mapanye & Chipu 2012 *Environmental Affairs Rhino Issue Management Report* SAPS 2013 Records.

288 Prohibiting the exporting of trophies in hand luggage.

adequate enough but when the number of rhinos poached is taken into consideration its effectiveness to achieve this goal is rightfully questioned. Firstly the establishment of nature reserves such as the Kruger National Park, Isimangaliso Nature Reserve etc. has taken the effort in preventing rhinos from being poached no further. In fact the vast majority of rhinos poached are poached not on privately owned game farms but in South Africa's protected nature reserves.

One of the main objectives of Section 45(1) is to minimise access to these parks. However, the whole purpose for creating a protected area, as envisioned in NEMPAA was nullified, the moment authorities decided to remove the fence bordering Kruger to Mozambique.<sup>289</sup> As Kotzé and Du Plessis justifiably state in their study related to domestic biodiversity conservation, this economic consideration actually places an additional burden on the biodiversity if not balanced harmoniously with conservation needs of the environment.<sup>290</sup> Instead of protecting the rhinos within a protected geographical area, government has actually opened up the reserve to a jurisdiction (Mozambique) which has little legal compatibility or certainty therefore making the rhinos extremely vulnerable to poaching and increased illegal trade activity.

As such the provisions of NEMPAA clearly has no direct impact on illegal trade activity nor does it pose the means to preventing it. Accordingly legislators should consider revising legislation to not only include the obligation to establish these parks but to put in place provisions which provide for the pro-active protecting of wildlife such as increased border control and in addition hereto more drastic penalty provisions than those contained in Section 89(1) and (2).<sup>291</sup>

#### **6.4 Criminal Provisions**

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289 Reyers "Evaluating Transboundary Protected Areas" 9. One of the main reasons why the transfrontier park was established was to achieve increased conservation by expanding the geographical area as well as to stimulate economic reconstruction and upliftment

290 Kotzé and Du Plessis 2006 *Queensland U Tech L & Just J* 30.

291 Imposing imprisonment for periods well exceeding that of the current maximum time of 5 years.

As mentioned the CPA does not address any specific criminal activity, be that as it may it never the less contains provisions that contributes immensely towards the curbing of illegal trade. Section 20 of the CPA authorises authorities to seize and detain any items which has been or is about to be used for the commission of an offence. The importance of such an authority is not necessarily the fact that such items can be detained but more importantly that it can be used as evidence to secure arrests and convictions by means of finger prints amongst other. Section 21(2) authorises officials to taking offenders into custody, the consequences thereof being twofold. Firstly it results in the perpetrator being prevented from executing any illegal activity such as poaching or rhino horns being traded illegally. Secondly it presents the opportunity to turning such an offender to state witness which in turn may assist authorities in making further arrests or even apprehending the syndicates in charge of these illegal operations.

Most seizures in terms of the CPA needs to be effected by means of a warrant, which often divines the whole point of the operation as prior knowledge thereof risks success. Section 22, however, authorises such seizure operations without a warrant which further contributes to prosecutions being made as offenders are caught off guard in the act which in turn leads to speedy convictions. The most valuable of all the CPA's provisions in the context of this study is that Section 24. It authorises any person whom is the owner or in charge of a premises to enter such a premises for the purpose of investigating where such a person is of the belief that criminal activity is underway. This broadens the scope for prosecutions to be made as the general public is not as limited in numbers as is the case with officials and officials can be notified in time if any ominous activity is suspected.

The applicability of the Prevention of Organised Crimes Act has already been reiterated in the discussion itself as it is focused on the activities of organised crime groups. The most notable contributory provision is that of Section 18(2)(a) as it imposes strict penalty measures of up to a R 100 000 000 or imprisonment of up to 40 years, which unboudtly is the most extreme of all legislation. The only shortfall of this Act, however, is the fact that, contrary to expectation if the preamble is read, it does not contain many provisions which are actually applicable to preventing these organised crimes which include illegal trade. It places a lot of emphasis in explaining what the terms organised, crimes and

groups means, to which activities its provisions apply and what the penalties are if contravened, but almost none of the provisions as stated provide the means of preventing illegal trade. As such legislators need to go back to the drawing board in an attempt to enact provisions that are equally up to standard so as to be able to effectively prevent all activities the act states to be applicable to.

Finally, two aspects of importance was identified regarding the Trade Administration Act. Firstly it provides the means as to prevent rhino horn to a great extent from illegally being smuggled through customs, as officials are authorised to investigate not only persons but all belongings as well.<sup>292</sup> If rhino horn is detected without the necessary permits the horns will be confiscated and the perpetrator arrested. Moreover, any horn that has been injected with red dye will be picked up by customs control proving to be invaluable. Secondly Section 6(1)(d) ensures that all horns exported are monitored as authorities of the relevant country to which the horn is exported is informed. The identity of the person exporting and the person importing is obtained so as to ensure validity.

Following all the above it is clear that the South African legal framework certainly does have the means to preventing illegal trade in rhino horn albeit subject to revision and fundamental adjustments or additions on a regular basis so as to keep up with an ever evolving illegal market. The biggest challenge South African authorities are faced with is neighbouring and international countries' ability and commitment to effectively implementing the provisions they share with South Africa as binding upon them.

In the face of an ever increasing illegal trade market the option of legalising the trade in rhino horn is seen by many as a last desperate measure. South Africa has taken a step in this direction with cabinet announcing that it had approved the suggestion to be made to CITES in 2016, which suggests for the legalisation of the trade in rhino horn.<sup>293</sup> If approved, it will be enacted as law, but more importantly it will create the opportunity for legislators to amend all legislation accordingly. This in turn can provide for an effective regulatory framework in

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292 Section 41(1)(a) and 36(1) of the Act.

293 Beeld SA *mik na handel in renosterhoring* 3 July 2013.



which legal trade could be regulated. Even though history has indicated legalisation is not necessarily the answer to eradicate illegal trade, taking the diamond and gold industry as example, it is realistic to believe that if an effective and executable model is implemented it will at least contribute to reducing the illegal trade in rhino horn to such an extent that it will prevent the extinction of the rhino species.

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## Certificate of language editor

### ENGLISH LANGUAGE EDITING CERTIFICATION

This is to certify that the English language editing of this dissertation by Mr N de Wet was done by Prof. L.A. Greyvenstein.



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