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**Protecting our Wildlife for Life.
A discussion on how we have failed to protect our rhino populations
in the past and what our future options really are.**

“Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.”

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1.INTRODUCTION

The poaching of the rhino of southern Africa is not a new debate. In fact, it has been a key area of environmental concern for a number of years. Today, it falls under the rubric of ecological criminology which shall be addressed in this dissertation. I intend to deal with the impact poaching and the illegal trade has had on this endangered species and, in addition, to give an overview of the current measures of the criminal justice system in force to combat it. I shall discuss the international perspective and propose some solutions to prevent the further elimination of the species.

Approximately 350 million wild animals and plants are traded each year world-wide, estimated to be worth US \$20 billion per year. It is argued that up to a quarter of this trade may be illegal and, thus after drugs and weapons it is the third most significant trade internationally.¹ This illegal activity continues despite the operation of an international convention aimed to prevent it, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, (CITES). I shall address many of the attributes of CITES, but also consider its numerous flaws which have failed to protect the rhino adequately.

Although extinction is considered a natural feature of evolution, humans have been responsible for the loss of most of the animals and plants that have disappeared due to loss of habitat and increased exploitation as human population grows.² It is accepted that a conflict exists between the need for economic growth and environmental protection. This is acutely apparent in the developing states where political leaders confront enormous pressure to achieve short-term growth, regardless of the detriment it will impose on the environment. While leaders are often aware that long-term growth depends on a responsible attitude towards environmental management, it is often impossible to persuade a starving population to favour environmental protection if it conflicts with their means of survival.³ I shall comment on the measures taken in Zimbabwe to address this fundamental problem.

Generally speaking, the majority of the existing rhinos are now concentrated within South Africa's borders. It is likely that the poaching and smuggling of rhino horn will increase in order to supply the overseas market demand. As a result the international traders are focusing their attention on these remaining populations, creating pressure on the law enforcement agencies in South Africa who are attempting to curb this criminal activity. The illegal trade is exacerbated by the potentially high rewards, the slim risk of capture and ineffective legislative penalties allowing it to be infiltrated by organised crime networks.⁴

The high international demand for rhino products stimulates an illegal market and hampers any protection projects initiated. Many Asian communities, accustomed to the traditional use of rhino products, are prepared to pay exorbitant sums for a commodity which promises physical and mental well-being.⁵ I shall address various

¹ Hughes 'Endangered Species. CITES, tigers and ivory' OP Ref328 Res97/45

² CITES - <http://www.wcmc.org.uk/CITES/english/why.htm>

³ Schlickman et al International Environmental Law and Regulation 1.O.07

⁴ Du Bois 'The Illegal Trade in Endangered Species' 28

⁵ Du Bois op cit 29

issues in this regard in due course.

The issue is exacerbated when it is noted that an ounce of rhino horn in an eastern medicine shop can cost more than one ounce of gold. Clearly, South Africa's rhino population is left in an extremely vulnerable position. It is argued that the actual poachers are not highly compensated for their efforts. Rather, the true beneficiaries of the market are the professional dealers and smugglers supplying it to the overseas markets. It is suggested that the scarcer the rhino horn becomes, the greater the chance that these dealers will invest in professional manpower and sophisticated equipment in order to acquire it.⁶

I shall comment on the protective measures adopted by numerous countries, including the option of harvesting rhino horn in a benign manner. However, this latter option is problematic both with regard to the difficulties in sedating such large animals and also the expense of the operation. In addition, even the shaving of horn left behind is still worth killing for.⁷

In January 1996 Mr Justice M E Kumleben submitted the report of the Commission of Inquiry into the alleged smuggling of and illegal trade in ivory and rhinoceros horn in South Africa to the State President of the Republic of South Africa. I shall refer to the conclusions of the Commission at the relevant stages in this dissertation.

South Africa is able to allocate more resources to park management and rhino protection than any other range state in the world. In fact, our government bodies spend more on rhino conservation than the total combined expenditure of all other African governments.⁸ However, even with these safeguards, as poaching is still prevalent in other African states, we must ensure the survival of our population. Therefore, the use of sophisticated and highly-developed anti-poaching operations must be emphasised. The current methods in place must be upgraded and improved if the survival of South Africa's rhino populations is to be ensured.

2. LIMITATIONS OF THE CRIMINAL JUSTICE SYSTEM TO DEAL WITH ENVIRONMENTAL CRIMES

A key issue with environmental offences is that the criminal law developed primarily in the context of individual offenders and the traditional notion of a harmed victim is problematic to identify. Furthermore, if harm is suffered, these effects are often dispersed over many years and perhaps over numerous individuals, with no one person being directly affected on a specific date. As a result, these obstacles have led to environmental offences being regarded as only of a regulatory nature and quite separate from 'real' crime. Although regulatory offences are usually punishable without having to prove fault, the penalties imposed are low and imprisonment is not an option. Thus, any deterring effect that a stigma may have to the offender has been removed. Recently, however, it has been recognised that crimes against the environment do not always fall neatly into the category of regulatory offences. This is

⁶ Du Bois op cit 29

⁷ Hughes op cit 17

⁸ Du Bois op cit 37

due to the harm they pose to the environment and thus different treatment is suggested for different types of environmental offences.⁹

These crimes impact extensively on every part of our daily lives as well as those of future generations who will need fresh air, clean water and a healthy living environment. It is time they are recognised as crucial to our future development.

According to Lipman, most countries have decided not to add a specific environmental offence to their criminal law, but rather to enact separate legislation which impose stiff sanctions for serious environmental offences. In Australia, the New South Wales Environmental Offences and Penalties Act of 1989, was created to supplement the existing regulatory framework. It introduces a three-tiered system of environmental offences: Tier One is designed to deal with serious environmental offences and requires proof of *mens rea* while Tiers Two and Three comprise less serious offences and strict liability applies. Liability under Tiers Two and Three do not require proof of fault and thus they conform to the 'regulatory' model. This Act is an amalgam of criminal and regulatory approaches to environmental offences within the same statute creating a clear distinction between types of crimes against the environment. This hierarchical approach has been adopted in most Australian jurisdictions.¹⁰

One problem with transferring this type of approach to South Africa is that Australia has neither a Bill of Rights nor any constitutional impediments that bear on criminal responsibility. In this way, the legislature is free to create various offences and impose varying standards of liability. This is clearly not the case in South Africa.¹¹

It is evident therefore that in the environmental arena, the South African criminal law needs to be reworked and new mechanisms developed to ensure compliance. Recent suggestions include punitive injunctions, adverse publicity and community service orders. Punitive injunctions lack the shortcomings of monetary penalties and can be tailored to the individual's financial circumstances. They can be used to prevent repetition of an offence by attaching conditions and carefully monitoring future operations. Community service orders can be beneficial to the affected community in particular as well as having a punitive aspect to them.¹²

However, it must be remembered that reliance on criminal enforcement alone is unlikely to protect the environment adequately. Thus, the criminal law should be used in conjunction with a wide range of sanctions and other remedies. A pro-active programme which focuses on preventing environmental harm before it occurs is imperative. In this way we must be committed to the precautionary principle. Educational programs can play an important role in this process and I shall deal with this option presently. Furthermore, civil enforcement is often a preferable alternative to criminal proceedings as it can be used to prevent environmental harm or to obtain compensation. The lower standard of proof here is a key advantage.¹³

⁹ Lipman 'Corporations, Crime and the Environment' 71

¹⁰ Lipman op cit 72

¹¹ Lipman op cit 78

¹² Lipman op cit 87

¹³ Lipman op cit 89

3.ECOLOGICAL CRIMINOLOGY

Ecological criminology is a very new concept meriting a brief introduction at this point. It is a new paradigm within the field of criminology which has been explored in South Africa since the mid-1990's. The contribution criminology can make to environmental protection and regulation is gaining international recognition. Through the independent research and theoretical exploration of criminologists Swanepoel and Hauck, the role of ecological criminology is gaining importance within the South African context. They have explored different dimensions of poaching involvement through a criminological perspective.

However, even the definition of ecological criminology is anthropocentric. Thus, we need legislation, the discipline of criminology or another field to give it substance so that it can be further researched and then implemented to protect our wildlife and the environment in general.

In 1995, Gerhard Swanepoel established the environmental group, The Criminological Research Centre for Wildlife and Ecological Crime (CROWA) which explores poaching from a criminological perspective. He is in the process of setting up a central database to deal with ecological and wildlife issues and which he hopes to be operational in January 1999. One of the problems he currently identifies is that very little data exists on which cases can be based and taken to court. For example, the monetary value of horns and how in practice the victims (he sees the actual poached rhino as a victim) get into a court of law. He proposes that the notion of 'wildlife and green environmental criminology' should include crimes of poaching, illegal trade in endangered and vulnerable fauna and flora species. Other crimes against wildlife and its habitat, pollution, the illegal disposal of toxic waste and the illegal trade in radioactive substances are also encompassed. These crimes against the environment merit consideration as a criminological field in their own right.¹⁴

As Swanepoel reminds us, human life is completely interrelated with the well-being and survival of wildlife. Crimes against the environment are detrimental not only to humans but to all other forms of life on earth. As we know, when a car is stolen, a bank robbed or a murder committed, these acts do not have such a significant effect on the global environment as poaching, toxic waste, pollution and illegal trade have on wildlife, and yet they are given prime attention. Crimes against endangered species can result in the extinction of these species as well as the destruction of the bio-diversity of the planet.¹⁵

If a multi-disciplinary approach is taken towards dealing with these types of crimes, the effective application of regulations will follow. Any investigation into the illegal trade must consider the role of private property rights, the options of decentralised power and the impact of the market economy. It is time to realise that the illegal trade in endangered species is not only of private or moral interest, but instead a criminal issue to be addressed in the same way as other serious crimes such as abuse, rape, murder

¹⁴ Swanepoel 'The Illegal Trade in Rhino Horn as an Example of Trade in an Endangered Species' 48, 55 in addition to informal conversation: August 1998

¹⁵ Swanepoel op cit 48

and theft.¹⁶

Through her exploration of ecological criminology in South Africa and her investigation of marine poaching, Hauck argues that whether dealing with deforestation, issues of over-exploited groundwater, endangered wildlife or depleted fisheries, the threat of destruction is a reality. I am particularly concerned with environmental destruction as a result of poaching which is defined as the illegal over-exploitation of natural resources. The consequences of poaching are evident in both the micro and macro levels of our existence. It affects the social, economic and political circumstances within local communities and furthermore, the degradation of the natural environment affects society in general with the involvement of organised crime and illegal syndicates. It is argued that due to these broad-ranging dynamics associated with poaching, the field of criminology has an important role to play in the investigation and understanding of this phenomenon.¹⁷

Clearly, poaching is not an occurrence to be solved simply. Its inherent dynamics incorporate environmental, social, political and economic issues requiring a holistic approach to justice, governance and development. Poaching should be investigated through each of these aspects. The National Crime Prevention Strategy (NCPS) developed for South Africa in 1996 has recognised that many origins to illegal activities exist and therefore special solutions are necessary. The NCPS encourages a holistic approach to crime prevention by adopting the principles of co-management and co-governance to achieve effective partnerships between the state and civil society.¹⁸ Poaching is important and must not be regarded as of only environmental interest. The discipline of ecological criminology deals with issues such as poaching and demonstrates that intervention is essential.¹⁹

Two important tenets of the discipline of criminology are addressed. The first is the importance of exploring and understanding the illegal exploitation of natural resources and the second is the necessity to incorporate a holistic strategy in not only investigating this issue but also in addressing it. These elements provide the foundation for the new ecological criminology. Peace, development and environmental protection are interdependent and indivisible and are inherent to the success of managing poaching, emphasising that this problem encompasses not only environmental issues, but also those relating to justice and human rights. The recent shift towards community participation in the critical criminology of the new South Africa is crucial in this regard. Ecological criminology adopts this approach to local autonomy and emphasises the power of the state as a key link to environmental crime. It is appropriate to have ecological criminology developed in this country as an important contributor in enriching contemporary South African criminology. It plays a pivotal role in understanding illegal exploitation, developing its theoretical foundation and finding new modes of justice through its peacemaking and development strategies.²⁰

¹⁶ Swanepoel op cit 55

¹⁷ Hauck 'Crime, Conservation and Community Development: Ecological criminology and the case study of abalone poaching' 8

¹⁸ Hauck op cit 261

¹⁹ Hauck op cit 10

²⁰ Hauck op cit 238

If we want to achieve resource sustainability it is imperative that we involve the local people in the protection of the local environment. The late 1980s showed a change of direction with regard to conservation measures. Increased law enforcement did not protect the natural resources successfully and resource management was required. The emphasis moved away from 'apprehending the "offender"' to promoting bio-diversity and sustainable resource utilisation. As a result, the *crime* of illegal exploitation became more a question of *access* to previously denied resources.²¹

Criminology can no longer neglect crimes which threaten the pillars of our existence and which are inextricably linked to human rights and bio-diversity. It is time to investigate and understand the social-political context of this crime in order to promote equality and justice and obtain a "social resolution" in the framework of natural resource management.²²

The peacemaking possibilities developed within ecological criminology involve a broad-based approach which targets fundamental causes and promotes crime prevention. However, the importance of community-based regulations, monitoring and sanctioning are clear to ensure the long-term sustainability of our natural resources. The legitimacy of this process is encouraged by means of shifting control away from the state to local communities. The theory of co-management, introduced and developed as a holistic strategy to address over-exploitation attempts to deal with these aims.²³

Ecological criminology is committed to the community-based philosophy embraced by the critical criminology of South Africa. It tackles these issues by exposing the inherent complex and intertwined dynamics. It contributes to criminology by exploring "crime" within the broader sociological context of South African society as well as recognising the necessity of integrating this theory with practical intervention methods. Therefore, it is believed that 'ecological criminology will not only contribute to South African criminology, but will enrich and enliven the discipline in its totality. It is a Third World contribution to a discipline largely dominated by First World theories.'²⁴

I shall deal extensively with the possibility of local community participation and co-management in due course, by looking at abalone poaching in the Cape and wildlife protection programmes in Zimbabwe.

