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INSTITUTE OF MARINE
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**Casting a wider legal fishnet: Assessing opportunities to combat fisheries
crime with a focus on the South African abalone poaching and trafficking
crisis**

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Abstract

The fisheries sector is a fundamental global industry for human prosperity worldwide as fish and fish products are among the most-traded food commodities worldwide. However, the fisheries sector is linked to a high degree of illegality. Fisheries crime is a multifaceted phenomenon – frequently transnational and organised in nature – which comprises a range of various crimes along the fisheries value chain, including corruption, money laundering as well as tax and customs fraud. The abalone poaching and trafficking crisis in South Africa is a prime example of fisheries crime: organised criminal syndicates control the (illegal) lucrative trade of abalone starting from poaching in the coastal waters of South Africa until the abalone ends up in East Asia. The syndicates take advantage of the sensitive socio-economic dynamics in South Africa’s coastal communities for financial gain by recruiting local poachers and using highly organised networks to smuggle abalone to East Asia. The illegal trade in abalone is one significant factor that threatens the species’ survival, thus these criminal syndicates must be disrupted and their activities combated. This dissertation examines legal tools to do so.

During the 2nd International Symposium on Fisheries Crime it was pointed out that ‘given the inter-connected and complex nature a successful law enforcement approach to addressing these crimes cannot focus exclusively on one type only; rather, what is required is a coordinated criminal law enforcement response at the domestic and international level that recognises the wide variety of forms fisheries crime can take’¹. This extends beyond the scope of fishing offences and is rooted in the use of all potentially applicable laws. This dissertation examines the applicability of the *Marine Living Resources Act 18 of 1998*, the *Prevention of Organised Crime Act 121 of 1998*, the *Customs and Excise Act 91 of 1964* as well as the *Prevention and Combating of Corrupt Activities Act 12 of 2004* to the abalone and trafficking crisis. The aim is to assess the South African legal framework as well as existing case law to determine how South Africa’s courts have approach the prosecution of fisheries crime to date in order to arrive at suggestions to combat abalone poaching and trafficking in the future.

¹ ‘Outcome of the 2nd International Symposium on Fisheries Crime’ at 2.

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Abbreviations

AFU	Asset Forfeiture Unit
APF	Abalone Processing Facilities
CEA	<i>The Customs and Excise Act 91 of 1964</i>
CITES	<i>Convention on International Trade in Endangered Species of Wild Fauna and Flora</i>
CPA	Criminal Procedure Act 51 of 1977
DAFF	Department of Agriculture, Fisheries and Forestry
DEA	Department of Environmental Affairs
EMI	Environmental Management Inspectorates
FAO	The Food and Agriculture Organisation of the United Nations
FCO	Fisheries Control Officers
ISMFR	International Symposium on Marine and Fisheries Research
ISS	Institute for Security Studies
IUCN	International Union for Conservation of Nature
IUU Fishing	Illegal, Unreported and Unregulated Fishing
MLRA	<i>The Marine Living Resources Act 18 of 1998</i>
MCM	Marine and Coastal Management
MCS	Monitoring, Control and Surveillance
NEMA	<i>The National Environmental Management Act 107 of 1998</i>
NDPP	National Director of Public Prosecutions
NISCWT	National Integrated Strategy to Combat Wildlife Trafficking
NPA	National Prosecuting Authority
PCCA	<i>The Prevention and Combating of Corrupt Activities Act 12 of 2004</i>
POCA	<i>The Prevention of Organised Crime Act 121 of 1998</i>
TAC	Total Allowable Catch

TRAFFIC	The Wildlife Trade Monitoring Network
SANBI	South African National Biodiversity Institute
SAPS	South African Police Service
SARS	South African Revenue Service
SCA	Supreme Court of Appeal
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
WWF	World Wildlife Fund

CHAPTER 1: INTRODUCTION

1.1 Statement of Problem

Around the globe the fisheries sector offers ample opportunities to alleviate poverty, hunger and malnutrition, generate economic growth and ensure better use of natural resources.² Fisheries make significant contributions in terms of employment, food security and nutrition as well as trade for developing countries.³ An estimated 57 million people worldwide rely on small-scale fisheries and aquaculture for their livelihoods⁴ and fish continues to be a cheap source of protein for the poor.⁵ The Food and Agriculture Organization of the United Nations (FAO) estimates that world fish consumption will increase by 19 % by 2026, noting that fish consumption will increase more strongly in developing countries.⁶ The trade in fish and fisheries products continues to be of integral importance to government revenues and developing countries remain the primary exporters of fish and fisheries products.⁷

South Africa's marine environment is shaped by two great currents: the cold Benguela current on the west coast and the warm Agulhas current on the east coast.⁸ These two currents contribute to the high levels of marine biodiversity and endemic species which support diverse artisanal and commercial fisheries along South Africa's 3000km long coastline.⁹ The fisheries sector in South Africa comprises 22 commercial fisheries sector and is worth around R6 billion yearly.¹⁰ Some 27000 South Africans are directly employed in the commercial sector and thousands more depend on fishery resources for food and the basic needs of life.¹¹

² Food and Agricultural Organisation of the United Nations (FAO) 'The State of World Fisheries and Aquaculture' (2016); the United Nations (UN) has recognised the importance of fisheries in sustainable development and dedicated Sustainable Development Goal (SDG)14 to 'conserve and sustainably use the oceans, seas and marine resources for sustainable development, see: UN 'Transforming our World: The 2030 Agenda for Sustainable Development' Resolution A/Res/70/1 adopted by General Assembly on 25 September 2015.

³ C Finegold 'The importance of fisheries and aquaculture to development' in P Wramner et al (eds) *Fisheries, Sustainability and Development* (2009) 353 -364.

⁴ Ibid at 354.

⁵ Beveridge, M et al 'Meeting the food and nutrition needs of the poor: the role of fish and the opportunities and challenges emerging from the rise of aquaculture' (2013) 83 *Journal of Fish Biology* at 1068.

⁶ OECD-FAO 'Agricultural Outlook 2017-2026' available at <http://www.fao.org/in-action/globefish/news-events/details-news/en/c/1032635/>, accessed on 16 January 2018

⁷ Ibid

⁸ WWF-SA 'Fisheries: Facts and Trends South Africa' (2011) *WWF Reports* at 3 - 4.

⁹ Ibid at 3.

¹⁰ J Duncan et al 'Ocean facts and futures: Valuing South Africa's ocean economy' (2016) *WWF Report* at 11.

¹¹ Ibid at 9.

A significant threat to the opportunities that the fishery sectors offer is the overexploitation of marine resources; 42% of South African fish stocks are over-exploited.¹² The overexploitation of South Africa's marine resources impacts negatively on livelihoods and income results in loss of potential food protein and causes the loss of the traditional fishing culture associated with South Africa's coastal communities.¹³ The illegal exploitation of fisheries deprives local governments of highly valuable resources.¹⁴ One of the most overexploited marine resources is the South African abalone.¹⁵

1.1.1 South Africa's abalone fishery

The abalone is a type of large sea snail with a flat shell and out of the five species of abalone found in South Africa only one, namely the *halitotis midea*, is commercially exploited.¹⁶ It is locally known as 'perlemoen' or referred to as 'white gold' and is endemic to the coastal waters of South Africa.¹⁷ The abalone is particularly vulnerable to over-exploitation: First, the abalone occupies the shallow inshore waters from Cape Columbine on the west coast to Port St Johns in the Eastern Cape, usually occurring in waters less than 10 metres deep.¹⁸ Thus, it is relatively easy to access the abalone. Moreover, the abalone grows slowly and reaches sexual maturity at around seven years of age.¹⁹ These biological factors, coupled with the high demand from Asia, especially mainland China and Hong Kong, render the abalone vulnerable to the impacts of over-harvesting.²⁰ In Asia the abalone is sought after from upmarket restaurants and is served as delicacy on important occasions.²¹

South Africa's commercial abalone fishery dates back to the late 1940s.²² It was initially run on an open-access basis but was soon regulated through catch licenses starting in 1954.²³ However, the catch licenses did not prescribe a catch nor size limit for abalone. The lack of regulation in combination with increasing demand for abalone from key importer countries led to unsustainable

¹² Ibid at 3.

¹³ Ibid at 12.

¹⁴ Andre Standing 'Criminality in Africa's fishing industry: a threat to human security' (2017) *Africa Security Brief* No 33 at 4.

¹⁵ J Duncan et al 'Ocean facts and futures: Valuing South Africa's ocean economy' (2016) *WWF Report* at 12.

¹⁶ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

¹⁷ WWF-SA 'Fisheries: Facts and Trends South Africa' (2011) *WWF Reports* at 12.

¹⁸ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

¹⁹ South African National Biodiversity Institute (SANBI) 'South African abalone' (2015) available at <https://www.sanbi.org/creature/south-african-abalone>, accessed on 13 December 2017

²⁰ Ibid

²¹ Lambrechts D and Goga K, 'Money and Marginalisation: The Lost War Against Abalone Poaching in South Africa' (2016) 45 *South African Journal of Political Studies* at 234.

²² Ibid at 234 – 235.

²³ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

levels of abalone harvesting in 1965.²⁴ The declining abalone stocks forced the state to impose limitations and quotas on trade; notably these limitations were motivated not only by poaching activities but also environmental reasons including encroachment of predators.²⁵ Due to these concerns, restrictions were implemented since 1968, with the total quota steadily being reduced. During the 1990s the poaching of abalone started to take off and abalone became a commodity traded by gangs.²⁶ In the following years the state attempted to manage the declining abalone stocks and related poaching thereof. In 2001 subsistence fishing rights were replaced with limited commercial fishing rights and in 2003 the recreational fishery of abalone was closed.²⁷ In the early 2000s abalone poaching rose to crisis levels and thus the state attempted to curb the decline of abalone stocks. In 2008 the commercial fishery of abalone was closed as well but soon re-opened. In 2003/2004 a new abalone policy was adopted that entailed commercial rights for abalone being issued for 10 years. Besides those measures, South Africa has undertaken other efforts to manage declining stocks as early as the 2000s with enforcement operations such as Neptune which was followed by Operation Trident, the 'Green Scorpions' and the establishment of an environmental court in Hermanus.²⁸ However, these efforts were closed down with the state claiming budget constraints despite their effectiveness which left many puzzled why those efforts were not prioritised.²⁹ The abolishment of the Hermanus environmental court is a great indication of a lack of political will to conserve South Africa's fast depleting marine resources.³⁰ The survival of the abalone remains threatened and poaching is one of the key drivers.³¹

Abalone poaching, namely the physical act of unauthorized removal of abalone from the seafloor and arranging for its onwards sale, threatens the survival of the abalone. It is estimated that illegal harvesting of abalone from South African shores comprise more than 90% of the total abalone

²⁴ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

²⁵ Lambrechts D & Goga K, 'Money and Marginalisation: The Lost War Against Abalone Poaching in South Africa' 2016 (45) *South African Journal of Political Studies* at 236.

²⁶ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

²⁷ *Ibid* at 2.

²⁸ Lambrechts D and Goga K, 'Money and Marginalisation: The Lost War Against Abalone Poaching in South Africa' 2016 (45) *South African Journal of Political Studies* P 238.

²⁹ *Ibid* at 238.

³⁰ P Snijman 'Hermanus' Environmental Court: does it protect the environment?' (2005) 12 *News and Views for Magistrates* at 2.

³¹ This dissertation focuses on the poaching and trafficking of abalone, however it is necessary to mention that there are other contributing factors for the decline of abalone stocks in South African waters; the inward migration of a lobster species destroys abalone territory is attributed to the decline in shellfish's numbers. See: Liwalam Madikiza 'Review and analysis of the status of abalone (*haliotis midae*) fishery in South Africa' (2012) United Nations University, Fisheries Training Programme at 26 -30.

production and is estimated at a value of R1 billion.³² The increase in abalone poaching is attributed to four factors.³³ Firstly, the weakening of the South African rand against the US dollar in the 1990 created favourable conditions for those trading commodities in dollars. The costs of poaching, concealing and shipping of abalone are paid in Rands, whereas on Asian markets the already valuable abalone is sold in dollars, meaning that abalone was a proverbial gold mine.³⁴ Secondly, the pre-existing presence of large and efficient Chinese organised crime networks contributed to abalone trafficking as illicit trade routes between South Africa and East Asia were already firmly established.³⁵ A third enabling factor for the rise in abalone poaching and trafficking is the difficulty to effectively control South Africa's borders. The difficulty of devising and executing border controls, especially at commercial ports, remains a challenge.³⁶ Fourthly, Steinberg identifies the 'mutation in the socio-political identities of the coloured fishing communities on the abalone-rich shoreline during South Africa's transition to democracy' as a necessary condition for the rise of the illicit abalone market.³⁷ During apartheid, the commercial abalone rights were reserved for white individuals, which left the non-whites in the role of providing cheap labour.³⁸ Poaching of abalone started to thrive in coastal communities and many frustrated with 'on the one hand the expectation that democracy ought to be coupled with the speedy implementation of a just fishing regime and on the other hand a deeply held suspicion that the new government would betray the working class'.³⁹ These factors combined provided an environment in which abalone poaching became a lucrative illicit trade.

Organised criminal syndicates operate the illicit trade in abalone.⁴⁰ The syndicates take advantage of the sensitive socio-economic dynamics for their own financial gain by recruiting poachers from local communities who feel distanced from the government and feel entitled to extract the abalone for their livelihoods and nutrition.⁴¹ The local poachers become part of highly organised networks that eventually smuggle the abalone to East Asia, where high profits can be made from the

³² Parliament of the Province of the Western Cape 'Report of the Standing Committee on economic opportunities, tourism and agriculture on the public hearings held to determine the impact of abalone poaching on small-scale fishing communities in the Western Cape, dated 14 June 2017' (2017)

³³ Raemaekers, S et al 'Review of the causes of the rise of the illegal South African abalone fishery and subsequent closure of the rights-based fishery' (2011) 43 *Ocean & Coastal Management*.
Steinberg J 'The illicit abalone trade in South Africa (2005) *ISS Paper 105*

³⁴ Steinberg J 'The illicit abalone trade in South Africa (2005) *ISS Paper 105* at 2.

³⁵ *Ibid* at 3.

³⁶ *Ibid* at 4.

³⁷ *Ibid* at 2.

³⁸ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 3.

³⁹ Steinberg J, 'The illicit abalone trade in South Africa' 2005 *Institute for Security Studies* at 6.

⁴⁰ Raemaekers, S et al 'Review of the causes of the rise of the illegal South African abalone fishery and subsequent closure of the rights-based fishery' (2011) 43 *Ocean & Coastal Management*; P Gastrow 'Triad Societies and Chinese organised crime in South Africa' (2001) *ISS Paper No 41*

⁴¹ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

valuable resource.⁴² Abalone poaching and related trade is often perpetrated by organized criminal networks that are involved in a number of associated criminal activities⁴³, such as money laundering, tax evasion, drug or human trafficking and corruption. Despite past efforts to combat abalone poaching, the criminal syndicates continue to make profits from illegally sourcing and trading abalone. They are driven by the high demand for the valuable delicacy from Asia.⁴⁴ The illegal trade in poached abalone presents a significant loss in revenues for South Africa. To illustrate, it is estimated that the loss per annum ranges somewhere between R500 million and R1 billion.⁴⁵

1.2 Relevance of the study

The relevance of this study lies in the fact that the state of abalone resources is critical. The abalone stocks have been declining over the last decade.⁴⁶ Poor fisheries management, ecological conditions and poaching have contributed to the current abalone crisis.⁴⁷ The World Wildlife Fund (WWF) estimates that 95% of the abalone stocks in South Africa are being fished illegally.⁴⁸ The total allowable catch for abalone for the past three years has been less than 100 tons; however estimates reveal that around 3000 tons are harvested.⁴⁹ The South African abalone stocks are in decline and the depleted stocks cannot recover unless illegal fishing is dramatically reduced.

1.3. Research Questions

1. What types of crimes occur at each stage of the abalone value chain?
2. What legal tools are available to prosecutors to punish abalone poaching syndicates?
3. What opportunities arise from using the previously identified tools?

1.4 Scope of the research

The scope of this research is limited in three ways. Firstly, this dissertation will focus on abalone poaching and trafficking cases after 2003 as most legislative changes were made before 2003. Secondly, key features of abalone poaching can be categorized as opportunistic or highly organized.

⁴² De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

⁴³ Regan Thaw, 'WWF: 95% of abalone stocks from SA being fished illegally' *IOL* 15 February 2017 available at <http://ewn.co.za/2017/02/15/wwf-95-of-abalone-stocks-from-sa-being-fished-illegally>, accessed on 25 January 2018

⁴⁴ Lau, Wilson 'An Assessment of South African dried abalone *Haliotis midae* consumption and trade in Hong Kong' (2018) *TRAFFIC Report* at 29 – 41.

⁴⁵ M Bürgener 'Fisheries trade analysis- a tool in tackling illegal fishing and related trade' (2014) *TRAFFIC*

⁴⁶ Ibid

⁴⁷ Raemaekers, S et al 'Review of the causes of the rise of the illegal South African abalone fishery and subsequent closure of the rights-based fishery' (2011) 43 *Ocean & Coastal Management* at 433 -445.

⁴⁸ Regan Thaw, 'WWF: 95% of abalone stocks from SA being fished illegally' *IOL* 15 February 2017 available at <http://ewn.co.za/2017/02/15/wwf-95-of-abalone-stocks-from-sa-being-fished-illegally>, accessed on 25 January 2018

⁴⁹ Raemaekers, S et al 'Review of the causes of the rise of the illegal South African abalone fishery and subsequent closure of the rights-based fishery' (2011) 43 *Ocean & Coastal Management* at 434.

As opposed to opportunistic abalone poaching, the highly organized groups undertake both shore and boat-based poaching, are active within a wider geographic range, have higher capital investments as well as higher yields, use more expensive gear and high-powered vessels and have sophisticated counter-intelligence measures in place.⁵⁰ This dissertation will focus on the abalone poaching activities of highly organized groups. Thirdly, as mentioned above, the organised crime syndicates involved in abalone poaching and trafficking have strong links to other crimes. This dissertation will focus on offences that enable abalone poaching and subsequent trade, namely economic crimes such as corruption, tax fraud and money laundering. Other crimes that are linked to those syndicates, like drug or human trafficking, will not be addressed in this dissertation as they do not enable abalone poaching and trafficking *per se*.⁵¹

1.5 Methodology and structure of the dissertation

This dissertation is based on a desk-top study of relevant legislation, policies, regulations, jurisprudence as well as academic commentary relating to fisheries crime and particularly abalone poaching and trafficking. The main purpose of this study is to identify and assess the legal tools available to prosecute syndicates involved in abalone poaching and trafficking. Having provided an introduction to South Africa's abalone sector, this chapter is divided into a further four chapters.

Chapter 2 explains the theoretical underpinning of this dissertation. It describes abalone poaching and trafficking in the context of transnational environmental crime and the paradigm shift towards recognising the transnational and organised nature of 'fishery crime'. For this purpose the chapter relies on international sources, namely publications by the *United Nations Office on Drugs and Crime*.