4. THE AFRICAN RHINO

There are five living rhino species, but only two, the white rhinoceros (*Ceratotherium simum*) and the black rhinoceros (*Diceros bicornis*) are found in Africa. The descriptions "white" and "black" rhino are deceptive as both species are similar in colour, usually different shades of grey, but this depends on the dust, soil or mud in the area. The white rhino is the second-largest land mammal after the elephant, with a body mass in adult bulls exceeding two tons and shoulder height reaching almost 2 metres. It is larger than the black rhino, and differs from it with a large distinctive

²¹ Hauck op cit 242

²² Hauck op cit 249

²³ Hauck op cit 256

²⁴ Hauck op cit 261

hump on the neck.²⁵ The head is long and carried close to the ground and its broad muzzle is distinctive. Its large ears are pointed and its horns, which are made up of hair-like tubular filaments, are located one behind the other in the front of the face. The record front horn length is 1,5 metres. The black rhino is about half the mass of the white rhino with an average shoulder height of 1,6 metres. It has no raised hump on the neck and the triangular, prehensile upper lip is distinctive. Even though it is much smaller, this rhino can also bear horns of considerable length: the record is 1,2 metres. The black rhino is solitary in nature whereas the white rhino assembles in groups of one to five.²⁶

Rhinos lie in the shade during the hot African midday hours and despite their cumbersome appearance they can reach a speed of 40 km/h when stressed. Both of the African rhino species have an acute sense of smell and hearing but their eyesight is very poor.²⁷ On occasion lions and spotted hyenas will take young rhinos of both species (but rarely adults) but their principal enemy is without doubt humans.²⁸

These two African rhino species have survived in their present form for at least three million years, while ancestors that were distinctly similar to our modern rhinos can be traced back as far as 40 million years. When the first Europeans settled in the present-day Western Cape, black rhinos were wandering around the bush within sight of Table Mountain.²⁹

Although the focus of this dissertation is on the effect of illegal poaching on the rhino population, it must be noted that the harsh living conditions of Africa may also play a role in the elimination of this species. As Stuart reminds us, the catastrophic drought in Kenya in 1961 may also have added to the decline of that rhino population.³⁰

It is important to see how we have failed to protect the rhino. In 1980 it was estimated that a total of about 20 000 black rhinos survived in Africa (although some reports put the figure as high as 30 000) but by 1984 the numbers had dropped to fewer than 9 000. Two years later barely 4 000 still roamed the bushlands of Africa. In 1989 a mere 3 000 were left and in 1992 numbers had fallen below 2 600. Although South Africa in 1996 had secure and growing rhino populations, it is clear they will come under severe pressure in the future.³¹ Approximately 85% of the world's rhino have been killed since 1970. No other animal family has been so rapidly depleted by the pressures of commerce.³²

It is estimated that of the 2 200 black rhinos still alive in Africa, 890 are found in South Africa, as are 6 300 of the estimated 6 800 white rhinos. Thus, South Africa has 63% of all living rhino in the world and makes the country a prime target for the illegal trade in rhino horn. The destruction of the rhino populations in the rest of Africa as well as

²⁵ This was in fact considered a delicacy in the days when these animals were much more numerous.

²⁶ Stuart *Africa's Vanishing Wildlife* 20-1

²⁷ Stuart *op cit* 25

²⁸ Stuart *op cit* 26

²⁹ Stuart *op cit* 21-2

³⁰ Stuart *op cit* 24

³¹ Stuart *op cit* 24-5

³² Du Bois *op cit* 28

the continually rising value of rhino horn, puts South Africa's rhino population in an extremely vulnerable position.³³

It must be remembered that rhino conservation is a national issue and incurs extensive costs to the taxpayer. In order to protect a single rhino per year, the estimated costs are US \$420.³⁴ This is a problematic concept when we identify that a number of the countries where these animals still roam have human populations that are starving and who are understandingly prepared to go to any lengths to provide for their families.

4.1. USES OF THE RHINO

The conservation of both rhino species is a matter of critical importance as they are hovering on the edge of extinction. They were originally hunted as a "problem animal" and for the trophy but in recent years they have been slaughtered on a massive scale for their horns which are used as an ingredient in Asian traditional medicine. Furthermore, highly prized dagger handles are also made from them in Yemen. However, contrary to media reports, powdered rhino horn is not in general demand as an aphrodisiac and it is only in India where rhino horn is reputed to be used for this purpose.³⁵

There have been no scientific tests that support the claims made for the healing properties of rhino horn, and strangely enough rhino horn is rarely used in African traditional medicine. Therefore, before the explosion in demand outside Africa, rhinos were generally left alone. Although rhino products have been part of the Asian medicine for centuries, pressure on buying countries, such as China, Taiwan, Singapore and Hong Kong in recent years seems to have slowed (but not stopped) the flow of rhino horn. This is not just a result of more effective law enforcement but also because there are simply fewer rhinos left to supply the market.³⁶

An alternative to rhino horn is saiga horn but it is deemed not to be as effective as rhino horn. 'Some traditional healers even specify that the best horns come from recently killed rhino bulls and that the tip of the horn is the most effective portion.'³⁷ Practitioners of traditional East Asian Medicine consider the horn to be an essential treatment to strokes, fevers and convulsions.³⁸

However, Jones argues that thousands and thousands of rhino are slaughtered in vain as scientists have determined that ingesting doses of horn has the same pharmaceutical value as chewing fingernails.³⁹

It is clear that the poachers usually only remove a rhino's horns, as speed is of the essence, but in fact there is also a market for its skin, viscera, penis and toenails. When trade was allowed in rhino products, many game farmers in South Africa offered

³³ Swanepoel op cit 49

³⁴ Du Toit 'Rhino Ranching' 14

³⁵ Stuart op cit 26

³⁶ Stuart op cit 26-7

³⁷ Stuart op cit 27

³⁸ Hughes op cit 15

³⁹ Jones 'Black Rhino Poaching' 178

surplus white rhino bulls to sport hunters for the horn trophy and then marketed the skin for considerable sums in the Far East.⁴⁰

An alternative to introducing this limited trade, but still a very anthropocentric attitude, would be to encourage these Asian market countries to follow the example of the People's Republic of China in this regard. This country's official pharmacopoeia now lists the non CITES-listed water buffalo horn as a viable substitute for rhino horn.⁴¹ We must be weary, however, not to create a *hot spot* phenomenon whereby we simply transfer the problems relating to the rhino to another species that may in turn suffer the same fate.

4.2. PROFILE OF A POACHER

It has been revealed that 90% of all poaching offenders are men, 76,5% of which come from the Republic of South Africa and the remaining from Botswana, Mozambique, Swaziland, Zimbabwe, Namibia, Ruanda and China. The daily occupations of the offenders range widely and include: general labourers, students, business workers, panel beaters, craft workers, hair dressers, sales assistants, computer workers, farmers, pensioners, taxi drivers, firemen, miners, and clerks.⁴²

The age of the offenders has been identified as varying from 20-65 years, with the average age being 35. The majority are married with a further 30% either divorced, widowed or of unknown marital status. The fact that most of the illegal traders are married supports the notion that a large proportion of the illegal trade in endangered species is done in order to support poor families.⁴³

Furthermore, 60% of the offenders have a higher than average education level, which shows that a certain skill is required in the bargaining process to negotiate prices during the illegal transactions. Offenders would need knowledge of the various currencies in addition to business and persuasion skills.⁴⁴

Swanepoel maintains that the illegal trade occurs in and around thoroughfares, airports and cities where established crime syndicates already operate. The majority of the offenders are black, followed by white and coloured offenders and speak mostly Afrikaans, Zulu or English.⁴⁵

It has been determined that the average weight of an illegally traded rhino horn is 4,45 kg⁴⁶ making it easy for smugglers to conceal, transport and trade. The illegal traders then hide the horns in plastic bags, rucksacks, sleeping bags and suitcases and transport them in motorcars, landrovers and trucks. If a horn is to be smuggled across a border, air and road transport is used.⁴⁷

⁴⁰ Stuart op cit 27

⁴¹ Hughes op cit 18

⁴² Swanepoel op cit 52

⁴³ Swanepoel op cit 52

⁴⁴ Swanepoel op cit 53

⁴⁵ Swanepoel op cit 53

⁴⁶ The lightest horn weighing 0,506 kg and the heaviest, 7 kg

⁴⁷ Swanepoel op cit 52

The actual numbers of horns that have been imported into East Asian countries is unknown. Hughes suggests that at least 46 000 kg of rhino horn were imported between 1960 and 1985. If we take the average weight of a rhino horn to be 5 kg, then at least 10 000 animals were massacred to supply this demand.⁴⁸

We must consider who benefits financially from this illegal trade. It seems that the poachers receive a miniscule proportion of the sums made by the retailer. And yet, the end user who buys only a few grams at a time is prepared to pay an exorbitant price for it. It seems that today the retail price of rhino horn may top many thousands of dollars with a given estimate of about US \$17 000 per kilogram.⁴⁹

5.SOUTH AFRICA'S ROLE IN THE DESTRUCTION

South Africa in the late 1980's was severely criticised by international conservation bodies for not countering the smuggling of rhino horn activities adequately. These illegal activities were supported by South Africa's geographical location by being in close proximity and with easy access to the range states. Furthermore, the ports and airports permitted infiltration and distribution of prohibited products. In addition, the large Asian community with links to the chief buyers in Taiwan, Singapore and the Far East all contributed to the considerable trade passing through South Africa's borders.⁵⁰

With increased reports of poaching within our own national parks, exposure of the widespread smuggling in the media, and pressure from independent organisations – such as the Endangered Wildlife Trust and TRAFFIC (Trade Records Analysis of Flora and Fauna in Commerce) – a specialist unit to investigate the criminal activity in this field was formed on the order of the Minister of Law and Order. The Endangered Species Protection Unit (ESPU) was thus formed in 1989. Previously, most police investigative work regarding the illegal trade in rhino horn was done by SANAB, the Narcotics Branch of the South African Police (SAP) but success rates were poor as the poaching and smuggling of rhino horn was not given priority status. It became clear that the SAP needed to address this issue directly by allocating person-power and resources to the specialist unit.⁵¹ I shall deal extensively with the activities of the ESPU in this dissertation as they have become the chief means to combat poaching activities.

The Kumleben Commission investigated the role the SADF played in the deterioration of the rhino population. It concluded that,

'During the period from 1975 to 1987 there was large-scale destruction of wildlife, including elephant and rhinoceros, in Angola and north-eastern Namibia as a result of civil strife and "Border War" in those two countries. There are clear indications that most of the rhino horn and tusks thus obtained were exported via the RSA either as undisclosed contraband or with false or dishonestly obtained documentation...That officials of the Transvaal conservation department or other conservation personnel in the RSA were

⁴⁸ Hughes op cit 15

⁴⁹ Stuart op cit 27

⁵⁰ Du Bois op cit 29

⁵¹ Du Bois op cit 29

involved in such misconduct is not the only reasonable inference to be drawn from the evidence placed before the Commission or from its investigations into this question.⁵²

‘During the period from mid-1978 to about 1986 the South African Defence Force (Military Intelligence Division) officially, though covertly, participated in the illicit possession and transportation of ivory and rhino horn from Angola and Namibia to the RSA. Initially the SADF was directly involved and at a later stage collaborated with its “front company”, Frama Inter-trading (Pty) Ltd, in continuing such illicit handling of ivory and rhino horn. The allegations of similar activity on the part of the SADF to assist Renamo in Mozambique were not supported by any evidence placed before the Commission. There are no grounds for believing that after 1986 the SADF, or its successor the SANDF, has been engaged in smuggling ivory or rhino horn.’⁵³

However, the Commission is convinced that even though

‘smuggling of ivory and rhino horn through and from the RSA took place, and is no doubt continuing – as evidenced by the arrests and convictions for such activity – the sweeping allegations in certain media reports and publications of large-scale syndicates continuing unabated remain unsubstantiated and in certain instances have been refuted.’⁵⁴

6. THE THREE TRADITIONAL OPTIONS AVAILABLE

Three traditional options for the conservation of rhinos, and in particular the black rhino are suggested by Stuart: horn removal, relocation to small, highly protected sanctuaries within the rhino’s natural distribution area, and translocation to ranch areas in other countries with a suitable climate and similar food plants to those found in their natural habitat.⁵⁵

6.1. HORN REMOVAL

Horn removal is considered controversial as it is seen as a last option measure to prevent the extinction of the black rhino in some areas. It has been attempted in the Damaraland-Kaokoveld area of north-western Namibia, in the Zambezi Valley and elsewhere in Zimbabwe. Some conservation authorities view de-horning with apprehension as it is an acknowledgement that control has been lost over that particular rhino population, and in certain areas it has not proven to be as successful as was originally hoped. The largest populations of both species of rhino, which now occur in South Africa, have not yet been de-horned but this may have to be done in the future, particularly in the more vulnerable reserves.⁵⁶

⁵² Kuntleben Commission of Inquiry into the alleged smuggling of and illegal trade in ivory and rhinoceros horn in South Africa 204-6

⁵³ Kuntleben Commission 206-7

⁵⁴ Kuntleben Commission 206

⁵⁵ Stuart op cit 28

⁵⁶ Stuart op cit 28

The de-horning procedure includes cutting off the horns with either a handsaw or a small chain saw. Following this, the edges are filed down with Stockholm tar. Unfortunately this is not a permanent solution as these horns, like fingernails, will regrow and the entire exercise has to be repeated. The rate of regrowth varies, but the front horn is estimated to regrow at 6,7 cm per year, and the back horn at half this rate. It must be remembered that even a small length of horn is valuable, thus ideally all rhinos should be recaptured and de-horned at least once a year. Unfortunately, the costs of this procedure would be too much to bear for many developing nations.⁵⁷

The black rhinos in Namibia were de-horned during Operation Bicornis in the late 1980's due to the sudden upsurge in poaching. The destruction of rhinos to the north had caused the focus to move to relatively large rhino populations to the south of the Cunene-Zambezi river line. The Namibian authorities had no choice but to act or lose their rhino populations. These rhinos lived in relatively open terrain and, as they had been studied for a decade, the individuals and their home ranges were known. The animals were located, darted and de-horned and then they were monitored. One worry to wildlife managers was the impact that horn removal may have on the behaviour of rhinos. In the Damaraland area the rhinos barely, if ever, used their horns to break high branches for food. However, animals living in dense bush may well do so, and thus de-horning could have a detrimental effect on them. Furthermore, in the open country of north-western Namibia, would-be poachers can in theory see whether a rhino has horns or not, but in the dense bush of such locations as the Zambezi Valley poachers find it much more difficult to judge this and a number of de-horned animals have died as a result.⁵⁸

Dr Lindeque, a deputy director of the Namibian conservation department, told the Kumleben Commission that Operation Bicornis has proved successful. But it was conceded that this was due to particular circumstances prevailing in the location chosen, for example, the small population concerned was not at risk from hyena or lion predation. Furthermore, their monitoring and protection from poachers during the rainy season presented problems. These populations have been repeatedly de-horned and thankfully, no negative effects have been observed.⁵⁹

One advantage of de-horning is that an individual rhino is rendered less attractive to a would-be poacher and furthermore, it forces the poacher to look for alternatives, thus spending more time in the hunting area and increasing the chances of the poacher being caught. To poach a rhino with the bulk of its horn removed reduces the benefit to the poacher, who must evaluate the risks of being apprehended against a smaller return for his efforts. Although Operation Bicornis was criticised by some conservationists, Blythe Loutit, researcher and founder of the Save the Rhino Trust Fund argues that it has been extremely successful. It has achieved more than its initiators had hoped for and he suggests that de-horning has not discouraged game watchers either.⁶⁰ It is clearly 'preferable to see a live, de-horned rhino in the wild than a bloated and maggot-filled carcass with a bloody, hacked skull'. And yet it is impossible to blindly accept that these magnificent animals have to endure such indignities to save them from

⁵⁷ Stuart op cit 29

⁵⁸ Stuart op cit 28-9

⁵⁹ Kumleben Commission 190-1

⁶⁰ Jones op cit 181

people who covet their horns for carved dagger handles as proof of manhood or for medicines of dubious benefit.⁶¹

A further concern was how horn removal may affect the ability of rhinos, particularly cows with small calves, to defend themselves against predators such as lions and spotted hyenas. Furthermore, it is as yet unclear what impact, if any, de-horning could have on general interactions between individuals, for instance between a horned and a de-horned rhino.⁶² Only time will tell.

In May 1992, in response to a desperate situation, the government of Zimbabwe embarked on an operation to de-horn all of the country's wild rhinos. It was viewed as essential to the survival of the rhino in the country that originally had held Africa's largest national herd of black rhinos. This action followed the experimental de-horning of the white rhinos of the Hwange National Park towards the end of 1991. In the initial capture of 71 animals, five individuals died, but in later captures no losses were suffered as a result of refined techniques.⁶³ It is claimed that this operation was also successful; however, it may be too soon to make a final assessment of this strategy.

As the Kumleben Commission concluded, the majority of conservationists do not favour this procedure as they believe it is unlikely to prove beneficial save in exceptional circumstances. It is an expensive exercise, depending on the method of darting the rhinos, (either by helicopter or ground-tracking), how easily they can be located and the density of the rhino population in the particular protected area. It has been calculated to cost between US \$350 and \$1 800 per animal. Due to the regrowth of the horn, the exercise has to be repeated every two or three years and therefore the overall expense ought to be weighed against the cost of other options to prevent poaching. Moreover, the fact that a rhino has been de-horned does not guarantee that it will not be killed by poachers, as immediately after de-horning the base of the horn still remains and can be cut from a carcass.⁶⁴

In South Africa, the dense vegetation of our reserves might prevent a poacher from checking if a rhino has been de-horned before shooting it.⁶⁵ The Kumleben Commission is of the opinion that de-horning is a last resort measure and should only to be considered in those locations where circumstances justify the costs involved.⁶⁶

6.2. CLOSED SANCTUARIES

The concept of closed sanctuaries which was initiated in Kenya offers hope for

⁶¹ Stuart op cit 29

⁶² Stuart op cit 28-9

⁶³ Stuart op cit 29

⁶⁴ Kumleben Commission 186-190: Following an informal interview (August 1998) with a game rancher on the South African/Botswana border it appears that poachers generally track an animal for three days. In this scenario, if they come across a de-horned rhino, they will shoot it to prevent tracking the same animal again. Swanepoel suggests that poachers will go so far as to cut off one ear of a de-horned rhino to show that the rhino has been poached even though the horn has been harvested or removed.

⁶⁵ Jones op cit 181

⁶⁶ Kumleben Commission 190-1

protecting small populations of rhinos under intensively protected conditions. In Kenya highly protected populations are located on privately owned ranches such as Solio, and in small sanctuaries such as the Nakuru National Park. The first advantage of these sanctuaries is that limited finances can be concentrated and specifically targeted, rather than spread over large parks without any visible benefit. Further advantages are that a greater number of better-equipped guards can be concentrated in a smaller area, and that installing such devices as electric fencing is more economical. From a futuristic perspective, one advantage is that the rhinos are in closer proximity to each other, which increases their chances of locating each other and mating. This is a major development as in many areas where poaching has greatly reduced rhino numbers, individuals are widely scattered, with limited chances of encountering each other.⁶⁷

Zimbabwe has followed the trend set by Kenya and rhinos are being moved to smaller and more easily controlled areas, away from troublesome national boundaries. It seems that except for a few populations in South Africa and possibly in Namibia, in the short term these closed sanctuaries offer the only real hope for rhinos, particularly the black, to survive in the wild.⁶⁸

6.3. TRANSLOCATION

The final option is to establish viable numbers of rhino, again in particular the black, in countries on other continents. Of course, the long-term goal is to be able to reintroduce populations within their former range if demand for rhino horn disappears and conditions once again become favourable. Foster countries are determined on the basis of their climate, habitat, food plants and the ability to offer adequate protection to the species. Rhinos have been sent to the south-western United States of America and to Australia, and this programme will no doubt be expanded in the future.⁶⁹

However there are many complications with translocating black rhino from one area to a safer one. Not only is it a very expensive exercise, but there are also habitat suitability issues, carrying capacity and logistical constraints.⁷⁰

The fact that we may have to change the natural lifestyle of a few rhinos in order to protect the very survival of the entire species may seem artificial, but surely this is better than the alternative. A clear advantage is that it not only strengthens the gene pool available for future breeding, but if a life-threatening disease threatens an entire population, at least we will have another resource to strengthen it again.⁷¹

7. THE LEGAL POSITION TODAY

Presently, the regulatory norms and enforcement means of most countries follow one of two possible approaches when dealing with environmental crimes. These are

⁶⁷ Stuart op cit 29

⁶⁸ Stuart op cit 29

⁶⁹ Stuart op cit 29

⁷⁰ Jones op cit 180

⁷¹ Informal interview with game rancher: August 1998

generally referred to as the compliance and deterrence models. The former seeks conformity with law or regulations without requiring the means to detect and penalise offenders. Rather it offers inducements and incentives or creates administrative procedures which are designed to avoid non-compliance opportunities. The latter aims to enforce the law by detecting any violations and then prosecuting and penalising the offenders. This punishment serves as a warning to potential offenders.⁷²

South Africa has adopted a regulatory based system to deal with environmental crimes thereby following the deterrence model as described above. South maintains that both models are flawed in practice. The compliance method is criticised as it only comes into operation after the offence has occurred. Usually penalties are imposed and hence limited in scope. Where deterrent punishments and in particular, imprisonment and negative publicity, have been used a greater impact is evident. Clearly, however, negative publicity can operate independently to the penal system. Thus, South suggests that the compliance strategy be preferred. This in turn will eliminate the cost of the conventional law enforcement measures in terms of the criminal justice system.⁷³

However, South Africa is still committed to the regulatory approach by means of adopting legislation. In terms of Schedule 2A of the Transvaal Nature Conservation Ordinance,⁷⁴ the black rhino is classified as a specially protected species so that no hunting or trade in its products is permitted.⁷⁵

Jones argues that there is an urgent need for the reassessment of the existing nature conservation laws as the current conservation programmes are inadequate to meet the challenges confronting a developing South Africa. Firstly, the plethora of existing laws is a serious impediment to the effectiveness of wildlife law. Second, the reservation of areas of land as protected areas and game reserves in terms of the National Parks Act⁷⁶ and provisional ordinances have not prevented the infiltration of poachers. Thirdly, a severe shortage of nature conservation law enforcement officers is evident. The rhino are obviously not safe in either the vast areas of limited patrols; nor in the heavily guarded sanctuaries such as Kruger National Park as problems of intimidation and bribery exist.⁷⁷

It is clear that the law enforcement bodies would be aided if uniform legislation is adopted in all provinces to deal with protection of endangered species and related matters. Unfortunately, the diverse, confusing and inadequate legislation contributes to the illegal trader's success. Presently, in terms of s 11(1)(a) of the Financial Relations Act,⁷⁸ the responsibility for the preservation of flora and fauna and the regulation and control of hunting of game and other animals vests in the provincial administrations. Each of the provinces has its own nature conservation ordinance containing extensive provisions relating to wildlife, i.e. the Orange Free State Nature Conservation Ordinance No 8 of 1969, and the Natal Nature Conservation Ordinance

⁷² South 'A green field for criminology? A proposal for a perspective' 220-1

⁷³ South op cit 221

⁷⁴ Ordinance 12 of 1983

⁷⁵ Jones op cit 177

⁷⁶ Act 57 of 1976

⁷⁷ Jones op cit 178

⁷⁸ Act 65 of 1976

No 15 of 1974. Not only do the penalties vary from province to province, but the listings in the class schedules differ with the result that, what may be an offence in regard to a particular species in one province, will not necessarily be an offence in regard to that species in another province. Even if we acknowledge that different regions may have different conservation needs, the current dispensation lacks uniformity and is in need of reform. Therefore, the need for a national policy and uniform legislation is both urgent and appropriate in the light of the changed constitutional and political conditions in South Africa.⁷⁹

South Africa is in a process of reviewing existing laws in order to bring about uniform and therefore more effective legislation. The maximum fine for illegal trade is R250 000 with a maximum prison sentence of ten years. However, imposed fines vary from only R300 to R30 000 per case.⁸⁰

Jones argues that these fines and prison sentences are inadequate and need to be substantially increased. A fine of at least three times the value of the rhino is necessary in order for it to have a deterring effect. Provision has been made for this in the National Parks Act⁸¹ and the Transvaal Nature Conservation Ordinance.⁸² Conservation authorities argue that the imposition of fines and prison sentences on poachers does very little to stop poaching activities. Rather we must target and prosecute the people behind the organisation of the large poaching syndicates.⁸³ This is exactly what the ESPU is trying to achieve.

It has been argued that the legislation governing nature conservation and thereby the protection of the black rhino is inaccessible to the general public. Although the regulations making up a considerable proportion of environmental law must be published in the Government Gazette, it is suggested that it is not always easy for those subject to the provisions to be aware of them or of the amendments which are regularly promulgated.⁸⁴

Jones suggests that s 109 of the Transvaal Nature Conservation Ordinance whereby, 'the Administrator may, upon the recommendation of the Commissioner of the South African Police, pay to any person not in the service of the State who gives information leading to a conviction of an offence in terms of this ordinance, and the imposition of the fine, a reward not exceeding one fourth of the amount recovered as a fine' should be included in the other provincial ordinances. Furthermore, Magistrates should be given the authority to exceed the prescribed maximum fine for poaching if the case warrants it.⁸⁵

In order to achieve a higher conviction rate, a working relationship and better co-operation between the investigating officers and the personnel at the Attorney-

⁷⁹ Du Bois op cit 39

⁸⁰ Swanepoel op cit 50

⁸¹ section 24(1)(b)(ii)(aa)

⁸² section 16(A)(2)

⁸³ Jones op cit 183

⁸⁴ Jones op cit 179-180

⁸⁵ Jones op cit 185

General's office in the province concerned, as well as with senior state prosecutors must be established. Advice from the latter may well be invaluable as occasionally court cases are lost due to game scouts lacking the requisite knowledge of and experience of court procedures. The Parks Board members responsible for court matters are attempting to see that maximum penalties are imposed for contravention of the legislation.⁸⁶

It is apparent that often the law enforcement operations are undertaken in hazardous circumstances where operatives are forced to deal with sophisticated crime syndicates. In order to do so effectively, they must be provided with the resources and technical expertise. Therefore, the assistance and co-operation of the Government is required on all issues, ranging from increased manpower and equipment, to financial assistance and legislation to curtail and reduce the poaching and eliminate the smuggling networks.⁸⁷

I shall comment on recent measures that realise international co-operation in terms of the Lusaka Agreement and measures that have been proposed to deal with organised crime syndicates in due course.

8. THE ENDANGERED SPECIES PROTECTION UNIT

The main function of the Endangered Species Protection Unit (ESPU) is to identify the international routes used by poaching syndicates and to destroy the organisation behind these schemes. The unit has made great strides in eliminating entire poaching networks and is one of the top wildlife enforcement agencies in the world; however this is not enough to curb the inevitable extinction of the black rhino if they continue to be poached at the present rate. It is clear that as long as the demand for rhino horn exists, consumers are going to ensure a steady supply even if it leads to extinction.⁸⁸ Even if further legislation is passed, this may not be enough without its successful implementation.