Chapter 3 constructs a profile of abalone poaching and trafficking. Considering the difficulty of describing the exact *modus operandi* of criminal syndicates involved in abalone poaching, this chapter relies on existing research by non-governmental organisations (such as TRAFFIC and the Institute for Security Studies (ISS)), government publications and newspaper articles. Using a textual analysis approach this chapter describes the methods used to poach and traffic abalone and identifies the actors that are involved as well as their level of sophistication. The chapter serves the purpose to identify the crimes that are committed in order to poach and traffic abalone and highlights the inter-dependence of these crimes.

⁵⁰ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

⁵¹ The link between organised crime in the fishing industry and trafficking of persons and drugs has been well documented; see: UNODC 'Transnational organised crime in the fishing industry: focus on: trafficking in persons, smuggling of migrants, illicit drug trafficking' (2011)

Chapter 4 provides an overview of the regulatory framework related to abalone poaching and trafficking and identifies the tools available to prosecute those activities. This includes South African legislation dealing with offences that enable the poaching and trafficking of abalone and analyses case law dealing with the identified provisions. Essentially, this chapter applies the relevant legislation to the conduct identified in chapter 3 and examines to which players along the abalone value chain the provisions apply. Furthermore, the chapter examines the approach South African courts have taken towards punishing abalone poachers and traffickers by analysing case law relating to offences identified in the first part of the chapter.

Chapter 5 assesses the provisions and legal tools identified in Chapter 4. This chapter identifies strengths, weaknesses, threats and opportunities of using each legal tool and concludes this dissertation by providing suggestions for the way forward. The analysis is guided by the 'Wildlife and Forest Crime Analytic Toolkit'.⁵² The aim of the toolkit is to provide comprehensive guidance in analysing administrative preventive and criminal justice responses to inter alia wildlife crime and other related offences.⁵³

⁵² United Nations Office on Drugs and Crime (UNODC) 'Wildlife and Forest Crime Analytic Toolkit' (2012).

⁵³ Ibid at 4.

CHAPTER 2: ABALONE POACHING AND TRAFFICKING IN THE CONTEXT OF TRANSNATIONAL ORGANISED ENVIRONMENTAL CRIME

Abalone poaching and trafficking needs to be understood in its broader context as a transnational organised environmental crime. As this dissertation aims to critically assess legal tools available to prosecute those who poach and smuggle abalone, it is important to examine abalone poaching and trafficking as part of a bigger picture, rather than examine it in isolation.

2.1 Transnational environmental crime

A good starting point would be to look at the elements of transnational organised environmental crime individually. There is no universally agreed upon definition of environmental crime, though it is commonly understood to cover illegal activities that harm the environment and are aimed at benefitting individuals or groups or companies from the exploitation of, damage to, trade or theft of natural resources, including but not limited to serious crimes and transnational organised crime.⁵⁴ Environmental crime has been rising at astonishing rates over the past decade and brings disastrous consequences: the environment is the very foundation of sustainable development, peace and security and vastly expanding crimes against the environment endanger wildlife populations, ecosystems, sustainable livelihoods and revenue streams to governments.⁵⁵ Environmental crime can be a cross-border crime, in other words transnational, in different circumstances. This includes that environmental crime can involve international commodities that are trafficked illegally from one part of the world to another.⁵⁶ This phenomenon is generally referred to as wildlife crime.

2.1.1 Wildlife crime

One category of environmental crime is wildlife crime, which often involves the trade in wildlife.⁵⁷ Defining wildlife crime is difficult as every country affords its wildlife protection in different ways.⁵⁸ However, wildlife crime has been understood to comprise a ‘myriad of diverse and sometimes overlapping offences from hunting, processing, exporting and importing, trafficking, supplying, to receiving, possessing and consuming fauna and flora’.⁵⁹ Wildlife crime is increasingly been recognised as a transnational and organised crime as a good deal of attention has been paid to the

⁵⁴ UNEP ‘The Rise of Environmental Crime: A growing threat to natural resources, peace, development and security’ (2016) at 17 – 24.

⁵⁵ Ibid at 39.

⁵⁶ Ibid at 17.

⁵⁷ Ibid at 20.

⁵⁸ UNODC ‘World Wildlife Crime Report: Trafficking in protected species’ (2016) at 23.

⁵⁹ UNODC ‘Wildlife and Forest Crime Analytic Toolkit’ (2012) at 34.

links between illegal wildlife trade and professional criminal groups.⁶⁰ This link makes it necessary to examine wildlife crime in the context of transnational and organised crime.

2.2 Transnational Crime

On the international level, the *United Nations Convention Against Transnational Organised Crime*⁶¹ defines an organised criminal groups as a ‘structured group or three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain or directly or indirectly, a financial or other material benefit’.⁶² A ‘serious crime’ is any crime that is punishable by four or more years in prison and a ‘structured group’ does not need to have formally defined roles for its members, continuity of its membership or a developed structure’⁶³. This definition highlights that essentially any pattern of profit –motivated, serious criminal activity can be considered an organised crime and transnational wildlife crime trade fulfils these criteria if the penalties of the country in question are sufficiently high.

The participants of the 2nd International Symposium on Fisheries Crime⁶⁴ used this definition to suggest that ‘fisheries crime should be treated as a transnational organised crime as long as it carries the elements of (i) a structured group, (ii) committing serious crime – an offence punishable by a maximum deprivation of liberty of at least 4 years or more, (iii) gaining material/financial benefit or profit-oriented, (iv) activities done in more than one country.’⁶⁵

2.3 Transnational organised wildlife crime in South Africa

As concerns transnational organised wildlife crime, South Africa has recognised that ‘until now, the low risk associated with environmental crime in South Africa and across the world has provided a relatively safe environment for criminal networks in which to operate. Taking advantage of the complexity of this type of crime, criminals operating internationally have significantly benefited and thrived while the international law enforcement community has only recently started to effectively address these crimes’.⁶⁶

⁶⁰ UNODC ‘World Wildlife Crime Report: Trafficking in protected species’ (2016) at 23.

⁶¹ *United Nations Convention Against Transnational Organised Crime*, Resolution 55/25 adopted by General Assembly in 2000.

⁶² *Ibid* s(2)(a)

⁶³ *Ibid* s(2)(b)

⁶⁴ International Symposium on Marine and Fisheries Research (ISMFR) 2nd Symposium held on 10-11th October in Yogyakarta, Indonesia.

⁶⁵ Commission on Crime Prevention and Criminal Justice ‘Outcome of the 2nd International Symposium on Fisheries Crime’ (E/CN.12/2017/CRP.3) para 13.

⁶⁶ National Integrated Strategy to Combat Wildlife Trafficking (NISCWT) at 15.

Wildlife crime is viewed as a form of transnational organised crime with particularly negative impacts on conservation and security⁶⁷. Transnational organised criminal networks have been operating in South Africa since the 1990s and have led to a significant escalation in the poaching and trafficking of the country's wild resources that are being sold on illicit markets in other parts of the world. According to South African legislation⁶⁸, organised crime constitutes and is committed by a (a) by a person, group of persons or syndicates acting in (i) an organised fashion; or (ii) a manner which could result in substantial financial gain for the person, group of persons or syndicate involved (e) in respect of the hunting, importation, exportation, possession, buying and selling of endangered species or any product thereof as may be described (f) in more than one province or outside the borders of the Republic by the same perpetrator or perpetrators, and in respect of which the prevention at national level would be in the national interest.⁶⁹

The *National Integrated Strategy to Combat Wildlife Trafficking*⁷⁰ (NISCWT) was adopted with the vision of a 'well-resourced and implemented integrated, multidisciplinary and consolidated law enforcement approach to break the illicit value chain of wildlife trafficking in South Africa and beyond'.⁷¹ The policy document recognises wildlife trafficking as a national security threat and declares the trafficking of abalone a priority taxon over the first five years of the NISCWT's implementation plan.⁷² Its primary goal is to 'direct law enforcement structures in South Africa and empower them with the necessary means to prevent the increasing scourge of wildlife trafficking, in the country itself and abroad'.⁷³ In order to achieve this goal, the NISCWT sets out three strategic goals, the first of which is to improve law enforcement to effectively investigate, prosecute and adjudicate wildlife trafficking as a form of transnational organised crime.⁷⁴

The recognition of wildlife crime as both an environmental and transnational security issue has two implications: firstly, the transnational dimension of wildlife crime implies that no state can tackle the crime on its own.⁷⁵ Secondly, a comparison to other transnational organised crimes can offer insights on how to address and combat wildlife crime.⁷⁶

⁶⁷ Ibid

⁶⁸ South African Police Service Act 68 of 1995

⁶⁹ South African Police Service Act 68 of 1995 s(16)

⁷⁰ National Integrated Strategy to Combat Wildlife Trafficking (NISCWT) Securing South Africa's Wildlife Heritage: Breaking Illicit Value Chain of Wildlife Trafficking (2017).

⁷¹ Ibid at 20.

⁷² Ibid at 39.

⁷³ Ibid at 13.

⁷⁴ Ibid at 21.

⁷⁵ O Biegus & Bueger C 'Poachers and pirates: Improving coordination of the global response to wildlife crime' (2017) 60 SA Crime Quarterly at 29.

⁷⁶ Ibid

2.3.1 South Africa: Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES)

South Africa has recognised the need to address wildlife crime. This follows the international trend to take matters of wildlife crime seriously. On an international level, the emerging threat of poaching and trafficking has long been recognized but the global wildlife crime regime is still developing. The *Convention on International Trade in Endangered Species of Wild Fauna and Flora*⁷⁷ (CITES) is a cornerstone of that regime. However, this regime is a trade agreement and as such not primarily concerned with the conservation or protection of species. South Africa is a party to CITES. The provisions of CITES aim to ensure that international trade of wild species of flora and fauna does not threaten their survival by imposing certain trade controls. Species covered by CITES are listed in one of its three appendices according to the degree that the species is threatened by international trade and the level of protection the species requires. The appendix dictates the measures of control that is afforded to a species. Appendix I lists species threatened with extinction, meaning that trade in these species is only permitted in exceptional circumstances.⁷⁸ Appendix II includes species that are not necessarily threatened with extinctions but in which trade must be controlled in order to avoid utilization incompatible with their survival.⁷⁹ The last Appendix, III, contains species that are listed in at least one country which has asked that other CITES Parties assist with controlling trade in that species.⁸⁰ Essentially CITES provides a baseline framework on how member states should regulate wildlife trade and manage the commonly agreed limitations.

Among the efforts to combat abalone poaching and trafficking, South Africa listed the *H. midae* in CITES's appendix III in 2007 which contains species that are protected at least in one country and asks other countries for assistance in controlling the trade. In listing the abalone in Annex III, all legal abalone exports leaving the country are required to be issued a permit by the South Africa's CITES Management authority. However, the effort was fruitless since in 2010 the abalone was delisted, despite increased levels of illegal poaching, due to difficulties in the implementation.⁸¹ Therein lies the flaw with CITES: if wildlife is not listed under CITES and is taken illegally from one country and transported to another. The protected species lists of most countries are limited to domestic species,

⁷⁷ *Convention on International Trade in Endangered Species of Wild Fauna and Flora* signed at Washington, D.C., on 3 March 1973. South Africa ratified the convention on 15/07/1975.

⁷⁸ CITES s(III)

⁷⁹ CITES s(IV)

⁸⁰ CITES s(V)

⁸¹ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 8.

meaning that there is no legal basis in the national law of the importing country to challenge the import or sale of the species in question.

2.4 Fisheries crime as part of wildlife crime

In most literature, offences relating to fisheries are examined separately to wildlife crime. For instance, Illegal, Unreported and Unregulated (IUU) fishing is considered an environmental crime. The commercial fishing industry is made up of a complex web of actors and fisheries that deal with ship registries, fish licensing authorities, fishers, fish processing workers, fish processing plants owners and operators, fleet suppliers, refuelling service providers, recruitment agencies, fisher trades and wholesalers as well as fish distributors.⁸² The complexity of the fisheries sector also means that the fisheries value chain is non-linear.⁸³ The fisheries value chain encompasses different stages: preparation, fishing, processing, landing, transporting and finally the sale. During each stage different actors are relevant. The advantage of examining the fisheries sector using the value chain and different stages thereof is that it highlights that different types of criminal offences occur at each stage and are perpetrated by different actors. This can shed light on potential opportunities for law enforcement interventions throughout the fisheries sector.⁸⁴

Along the fisheries value chain different types of crimes are committed and these crimes enable the illegal fishing and subsequent trade in illegally-sourced fish. Generally speaking, the main types of crimes that occur are fraud, forgery, corruption, tax crime and money laundering. According to the UNODC fraud and forgery as well as corruption are committed throughout the fisheries value chain.⁸⁵ Money laundering and related tax crimes on the other hand occur at the later stages of the value chain, namely during the sale. Notably, during the transportation stage other crimes might occur. The criminal syndicates that are involved in fisheries crimes might also be involved in drug trafficking or human trafficking.⁸⁶ The inter-dependence of the crimes signifies the shift from regarding illegal fishing as a fisheries management problem to considering it a 'fisheries crime'.⁸⁷

⁸² UNODC 'Stretching the Fishnet: Identifying Opportunities to Address Fisheries Crime' (2017) at 8 -9.

⁸³ *Ibid* at 9.

⁸⁴ *Ibid*

⁸⁵ *Ibid*

⁸⁶ UNODC 'Transnational organised crime in the fishing industry: focus on: trafficking in persons, smuggling of migrants, illicit drug trafficking' (2011)

⁸⁷ E de Coning & E Witbooi 'Towards a new 'fisheries crime' paradigm: South Africa as an illustrative example' (2015) 60 *Marine Policy* at 210.

2.4.1 From an IUU fishing paradigm towards a ‘fisheries crime’ paradigm

Fisheries crime remains an ill-defined legal concept.⁸⁸ A starting point to understand the complexity of the concept is to contrast it from IUU fishing. Fishery crime is not to be confused with the concept of IUU fishing. According to the UNODC the discussion of illegal activities in the fishing sector and the devising of legal mechanisms to combat the activities has taken place within the framework of IUU fishing.⁸⁹ The term IUU fishing was defined by the FAO and covers a number of activities⁹⁰: illegal fishing refers to activities that violate the national laws or international obligations relevant to fisheries management and can be conducted by national as well as foreign vessels in the waters under the jurisdiction. Unreported fishing refers to activities that have not been reported or have been misreported to the relevant national authorities in contravention of national laws. Unregulated fishing refers to activities that are in the area of application of a relevant regional fisheries management organisation that are conducted by vessels without a nationality or in areas (or fish stocks) in relation to which there are no applicable conservation or management measures. Unregulated fishing also refers to fishing activities that are conducted in a manner inconsistent with state responsibilities for the conservation of living marine resources under international law.⁹¹ Notably, unreported and unregulated fishing is not necessarily an illegal activity.

It can be argued that ‘by far the most dominant paradigm to date internationally and in South Africa has been to address illegal fishing through an IUU lens’.⁹² In some jurisdictions ‘fisheries offences in domestic jurisdictions have traditionally been regarded as conservation or fisheries management problem, rather than a criminal concern, which attracts relatively lenient administrative sanctions’.⁹³ Traditionally, the South African fisheries management relied on single-species quotas of which the total allowable catch is allocated in portions to commercial, recreational and small-scale with fishing rights. On a legislative and policy level illegal fishing was understood as those activities that circumvent the rules concerning management and conservation of fish stocks.⁹⁴ In some instances these activities are considered a ‘crime’ under national law. South Africa is relative unique in that

⁸⁸ UNODC ‘Fisheries Crime: transnational organised criminal activities in the context of the fisheries sector’ (2016) at 2.

⁸⁹ Ibid

⁹⁰ UN FAO ‘International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing’ (2001)

⁹¹ Ibid s(3)

⁹² E de Coning & E Witbooi ‘Towards a new ‘fisheries crime’ paradigm: South Africa as an illustrative example’ (2015) 60 *Marine Policy* at 211.

⁹³ UNODC ‘Fisheries Crime: transnational organised criminal activities in the context of the fisheries sector’ (2016) at 3.

⁹⁴ E de Coning & E Witbooi ‘Towards a new ‘fisheries crime’ paradigm: South Africa as an illustrative example’ (2015) 60 *Marine Policy* at 209.

most violations of the *Marine Living Resources Act of 18 of 1998* amount to a criminal offence.⁹⁵ The primary traditional government response to combatting illegal harvesting domestically has been to increase compliance and enforcement mechanisms. As concerns abalone poaching, these compliance and enforcement mechanisms included the establishment of the environmental court and increased inshore patrolling.⁹⁶ These measures, which are rooted in a fisheries management approach, were implemented despite evidence that abalone poaching was largely perpetrated by organised groups.⁹⁷ In combination with factors that gave rise to the abalone poaching crisis, the government is unable to curb illegal abalone harvesting.

Arguably, there is a realignment of thinking in regards to how illegal is viewed and tackled in South Africa.⁹⁸ This is due to the strong drive to re-assess the nature of illegal fishing particularly in regards with its linked to transnational organised criminal activities.⁹⁹ In 2014, the FAO released a report on the state of world fisheries in which it is recognised that ‘the realities of corruption and organised crime, which add complexity to the task of combatting IUU fishing, need to be addressed through supplementary means extending beyond the realm of fisheries control and enforcement’.¹⁰⁰ In this line of thinking, de Coning and Witbooi argue that ‘it is arguable that this alternative realm comprises the criminal law and procedure sphere and that the ‘supplementary means’ referred to constitute the additional investigation and enforcement tools that this realm brings to the problem-solving table’.¹⁰¹ They suggest that ‘ideally illegal fishing should this be address from the realm of a comprehensive legislative and criminal justice system that takes adequate cognisance of the issues surrounding fisheries crime and that, accordingly, comprises the necessary legal and institutional tolls, as well as appropriately trained personnel, to ensure effective compliance, enforcement and sanctioning of the full range of illegal fishing activities’.¹⁰²

The paradigm shift towards ‘fisheries crime’ presents a new approach towards addressing illegal fishing that seeks to put the illegal fishing activities in a broader realm of crime and criminal justice.¹⁰³ As ‘the inability of the traditional model to date to curb illegal of fishing ... might be remedied by taking a broader view of illegal activities associated with the fishing sector and drawing

⁹⁵ Ibid at 211.

⁹⁶ Ibid at 212.

⁹⁷ Ibid

⁹⁸ Ibid

⁹⁹ Ibid

¹⁰⁰ FAO ‘The State of World Fisheries and Aquaculture: Opportunities and Challenges’ (2014)

¹⁰¹ E de Coning & E Witbooi ‘Towards a new ‘fisheries crime’ paradigm: South Africa as an illustrative example’ (2015) 60 *Marine Policy* at 210.

¹⁰² Ibid at 210.