The unit was formed with the aim of stopping the illegal trade in ivory and rhino horn, but it has broadened its base of operations to include all endangered fauna and flora. Furthermore, the global nature of this illegal trading requires an international law enforcement perspective and hence the ESPU does not work in isolation, nor does it confine its area of operations to South Africa.⁸⁹

Lieutenant-Colonel Lategan has been in charge of this unit since its inception which consists of some 30 specially trained members of the SAPS. The illegal handling and disposal of toxic waste and radio-active substances now fall within the scope of its responsibilities, demonstrating that the unit cannot devote all its time to ivory and rhino horn poachers and smugglers.⁹⁰

The ESPU focuses on community policing and is therefore a national asset as well as

⁸⁶ Du Bois op cit 39-40

⁸⁷ Du Bois op cit 40

⁸⁸ Jones op cit 179

⁸⁹ Du Bois op cit 30

⁹⁰ Kumleben Commission 161-2

an international role model. It has been successful in establishing consultation with interest groups in various communities. For example, the traditional leaders on the borders of national parks are consulted and urged to become involved in the fight against wildlife and environmental crime, such as the poaching of rhinos and the illegal trade in rhino horn.⁹¹

The ESPU is in a favourable position to combat crime such as the illegal trade in rhino horn because of its ability to function not only nationally, but also internationally. This is made possible by the ESPU's links with Interpol as well as the signing of international agreements. This is of particular importance as nature conservation efforts are limited to borders of national parks and provinces as described above.⁹²

The unit is divided into various task groups and, besides those dealing with administrative matters the unit consists of investigative teams into *inter alia*: fauna, flora, environmental crime and anti-poaching teams.⁹³

Presently, the unit's main functions are:

- the identification of routes by which endangered species or their products, such as ivory and rhino horn, are smuggled in or out of the country;
- the infiltration of existing syndicates;
- the collection of evidence;
- the arrest and prosecution of the individuals and/or networks involved in these schemes; and
- the provision of assistance to law enforcement agencies throughout Africa in order to effect international co-operation in cross-border law enforcement.⁹⁴

The ESPU believes that it is the conservator or game warden's duty to patrol the protected area and establish an intelligence network in the locality by means of informants. However, once an animal has been killed and poached, the ESPU should promptly be called in and conduct the investigation. The local unit would pursue the matter in the meantime and assist the ESPU in the detection and arrest of offenders. With the help of the South African Air Force, the ESPU can reach the scene of a killing within hours of its discovery and this unit has the forensic, ballistic and other skills required to proceed with a proper investigation. For the ESPU to be effective, a permanent presence in KwaZulu-Natal, the Eastern Cape and Western Cape is essential, requiring additional branches elsewhere in time. These other units have a valuable role to play in intelligence work, that is, in the gathering of information of poaching and smuggling activity and this function ought not be restricted to a protected area or its immediate locality. But the ESPU should be the nerve-centre to which all this information should be sent. As the Kumleben Commission was told by Lategan, without such an arrangement there could be duplication of effort or worse. He cited the example of an *agent provocateur* of a police unit setting up a potential buyer only to find that his counterpart of another unit regarded him as a potential illicit

⁹¹ Swanepoel op cit 52

⁹² Swanepoel op cit 51

⁹³ Swanepoel op cit 51-2

⁹⁴ Du Bois op cit 29-30

seller and until the moment of revelation, both had been wasting time.⁹⁵

The penetration team of the ESPU concluded numerous transactions with smugglers during 1990. Rhino horn, worth almost \$250 000, was sold to existing networks in order to build up the confidence of the underworld with the view to infiltration.⁹⁶ The undercover team of the ESPU began to realise that they were gaining ground in their fight against the international syndicates. This is due to the fact that it became apparent their lives were in danger and that they found themselves in the line of fire as a result of the swift and effective way they were exposing the smugglers. This presented a serious threat to the syndicate bosses and their corrupt contemporaries in the South African government leading to a barrage of accusations and allegations of criminal activities against members of the ESPU, and Colonel Lategan in particular. This sowed suspicion on the unit and hampered the ESPU's investigation in the exposure of the smuggling routes.⁹⁷

As is evident from their records, the ESPU has been successful. From January 1991, when the ESPU became fully operative, until June 1995 there were 792 reports relating to ivory and rhino horn and each received attention. This resulted in 529 prosecutions of which 478 were successful – a 90% success rate. Over this period of four and a half years the ESPU recovered 403 rhino horn, 34 095 ivory cubes and 1 045 raw tusks. The cubes, it is estimated, would have had to have been manufactured from about 3 410 tusks. Thus, the total number of tusks involved would have been of the order of 4 455. Their value, taken with the rhino horn, amounts to about R30 million.⁹⁸

The Kumleben Commission concluded that the ESPU, under the command of Lieutenant-Colonel Lategan, is operating effectively and conscientiously with the limited resources at its disposal. However, the ESPU is understaffed and ought to be extended by having a permanent presence of ESPU staff in other parts of South Africa in addition to Pretoria. The major role the ESPU plays in the prevention and detection of criminal activity relating to wildlife was praised. However, the Commission did comment that there is a need for greater collaboration between the ESPU and other investigatory units attached to protected areas with a clearer demarcation and understanding of their respective functions.⁹⁹

The ESPU needs to be enlarged and decentralised and any furnishing of information should be reciprocal. Thus any information acquired by the ESPU which may be of value to a particular anti-poaching unit should be passed on to it. It was also pointed out that anti-poaching units need training in certain aspects of police work, for example, preserving evidence at the scene of a killing. This training could and should be provided by the ESPU. If nature conservation matters are to remain to a greater or lesser extent under the control of the nine different provinces of South Africa, the need for the ESPU to be the information bank and co-ordinating body is increased.¹⁰⁰

⁹⁵ Kumleben Commission 169-170

⁹⁶ Potgieter Contraband: South Africa and the International Trade in Ivory and Rhino Horn 127

⁹⁷ Potgieter op cit 171

⁹⁸ Kumleben Commission 163

⁹⁹ Kumleben Commission 208-9

¹⁰⁰ Kumleben Commission 171

The ESPU has penetrated some of the ivory and rhino-horn networks, and as the country emerges from its political isolation one can only hope that international traffickers who have found an easy working refuge here will be isolated and exposed.¹⁰¹

The ESPU must continue to be supported by the new government. Potgieter urges the Organised Crime Unit to continue its undercover investigations into the activities of those who use the smuggling routes for contraband - ranging from drugs and exotic birds to arms sold on the international black market. As long as these units remain incorruptible, they may be in a position to halt the constant flow of firearms into South Africa, and thus stop the crime and violence that threatens it.¹⁰²

Many conservationists are of the opinion that the 21-year old ban on trade in rhino horn regulated by legislation and CITES has not been successful. Swanepoel suggests that one possible explanation is that active policing in the field of endangered species in South Africa only came into place in 1989.

‘Previously the task was hampered by problems such as park officials and national and private owners being restricted by national and international borders in the combating of crime and poaching. The police service has the ability to move between borders and can also conduct anti-poaching exercises in various national parks or private game parks. They do, however, experience certain problems that hamper their task. The source of illegal wildlife products cannot be forensically traced, as a database has not been developed and forensic tests are too expensive for most law enforcement agencies.’¹⁰³

Hopefully, this will cease to be the case shortly.

Although the police and game rangers are doing everything they can, they lack the necessary equipment to combat the poaching. In some cases ammunition and even necessities such as shoes are luxury items due to a lack of funds. These authorities risk their lives as they can be killed by either the wild animals they protect, or by poachers.¹⁰⁴

9. THE LUSAKA AGREEMENT

Inter-agency co-operation is essential in order to monitor and control international criminal activities effectively. Fortunately, the ESPU is constantly involved in international contact with other organisations, for example, the US Fish and Wildlife Service, as well as government departments in the Far East and Europe. It is also one of the founder members of the Interpol Sub-Group on the Smuggling of Wildlife and is able to collect, co-ordinate and disseminate all information world-wide with regard to illegal activities in wildlife. The ESPU also initiated the formation of an international task force by members of law enforcement organisations in South and East Africa. A presentation by members of the unit in December 1992, at a meeting of wildlife law

¹⁰¹ Douglas-Hamilton *Battle for the Elephants* 344

¹⁰² Potgieter op cit 177

¹⁰³ Swanepoel op cit 54

¹⁰⁴ Swanepoel op cit 55

enforcement officers,¹⁰⁵ led to the drafting of the Lusaka Agreement that envisages the formation of a Task Force to carry out cross-border investigations effectively. This co-operation agreement is aimed to boost law enforcement operations and this kind of cross-border liaison has already achieved notable successes. In 1995, the ESPU, with the co-operation of the Zambian Species Protection Department, confiscated ten tusks, four rhino horns and three AK-47 rifles, and arrested fourteen people, thereby eliminating a poaching syndicate that operated out of Zambia into Botswana and Zimbabwe.¹⁰⁶

The “Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora” was agreed on and adopted on 8 September 1994. Its signatories to date are Kenya, Tanzania, Ethiopia, Uganda, Swaziland, Zambia, Lesotho and the RSA. For an adequate representation of African states it is hoped that Mozambique, Namibia, Botswana and Zimbabwe will become parties.¹⁰⁷

Observers from the US, UK, Germany, Canada and Northern Ireland attended the signing ceremony¹⁰⁸ giving it well-deserved international support. In addition to these representatives, observers from the Commission of the European Communities, from the United Nations Development Programme and from the Secretariat of CITES were also in attendance.¹⁰⁹ The Kumleben Commission urges that the Lusaka Agreement receive the full support of the authorities and non-governmental conservation agencies in South Africa.¹¹⁰

In the Preamble to the Agreement it is noted that the

“illegal trade in wild fauna and flora has been made more sophisticated through the use of superior technology in transboundary transactions and should be addressed through commensurate national, regional and international measures”.

Furthermore, it is recognised that States must co-operate in law enforcement measures to reduce and ultimately eliminate the illegal trade in wild fauna and flora. For this to be possible, it is vital for States to share information, training, experience and expertise.¹¹¹

Article 2 declares that the ‘objective of this Agreement is to reduce and ultimately eliminate illegal trade in wild fauna and flora and to establish a permanent Task Force for this purpose.’¹¹²

As the President of Zambia addressed the Meeting.

¹⁰⁵ Potgieter op cit 174

¹⁰⁶ Du Bois op cit 31

¹⁰⁷ Kumleben Commission 172

¹⁰⁸ Potgieter op cit 174

¹⁰⁹ Lusaka Final Act of the Meeting of Ministers for the Adoption and Signature of the Agreed Text of the Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora 1

¹¹⁰ Kumleben Commission 209

¹¹¹ Lusaka Agreement op cit 11

¹¹² Lusaka Agreement op cit 13

'The home and foreign criminals promoting this trade impoverish our natural resources, and can eventually rob us of our livelihood if not controlled and finally eradicated. The near extinction of the rhino in most of our countries with similar risks to our elephant populations, are symptomatic of a larger threat posed by the illegal international trade in wild plant and wild animal products the Lusaka Agreement is designed to control, if not eliminate altogether. Unfortunately, our poor become accomplices of criminals because of the dependence created by externally manipulated illegal trade.'¹¹³

The President of the Meeting of Ministers emphasised that the Lusaka Agreement is African in character and that it is endorsed by CITES as evidenced in the support of the CITES Secretariat since its conception.¹¹⁴

The ESPU and CROWA have suggested that the Lusaka Agreement become the enforcement mechanism of domestic legislation as well as of CITES and its amendments. However, money and support is required to get this ratified.¹¹⁵

10. PROBLEMATIC ISSUES FACING THE NEW SOUTH AFRICA

10.1. CUSTOMS CONTROL

It is clear that the existing customs control system is completely inadequate to deal with the passage of illegal wildlife and requires 'urgent attention and overhaul.'¹¹⁶ Not only is it under-staffed, but X-ray scanners and surveillance equipment are necessary to control and detect smuggling. The smuggling of containerised goods is an international problem for which no completely satisfactory solution has been found.¹¹⁷

It must be noted that the problem is not confined to goods departing or arriving by sea as the checking of baggage at international airports is equally unsatisfactory. Therefore, more trained staff are required to carry out checks and searches at airports for both outgoing and incoming baggage.¹¹⁸

The Kumleben Commission highlighted a serious loophole in the existing South African customs management. South African Airways have some "direct" flights from London to Durban, however, they stop at Johannesburg for passengers to disembark. Domestic travellers from Johannesburg to Durban are sometimes booked in the vacated seats and for them to avoid the inconvenience of going through customs on arrival at Durban, a sticker is attached to their boarding passes as they exit the Johannesburg gate. It has been pointed out that there is nothing to stop a passenger from previously arranging with a passenger who boarded in London to swap luggage.

¹¹³ Speech by the President of the Republic of Zambia, Mr F.J.T. Chiluba, Lusaka Agreement op cit 23

¹¹⁴ Speech by the Hon. Minister, L.T. General C.S. Tembo, MP, DFS as President of the Meeting of Ministers, Lusaka Agreement op cit 27

¹¹⁵ Informal discussion with Gerhard Swanepoel, August 1998

¹¹⁶ Kumleben Commission 209-210

¹¹⁷ Kumleben Commission 182

¹¹⁸ Kumleben Commission 182-3

Therefore, the luggage enters South Africa without passing through customs. This procedure is followed in order to sell more air tickets and for the convenience of passengers, despite the objections raised by Customs. The obvious answer would be to require all passengers on such a flight to go through customs, with local passengers being aware of this inconvenience when considering a reservation on the flight.¹¹⁹

Privately owned aircraft using other airports also allow for the smuggling of contraband. For example, Lanseria near Johannesburg or Virginia in Durban, have no resident customs official, thus nothing prevents an aircraft from landing and discharging its cargo unchecked. In the case of an international flight to such an airport it is a duty of the pilot to contact the customs office, but clearly he would hardly do so if he did not wish his cargo to be subject to inspection. It must be remembered that relatively large planes can make use of these airports, increasing the opportunity for them to be used for smuggling goods.¹²⁰

Similar problems exist with regard to the inspection and control of vehicular traffic entering and leaving through the various customs control points on the borders of South Africa. It is suggested that transportation by road accounts for the bulk of prohibited goods entering the country.¹²¹

Unfortunately, the customs officials at control points are not trained to detect prohibited items when disguised: for instance, ivory cubes stained or painted to represent something else. The ESPU has recognised this shortcoming and has offered to put in place the necessary training programme.¹²²

There is a further serious problem relating to customs control and the detection of illegal exports. Lesotho, Botswana, Swaziland and South Africa are all parties to the Customs Union agreement whereby once goods have been cleared by the customs authorities of a member country, no further formalities are required for their passage through South Africa to their foreign destination. Therefore, such goods entering and leaving the country would not attract the attention of the authorities, unless it is suspected that their transportation and presence here constituted a criminal offence. Any smuggling by individuals or syndicates in a member country is therefore beyond the control of the South African officials.¹²³

Customs control requires inside information in order to eliminate or prevent the smuggling of endangered species products. It seems that extensive 'international co-operation, stricter controls at points of exit and the deployment of specialised units qualified in anti-smuggling operations, will be required if any progress is to be made on this front.'¹²⁴

I understand that a recent method to help monitor the activities that are still threatening the rhino has been initiated on the South Africa/Botswana border. Here,

¹¹⁹ Kumleben Commission 183-4

¹²⁰ Kumleben Commission 184-5

¹²¹ Kumleben Commission 185-6

¹²² Kumleben Commission 186

¹²³ Kumleben Commission 186-7

¹²⁴ Du Bois op cit 37

game ranchers are placing a microchip into the horns and rump of the rhino. This chip contains information relating to the sex, age and origin of the rhino. Equipment is then placed at the various ports of exit and when a rhino horn with a microchip passes through, evidence is gathered which helps to provide the various conservation groups with valuable information on the actions of the poachers.¹²⁵

10.2. ORGANISED CRIME

Certainly, all law enforcement bodies are facing a severe challenge as political and social changes affect the nature and prevalence of criminal activities. The new political dispensation has necessitated new approaches to policing and has induced different and heavy pressures to bear on law enforcement organisations. Our recent period of political transition in conjunction with the prevailing climate of economic uncertainty, has allowed crime to flourish. Environmental crimes are no exception. In this regard, police are confronted by the emergence of criminal organisations that use the increased violence, political instability and impoverishment of local communities to establish and expand criminal networks. KwaZulu-Natal, in particular, has been identified as a golden opportunity area for organisations engaged in criminal activities and is extremely vulnerable to infiltration and exploitation by organised crime syndicates.¹²⁶

In KwaZulu-Natal, the recent weakening of border controls since the dismantling of apartheid has created new areas for the operation of organised crime. It is one of the two provinces in South Africa, which is ruled by an opposition party and has been a centre of politically motivated conflict for a considerable period. In all probability, this is likely to continue, especially when we consider that this is also the most populous province in South Africa. The existing instability and sharp divisions in the area offer many opportunities for criminals to act. Previously, law enforcement concentrated on controlling political violence, to the detriment of crime prevention, allowing crime to flourish which further destabilises society and contributes to the cycle of violence.¹²⁷

The socio-economic conditions of the province are also likely to contribute to a great deal of the rising crime. Clearly, the rising crime levels provide the perfect

‘environment in which poachers can operate with relative ease of movement, enjoy access to weaponry and exploit the climate of lawlessness. KwaZulu-Natal’s already high number of reported conservation offences has increased in the recent past, as this province in particular appears to have been targeted by poachers. The high levels of violent crime require intensive policing and this further limits the resources available to units, such as the wildlife squad.’¹²⁸

The ESPU in northern KwaZulu-Natal emphasise the fact that crime is indivisible. Therefore it seems that the syndicates who are involved in smuggling arms into the country are also involved in the smuggling of stolen vehicles out of the country. Furthermore, they deal in drugs and other illegal substances, including endangered

¹²⁵ Informal interview with game rancher: August 1998

¹²⁶ Du Bois op cit 32

¹²⁷ Du Bois op cit 32-3

¹²⁸ Du Bois op cit 33

species products, should the opportunity arise. While car theft syndicates and drug syndicates will focus on their chosen contraband goods, they will nevertheless deal in any product considered lucrative. Rhino horn is not only a very lucrative commodity, but it is also easily available in the game reserves found in the northern regions of KwaZulu-Natal. These reserves have traditionally faced a threat of poaching but are now increasingly susceptible to crime syndicates dealing in environmental contraband. While the local people use the neighbouring protected areas for subsistence hunting and consider this a traditional and cultural necessity, the organised poaching gangs place endangered wildlife, such as the rhino, under a real threat. These networks often contain professional rhino hunters with automatic weapons who use vehicles, spotlights and radios, penetrating deep into the national parks. These gangs can decimate entire rhino populations and may operate alone or recruit people from the neighbouring communities to act for them in poaching forays or for use as carriers in smuggling operations.¹²⁹

These game reserves are also seen to some as a pool of meat or other products that can be illegally acquired either for survival or exploitation. Most rhino losses are the result of the work of armed gangs but there is evidence of practical support from the local people who reside permanently in the area due to unemployment problems.¹³⁰

Unfortunately and even more worrying are the indications that game guards themselves are actively involved in poaching or who turn a blind eye when confronted with the evidence and/or perpetrators. It is said that occasionally members of the Game Guard in Zululand have become involved in illegal hunting of black and white rhino. The actual number of animals involved will never be accurately known, but the potential for losses is vast given the inside knowledge that Parks Board employees possess about animal movements and guard duties. With the resources available to organised crime networks, it is easy to co-opt these individuals through bribery. If we recall the inadequate salaries earned by both police officers and game guards in particular, it is clear that these men are susceptible to criminal inducements.¹³¹

10.3. SMUGGLING

South Africa has a good existing infrastructure that has been and still is used as an exit route by international smugglers to transport their wares by air or sea to their overseas markets.¹³²

Du Bois argues that the trafficking of rhino horn and related products comprises a fair proportion of the international smuggling trade. Not only is the volume of trade extensive, but also the speed of clearance that is demanded as the air-freight business develops, making it exceedingly difficult for customs officials to carry out more than a few token searches of travellers and cargo. The use of false customs declarations and other forms of creative paperwork allow for smuggling activities to occur. In order to

¹²⁹ Du Bois op cit 34

¹³⁰ Du Bois op cit 34-5

¹³¹ Du Bois op cit 35: 38

¹³² Jones op cit 179

combat this, good information, intense investigations and tip-offs are required. The advantage of this information is not just that it enables the customs officer to pinpoint the actual smuggler, but that it can lead him to the entire smuggling ring.¹³³

As outlined above, South Africa has for many years been the main port of exit for poached ivory and rhino horn that are smuggled in from neighbouring countries in trucks. Once inside South Africa, the rhino horn is typically concealed in packages and sent to its final destination by air or sea freight or by post. Therefore, in order to regulate the illegal trade, we need to address the discrepancies in the customs control as it exists at present. Presently, smugglers are able to operate largely unchecked and without fear of capture at all ports of entry and exit. The focus is mainly on tax collection rather than on law enforcement and in addition, the Department of Customs and Excise is not equipped to advance operations to curtail illegal activities. It is clear that insufficient manpower and a lack of experience in wildlife crime result in loopholes that are exploited by unscrupulous traders. The result is that the unchecked transit of illegal natural resources materials and the failure to identify banned products allow smugglers ease of movement with small chances of capture.¹³⁴

10.4. RECENT MEASURES TO COMBAT THIS SITUATION

The National Crime Prevention Strategy (NCPS) recognises that organised crime syndicates are a 'major motor force for greater levels of criminality and violence. These organisations have developed rapidly in South Africa since the advent of democracy and the re-integration of South Africa into the international economy and community.'¹³⁵

The NCPS deals with the trade in endangered species specifically and iterates that it 'remains an international problem that has driven several plant, animal and bird species to the brink of extinction.' It states that rhino horn is currently being smuggled by syndicates to international markets.¹³⁶

The recent Prevention of Organised Crime Bill will hopefully be able to help eradicate the operation of some of these syndicates who are systematically raping our land of its wildlife. In terms of Clause 2(1), any person who is involved in an illegal trading operation shall be guilty of an offence. And any person who is convicted of such an offence shall be subject to a fine or to a maximum sentence of 30 years imprisonment in terms of Clause 3.

Schedule 2 to the Bill lists certain acts, including,

'Dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance.'

¹³³ Du Bois op cit 35

¹³⁴ Du Bois op cit 36

¹³⁵ NCPS 5.7.2.0.1

¹³⁶ NCPS 5.7.2.3.1

Clause 27 holds that if an investigation is instituted into the above offence, the 'Commissioner of the South African Revenue Services or any official designated by him or her for this purpose, shall be notified of such investigation with a view to mutual co-operation and the sharing of information.'

These sections will hopefully be relied on in the future, both to the attaining of critical information as well as to getting the illegal syndicates into a court of law and being held accountable for their actions.

11. INTERNATIONAL PERSPECTIVE

When dealing with organised crime syndicates, we need to address the issue on an international level. Today, due to technological advances in communication and the ease of international travel, these crimes must be tackled through a global approach. In addition, trade and foreign currency barriers are less stringent than before and the establishment of free trade or preferential trade zones all favour the international operator whether legitimate or not.¹³⁷

In the last twenty years, the issues of policing and crime control have become international as a result of the impact of international terrorism, drug trafficking, and the internationalisation of social and economic activities. Police co-operation can take on numerous forms, for example, the exchange of information about crimes and criminals, joint or co-ordinated surveillance of suspects, investigation of crimes, as well as providing training facilities and the transfer of information about police techniques. These activities can take place on a multilateral or bilateral basis and at global, regional and local levels. In other parts of the world, regional organisations co-operate in law enforcement, but the most intensive form of co-operation on case-related matters usually takes place at the bilateral level. The increase in international crime has stimulated direct police-force-to-police-force contacts, with the US at the head of this kind of co-operation with federal law enforcement agencies such as the Federal Bureau of Investigation, the Drug Enforcement Agency and US Customs, now retaining permanent representatives in many countries.¹³⁸

It is argued that contact between police forces of different states is 'a delicate matter' as issues of sovereignty and the principle of territoriality are involved. The basic difficulty of formal treaty-based co-operation lies in the fact that these police forces are based in legal systems with different principles, structures and procedures. Therefore, the very existence of different jurisdictions creates difficulties because police are unlikely to have direct access to suspects, witnesses and evidence in another jurisdiction.¹³⁹

In 1977, CITES prohibited all commercial international trade in rhinoceros parts, derivatives or products. Continued demand for the horn is clear, as evidenced by the continued loss of rhinos in the wild. This is a result both of speculators stockpiling horn and consumers using it. For example Taiwan, has failed to put forward culture-specific public relations campaigns to change the habits of rhino horn users.

¹³⁷ Du Bois op cit 30

¹³⁸ Du Bois op cit 30

¹³⁹ Du Bois op cit 30

Nevertheless it is not clear whether such campaigns can succeed, particularly when rhino horn is seen by many consumers as being if not a necessity, at least of great benefit to them for medicinal purposes. The most recent CITES Conference acknowledged that law enforcement efforts had driven the illegal trade further underground, and although the CITES and other national bans have slowed the rhino horn trade, they have been unable to halt it. Unfortunately, control of domestic possession and sale of rhino parts and products is beyond the mandate of CITES and still remains unregulated in most of the consuming nations in Asia. Thus, the incentive to smuggle the prohibited items into these countries continues to exist, ensuring that laws will be flouted and law enforcement authorities will struggle to catch up with illegal traders.¹⁴⁰

Clearly, the CITES ban is not achieving its objective and the illegal trade is flourishing with financial incentives for both the poachers and middlemen in producer countries. The Taiwanese are buying rhino horn as an investment as they believe that the value of the horn will increase in the future due to the scarcity of the product. Taiwan's ban in August 1985 on the international trade in rhino products has done nothing to abet this trade. The substitution of saiga antelope or water buffalo for that of rhino has not been effectively promoted.¹⁴¹

Du Bois argues that evidence exists indicating that Taiwanese nationals living in Southern Africa are still involved in purchasing poached ivory and rhino horn, and that most of the horn leaving Southern Africa for Asia is going to Taiwan. Furthermore, organised crime links between the two countries are well established. Due to the fact that Taiwan is not recognised by the United Nations, and therefore not eligible to become a Party to CITES, this means that it cannot be forced to comply with any resolutions or Conference recommendations. Taiwan has attempted to take steps to control the trade and establish law enforcement mechanisms as a result of intense international pressure but rhino horn is still available illegally. Seemingly, Taiwan continues to be the predominant consumer in a world-wide market.¹⁴²

Even though there are a growing number of international agreements on environmental protection, the co-ordination of enforcing these environmental rules is still in its infancy, except in the rare examples of transfrontier national parks. Unfortunately, economic and political interests prevent this form of police co-ordination from being put on the agenda, despite the fact it is widely recognised that the illegal trade in endangered species is international in character. Clearly, control of the trade is beyond the power of any one government or law-enforcement agency. Thankfully,

Agencies such as Interpol and the Customs Co-operative Council (CCC), co-operate on a bilateral and multilateral level in order to facilitate criminal investigations, to prevent the flight of suspect persons and to promote the successful prosecutions of international fugitives. Recent new agreements on closer co-operation regarding the combating of crime have been established and most countries in Europe, as well as the US, have passed legislation to accommodate the principle of "Commission Regatoire". By virtue of these

¹⁴⁰ Du Bois op cit 37

¹⁴¹ Jones op cit 179

¹⁴² Du Bois op cit 36-7

agreements evidence can be taken anywhere in the Western world by such a legal commission, as long as there is co-operation between the two governments concerned. International warrants of arrest have now become commonplace and extradition orders are being revised to ensure that criminal organisations do not escape prosecution by crossing international borders.¹⁴³

The co-operation of all nations is required if the solutions to environmental problems are to be implemented successfully. Developed nations are encouraged to promote this process by providing developing countries with the ecological and technological assistance when faced with environmental problems¹⁴⁴ to ensure that the global objectives are met.

11.1. CITES CONSIDERED

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is a general instrument of global application. However, it must be remembered that the effectiveness of international legal instruments, such as conventions, depends on voluntary compliance as no institutionalised authority exists to monitor enforcement. Nevertheless, public officials are usually sensitive to the pressure of adverse publicity which amounts to an effective means of indirect compliance. Generally speaking, the public is most aware and concerned with environmental issues and thus non-governmental organisations (NGOs) play an important role in promoting environmental awareness.¹⁴⁵ I shall comment on their participation in due course.