¹⁰³ Ibid 214.

on the strength of a more crime-based investigate approach to the problem'.¹⁰⁴ Thus, in contrast to IUU fishing, fisheries crime includes a range of serious offences committed along the entire fisheries value chain.¹⁰⁵ It is not only associated with fishing *per se* but extend to a wide variety of criminal offences such as corruption, document fraud, tax evasion and money laundering.¹⁰⁶ The various types of offences enable illegal fishing and as such undermine the vital role of fisheries sectors by depriving states of valuable sources of income. In the context of abalone poaching and trafficking, as in many other practical scenarios, the concepts of IUU fishing and fisheries crime overlap: an illegal fishing offence in the IUU fishing context, i.e. fishing without a license, constitutes a fisheries crime in combination with other criminal offences along the fisheries value chain, i.e. corruption or document fraud.

Fisheries crime is a multifaceted phenomenon that has an important transnational element.¹⁰⁷ The nature of the fisheries sector renders it vulnerable to organised criminal activity due to its transnational element and the associated law enforcement challenges combined with weak regulatory regime.¹⁰⁸ The transnational aspect of fisheries crime can derive from the nationality of the fisheries, the flag or the vessel, the water in which the fisheries crime takes place, the port where the vessel docks or where the catch is landed. Organised criminal syndicates are drawn to the fisheries sector because of its high potential profit on one hand and the low risk of enforcement. The link between the fisheries sector and transnational organised crime is twofold¹⁰⁹: firstly, major transnational organised criminal groups may be directly involved in the fisheries crime by engaging in large-scale organised fishing activities or widespread document fraud, corruption or money laundering. Secondly, seemingly compliant transnational fishing operators may engage in parallel criminal activities, in other multi-level business operations can engage in laundering illegally caught fish by mixing them with the legally sourced products and selling them through legitimate trading relationships.¹¹⁰ Fisheries crime is complex with organised criminal networks employing constantly changing business models and *modus operandi*.¹¹¹

¹⁰⁴ Ibid at 214.

¹⁰⁵ UNOCD 'Stretching the fishnet: identifying opportunities to address fisheries crime' (2017) at 11.

¹⁰⁶ Ibid at 11.

¹⁰⁷ Ibid at 12.

¹⁰⁸ UNODC 'Fisheries Crime: transnational organised criminal activities in the context of the fisheries sector' (2016) at 4.

¹⁰⁹ UNOCD 'Stretching the fishnet: identifying opportunities to address fisheries crime' (2017) at 12.

¹¹⁰ Ibid

¹¹¹ UNODC 'Fisheries Crime: transnational organised criminal activities in the context of the fisheries sector' (2016) at 4.

2.4.2 Implications of the paradigm shift towards ‘fisheries crime’ on enforcement

There are considerable challenges in prosecuting fisheries crime. Fundamentally, there is the issue that some crimes related to fisheries have been regarded as conservation or fisheries management problems rather than a criminal concern. These would be addressed with lenient sanctions and increased monitoring, control and surveillance (MCS) meaning that enforcement has been confined to the fisheries sector.¹¹² Furthermore, there are considerable challenges in investigating and prosecuting fisheries crime.

UNODC states that the largest single challenge is to ‘get an agency to investigate and regard fisheries crimes as important’.¹¹³ In regards abalone poaching is arguably a crime ‘without a face’ in contrast to rhino poaching and receives far less attention from media campaigns, funders and researchers’.¹¹⁴ The enforcement agencies, namely police forces, tax authorities or anti-corruption bodies have limited budgets and resources, meaning that priorities need to be set. The crimes that are perceived as most serious will be set as priorities and in some countries crime linked to the fisheries value chain will not be investigated because it is not seen as a major priority and it is difficult to investigate.¹¹⁵

The complex nature of fisheries crime hinders enforcement because fisheries crime rarely falls under the mandate of a single agency.¹¹⁶ The UNOCD identified that successful that a large number of successful cases against offenders of fisheries crimes are brought by anti- corruption authorities or the commercial arm of the police.¹¹⁷ Often if the conduct, that may lead to criminal charges, is identified the relevant authorities are satisfied with imposing administrative sanctions rather than reporting the case to a criminal authority.¹¹⁸ This highlights the importance of a high level of domestic cooperation.

2.4.3 Mandates of relevant agencies in South Africa

In South Africa, the fisheries management falls within the mandate of the Department of Agriculture, Fisheries and Forestry (DAFF) and its Fisheries Control Officers (FCO). Today, the DAFF is responsible for the coordinating functions for the protection and conservation of abalone

¹¹² Ibid at 2.

¹¹³ UNOCD ‘Stretching the fishnet: identifying opportunities to address fisheries crime’ (2017) at 28.

¹¹⁴ Lambrecht, Derica & Goga, Khalil ‘Money and Marginalisation: The lost war against abalone poaching in South Africa’ (2016) 43 *Politikon* at 231.

¹¹⁵ UNOCD ‘Stretching the fishnet: identifying opportunities to address fisheries crime’ (2017) at 28.

¹¹⁶ Ibid at 28.

¹¹⁷ Ibid at 28.

¹¹⁸ UNOCD ‘Stretching the fishnet: identifying opportunities to address fisheries crime’ (2017) at 29.

stocks.¹¹⁹ The DAFF's strategic plan from 2015/2016 to 2019/2020¹²⁰ aims to ensure the conservation, protection and rehabilitation and recovery of depleted and degraded natural resources as well as updating recovery plans for the abalone sector.¹²¹ During the harvesting, transporting and processing stage the following authorities are relevant: the national Department of Environmental Affairs (DEA) as well as provincial environmental departments employ Environmental Management Inspectorates (EMI).¹²² This network of environmental enforcement officials are tasked with enforcing environmental legislation and to do so are empowered to *inter alia* search premises, seize evidence and make arrests. As EMIs are not empowered to prosecute cases in court, they hand over all cases to the National Prosecuting Authority (NPA). EMIs are further supported by FOCs who also have extensive powers with and without warrants; including powers to enter and search fishing vessels, check fishing permits and seize specified property.¹²³

On the other hand, organised crime activities fall within the mandate of the South African Police Service (SAPS) who are supported in their task to enforce legislation by the Serious Organised Crime Investigation Units.¹²⁴ These Units are responsible for the prevention and investigation of projects relating to national as well as transnational organised crime related activities, including illegal abalone trade. For that purpose the Organised Crime Project Investigations allow for the application of cover and overt investigations to gather sufficient evidence against members of criminal syndicates. These Units operate with the objective to dismantle the functioning for criminal syndicates by prosecuting members and seizing their assets.

Additionally, money laundering and tax crimes fall within the mandate of the South African Revenue Service (SARS). SARS has the mandate to *inter alia* ensure optimal compliance with tax, customs and excise legislation and play a fundamental role during the trafficking stage as they oversee the facilitation of movements of goods and people entering and exiting the borders of South Africa.

Traditionally, there have been few coordinated efforts between these agencies but the prosecution of abalone poachers and traffickers requires close co-operation between environmental

¹¹⁹ The proclamation No 44 of 2009 transferred the administration, powers and functions of the MLRA from the Department of Environmental Affairs and Tourism (DEA) to the DAFF.

¹²⁰ DAFF '2015/16 to 2019/20 Strategic Plan' (2015)

¹²¹ *Ibid* at 36.

¹²² EMIs derive their mandate from the National Environmental Management Act 107 of 1998

¹²³ MLRA s(51)(1)

¹²⁴ The Directorate for Priority Crime Investigation is established under the *South African Police Service Act 68 of 1995* s(17)(c). It is often referred to as the 'Hawks'.

authorities and non-environmental agencies.¹²⁵ Law enforcement operations in terms of the fisheries crime paradigm necessitates a mind shift on the part of the main against involved in fisheries compliance.¹²⁶ This issue is somewhat addressed in the newly adopted policy in wildlife trafficking as one of its strategic objectives is to increase national, regional and international law enforcement collaboration and cooperation on combatting wildlife trafficking.¹²⁷ The policy sees the SAPS to play a key role in regional and international wildlife trafficking and combatting initiatives but makes reference only to the need to increase international collaborations rather than focusing on cooperation strategies within the SAPS, the SARS, the DAFF and the Serious Organised Crime Units.¹²⁸

2.5 Law enforcement responses to fisheries crime

The abalone fishery in South Africa has been recognised as one of the most difficult fisheries to manage due to the combination of its inshore nature, the adverse impacts of ecological factors on its stocks, its high value and the increasing organised black market trade in abalone.¹²⁹ Nevertheless, there are compelling arguments in favour of combatting abalone poaching and trafficking and identifying appropriate legal mechanisms to do so.

2.5.1 Motivation to combat abalone poaching and trafficking

The need to combat abalone poaching and trafficking is motivated by the economic, scientific and ecological as well as recreational importance of wildlife.¹³⁰ As an endemic species to the South African coast the communities consider abalone as a part of the environment they inherited and want to pass onto their children, thus the conservation of abalone also has ethical and moral aspects to it.

Besides South Africa's commitment to protect flora and fauna under CITES, the mandate can also be derived from the Constitutional environmental right. The South African Constitution contains the right to an environment not harmful to health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent ecological degradation, promote conservation and secure the ecologically sustainable development and use of natural resources while promoting economic and social development.¹³¹ The protection and realisation of this environmental right serves as motivation to

¹²⁵ E de Coning & E Witbooi 'Towards a new 'fisheries crime' paradigm: South Africa as an illustrative example' (2015) 60 *Marine Policy* at 213.

¹²⁶ *Ibid*

¹²⁷ NISCWT at 14.

¹²⁸ *Ibid* at 21.

¹²⁹ E de Coning & E Witbooi 'Towards a new 'fisheries crime' paradigm: South Africa as an illustrative example' (2015) 60 *Marine Policy* at 209.

¹³⁰ International Union for Conservation of Nature (ICUN) 'Wildlife and Criminal Law: Strengthening Legal Mechanisms to Combat Illicit Wildlife Trade' (2016) *Training Module Workbook* at 2.

¹³¹ Constitution s(24)

combat abalone poaching. The abalone is part of the environment that the Constitution mandates to protect¹³² but the current populations of abalone prove the stocks have degraded to near extinction, meaning that future generations will not be able to make use of this natural resource if poaching continues.¹³³ This highlights the need for conservation of abalone and from a legal perspective the effective prosecution of abalone poachers and traffickers can protect the environmental right.

2.6 Types of law enforcement responses

Three main types of law enforcement responses to transnational environmental crime have been identified: administrative, civil and criminal responses.¹³⁴ The nature of these responses varies and is based on different legal principles and systems of law. It is necessary to identify the different types of law enforcement responses as fisheries crimes along the abalone value chain are perpetrated by different actors, meaning that one type of response might be appropriate for conduct in one stage but another more effective for illegal conduct in another stage of the abalone value chain.

2.6.1 Administrative measures

Administrative measures, namely administrative sanctions are used for minor breaches or breaches that can be regulated by exercising a statutory authority without recourse to the court systems.¹³⁵ Therein is the advantage of administrative measures: they can resolve matters quickly and efficiently as they do not require court proceedings. However, administrative measures are perceived as a ‘soft option’¹³⁶ which can be a disadvantage if the wrongdoer is a repeat offender and the breach is serious. Yet, administrative responses might be appropriate where a regulator has frequent and on-going contact with a regulated entity.¹³⁷

2.6.2 Civil measures

Civil measures, also known as civil remedies or penalties, are commonly used when the regulator wishes the court impose a monetary or another form of order that is not available under administrative measures.¹³⁸ Civil action is prescribed by courts but civil action has some advantages

¹³² NEMA s(1) defines ‘environment’ to mean the surroundings within which humans exists and that are made up of inter alia micro-organisms, plants and animal life’

¹³³ Kimon de Greef ‘The abalone poacher’ Roads & Kingdoms 4 December 2016, available at <http://roadsandkingdoms.com/2016/the-abalone-poacher/>, accessed on 30 November 2017

¹³⁴ G Pink ‘Regulatory responses to transnational environmental crime: An overview of choices, challenges and culture’ in Sapens T, White R and Huisman W (eds) *Environmental Crime in Transnational Context: Global Issues in Green Enforcement and Criminology* (2016) at 104.

¹³⁵ Ibid 104.

¹³⁶ Ibid at105.

¹³⁷ Ibid at105.

¹³⁸ Ibid at106.

over criminal measures: the burden of proof for civil action is lower and there is greater flexibility which enables more innovative outcomes.¹³⁹

2.6.3 Criminal measures

Criminal measures, in other words criminal prosecution, are appropriate where the conduct in question is a more serious breach of legislation and the public expects a punishment. Generally, the South African fisheries management is based of single-species quotas of the total allowable catch are allocated in various sectors and access rights, or portions thereof are assigned in individual fishers. This also applies to the abalone sector. The evasion or circumvention of these rules is understood as illegal fishing which is prohibited by the *Marine Living Resources Act 18 of 1998*.¹⁴⁰ The violations of the MLRA amount to a criminal offence. Most legislation aimed at the protection of abalone contains that a failure to comply with its provisions constitutes an offence and prescribes maximum penalties to be imposed upon conviction. South African environmental legislation provides extensively for criminal sanctions but the use of criminal sanctions to punish environmental crime is often criticised.

2.6.3.1 Weaknesses of using criminal measures

There are inherent weaknesses of criminal sanctions. Firstly, the criminal sanctions require costly and time intensive processes. The reactive nature of criminal law is refers to criminal sanctions being designed to react to offences that have already been committed as such are not suitable to prevent damage to the environment. In other words, if the abalone has been poached already criminal sanctions cannot rehabilitate the situation. In some circumstances standards of proof can be difficult because proof of commission of an offence must be beyond reasonable doubt; procedural safeguards are additional obstacles to prosecution because due process can make criminal prosecutions time-consuming and cumbersome.¹⁴¹ South Africa faces another set of weaknesses in relation to criminal sanctions since its strained government resources lead to inadequate policing it is often court officials lack the expertise in environmental prosecutions. The lack of resources also makes investigations difficult as it undermines proper training and specialist scientific and expertise.¹⁴² There is a lack of public awareness when it comes to environmental crimes in South Africa and this lack of environmental ethos is exacerbated by the low profile of abalone poaching.¹⁴³

¹³⁹ Ibid at 106.

¹⁴⁰ *Marine Living Resources Act 18 of 1998*

¹⁴¹ Kidd M, *Environmental Law* 2nd ed (Cape Town, Juta & Company 2008) at 270 – 275.

¹⁴² Ibid at 273.

¹⁴³ Lambrecht, Derica & Goga, Khalil 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 231 -232.

Nevertheless, there are strong arguments in favour of using criminal sanctions to punish abalone poachers and traffickers.¹⁴⁴ The mere threat of criminal prosecutions can be sufficient to change behaviour and the avoidance of getting a criminal record can be an incentive to refrain from poaching. As opposed to other measures, criminal sanctions are serious and in some circumstances the state calls for prison sentences to be imposed because ‘a fine is probably factored into the syndicate’s business plan’ and will therefore not serve as a deterrent.¹⁴⁵

However, in order for criminal sanctions to be an effective deterrent the sanctions must be adequate. The DAFF Chief Director for Monitoring and Compliance, Ceba Mtoba, stated that ‘our sanctions are too lenient. Poachers are sentenced to community service’.¹⁴⁶ The effective use of powers by inspectors in their investigations, followed by successful prosecutions can break up organised syndicates by arrests as well as seizure of instrumentalities. The objectives of effective prosecutions of abalone poachers and traffickers is on one hand to punish those who commit the crimes and deter others from committing similar offences and on the other hand make it impossible for the offender to commit the offences again. The former contains the additional objective to locals who harvest abalone legally and as such level the economic playing field. The latter includes both incarceration but also taking away the means of continuing the offence through forfeiture or related measures. The effectiveness of criminal sanctions imposed on abalone poachers and traffickers also depends on the functioning of court system, thus the role of the judiciary and prosecutors must be examined.

2.7 The role of South Africa’s judiciary

A functioning court system is an integral part of any criminal justice system and is an important element of efforts to effectively prevent and suppress abalone poaching and trafficking.¹⁴⁷ The judiciary can support the protection of wildlife in two ways: firstly because the judiciary is tasked with the enforcement of relevant laws and secondly because the judiciary has a supervisory function to review decisions of the executive where these actions threaten wildlife.¹⁴⁸ In relation to abalone poaching and trafficking the former is the main objective of the judiciary. The judiciary in South

¹⁴⁴ Snijman, P. ‘The prosecution of offences under fisheries legislation in the IOC Smartfish Project Region: class notes for the development of a training course for prosecutors’ *Smartfish Working Papers* No 25 at 91 -93.

¹⁴⁵ Lee-Anne Butler ‘Two men found guilty in R5m perlemoen bust’ *HeraldLive* 12 November 2014, available at <http://herald.newspaperdirect.com/epaper/showarticle.aspx?article=6816c7a4-aeaf-418e-8cae-7248b2cb75c9&key=M1z0wpyQ3%2f3c2brraH8lYg%3d%3d&issue=8147201411120000000001001>, accessed on 13 November 2017

¹⁴⁶ Michael Nkllane ‘Abalone decimation feared’ *IOL* 4 February 2016 available at <https://www.iol.co.za/news/crime-courts/abalone-decimation-feared-1979851>, accessed on 12 October 2017

¹⁴⁷ UNODC, *Wildlife and Forest Crime Analytic Toolkit* (2012) at 115 - 116.

¹⁴⁸ *Ibid* at 115.

Africa is structured as follows. The South African Constitution¹⁴⁹ sets out the hierarchy of courts, with the Constitutional Court being the highest authority and deals with constitutional matters.¹⁵⁰ Below the Constitutional Court in the hierarchy is the Supreme Court of Appeals¹⁵¹ (SCA) which deals with any matter on appeal, other than constitutional issues, and its decisions are binding on all lower courts.¹⁵² Following the SCA are the High Courts¹⁵³, including the high courts of appeal and specialist courts established by statute. The High Courts are first instance courts in matters that are beyond the jurisdiction of magistrates courts or where the penal jurisdiction is unlimited and includes a sentence to life imprisonment. At the bottom of the hierarchy are the district and regional magistrates' courts. District courts have jurisdiction on all criminal matters, with some exceptions, and may impose sentences not exceeding three years in prison as well as fines not exceeding R60000.¹⁵⁴ Regional magistrate courts have jurisdiction over criminal matters, except treason, and may impose penalties up to life imprisonment and fines not exceeding R300,000.¹⁵⁵

From 2003 to 2006 a specialist environmental court operated from Hermanus. The court had the primary purpose to prosecute abalone poachers but also dealt with cases relating to other environmental issues. The first year of the court proved to be a success as the court heard 74 cases which resulted in 51 successful prosecutions, whereas in the last year of the court's operation it achieved an 85% conviction rate.¹⁵⁶

2.7.1 The National Prosecuting Authority

The National Prosecuting Authority (NPA) is set up and empowered by the Constitution to institute criminal proceedings on behalf of the state and to carry out essential functions.¹⁵⁷ In regards to environmental crimes, the NPA derives its mandate from environmental related legislation and considers illegal hunting, dealing and possession of abalone a prioritised focus area that impacts the environment.¹⁵⁸

¹⁴⁹ Constitution of the Republic of South Africa, 1996

¹⁵⁰ Constitution s(166)

¹⁵¹ Constitution s(166),(168)

¹⁵² Constitution s(168)

¹⁵³ Constitution s(166)

¹⁵⁴ Magistrates' Courts Act 32 of 1944 s(89), (92)

¹⁵⁵ Magistrates' Courts Act 32 of 1944 s(89), (92)

Criminal Law Amendment Act 105 of 1997 s(51)

¹⁵⁶ P Snijman 'Hermanus' Environmental Court: does it protect the environment?' (2005) 12 *News and Views for Magistrates* at 2.