Species of wild fauna and flora have been internationally protected since the early 1900's.¹⁴⁶ CITES entered into force on 1 July 1975 and presently has a membership of 143 countries. The role of the Parties to this Convention is to ban commercial trade in an agreed list of endangered species and to regulate and monitor trade in others that might become endangered.¹⁴⁷

The two primary threats to animals and plants is the destruction of their natural habitat and their removal from it for commerce, entertainment, sport or other human interest. From the international perspective, the former issue is problematic to combat, however, it is possible to control the movement of animals as the flow of international commerce already tracks through identifiable locations which can be monitored. This aspect of protection may not be the final saviour for the survival of all species, but it would be impossible to protect most species without controlling trade; furthermore, in listing an animal or plant under CITES, public attention and government action are induced.¹⁴⁸

Glennon suggests that customary international law requires states to take necessary steps to protect endangered species and that customary norms established by state

¹⁴³ Du Bois op cit 31

¹⁴⁴ Schlickman et al op cit I.O.07

¹⁴⁵ Schlickman et al op cit I.O.06

¹⁴⁶ Bowman Book Review 144

¹⁴⁷ CITES - <http://www.wcmc.org.uk/CITES/english/what-is.htm>

¹⁴⁸ Favre International Trade in Endangered Species 30

practice are followed from a sense of legal obligation. It is further argued that wildlife protection norms have also become binding on non-Parties as customary law, and similarly, norms are created by convention “when such agreements are intended for adherence by states generally and are in fact widely accepted.” Several such agreements are directed at wildlife protection, and CITES is one of them.¹⁴⁹

In terms of CITES, trade is any export, import or re-export of a specimen, and thus covers the situation when a specimen crosses an international border. It is not necessarily limited to the movement of goods for profit and both a live rhino en route to a zoo in a foreign country or a horn pulled from a rhino killed illegally by poachers would fall under the CITES domain.¹⁵⁰

CITES consists of three appendices: Appendix I is of paramount importance as it lists those species which are most endangered. A species must be either threatened with extinction or affected, or potentially affected, by international trade. To trade in an Appendix I species, both export and import permits are required providing a double check on illegal trade. It must be shown that this action will not be “detrimental to the survival of the species,” and that the specimen was obtained legally in the country of export. Most importantly, commercial trade in Appendix I species is prohibited.¹⁵¹ In the case of Appendix II specimens, only export permits are required and commercial use is allowed. As to the Appendix III listings, export permits are required only when such specimen is exported from a country for which it is listed and commercial use is permitted.¹⁵² Presently, the black rhino is on Appendix I while the white rhino on Appendix II.¹⁵³

Swanepoel maintains that CITES is effective only in so far as listing on these three appendices occurs, as there is no enforcement agency either domestically or internationally to institute an action on a contravention of one of the regulations.¹⁵⁴

The enforcement measures of Article VIII call for

“penalising trade which violates the terms of the Convention, confiscating illegally traded specimens, designating special ports of exit and entry for wildlife, maintaining records of exports and imports of specimens of listed species and submitting reports to the Secretariat summarising this information.”¹⁵⁵

Due to the fact that it is problematic to identify wildlife, especially parts and derivatives, the Parties were encouraged to build up expertise among their enforcement officers in a few ports and then to channel all trade through those ports. The aim was to minimise delay for legal traders as well as reduce smuggling in that it would enable a few experts in species identification to inspect the bulk of the trade. To date, only a few Parties have adopted this system of restricted ports of exit and entry for wildlife.

¹⁴⁹ Glennon “Has International Law Failed the Elephant?” 30-1

¹⁵⁰ CITES - <http://moby.ucdavis.edu/GAWS/122/1delta/2.htm>

¹⁵¹ CITES - <http://ibid>

¹⁵² Fuggle & Rabie Environmental Concerns in South Africa 71

¹⁵³ Du Toit op cit 60

¹⁵⁴ Informal conversation with Gerhard Swanepoel; August 1998

¹⁵⁵ Lyster International Wildlife Law 264

The US has incorporated this approach with only nine ports which are authorised to handle wildlife exports and imports. The evidence suggests that it has helped combat the illegal trade. Bearing in mind South Africa's poor customs control, it is imperative that the CITES recommendations be adopted in order to reduce the proportion of goods being smuggled out of the country.¹⁵⁶

Enforcement falls to the hands of the contracting states who must appoint the necessary officials and authorities to implement the provisions. Proper records are to be kept and provision must be made in local law for any penalties and for the confiscation of species. States are entitled to impose their own stricter domestic controls.¹⁵⁷ The success of the treaty therefore depends on the efficiency of domestic legislation and the extent of enforcement in each country. Usually, customs officers are given the task of enforcing CITES regulations and are required to submit these reports and trade records tracking any movement.¹⁵⁸ As has already been discussed, South Africa is lacking in this area.

Decisions of the Conference of the Parties to CITES allows for the situation where specimens are taken from the wild and raised for commercial purposes in a controlled environment, in other words, ranching of endangered species. This would encourage the maintenance of wild populations as a source of young for future ranching activities.¹⁵⁹ It would then be necessary for the Conference to establish quotas for those range countries and to monitor this legal trade in rhino horn.

If an illegal trade has been discovered, the Parties at the recent meeting in Harare were encouraged to do everything in their power to find out where the specimens were, where the false document originated and attempt to procure the identification and conviction of those responsible.¹⁶⁰

11.2. ADVANTAGES TO CITES

Birnie and Boyle regard CITES as one of the most effective and important conventions. They argue that the basis of CITES and the main reason for its effectiveness is its elaborate but workable operational system which incorporates a national export/import permit system combined with a national institutional system. Furthermore, Parties must establish at least one Management Authority and Scientific Authority which take on the responsibility of monitoring the required conditions for the permits, checking they have been fulfilled and only then granting the permit.¹⁶¹

CITES has a permanent Secretariat whose role is to collate all information with regard to the illegal trade in endangered species and to chair the periodic Conference of the Parties. The administrative system inherent to CITES allows the Secretariat to receive

¹⁵⁶ Du Bois op cit 36

¹⁵⁷ Fuggle & Rabic op cit 71

¹⁵⁸ CITES – <http://moby.ucdavis.edu/GAWS/122/ldelta/2.htm>

¹⁵⁹ De Klemm 'Biological Diversity Conservation and the Law' 120

¹⁶⁰ CITES - Decision 10.33 of the Conference of the Parties at the Tenth Meeting in Harare (Zimbabwe) in June 1997

¹⁶¹ Birnie & Boyle International Law and the Environment 476

and circulate information crucial to the location of movement of illegal specimens. CITES has been widely ratified giving it practical significance lacking in many other conventions.¹⁶² The Convention's effectiveness is further promoted by the fact that regular meetings of the contracting Parties are called for and have frequently been held since its establishment.

Lyster suggests that CITES has been effective due to the financial stability of the Secretariat which has an annual budget of hundreds of thousands of dollars used to monitor compliance and to aid those Parties in eradicating illegal trade.¹⁶³ He argues that CITES is

attractive to the "producer" nations who see controls at the place of import as well as the place of export as essential weapons in their fight to protect their valuable wildlife resources from poachers and illegal traders. The "consumer" nations support it because without controls their legitimate dealers might have no raw materials in which to trade in the generations to come.¹⁶⁴

It is further suggested that the CITES system works well because it focuses on the illegal trade occurring as opposed to the act of killing. Thus, there is a high level of understanding that dealing with the trade gets to the root of the problem, which is *not* the individual death but the decline in the conservation status of a species as a whole.¹⁶⁵

One final attribute of CITES which is worth noting, is that the list of species adapts over time as new information and new circumstances arise.¹⁶⁶ This provides for the situation where if a species is becoming more threatened, the Parties to CITES can vote for new protective measures.

11.3. VARIOUS LIMITATIONS TO CITES

Although CITES has had numerous positive effects on the protection of endangered species, there are a number of loopholes in the system as it stands today. I shall now analyse some of these limitations and show how they impede the operation of CITES and what can be done to prevent such consequences from being repeated in the future.

The Reservations Provision

A reservation is a formal notification by one party to a treaty to the other parties that while accepting the majority of the provisions of the treaty, the country concerned does not consider itself bound by that particular provision with regard to which it reserves acceptance.¹⁶⁷ This is usually done because that country has an economic interest in the trade of the species. Once a reservation has been entered, the country can then trade with non-member States and also with other members who have taken

¹⁶² Birnie & Boyle op cit 478

¹⁶³ Lyster op cit 301-2

¹⁶⁴ Lyster op cit 241

¹⁶⁵ Sands Greening International Law 108

¹⁶⁶ Favre op cit 30

¹⁶⁷ Greig International Law 363

the same reservation. Thus, reservations 'allow these countries to comply with CITES only when it suits their need, and to legally exempt themselves when the economic incentive is present.'¹⁶⁸

Lyster identifies a further disadvantage to the reservation scheme; namely, that Parties are not obliged to provide the Secretariat with trade data in these species as they are considered non-Parties. Thus, statistical material used for monitoring trade may be lost. This issue was recognised at the Fourth Conference and Parties are now requested to report on their trade notwithstanding the reservation.¹⁶⁹ This exhortation as opposed to a binding legal obligation is clearly problematic.

It has been argued that perhaps a limit should be placed on the number of reservations which a Party might enter and furthermore, that the reservation only last for a specific time and should be periodically reviewed. For political reasons, in order to encourage participation and to protect the national interests, most wildlife conventions do permit reservations to be entered but this process could be better controlled.¹⁷⁰

Article VII Limitations

Birnie and Boyle suggest Article VII is problematic in that although Parties are required to impose penalties, cater for confiscation and anticipate the return of the specimens, these provisions are ineffective if evasion is relatively easy. Furthermore, they do not act as a deterrent unless used properly and unless penalties are internationally harmonised and set at a high level.¹⁷¹

Sands and Bedecarre argue that the possibility of a Party to trade in a "pre-Convention specimen" in terms of Article VII(2) is problematic.¹⁷² One of the aims of this Article was to allow stockholders to trade in any existing stocks before the Convention originally entered into force, as well as to permit stockholders to trade in any specimen other than personal effects. However, this section has been abused by stockpiling large quantities of specimens that shortly may be listed in the appendices or subsequently granted a higher level of protection.¹⁷³

A key problem to the enforcement of CITES is customs control, as most countries do not have a system in place to strictly control travelling individuals and their luggage. In terms of Article VII(c), each country is under an obligation to control imports from countries of origin which impose export requirements but this is a heavy burden that many choose to ignore.¹⁷⁴ The South African system (or lack thereof) has been commented on above.

¹⁶⁸ CITES - <http://moby.ucdavis.edu/GAWS/122/1delta/2.htm>

¹⁶⁹ Lyster op cit 263

¹⁷⁰ Birnie & Boyle op cit 480

¹⁷¹ Birnie & Boyle op cit 479

¹⁷² Sands & Bedecarre 'Convention on International Trade in Endangered Species: the role of public interest non-governmental organisations in ensuring the effective enforcement of the ivory trade ban' 799

¹⁷³ Sands & Bedecarre op cit 804

¹⁷⁴ Favre op cit 30

Various Other Limitations

Lyster recognises a serious flaw to CITES in that it gives no guidance as to the penalties to be imposed on persons convicted of illegal trade or possession, resulting in considerable variation in the punishments imposed. He further argues that although confiscation may be a deterrent to illegal trade, problems nevertheless arise when dealing with its disposal. Not only is it not always possible to return the specimen to its natural habitat, but often it costs money to store the stock; or even worse, this confiscated stock is liable to be stolen.¹⁷⁵

The crucial component to trade is information, without which there is no way of knowing whether or not the controls are working as contemplated. Article VIII requires that governments keep records and report to the Secretariat. However, the persistent failure of many states to fulfil this obligation has been a continuing exasperation for both the Secretariat and those interested in the impact of CITES.¹⁷⁶

Glennon criticises CITES in that it only relates to the endangerment of species posed by international trade. He would like to see a new, world-wide treaty that safeguards endangered species irrespective of commerce.¹⁷⁷ This would be a great improvement of the international measures designed to protect our global heritage.

Finally, countries with listed species receive no additional votes when deciding a listing issue. This incorporates the problem of range states having significant economic impacts imposed on them by countries far removed from local social and economic problems.¹⁷⁸ This in turn creates discomfort between the various member states and results in international tension that is undesirable when attempting global enforcement in the interests of all.

Many of the limitations outlined above can be scrutinised in order to provide for better enforcement of CITES. It is suggested that the developed countries not only provide financial aid in this regard, but also practical know-how and lead by example in the integration of CITES in their domestic laws. As a final proposal, perhaps the Convention itself should be modified using clauses and terms which eradicate the ambiguity and which address the problematic issues raised here.

11.4. APPLICATION OF CITES IN LOCAL JURISDICTIONS

National legislation is of paramount importance both for the implementation of public international obligations and for the solution of purely domestic environmental problems.¹⁷⁹ CITES encourages Party States to have strict domestic measures. It is implicit in becoming a Party that an elimination of any domestic law which is less protective than the requirements of CITES will occur.¹⁸⁰

¹⁷⁵ Lyster op cit 264-6

¹⁷⁶ Favre op cit 215

¹⁷⁷ Glennon op cit 42

¹⁷⁸ Favre op cit 31

¹⁷⁹ Bowman op cit 146

¹⁸⁰ Favre op cit 300

South Africa is a Party to CITES, but according to Swanepoel,¹⁸¹ no implementing legislation exists at this point. Hopefully, the Draft Bill of the Endangered Species Protection Law will be enacted shortly. It is hereby suggested that the example of the US be followed as soon as possible in other member countries.

Section 1(a)(4)(F) of the U.S. Endangered Species Act of 1973 has committed itself to conserve, to the extent practicable, the various species of fish, wildlife and plants facing extinction following its involvement with CITES. Blum maintains that,

'Congress, by the language of the Act acknowledges that the United States is dedicated to world wildlife preservation and declares its intent to support the Government's international commitments.'¹⁸²

12.ROLE OF NGOs/PINGOs

I shall now turn to the role both non-governmental organisations (NGOs) and public interest non-governmental organisations (PINGOs) can play in eradicating the poaching of a species such as the African rhino. PINGOs played a key role in the decision-making process of CITES having been instrumental in calling for its establishment. They have now taken on the role of monitoring both compliance and enforcement.¹⁸³ Both NGOs and PINGOs contribute to the success of CITES by providing information through monitoring trade and by gathering and analysing data concerning various species. It is suggested that co-operation among all the participating states and organisations is essential to save Africa's wildlife.¹⁸⁴

Birnie and Boyle declare that the role of NGOs is fundamental to the success of CITES in that they provide information which 'enables the CITES Secretariat to identify problems and take counter measures, if controls are or are about to be evaded.'¹⁸⁵

As with ivory, stocks of rhino horn are very valuable to the economy of developing nations. When Zambia burnt some ivory stocks in 1992, UK NGOs provided over £100 000 in compensation. It is most likely that other states would want compensation of around the market value for burning their stocks and it is argued that 'millions of dollars' would be needed for this buy-out, however there appear few willing donors.¹⁸⁶

Kenya is the only African country that burns its ivory stockpiles regularly, without compensation, due to the Government officially rejecting ivory as an economic asset.¹⁸⁷ In the summer of 1989, the President of Kenya held a public burning of twelve tons of confiscated tusks to demonstrate his country's commitment to banning all trade in ivory.¹⁸⁸ This attitude and action has been severely criticised when one considers the

¹⁸¹ Informal conversation with Gerhard Swanepoel: August 1998

¹⁸² Blum 'Extraterritorial Application' 139-140

¹⁸³ Sands & Bedecarre op cit 800

¹⁸⁴ CITES - <http://moby.ucdavis.edu/GAWS/122/delta/2.htm>

¹⁸⁵ Birnie & Boyle op cit 477

¹⁸⁶ Hughes op cit 23

¹⁸⁷ Hughes op cit 23

¹⁸⁸ Sands & Bedecarre op cit 807-8

value such a commodity could have brought to a struggling nation such as Kenya.