¹⁵⁷ Constitution s(179)

¹⁵⁸ NDPP 'Annual Report National Director of Public Prosecutions 2016/2017' at 37.

2.7.2 The role of prosecutors

The role of public prosecutors is unique in the sense that they appear on behalf of the governments as the representative of the people.¹⁵⁹ The prosecutor acts with the broad obligation to uphold the rule of law but is bound by ethical and professional duty to make sure that the accused receives a fair trial.¹⁶⁰ If a prosecutor fails to fulfil the obligations the trial can lead to a miscarriage of justice, ranging from malicious prosecutions to wrongful convictions.¹⁶¹ A miscarriage of justice can result in compromising the integrity of the justice system in its entirety and violate the public's trusts.¹⁶²

Where the prosecutor's primary role as an advocate for the state in prosecuting offences is fundamental, the consultative and advisory role of the prosecutors during the investigations of an offence should be highlighted.¹⁶³ Prosecutors do not get involved in the investigation of offences per se, but can provide valuable appropriate guidance and advice to environmental inspectors and police officers.¹⁶⁴ If the prosecutor is involved in ensuring that sufficient and admissible evidence is gathered during the investigations phase, he or she will have a thorough knowledge of the case once it goes to court which can often make the difference between success and failure.¹⁶⁵ An example of the good working relationship of prosecutors and investigators is the environmental court in Hermanus: during its operation the prosecutors became actively involved by providing a 24-hour hotline for inspectors and investigators; setting up systems to secure the integrity of evidence; making recommendations for amendments to legislation and assisting in the training of inspectors.¹⁶⁶ Arguably, these measures contributed to the high conviction rate of the court.¹⁶⁷

However, South Africa has a limited availability of specialist prosecutors and magistrates trained in environmental law which can mean that there are insufficient prosecutors to cover all cases that require expertise in environmental law.¹⁶⁸

¹⁵⁹ UNODC 'Wildlife and Forest Crime Analytic Toolkit' (2012) at 122.

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² Ibid

¹⁶³ ICUN 'Wildlife and Criminal Law: Strengthening Legal Mechanisms to Combat Illicit Wildlife Trade' (2016) *Training Module Workbook* at 39.

¹⁶⁴ Ibid

¹⁶⁵ Ibid

¹⁶⁶ ICUN 'Wildlife and Criminal Law: Strengthening Legal Mechanisms to Combat Illicit Wildlife Trade' (2016) *Training Module Workbook* at 39 - 40.

¹⁶⁷ Ibid

¹⁶⁸ White, R & Heckenberg D 'Green Criminology: An introduction to the study of environmental harm' (2014) at 273.

CHAPTER 3: THE DECONSTRUCTION OF ABALONE POACHING AND SUBSEQUENT TRADE IN SOUTH AFRICA

The poaching and subsequent illegal trade of abalone is typically perpetrated by actors from a broad spectrum of role-players, ranging from those at the water's edge to highly organized syndicates.¹⁶⁹ The illegal exploitation of abalone arguably has evolved into its own organized illicit industry that is controlled by street gangs at the shore and transnational syndicates which are involved with trafficking abalone to the Far East.¹⁷⁰ Warchol and Harrington observe that in the last two decades the illegal trade in South African abalone evolved from localised small scale poachers to include more sophisticated criminal enterprises that are ready and willing to resort to violence to defend their harvest'.¹⁷¹ Their criminal activities are driven by the high demand for abalone in Asia, particularly Hong Kong and China, where abalone has become a delicacy and is served at weddings, corporate events or other important occasions.¹⁷² The following chapter unravels this complex crime: it examines the different actors and their level of sophistication as well as criminal acts they perpetrate in order to understand the different possible charges and related legal tools to combat abalone poaching and trafficking.

3.1 The harvesting of abalone

The first stage of the poaching and trafficking network is the production of abalone, in other words the physical act of poaching.¹⁷³ The removal of abalone from the seafloor and arranging for its subsequent sale is predominantly the domain of the unemployed and the working class.¹⁷⁴ Often operations take place at night, when 'divers' harvest the abalone and once the abalone is poached, the catch is dropped off along the coast or estuaries where 'runners' swim the bags ashore and carry them to waiting vehicles which transport abalone to accumulation points or drying facilities.¹⁷⁵ The majority of these communities are impoverished and lack socio-economic development, which makes them easy prey for criminal syndicates that provide lucrative incentives for them to poach abalone in

¹⁶⁹ Hauck, M & Sweijd, N 'A case study of abalone poaching in South Africa and its impact on fisheries management' (1999) 56 *ICES Journal of Marine Science* at 1028.

¹⁷⁰ Ibid

¹⁷¹ Warchol, Greg & Harrington, M 'Exploring dynamics of South Africa's illegal abalone trade via routine activities theory' (2016) 19 *Trends in Organised Crime* at 34.

¹⁷² Lambrecht, D & Goga, K 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 234.

¹⁷³ Goga K 'The illegal abalone trade in the Western Cape' (2014) *ISS Paper No 261* at 3.

¹⁷⁴ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

¹⁷⁵ Raemaekers, Serge & Britz, Peter J 'Profile of the illegal abalone fishery (*Haliotis midae*) in the Eastern Cape Province, South Africa: Organised pillage and management failure' (2009) 97 *Elsevier* at 187.

order to sustain the flow of abalone.¹⁷⁶ Large criminal syndicates may have their own poaching groups.¹⁷⁷ Besides payments in cash, there are numerous reports that poachers are remunerated in recreational drugs, namely crystal methamphetamine which is referred to as 'tik'.¹⁷⁸ The link between drug dealers and Asian abalone smugglers is well-known. Steinberg states that the proportion of abalone traded for drugs is substantial: Chinese criminals supply drugs to the drug lords that are able to gain cheap abalone that can be bartered for drugs.¹⁷⁹ In order to avoid detection, the poachers use a system of paid informants, including corrupt enforcement officials, to monitor enforcement activities such as raids or patrols.¹⁸⁰

3.2 Intermediaries

Where poachers and divers are not affiliated with a specific syndicate, they often sell the abalone to wholesalers or intermediaries who are able to connect with transnational syndicates and organize the transport of abalone offshore.¹⁸¹ Wholesalers can abuse the quota system by encouraging legal fishers to poach more abalone than they are allowed or by buying quotas¹⁸². Transporters may pay bribes to enforcement officials in order to facilitate safe passage.¹⁸³

3.3 The Processing of Abalone

Abalone needs to be processed, i.e. de-shelled and preserved as abalone can rot or become stale quickly once it is harvested.¹⁸⁴ This process is critical as the processing requires a good knowledge base to get a high price for the abalone. The majority of illegally sourced abalone is dried as the dried product offers several advantages over canned or live abalone for the subsequent trade. Live or frozen abalone has a distinctive smell which makes it difficult to ship or transport undetected, as opposed to the dried abalone, which weighs less and can be disguised more easily and can be preserved for months. Investigators have found abalone processing factories (APF) from Cape Town to Limpopo, which typically make up entire houses or commercial properties.¹⁸⁵ These facilities often hold large amounts of abalone and equipment. The legal abalone processing factories in South Africa present an

¹⁷⁶ Lambrecht, D & Goga, K 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 240.

¹⁷⁷ *Ibid* at 241.

¹⁷⁸ Steinberg J 'The illicit abalone trade in South Africa' (2005) *ISS Paper No 105* at 3.

¹⁷⁹ *Ibid* at 3.

¹⁸⁰ De Greef K & Raemaekers S 'South Africa's illicit abalone trade: An updated overview and knowledge gap analysis' (2014) *TRAFFIC Report* at 2.

¹⁸¹ Goga K, 'The illegal abalone trade in the Western Cape' (2014) *ISS Paper No 261* at 3 - 4.

¹⁸² Lambrecht, D & Goga, K 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 241.

¹⁸³ Goga K 'The illegal abalone trade in the Western Cape' (2014) *ISS Paper No 261* at 4.

¹⁸⁴ *Ibid* at 4.

¹⁸⁵ Steinberg, J 'The illicit abalone trade in South Africa' (2005) *ISS Paper No 105* at 5 -6.

opportunity to launder illegally-sourced abalone into the legal abalone harvest and prepare it for further trade.

3.4 The trafficking of abalone out of South Africa

The ‘transporters’ operate at the final stage of the abalone trafficking. Goga finds that the methods of transport used by criminal syndicates to smuggle abalone to the destination states are threefold: abalone can be smuggled by sea or air ways using forged permits; or concealed among other export products; or customs officials are bribed to let smuggled abalone through.¹⁸⁶ Again, there are high levels of corruption at border posts which facilitate the smuggling process. Officials in other departments have been implicated in corruption cases as well: officials of the Department of Home Affairs are able to provide documentation for criminals to enter the country or provide the networks with connections.¹⁸⁷

However, there are two main ways to smuggle abalone out of South Africa into Hong Kong or China: the first possibility is to transport the abalone to a neighbouring country, namely Mozambique or Zimbabwe, and then import the abalone back to South Africa, ultimately exporting them to Hong Kong or China with fraudulent permits. Upon import to Hong Kong or China, the importer declares the content of his shipment and the customs officials record the origin and volume of the imported abalone, meaning that the illegally-sourced abalone has now entered the legal market and are indistinguishable from legally-sourced abalone. The second possibility is to store dried abalone in a warehouse and then smuggle them out of South Africa by bribing officials and often with fraudulent documentation.¹⁸⁸

Most traffickers are bold risk-takers who work with family members or form alliances with Chinese transnational smugglers work with networks of organizers that resemble a group of entrepreneurs rather than a criminal organization.¹⁸⁹ These Asian business people hide their illicit operation behind licit companies.¹⁹⁰ In some instances, companies are created in order to facilitate export, which pass customs with fraudulent documentation.¹⁹¹ There are major challenges in the

¹⁸⁶Goga K 'The illegal abalone trade in the Western Cape' (2014) *ISS Paper No 261* at 5.

¹⁸⁷ Lambrecht, D & Goga, K 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 243.

¹⁸⁸ Crystal Chow 'How SA's abalone ends up on China's plates' *Oxpeckers* 9 June 2017, available at <https://oxpeckers.org/2017/06/abalone-on-chinas-plates/>, accessed 10 October 2017

¹⁸⁹ Goga K 'The illegal abalone trade in the Western Cape' (2014) *ISS Paper No 261* at 5.

¹⁹⁰ Lambrecht, D & Goga, K 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 242.

¹⁹¹ Jenna Etheridge 'Companies created to smuggle perlemoen out of SA as 'pilchards', court finds' *News24* 4 September 2017, available at <http://www.news24.com/SouthAfrica/News/companies-created-to-smuggle-perlemoen-out-of-sa-as-pilchards-court-finds-20170904>, accessed on 29 November 2017

investigation and subsequent prosecution of actors at the final stage of abalone poaching and trafficking. Abalone is not protected in Asian countries and is generally not perceived as an illegal commodity.¹⁹²

3.5 Towards new form of abalone poaching

There are some worrying trends for the future. As the abalone stocks are depleting criminals are seemingly looking for other ways to source abalone. Traffickers have begun targeting the legal supply chain, which includes storage factories, transit vehicles and abalone farms.¹⁹³ In 2015 a group of armed and masked men overpowered security personnel and stole an undisclosed amount of abalone from the DAFF. The abalone in question had been confiscated by the department in previous operations and had been stored at a Forestry and Fisheries abalone storage facility.¹⁹⁴ During a similar incident in Gansbaai in 2017, armed men stole 1.6 tons of dried abalone from the Gansbaai Harbor which was valuable at \$220,000. This new form of abalone poaching highlights the need to curb demand in the consumer countries.

3.6 Implications of different activities along the value chain on prosecuting abalone poachers

The deconstruction of abalone poaching highlights how the wildlife crime can link to offences under other legislation that deals with different areas along the value chain. In the harvesting stage legislation prescribing protected areas or specifying fishing gear can prove relevant. While transporting and processing the illegally sourced abalone, provisions relating to public health or corrupt practices may be violated. During the trafficking stage, legislation dealing with offences relating to customs and excise, falsification of customs permits, mislabelling shipments and smuggling is relevant. Thus, there is a clear relationship of wildlife trafficking with other crimes but commercial and organised crime as well as corruption. The following chapter will identify, outline and assess the relevant South African legislation that deals with fisheries crimes.

¹⁹² Lambrecht, D & Goga, K 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 235.

¹⁹³ Kimon de Greef 'Armed robbers are now targeting these valuable shellfish' *National Geographic* 14 November 2017 available at <https://news.nationalgeographic.com/2017/11/wildlife-watch-armed-robbers-abalone-farm-heists/>, accessed on 12 January 2018

¹⁹⁴ DAFF Media Statement 'Abalone poachers hit the departments' storage facility in Paarden Island' 30 October 2015

CHAPTER 4: LEGAL TOOLS AVAILABLE TO COMBAT ABALONE POACHING AND RELATED TRADE

4.1 Introduction

The quest to counter poaching is at a critical stage and the authorities need every effective tool at their disposal.¹⁹⁵ ‘Given the inter-connected and complex nature of fisheries crime ... successful law enforcement approach to addressing these crimes cannot focus exclusively on addressing one type only; rather, what is required is a coordinated criminal law enforcement response at the domestic and international level that recognizes the wide variety of forms fisheries crime can take’.¹⁹⁶ This extends well beyond the scope of fishing *per se* and is rooted in the use of all potentially applicable laws¹⁹⁷, where the following chapter has the aim to identify the potentially applicable laws. The link between abalone poaching and related trade and other offences provides additional potential charges and approaches. Brining charges based on different areas of legislation will mean that additional charges can be added without a fear of duplication and can substantially add to the combined maximum penalty available at sentencing.¹⁹⁸ Some of these offences might be taken more seriously by the courts and thus contribute to higher conviction rates and harsher penalties.

Chapter 3 outlined how abalone poaching and trafficking is enabled by other criminal activities, including corruption, organised crime and tax evasion. The following chapter will identify the statutes that regulate the criminal activities at hand and examine how their provisions apply throughout the illegal abalone trade.

4.2 The Marine Living Resources Act 18 of 1998

The *Marine Living Resources Act*¹⁹⁹ (hereinafter MLRA) provides a framework for the protection of abalone in South Africa. The MLRA aims at conserving marine living resources for present and future generations and to ensure their optimal utilisation and ecologically sustainable development, the endorsement of a precautionary approach in marine living resource management and the need to use marine living resources to promote economic growth and create employment.²⁰⁰ The

¹⁹⁵ Kidd M ‘Punishing perlemoen poaching - developments both recent and possibly future?’ 2005 (26) *Obiter* at 403.

¹⁹⁶ Commission on Crime Prevention and Criminal Justice ‘Outcome of the 2nd International Symposium on Fisheries Crime’ (E/CN.12/2017/CRP.3) at 2.

¹⁹⁷ *Ibid*

¹⁹⁸ ICUN ‘Wildlife and Criminal Law: Strengthening Legal Mechanisms to Combat Illicit Wildlife Trade’ (2016) *Training Module Workbook* at 35.

¹⁹⁹ *Marine Living Resources Act 18 of 1998*

²⁰⁰ MLRA s(2)

MLRA and its regulations, read in conjunction with NEMA, provide a basis for administrative as well as criminal enforcement and penalties for fisheries offences.

4.2.1 Application

The MLRA applies to ‘fish’, which is broadly defined as ‘the marine living resources of the sea and the seashore, including any aquatic plant or animal whether piscine or not, and any mollusc, crustacean, coral, sponge, holothurian or other echinoderm, reptile or marine mammal, and includes their eggs, larvae and all juvenile stages’.²⁰¹ The regulations in terms of the MLRA define abalone as any species of the genus *Haliotis*. The abalone, being a type of sea snail, falls within the definition of ‘fish’ under the MLRA.

The MLRA applies to commercial, recreational and subsistence fishers. Commercial fishers those local and foreign fishers who harvest ‘for any of the species which have been determined by the Minister to be subject to the allowable commercial catch or total applied effort or parts of it’.²⁰² In order to harvest legally, commercial fishers require a fishing right and permits in terms of the MLRA. The abalone is one of the species to be subject to a total allowable catch (TAC) set by the Minister. During the fishing period in 2017 the TAC of abalone should not exceed 130 tonnes.²⁰³ The TAC is allocated among those who were granted a fishing right. These commercial fishers with fishing rights and appropriate permits in terms of the MLRA can contribute to abalone poaching by violating the terms of their rights; namely harvesting abalone beyond the stipulations of their permits or catching under-sized abalone. Notably, during the determination of the TAC the responsible committee has taken into consideration abalone catches of non-commercial fishers being 10 t and illegal and illegal and unreported commercial catches being up to 50t.²⁰⁴

A contributing factor to the abalone poaching crisis in South Africa is closely linked to commercial fishing rights and the allocation thereof. Coastal fishing communities started poaching as an important source of livelihood due to *inter alia* the absence of the governments’ assurance of equitable access to marine resources.²⁰⁵ This excerpt from an interview with local fishermen in Hangberg illustrates a fundamental issue with the allocation of (abalone) fishing rights. The local fishermen said that ‘to us, fishing is the only way to make money. Fishing is the world we know and

²⁰¹ MLRA s(1)

²⁰² MLRA s(1); s(21)

²⁰³ NSW Total Allowable Catch Setting and Review Committee ‘Report and Determination 2017 Abalone fishery’ (2016) at 14.

²⁰⁴ Ibid

²⁰⁵ Parliament of the Province of the Western Cape ‘Report of the Standing Committee on economic opportunities, tourism and agriculture on the public hearings held to determine the impact of abalone poaching on small-scale fishing communities in the Western Cape, dated 14 June 2017’ (2017) at 6.

is our ancestral right. We should be able to fulfil all the criteria, but almost all of the quotas go to big companies, and laws are put on everything. Why does the government not recognise our rights?’²⁰⁶ It is clear that further steps need to be taken to assure equitable access to marine resources including abalone, but in the context of this dissertation the excerpt highlights that prosecutions of abalone poachers should be directed at higher level players. In other words, prosecution efforts should be directed at those who make the most financial gain from the crime.