The World Wide Fund for Nature (WWF) is prepared to forge outright debt forgiveness schemes of a certain percentage of the amount owed, in return for the disposal of stockpiles and an agreement to make local currency available for development and conservation. However, any arrangements would have to be made on an *ad hoc* basis as situations vary and most debt agreements are bilateral.¹⁸⁹ Alternatively debt swaps involving 'monetary concessions by lenders in exchange for enhanced resource management by borrower states that are unable to keep current on debt payments'¹⁹⁰ is a potential measure to increase wildlife protection. In all these cases - compensation, debt forgiveness agreements and debt-for-rhino horn swaps - both NGOs and PINGOs have a fundamental role to play.

13.POSSIBLE PRACTICAL SOLUTIONS

13.1.NEGOTIATED RULEMAKING

It is clear that the adoption of more environmental legislation may not be the only route to follow at this point as there are too many factors to consider. I am referring to the many role-players who have a direct interest in the future conservation methods we adopt. For example, the historically disadvantaged local communities of the area in question as well as the formal administrative agencies who up to now have had unlimited power in the protection of South Africa's wildlife. I suggest that we need a combination of better legislation that can be well implemented as well as the adoption of other methods of resolving these conflicting interests.

The United States had identified this issue and has adopted guidelines to draw up negotiated rulemaking procedures in the belief that the costs incurred of negotiated rulemaking is offset by long-term savings. It is believed that 'negotiated agreement develops better rules than the traditional process.'¹⁹¹

Lyster identifies that certain elements are necessary for a successful negotiation. These include, a limited number of participants who have an interest in the process, agreement on certain fundamental values, a willingness to compromise and a commitment to adopt the agreed position. Furthermore, the negotiations must be based on the 'need to focus on interests and not positions, to seek options for mutual gain and to insist on objective criteria'. Finally, the participation of various interest groups is necessary especially in developing states where a tension exists between environmental conservation and socio-economic development. This would result in legitimate rules that promote sustainable development and would help reduce the suspicion that exists between the administration and local communities.¹⁹²

If the various interest groups are given an opportunity to participate and air their

¹⁸⁹ Hughes op cit 23-4

¹⁹⁰ Glennon op cit 36

¹⁹¹ Lyster 'Environmental dispute resolution' 151

¹⁹² Lyster op cit 152

perspectives, it is more likely that they will support any consensus arrived at. However, as Lewis reminds us, this form of participation in decision-making in many parts of the world is viewed as undermining the notion of national sovereignty or as contrary to the national conservation interests.¹⁹³ These considerations must be taken into account before any negotiated rulemaking process is embarked on.

Glavovic maintains that inadequate participation of the affected community results in 'development incompatibilities and project failures' and therefore the socio-cultural characteristics of the local people must be considered. The form this participation will take will vary from area to area but its premise must be to 'enable beneficiaries to drive the decision-making process'. It must be remembered that local people know the local conditions and their understanding of these local issues can be developed by interacting with scientists and park personnel.¹⁹⁴ It is clear that effective communication requires more than just sharing of information. 'It implies that parties are able to clearly articulate their needs and concerns, and that they are able to hear and understand needs articulated by other parties.'¹⁹⁵

Many of our protected areas have growing populations of poor people on their borders and in their vicinity and these protected areas were sometimes the former traditional tribal hunting grounds of these communities. Thus it is not surprising that a negative attitude towards conservation and its officials exist in the minds of these neighbours. It is imperative to create a relationship of mutual trust and co-operation in order to achieve political and socio-economic benefits for all. Such a relationship will also benefit the combating of poaching and smuggling activity in the protected areas concerned by ensuring an effective informer network, reducing the incidence of poaching by members of such a community and facilitating the detection of offenders after poaching has taken place.¹⁹⁶

At this point, it is useful to look to the abalone poaching situation, analysed by Hauck in the Hawston Community near Cape Town and the CAMPFIRE programme in Zimbabwe.

13.2. LOCAL COMMUNITY PARTICIPATION

The theory of co-operative management, or co-management, recognises that new mechanisms need to be devised to ensure the sustainable utilisation of natural resources. The state is seen to be partially responsible for the over-exploitation and a move away from exclusive state controlled resource management is presented. Therefore, the sharing of power, responsibility and decision-making between the local users of natural resources and the government is engendered. Communities are encouraged to obtain a sense of ownership over their resources, taking on greater responsibility in ensuring their long-term sustainability. The principles of co-management perceive over-exploitation as a consequence of unequal access to, and

¹⁹³ Lewis 'Parks and People in Conflict - A Framework for Analysis and Action' 12

¹⁹⁴ Glavovic 'Resolving People-Park Conflict through Negotiation: Reflections on the Richtersveld Experience' 19

¹⁹⁵ Glavovic op cit 21

¹⁹⁶ Kumlleben Commission 191-2

competition over resources.¹⁹⁷

Thus, a contemporary move away from the state alone trying to control crime and manage the resources to governing these issues in a more co-operative manner is proposed. This shared responsibility between the state and local communities to manage the illegal exploitation of natural resources allows the issue to be addressed within the broader socio-economic and political understandings of society.¹⁹⁸

Not only is exclusive state control ineffective in providing security and controlling crime, but there is an expectation that communities should share the responsibility of providing safety. The theory of co-management endorses this community participation within resource management, where partnerships are encouraged between the different levels of the state and local resource users. Equitable access to and ownership over the natural resources is fundamental to co-management which argues that a vested interest is created in the community to protect and sustain the resource. Therefore, through a co-operative approach to resource management, resource users and law enforcement agents are in a stronger position to address the encroachment of outsiders and illegal users of the resource.¹⁹⁹

The fundamental principles of resource co-management can be relayed to wildlife management issues too. The importance of devolving power and responsibility of resource management in order to diminish illegal exploitation is clear. The aim of co-management is to address unequal and illegitimate rights of access to a given resource in order to ensure local communities have a reason to maintain the sustainability of the resource. By increasing

‘participation and legitimacy to resource decision making, co-management aims to address the inequalities embedded in state controlled management strategies. In addition, through the principles of collective ownership, co-management investigates the potential of resource users to work together for the mutual goal of sustainable utilisation.’²⁰⁰

13.2.1. Abalone Poaching

It is apparent that the poachers of abalone do not see law enforcement measures as the answer to their problems. It is most likely that the same applies to poachers of rhino horn and other endangered species. It is believed that law enforcement should only become involved after a legitimate opportunity in the industry has been offered to them. Until such time, poaching would continue. In fact, the poachers were adamant that neither the police nor the marine inspectorate would stop them from poaching and indeed this would only make the situation more violent. In this scenario, they were angry for being labelled criminals, and argued that they were poaching because they had been disadvantaged in the past.²⁰¹

¹⁹⁷ Hauck op cit 61

¹⁹⁸ Hauck op cit 202-3

¹⁹⁹ Hauck op cit 203

²⁰⁰ Hauck op cit 257-8

²⁰¹ Hauck op cit 171

In order to reduce poaching activities, local communities can perhaps form organised patrols in the area or gather information for the police. Thus, outward community pressure to reduce the poaching and support the police has been emphasised as an important means of alleviating the problem. Similarly, the police and marine inspectorate emphasised the role the community could play in diminishing the poaching.²⁰²

Many poachers continued their activities due to their unemployment status so community development was suggested as an option to employ builders, painters and labourers. All of the poachers interviewed in this area suggested a community abalone quota which would give them a chance to return to the sea. They emphasised that people born by the sea did not want to work in any other profession and fundamentally, they wanted opportunities which would allow them to remain fishermen, working legitimately on the sea.²⁰³

A spokesperson for the poachers claims they want to use their quotas for the upliftment of their town. Thus the Hawston community wants to get involved in the entire process of catching, processing and marketing the abalone as a means of benefiting the whole community.²⁰⁴ In all likelihood, this would be the similar stance of the rhino horn poachers of Southern Africa.

13.2.2. The CAMPFIRE Example

The situation in Zimbabwe merits consideration at this point as it is an example of the successful shift in conservation power from the state to community-based bodies. The Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) has been widely applied in the country. I intend to briefly discuss the principles which are inherent to CAMPFIRE and which could well be incorporated into any future conservation and development management plans in South Africa.

CAMPFIRE is based on principles which emphasise flexibility and adaptability to local conditions, voluntary community involvement and local command.²⁰⁵ Furthermore, any monies that are accumulated 'should be returned to producer communities, and that communities should have the full choice of how to use these monies including the option of cash dividends.'²⁰⁶

Traditionally, in Zimbabwe, the protected areas were controlled by centrally managed protective legislation. Thus, socio-economic conditions were ignored and local community participation was non-existent. In the early 1960's, this position changed and landholders were given further autonomy over the management of wildlife on their land. Sustainable utilisation was encouraged over these resources in terms of a permit system. Although, initially the State supervised these activities, this was not necessary

²⁰² Hauck op cit 174

²⁰³ Hauck op cit 181

²⁰⁴ Houthoofd 'Towards some solutions relating to the Conservation of Abalone' 302-3

²⁰⁵ Child 'The role of community-based wild resource management in Zimbabwe' 363

²⁰⁶ Child 'The practice and principles of community-based wildlife management in Zimbabwe: the CAMPFIRE programme' 391

once private ownership of wildlife and its financial stability were recognised as promoting successful conservation.²⁰⁷

CAMPFIRE is a management system which implements community-based natural resource management and which is a successful example of the new decentralized approach. The first step was to devolve ownership to private landowners. Secondly, it was necessary to move beyond the notion of a right to wildlife and to drive the prices upwards. This resulted in landholders receiving increased benefits from their wildlife which would in turn lead to widespread expansion of wildlife populations and novel enterprises on this private land. The third process was to transfer this system to communal lands.²⁰⁸

Once the success of the programme on private land was identified, the Zimbabwean conservationists established community-based institutions to manage it in communal areas too.²⁰⁹ In terms of s 95 of the Parks and Wild Life Act of 1975 (as amended in 1982), the Minister can confer full rights of use of wildlife to the people on whose land the wildlife exists. These rights are the same as those enjoyed by private landholders but there are some checks to prevent abuse of these rights. This legal legitimacy has clearly promoted the success of CAMPFIRE.²¹⁰

As Child comments, this new community-based natural resources management

'requires co-management between community and government, but the roles of community and government are modified significantly from their traditional colonial ones...In CAMPFIRE, the state has devolved authority to the community and...it facilitates improved resource management by providing or sourcing information and other support...While the community is responsible for the nuts and bolts of management, government sets policies and retains its regulatory role. Where a community abuses or ignores the principles under which it receives its authority, the state should step in to correct the situation.'²¹¹

It is concluded that the programme has benefited not only wildlife protection and rural land use, but also the socio-economic means of those in isolated areas.²¹² It appears that the implementation of CAMPFIRE has reduced the poaching activities in Zimbabwe. This can be attributed to the

'internal social mechanisms of producer countries, and as such is both cheap and effective. Some international rhino and ivory poachers have been apprehended by local communities, as have lesser poachers...In short, CAMPFIRE appears to be developing unified communities that are becoming

²⁰⁷ Child 'The role of community-based wild resource management in Zimbabwe' 356; 358

²⁰⁸ Child 'The practice and principles of community-based wildlife management in Zimbabwe' op cit 370-1

²⁰⁹ Child 'The practice and principles of community-based wildlife management in Zimbabwe' op cit 370

²¹⁰ Child 'The practice and principles of community-based wildlife management in Zimbabwe' op cit 383-4

²¹¹ Child 'The practice and principles of community-based wildlife management in Zimbabwe' op cit 381

²¹² Child 'The role of community-based wild resource management in Zimbabwe' 365

aware of the importance and value of natural resources and have a growing capacity to tackle these problems.²¹³

Child suggests that this approach is appropriate as it is intrinsically African in character. He argues that the extended family and the community are deeply embedded in the African culture and therefore it is logical to base the approach on the community.²¹⁴

However, the long-term success of programmes such as CAMPFIRE will depend on external factors such as the population growth and employment levels in the area. Thus Zimbabwe must 'industrialize fast enough so that the population depends on employment rather than the already over-utilized land resource' in order for CAMPFIRE to ultimately succeed.²¹⁵

13.2.3. Conclusion

Du Bois urges that law enforcement bodies prioritise co-operation relations with local communities in the area. It is the responsibility of nature conservation officials to involve these communities in the case of conservation – by giving them a stake in the continued existence of the reserves – as their support is vital to the SAPS in combating poaching. There are numerous advantages to the establishment of community initiatives. For example, where members of a Tribal Authority are included in management programmes, a sense of inclusion, responsibility and custodianship is promoted. If information of any intended poaching activity, or of those who participate, is given to the right people, early arrests are likely. As soon as would-be poachers become aware of this kind of co-operation, poaching levels are likely to drop as the co-operative nature of the community acts as a deterrent and hinders the successful execution of illegal activities.²¹⁶

It is stressed that the consequences of poaching, at a community level, are critical. It has the potential to create a great deal of tension and conflict among various members and organisations within a community. Local people and communities who are directly involved in, or affected by poaching have their quality of life undermined which is further threatened as local residents become fearful of the poachers and anxious about the situation. The secrecy and illegal nature of poaching affects the community as a whole.²¹⁷

Finally, the notion of co-management promotes long-term crime prevention in favour of short-term crime control options.²¹⁸ Many conservation authorities in South Africa

²¹³ Child 'The practice and principles of community-based wildlife management in Zimbabwe' op cit 395

²¹⁴ Child 'The practice and principles of community-based wildlife management in Zimbabwe' op cit 372

²¹⁵ Child 'The practice and principles of community-based wildlife management in Zimbabwe' op cit 396

²¹⁶ Du Bois op cit 38

²¹⁷ Hauck op cit 13

²¹⁸ Hauck op cit 259

and elsewhere are aware of this need for community participation and the need to assume some responsibility for the welfare of local communities. It is now recognised that communities adjacent to protected areas need to benefit from them and participate in the protection of wildlife.²¹⁹

13.3. THE MARKET MECHANISM

One further consideration needs to be addressed at this point. Breytenbach, when dealing with elephant conservation, suggests the well-known conservation principle that a renewable resource is only worth protecting if it can be exploited intelligently for the benefit of mankind, even if this may only be evident in the distant future. In other words, to protect a species just for the sake of protection is foolish as it inevitably leads to a conflict between man's interests and the interests of the species being protected. With regard to smuggling it is useless to try and close down the smuggling pipelines because new ones are set up as fast as the old ones are destroyed. The closing down of markets only encourages black markets to open and flourish in the dark where it is even harder to control them. The answer, he avers, is therefore to control the open market, not to destroy it, and the best way to control the market is to control the buyers and the sellers of the commodity.²²⁰

It is argued by various conservation authorities that the best solution is right in front of us and that it is not necessary to implement any new innovations to save the rhino from extinction. It is possible for legislation to be passed which will provide for the market mechanism to operate. This proposal if implemented may encourage poachers not only to protect the rhino but also to breed them. It is suggested that the market mechanism has many advantages over all other proposals and has been thoroughly tried and tested. It is clear that some animals are slaughtered on a much vaster scale than any endangered species and yet their numbers keep multiplying, often to the extent that many governments have adopted costly schemes to reduce their numbers.²²¹

The solution of the market mechanism is the decriminalisation of rhino farming and trade in existing and potential rhino products. Poachers have no competition in a market where conservationists are doing all they can to drive prices up and so it is in the ever-increasing self-interests of poachers to poach. Jones argues that the most counter-productive acts of ignorance, malice and stupidity are when the authorities in various countries burn millions of dollars of horns and tusks. The very worst thing they can do is to increase the shortage thereby driving up the price. If they were to saturate the market they would drive the prices down which would in turn reduce poaching.²²²

Although most conservationists would like to see all trade in wildlife products banned, Jones argues this is a First World concept that would eliminate wildlife in the

²¹⁹ Kumleben Commission 192, 211

²²⁰ Breytenbach 'An empty land created for elephants' 1989 as quoted in Potgieter op cit 50

²²¹ Jones op cit 181

²²² Jones op cit 182; see above discussion at 12

developing countries of Africa. The argument runs that it is not viable to let valuable animals die for nothing when necessary finances could be generated to help improve the black rhino situation. The conclusion drawn here is that the black rhino can pay for its own conservation if utilised in a highly regulated manner.²²³

The suggestion is to legalise rhino ranching or farming so that a renewable supply would exist which will reduce prices as well as the incentive for poaching. The Parks Board would be able to auction off supplies of old horn which are stored in warehouses and which are worth tens of millions of rands. The idea is to sell small amounts at a time to keep the market partially satisfied while still gaining maximum return. This would lead to the gradual commencement of rhino horn production. Thus, a legalised market and the recognition and protection of private property rights to the black rhino is required. The Parks Board is urged to call for a lift of the ban on black rhino products and hunting, and further, to auction off some of the non-breeding bulls to trophy hunters. This would raise a considerable amount of money which would be ploughed back in to conservation methods. The proposal envisages that in lifting the trade restriction a market-regulated system of rhino conservation is created where the state agencies can focus their efforts on those issues that are less easily resolved by the market.²²⁴

As Du Toit stresses, 'Why may we shear a sheep's wool, but not cut off compressed fibre in the shape of rhino horn?' In fact, 'Why can't we export live rhinos to China and teach the Chinese to farm rhinos?'²²⁵ These are two very good points that have been ignored for too long.

It is necessary to create an intelligence-gathering network by having enough money to pay informants for reliable information about poachers and trades. If rhino horn is sold on a saturated market, the money raised could pay for patrols, and in addition, rewards for informants and game guards. Therefore, the money from sales would go directly back into conservation. Finally, it must be remembered that one rhino can produce one kilogram of horn every 2-3 years without having to die.²²⁶

Swanepoel contests this argument by reminding us that the tendency is that illegal trade continues in spite of legalisation as is evident in the diamond and gold industries. He argues that the legalisation 'without any proper counter measures such as legislation and strict control, will only create a parallel opportunity for illegal trade to exist with the legal.'²²⁷ He queries whether the rhino can survive pressures from both legal (rhinos used for harvesting their horn) as well as the illegal markets.²²⁸

However, I believe it would be possible to regulate the trade, for example, by forbidding all trade in rhino horn bases.²²⁹ This would support the de-horning conservation measures outlined above by quelling the fears that de-horned rhinos will

²²³ Jones op cit 182

²²⁴ Jones op cit 182-3

²²⁵ Du Toit op cit 48-9

²²⁶ Jones op cit 183

²²⁷ Swanepoel op cit 55

²²⁸ Swanepoel op cit 56 and re-emphasised in our conversation; August 1998

²²⁹ Du Toit op cit 53

continue to be poached for the morsel of horn that is left behind to regrow.

The Natal Parks Board, which has done vast amounts to protect the white rhino from extinction, supports the notion of harvesting rhino horn and can see the benefits of controlling the market demand.²³⁰

The Kumleben Commission decided not to address the 'controversial and emotional issue' on whether the prohibitions ought to be totally or partially relaxed as it fell beyond the terms of reference of the report. It did note, however, that should these bans be lifted, the cost-effectiveness of de-horning procedures would be increased since the sale of these products would generate income.²³¹

13.4. EDUCATION

It is essential to gain the support of the local populations through education as it must be beneficial to the local people to protect their own heritage. Further co-operation between state bodies and NGOs must be encouraged. The needs of the rural people must be clearly established and incorporated into any conservation programme in the future. It is believed that local people are being hired to kill black rhino even once they have been de-horned. The reasoning behind this is that if the black rhino is extinct the value and price of rhino horn will rise dramatically and therefore bring further financial rewards for the organisers in the syndicates who are believed to be stockpiling rhino horn. In this way, it is clear that the need to educate the local people of the disastrous consequences of these poaching activities is imperative.²³²

Du Bois argues that both domestic and international legislation is ineffective unless combined with a grassroots programme of education designed to alter the perceptions of the consumer. This is a long-term process and it is clear that the changes in attitude and behaviour required to eradicate the desire for rhino products will be a long time coming.²³³

If we look once more to the elephant situation it is surmised that the demand for ivory is falling off as fast as its prices due to conservation groups who are stepping up anti-ivory publicity and education campaigns world-wide.²³⁴ Hopefully, the same will be able to be said with regard to the African rhino if we adopt a similar approach today.

Until these changes occur, protection of the rhino remains in the hands of the conservationists, local communities and law enforcement agencies. Only a handful of rhino remain world-wide with the majority found in South Africa. It is apparent that the last line of defence for the rhino lies within our borders. Clive Walker, Chairman of the Rhino and Elephant Foundation maintains that the long-term poaching situation is a long way off from being fully under control. Fortunately, at the moment, we do not have the type of poaching that affected the rhino populations of Kenya, Zambia

²³⁰ Du Toit op cit 59

²³¹ Kumleben Commission 199-200

²³² Jones op cit 184

²³³ Du Bois op cit 40

²³⁴ Sands & Bedecarre op cit 817

and more recently Zimbabwe, although our rhinos do remain vulnerable.²³⁵

Various institutions already exist with regard to the educating of the population as to the danger our wildlife is in. The Endangered Wildlife Trust which operates in Southern Africa was created in 1973. It is a private, non-profit organisation which focuses on research, conservation and creating an awareness among the public of conservation problems. Furthermore, the aim of the Wildlife Society of South Africa is to educate children in conservation issues and to prevent environmental disasters. Similarly, the Rhinoceros Museum, which was initiated by the Rhino and Elephant Foundation, is based in the Waterberg. Its main purpose is to educate school children.²³⁶

13.4. OTHER OPTIONS AVAILABLE

One proposal is to levy a tax on those countries whose nationals have benefited directly or indirectly from the unrestrained commercial hunting of endangered species, and that the revenues collected be paid to the community who hunts as a form of subsidy or reparation for the endangerment of the species. With these revenues, a different form of commercial enterprise could be established that would provide for the needs of the community. These tax payments would be of a limited duration just in order to establish the new venture.²³⁷

The US has a useful model relating to the conservation of African elephants that could well be extended to African rhino protection. Here the African Elephant Conservation Act incorporates a Fund capable of receiving tax dollars out of the general budget, penalty moneys for violations of the Act and donations from private citizens and organisations (the latter being tax deductible under US law). The Secretary of the Interior may approve a project if it 'will enhance programs for African elephant research, conservation, management or protection.' It is not yet known what level of funding will materialise for the Fund but the potential is present for several hundred thousand dollars which could make a significant difference in the battle to learn about and save the elephant.²³⁸

Glennon argues two 'sets of costs are incurred by ivory-producing states: the opportunity cost of forgoing the sale of ivory from natural elephant deaths and confiscated poached ivory, as well as the cost of running conservation programs.' A similar scenario exists with regard to those range states with valuable rhino reserves. He maintains that it is appropriate for the international community to reimburse states such as Botswana and Zimbabwe for the cost of *not* selling ivory, as revenues from the export of ivory help pay for conservation programmes.²³⁹

Perhaps we should look once more to the elephant situation at this point: they are a benefit to the economy simply by having people come to look at them in national

²³⁵ Du Bois op cit 40

²³⁶ Du Toit op cit 59.61

²³⁷ D'Amato & Chopra 'Whales: Their Emerging Right to Life' 61

²³⁸ Favre op cit 133

²³⁹ Glennon op cit 35-6

parks. In Kenya live elephants are now worth more than dead ones as in a good year they can accumulate US \$25 million or more in tourist revenue.²⁴⁰ Clearly, our rhino populations are also a valuable asset to promote tourism.

One proposed option to prevent poaching is for the police to visit the homes or kraals of identified suspects, even making use of helicopters. These visits may restrain suspects and potential suspects from indulging in poaching activities as well as create an awareness of the implications of poaching among the suspects' neighbours. Another possibility is to recruit witchdoctors as informers – experience shows this to be a viable option.²⁴¹

It is imperative that government departments at national and provincial level cooperate to combat crimes associated with the trade in endangered species and their products. All government departments involved in issues affecting the environment and the movement of goods across the borders, and in particular, the departments of Agriculture and Customs and Excise, must join these efforts. Any secrecy clauses encoded in legislation relating to these departments hinder investigations by provincial environmental agencies and should be reviewed. Furthermore, it is essential to enlist the services of NGOs, such as the Endangered Wildlife Trust and TRAFFIC, as they may be able to provide valuable information regarding some of the issues under consideration. Clearly, with better co-ordination, duplication of research may be avoided and the efficient use of financial resources can be enhanced.²⁴²

An effective and detailed database is necessary in order to facilitate investigation and operational planning. A simple computerised system for use by both the Parks Board and the ESPU based on particulars gleaned from dockets investigated would be valuable. With regular updating by Parks Board staff, this database can serve as a management, crime prevention and investigation tool. These computer communications would facilitate efficient information processing and enable the co-ordination of operations and investigations, and assist in identifying trends and targeted areas. The fact that crime syndicates are becoming increasingly professional with access to modern technology and facilities demonstrates that it is essential that the law enforcement bodies are adequately equipped to counter their threat.²⁴³

14. CONCLUSION

I have argued therefore that the present protective measures in force have not adequately protected our rhino populations from the poachers, organised crime syndicates and smugglers who every day threaten their existence. Our rhino populations are likely to be in increasing demand as their elimination in other African countries continues. It is time to act now to prevent the extinction of our wildlife.

The conflict arises as the rhino horns that are confiscated, taken from those rhino that have died naturally or that have been de-horned are a valuable natural resource which could bring foreign currency into a weak economy. Due to the international ban in

²⁴⁰ Douglas-Hamilton op cit 343

²⁴¹ Du Bois op cit 38

²⁴² Du Bois op cit 39

²⁴³ Du Bois op cit 39

terms of CITES, this potential source of finance is worthless. Perhaps it is time that our wildlife contributes to its own protection as tourism alone does not generate the commercial resources to sustain the habitat and species desired by the global community.

Dealers of the illegal rhino trade are prepared to take the necessary risks involved because of the potentially high financial rewards. Clearly, it is imperative to increase patrol coverage of vulnerable areas. Thus the law enforcement teams must be supported. It is essential to upgrade the existing radio equipment and to increase the use of cellular telephones and technical equipment, such as night-vision instruments. Many of the areas have a poorly developed infrastructure, so the use of motor cycles and four-wheel drive vehicles is required. The rapid reaction time of helicopters means that their use is crucial and may deter potential poachers.²⁴⁴

The new law enforcement measures in terms of the NCPS, the Prevention of Organised Crime Bill and the Lusaka Agreement target the international dealers as opposed to the local poachers and are to be welcomed. The present customs control system needs to be reworked to identify the smuggling routes and members. The courts need to be stricter in their sentencing to act as a deterrent to the poachers. The present fine imposition system is clearly problematic in that the poachers may have to poach to pay it.

CITES attempted to protect the rhino completely by banning international trade in its horn. This failed and it is time to recognise the weaknesses of the CITES ban. It is suggested that the ban be relaxed and a limited amount of trade in rhino horn be allowed. Rigid legal regulation will be essential to keep illegal traders out of the market.

As a final comment with regard to CITES, the range states are to report at the Eleventh Meeting of the Conference of the Parties, through the Secretariat, the conservation measures they have adopted to protect their rhinoceros populations.²⁴⁵ Hopefully, the principles discussed here will be considered and adapted to provide the best protection possible for the future of the African rhino.

We need a combination of short-term and long-term protection measures. Thus de-horning measures (where this is essential), concentration into sanctuaries and increased anti-poaching and law enforcement efforts in the field are immediately required. Furthermore, it is necessary to understand and control the market activities relating to rhino horn and to incorporate the principles of co-management into future protection methods. It is essential to publicise the plight of the rhino and to put education schemes into operation as soon as possible.

The new discipline of ecological criminology tackles this issue by evaluating the needs of the local communities and then bringing them on board with any future initiatives. This is likely to decrease poaching activities.

²⁴⁴ Du Bois op cit 37-8

²⁴⁵ CITES – Decision 10.45 of the Conference of the Parties at the Tenth Meeting in Harare (Zimbabwe) in June 1997

Poaching is detrimental not only to the animal killed, but also to society in general. It is imperative to realise that environmental crimes are as harmful to the future of this country as any other traditional crime. It is urged, therefore, that all measures possible be taken to combat the poaching levels and to focus our attention towards these activities to protect not only the African rhino, but all endangered species and the very fabric of our society.

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