In 2014, the original definition of ‘subsistence fishers’ under the MLRA was repealed and replaced by the definition of ‘small scale fishers’.²⁰⁷ Accordingly, small scale fishers ‘means any member of a small-scale fishing community engaged in fishing to meet food and basic livelihood needs, or directly involved in processing or marketing of fish who – (a) traditionally operate in near-shore fishing grounds; (b) predominantly employ traditional low technology or passive fishing gear; (c) undertake single day fishing trips and (d) is engaged in consumption, barter or sale of fish or otherwise involved in commercial activity, all within the small-scale fisheries sector.’²⁰⁸

Recreational fishing refers to fishers who fish ‘for leisure or sport and not for sale, barter, earnings or gain.’²⁰⁹ Recreational fishers require a permit in terms of the MLRA and are not allowed to barter or sell their catch²¹⁰ and as concerns abalone fishing, are not allowed to use equipment other than conventional snorkelling equipment.

4.2.2 Relevant offences under the MLRA and its regulations

The MLRA prohibits any person from undertaking commercial fishing or operating a fish processing plant without an appropriate permit.²¹¹ Alternatively, the regulations in terms of the MLRA²¹² provide the general prohibition of collecting or being in possession of abalone except on the authority of a permit, transporting abalone in part of whole without a permit and prescribes the tool to be used to harvest abalone.²¹³ The regulations also limit the size of abalone that is allowed for harvest and provide the offence of being in possession of undersized abalone.²¹⁴ Furthermore, the

²⁰⁶ Crystal Chow ‘The ecological, industrial and drug war behind the abalone on your dinner table’ Africa-China Reporting Project 31 May 2017, available at <http://africachinareporting.co.za/2017/05/the-ecological-industrial-and-drug-war-behind-the-abalone-on-your-dinner-table/>, accessed on 13 October 2017

²⁰⁷ Government Notice No 383 in Government Gazette No. 37659 of 19th May 2014

²⁰⁸ Ibid s(1)(a)- (d)

²⁰⁹ MLRA s(1)(xvii)

²¹⁰ MLRA s(13), s(20)(1),(2)

²¹¹ MRLA s(18)

²¹² Government Notice R1111 Government Gazette 19205 of 2nd September 1998

²¹³ Ibid s(36)(a)

²¹⁴ Ibid s(37)

*Regulations for the Protection of Wild Abalone (Haliotis midae)*²¹⁵ introduced a general diving ban in certain areas. The offences under the MLRA are relevant in all stages of illegal abalone trade. The divers contravene s(18) of the MLRA which prohibits the undertaking of commercial fishing as well as provisions under the regulations which also include the size limit for abalone. The transporters and smugglers of abalone contravene the provisions prohibiting the possession of abalone. The operators of the abalone processing plants can be held liable for possession of abalone as well as running a fish processing plant without a permit.²¹⁶ The offences under the MLRA are subject to penalties including fines not exceeding 2million rand or imprisonment not exceeding five years. The consequence of non-compliance with provisions of the regulation constitutes an offence and is punishable with a fine or to imprisonment for a period not exceeding five years.²¹⁷

4.2.3 The role of the MLRA and its regulations

The MLRA and regulations thereof are the fundament on which abalone poaching and trafficking cases are built: they contain prohibitions regarding harvesting abalone without a permit, prescribe protected areas, criminalize illegal hunting methods and dictate a minimum size for abalone. These provisions are relevant in the harvesting stage and relate to divers at the local level who are often driven by subsistence and necessity. The prosecution of these low level players does not suffice to effectively address abalone poaching because they are not the drivers of abalone poaching and trafficking and the prosecution could cause resentment within the communities. Notably, the MLRA does not criminalize the aiding and abetting, or accessory, or procuring the offence of abalone harvesting related activities. Other jurisdictions criminalize conspiracy or incitement to commit wildlife crimes in order to utilize inchoate and ancillary offences in order to be able to prosecute those who organise and direct the criminal activity, rather than the low level perpetrators. In this regard, the MLRA plays a rather limited role. However, the MLRA and its regulations prohibit the possession or control of abalone, which is highly relevant in the trafficking of abalone because a number of different actors can be held liable for the possession of abalone, including higher level players. The transport, processing or smuggling of abalone all contain an element related to possession.

4.3 National Environmental Management Act 107 of 1998

The Constitutional environmental right is given effect to by the *National Environmental Management Act*²¹⁸ (hereinafter NEMA) which provides a number of guiding principles that apply to

²¹⁵ Government Notice R.62 in Government Gazette 30716 of 1st February 2008

²¹⁶ MLRA s(1)(xxi) provides that fish processing establishment means ‘any vehicle, vessel, premises or place where any substance or article is produced by any m method, including the work of cutting up, dismembering, separating parts of, cleaning, sorting, lining and preserving of fish, or where fish are canned, packed, dried, gutted, salted, iced, chilled, frozen or otherwise processed for sale in or outside the territory of the Republic’

²¹⁷ MLRA s(58)(1)

²¹⁸ *National Environmental Management Act 107 of 1998*

all actions of all organs of state.²¹⁹ As concerns abalone poaching and trafficking the NEMA principles dictate that the use and exploitation of abalone is responsible and equitable, and takes into account the consequences of the depletion of the resource.²²⁰ NEMA is not directly concerned with fisheries but includes a number of relevant provisions to poaching. First, section 34 of NEMA empowers prosecutors to apply for costs from persons convicted of criminal offences cited in schedule 3 arising from loss or damage caused by the offence committed to any organ of state or other person, including the costs of rehabilitating the environment.²²¹

4.4. The Prevention of Organised Crime Act 121 of 1998

The *Prevention of Organised Crime Act*²²² (hereinafter POCA) penalizes certain organised crimes and gang activities, with a focus on money-laundering, racketeering and illegal business activities. It recognises that there is a rapid growth of organised crime and that persons should not benefit from the fruits of organised crime. Organised crime activities are harmful to the well-being of communities and as such participation or promotion of criminal gang activities should be criminalised.²²³ The act contains offences relating to racketeering activities²²⁴; offences relating to proceeds of unlawful activities²²⁵ and offences to criminal gang activities.²²⁶ Furthermore, as it is relevant to abalone poaching and trade, the act contains provisions on proceeds of unlawful activities, confiscation and restraint orders, forfeiture of property and penalties. South Africa has pledged to appropriately charge offenders in relation to wildlife crime and focus investigations on dealing with wildlife trafficking as a serious organised crime.²²⁷

4.4.1 Relevant definitions under POCA

There are several definitions that are important in regards to organised crime activities related to abalone poaching and trafficking. Firstly, POCA provisions apply to property and proceeds of illegal activities, where unlawful activity means any conduct which constitutes a crime.²²⁸ Under POCA property is defined as ‘money or any other movable, immovable, corporeal or incorporeal thing that includes any rights, privileges, claims and securities and interest thereon and proceeds thereof’.²²⁹ The poached abalone itself can be categorised as a corporeal thing and falls within the ambit of ‘property’. The proceeds of unlawful activities refer to ‘any property or any service,

²¹⁹ NEMA s(2)(1)

²²⁰ NEMA s(4)(v)

²²¹ NEMA s(34)(1)-(3)

²²² *The Prevention of Organised Crime Act 121 of 1998*

²²³ POCA preamble

²²⁴ POCA s(2),(3)

²²⁵ POCA s(4)-(8)

²²⁶ POCA s(9)-(11)

²²⁷ NISCWT at 21.

²²⁸ POCA s(1)

²²⁹ POCA s(1) (xvi)

advantage, benefit or reward which was derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activities carried on by any person.²³⁰ The proceeds of any unlawful activity clearly refer to the monetary gain that criminal syndicates profit from in relation to trafficking of abalone. It could also include e.g. the facilities that are bought or rented for the purposes of processing abalone. Furthermore, abalone can be regarded as proceeds of a criminal activity as it is any property that is derived in connection or as a result of any unlawful activity. Notably, any criminal conduct whether or not it occurred in South Africa or abroad constitutes unlawful activity.²³¹

4.4.2 Relevant offences under POCA

4.4.2.1 Racketeering related offences under POCA

POCA contains the criminalisation of racketeering offences in section 2, which reads:

Any person who-

(a) (i) receives or retains any property derived, directly or indirectly, from a pattern of racketeering activity and

(ii) knows or ought reasonably to have known that such property is so derived; and

(iii) uses or invests, directly or indirectly, any part of such property in acquisition of any interest in, or the establishment or operation or activities of, any enterprise;

(b) (i) receives or retains any property, directly or indirectly, on behalf of any enterprise; and

(ii) knows or ought reasonably have known that such property derived or derived from or through a pattern of racketeering activity;

(c)(i) uses or invests any property, directly or indirectly, on behalf of any enterprise or in acquisition of any interest in, or the establishment or operation or activities of any enterprise; and

(ii) knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity;

(d) acquires or maintains, directly or indirectly, any interest in or control of any enterprise through a pattern of racketeering activity;

(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;

(f) manages the operation or activities of an enterprise who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise conducts or participates in the

²³⁰ POCA s(1)(xv)

²³¹ POCA s(1)(xv)(a)(b)

conduct, directly or indirectly, of such enterprises' affairs through a pattern of racketeering activity;
or
(g) conspires or attempts to violate any of the provisions of paragraphs (a), (b), (c), (d), (e) or (f)
Shall be guilty of an offence.

There are seven different offences: subsections (a) – (d) deal with property connected to racketeering offences, subsection (7) can be used to charge a manager of an enterprise and the employees thereof are covered by subsection (e). The existence of an enterprise, a pattern of racketeering activity and a link between them and the accused must be established in order to convict an accused.²³² If these elements are fulfilled the penalties for any person convicted of racketeering activities is liable to a fine not exceeding R1000 million or to imprisonment for life.²³³

4.4.2.1.1 Enterprise'

The concept of the 'enterprise' is central to the prohibition against racketeering activities because the enterprise is the vehicle which the syndicates use to commit abalone related crimes. POCA defines an enterprise as 'any individual, partnership, corporation, association, or other juristic person or legal entity, any union or group of individuals associated in fact'.²³⁴ The definition of enterprise under POCA is wide, however there are two types of 'enterprises' that are relevant to consider in relation to abalone poaching and trafficking. Firstly, there is the criminal syndicate that poaches and traffics abalone through a pattern of racketeering activities. In order to hold these actors responsible for racketeering offences it must be established that the illegal syndicate constitutes an enterprise. In *S v Eyssen*²³⁵, the court clarified that:

'The association would at least have to be conscious; that there would have to be a common factor or purpose identifiable in the association; that the association would have to be ongoing; and that the members would have to function as a continuing unit. There is no requirement that the enterprise be legal or illegal. It is the pattern of racketeering activity, through which the accused must participate in the affairs of the enterprise, that brings in the illegal element and the concepts of 'enterprise' and 'pattern of racketeering activity are discrete. Proof of the pattern may establish proof of the enterprise, but this will not inevitably be the case'.²³⁶

²³² *S v dos Santos and another* 2010 (2) SACR 382 (SCA)

²³³ POCA s(3)

²³⁴ POCA s(1)

²³⁵ *S v Eyssen* 2009 (1) SACR 406 (SCA)

²³⁶ *Ibid* para 6

This suggests that abalone poaching syndicates constitute an enterprise under POCA while the syndicate is illegal. The criminal syndicate that organises the harvesting, processing and trafficking of abalone is a group of individuals and the court must prove the association in fact. The court also assesses the individual contribution of each accused. In relation to the criminal syndicate surrounding Ran Wei, a Chinese National who has been charged in absentia, 25 individual members were arrested and charged: the defendants include leaders, police officers, former police officers and a bookkeeper.²³⁷

Secondly, there are corporations that are established in order to export illegal abalone out of South Africa. The definition suggests that corporations that are created in order to facilitate exports fall within the meaning of enterprise and those individuals linked to the companies can be held responsible for certain conduct.²³⁸ These corporations qualify as enterprises under POCA because they constitute legal entities. For instance, Viridon Trading CC, a closed corporation duly registered in accordance with the *Close Corporations Act*²³⁹ was charged as a defendant in the proceedings against the Wei syndicate. The State argued that Viridon Trading was used to facilitate legal activities as well as illegal activities and as such was participates in the activities that amounted to the planned, continuous and repeated participation in the unlawful collection, possession, transportation, controlling, storing and processing and exporting of abalone.

4.4.2.1.2 'Pattern of racketeering offences'

According to POCA a pattern of racketeering activity means the 'planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence to in Schedule 1'.²⁴⁰ Abalone poaching and trafficking falls under Schedule 1 of POCA because it can be categorized as '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 planning'.²⁴¹

²³⁷ Henriette Geldenhuys 'How Hawks cracked abalone syndicate' IOL 2 November 2013, available at <https://www.iol.co.za/news/crime-courts/how-hawks-cracked-abalone-syndicate-1417162>, accessed on 1 December 2017

²³⁸ Jenna Etheridge 'Men convicted for participating in perlemoen enterprise' *News24* 5 September 2017, available at <https://www.news24.com/SouthAfrica/News/men-convicted-for-participating-in-perlemoen-enterprise-20170905>, accessed on 30 December 2017

²³⁹ *Close Corporations Act 69 of 1984*

²⁴⁰ POCA s(1)

²⁴¹ POCA schedule 1 s(25)

Abalone poaching and trafficking can also trigger other offences of Schedule 1: any offence referred to in s(13) of the *Drugs and Drug Trafficking Act*²⁴²; fraud²⁴³; any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament and the unlawful possession of such firearms, explosives or armament²⁴⁴; any offence contemplated in s(1)(1) of the *Corruption Act*²⁴⁵ or any offences relating to proceeds of unlawful activities or relating to criminal gang activities.

Considering the activities of the criminal syndicates, several of these provisions could apply. The divers and harvester can be held liable for racketeering offences because they, whilst employed by any enterprise, participate in the conduct of such enterprise's affairs through a pattern of racketeering activities.²⁴⁶ Subsection (a) applies to intermediaries and processors of abalone: those persons receive abalone (i.e. any property) from a pattern of racketeering activity and can be expected reasonably to have known that such property was derived from a criminal activity and use any part of such property in the operation or activities of any enterprise.²⁴⁷ The operation or activities of the enterprise is the subsequent trade in abalone. Those who manage processing plants can further be held accountable because they receive property on behalf of an enterprise and know that such property is derived through a pattern of racketeering activity.²⁴⁸ The racketeering offences under POCA extend over those who organise or manage abalone poaching and trafficking.²⁴⁹ Notably, anyone involved in the abalone poaching and trafficking syndicates can be held liable under subsection (g) which provides that anyone who conspires to violate any provision in s(2) of POCA.

4.4.2.2 Money laundering offences under POCA

There are two types of money laundering linked to abalone poaching. First, if transnational criminal networks integrate the proceeds of illegal abalone trade into the legitimate economy.²⁵⁰ These money-laundering offences are committed when certain acts are performed in respect of the proceeds of unlawful activities and a person benefits from it. In simple terms, a money laundering scheme commences with a deposit of illegally acquired money into a bank account. The funds are then converted into monetary instruments and can be withdrawn or used to buy expensive goods or property. When these goods are sold the proceeds are deposited again and appear as legally acquired

²⁴² POCA schedule 1 s(22)

²⁴³ POCA schedule 1 s(19)

²⁴⁴ POCA schedule 1 s(23)

²⁴⁵ *Corruption Act 94 of 1992*

The act was repealed by the Prevention and Combating of Corrupt Activities Act 12 of 2004

²⁴⁶ POCA s(2)(e)

²⁴⁷ POCA s(2)(1)(a)(i)(ii)(iii)

²⁴⁸ POCA s(2)(1)(b)

²⁴⁹ POCA s(2)(f)

²⁵⁰ UNODC 'Stretching the Fishnet: Identifying opportunities to address fisheries crime' (2017) at 27.

funds. Such schemes enable criminal syndicates to profit from their trafficking activities and enjoy the profit they make while hiding the true origin of the funds. The second form of money laundering crime is when syndicates use their proceeds, legitimate or not, to further a criminal activity.²⁵¹

The key provision for the criminalisation of money laundering under POCA reads:

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and –

(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or (b) performs any other act in connection with such property, whether it is performed independently or in concert with any person, which has or is likely to have the effect of (i) of concealing or disguising the nature, sources, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere –

(aa) to avoid prosecution; or

(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence

*Shall be guilty of an offence*²⁵²

These offences can only be committed by an individual who knows or ought reasonably to have known that the property concerned constituted the proceeds of unlawful activities.²⁵³ A person had knowledge of a fact if he actually knew that fact, or if the court is satisfied that the person believed that there was a reasonable possibility of the existence of that fact and then failed to obtain information to confirm or disprove that fact²⁵⁴, meaning that if a person had a strong suspicion that the property might be tainted and nevertheless proceeded with the transaction without making reasonable inquiries the court can conclude that the person had full knowledge. A person acted negligently, in other words ought reasonable have known, if he or she failed to recognise or suspect a fact with the general knowledge that may be expected of a person in the position of the particular person.²⁵⁵

²⁵¹ Ibid

²⁵² POCA s(4)

²⁵³ POCA s(4)

²⁵⁴ POCA s(1)(2)

²⁵⁵ POCA s(1)(3)

4.4.2.3 Criminal gang related activities

POCA contains offences relating to criminal gang activities²⁵⁶ and provides guiding factors for considering whether a person is a member of a criminal gang. POCA understands a criminal gang as any formal or informal on-going, organisation, association or group of three or more persons whose activities amount to a criminal offence²⁵⁷ which makes it relatively easy for a criminal syndicate involved in abalone poaching and trafficking to fall within this ambit. This means that the criminal syndicates can be subjected to the relevant provisions under POCA. However, the court will have to take into account *inter alia* whether the person admits to criminal gang membership, has been arrested more than once in company of identified gang members or is identified as a member of a criminal gang by physical evidence.²⁵⁸ If the court is satisfied that an individual is a member of a criminal gang, the individual can be convicted for wilfully aiding and abetting criminal activities for the benefit of the criminal gang²⁵⁹ or if the individual performs any act which is aimed at promoting or contributing towards a pattern of criminal gang activity.²⁶⁰ The penalties imposed for gang related offences can range from a maximum of three years imprisonment to imprisonment not exceeding eight years, depending on the circumstances.

4.4.2.4 Proceeds of unlawful activities and civil recovery of property

The POCA deals with the proceeds of unlawful activities²⁶¹ as well as civil recovery of property.²⁶² The provisions dealing with the proceeds of unlawful activities include confiscation and restraint orders as well as realisation of property. These provisions can be used against offenders during different stages of proceedings. In this section it is important to note that abalone can constitute both the proceeds of the crime as well as property within the meaning of ‘property’ under POCA.

Confiscation orders can be used against convicted persons who were found to have benefited from a crime.²⁶³ The benefit in question must be sufficiently related to the offence or another offence the defendant has been convicted at the same trial.²⁶⁴ In such circumstances, the court may ‘make an order against the defendant for the payment to the State of any amount it considers appropriate and the court may make any further order as it may deem fit to ensure the effectiveness and the fairness of

²⁵⁶ POCA s(9)

²⁵⁷ POCA s(1)(iv)

²⁵⁸ POCA s(11)

²⁵⁹ POCA s(9)(1)

²⁶⁰ POCA s(9)(2)

²⁶¹ POCA chapter 5

²⁶² POCA chapter 6

²⁶³ POCA s(18)

²⁶⁴ POCA s(18)(a)-(c)

that order'.²⁶⁵ Generally, the confiscated amount cannot exceed the value of the proceeds of the crime. POCA stipulates that the value of the defendant's proceeds of unlawful activities shall be the sum of the values of the property, services, advantages, benefits or rewards received, retained or derived by him or her.²⁶⁶ As concerns abalone poaching and trafficking estimating the value of the proceeds can prove difficult as some syndicates have been operating for many years which makes it difficult to calculate the sum of value derived.

If there is a final confiscation order against a defendant and the trial has come to an end, a High Court may appoint someone to take over any realisable property.²⁶⁷ Such realisation order entails that the defendant must hand over the property in question to the person appointed by the court. On the other hand, restraint orders can be put on a person's property meaning that the person cannot transfer ownership of that property. As such, restraint orders can prevent suspects from getting rid of evidence during the investigation period. Restraint orders can play an important role as investigating the various activities of abalone poaching and trafficking syndicates is time-intensive and restraint orders can prevent the accused of getting rid of evidence.

As concerns the recovery of property in civil cases POCA essentially provides that an order, namely a preservation of property order, can be issued to stop a person from selling or disposing of property, including seizure and forfeiture, but different rules apply.

A preservation of property order is issued by the High Court if there are sufficient grounds for believing that the property in question is an ill-gotten gain or is linked to crime.²⁶⁸ This applies to movable or immovable property, meaning that a preservation order may prevent an abalone processing facility from being sold or mortgaged, If the application for an preservation order has been granted and the order has been issued, the High Court may, upon application, forfeit that property to the state.

Provisions allowing for forfeiture of instrumentalities of a crime are fundamental in combatting wildlife crime.²⁶⁹ Forfeiture orders on the instrumentalities of abalone poaching and trafficking can remove the incentive to commit a crime and deter persons from using that property to commit a crime. These orders can also neutralise the property that was previously linked to the commission of a crime

²⁶⁵ POCA s(18)(1)

²⁶⁶ POCA s(19)(1)

²⁶⁷ POCA s(30)

²⁶⁸ POCA s(38)

²⁶⁹ ICUN 'Wildlife and Criminal Law: Strengthening Legal Mechanisms to Combat Illicit Wildlife Trade' (2016) *Training Module Workbook* at 49 – 51.

and forfeiture can advance justice by depriving the involved parties of the use of that property.²⁷⁰ In making a forfeiture order two elements must be satisfied: the property concerned must be an instrumentality of an offence referred to in Schedule 1 of POCA and it must be the proceeds of unlawful activities (or the property is associated with terrorist and related activities).²⁷¹ An instrumentality of an offence is defined as ‘any property which is concerned with the commission or suspected commission of an offence at any time before or after the commencement of this Act, whether committed within the Republic or elsewhere’.²⁷²

The Asset Forfeiture Unit (AFU) was established by the NPA to focus on the implementation of Chapters 5 and 6 of POCA. The AFU was created to ensure that the power to seize criminal assets would be used to fight organised crime and the AFU targets crimes involving natural resources as a priority. The key objectives are to take the profit out of the crime and removing property that served as an instrumentality of an offence. The AFU froze assets of the more R3,3 million, seized two houses and furniture belonging to convicted abalone poachers.²⁷³

4.4.2.5 The controversial sale of confiscated abalone by the DAFF

Abalone is frequently confiscated by the authorities during enforcement operations. Even though it is estimated that only 14% of poached abalone is confiscated, the value of confiscated abalone cannot be underestimated. The confiscated abalone is sold in auctions, meaning that the illegally-sourced abalone finds its way into the legal market for abalone. It is claimed that the profits made from such auctions is used to fund the DAFF.

However, the sale of confiscated abalone is highly controversial. Brenton Holloway, a Senior Inspector of Marine Conservation, has stated that ‘the auctions are managed by the compliance office, and the money that they make out of the auctions does not go into the operation of the department. In fact, there have been too much red tape and competition across units over resources in the department. Our manpower and equipment are nothing compared to those professional poachers’. Furthermore, Holloway admitted that the way the Department handles confiscated abalone does not present an ideal financing mechanism as ‘the problem is that it enables the major players in the black market to benefit from the auction, thus further controlling the market. I am not aware that the Department is tracking

²⁷⁰ Ibid at 51.

²⁷¹ POCA s(50)(1)(a)-(c)

²⁷² POCA s(1)

²⁷³ Melanie Gosling ‘Perlemoen poacher’s assets seized’ IOL 13 April 2003 available at <https://www.iol.co.za/news/south-africa/perlemoen-poachers-assets-seized-104748>, accessed on 14 January 2018

the sale of this abalone, but from what I know the lines between the legal market and the black market are very blurry here in South Africa'.²⁷⁴ Furthermore, a Standing Committee Report²⁷⁵ on the impact of abalone poaching on small-scale fishing communities has found that 'the sale of confiscated illegally obtained abalone by DAFF for far below market value has resulted in the South African market for abalone becoming less competitive for other sellers. There is no quality standard that the abalone has to meet before it is sold by DAFF. Hence sub-standard abalone is often sold to international markets'.²⁷⁶

Furthermore, 'the fact that confiscated abalone is sold below market value, devalues South African abalone on the international market and creates a disabling environment in which our fishermen can trade'.²⁷⁷ Arguably, it is the commercial fishers of abalone who also suffer from the DAFF's auction. The auctions can also enable criminal syndicates to further their smuggling activities. Once the abalone has been bought at an auction it can legally be used for trade but this affords criminal syndicates the opportunity to buy abalone and launder illegally-sourced abalone into the legal abalone. Besides, there are some critics who question the motivation of the DAFF to curb illegal abalone poaching if the DAFF's budget depends on the profit made in such auctions.²⁷⁸

4.4.2.6 Relevance of POCA in abalone poaching and trafficking

The POCA applies to the stages of abalone poaching and trafficking where organised crime syndicates are heavily involved; meaning the processing, transporting and trafficking stage. It is the organised crime syndicates that orchestrate and drive the business around abalone poaching related crimes thus harsh sentences under POCA can serve as real deterrents. The underlying goal of a separate charge under organised crime offences is to target the masterminds or funders of the criminal activities which brings certain advantages with it²⁷⁹: prosecutions for organised crime related activities focus on repeated conduct and overall contribution to the enterprise rather than establishing details and specifics of each act committed. Sometimes charging the accused on individual charges can lead

²⁷⁴ Crystal Chow 'The ecological, industrial and drug war behind the abalone on your dinner table' Africa-China Reporting Project 31 May 2017 available at <http://africachinareporting.co.za/2017/05/the-ecological-industrial-and-drug-war-behind-the-abalone-on-your-dinner-table/>, accessed on 13 October 2017

²⁷⁵ Parliament of the Province of the Western Cape 'Report of the Standing Committee on economic opportunities, tourism and agriculture on the public hearings held to determine the impact of abalone poaching on small-scale fishing communities in the Western Cape, dated 14 June 2017' (2017).

²⁷⁶ Ibid at 27 -28.

²⁷⁷ Beverly Schaefer 'Abalone poaching threatens lives' IOL 19 December 2017, available at <https://www.iol.co.za/capeargus/opinion/abalone-poaching-threatens-lives-12476560>, accessed on 5 January 2018

²⁷⁸ Ibid

²⁷⁹ ICUN 'Wildlife and Criminal Law: Strengthening Legal Mechanisms to Combat Illicit Wildlife Trade' (2016) *Training Module Workbook* at 37.

to parties and or crimes being left out so if members are charged jointly for the participation to the enterprise as a whole, misjoinder and non-joinder problems are avoided. As concerns evidence, one indictment covers many indictments and similar fact evidence covers all incidents, making it easier to depend on the evidence. Lastly, in some cases corporations are involved in the poaching and trafficking process, and in those cases public exposure on the contribution to organised crime and how the corporation was connected to criminal activities leads to negative publicity. Nevertheless, the different enforcement agencies will have to cooperate closely to enjoy these advantages to prosecute organised crime related activities within the abalone poaching and trafficking context.

4.5 The Prevention and Combating of Corrupt Activities Act 12 of 2004

Corrupt practices are an enabler for abalone poaching and subsequent trade: it facilitates poaching as well as transactions between supply, transit and demand countries and is an important source of resilience for organised criminal groups involved in such crimes.²⁸⁰ Anti-corruption instruments can support governments in combating corruption related to poaching and related trade. The primary legislation penalizing corruption and bribery is the *Prevention and Combatting of Corrupt Activities Act*²⁸¹ (hereinafter PCCA) which provides the general offence of corruption. The preamble states that corruption and related corrupt activities undermine institutions and values of democracy and ethical values and morality as well as they jeopardise sustainable development. To strengthen measures to prevent and combat corruption and corrupt activities in relevance to abalone poaching and trafficking, the act contains a general offence of corruption²⁸², offences in respect to corrupt activities relating to specific persons including public officers and foreign public officials²⁸³; other offences relating to corrupt activities²⁸⁴ as well as defences²⁸⁵ and penalties²⁸⁶.

4.5.1 Relevant definitions

The act dictates that any person who, directly or indirectly accepts or agrees to accept any gratification from any other person; or gives or agrees or offers to give any gratification to any other person; in order to act personally or by influencing another person to so act, in a manner designed to achieve an unjustified result, is guilty of corruption.²⁸⁷ The meaning of 'gratification' is broad: besides

²⁸⁰ Maira Martini 'Wildlife Crime and Corruption' (2013) *Anti-Corruption Resource Centre U4 Expert Answer No 367* at 2.

²⁸¹ The Prevention and Combating Of Corrupt Activities Act 12 of 2004

²⁸² PCCA s(3)

²⁸³ PCCA s(4) – (9)

²⁸⁴ PCCA s(22),(23)

²⁸⁵ PCCA s(25)

²⁸⁶ PCCA s(26)

²⁸⁷ PCCA s(3)

cash, it can include the avoidance of punishment or forfeiture and any rights or privileges.²⁸⁸ The PCCA applies to a wide range of persons in the private and public sector, including public officials and as such covers police officers and imposes penalties for offences including imprisonment for life.²⁸⁹

4.5.2 Relevant offences under PCCA

The PCCA applies to low level police officers as well as higher ranking police officers, DAFF officials and officers and border posts.²⁹⁰ During the harvesting, transporting and processing stage the following is relevant: The PCCA can hold any person liable for paying a bribe, whether it is a monetary or non-monetary bribe to a police officer in order to avoid punishment for poaching abalone or the possession thereof. Said police officer becomes liable for corrupt practices upon the acceptance of the bribe. Furthermore, a police officer can be held liable for accepting a bribe for revealing information on enforcement operations because the bribe is paid in order to act in a manner that misuses or sells information or material that is acquired in the course of action of the police officers' duties or functions. Similarly, the person paying the bribe can be held accountable under PCCA. During the trafficking stage, a public official, at customs or border controls, is liable for corrupt practices if the official accepts a bribe for the purpose of issuing a false license as an abuse of position or authority. The person who is paying the bribe or other form of gratification is also liable for corrupt practices.

Thus the PCCA covers the corrupt practices that facilitate abalone poaching and trafficking at all stages and as have the potential to play a big role is dismantling the criminal activities linked to abalone poaching and trafficking. However, there are some issues: there are certain circumstances where police officials serve as witnesses or give testimonies in abalone or fisheries related cases and charging those officials with corrupt practices in other cases would undermine the on-going trials. For instance, when a high-powered SARS investigator was arrested for taking bribes or referring defaulters to private consultancy firms in which they had interests, the arrest threatened to jeopardise sensitive tax probes and tax-related court against abalone syndicates.²⁹¹ The SARS investigator, Botha, was set to be a key witness in several high court actions against a syndicate of abalone smugglers, who claimed that several SARS inspectors were involved in the smuggling process.

²⁸⁸ PCCA s(1)

²⁸⁹ PCCA s(26)

²⁹⁰ Lambrecht, D & Goga, K 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 243.

²⁹¹ Johan Schronen 'SARS detective arrested for poaching' IOL 25 April 2003, available at <https://www.iol.co.za/news/south-africa/sars-detective-arrested-for-poaching-105361>, accessed on 1 December 2017

4.5.3 The relevance of PCCA in abalone poaching and related trade

The PCCA is highly relevant in terms of abalone poaching and trafficking in all stages. Allegations of low level corruption within the SAPS are widespread: there are numerous allegations that police officers in some coastal towns are on the payroll of poaching syndicates.²⁹² Officers of the DAFF are tasked with patrolling landing sites and harbours to ensure that fishers are compliant with legislation, however those enforcement officers have limited training in conservation and relatively low salary levels.²⁹³ An investigation²⁹⁴ revealed that local enforcement officers within the directorate were paid off with monetary and non-monetary bribes and often become informants for those who paid the bribes, sharing secret information detailing enforcement operations.²⁹⁵ If officers could not be bought off, they were instead threatened with violence; a practice that evidently widespread.²⁹⁶

4.6 The Customs and Excise Act 91 of 1964

The *Customs and Excise Act*²⁹⁷ (hereinafter the CEA) has the purpose to *inter alia* provide for the levying of customs and excise duties as well as for the prohibition and control of the importation, export of manufacture of certain goods.²⁹⁸ The CEA is administered by the South African Revenue Service (SARS). SARS is the South African tax collecting authority which is established under the *South African Revenue Service Act*²⁹⁹ as an autonomous agency. It is mandated with administering South Africa's tax system and customs service, meaning that it collects and administers national taxes, duties and levies and provides customs services that facilitates trade, maximises revenue and protects borders from illegal importation and exportation of goods. The SARS is tasked with controlling prohibited and restricted goods and exercises controls through quota requirements, permits, authority or certificates. Abalone is listed under the Prohibited and Restricted Goods List according to s(113) of the CEA which means that there are controls when exporting abalone.³⁰⁰ The provisions of the CEA are relevant at the last stage of the abalone value chain, namely when abalone is traded out of South Africa. The aforementioned methods of smuggling abalone out of the country require falsified documentation for the exports.

²⁹² Crystal Chow 'The ecological, industrial and drug war behind the abalone on your dinner table' *Africa-China Reporting Project* 31 May 2017, available at <http://africachinareporting.co.za/2017/05/the-ecological-industrial-and-drug-war-behind-the-abalone-on-your-dinner-table/>, accessed at 20 November 2017

²⁹³ Gore M, *Conservation Criminology* (2017) West Sussex, Wiley-Blackwell at 103

²⁹⁴ Ibid

²⁹⁵ Ibid

²⁹⁶ Ibid at 104

²⁹⁷ *Customs and Excise Act 91 of 1964*

²⁹⁸ CEA preamble

²⁹⁹ *South African Revenue Service Act 34 of 1997*

³⁰⁰ CEA s(113)(8)(a)

The penalties under the CEA include both administrative and criminal measures. The CEA distinguishes between less serious offences and serious offences and the severity of penalties increases in regard to the extent of the infringement. However, the improper use of a license, permit or other document is considered a serious offence.³⁰¹ The ‘improper use of license, permit or other document issued in respect of goods’³⁰² constitutes an offence which is punishable with a fine not exceeding R 20000 or treble the value of goods in respect of which the offence was committed and/or imprisonment not exceeding five years. Furthermore, making false statements in connection to any matter dealt with under the CEA also constitutes an offence which can lead to a fine not exceeding R40000 or treble the value of the goods or to imprisonment for a period not exceeding ten years.³⁰³ However, in regards to the latter, the accused can prove he was ignorant of the falsity of such statement and that such ignorance was not due to negligence of his part.³⁰⁴

4.6.1 The relevance of the CEA

The relevance of customs declarations in combating illegal wildlife trade is best illustrated by the Bengis Case.³⁰⁵ The Bengis case involved the criminal syndicate surrounding Arnold Benigs, who illegally harvested massive amounts of South African rock lobster and Patagonian toothfish in order to make huge profits on US markets.³⁰⁶ As concerns customs rules, the syndicate overharvested marine resources for nearly a decade and underreported their catch to the South African authorities and submitted false export documents to the SARS. Upon arrival at in the US, correct import declaration were made. Ultimately, the relevant authorities compared the documentation and the Bengis scheme was unearthed. This case illustrates the importance of customs data and the cooperation of the relevant authorities in investigating wildlife trafficking.

Tax evasion and avoidance, the non-payment of duties, tariffs and other fees are common offences in wildlife trafficking.³⁰⁷ Failure to pay the relevant duties, taxes and fees seriously undermines economic development and deprives governments and local communities of revenues streams. Furthermore, these offences create unfair competition which can pose a serious threat to those who trade abalone in compliance with the relevant legislation and pay the relevant fees.

³⁰¹ CEA s(80)(1)(i)

³⁰² Ibid

³⁰³ CEA s(84)(i)

³⁰⁴ Ibid

³⁰⁵ *United States v. Bengis*, 631 F.3d 33, 35 (2d Cir. 2011)

³⁰⁶ Marcus Asner ‘To catch a wildlife thief: strategies and suggestions for the fight against illegal wildlife trafficking’ (2017) 12 *University of Pennsylvania Asian Law Review* at 4-5.

³⁰⁷ UNODC ‘Wildlife and Forest Crime Analytic Toolkit’ (2012) at 57.

The CEA is also relevant because it can be used to punish the corporation used to smuggle abalone abroad. In one case, the prosecutors charged Viridon Trading, the company used to export the abalone with similar charged and ultimately charged the company with a R400000 fine.³⁰⁸ Viridon Trading CC, an entity allegedly registered in 2010 and licenses to export fresh produce was held responsible for ‘participating in unlawful activities that involved intricate planning and continuous looting, storing and exporting of abalone overseas’.³⁰⁹

³⁰⁸ Ana Reporter ‘Four in prison for a combined 127 years over abalone syndicate’ *IOL* 31 May 2015 available at <https://www.iol.co.za/news/south-africa/western-cape/four-in-prison-for-a-combined-127-years-over-abalone-syndicate-9443362>, accessed on 20 January 2018

³⁰⁹ Tammy Petersen ‘4 international abalone smugglers found guilty’ *news24* 20 January 2017 available at <https://www.news24.com/SouthAfrica/News/4-international-abalone-smugglers-found-guilty-20170120>, accessed on 13 December 2017

4.7 Summary of key findings

	Actor(s)	Activity	Act	Possible Counts	Penalty
Harvesting of abalone	divers	removal of abalone from the seafloor	MLRA	s(18) 'prohibition of commercial fishing without the appropriate permit'	s(58)(1) fine up to R2 million or imprisonment up to 5 years
		removal of undersized abalone	MLRA	s(36)(1)(c)	
	Gang members	threatening community members	POCA	s(9) 'gang related offences'	s(3) penalties fine up to R1000million or imprisonment up to life
Intermediaries	runners, wholesalers, transporters	possession of abalone without a permit	MLRA	s(13) 'related activities'	s(58)(1) fine up to R2 million or imprisonment up to 5 years
	wholesalers, transporters	paying bribes to police officers to facilitate safe passage	PCCA	s(4)(b)(ii)(aa) and (cc) offences in respect of corrupt activities relating to public officers	s(26) 'penalties' in <u>High Courts</u> : fine or imprisonment for life
	Police officers	Accepting bribe paid by the transporter to facilitate safe passage	PCCA	s(4)(a)(ii)(aa) and (cc) offences in respect of corrupt activities relating to public officers	in <u>regional courts</u> : fine or imprisonment for max 18 years
		sharing information on police activities including enforcement activities	PCCA	s(4)(a)(i)(bb) offences in respect of corrupt activities relating to public officers	in <u>magistrate courts</u> : fine or imprisonment for max 5 years

Processing of abalone	Operators of processing facility	Operating illegal abalone processing facility	MLRA	s(18)(1) Operating a fish processing establishment without having a right granted	s(58)(1) fine up to R2 million or imprisonment up to 5 years
		Possession of abalone	MLRA regs	s(39)(1)(a) receiving and possession of abalone at a processing establishment without permit	
		Operating an illegal abalone processing facility	POCA	s(2)(1)(a), (e) racketeering activities	s(3) penalties fine up to R1000million or imprisonment up to life
	Owners of the processing facility	Managing and controlling the enterprise	POCA	S(2)(1)(d) acquire/maintaining interest or control of enterprise through a pattern of racketeering	s(3) penalties fine up to R1000million or imprisonment up to life
		Making transactions of abalone with wholesalers or divers	POCA	s(4)(a)(i) 'money laundering'	s(8) fine up to R100million or imprisonment up to 30 years
		Not reporting illegal abalone business	POCA	s(7)(1)(a) 'failure to report suspicion regarding proceeds from unlawful activities'	s(8)(2) a fine or imprisonment not exceeding 15 years
		Possession of abalone	MLRA	s(13) 'related activities'	s(58)(1) fine up to R2 million or imprisonment up to 5 years

	Trafficker /transporter	Bribing an official for a fraudulent permit	PCCA	S(4)(a)(ii)(aa) and (cc)	s(26) in <u>High Courts</u> : fine or imprisonment for life in <u>regional courts</u> : fine or imprisonment for max 18 years in <u>magistrate courts</u> : fine or imprisonment for max 5 years
Orchestrating abalone poaching and related trade	High ranking members of transnational syndicates	Failing to provide accurate information on products being exported	Comm -on law based	fraud has five elements: prejudice, misrepresentation, unlawfulness, causality and criminal intent	Case-by-case basis
		hiding origins of profits of abalone poaching and trafficking	POCA	s(4) money laundering	s(8) a fine not exceeding R1000million or imprisonment not exceeding 30 years
		assisting in the conduct of the enterprise	POCA	s(5) for assisting another or benefit from proceeds of	
		Participating in the conduct of the enterprise	POCA	s(6) acquisition, possession or use of proceeds of unlawful activities	
		Misreporting exports/permits	CEA	s(80) improper use of permits, licenses a	s(80) fine not exceeding R20000and/or imprisonment not exceeding 5years

		Underreporting volume of abalone, not reporting abalone	CEA	s(84) making false statements	s(84) fine not exceeding R40000 or imprisonment not exceeding 10 years
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4.8 South African courts' approach to abalone poaching and related trade

4.8.1 Pre-2002

4.8.1.1 Possession and transport

In *S v Packereysammy*³¹⁰ the defendant was charged with a contravening regulation 38(3)(b) as he was found in possession of 6140 abalone and for that was convicted in the Caledon Magistrate's Court and sentenced to 18 months imprisonment. Packereysammy appealed against both the conviction and the sentence and raised five grounds for appeal: namely (1) that the magistrate's court over-emphasised the gravity of the offence; (2) that the sentence was wrongly intended by the magistrate to be exemplary; (3) that he was a first offender; (4) the magistrate was not sufficiently proactive and thus over-emphasised retribution and deterrence to the exclusion of other objects of punishment and (5) that the offender should have been sentenced to correctional supervision or community service or a suspended license. The Cape High Court did not agree with any of those grounds. The court held that abalone possession was a very serious offence and that the magistrate's sentence was severe but not inappropriately so.³¹¹ The accused had referred to a previous case of *S v Prinsloo*³¹², in which the defendant was sentenced to suspended sentences, in order to argue for a lesser sentence. The Cape High Court made a clear distinction between *S v Prinsloo* and the case at hand because the former was found in possession of 50 abalone, whereas Packereysammy was found in possession of more than 6000 abalone. On the appropriateness of the sentence the court considered the role played by the applicant, but found no evidence that he was not a vital part of the criminal enterprise³¹³ and further argued that the interests of the community and the seriousness of the offence had to be taken into account and concluded that direct imprisonment was appropriate. The judgement in Packereysammy demonstrated that courts are willing to serve harsh sentences and impose direct on first time offenders for abalone poaching. In this regard the court stated that 'the submission was made that because the appellant was a first offender he should have been given a sentence that would ensure that he was kept out of jail. A first offender has no right to be kept out of jail. It all depends on the circumstances of each case. It has been held that any serious offence can lead to imprisonment and frequently imprisonment is the only appropriate sentence that ought to be imposed'.³¹⁴

³¹⁰ *S v Packereysammy* 2004 (2) SACR 169 (SCA)

³¹¹ *Ibid* para 7

³¹² *S v Prinsloo* 2002 (2) SACR 457 (C)

³¹³ *S v Packereysammy* 2004 (2) SACR 169 (SCA) para 8

³¹⁴ *S v Packereysammy* 2004 (2) SACR 169 (SCA) para 12

In *S v Van Dyk*³¹⁵ the accused faced three charges of contravening regulations 9s(36)(1) and regulation 38(3)(b) under the MLRA regarding the illegal possession and transport of abalone. Van Dyk pled guilty and was convicted and sentenced to 18 months imprisonment. The Hermanus Magistrate's court argued that correctional supervision could not be imposed for a statutory offence unless it was expressly included as a sentencing option in the statute.³¹⁶ On appeal the Court Cape Court agreed and a further appeal to the SCA dealt with the question whether a sentence of correctional supervision could be imposed for a statutory offence if the penalty provision of the statute did not provide for correctional supervision'.³¹⁷

4.8.1.2 Illegal fish processing plant

After being arrested for the possession of 37356 units of abalone, Zhanyang and Kekun pled guilty to charges of conducting an illegal fish processing establishment and illegal possession of abalone. The state's advocate argued strongly in favour of imposing a prison sentence as opposed to a fine. He argued that it is the court's responsibility to protect South Africa's natural resources and biodiversity and in cases of organised crime where the accused if caught their employer simply pays a fine meaning that there is no risk and these fines are probably factored into the business plan.³¹⁸ Zhanvang and Kekun were sentenced in the Port Elizabeth Regional court to three years imprisonment.

4.8.2 Post 2002/2003

The previously mentioned cases were heard against the backdrop of the establishment of the environmental court in Hermanus and the parallel changes to the MLRA. The MLRA allowed prosecutors to build stronger cases and obtain higher number of custodial sentences which proved necessary as fines had little deterrent effect because crime syndicates could easily cover the financial penalties.³¹⁹

Furthermore, in 2002/2003 the approach to investigating criminal syndicates and prosecuting abalone poachers changed. The DSO was involved in the investigation and prosecution of the Marx

³¹⁵ *S v Van Dyk* 2005 SACR 35 (SCA)

³¹⁶ The court followed the precedent of *S v Daniels* 2000 1 SACR 256 (C)

³¹⁷ *S v Van Dyk* 2005 SACR 35 (SCA) para 6

³¹⁸ Lee-Anne Butler 'Two men found guilty in R5m perlemon bust' *The Herald* 12th November 2014, available at <http://herald.newspaperdirect.com/epaper/showarticle.aspx?article=6816c7a4-aeaf-418e-8cae-7248b2cb75c9&key=M1z0wpyQ3%2f3c2brraH8IYg%3d%3d&issue=814720141120000000001001>, accessed 9th December 2017

³¹⁹ Snijman, Phil 'The prosecution of offences under fisheries legislation in the IOC Smartfish Project Region: class notes for the development of a training course for prosecutors' *Smartfish Working Papers* No 25 at 71.

Crime syndicate, led by Elzette Marx in Gansbaai.³²⁰ The DSO found that the syndicate had exploited the abalone resources in the area and was involved in dealings with Chinese buyers. The investigation led to the arrest of 66 members or associated of the syndicates of which 44 were convicted.³²¹ Marx was sentenced to four years direct imprisonment for racketeering and money laundering charges under POCA. Arguably this case presents a shift towards acknowledging the role of criminal syndicates in abalone poaching and prosecuting them under POCA.

4.8.2.1 Racketeering and money laundering

In *S v Roberts and others*³²² the accused faced multiple charges arising from contraventions of the regulations of the MLRA relating to the illegal possession of abalone. Further charges were brought under POCA for conducting or participating in the operation of an enterprise through a pattern of racketeering activities as well as managing an enterprise conducted through a pattern of racketeering activities. In this case the court made clear that the matter was not only concerned with abalone poaching, but with being involved in racketeering activities, namely the unlawful trade in abalone and that the abalone activities only constitute the predicate offences that constitute a pattern of racketeering activities.³²³

In the case against Wei³²⁴, 30 individuals are accused of running an abalone poaching syndicate and face 590 charges. Among the accused is Anthony Broadway, a defence attorney who has represented a number his co-accused in the past.³²⁵ Broadway faced racketeering and money laundering charges. He has been charged with contravening section (2) of POCA for receiving or retaining property which was aware was derived from racketeering. The racketeering charges allege that Broadway received various sums of cash as fees from member of the syndicate, while being aware that they did not have legal income to pay his fees. In addition, he has been charged with several money laundering offences under sections (4),(5) and (6) of POCA. The money laundering charges against Broadway relate to a number of payments made from and to his accounts that presumably are criminal proceeds and supposedly laundered by Broadway. The case against Broadway ‘stands as an exemplar of the precarious position of South African lawyers representing

³²⁰ Craigie F, Snijman P & Fourie M ‘Environmental compliance and enforcement institutions’ in Paterson A & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009 at 79- 80.

³²¹ Ibid at 79.

³²² *S v Roberts* 2013 (1) SACR 369 ECP

³²³ Ibid para 10

³²⁴ *S v Wei & Others*, pending case, Western Cape High Court

³²⁵ Genevieve Serra ‘Poachers’ attorney busted by the Hawks’ *IOL* 15 March 2013, available at <https://www.iol.co.za/news/crime-courts/poachers-attorney-busted-by-the-hawks-1487097>, accessed on 30 November 2017

clients who profit from criminal conduct'³²⁶ and removes all doubt about the criminalisation of tainted fees under POCA. Broadway is the first attorney in South Africa to be indicted for receiving tainted fees.³²⁷

Ran Wei, a Chinese national, was implicated in some of the largest abalone poaching syndicates in South Africa. His involvement in the syndicate including Frank Barends and 24 others who cumulatively ran an abalone poaching ring worth R 2 billion is known.³²⁸ The syndicate, involving ex-police officers, pastors, bookkeepers and politicians besides Broadway, was largely funded by Ran Wei. Allegedly, Wei ordered and paid for three abalone processing plants and employed those he put in charge running the facilities.³²⁹ Furthermore, Wei is accused of facilitating the smuggling of abalone to Asia by using his successful South African crayfish-exporting business as a front for the illegal trafficking.³³⁰ Ran Wei was arrested in 2015 but managed to escape the country. Currently he is on a number of international most wanted lists. This case is representative for a number of foreign individuals that managed to escape South African justice: a majority of transnational traffickers in abalone have been Asians³³¹ but these frequently avoid prosecutions even if arrested as they are released on bail and leave the country.

In a recent case the Western Cape High Court convicted Philip Miller, Willem van Rensburg, Adriaan Wildschutt and Tony du Toit (hereinafter the Millers case) for their participation in an enterprise's affair through a pattern of racketeering.³³² The companies 'Rapitrade 109 PTY Ltd' and 'Syroun Exports PTY Ltd' were created in order to facilitate the illegal export of abalone by pretending the export containers were filled with frozen pilchards. The court first considered the modus operandi of the alleged 'joint enterprise' to consider its existences as well as the participation of the accused.³³³ The court observed that 'the process of procuring abalone illegally, processing it at an illegal FPE, packing and storing it in a safe cold store facility; loading it on board a vessel for transshipment overseas, and the diversion of the proceeds of sale thereof from the tentacles of the

³²⁶ Hamman A and Koen R, 'Pecunia non olet: Dirty money as legal fees' 2017 (1) *Journal of Anti-Corruption Law* at 128.

³²⁷ Ibid at 127.

³²⁸ Lambrecht, Derica & Goga, Khalil 'Money and Marginalisation: The lost war against abalone poaching in South Africa' (2016) 43 *Politikon* at 241.

³²⁹ Henriette Geldenhuys 'Poaching boss spotted in Cape' IOL 4 November 2012 available at <https://www.iol.co.za/news/crime-courts/poaching-boss-spotted-in-cape-1417306>, accessed on 16 January 2018

³³⁰ Wendell Roelf 'Asia's abalone fever feared wiping out the gourmet mollusc in South Africa' Reuters 16 March 2014 available at <https://www.reuters.com/article/us-safrica-abalone/asias-abalone-fever-feared-wiping-out-the-gourmet-mollusc-in-south-africa-idUSBREA2POE820140326>, accessed on 14 December 2017

³³¹ Goga, Khalil 'The illegal abalone trade in the Western Cape' (2014) *ISS PaperNo261* at 4.

³³² *S v Miller and Others* (SS13/2012) (2017) ZAWCHC

³³³ Ibid para 15

revenue authorities, *prima facie* fits what the state says constituted ‘a pattern of racketeering activity’.³³⁴

In another recent case, the Regional Court in Khayelitsha sentenced four men to a combined total of 127 years in prison, which is believed to be a record sentence to date. The four men were arrested in 2010 and faced charges related to the illegal possession, processing and export of abalone as well as fraud and money laundering.³³⁵ Upon the arrest about 98981 units of abalone valued at approximately R20million and various items of equipment were seized. The Hawks spokesperson Captain Llyod Ramovha welcomed the harsh sentences and hopes that they will deter those who are considering dealing in abalone to think twice about it.³³⁶

4.8.3 Conclusion

The presented case law suggests that South African courts have recognised abalone poaching as a serious crime and are willing to impose harsh sentences, including direct imprisonment on first time offenders. The more recent case law from 2003, namely the *Roberts* case and the *Millers* case, suggest that the courts recognise the link between abalone poaching and organised crime; in other words since 2002/2003 there has been an increase of convictions of members of abalone poaching syndicates under POCA. It is suggested that ‘the period from 2003 and 2004 seems to have been the period when the monitoring system produced the most effective results. Fines for poaching of abalone skyrocketed, abalone poaching syndicates were infiltrated and their leaders jailed and a number of high profile arrests were made.’³³⁷ This development is in line with the paradigm shift towards perceiving illegal fishing, including abalone poaching, in its broader context as fisheries crimes. Yet, some aspects of the transnational element of abalone poaching and trafficking remain a challenge for the judiciary. For instance, foreign nationals, who reportedly finance abalone poaching operations, escape South African justice when they are released on bail.

³³⁴ Ibid para 34

³³⁵ Ana Reporter ‘Four in prison for a combined 127 years over abalone syndicate’ *IOL* 31 May 2015 available at <https://www.iol.co.za/news/south-africa/western-cape/four-in-prison-for-a-combined-127-years-over-abalone-syndicate-9443362>, accessed on 20 January 2018

³³⁶ Unknown, ‘Sentences for Abalone syndicate intended as deterrent for others’ *Netwerk24* 5 June 2017 available at: <https://www.netwerk24.com/ZA/Hermanus-Times/Nuus/sentences-for-abalone-syndicate-intended-as-deterrent-for-others-20170531-2>, accessed 6 January 2018

³³⁷ Sjöstedt, M & Sundström A ‘Coping with illegal fishing: An institutional account of success and failure in Namibia and South Africa’ (2015) 189 *Biological Conservation* at 81.

CHAPTER 5: ASSESSING LEGAL TOOLS TO COMBAT ABALONE POACHING AND TRAFFICKING AND IDENTIFYING OPPORTUNITIES

While fisheries crime, including abalone poaching and trafficking, has begun to receive the attention it deserves, there is still a long way to go. Governments around the world struggle to address organised crime in the fisheries sectors. It is suggested that this is due to legislative frameworks being inadequate and law enforcement tools being underutilised.³³⁸ This chapter identifies the strengths, weaknesses, threats and opportunities of the aforementioned legislation in order to arrive at recommendations to curb illegal abalone poaching and trafficking. However, since these legal tools are to be considered within the criminal justice system of South Africa, some general remarks must be made.

5.1 The international sphere: The potential of CITES

Asner argues that transnational fisheries crimes should be approached with a focus on three key components in order to prosecute and investigate successfully, namely the demand side, the supply side and the money flow.³³⁹ This dissertation focused on the prosecuting offences on the supply side, but it must be noted that, as the abalone and trafficking crisis is driven by the demand for abalone from East Asia, any successful approach to combat abalone poaching needs to take measures to curb or control demand for abalone in East Asian countries.

TRAFFIC conducted a consumer survey analysis³⁴⁰ of abalone consumers in Hong Kong which *inter alia* concluded that respondents were most aware of abalone species becoming threatened (57%) than about illegal taking of abalone from the wild in South Africa (46%) and even fewer were aware of the availability of illegally-sourced abalone in Hong Kong (35%).³⁴¹ The survey analysis revealed that ‘around half of the surveyed consumers were less inclined to consume abalone after learning about the endangered statuses of some wild abalone species, and that illegal sourced abalone are available in Hong Kong’.³⁴² This highlights the need to alert consumers and raise awareness on issues surrounding abalone in consumer states.

³³⁸ Emma Witbooi ‘Organised crime in the fisheries sector starts to get the attention it deserves’ *The Conversation* 4 January 2017 available at <https://theconversation.com/organised-crime-in-the-fisheries-sector-starts-to-get-the-attention-it-deserves-70216>, accessed on 25 January 2018

³³⁹ Record of the First International Symposium on FishCrime (12th to 13th October 2015, Cape Town) at 27.

³⁴⁰ Lau, Wilson ‘An Assessment of South African dried abalone *Haliotis midae* consumption and trade in Hong Kong’ (2018) *TRAFFIC Report* at 46 – 52.

³⁴¹ *Ibid* at 52.

³⁴² *Ibid* at 76

Furthermore, a regulatory system that is capable of restricting the illegal international abalone trade across producer, transit and market countries is still urgently needed.³⁴³ CITES provides the opportunity to control the international trade in illegally-sourced abalone if the South African abalone were to be re-listed under CITES Appendix II or III. A listing under Appendix II would require an importing State to only allow trade in abalone with an export permit or a re-export certificate.³⁴⁴ The Scientific Authority of the South African government would be required to develop a Non-Detriment Finding to determine the legal limits that should be placed on abalone.³⁴⁵ In order to be listed under Appendix II the Conference of the Parties to the Convention must support the listing with two thirds of members present and voting.³⁴⁶ In contrast, a listing under Appendix III can be done unilaterally by a range State of the species at any time.³⁴⁷ Furthermore, for a listing under Appendix III, a Non-Detriment Finding is not necessary. However, the export requirements under Appendix III only relate to the State that listed a species under Appendix III. A Certificate of Origin is necessary for export of wild species needs to be issued by the exporting state³⁴⁸; however the Certificate of Origin does not involve any determination on whether the specimen was illegally harvested. Such listing would create a loophole that could be exploited by illegal traders. When specimens of an Appendix III species are smuggled into a country that did not list the species under CITES and subsequently laundered as a legitimate product of that country. Thus an Appendix II listing may be more effective in countering laundering practices because CITES parties are required to assess the legality of origin of specimen before issuing an export permit.³⁴⁹

The decision whether to list abalone under Appendix II or III must be made by the South African government and should be, as *TRAFFIC* suggests, ‘informed by widespread discussions with legal abalone farmers and traders, and with consumer and transit countries, prior to a listing proposal, which could also serve as a prologue to eliciting their future assistance in implementing such CITES listing’.³⁵⁰

³⁴³ Lau, Wilson ‘An Assessment of South African dried abalone *Haliotis midae* consumption and trade in Hong Kong’ (2018) *TRAFFIC Report* at 62.

³⁴⁴ CITES s(IV)(2)

³⁴⁵ CITES s(IV)(2)

³⁴⁶ CITES s(XV)(1)(b)

³⁴⁷ CITES s(XVI)

³⁴⁸ CITES s(V)

³⁴⁹ Lau, Wilson ‘An Assessment of South African dried abalone *Haliotis midae* consumption and trade in Hong Kong’ (2018) *TRAFFIC Report* at 64.

³⁵⁰ *Ibid* at 65 -66.

5.2 Assessment of the tools

As the symposium on fisheries crime noted, the use of a ‘multi door’ or ‘full force of the law’ approach is required to identify and subsequently investigate and prosecute transnational organised fisheries crime.³⁵¹ The ‘multi-door’ or ‘full force of the law’ approach means that the entry point into investigation is via any criminal offence in any jurisdiction along the value chain. South Africa has legislation in place that can be used to combat fisheries crime, including abalone poaching and trafficking, but the legislation is under- implemented and existing legislation can be amended and improved.³⁵²

As identified above, the legislation related to abalone poaching and trafficking contains criminal offences attracting both fines and imprisonment sentences. This is a strong advantage as severe punishments combined with a high probability of conviction lead to increasing levels of deterrence.³⁵³ Conventional wisdom holds that the threat of harsh punishments, such as imprisonment, has deterrent effects on potential offenders: it is assumed that criminals weigh the potential benefits of committing a crime against the potential costs of being caught and prosecuted.³⁵⁴ However, it takes a well-functioning justice system to achieve this deterrent effect and the South African justice system is notoriously cumbersome and slow.³⁵⁵

There is a lack of environmental prosecutors.³⁵⁶ However, there are some notable developments in that area. In 2017, the second Justice College and DEA collaborative workshop entitled ‘prosecuting environmental crime course’ was presented in the Eastern Cape. It focused on issues experienced in coastal areas with additional attention given to *inter alia* abalone poaching.³⁵⁷ Besides

³⁵¹ Commission on Crime Prevention and Criminal Justice ‘Outcome of the 2nd International Symposium on Fisheries Crime’ (E/CN.12/2017/CRP.3) at 4.

³⁵² Jan Glazewski, International Symposium on FishCrime (12 -13th October 2015) available at: <http://www.motherchannel.com/category/environmental-news-information/fish-crime/>, accessed 23 January 2018

³⁵³ White, Rob & Heckenberg Diane ‘Green Criminology: An introduction to the study of environmental harm’ (2014) Routledge, Abingdon, Oxon at 274.

³⁵⁴ C Gould ‘Does South Africa’s criminal system deter offenders’ *ISS Today* 22 October 2013 available at <https://oldsite.issafrica.org/iss-today/does-south-africas-criminal-justice-system-deter-offenders>, accessed on 12 January 2018

³⁵⁵ Craigie F, Snijman P & Fourie M ‘Environmental compliance and enforcement institutions’ in Paterson A & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) at 79.

³⁵⁶ White, Rob & Heckenberg Diane ‘Green Criminology: An introduction to the study of environmental harm’ (2014) Routledge, Abingdon, Oxon at 273 – 274.

³⁵⁷ DEA ‘National Environmental Compliance and Enforcement Report 2016-2017’ (2017) at 86.

training prosecutors, such workshops have the added benefit that they raise awareness of fisheries crime and contribute to understanding the nature as well as negative effects of such crimes.³⁵⁸

The *Criminal Procedure Act*³⁵⁹ (hereinafter CPA) provides for procedures and related matters in criminal proceedings.³⁶⁰ This includes provisions on bail³⁶¹, which generally refers to an amount of money paid to ensure the temporary release of someone who has been arrested for committing a crime. As regards environmental crimes, the CPA does not make any specific reference in its Schedules, but ‘any offence for which the punishment may be a period of imprisonment exceeding 6 months, without the option of a fine’ is listed under Schedule 1. This includes offences under the MLRA, POCA, CEA and PCCA. Notably, if the accused has been previously convicted of a Schedule 1 offence or has a pending case against him or her, the offence will fall under Schedule 5 of the CPA. If the offender is accused of a Schedule 1 offence, he or she is entitled to bail unless the state can prove that it is in the interest of justice to deny bail. However, if he or she is accused of a Schedule 5 offence the accused must prove that to the satisfaction of the court that it is in the interest of justice that bail is granted; in other words it is harder to be released on bail if accused of a Schedule 5 offence. Yet, most abalone poachers and traffickers fall under Schedule 1, meaning that in order to prevent the accused from leaving the country it is worth considering amending the CPA to including poaching offences under Schedule 5 of CPA.

5.2.1 Assessing the *Marine Living Resources Act*

In regards to abalone poaching and trafficking, the illegal fishing offences are regulated under the MLRA. These offences attracted penalties under the MLRA and as such form the predicate offence of abalone trafficking. The provisions under the MLRA and its regulations are detailed and criminalize a number of activities: the harvesting of abalone, including the harvesting of abalone outside permitted quotas, undersized abalone or with inappropriate tools. In addition, the possession and processing of abalone is criminalized and marine protected areas established by regulations under the MLRA. The provisions under the MLRA have certain strengths. Firstly, they can cover a broad range of activities along the abalone value chain, i.e. traffickers can be held liable for the possession of abalone in the final stage of the value chain. Secondly, these offences attract criminal measures, with options of punishment by fine or imprisonment.

³⁵⁸ Emma Witbooi ‘Organised crime in the fisheries sector starts to get the attention it deserves’ *The Conversation* 4 January 2017 available at <https://theconversation.com/organised-crime-in-the-fisheries-sector-starts-to-get-the-attention-it-deserves-70216>, accessed on 25 January 2018

³⁵⁹ *Criminal Procedure Act 51 of 1997*

³⁶⁰ CPA preamble

³⁶¹ CPA chapter 9

Additional sentencing options can be derived from NEMA. NEMA provides that ‘whenever any person is convicted of any offence under any provision listed in Schedule 3 the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence and, in addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed’.³⁶² The offences listed under Schedule 3 of NEMA do not relate to illegal harvesting of marine resources but could include contraventions of international conservation and management measures in terms of NEMA s(43)(2), s(45) and s(58)(2).³⁶³ It is within the power of the Minister to amend Schedule 3 of NEMA by a regulation.³⁶⁴ This provision remains under-utilised but it presents an opportunity to increase the deterrence factor of fines for abalone poaching and trafficking. If the courts were able to impose additional fines equal to the monetary value of poached abalone this could have a significant impact because the syndicates smuggle abalone worth millions.

An opportunity arising under the MLRA is to increase seizure of property. Even without a warrant, a FCO can seize ‘any vessel including its gear, equipment, stores and cargo, and any vehicle or aircraft of which he or she has reasonable grounds to believe that is has been or is being used in the commission of an offence in terms of the MLRA or in which he or she knows or has reasonable grounds to suspect that is has been seized or forfeited in terms of any provision of the MLRA.’³⁶⁵

5.2.2. Assessing the *Prevention of Organised Crime Act*

Using POCA to prosecute abalone poaching and related trade presents several advantages. Firstly, the penalties under POCA are high, meaning that they can be used as a deterrent, especially in comparison to the two year maximum penalty under the MLRA. Secondly, POCA can cover those who enable the smuggling of abalone along the value chain, namely attorneys, accountants and financiers. While the MLRA can be used against those who are found in possession of abalone along the entirety of the abalone value chain, the POCA can be used against higher level players who make abalone smuggling possible.

³⁶² NEMA s(34)(3)(a)

³⁶³ M Kidd ‘Punishing perlemoen poaching - developments both recent and possibly future?’ 2005 (26) *Obiter* at 402 – 403.

³⁶⁴ NEMA s(34)(10)(a)

³⁶⁵ MLRA s(51)(3)(c)(ii)

An essential tool under POCA is its forfeiture provisions. Asner finds that ‘a trafficker expecting to make a few million dollars in a trafficking scheme, and facing a small change of spending a few years in jail, may decide that wildlife trafficking is worth the risk, especially if he can expect to end up with the money after he gets out of jail’.³⁶⁶ Forfeiture of the proceeds of the crime can be used as a tool to change this and ensure that traffickers are denied the enjoyment of their proceeds. POCA provisions enable the AFU to do so.

5.2.3. Assessing the *Prevention and Combating of Corrupt Activities Act*

Corrupt practices are a fundamental concern in South Africa. South Africa is a party to the *United Nations against Corruption*³⁶⁷ which is the only legally binding universal anti-corruption instruments. It covers preventative measures, criminalisation and law enforcement, international cooperation, asset recovery as well as technical assistance and information exchange. South Africa ratified the convention in 2004, yet Transparency International ranks South Africa at 64 out of 100 worldwide.³⁶⁸ In 2016, South Africa scored 45 out of 100 in regards to the perceived level of public sector corruption on a scale where 0 stands for a highly corrupt and 100 for very clean.³⁶⁹ In recent years this score has not changed significantly.

South Africa has a desperate need to address corrupt practices in the public sector. As concerns abalone poaching and trafficking corrupt practices occur at each stage of the abalone value chain and effectively enable the syndicates to profit from their activities. Along the abalone value chain bribing police officers and other public officials can ensure safe passage, falsified documentation and insight to police operations. Beyond the abalone value chain, some argue that corruption within the DAFF undermines the worth of auctioning off confiscated abalone as the proceeds do not end up in the DAFF’s budget to finance further anti-poaching operations.³⁷⁰

The central piece of legislation addressing corruption, PCCA, does criminalise corrupt practices and contains hefty sentences, including imprisonment for life. Even though PCCA does criminalise corrupt practices in relation to both lower levels of public officers as well as higher ranking public officers, one must note that high level corruption is a priority. The abuse of high level

³⁶⁶ Marcus Asner ‘To catch a wildlife thief: strategies and suggestions for the fight against illegal wildlife trafficking’ (2017) *12 University of Pennsylvania Asian Law Review* at 18.

³⁶⁷ *United Nations against Corruption* Resolution 58/4 adopted by General Assembly in 2005

³⁶⁸ Transparency International ‘Country Profile: South Africa’ available at:

<https://www.transparency.org/country/ZAF>, accessed 2 January 2018

³⁶⁹ Ibid

³⁷⁰ Schaefer, Beverly ‘Abalone poaching threatens lives’ *IOL* 19 December 2017, available at <https://www.iol.co.za/capeargus/opinion/abalone-poaching-threatens-lives-12476560>, accessed on 5 January 2018

officials with high level power is termed ‘grand corruption’.³⁷¹ Yet, in the early stages of the abalone value chain the bribing of low level police officers can have significant negative impacts on tackling abalone poaching because they are tasked with enforcing legislation at the ground level. However severe the sentences are, they can only be used as an effective deterrent if PCCA is enforced and prosecutions are successful. In relation to abalone poaching and trafficking this does not seem to be the case.

An important opportunity arising under PCCA is its provision dealing with the failure to report corruption³⁷², meaning a person in a position of authority who has knowledge or suspicion of an offence of corruption, fraud, extortion, forgery or uttering forged document has the duty to report this to the SAPS if it involves an amount of R100000 or more. The failure to do so constitutes an offence and can lead to imprisonment for a period of up to 10 years. This duty to report is placed on individuals who hold positions of authority, including Director-General or equivalent officers of national or provincial departments, any public officer in the senior management service of a public body as well as managers, company secretaries or directors of companies. If properly enforced and implemented, this provision acts as a further deterrent for engaging in corrupt activities.

5.2.4 Assessing the *Customs and Excise Act*

Generally speaking, export offences involve a range of cross-border activities including the transportation of goods without the proper authorisation or the export of goods using falsified customs declaration. The CEA criminalizes import and export offences with harsh sentences including imprisonment for up to ten years. Among other enforcement issues, the proper identification of abalone creates a challenge as some officials cannot identify abalone in its dried states even if the cargo is inspected.

The customs authorities are tasked with inspecting goods at commercial gateways, namely ports and borders, in order to prevent the trade in illegal goods. In the context of fisheries crime the analysis of trade information is a potentially powerful tool to assess illegal activities and assist efforts to combat them.³⁷³ The identification of discrepancies between export and import figures for abalone can shed light on the illegal activities of abalone poaching syndicates: for instance Hong Kong has reported the import of abalone from several southern African countries, some of which are

³⁷¹ Transparency International ‘What is grand corruption and how can we stop it?’ 21 September 2016, available at https://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it, accessed 2 January 2018

³⁷² PCCA s(34)

³⁷³ M Bürgener ‘Illegal fishing, another form of wildlife crime’ (2016) *World Customs Organisation News* at 27.

landlocked. This reveals the trade routes of the syndicates and highlights the need for international cooperation in trade information.

5.3 The road ahead

The case against *Bengis* demonstrates some very useful lessons learned for moving forward with fisheries crime prosecutions.³⁷⁴ The *Bengis* case involved an elaborate scheme, running from 1987 to 2001, to illegally harvest large quantities of South Coast and West Coast rock lobsters in South African waters and export them to the United States in violation of South Africa as well as US law. The three defendants, Arnold Bengis, Jeffrey Noll and David Bengis, were directors of the South African registered company Hout Bay Fishing Industries (Pty) Ltd, which held legitimate fishing rights and quotas under the MLRA, but exceeded quotas grossly. The trio was found guilty on charges of violating the *US Lacey Act*³⁷⁵ as well as conspiracy to violate the *Lacey Act* and sentenced to imprisonment, fines and ordered to pay restitution. In the context of this dissertation, the investigation and prosecution of the *Bengis* case is relevant. The *Bengis* Case highlights the need to understand the modus operandi of criminal syndicates involved in fisheries crime in order to identify ways to tackle it.³⁷⁶ In other words, ‘it boils down to how understanding better how they go about moving their illegal goods, what sorts of things they have to do to evade detection, and how they move around money both to support the scheme and to launder their illegal profits’.³⁷⁷ This will reveal where the syndicates leave evidence which will eventually help the effort to disrupt their operations. Furthermore, the risks and costs associated with the crimes need to increase in order to make fisheries crime less attractive.³⁷⁸ As Asner argues, the costs need to outweigh the benefits of committing wildlife crimes, namely there need to be high probabilities of being investigated and prosecuted.³⁷⁹ In the current context this refers to the increased enforcement and implementation of the existing legal framework as well as the increased forfeiture of assets associated with wildlife crime so that criminals cannot make use of proceeds of their crimes once they return from jail.

³⁷⁴ Stop Illegal Fishing and PescaDOLUS (2016) Record of The First International Symposium on FishCRIME. The Norwegian Ministry of Trade, Industry and Fishing: Oslo, Norway at 27 -28.

³⁷⁵ The US Lacey Act (16 U.S.C. §§ 3371-3378) prohibits the trade in wildlife, fish and plants that have been illegally taken, possessed, transported or sold can creates civil and criminal penalties.

³⁷⁶ Stop Illegal Fishing and PescaDOLUS (2016) Record of The First International Symposium on FishCRIME. The Norwegian Ministry of Trade, Industry and Fishing: Oslo, Norway at 27 -28.

³⁷⁷ Asner, Marcus ‘To catch a wildlife thief: strategies and suggestions for the fight against illegal wildlife trafficking’ (2017) *12 University of Pennsylvania Asian Law Review* at 19.

³⁷⁸ Stop Illegal Fishing and PescaDOLUS (2016) Record of The First International Symposium on FishCRIME. The Norwegian Ministry of Trade, Industry and Fishing: Oslo, Norway at 27 -28.

³⁷⁹ Ibid

5.4 Conclusion

If the South African abalone industry were managed well, it would constitute a lucrative business contributing to livelihoods of South Africans as well as creating state revenue. However, the abalone industry is plagued with a high degree of illegality which ultimately only enables a few to benefit from the resource. Witbooi suggests that the first step to tackling illegality in fisheries sectors is to diagnose the problem, namely identifying organised crime in the fisheries sector as opposed to a fisheries management problem.³⁸⁰ Arguably, South Africa has managed to take this first step: since 2002/2003 an increasing number of abalone related cases were dealt with under POCA, indicating that the link between organised crime and the abalone fishery are recognised in courts. South African policy documents explicitly recognise the link between wildlife trafficking and organised crime.³⁸¹ The second step is to develop an appropriate and effective criminal law enforcement response.³⁸² South Africa has legislation in place that enables law enforcers to resort to different laws at different entry points; in other words applicable laws can be found in each stage of the abalone value chain. These laws criminalise the serious offences in each stage and prescribe adequate penalties; however they generally remain under-implemented. In order to facilitate detection and subsequent investigation and prosecution of abalone related offences, law enforcement officers from all relevant agencies must cooperate and South African prosecutors must be aware of the tools at their disposal and use them. The Benigs case highlights the need for international cooperation to tackle transnational fishery crime and proves it is not an impossible task. There is still a long way to go to tackle abalone poaching and trafficking effectively, but South Africa 'is making strides towards this goal'.³⁸³

³⁸⁰ Witbooi, Emma 'Organised crime in the fisheries sector starts to get the attention it deserves' *The Conversation* 4 January 2017 available at <https://theconversation.com/organised-crime-in-the-fisheries-sector-starts-to-get-the-attention-it-deserves-70216>, accessed on 25 January 2018

³⁸¹ NISCWT at 15.

³⁸² Witbooi, Emma 'Organised crime in the fisheries sector starts to get the attention it deserves' *The Conversation* 4 January 2017 available at <https://theconversation.com/organised-crime-in-the-fisheries-sector-starts-to-get-the-attention-it-deserves-70216>, accessed on 25 January 2018

³⁸³ Ibid

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